

RAS 11956

# Official Transcript of Proceedings

## NUCLEAR REGULATORY COMMISSION

Title: Entergy Nuclear: Pilgrim NPS

Docket Number: 50-293-LR; ASLBP No. 06-848-02-LR

Location: Plymouth, Massachusetts

Date: Thursday, July 6, 2006

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UNITED STATES OF AMERICA

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NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

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ORAL ARGUMENTS ON CONTENTIONS

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In the Matter of: ||  
ENTERGY NUCLEAR GENERATION || Docket No. 50-293-LR  
COMPANY AND ENTERGY NUCLEAR || ASLBP No. 06-848-02-LR  
OPERATIONS, INC., ||  
(Pilgrim Nuclear Power ||  
Station) ||

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Thursday, July 6, 2006

The above-entitled matter came on for hearing, in the Ballroom of the Radisson Hotel Plymouth Harbor, 180 Water Street, Plymouth Massachusetts, pursuant to notice, at 9:30 a.m., ANN M. YOUNG, Chair, presiding.

BEFORE:

- ANN M. YOUNG, Chair
- RICHARD F. COLE, Administrative Judge
- NICHOLAS G. TRIKOUROS, Administrative Judge

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1 ALSO PRESENT:

2 ROBERT PALLA, NRC

3 ROBERT SCHAAF, NRC

4 RAM SUBBARATNAM, NRC

5 ALICIA WILLIAMSON, NRC

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

(9:30 a.m.)

1  
2  
3 CHAIR YOUNG: Go on the record again. My  
4 name is Ann Marshall Young. I'm the Chair of the  
5 Licensing Board. With me on my left is Judge Nicholas  
6 Trikouros. On my right is Judge Richard Cole.

7 We are here today to hear oral argument on  
8 the contentions of the Massachusetts Attorney General  
9 and Pilgrim Watch. This afternoon we will break and  
10 go into a session to hear limited appearance  
11 statements from members of the public.

12 Before we go on any further, let's start  
13 over here on our left and have all counsel identify  
14 yourselves and all people who are with you today.

15 MR. LEWIS: My name is David Lewis. I'm  
16 with the law firm of Pillsbury Winthrop Shaw Pittman.  
17 With me is Paul Gaukler from the same firm. And we're  
18 representing Entergy in this proceeding.

19 CHAIR YOUNG: Ms. Uttal?

20 MS. UTTAL: My name is Susan Uttal. I'm  
21 representing the NRC staff from the Office of the  
22 General Counsel. With me, to my right, is Harry  
23 Wedewer, who is also counsel representing the staff.

24 I have several staff members with me.  
25 They will not be entering an appearance. Do you want

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1 me to introduce them?

2 CHAIR YOUNG: If everyone doesn't know  
3 them, that might be helpful.

4 MS. UTTAL: Okay. Robert Palla, Ram  
5 Subbaratnam, Robert Schaaf, and Alicia Williamson  
6 sitting behind them.

7 MS. HOLLIS: Good morning, Judges. I'm  
8 Sheila Hollis with the law firm of Duane Morris. I'm  
9 here representing the Town of Plymouth.

10 MS. CURRAN: Good morning. I'm Diane  
11 Curran with the law firm of Harmon Curran, Spielberg  
12 and Eisenberg, representing the Massachusetts Attorney  
13 General. And with me is Matt Brock from the Mass.  
14 AG's office.

15 MS. BARTLETT: Hi. I'm Molly Bartlett.  
16 I'm the attorney for Pilgrim Watch. And Mary Lampert  
17 is the Director of Pilgrim Watch.

18 CHAIR YOUNG: Thank you all.

19 We thought we'd begin, as I said earlier,  
20 this morning with the issue of Pilgrim Watch's  
21 adoption of the Massachusetts AG contention. And the  
22 reason for that is the next thing we will be going  
23 into is argument on the Massachusetts Attorney General  
24 contention. And we thought it would make more sense  
25 and be more efficient to include the argument on

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1 Pilgrim Watch contention 4 with that since they  
2 overlap so much.

3 We expect that that should take a big  
4 longer than argument on the other contentions since we  
5 would expect to hear from everyone on that one or on  
6 that combination of contentions.

7 Is there any objection to proceeding in  
8 that manner?

9 (No response.)

10 CHAIR YOUNG: All right. On the notice of  
11 adoption of the Massachusetts Attorney General  
12 contention, as I understand it, the only difference  
13 that the staff has with that is that the staff would  
14 have that be conditioned on Pilgrim Watch's admission  
15 as a party based on admitting at least one of their  
16 contentions.

17 Entergy opposes that because you're  
18 interpreting that as falling under essentially the  
19 late-filed contention rule. So if we could focus on  
20 those issues along with any others I may have  
21 overlooked, before we move on, the other thing I  
22 mentioned before we went on the record was whether it  
23 would be more meaningful to go directly to Entergy and  
24 the staff on most of these issues since the last  
25 pleadings filed were from the petitioners or it would

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1 make more sense to have the petitioners give short  
2 summaries of your position at this point, having read  
3 all of the pleadings and seeing where the areas of  
4 disagreement lie.

5 I'll ask the petitioners first. Do you  
6 have any preference on that?

7 MS. CURRAN: Well, there were a couple of  
8 points that were not raised in the reply that I would  
9 like to address. And it might make sense to just do  
10 that first.

11 And also Mr. Brock has a statement that he  
12 would like to make.

13 CHAIR YOUNG: On the adoption or just sort  
14 of at the outset of argument?

15 MS. CURRAN: No. At the outset of  
16 argument.

17 CHAIR YOUNG: Okay. Go ahead.

18 MR. BROCK: Thank you, Your Honor.

19 Members of the Board, my name is Matt  
20 Brock. I'm an Assistant Attorney General in the  
21 Environmental Protection Division for the Commonwealth  
22 of Massachusetts. We have already introduced  
23 ourselves, but I would like to make a brief statement  
24 about the Attorney General's position in this case.

25 I first want to indicate that the Attorney

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1 General does not oppose nuclear power and as a general  
2 matter does not oppose a licensing extension for  
3 Entergy to operate the Pilgrim plant. However, before  
4 that license extension is granted, the Attorney  
5 General is requesting that the NRC and Entergy comply  
6 with federal law that requires them to address the  
7 safety and environmental concerns surrounding the  
8 storage of spent fuel at the Pilgrim plant.

9 This includes an evaluation of the risks  
10 of a serious accident at the Pilgrim plant and an  
11 examination of ways to reduce or mitigate those risks.  
12 As part of that evaluation, the Massachusetts Attorney  
13 General also is requesting the NRC to address the  
14 environmental impacts of intentional destructive acts  
15 at the Pilgrim plant, as required by the National  
16 Environmental Policy Act.

17 While such events are unlikely, they are  
18 still foreseeable. And the NRC should address them as  
19 part of the NEPA process. Moreover, as this Board is  
20 aware, a recent decision by the Ninth Circuit Court of  
21 Appeals in *San Luis Obispo Mothers for Peace v. NRC*  
22 held that the NRC is required to consider under NEPA  
23 the impacts and intentional attack on a fuel storage  
24 facility.

25 And because intentional attacks are at

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1 least one of the ways that accidents can occur at the  
2 Pilgrim plant, we're asking this Board to apply the  
3 Ninth Circuit decision in this case and to consider  
4 that as additional grounds and bases for the Attorney  
5 General's contention.

6 Finally, the Attorney General is engaged  
7 in this process in an effort to ensure that the  
8 Pilgrim plant operates in a safer manner and in  
9 compliance with applicable law.

10 Thank you.

11 CHAIR YOUNG: Thank you.

12 Did anyone else have anything else to say  
13 about the order of argument generally; in other words,  
14 whether to start with the petitioners or with staff  
15 and Entergy?

16 (No response.)

17 CHAIR YOUNG: If there is nothing more on  
18 that, then I will take Ms. Curran's statement earlier  
19 to be a request for the petitioners to give short  
20 summaries of your positions insofar as there is  
21 dispute on them.

22 And, as I said, we will start with the  
23 issue of adoption of the Massachusetts contention by  
24 Pilgrim Watch. And then we'll get to the issues that  
25 Mr. Brock was discussing in the argument on the

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1 Massachusetts contention.

2 When we get to that one, we might want to  
3 separate out the San Luis Obispo Mothers for Peace,  
4 the relevance and how we should consider that case,  
5 separate that as it's sort of a separate issue, and  
6 then move on to the other issues. When we get to  
7 that, I will give you a little bit of a summary of how  
8 I see it and let you fill in any blanks.

9 Okay. On the adoption, do all parties'  
10 positions remain the same essentially? Okay. Let's  
11 start with you, then, Ms. Bartlett, on that.

12 MS. BARTLETT: All right. I guess I'll  
13 just reiterate what I put in my reply to their  
14 responses. And that is that it was my understanding  
15 of the regulations, 10 CFR 2309(f)(3), that the  
16 requirements for one petitioner to adopt the  
17 contention of another, it was only necessary for us to  
18 show standing and to have submitted our own petition.

19 I haven't seen anything in the decisions  
20 I've read and in the plain language of that rule that  
21 seemed to require more. If there's going to be a  
22 provisional aspect to your ruling on our adoption, I  
23 think it would be provisional on us later being able  
24 to show that we're capable of carrying on with that  
25 contention should the Massachusetts Attorney General

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1 subsequently drop out of this proceeding.

2 Let's see. Well, I guess that's pretty  
3 much my basic read on it.

4 CHAIR YOUNG: Mr. Lewis, I guess my main  
5 question for you to sort of get you focused at the  
6 outset is the staff has not opposed adoption of the  
7 contention. I think the staff does argue that it  
8 should be conditioned on the admission Pilgrim Watch  
9 as a party.

10 But this is the first time I've heard a  
11 party argue that the adoption process should  
12 essentially be analyzed under the late-filed  
13 contention rules. Do you have any authority for that  
14 having been done before?

15 MR. LEWIS: The argument was made in the  
16 Vermont Yankee uprate proceeding. But there the  
17 Licensing Board did not have to reach the issue. So  
18 it was not decided.

19 It has also been advanced again in the  
20 Vermont Yankee license renewal proceeding but is not  
21 yet a ruling. So this is indeed a novel issue. And,  
22 indeed, the provisions that the petitioners are citing  
23 the provision in 10 CFR 2.309(f)(2) or (3) is a fairly  
24 new provision. It was a provision that was added in  
25 the recent amendments to part 2. So there has not

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1 been consideration of the effect of that provision in  
2 the past.

3 My reading of that provision is simply  
4 that if a party seeks to adopt the parties'  
5 contention, they will confer with the parties who  
6 contention they are trying to adopt to designate a  
7 lead representative.

8 That does not indicate that seeking the  
9 lead of the permission of the Board is necessary.  
10 Indeed, it prefers to seeking their permission.  
11 Therefore, presumably there is a need for some motion  
12 and some requests and some standards.

13 In this case, in fact, there has been no  
14 request to the Board to adopt the contention. It was  
15 simply an assertion that the contention was being  
16 adopted.

17 If there are indeed standards, then what  
18 the Board needs to do is look to the rules to see what  
19 are the standards for granting that contention. Our  
20 position is the rules are clear on their face that if  
21 you seek to add a contention after your initial  
22 filing, you should address the lateness factors, which  
23 are simply do you have good cause, is there something  
24 that you can contribute, you know, why is this in the  
25 interest.

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1 Here we have the State of Massachusetts,  
2 which is very able to present its own contention and  
3 defend it. And I see nothing that would be added by  
4 allowing another party to piggyback on that issue.

5 CHAIR YOUNG: Is that really part of the  
6 standard that the parties seeking to adopt a  
7 contention would have to show that the party who filed  
8 the contention was not able to argue it on its own or  
9 --

10 MR. LEWIS: The lateness factors include  
11 that their interests would not otherwise be protected.  
12 And one of the factors -- this is not verbatim -- is  
13 basically that they have something to offer on the  
14 issue, like in --

15 CHAIR YOUNG: On the lateness issue, just  
16 another sort of ground-level question, how could a  
17 notice of adoption of contention ever be timely unless  
18 the party who filed the original contention filed it  
19 before the final deadline for filing contentions?

20 Usually what we see is the contentions  
21 come in on the last day. So that unless the party  
22 wanting to adopt it under your theory that same day  
23 filed a request to adopt the contention, they would  
24 always be late, wouldn't they?

25 MR. LEWIS: I don't think the notion is

1 untimely. I think the contention is untimely. I  
2 think that an intervenor is obligated to develop its  
3 own contentions, review the record, review the  
4 application, formulate the issues it raises.

5 If at any point after it files its  
6 petition it decides, "Well, there are some additional  
7 issues that I would like to raise," it needs to  
8 provide a justification. Why is that appropriate?

9 I do think there is a strong policy issue  
10 here. And it in general may not be the situation  
11 here, but the position that Pilgrim Watch is taking  
12 would essentially allow a petitioner to come in with  
13 no valid contentions, not satisfy the standard for a  
14 hearing at all, but at some point after other parties  
15 come --

16 CHAIR YOUNG: We agree that they have to  
17 show standing. So we don't need to worry about that,  
18 do we?

19 MR. LEWIS: I'm talking about coming in  
20 with no valid contentions and, therefore, not being  
21 entitled to a hearing but staying in proceeding simply  
22 by saying afterwards, "Well, we're going to adopt all  
23 the other parties' contentions." I don't think that's  
24 what the Commission intended.

25 CHAIR YOUNG: Well, maybe the staff would

1 have a better answer on this, but in the past,  
2 contentions have been adopted by other parties without  
3 going under the requirements that you're seeking us to  
4 impose.

5 MR. LEWIS: I'm not aware that that's the  
6 case, Judge Young. I'm aware that in other cases  
7 where parties were seeking to adopt contentions later  
8 in the proceeding where another party was dropping  
9 out, in fact, they were held to standards.

10 CHAIR YOUNG: Did you cite that case?

11 MR. LEWIS: Yes, I did. It's the Houston  
12 Lighting and Power case cited on page 60 of our  
13 answer, ALAB 779, 21 NRC 360 at page 381 to 82.

14 CHAIR YOUNG: Anything further?

15 MR. LEWIS: No.

16 CHAIR YOUNG: Ms. Uttal, could you address  
17 that in your comments?

18 MS. UTTAL: The timing issue or --

19 CHAIR YOUNG: What happened in the past  
20 and what the general precedent and practice have been  
21 at the NRC.

22 MS. UTTAL: My reading of the case law is  
23 that parties, entities that are already parties, have  
24 been permitted to adopt. For instance, in the Conn.  
25 Ed. case that we cited, the party was permitted to

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1 adopt at an early stage in the proceeding the  
2 contention of another, but that party had already been  
3 admitted, having shown standing in their own  
4 admissible contention. In order --

5 CHAIR YOUNG: But it does say "requester  
6 or petitioner." So it sort of seems to indicate it  
7 could be a requester who is a party or a petitioner,  
8 who is not yet a party, right?

9 MS. UTTAL: It may be written by that, but  
10 our pleading rules require that in order to  
11 participate in a proceeding, you have to show standing  
12 and offer one admissible contention.

13 To allow an entity to just show standing  
14 and then piggyback on somebody else's contention  
15 thwarts our pleading requirements that each individual  
16 intervenor entity show that they have standing and  
17 offer their own admissible contention.

18 And that's our major issue here, that they  
19 have to be otherwise eligible to participate in this  
20 proceeding before they can then -- then they can adopt  
21 the --

22 CHAIR YOUNG: You do not agree with  
23 Entergy that they need to show that they have met the  
24 last-filing --

25 MS. UTTAL: It's the staff's position, not

1 I believe necessarily, that as long as they make their  
2 motion prior to contentions having been decided, then  
3 yes. That's timely because there's nothing specific.

4 In the Indian Point case that we cited, I  
5 don't believe that -- they didn't specify exactly what  
6 the time limits were, but it seems to me that that is  
7 the logical conclusion, that as long as it is before  
8 the contentions have been determined.

9 MS. CURRAN: Judge Young, could I make a  
10 comment?

11 CHAIR YOUNG: Yes. I want to hear from  
12 both you and Ms. Hollis.

13 MS. CURRAN: Okay.

14 CHAIR YOUNG: Do you want to go ahead?

15 MS. CURRAN: Sure. I think the major  
16 policy concerns of the Commission in these rules for  
17 standing and admissibility are to ensure, one, that  
18 the parties who participate actually have an interest  
19 and have standing; and, second, that the issues that  
20 are raised are legitimate, that they have some basis  
21 to them.

22 I don't think the NRC is concerned with  
23 the identity of who raises these issues. As long as  
24 a party with standing raises an issue, then the major  
25 concerns have been satisfied.

1           And then once the proceeding starts, the  
2 NRC also has rules for ensuring that there is not a  
3 lot of duplication of effort. The rules actually  
4 require that a lead intervenor is identified so that  
5 you don't have three parties making the same argument.

6           The kind of situation that I think this  
7 would be helpful for adoption of contentions is  
8 supposing a party puts in an issue and other parties  
9 agree that it's important and they want to pursue it.  
10 They all delegate to one lead intervenor to pursue it.

11           What if that lead intervenor has to drop  
12 out of the case? Then the other parties are able to  
13 pursue it.

14           CHAIR YOUNG: Let me just interrupt.  
15 You're using the word "party." So you seem to be  
16 implying or are you implying by that the entity that  
17 wants to adopt the contention has been admitted as a  
18 party by virtue of having had at least one contention  
19 admitted?

20           MS. CURRAN: That is what makes sense to  
21 me, that that should be --

22           CHAIR YOUNG: So you agree with the staff?

23           MS. CURRAN: I don't agree with the staff  
24 that --

25           CHAIR YOUNG: On this issue?

1 MS. CURRAN: The staff really makes two  
2 arguments. The first one is that, say, for instance,  
3 Pilgrim Watch would need to have a contention of their  
4 own admitted before being allowed to adopt the --

5 CHAIR YOUNG: You agree with that?

6 MS. CURRAN: I don't agree with that  
7 because it doesn't make sense. And I am not familiar  
8 with the case law that Ms. Uttal cites, but I am  
9 familiar with the Commission's overall policy -- and  
10 that's part of what is being discussed here -- which  
11 is that in terms of admissibility of contentions, the  
12 Commission is concerned with the legitimacy of the  
13 issues, not --

14 CHAIR YOUNG: Right.

15 MS. CURRAN: -- who sponsored the issue.

16 CHAIR YOUNG: But by using the word  
17 "party" and by using the example of the initial party  
18 who raised a contention dropping out and then another  
19 party coming in to take over --

20 MS. CURRAN: Entity perhaps I should have  
21 --

22 CHAIR YOUNG: But, for example, if  
23 Massachusetts, the Attorney General, gets this  
24 contention admitted and there is no other party in the  
25 proceeding by virtue of, for example, Pilgrim Watch,

1 for example, -- these are all hypothetical -- if  
2 Pilgrim Watch doesn't get any contentions admitted,  
3 you're arguing that they should then later be able to  
4 come in and adopt your contention, even though they  
5 have not been a party up to that point?

6 MS. CURRAN: I think that what makes sense  
7 under the Commission's policies is to admit Pilgrim  
8 Watch as a co-sponsor of the contention.

9 CHAIR YOUNG: At the outset?

10 MS. CURRAN: Yes.

11 CHAIR YOUNG: Anything further?

12 MS. CURRAN: No.

13 CHAIR YOUNG: Ms. Hollis?

14 MS. HOLLIS: Well, Your Honor, to the  
15 Panel, as you know, we have not filed contentions and  
16 we have not sought admission as a party. We are here  
17 to help the Panel and to enlighten the record to the  
18 extent possible on behalf of the Town of Plymouth.

19 CHAIR YOUNG: And, just to interrupt, we  
20 appreciate that. And we appreciate your giving up  
21 your trip to be here. You did request earlier to  
22 participate in oral argument. And so we will be  
23 allowing you to make argument on all of the issues and  
24 appreciate any additional enlightenment you can offer.

25 Go ahead.

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1 MS. HOLLIS: Thank you very much, Your  
2 Honor.

3 As a general observation, it would seem  
4 like this early in the proceeding, the fact that the  
5 Pilgrim Watch motion to adopt the contention of the  
6 Massachusetts Attorney General does not impede or  
7 impair in any way the progress of this hearing today  
8 or hold back the proceedings in any way seems just  
9 from a logical standpoint to make sense.

10 And to the extent that the record can be  
11 enlightened by their participation, we would observe  
12 and not as a party, just say that that would be more  
13 good than bad.

14 But just from the natural cadence and flow  
15 of events in the hearing and the proceedings  
16 themselves, it seems like there is no delay, really,  
17 that impacts the process. And on that basis alone, it  
18 would make sense.

19 CHAIR YOUNG: Since there is so much  
20 similarity between contention 4 and the Massachusetts  
21 Attorney General contention and since we are going to  
22 ask for argument on those at the same time, I guess  
23 maybe if the staff and Entergy could address what do  
24 you think would be left out?

25 There are the Thompson and Beyae

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1 affidavits and some additional argument, but aren't  
2 the contentions essentially the same thing so that in  
3 a sense, part of this issue of adoption is somewhat  
4 much ado about not that much different?

5 MS. UTTAL: Well, they're different in a  
6 couple of respects. First of all, they're different  
7 in what they have behind them, the basis. But I think  
8 the major difference is that the Mass. AG is asking  
9 for a wholesale looking at spent fuel pool accidents  
10 and having SAMA spent fuel pool accidents; whereas,  
11 Pilgrim Watch is only asking for a SAMA on spent fuel  
12 pool accidents. I think that's the main difference.  
13 It's a narrower contention.

14 CHAIR YOUNG: Well, we'll get back and ask  
15 them their view on that.

16 Mr. Lewis, what's your view on it?

17 MR. LEWIS: The Massachusetts Attorney  
18 General has provided more background documents and has  
19 identified two individuals as support, where Pilgrim  
20 Watch does not have that backing behind its  
21 contention. I do believe, however, that both  
22 contentions are very similar and inadmissible for the  
23 same legal reasons.

24 And my view on whether this is much ado  
25 about nothing is, in fact, I think both contentions

1 cannot be admitted in this proceeding. And,  
2 therefore, in the end, if those contentions are  
3 rejected, there will be nothing to adopt.

4 JUDGE COLE: But you agree that contention  
5 4 is subsumed within the Mass. AG contention, don't  
6 you?

7 MR. LEWIS: Yes. Let me explain, you  
8 know, why we have opposed this. What is the effect?  
9 Really, the only effect that I see, whether a  
10 contention is adopted or not, if the Massachusetts  
11 Attorney General's contention were accepted and  
12 Pilgrim Watch's weren't, hypothetically, -- I think  
13 they are both inadmissible -- really, the only effect  
14 of this is if I were going to try and settle with the  
15 contention, do I have to deal with two parties or one.

16 So that really is the only reason why I'm  
17 arguing that there should be, in fact, some indication  
18 of why there should be two parties to have to deal  
19 with, instead of one.

20 CHAIR YOUNG: Ms. Bartlett, on the issue  
21 of the similarity, do you have anything to add on  
22 that?

23 MS. BARTLETT: Well, I would say that the  
24 adequacy of the bases that the two contentions has is  
25 not relevant to the issue of adoption, for one thing

1 because, for one thing, we're not required to prove  
2 our case at this point. So if the Attorney General  
3 has experts and reports that we don't have, that's  
4 really not relevant to the issue of adoption.

5 I guess we would be happy if we're both  
6 admitted, the two contentions are admitted, and you  
7 consolidate the two. The effect is the same.

8 To me, as Ms. Hollis said, I don't see  
9 that the adoption causes anyone any hardship at this  
10 stage.

11 CHAIR YOUNG: Anything further, Ms.  
12 Curran?

13 MS. CURRAN: No.

14 CHAIR YOUNG: If there's nothing further,  
15 I guess we will take your arguments under advisement  
16 and rule on that either before or when we rule on the  
17 contentions themselves.

18 Did you have anything further before we  
19 get started?

20 JUDGE TRIKOUROS: No. The only thing I'm  
21 left with is one bit of confusion here -- actually,  
22 two. I'm concerned about the timing issue because I  
23 can see some very advantageous situations occurring if  
24 timing were not an issue.

25 And I am also confused about the

1 admissible contention question, whether or not the  
2 party wishing to adopt the other contention has to  
3 have an admissible contention of their own or not. I  
4 don't think that -- I'm not coming away from this  
5 understanding anything definitive on that.

6 So if there's anything else to add, I  
7 would like to hear it, but right now I'm totally  
8 unclear as to whether the Pilgrim Watch has to have an  
9 admissible contention or not in order to be able to  
10 adopt it.

11 MR. LEWIS: Judge Trikouros, I could make  
12 a suggestion. I think that while there are some  
13 differences in our opinion and the NRC staff's  
14 opinion, in fact, my argument that you should address  
15 the late-filed standards and, therefore, adopt them,  
16 in fact, is what you do to make that contention your  
17 own.

18 And if you show good cause and ability to  
19 contribute, you can file a late-filed contention  
20 legitimately if you address those standards. And if  
21 you do so and become it so, that can, in fact, provide  
22 you the basis for becoming a party.

23 CHAIR YOUNG: Anything further?

24 (No response.)

25 CHAIR YOUNG: Would it be helpful to hear

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1 argument separately at the beginning on the issue of  
2 how we should consider the San Luis Obispo case and  
3 what we should do with regard to a ruling on that?

4 The AG's office has asked that we rule on  
5 it and refer it to the Commission. I believe the  
6 staff has asked that we certify it directly to the  
7 Commission. It might be helpful to separate that out  
8 and just quickly go through the arguments on that.  
9 And then we'll get to the more direct issues relating  
10 to the contentions themselves.

11 We have read your filings on this. We  
12 thought we had something from the staff on this  
13 further on Monday, but it turns out that was a  
14 mistake. But, Ms. Uttal, would you like to begin on  
15 this issue and state your position? And part of the  
16 reason I'm asking you to begin is perhaps you can give  
17 us an update on the latest information you have on  
18 when the Commission is expected to take any action on  
19 this and whether you can give us any further  
20 edification than we already have on that.

21 MS. UTTAL: I have no further information  
22 as to what action the Commission might take. I don't  
23 know exactly what date the time for filing the appeal  
24 is up. So I can't add anything to what I have already  
25 written.

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1 JUDGE COLE: You don't have a crystal  
2 ball?

3 (Laughter.)

4 MS. UTTAL: But the staff's position is  
5 that the position of this agency is that these issues,  
6 the issues of terrorism, are not admissible. They're  
7 not to be addressed. They are not required to be  
8 addressed in NEPA and not in license renewal, where  
9 the Commission has said in the Turkey Point case that  
10 they have already addressed these issues in the GEIS.  
11 And that's my major point.

12 And because the Commission's position is  
13 that they're not to be addressed, I don't think that  
14 this Board has the authority to overrule what the  
15 Commission says, despite what the Ninth Circuit may  
16 have said, because the Commission hasn't decided what  
17 action, if any, it is going to take and hasn't sent  
18 anything down saying what the Board should do.

19 JUDGE COLE: So you're saying it's not  
20 right?

21 MS. UTTAL: Right. Okay. Not right.

22 CHAIR YOUNG: Are you saying that we  
23 should just ignore the Ninth Circuit decision?

24 MS. UTTAL: I'm saying that you have to  
25 follow Commission policy and Commission direction

1 regarding what is the law of this agency.

2 CHAIR YOUNG: But we don't know what the  
3 Commission's view - we know what the Commission has  
4 said in the past, --

5 MS. UTTAL: Right.

6 CHAIR YOUNG: -- but we don't know what  
7 position the Commission is going to take with regard  
8 to that decision.

9 MS. UTTAL: So until you hear otherwise,  
10 it should be business as usual. What the Commission  
11 has said prior to this is what holds at this point.  
12 And if you have any question about what you should do,  
13 then you should certify it to the Commission to --

14 CHAIR YOUNG: What about the suggestion  
15 that we make, in effect, a somewhat provisional ruling  
16 and refer it to the Commission?

17 MS. UTTAL: I don't think that that is  
18 appropriate considering the circumstances that this is  
19 just one circuit that has decided this matter and that  
20 it's the staff's position that, even with that having  
21 been done, that it's not applicable to license renewal  
22 based on the McGuire decision?

23 CHAIR YOUNG: I'm sorry?

24 MS. UTTAL: Based on the McGuire decision,

25 --

1 CHAIR YOUNG: McGuire.

2 MS. UTTAL: -- it's not applicable to  
3 license renewal at any rate. This is a different  
4 case. That was an ISFSI, and this is a license  
5 renewal case, where the Commission has said, in  
6 addition to what said in that case, it's not  
7 applicable to license renewal because we have already  
8 addressed it.

9 CHAIR YOUNG: Just from a procedural  
10 standpoint and efficiency standpoint, which is one of  
11 the concerns of the Commission, as we all know, if you  
12 are asking us to certify this question to the  
13 Commission, are you asking us to do that at the outset  
14 and then await further word from the Commission before  
15 ruling on the contention?

16 In that sense, it would seem more  
17 efficient to go ahead and do what the AG is asking us  
18 to do, which is to make a somewhat provision ruling  
19 and then refer it so that we wouldn't hold up our  
20 ruling on the contention to await the Commission's  
21 word on our certified question.

22 MS. UTTAL: What I'm saying is that the  
23 case is not applicable here. The Commission's policy  
24 is clear. And if you have any questions regarding  
25 that, then you should certify it.

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1 CHAIR YOUNG: And wait for further word  
2 from the Commission before ruling on the contention?

3 MS. UTTAL: I think that is what has to be  
4 done.

5 JUDGE COLE: Not make a decision and just  
6 certify a question?

7 MS. UTTAL: I think that's what has to be  
8 done because the Commission's policy as of this day is  
9 that it's not admissible in a license renewal case and  
10 that hasn't changed because of what the Ninth Circuit.

11 Otherwise that's the position that the  
12 Board has to take. And if the Board disagrees, then  
13 I think you have to certify it.

14 CHAIR YOUNG: Just to sort of let the next  
15 party who may be in line logically with that argument  
16 go and then come back to the petitioners, Mr. Lewis,  
17 what is your view on this? I know you probably have  
18 as much or more interest in quick resolution of these  
19 issues as any party, any participant.

20 How do you view the issue of certifying  
21 and then holding off on ruling on the contention until  
22 we hear back from the Commission and then any other  
23 arguments on that?

24 MR. LEWIS: Yes, Judge. I believe that is  
25 unnecessary. The contention is barred by a rule.

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1 This Board cannot admit the contention without that  
2 rule being waived. I think the Board should reject  
3 the contention because it is barred by a rule.

4 Because the Massachusetts Attorney General  
5 only has one contention, they would be able to take an  
6 immediate appeal to the Commission. And it will  
7 before the Commission right away anyway. And they can  
8 advance all the arguments they want about the effect  
9 of the Ninth Circuit case.

10 CHAIR YOUNG: But what I'm trying to get  
11 you to do is to separate your arguments on the merits  
12 of whether we should admit the contention, other  
13 reasons from just the issue of the relevance and  
14 effect of the Ninth Circuit decision and the issue of  
15 certification versus referral.....

16 MR. LEWIS: I was. I believe that because  
17 this issue is resolved by rule, it's only the  
18 Commission that can decide that the rule should be  
19 waived and this contention should be allowed.

20 So I don't think you could have a  
21 provisional ruling that said "We believe the rule is  
22 no longer in effect." The Licensing Board does not  
23 have that authority. That is a matter that can only  
24 go to the Commission at that --

25 CHAIR YOUNG: Let's just say that we were

1 to disagree with you on other grounds than the Ninth  
2 Circuit decision. Putting aside the question of how  
3 we viewed all of the other issues related to the  
4 contention, just focusing on the issue of the  
5 relevance of the Ninth Circuit decision, what is your  
6 view on whether we should certify that at that outset  
7 and await further word from the Commission or consider  
8 that in the mix of everything else and then make a  
9 decision that we would then refer to the Commission on  
10 the whole contention?

11 MR. LEWIS: A certification is just an  
12 unnecessary step. I think if you set it aside and go  
13 to the Commission, they can provide their advice in  
14 plenty of time. I think there's lots of reasons why  
15 the Ninth Circuit decision is not controlling on its  
16 face. First, it's not effective.

17 The mandate has not been issued. My  
18 recollection is that the timing which a petition for  
19 rehearing may be filed is July 17th if there is a  
20 petition for rehearing before the fact period is  
21 extended. The mandate might not be issued for any  
22 longer period of time. And, of course, the NRC could  
23 also go to the Supreme Court and seek review there.  
24 So currently that decision has no effect.

25 As we point out in our papers, there is

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1 also a very significant difference in the situation at  
2 Diablo and the situation in license renewal in that  
3 the GEIS provides some information addressing  
4 sabotage. It basically says the impacts would be no  
5 worse than a reactor severe accident.

6 . There is, in fact, case law out there with  
7 other agencies, DOE case law, for example, where  
8 opponents were arguing that the effects of terrorism  
9 on spent fuel shipments need to be analyzed.

10 And the court in one case rejected that,  
11 saying DOE had analyzed the impacts of an accident.  
12 How it happens doesn't matter. That's, in fact, very  
13 supportive of what the NRC did in the GEIS.

14 I think those decisions need to be decided  
15 by the NRC. I don't think they can be decided by the  
16 Board. I think this is a matter where the NRC has  
17 addressed it generically, no need to decide how to  
18 apply the Ninth Circuit decision, whether it has any  
19 effect, whether it applies outside the circuit. If it  
20 became effective, it would only be the law of the  
21 Ninth Circuit and conflicting decisions elsewhere.

22 . But, in addition, even if hypothetically  
23 they were to decide to do something, they might well  
24 decide to address this issue by rulemaking, rather  
25 than an individual case.

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1           So there are just multiple reasons why  
2 this is not a proper issue for the Board to make a  
3 provisional decision on. I think that you should  
4 follow the rule, take the action that's compelled by  
5 the rule to let the Commission decide on appeal  
6 whether it wants to change its rule, waive its rule,  
7 and take a fundamentally different approach from a  
8 policy perspective.

9           CHAIR YOUNG: Ms. Curran, do you have  
10 anything to add to your written arguments?

11           MS. CURRAN: Yes.

12           CHAIR YOUNG: Go ahead.

13           MS. CURRAN: We've asked for a ruling to  
14 be certified or referred to the Commission. And one  
15 of the reasons is that our concern here is that in  
16 considering the entire contention that we think that  
17 intentional attacks are one of a range of potential  
18 causes of a spent fuel pool fire. And, therefore, it  
19 seems important to us to look at the contention as a  
20 whole that way.

21           That being said, we don't see any problem  
22 with separately referring the Mothers for Peace issue  
23 to the Commission because it is segregable in terms  
24 of, you know, what are the legal implications of the  
25 Mothers for Peace decision and --

1 CHAIR YOUNG: When you said "referred to,"  
2 did you mean decide and refer or --

3 MS. CURRAN: Decide and refer. That's  
4 what we would like.

5 CHAIR YOUNG: Yes, as opposed to certify?

6 MS. CURRAN: Yes. Certify appears to be  
7 don't decide but just certify a question. Refer seems  
8 to be make a decision and then refer. So we're using  
9 the word "refer."

10 And we think it is possible to -- even  
11 though we would like a ruling on the contention as a  
12 whole, including that issue, we think it's also  
13 possible to refer that piece of it to the Commission.

14 We don't think that the McGuire decision  
15 precludes a ruling by the Board for two reasons.  
16 First, the McGuire decision basically said we think  
17 it's more appropriate to use security, Atomic Energy  
18 Act security, measures for license renewal cases than  
19 to do an environmental impact statement.

20 That issue was addressed in the Mothers  
21 for Peace decision at page 6070, where the court said,  
22 talking about the relationship between the Atomic  
23 Energy Act and NEPA, "The NRC does not contest that  
24 the two statutes impose independent obligations so  
25 that compliance with the AEA does not excuse the

1 agency from its NEPA obligations."

2 So in the Mothers for Peace case, the NRC  
3 conceded that it couldn't carve out some issues and  
4 say, "We don't have to comply with NEPA because we  
5 have an adequate regime for taking care of it under  
6 the Atomic Energy Act."

7 CHAIR YOUNG: You're saying that in  
8 McGuire, the Commission limited their ruling to saying  
9 that they were going to handle it.

10 MS. CURRAN: There were --

11 CHAIR YOUNG: It's a security non-NEPA  
12 issue?

13 MS. CURRAN: The words are quoted in the  
14 NRC staff's response to our hearing request at page  
15 19. And the quotation from the McGuire case is "It is  
16 sensible not to devote resources to the likely impact  
17 of terrorism during the license renewal period but,  
18 instead, to concentrate on how to prevent a terrorist  
19 attack in the near term at the already licensed  
20 facilities." That's CLI-02-26, 56 NRC at 365.

21 In other words, the NRC seems to be saying  
22 "We're taking care of that problem under the Atomic  
23 Energy Act. So we don't need to look at it under  
24 NEPA." And that issue was basically conceded that  
25 that's not correct in the Diablo Canyon case.

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1           Also, the GEIS that Ms. Uttal refers to  
2 discuss apparently only looked at reactor accidents.  
3 And spent fuel pool accidents are different. The way  
4 they happen is different. The consequences are  
5 different.

6           You can't say that the consequences are  
7 bounded by the consequences of a reactor accident.  
8 The radioactive constituents are different. Their  
9 behavior in the environment is different. The  
10 measures that are used to mitigate or avoid the  
11 impacts are different.

12           So just the fact that the GEIS may have  
13 been supplemented to address intentional attacks on  
14 reactors just doesn't have relevance to the question  
15 of whether the impacts of pool fires have been  
16 considered.

17           In terms of the mandate, I don't have a  
18 crystal ball, but I have a little more information  
19 because I am representing the Mothers for Peace in  
20 that case. And on June 29th, the NRC commissioners,  
21 their counsel filed a motion for an extension of the  
22 time for seeking a rehearing, a rehearing on BOC.

23           I think Mr. Lewis correctly said that the  
24 time now expires July 17th. And under Federal Rule of  
25 Appellate Procedure number 40, the mandate would

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1 expire seven days later, on the 24th of July. The NRC  
2 has asked for a -- I mean, the mandate would issue.  
3 I'm sorry. The mandate would issue on the 24th.

4 The NRC has asked for a 45-day extension,  
5 which would take them to, I think it is, something  
6 like August 31st. And we have opposed that extension,  
7 although we have agreed that it would be reasonable  
8 for them to take an extra week because the Justice  
9 Department was flooded in last week's heavy rains and  
10 they're not able to get in there.

11 So it's possible that the mandate won't  
12 issue until September 7th, but it's also possible that  
13 it will issue sometime around the 31st of July  
14 depending on what the court does.

15 That has to be weighed against the -- the  
16 Commission has set these milestones for the Licensing  
17 Board to make decisions at a certain pace. And I  
18 think the milestone was 45 days after the last reply  
19 for the decision on the admissibility of these  
20 contentions.

21 And to us, it would seem appropriate to  
22 assume unless and until something else happens that  
23 the Mothers for Peace decision is going to be a  
24 relevant precedent and apply it.

25 It seems as though all of us are being

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1 required to do everything in an extremely rapid pace  
2 here. And maybe that should apply to the Licensing  
3 Board, too, to make a provisional ruling because,  
4 although the mandate hasn't been issued, there's a  
5 decision from the Ninth Circuit that can be  
6 interpreted.

7 And knowing that it is provisional,  
8 knowing that ultimately the Commission has to decide  
9 what to do with it, it would probably save time to  
10 just make the ruling.

11 I don't have anything more.

12 CHAIR YOUNG: Why don't we go to Ms.  
13 Bartlett next?

14 MS. BARTLETT: I don't have a lot to add  
15 to that. I agree with Diane.

16 CHAIR YOUNG: Ms. Hollis?

17 MS. HOLLIS: Nothing further to add, Your  
18 Honor.

19 CHAIR YOUNG: I think we probably need to  
20 come back to you, Ms. Uttal? in view of Ms. Curran's  
21 citing your argument and giving us the updated  
22 information, do you have anything to add in response  
23 to Ms. Curran?

24 MS. UTTAL: No. My position remains the  
25 same that the Board should not decide the issue but

1 only the Commission decide it because the Commission  
2 policy remains the same until otherwise noted.

3 CHAIR YOUNG: Let me just ask you one  
4 question before we move on. The reference to the  
5 rotation on page 19 of your answer, do you agree that  
6 the Commission in McGuire was basically saying that  
7 they were going to limit their consideration of  
8 terrorism issues to a security context.

9 MS. UTTAL: I don't get that from the  
10 opinion. It's not what they're saying. In addition,  
11 they're saying that we have already dealt with it in  
12 the GEIS. The GEIS is an environmental document. It  
13 already dealt with it in the NEPA context.

14 MS. CURRAN: Judge Young, I just wanted to  
15 make one comment on something Ms. Uttal said, which is  
16 only the Commission can decide. The regulations  
17 clearly give the Licensing Board the discretion to  
18 make a ruling in the first instance and refer it.

19 So perhaps it is true that ultimately the  
20 Commission will decide this issue, but you do have the  
21 discretion to make an initial ruling. And we think  
22 that would be appropriate here.

23 MS. UTTAL: Judge, I am not so sure that  
24 that is true. Under 2.335 if the Board finds that  
25 they have made a prima facie case, it has to be

1 referred to the Commission. And if the Board finds  
2 that they have not made a prima facie showing special  
3 circumstances why a rule should not be applied here,  
4 then the Board will go on because essentially what  
5 they are saying is that the Commission's rule and  
6 regulations regarding what is admissible in a license  
7 renewal proceeding and what has already been decided  
8 generically should not be followed because of the  
9 Ninth Circuit, they're asking you to waive the  
10 application of the Commission's regulations and,  
11 therefore, that 2.335 would be applicable.

12 CHAIR YOUNG: So you just sort of skipped  
13 over from the issue of certification versus referral  
14 to waiver.

15 MS. UTTAL: I think what Mr. Lewis raised  
16 is true also because the Commission has said that in  
17 license renewal proceedings, the issue of terrorism is  
18 not admissible in the proceeding. It's I guess a  
19 category 1 issue that if you want to address it in a  
20 proceeding, you have to ask the Commission or you have  
21 to go under 2.335 and the Commission decides whether  
22 the rule will be waived for this particular proceeding  
23 based on special circumstances. So it's like a  
24 two-pronged thing.

25 CHAIR YOUNG: I think we will get back to

1 the waiver issue in a little more depth in a few  
2 minutes.

3 MR. LEWIS: Judge, may I just make one  
4 point?

5 CHAIR YOUNG: Go ahead.

6 MR. LEWIS: I believe the state indicated  
7 that the McGuire case was basically hinging on one  
8 prong of the argument that was made in the Diablo  
9 case. My recollection is when the private fuel  
10 storage case came out, which had the four reasons for  
11 not considering terrorism, there were also companion  
12 cases that day, both in the Diablo Canyon and in the  
13 Millstone proceeding. And both of those cases adopted  
14 all of the reasons for not considering terrorism in a  
15 license renewal proceeding that were also advanced and  
16 explained to the private fuel storage proceeding.

17 CHAIR YOUNG: I think the McGuire decision  
18 came out around the same time as all of those as well.

19 MR. LEWIS: Right.

20 MS. UTTAL: Yes, they all came out  
21 together, the four cases.

22 CHAIR YOUNG: Right. Okay. If there's  
23 nothing further on that issue, we will take that under  
24 advisement as well and move more into sort of the meat  
25 of these two contentions on the spent fuel pool and

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1 related issues.

2 I wanted to just share with you a little  
3 bit on how I am looking at this at this point to see  
4 if you could, all of you could, help us out and point  
5 out any omissions or anything that I may have  
6 overlooked in this.

7 I guess the way I am looking at it is the  
8 first question we need to look at is whether section  
9 51.53(c)(3)(iv), whether that section, and the  
10 regulatory history relating to that section, as argued  
11 by the Attorney General, is something that is an  
12 argument that has not previously been made to the  
13 Commission. The Commission has clearly said in Turkey  
14 Point and I think -- I can't remember if they did in  
15 McGuire as well, but in Turkey Point, at least, that  
16 the spent fuel pool accidents fall under the GEIS,  
17 it's a category 1 issue, and that there would need to  
18 be a request for a waiver or a petition for  
19 rulemaking.

20 Now, obviously, just as judges don't know  
21 everything that judges who have preceded us have done  
22 until we do the research or until parties bring their  
23 decisions to our attention, there are new Commission  
24 members, who may not know everything that previous  
25 commissions have done.

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1                   And to me, the regulatory history that the  
2                   AG brought to our attention was new information to me.  
3                   And, as I understand the argument, you're saying that  
4                   the Commission when they adopted the final rule, of  
5                   which this provision was a part, had considered  
6                   limiting this provision to category 2 or 2 and 3  
7                   issues but in the end used language in the statement  
8                   of considerations to the effect that "Absent new and  
9                   significant information, the analyses for certain  
10                  impacts codified by this rulemaking need only be  
11                  incorporated by reference in an applicant's  
12                  environmental report."

13                  In other words, you can incorporate  
14                  portions of the GEIS by reference absent new and  
15                  significant information. And the argument that the AG  
16                  is making is that that results in a requirement that  
17                  an applicant address any new and significant  
18                  information that might otherwise fall under a category  
19                  1 issue that was addressed in the GEIS.

20                  And if the applicant needs to do that,  
21                  then a petitioner can challenge an applicant's  
22                  perceived failure to do that. And if that's what the  
23                  AG is doing in this contention, that allows for  
24                  raising that issue more directly without applying for  
25                  a waiver.

1 In saying that a waiver needed to be  
2 applied for in the Turkey Point case, whether the  
3 Commission was aware of that regulatory history and  
4 whether this is a new argument that sort of  
5 distinguishes this case from Turkey Point and other  
6 previous cases is something that it seems to me is  
7 sort of a threshold issue here.

8 Then if we get past that issue and find  
9 that the petitioner can or petitioners can challenge  
10 a perceived failure to raise new and significant  
11 information or address new and significant  
12 information, then the next issue becomes whether the  
13 information is actually new and significant such that  
14 it would fall under this section.

15 Then additional issues that I have sort of  
16 perceived among the parties are whether there is an  
17 actual or a genuine dispute and whether there is a  
18 material issue of law or fact.

19 I am sure I have overlooked some, but if  
20 that would help counsel to sort of organize your  
21 arguments, that is sort of the order in which I have  
22 to this point analyzed the issues around this  
23 contention.

24 Before we get started, are there any  
25 glaring omissions that we need to sort of add to this

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1 list?

2 (No response.)

3 CHAIR YOUNG: If not, we'll start with  
4 you, Ms. Curran. Does my sort of analysis make sense  
5 so that you can sort of follow that and help us out?

6 MS. CURRAN: Yes, it does. And I wonder.  
7 Would you like us each to deal with all of your  
8 questions or would you like us to stop after one and  
9 then talk about one and then go on to the rest?

10 JUDGE TRIKOUROS: I would suggest we do  
11 one at a time.

12 CHAIR YOUNG: Okay.

13 JUDGE TRIKOUROS: It will get much too  
14 complicated if we try and respond to four at the same  
15 time.

16 CHAIR YOUNG: It will make more sense,  
17 right, because obviously if we don't get past the  
18 first one -- well, there is sort of a subissue there  
19 that I forgot to add in. And that is the question of  
20 when does a waiver have to be requested. So that  
21 might go along with that.

22 MS. CURRAN: And, actually, the two,  
23 three, and four questions seem kind of related. So  
24 maybe it makes sense to do those together after we get  
25 done with one.

1 CHAIR YOUNG: Okay.

2 MS. CURRAN: Well, on the first question,  
3 I think we briefed it pretty thoroughly. And in terms  
4 of a legal argument, I don't have anything to add  
5 about our reasons for feeling very confident that we  
6 are in the right forum, that we were actually  
7 obligated if we wanted to raise this issue to  
8 challenge the environmental report.

9 In order to get a hearing and in order to  
10 raise a legitimate contention, it's clear there's one  
11 door that you can go through. And that is to  
12 challenge the environmental report.

13 I would like to talk just a little bit  
14 about the Turkey Point decision because I think it  
15 create some confusion because it doesn't address  
16 51.53(c)(3)(iv).

17 CHAIR YOUNG: Pardon me for interrupting  
18 you, but let me just add another little ingredient  
19 here, if you could address that. And that is, I don't  
20 recall right now whether it was in Turkey Point or  
21 somewhere else, but I think there is some language  
22 somewhere that seems to suggest that in order to avoid  
23 a deluge of parties raising what they allege to be new  
24 and significant -- I think it may have been in the  
25 context of SAMAs that the Commission was sort of

1 saying, "Well, on the new and significant information  
2 question, we're saying you have to file a request for  
3 a waiver at some point during the hearing process,  
4 presumably before or along with the contention so that  
5 a contention on new and significant information would  
6 somehow hinge on whether or not there was a companion  
7 waiver of the rule or request." Does that --

8 MS. CURRAN: I don't recall, but I will  
9 address the waiver question --

10 CHAIR YOUNG: Okay.

11 MS. CURRAN: -- because I'm concerned that  
12 it's clear to me that this case doesn't meet the  
13 threshold requirement for a waiver petition, that the  
14 issue that's raised has to be unique to the plant in  
15 question.

16 Of course, we have raised an identical  
17 issue at Vermont Yankee, though. The only differences  
18 are some minor differences in the plant design and the  
19 population around the plants.

20 So it would be hard to say that Pilgrim  
21 presents a kind of unique case. And there are some  
22 issues raised by our contention that are common to all  
23 nuclear plants. So we think that if we were to follow  
24 Turkey Point, that the only appropriate thing to do  
25 would be a rulemaking petition.

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1           And I wanted to let you know that in the  
2 alternative, we do think that we have filed an  
3 admissible contention. And we would like a ruling on  
4 our contention.

5           In the alternative, in order to be  
6 cautious and prudent, we are planning to file a  
7 rulemaking petition with the Commission because we  
8 don't want to not have this issue considered for some  
9 procedural reason. We may not agree with the  
10 Commission, but we will do it.

11           We don't think that we should have to show  
12 that either an issue is unique to a plant or that it's  
13 generic in order for it to be dealt with. NEPA  
14 requires that before this plant is licensed for  
15 renewal for 20 more years of operation, that  
16 significant environmental impacts have to be taken  
17 into account. And that includes impacts that are  
18 newly discovered.

19           And NEPA doesn't say "And those impacts to  
20 be unique to the plant" or "Those impacts have to be  
21 generic such that you get a waiver, a reversal of an  
22 entire rulemaking." But, nonetheless, we're planning  
23 to file a rulemaking petition.

24           CHAIR YOUNG: But you have not yet filed  
25 a request for a wavier because you don't think you

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1 meet the special circumstances requirement?

2 MS. CURRAN: That's right. We can't see  
3 how we would even get across the threshold. And, as  
4 a matter of fact, we would have to file that waiver  
5 petition with the Board, the Licensing Board, who  
6 would have to refer it to the Commission, I think.  
7 That was the previous procedure. I think it's still  
8 the same.

9 So I think it would be helpful to us if  
10 within your ruling you would discuss that. Is this  
11 issue unique? Is a waiver petition appropriate here?

12 CHAIR YOUNG: Anything further?

13 MS. CURRAN: No.

14 CHAIR YOUNG: Do you want to add anything,  
15 Ms. Bartlett, on this?

16 MS. BARTLETT: I don't really have much to  
17 add. The waiver issue is a bit beyond my level of  
18 expertise. But it was my understanding that if you  
19 were going to file for a waiver, you had to show  
20 unique circumstances to the plant. And I think that  
21 would be just a strange way to shut down the  
22 admissibility of these contentions.

23 CHAIR YOUNG: Okay. Shall we go to  
24 Entergy next and -- well, you have heard what they  
25 have to say.

1 MR. LEWIS: Let me start with just a  
2 statutory argument before I get into the specifics of  
3 51.53(c)(3)(iv) because I heard Ms. Curran say and she  
4 also said in the reply that NEPA obligates this issue  
5 to be heard in this proceeding that there is a  
6 requirement to supplement when there is significant  
7 and new information.

8 That argument that NEPA compels this and  
9 so a waiver can't possibly be a right mechanism is  
10 flat-out inconsistent with Supreme Court law in both  
11 the Vermont Yankee case and the Baltimore Gas and  
12 Electric case. The Vermont Yankee case is 435 U.S.  
13 519, and the Baltimore Gas case is 462 U.S. 87.

14 Both those cases upheld the NRC's ability  
15 to use generic rulemaking to resolve an environmental  
16 issue. And the NRC has done this for decades. Table  
17 S-3 and S-4 are two rules that resolve issues  
18 generically. They preclude those issues from being  
19 raised in the proceeding. The Supreme Court has  
20 blessed that approach.

21 Now, it's correct there may need to be  
22 supplementation of a finding when it becomes out of  
23 date, but the appropriate procedural mechanism in that  
24 event is a waiver or amendment of the rule. That is  
25 the only way that you reconcile this clear Supreme

1 Court case that says you can resolve these issues  
2 generically by --

3 CHAIR YOUNG: Excuse me for a second. I  
4 missed something there. These cases say you can  
5 resolve, what types of issues?

6 MR. LEWIS: Generically --

7 CHAIR YOUNG: Okay. Well, what about the  
8 specific issue of new and significant information?  
9 That would sort of fall outside that, wouldn't it?

10 MR. LEWIS: No. New and significant  
11 information is the standard that's in the CEQ  
12 regulations for when you supplement an environmental  
13 finding. The way that you can reconcile this case law  
14 that says that you can resolve issues, if an issue is  
15 real, any time that somebody alleges new and  
16 significant information, it's not resolved  
17 generically. It's not resolved at all.

18 All someone has to say is "I think  
19 something is new and significant," and they're into  
20 litigating the full issue. And it's wide open for  
21 analysis. That's absolutely inconsistent with the  
22 concept of resolving an issue generically by rule.  
23 The way that --

24 CHAIR YOUNG: Apart from the generic  
25 issue, just the plain meaning of new and significant,

1 under NEPA, you have to in your environmental report  
2 -- well, the NRC has to. And by one step back, you  
3 have to address any new and significant information,  
4 right?

5 MR. LEWIS: I don't believe that that's  
6 the case unless it is brought to the Commission and  
7 the Commission agrees, yes, it is new and significant  
8 and they expand the proceeding. That is the  
9 procedural mechanism that prevents these generic  
10 findings from just being obliterated by an allegation.

11 CHAIR YOUNG: Well, before we get to the  
12 point of the petitioners raising allegations, do you  
13 think that if you're aware of new information, that  
14 you have an obligation to -- under this  
15 51.53(c)(3)(iv), "The environmental report must  
16 contain any new and significant information regarding  
17 the environmental impacts of license renewal, of which  
18 the applicant is aware." What does that mean"?

19 MR. LEWIS: Well, that means -- and I can  
20 explain the history of this provision. Again, it goes  
21 back to how you determine when you need a waiver, when  
22 should the Commission step in to waive a rule or to  
23 institute a new rulemaking to supplement a generic  
24 finding?

25 Maybe I should start at that point in

1 time. The license renewal rule, then environmental  
2 rules were clearly intended to resolve issues  
3 generically. In the proposed rule, the Commission  
4 specifically said that "Our purpose is to assess  
5 issues generically so they don't have to be addressed  
6 in individual cases."

7 That was the purpose. And in the final  
8 rule, they continued that. They put inside their  
9 regulations the version that an applicant was not  
10 required to analyze any category 1 issue.

11 CHAIR YOUNG: Right.

12 MR. LEWIS: That same provision was in the  
13 regulation that applies to the EIS. And, in addition,  
14 in response to comments, they indicated an applicant  
15 is not required to validate the category 1 findings.

16 CHAIR YOUNG: Right. You incorporated by  
17 reference --

18 MR. LEWIS: That's right. Do you want to

19 --

20 CHAIR YOUNG: But isn't this section an  
21 exception to that in the language in the SOC that says  
22 "absent new and significant information"? I mean,  
23 apart from petitioners, if you're aware of something  
24 new that the category within which it lies having been  
25 addressed in the GEIS but you're aware of something

1 new, aren't you required to address that in your  
2 environmental report?

3 MR. LEWIS: If I am aware of something  
4 that is both new and significant --

5 CHAIR YOUNG: Right. That's what I mean,  
6 new and significant.

7 MR. LEWIS: -- that I believe is new and  
8 significant, I am required to identify that  
9 information. I don't have the new allowances. The  
10 purpose of identifying it is so that the staff can  
11 look at it and take that issue to the Commission and  
12 say, "The applicant indicates there is some  
13 information that may affect a category 1 issue. We  
14 think that the scope of this proceeding needs to be  
15 expanded."

16 The Commission will then make a ruling  
17 saying, "Okay. Based on this, we are waiving the rule  
18 in this instance to allow this issue to be raised."  
19 That is the procedural mechanism.

20 I'm not denying that new and significant  
21 information is the correct standard to determine  
22 whether a resolved issue should be reopened. What I'm  
23 saying is that the procedural safeguards that don't  
24 allow this to happen automatically --

25 CHAIR YOUNG: Hold on. Let's slow down

1 for just a second. Before we get to the waiver issue,  
2 what supports what you just said to the effect that  
3 what this section means, 51.53(c)(3)(iv), what that  
4 means with regard to applicants is that the applicants  
5 identify the new and significant information, ask the  
6 Commission to make a determination whether they're  
7 going to reopen the generic issue? What supports your  
8 reading on that? Is there something in the SOC that  
9 supports that? I don't know. I want to know the  
10 answer.

11 MR. LEWIS: I mean, there's the context of  
12 it. This whole issue was raised by the Council for  
13 Environmental Quality, CEQ, during the proposed  
14 rulemaking. The CEQ --

15 CHAIR YOUNG: During the proposed --

16 MR. LEWIS: During the proposed --

17 CHAIR YOUNG: -- rulemaking for NEPA or  
18 NRC?

19 MR. LEWIS: During the proposed rulemaking  
20 to establish 51.53(c), the proposed rule that  
21 established the category 1 findings and the category  
22 2 findings and what had to be addressed in license  
23 renewal.

24 CEQ commented that they were concerned  
25 that category 1 findings might cut off the public's

1 ability to comment. The public might want to comment  
2 on the category 1 issue.

3 The NRC said after a lot of discussion  
4 with CEQ, with NRC indicating that "We want to resolve  
5 issues generally" that they reached a compromised  
6 position. They said, "Any member of the public can  
7 submit a comment on any issue. And the NRC will  
8 consider that comment. And they will evaluate it for  
9 new and significant information. If the staff  
10 determines that there is new and significant  
11 information, they will then go to the Commission and  
12 either get the Commission to waive the rule or get the  
13 Commission to suspend the rule for further  
14 rulemaking." So the purpose of this original --

15 CHAIR YOUNG: Okay. Let me stop you again  
16 because I really need help on this one. What I was  
17 trying to ask before was, where is the support?  
18 You're talking about a member of the public.

19 MR. LEWIS: Yes.

20 CHAIR YOUNG: Let's back up.

21 MR. LEWIS: It's all interrelated.

22 CHAIR YOUNG: Okay. But what I want you  
23 to address is what I see as the first prong, at least  
24 in time, at least in sequence, the first thing that  
25 happens is that an application is filed. With that

1 application, an environmental report is filed.

2 Under this section, the applicant has to  
3 -- the environmental report of the applicant has to  
4 contain any new and significant information, of which  
5 it is aware.

6 And what I understood you to be saying  
7 before was that the procedure for that is that the  
8 applicant identifies it and then either asks the staff  
9 or the NRC or the staff on its own then goes to the  
10 NRC to ask the Commission to reopen the generic issue,  
11 in effect, before we even get to a member of the  
12 public, before we get to a petitioner.

13 And what I was trying to understand from  
14 you is where is the support for that particular  
15 argument?

16 MR. LEWIS: In consideration, in the SECY  
17 paper, the Commission does not outline this particular  
18 scenario that you are discussing. So what I need to  
19 do is explain the whole picture, including what they  
20 said, what happened if this issue was raised by a  
21 member of the public, what they said --

22 CHAIR YOUNG: Okay. And you can do that,  
23 but before we get to that point, just sequentially,  
24 what I would like you to address is, what does this  
25 mean with regard to the applicant's responsibility if

1 the applicant is aware of some new and significant  
2 information?

3 You don't know or care what the public or  
4 any petitioners -- it's before it even gets to that  
5 point. What's the applicant's responsibility on that?

6 I thought I understood you to be saying  
7 that the staff and the Commission then determined  
8 whether they're going to reopen the generic issue for  
9 far more information.

10 MR. LEWIS: Our obligation under  
11 51.53(c)(3)(iv) is to do exactly what it says, to  
12 identify any new and significant information, of which  
13 you're aware. That's actually a fairly narrow and  
14 subjective standard.

15 It's not analyze all new information and  
16 determine whether it's significant or analyze all new  
17 information and show it's not significant and it's not  
18 analyze information that someone else thinks is new  
19 and significant. It's only a provision that says,  
20 "Include a statement whether you're aware of  
21 information that you believe is new and significant."

22 Entergy has done that in their  
23 application. There is a section of the application,  
24 section 5.1 if my recollection serves me, that says,  
25 "We established the process for determining whether

1 there was new and significant information or looking  
2 for it. And we are not aware of any."

3 So we have fulfilled what 51.53(c)(3)(iv)  
4 does by saying we're not aware of any. There's no  
5 information that we know of that we believe is new and  
6 significant. We have --

7 CHAIR YOUNG: What if there were? What  
8 would happen then?

9 MR. LEWIS: If there were? I think that  
10 staff would take it. The Commission proceeding would  
11 be expanded. That would be put in scope. And I  
12 suspect that would be done before the notice of  
13 hearing was put out. I think you would have a notice  
14 of hearing saying, "In addition to the normal issues,  
15 you know, this additional issue is within the scope of  
16 this proceeding," and it would be raised.

17 CHAIR YOUNG: So then --

18 MR. LEWIS: The purpose is safety --

19 CHAIR YOUNG: If that happened -- pardon  
20 me for sort of slowing this down, but I really want to  
21 understand each step. If that happened, then could a  
22 petitioner submit a contention about that new and  
23 significant information that you had identified  
24 without going through the waiver process since the  
25 staff was already --

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1 MR. LEWIS: Yes, ma'am. If the staff  
2 issued it to the Commission and the Commission said,  
3 "Yes, we think there should be an exception in this  
4 case," they have a perfectly ability by adjudicatory  
5 order to redefine the scope of the proceeding and  
6 expand it. That's the same as a waiver. And they  
7 could indeed say, "If the staff came to the Commission  
8 at the beginning of the proceeding based on  
9 information we gave them and said, you know, there  
10 were these issues in the GEIS, but they just don't  
11 apply to our plant," they're wrong.

12 It would be appropriate for the Commission  
13 to do so. And if the Commission then opened the  
14 proceedings, as I think it would, anybody would be  
15 able to raise an issue with respect to those waived  
16 issues.

17 CHAIR YOUNG: Okay. So they have already  
18 been waived. But if you do what you have done here,  
19 say, "We are not aware of any new and significant  
20 issues," you're saying that you have met your  
21 responsibility under 4, a contention challenging  
22 whether you have met your responsibility under  
23 (c) (3) (iv), you're saying it can't be submitted unless  
24 there's a waiver request submitted.

25 MR. LEWIS: At that point, the SECY paper

1 that explained this whole compromised position and why  
2 new and significant --

3 CHAIR YOUNG: And what SECY paper?

4 MR. LEWIS: It's 93-032, February 9th,  
5 1993. This was a SECY paper where the NRC staff  
6 presented to the Commission the negotiating agreement  
7 that they had reached with the CEQ on how they were  
8 going to address this issue.

9 I think that the Mass. AG at one point  
10 suggested that this was jut a proposed provision that  
11 was, you know, not even the final rule, but, in fact,  
12 this SECY paper presented the position that was in the  
13 final rule. And this SECY paper was voted on. There  
14 was an affirmation of this SECY paper.

15 CHAIR YOUNG: In 93?

16 MR. LEWIS: Yes. Those sheets are dated  
17 -- well, they're different dates, but it looks like  
18 they were all released to the public docket May 6th,  
19 '93.

20 Each of the commissioners voted. I could  
21 provide the vote sheets. I can pull them out of this  
22 book and give everybody a copy. But it shows that the  
23 SECY 93-032 is more than just a proposal. It is what  
24 the Commission approved by vote. And in there --

25 CHAIR YOUNG: What was the date of the

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1 first of the proposed rule that the AG --

2 MR. LEWIS: The date of the proposed rule.

3 CHAIR YOUNG: Do you know off the top of  
4 your head, Ms. Curran?

5 MS. CURRAN: The date of the proposed  
6 rule?

7 CHAIR YOUNG: Right, the Federal Register  
8 notice on that.

9 MR. LEWIS: The Federal Register citation  
10 I can give you. It's 91. It's 56 Federal Register  
11 47016, 1991. That was the proposed reg. I don't know  
12 the month and date from the citation.

13 CHAIR YOUNG: There was the proposed rule.  
14 Then there was the SECY paper. And then in '96, there  
15 was the final rule.

16 MR. LEWIS: And the final rule was 61  
17 Federal Register 28467, 1996.

18 CHAIR YOUNG: Thank you.

19 MR. LEWIS: In this SECY paper explaining  
20 the position, what the Commission did say is  
21 litigation of environmental issues in a hearing will  
22 be limited to what was then called unbounded category  
23 2 and category 3 issues.

24 Those two categories together are now what  
25 is called category 2 unless the rule is suspended or

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1 waived. So what that statement does is specifically  
2 address this situation where somebody is trying to say  
3 a category 1 issue should be raised.

4 The Commission said in reaching this  
5 compromised position, if somebody is trying to raise  
6 that issue in a hearing, it requires a waiver.

7 CHAIR YOUNG: And was that language  
8 repeated anywhere in this final rulemaking in '96?

9 MR. LEWIS: That language is not in the  
10 final statement of consideration. There is some of  
11 the language from the SECY paper. It's an abbreviated  
12 version. What the statement of consideration does do,  
13 though, is it addresses the public comment situation,  
14 which has to be analogous.

15 The ability for a public to raise an issue  
16 within the scope of the proceeding has to be the same  
17 as the ability of a petitioner to raise a scope in the  
18 hearing. You can't have one scope of the proceeding,  
19 you know, for purposes of public comment and another  
20 for purposes of adjudication.

21 What the Commission did say in the  
22 statement of considerations --

23 CHAIR YOUNG: Would the procedures be  
24 different?

25 MR. LEWIS: I beg your pardon?

1 CHAIR YOUNG: Would the procedures  
2 necessarily be the same?

3 MR. LEWIS: I think the procedure is the  
4 same. In both cases, you need to waive the generic  
5 finding allowed to be introduced. What the Commission  
6 said in the statement of consideration is in the  
7 context of a commenter.

8 If somebody believes there is new and  
9 significant information, they should, you know, bring  
10 it to the staff's attention. The staff will then go  
11 to the Commission and seek a waiver if they believe  
12 it's new and significant or suspend the rule if they  
13 think it is generically new and significant.

14 That has to be the same standard in a  
15 hearing. That is the only way that you balance  
16 finality against the need for supplementation.

17 CHAIR YOUNG: Well, then, since the  
18 Massachusetts AG has raised this issue, are you saying  
19 the staff should now go request the Commission waive  
20 the rule?

21 MS. UTTAL: That's only if the staff  
22 agrees with them.

23 MR. LEWIS: I think that the petitioner  
24 can waive it in -- he can petition for the waiver  
25 himself. I don't think it has to be the staff. It

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1 was the staff in the context of a comment because that  
2 was not in the hearing context, but then it was  
3 anybody can bring this information to the staff. And  
4 the staff can then take it to the Commission for a  
5 comment.

6 I think in adjudication, any person who is  
7 alleging that a category 1 issue should be litigated  
8 has the obligation to seek a waiver. I think it also  
9 avoids the issue of somebody coming in and saying,  
10 "The applicant doesn't believe this is new and  
11 significant. We do. We're just alleging it is. So,  
12 therefore, our contention comes in."

13 It is very easy to say something is new  
14 and significant in a contention. You simply say,  
15 "Here is some information that postdates the GEIS."  
16 It can be my own expert's opinion. And I think it is  
17 significant because I think it changes the results of  
18 the GEIS.

19 JUDGE COLE: Right.

20 MR. LEWIS: I've got an expert that is new  
21 and significant. The contention is in. And the  
22 finality of the rules are blown. That can't be the  
23 appropriate procedural posture.

24 JUDGE COLE: Mr. Lewis, did the Council on  
25 Environmental Quality or the Commission, Nuclear

1 Regulatory Commission, provide any guidance to the  
2 staff or applicants on a definition of what would  
3 constitute new and significant information in  
4 51.53(c)(3)(iv)?

5 MR. LEWIS: I'm not aware of any  
6 Commission guidance on that point. I don't think it  
7 was really explained in the SECY paper or in the  
8 statement of consideration.

9 My position, my view is that new means  
10 information that came into existence after the GEIS,  
11 but it doesn't mean just that somebody else said  
12 something that was said before. It means something  
13 that was really substantively new.

14 If it predated the GEIS or it was  
15 information that was within the general knowledge at  
16 the time of the GEIS, it wouldn't be new and  
17 significant I think has to be done that changes  
18 materially the findings in the GEIS. If it doesn't  
19 materially change the findings, it can't possibly be  
20 significant. There's no need to supplement if it's --

21 JUDGE COLE: So your criteria would be  
22 significant means something that would change the  
23 overall findings of the application?

24 MR. LEWIS: That's right. And when we get  
25 into the second prong of the second question that

1 Judge Young has asked, I think that's a perfect  
2 example of what does significant mean.

3 JUDGE COLE: Okay. Thank you.

4 JUDGE TRIKOUROS: Mr. Lewis, what if there  
5 were a particular plant-specific situation in which --  
6 and I'll repeat: plant-specific situation where some  
7 information came to light that for that plant, there  
8 would be something unique that's not covered in the  
9 GEIS? Would that also require filing of a waiver?

10 MR. LEWIS: Yes, yes. If there is new  
11 information, if something new comes to light and it's  
12 significant, it changes the GEIS findings that it's  
13 plant-specific, that would be within the obligation of  
14 licensee to inform the NRC so the NRC can obtain a  
15 waiver. And, you know, that's the same as generic  
16 information.

17 In fact, the difference is in that  
18 situation, that's the situation where the waiver of  
19 the rule is really appropriate, as opposed to the  
20 situation where there is new information that affects  
21 everybody, where the Commission has suggested in that  
22 case, the more appropriate course is to reopen the  
23 rulemaking and address that issue generically, because  
24 the Commission is really trying here to resolve issues  
25 that are generic generically so they don't have to be

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1 looked at in individual proceedings.

2 It's like the waste confidence rule, where  
3 they've said it doesn't make sense litigating these  
4 issues over and over in individual proceedings.

5 These are really national issues. We're  
6 going to resolve them, you know, one time and if there  
7 is something that changes addressed in the generic  
8 rulemaking because that is the only way that you can  
9 serve your underlying purpose to stop this one  
10 national issue from being raised individually over and  
11 over again in individual proceedings.

12 CHAIR YOUNG: Could you address the  
13 argument of the AG about special circumstances being  
14 circumstances essentially unique to the plant and that  
15 in this instance, the new and significant information  
16 is not the same as the special circumstances that  
17 might warrant a waiver and so, therefore, they don't  
18 meet the requirements for a waiver?

19 MR. LEWIS: I think that's inconsistent  
20 with what the Commission said in Turkey Point. Turkey  
21 Point specifically addressed the waiver provisions,  
22 and it required special circumstances and said new and  
23 significant information is the type of information  
24 that provided those special circumstances. That's my  
25 recollection of the case.

1 CHAIR YOUNG: Do you recall? Can you give  
2 me --

3 MR. LEWIS: I'll have to look quickly. I  
4 think it's -- I'm referring to -- actually, there's  
5 probably a better quotation, but -- 54 NRC 3  
6 CLI-01-17. This is the Turkey Point case, page 12.

7 CHAIR YOUNG: Page 12?

8 MR. LEWIS: Page 12. "In the hearing  
9 process, for example, petitioners with new information  
10 showing" --

11 CHAIR YOUNG: Hold on a second.

12 (Pause.)

13 MR. LEWIS: Okay. "In the hearing  
14 process, for example, petitioners with new information  
15 showing that a generic rule would not serve its  
16 purpose at a particular plant may seek a waiver of the  
17 rule."

18 Therefore, what the Commission is saying  
19 is that the showing of new information specific to a  
20 particular plant, you know, that would show that the  
21 rule doesn't serve its purpose in this proceeding and  
22 allows a waiver. In fact, this is a very strong  
23 statement showing how this new and significant  
24 information standard is tied to the need to obtain a  
25 waiver.

1 CHAIR YOUNG: What is the new section  
2 number for the waiver provision? Does anyone --

3 MS. UTTAL: 2.335.

4 CHAIR YOUNG: That's right. And the  
5 language is the same as it was?

6 MS. UTTAL: I haven't compared them.

7 MR. LEWIS: It's certainly substantively  
8 the same. I don't recall anything that's a major  
9 change.

10 CHAIR YOUNG: So the language you just  
11 referred us to in Turkey Point was "In the hearing  
12 process, for example, petitioners with new information  
13 showing that a generic rule would not serve its  
14 purpose at a particular plant may seek a waiver of the  
15 rule"?

16 MR. LEWIS: That's correct.

17 CHAIR YOUNG: And then it goes on to say,  
18 "Petitioners with evidence that a generic finding is  
19 incorrect for all plants may petition the Commission  
20 to initiate a fresh rulemaking." I understand the AG  
21 to be saying that those are alternatives.

22 MR. LEWIS: I don't think that is correct.  
23 I think the Commission has always had the ability to  
24 decide whether to proceed by rule or adjudication. If  
25 the NRC thought, in fact, that there was an issue that

1 needed to be supplemented, it has the complete  
2 discretion to decide to address that issue by rule, by  
3 rulemaking, by amending the rules.

4 And the longstanding precedent of the  
5 Commission has been whether an issue is addressed in  
6 rulemaking and should not be considered in individual  
7 adjudications.

8 CHAIR YOUNG: Well, the alternatives that  
9 I was referring to were the waiver versus rulemaking,  
10 not adjudication versus rulemaking. Correct me if I'm  
11 wrong. I understand the AG is arguing that there are  
12 alternatives, right?

13 MS. CURRAN: Yes. That's what it seemed  
14 to us the Commission is saying.

15 CHAIR YOUNG: And you're saying that they  
16 sort of overlap, that in the hearing process, the  
17 petitioners with new information --

18 MR. LEWIS: The hearing process --

19 CHAIR YOUNG: -- that a generic rule would  
20 not serve its purpose at a particular plant or at any  
21 plant would be required to seek a waiver?

22 MR. LEWIS: I guess that's true. I guess  
23 if a petitioner thought that there's new and  
24 significant information that should be raised in the  
25 adjudication, it could seek a waiver to the

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1 Commission.

2 If the Commission looked at it and said,  
3 "We don't think this is appropriately treated at an  
4 individual proceeding. This is generic. We're going  
5 to address it by rulemaking," the Commission would do  
6 so.

7 They would deny the waiver request, and  
8 they would say, "We are going to resolve this by  
9 adjudication.

10 CHAIR YOUNG: By rulemaking.

11 MR. LEWIS: By rulemaking. I'm not going  
12 to say that a petitioner can't file a petition for  
13 waiver with the Commission. I think they can. I  
14 think what the Commission has said is if it's generic  
15 to all plants, we're going to address it by  
16 rulemaking. If it's specific, then we'll allow it to  
17 be admitted in the adjudication.

18 So I think the Commission would take care  
19 of that in ruling on whatever petition the petitioner  
20 filed.

21 CHAIR YOUNG: What about the language in  
22 335 that says "The sole ground for petition of a  
23 waiver or exception is that special circumstances with  
24 respect to the subject matter of the particular  
25 proceeding"? That seems to support the AG's argument

1 that waiver applies only to plant-specific issues.

2 MR. LEWIS: Let me say it again. I think  
3 that they can file their petition and they can make  
4 their argument and they can say it's specific to this  
5 plant.

6 I think that if it's not specific to the  
7 plant, if it's generic, that it's not special  
8 circumstances, the Commission would deny the waiver  
9 request and would institute a rulemaking proceeding.  
10 I guess I am not saying anything different.

11 CHAIR YOUNG: Okay. Pardon me for  
12 continuing on here, but I'm really trying to sift out  
13 the parties' positions on this. As I understand what  
14 you just said, if the petitioner doesn't believe that  
15 they meet the sole ground for petition of a waiver  
16 because they don't see special circumstances with  
17 respect to the subject matter of a particular  
18 proceeding relating to that particular plant, then the  
19 only thing that they can do is to file a petition for  
20 rulemaking. And they cannot challenge what they  
21 perceive to be a failure to meet 51.53(c)(3)(iv)  
22 absent the --

23 MR. LEWIS: I would concede that. I will  
24 concede that. If the petitioner believes he has no  
25 grounds to waive the rule in an individual proceeding

1 that he shouldn't do so and to do so in the rules  
2 would be inappropriate, I think the petition for a  
3 rulemaking is an appropriate method/means available to  
4 the petitioner to tell the Commission "You have this  
5 generic rule. It's wrong. It's affecting this  
6 proceeding. And it's affecting everybody. Please  
7 change it." And the Commission would address it.

8 CHAIR YOUNG: But what the AG is saying,  
9 as I understand it, is if we are limited to a petition  
10 for rulemaking, we don't have any recourse. We can't  
11 appeal that. We want to be able to challenge the  
12 failure to address what we consider, they consider, to  
13 be new and significant information, the failure to  
14 address that in the environmental report. And we want  
15 to be able to appeal that in the context of an  
16 adjudication proceeding.

17 MR. LEWIS: I mean, it sort of --

18 CHAIR YOUNG: And so you're saying that  
19 they can't. They can't challenge. If they perceive  
20 that the applicant has not addressed new and  
21 significant information that it should have addressed  
22 under (c)(3)(iv), they cannot challenge that outside  
23 a rulemaking if they don't believe it applies to the  
24 particular plant only.

25 MR. LEWIS: When you said "appeal," do you

1 mean appeal to the Commission or do you mean appeal  
2 outside the --

3 CHAIR YOUNG: Appeal outside the  
4 Commission, to the --

5 MR. LEWIS: Oh, I think they certainly  
6 could. I think if, as they have done here, they have  
7 a contention saying, "This should be considered in an  
8 individual proceeding" and we disagree with the  
9 Commission's generic approach and we think it violates  
10 NEPS, if the Licensing Board denies that contention as  
11 barred by the rules and the Commission affirms, they  
12 would directly and definitely be able to take that  
13 under judicial review anyway.

14 CHAIR YOUNG: I guess what you're saying  
15 is that we don't have the authority to grant the  
16 contention.

17 MR. LEWIS: Yes, I am saying that very  
18 much so.

19 CHAIR YOUNG: And the basis for your  
20 saying that, even though they have, the petitioners  
21 have, the authority to file a contention challenging  
22 that but that the Board does not have the authority to  
23 rule in any way but to deny such a contention, your  
24 authority for that is?

25 MR. LEWIS: Let me say again that because

1 this is a result -- I mean, this goes back to an  
2 earlier issue. Because this is resolved generically  
3 by rule and the rules are preclusive, if an individual  
4 wants to raise it before the Licensing Board, they  
5 have to file a petition for a waiver and they've got  
6 to show special circumstances.

7 And you're right in referring to what the  
8 standards are. They have to show that there's some  
9 significant new information that has some bearing on  
10 that plant to why the generic category, one finding is  
11 wrong for that plant.

12 If the Board determined that the petition  
13 established prima facie that the rule should be  
14 waived, it would then refer the petition to the  
15 Commission, who could then grant it. And the issue  
16 would be within the scope of the proceeding.

17 CHAIR YOUNG: Okay. But in this  
18 situation, where they don't believe they have grounds  
19 for a waiver but they want to challenge what they  
20 believe to be your failure to address new and  
21 significant information, you're saying they can file  
22 a contention, but the only thing we can do is deny it.

23 How would it make sense to say that a  
24 party can file a contention, but it's essentially a  
25 futile effort because it's going to automatically be

1 denied under your reading?

2 MR. LEWIS: I don't know if it's going to  
3 be automatically denied.

4 CHAIR YOUNG: Well, if we don't have  
5 authority to do anything but deny it, it's the same  
6 impact, right?

7 MR. LEWIS: If they have filed a petition  
8 for a waiver, which they didn't -- I mean, you're  
9 asking hypothetically.

10 CHAIR YOUNG: No, no. I'm not saying --

11 MR. LEWIS: If there's a generic rule that  
12 precludes this issue and they don't ask for it to be  
13 waived, it cannot be admitted.

14 CHAIR YOUNG: Hold on a second. I thought  
15 what we did a minute ago was you agreed that in a  
16 circumstance where they don't believe they have  
17 plant-specific grounds for a waiver, that they would  
18 still have the right to file a petition and a  
19 contention challenging their perception that the  
20 applicant failed to identify new and significant  
21 information in the environmental report. That  
22 wouldn't meet the grounds for a waiver because it was  
23 more general but which you I thought agreed that they  
24 would then have the right to file a contention on  
25 that, in addition to a petition for rulemaking, but

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1 that they could file a contention challenging their  
2 perception that the applicant failed to identify this  
3 new and significant information.

4 MR. LEWIS: I don't believe I ever  
5 conceded that. Again, I think that the --

6 CHAIR YOUNG: I must have missed it.

7 MR. LEWIS: -- standard for what the  
8 applicant has to do is to identify new and significant  
9 information of which it's aware. I think that's a  
10 narrow, subjective standard that says, "Licensee, if  
11 you believe that there is new and significant  
12 information, tell us so that we can go to the  
13 Commission and obtain a waiver of the rule early on to  
14 expand the scope of the proceeding."

15 We even address that. I think if we say  
16 we're not aware of, we have not seen any information  
17 that we believe is new and significant, we fully  
18 satisfy that provision. And I don't think there is  
19 much of a basis for anybody to challenge it.

20 What the Pilgrim Watch contention and the  
21 Massachusetts Attorney General contention were trying  
22 to do is say not that we failed to say whether we  
23 believe there is any new and significant information,  
24 but they say, "You failed to analyze information that  
25 the Massachusetts Attorney General and Pilgrim Watch

1 thinks is new and significant." And that is very  
2 different. I don't think that there is anything --

3 CHAIR YOUNG: Well, how is it different?  
4 By saying that they think it is new and significant,  
5 they're saying that they think you should have  
6 identified it in your environmental report. That's  
7 how I read their contention.

8 MR. LEWIS: Again, I think that you have  
9 to reconcile this limited provision with the  
10 Commission's intent to resolve issues generically and  
11 provide finality. And if you accept the position that  
12 simply alleging I think there was something new and  
13 significant that you should have analyzed opens up a  
14 category 1 issue without any need for a waiver. Then  
15 none of the category 1 issues have any preclusive  
16 effect. The Commission --

17 CHAIR YOUNG: Well, wouldn't they have to  
18 meet the contention admissibility requirements by  
19 showing enough there so that they couldn't just sort  
20 of make a bare assertion or speculation?

21 They have to support their argument that  
22 there's new and significant information that the  
23 applicant should have but did not include in the  
24 environmental report. They have to support it with  
25 something.

1           And the Board has to make a determination.  
2           Is it really new and significant? So, I mean, the  
3           floodgates argument, it seems to me, is countered by  
4           the function that we serve of determining whether  
5           there is enough of a basis for whatever contention is  
6           raised; in this case, a contention saying that there  
7           is new and significant information.

8           We have to make a determination. Is there  
9           enough of a basis there to support admitting the  
10          contention, where if we find there is, then there  
11          wouldn't be the opportunity to litigate "Well, is it  
12          really new and significant?" in more depth.

13                 MR. LEWIS: The basis with specificity  
14                 requirements for contentions is not an adequate level  
15                 of protection. It's not a safeguard. It doesn't  
16                 provide the finality that the Commission intended. In  
17                 ruling on the contention, you are ultimately not  
18                 making a merits determination. You are simply  
19                 providing a determination that there was enough of a  
20                 basis advanced.

21                 And that can be an assertion by an expert.  
22                 It can be an expert saying, "I now believe that the  
23                 dose-response curve is quadratic. And, as a result,  
24                 the health effects are a million times higher. And  
25                 obviously that would change the GEIS." Here are my

1 credentials.

2 It's new. It's an opinion that's just  
3 been given in an affidavit. And it certainly would  
4 change the results. Does that mean that all the  
5 category 1 findings on radiological impacts now get in  
6 because the applicant didn't address that, you know,  
7 far-fetched scenario?

8 CHAIR YOUNG: You're saying that that  
9 would make the contention misbelieved generally?

10 MR. LEWIS: I'm saying that you can put  
11 together allegations of new and significant  
12 information that meet the contention pleading  
13 standards, which would allow category 1 issues to be  
14 reopened willy-nilly.

15 Yes, I'm saying it would open the  
16 floodgates that people could always craft those kinds  
17 of issues if they lined up the experts and made the  
18 allegations because allegations don't have to be  
19 accepted as right. It just has to be enough basis in  
20 specificity for the contention to be admitted.

21 The difference with a waiver petition is  
22 it's got to be supported. It is a factual  
23 discrimination. The Commission actually looks at a  
24 prima facie showing and weighs the material and  
25 considers it and makes subjective judgments.

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1           That is why the Commission repeatedly  
2 referred here to the need to obtain a waiver. And the  
3 Commission's standards and the Commission's rulings in  
4 this case are that the category 1 findings preclude  
5 this issue from being raised in the proceeding.

6           The Commission has ruled that category 1  
7 issues are outside the scope of the proceeding and,  
8 therefore, admissible. The Commission hasn't ruled  
9 that, you know, a category 1 issue is outside the  
10 scope of the proceeding unless somebody alleges it is  
11 new and significant, in which case it is something in  
12 what they said is a no circumstance as file a waiver.  
13 Bring it to the Commission. We'll then decide whether  
14 there is some special circumstance that results in the  
15 rule being waived.

16           Once again, that is the only procedural  
17 mechanism that makes sense. That is the only  
18 procedural mechanism that balances the Commission's  
19 intent to provide finality against supplementation  
20 when appropriate under NEPA.

21           CHAIR YOUNG: Anything further?

22           MR. LEWIS: No.

23           CHAIR YOUNG: Ms. Uttal? Actually, do you  
24 want to take a break at this point and then come back  
25 and finish up the arguments on this particular issue?

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1 We're sort of going long on it. We'll come back to  
2 you and then to Ms. Hollis and then any follow-up. Be  
3 back in ten minutes.

4 (Whereupon, the foregoing matter went off  
5 the record at 11:19 a.m. and went back on the record  
6 at 11:31 a.m.)

7 CHAIR YOUNG: Ms. Uttal, we will go to you  
8 next. And if you could focus some on the issue of the  
9 grounds for waiver and whether you think the AG's  
10 office would have grounds for a waiver or whether the  
11 situation where a petitioner sees what they view as  
12 new and significant information that should have but  
13 was not included in the environmental report does not  
14 meet the standard for waiver because it's not special  
15 or unique to the particular plant, whether and how  
16 they can raise the issue in an adjudication of whether  
17 they are limited to rulemaking because I confess that  
18 I don't at this point follow how if the AG's view is  
19 right about the standard for waiver a party could  
20 raise their perceived lack of addressing new and  
21 significant information in the environmental report  
22 that was broader than just applicable to one plant,  
23 how they could raise that in an adjudication.

24 MS. UTTAL: I don't know if they can if  
25 they don't have the special circumstances that you

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1 would need. I am not going to comment on whether the  
2 Mass. Attorney General has special circumstances.

3 CHAIR YOUNG: Well, what I would like you  
4 to address, though, is do the special circumstances --  
5 do you agree that they have to be unique to the  
6 specific plant?

7 MS. UTTAL: Just what it says in the  
8 language in the regulation.

9 CHAIR YOUNG: Well, do you interpret that  
10 as being limited to plant-specific new and significant  
11 information or do you believe that if the new and  
12 significant information that a petitioner exists is  
13 broader than solely applicable to one plant, that they  
14 could meet the standard for a waiver and that that is  
15 how they should raise it in the context of an  
16 adjudication?

17 MS. UTTAL: See, I mean, I don't know if  
18 I could answer that. Special circumstances means  
19 specific to the proceeding which is before the Board  
20 right now.

21 CHAIR YOUNG: In other words, it would not  
22 apply to any other proceeding?

23 MS. UTTAL: Well, you know, it can apply  
24 somewhat to another proceeding. See, I don't know if  
25 I can give a bright-line opinion. If there are

1 circumstances that apply to Pilgrim and some of them  
2 may also apply to, let's say, Vermont Yankee, I don't  
3 know if that would preclude the finding special  
4 circumstances. If there are circumstances that apply  
5 just across the board, then that would definitely be  
6 a generic --

7 CHAIR YOUNG: Well, what do you think that  
8 the new and significant information that the AG and  
9 Pilgrim Watch are alleging --

10 MS. UTTAL: I don't think it's new and  
11 significant information.

12 CHAIR YOUNG: Okay. But let's leave out  
13 the new and significant. Do you think it applies  
14 across the board or do you think it is specific to one  
15 or a few plants?

16 MS. UTTAL: It depends on how you couch  
17 it. I mean, in their report, Dr. Thompson alleges  
18 that there were specific things that are specific to  
19 Pilgrim or maybe to Pilgrim and Vermont Yankee. He  
20 talks about how it's different from, let's say,  
21 Shearon-Harris or something like that. So it depends  
22 on --

23 CHAIR YOUNG: The configuration of the  
24 rods? Is that what you're talking about?

25 MS. UTTAL: Yes. So I don't --

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1 CHAIR YOUNG: All BWRs, right?

2 MS. UTTAL: I don't know. I am not -- you  
3 can't pin me down on whether they have enough to show  
4 special circumstances in this particular case. I  
5 haven't --

6 CHAIR YOUNG: Well, hypothetically --

7 MS. UTTAL: I haven't looked at it.

8 CHAIR YOUNG: -- do you think a party who  
9 is alleging some information that they contend is new  
10 and significant but that it's not limited to the  
11 particular plant and would apply to, say, all plants  
12 of a particular category -- do you think that could  
13 meet the waiver standard?

14 MS. UTTAL: If it's applicable to the  
15 fleet, the entire fleet? I don't see how.

16 CHAIR YOUNG: Okay. So, then, if that is  
17 what your view is, then a petitioner who wanted to  
18 raise that kind of information could not do so in an  
19 adjudication?

20 MS. UTTAL: We're talking just  
21 hypothetically and just very high-level. If you have  
22 a generic issue that you say is new and significant,  
23 then you would have to go for a rulemaking or ask the  
24 -- I guess you could ask the Commission to waive it or  
25 suspend application of the rule for the time being.

1 I think there is something in the  
2 statement of considerations about the staff asking the  
3 Commission to waive application of the rule until the  
4 rule is changed or reanalyzed.

5 CHAIR YOUNG: What I am trying to get you  
6 to do, though, is interpret this language that defines  
7 the ground for waiver in the Commission's rule because  
8 that really defines whether or not a party who has  
9 more generic, broad information that they contend is  
10 new and significant, that really defines whether or  
11 not under your reading and the applicant's reading  
12 they can, petitioners can, raise that type of an issue  
13 in an adjudication. Under your reading, as I  
14 understand it, they cannot, although maybe the staff  
15 --

16 MS. UTTAL: If they want to raise a  
17 generic issue in this proceeding that would conflict  
18 with what the Commission has already said about what  
19 can be raised in this proceeding, then no, they can't  
20 do it.

21 They can't get a waiver if they have no  
22 special circumstances. And special circumstances  
23 would be those that would make the application of the  
24 rule inappropriate to this proceeding and their  
25 facility.

1 CHAIR YOUNG: So, then, your  
2 interpretation of 51.53(c)(3)(iv) is that the only  
3 perceived absence of new and significant information  
4 that can be a challenge in an adjudication is new and  
5 significant information that is specific to a plant  
6 that would meet the waiver requirement?

7 MS. UTTAL: Yes. I don't think you can  
8 get to the new and significant information until there  
9 is a waiver. I have nothing else to add to what Mr.  
10 Lewis said.

11 CHAIR YOUNG: Okay. Ms. Hollis, you have  
12 heard all of the others. What do you have to offer us  
13 on this?

14 MS. HOLLIS: From the Town of Plymouth's  
15 standpoint, really, what matters is not the niceties  
16 of the regulations, the fine point of the regulation.  
17 But obviously our major concern is, are the citizens  
18 of Plymouth and surrounding environs and those who  
19 come to visit, like the 80,000 or 100,000 people who  
20 were here for the Fourth of July weekend, protected?  
21 And are the issues being fairly and fully considered,  
22 issues of importance and significance that are being  
23 raised?

24 From the standpoint of listening to the  
25 dialogue among counsel and the very incisive

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1 questioning from the Bench., the issue obviously is,  
2 what is generic? Is it one plant? Is it more than  
3 one plant? Could it be two? Are two plants generic?  
4 Are five plants generic?

5 What are the circumstances in which this  
6 can be raised in a timely fashion while this relicense  
7 application is proceeding through the highways and  
8 biways of the Byzantine processes of the NRC?

9 Is there an opportunity for this issue to  
10 be the issues that have been raised by the  
11 Massachusetts Attorney General, which we do not have  
12 the scientific background and expertise to bring to  
13 the table to really shed much light on except to say  
14 these issues obviously are of concern to us?

15 We have read them. We have read the  
16 report. And we want to know that the issues that are  
17 legitimately raised, are they going to be considered  
18 in this proceeding at some place along the line or in  
19 some other way at the NRC, which would allow the  
20 citizens of Plymouth and those who visit Plymouth to  
21 be protected in the event of one of these extremely  
22 unfortunate events?

23 Thank you, Your Honor.

24 CHAIR YOUNG: Anything further?

25 MS. CURRAN: Yes, I do have a couple of

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1 more points I would like to make in reply. First, I  
2 think I heard Mr. Lewis concede that Entergy is  
3 required to identify new and significant category 1  
4 information and its application. We just have a  
5 dispute about what happens after that.

6 I guess his view is that if Entergy does  
7 it, then that is all that is in issue. Did Entergy  
8 say something in its application to the effect that  
9 "We did this"? And the only thing that we could  
10 challenge is whether they said it or they didn't say  
11 it.

12 And they did say, "We have thought about  
13 whether there was new information." I think there  
14 were a couple of areas where they may have identified  
15 significant new information but nothing with relation  
16 to the fuel pools. That isn't our interpretation of  
17 the regulation, and I don't think that is consistent  
18 with NEPA.

19 I think Mr. Lewis referred to his global  
20 view of how the regulations and NEPA work. His global  
21 view seems to put a huge burden on the public to  
22 identify new information but kind of keep it -- it's  
23 between the applicant and the NRC staff, whether they  
24 identify new information.

25 We are not allowed to criticize the extent

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1 to which they do that. And if we come up with new  
2 information, then we are supposed to go to the NRC  
3 with a request for rulemaking or a waiver.

4 But I think NEFA puts an obligation on the  
5 federal agency to identify the new information. And  
6 the NRC happens to have put a big responsibility on  
7 its licensees and applicants to take a part in that  
8 process.

9 NEPA is an action-forcing statute. So the  
10 idea that in this regulation, the category 1  
11 regulation that sort of sets apart these categories  
12 for which there is a generic finding, the idea that  
13 that is some kind of a bulwark that can't be  
14 challenged, it just doesn't make sense. It doesn't  
15 comport with NEPA's status as an action-forcing  
16 statute.

17 Mr. Lewis also said he thought that the  
18 admissibility standards were too low, that that was  
19 too easy a threshold to jump over to challenge this  
20 category 1 determination. But, in fact, the threshold  
21 that we have to get over is showing that the  
22 information is new and significant.

23 I just want to read the language in the  
24 Marsh decision, Marsh v. Oregon Natural Resources  
25 Council, because I think the court put it very

1 succinctly there. It's not just anything that happens  
2 to be new. It's something that would be information  
3 --

4 CHAIR YOUNG: What page?

5 MS. CURRAN: Oh, I'm sorry. This is 490  
6 U.S. at 374. And it's cited on page 10 of our  
7 contention. "This has to be new information showing  
8 that the remaining federal action will affect the  
9 quality of the human environment in a significant  
10 manner or to a significant extent not already  
11 considered."

12 That is the standard that we have to meet.  
13 And it's not a low threshold. That's a significant  
14 standard. And we think we have met it. And, you  
15 know, the idea that just anybody could come along and  
16 knock over category 1 with an allegation, that's not  
17 correct.

18 And we never interpreted it that way. We  
19 submitted a 50-page pleading and two expert reports.  
20 It's serious business challenging a category 1  
21 finding, but NEPA requires that if there is new and  
22 significant information, it has to be considered.

23 So I don't think that's there is anything  
24 about the regulatory scheme as it is written that,  
25 first of all, protects category 1 findings from the

1 requirement to consider new and significant  
2 information. That is a basic NEPA requirement that  
3 has to be met.

4 But also the regulations provide a process  
5 for which that must be done responsibly, for which  
6 someone who comes along with new information has to  
7 show it's new, has to show it's significant. And that  
8 is what we have done.

9 CHAIR YOUNG: How do you reconcile the  
10 language that Mr. Lewis has cited in the SECY paper, in  
11 the final rulemaking about category 1, and the  
12 regulatory history that you have presented? And also  
13 do you know whether that regulatory history has ever  
14 been raised by a party before?

15 And any other party after this, any other  
16 participant can answer that as well after we finish  
17 with Ms. Curran.

18 MS. CURRAN: I don't know any more than  
19 what I have found reading the SECY paper and reading  
20 the Federal Register notice, the preambles and the  
21 language of the proposed rule and the final rule.

22 And I have not seen that discussed in  
23 other cases, but I did want to direct your attention  
24 to a page in the final rule which I think puts that  
25 SECY paper into context. This is 61 Federal Register

1 at page 28470 in the final rule, which is dated June  
2 5th, 1996.

3 CHAIR YOUNG: All right. Where on the  
4 page?

5 MS. CURRAN: Okay. The NRC describes the  
6 process. Do you see the paragraph that starts,  
7 "Response" in the middle of that page?

8 CHAIR YOUNG: Yes.

9 MS. CURRAN: It says, "In SECY 93-032,"  
10 which is the SECY paper we have been discussing,  
11 "February 9th, 1993, the NRC staff reported to the  
12 Commission their discussion with CEQ and EPA regarding  
13 the concerns these agencies raised, which were also  
14 raised by other commenters about limiting public  
15 comment and the consideration of significant new  
16 information in individual license renewal  
17 environmental reviews. The focus of the commenters'  
18 concerns is the limited nature of the site-specific  
19 reviews contemplated under the proposed rule."

20 So the thing that strikes me about this  
21 discussion is -- and then after that, the NRC says  
22 that "We have made some changes as a result of these  
23 discussions." And they go through them. They're  
24 numbered 1A, B, C, and then 2. It kind of goes on for  
25 a while. Here are all the changes the Commission made

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1 as a result of this discussion.

2 Well, the discussion was reported to them  
3 in SECY 93-032. So these things that follow followed  
4 that. In other words --

5 CHAIR YOUNG: Down through the top of page  
6 71, is that what you're saying, all of that?

7 MS. CURRAN: That's right. And, you know,  
8 all you can do is interpret what you see on a page,  
9 right? I don't have any other information. But what  
10 I see here is the way this is written, it indicates  
11 that they have moved on from SECY 03-032, that that  
12 was an interim paper.

13 And then after they received SECY 03-032,  
14 they went on to make this agreement to take these  
15 various steps to ensure that I think they had used the  
16 word "rigid," that the process wouldn't be too rigid  
17 for considering new and significant information.

18 So I think that is a helpful insight into  
19 where SECY 03-092 fits into that rulemaking history.

20 CHAIR YOUNG: Let's look at B in the  
21 right-hand column on 28470. That looks like it may  
22 address the situation here. "If the commenter  
23 provides new information which is relevant to the  
24 plant and is also relevant to other plants" -- that's  
25 what you're alleging -- "i.e., generic information,

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1 and that information demonstrates that the analysis of  
2 an impact codified in the final rule is incorrect, the  
3 NRC staff will seek Commission approval to either  
4 suspend the application of a rule."

5 MS. CURRAN: That is referring to when  
6 there is a draft EIS and people submit comments. What  
7 is the NRC going to do with a comment? This list here  
8 didn't address what the NRC was going to do with  
9 environmental reports. It isn't one of these bullet  
10 points, the environmental report discussion. That was  
11 at another page, which I will have to find.

12 But I think it's different. What they're  
13 saying there has to do with, what do we do when we get  
14 a comment, which the commenting process is different  
15 from the hearing process.

16 CHAIR YOUNG: Right.

17 MS. CURRAN: And the hearing process, I  
18 don't really know whether if one were to just be a  
19 commenter on a draft EIS, whether one would have the  
20 same kind of rights to appeal a result as one does by  
21 participating in an NRC hearing. I don't know the  
22 answer to that question, but I wouldn't bank on it.

23 CHAIR YOUNG: Well, Mr. Lewis is arguing  
24 that basically the same -- the process with regards to  
25 comments in the EIS process and contentions in the

1 adjudication process would have the same general  
2 outline and scope, so to speak. I think that's --

3 MS. CURRAN: Well, then the question is,  
4 what do you do with the discussion on page 28483,  
5 which is the part that we quoted in our reply in the  
6 last column towards the bottom? And that's where the  
7 Commission says, "Accordingly, absent new and  
8 significant information, the analyses for certain  
9 impacts codified by this rulemaking need only be  
10 incorporated by reference in an applicant's  
11 environmental report for license renewal."

12 So these words to us flag the concept that  
13 the NRC was putting an obligation on the applicant to  
14 identify new and significant information. It's in the  
15 code. It's in the regulation. You can't ignore that  
16 requirement in the regulation.

17 So what does it mean if it's in there? It  
18 can't mean if you have some words on a page, you have  
19 met the requirement. There has to be some substantive  
20 content to it that a person could challenge because  
21 otherwise then NEPA becomes just a paper-pushing  
22 exercise without any content, without accountability  
23 to the public.

24 CHAIR YOUNG: Did you consider filing a  
25 waiver request just to cover yourself, more or less?

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1 MS. CURRAN: Well, yes, we considered it.  
2 I looked at cases where other parties had filed waiver  
3 petitions. And the answer was "These circumstances  
4 are not unique. Go away."

5 CHAIR YOUNG: Did you give us cites to any  
6 of the cases that say that the information has to be  
7 unique to the particular plant?

8 MS. CURRAN: Well, I think it says that  
9 right in Turkey Point, doesn't it? I'm not sure, but  
10 if you would like, I would certainly be glad to give  
11 you -- sure.

12 MR. LEWIS: Judge Young, I may provide one  
13 right now if you -- it's a Commission decision. Where  
14 is that? If I can find it. Oh, here it is. It is  
15 Metropolitan Edison Company Three Mile Nuclear Station  
16 unit number 1, CLI-80-16, 11 NRC 674 at 675, 1980.

17 CHAIR YOUNG: What's the NRC cite again?

18 MR. LEWIS: CLI-80-16, 11 NRC 674 at 675.

19 CHAIR YOUNG: Can you read the language  
20 from it just to give --

21 MR. LEWIS: I'm taking this from a brief.  
22 So I only have an excerpt, but it says "The proper  
23 response is not a waiver of the rule under 2.758  
24 because the case presents no special circumstances."  
25 That's not the right cite. Basically it holds,

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1       though, that there were no special circumstances  
2       specific to the rule; specific to the plant.

3               CHAIR YOUNG: Okay. Thanks. And then if  
4       you have any other -- okay. Go ahead.

5               MS. CURRAN: I guess just one last comment  
6       on this that we don't think that -- I think Mr. Lewis  
7       talked a little bit before about how the Commission  
8       has discretion to proceed by rulemaking or choose  
9       between rulemaking in case-by-case adjudication. We  
10       are absolutely in agreement with that.

11               We just don't think it is our job to tell  
12       the Commission how to do this. It is our job to ask  
13       for a hearing and to contest the environmental report.  
14       That is really clear from the regulations. That is  
15       how we challenge this license renewal application.

16               If the Commission wants to say to the  
17       Board, "We are taking this issue away from you, and we  
18       are going to make it a rulemaking proceeding because  
19       we think the Attorney General's contention raises too  
20       many generic questions," we wouldn't dispute that.

21               We would ask that any license renewal  
22       decision be suspended until the rulemaking is  
23       complete. We just don't think that it's our job. And  
24       we don't want to feel as though we have to guess which  
25       door to go to because it is kind of a guessing game.

1 Nobody here can tell us which door we  
2 should go in with certainty. That doesn't seem fair.  
3 This is supposed to be a fair and meaningful process.  
4 And it shouldn't be some kind of mystery process that  
5 you're not sure which door to go in.

6 JUDGE TRIKOUROS: You know, this all seems  
7 to focus on what constitutes new and significant  
8 information. That's part A. Part B is what do you do  
9 with it when you have it.

10 I haven't gotten over part A yet. You say  
11 that the Massachusetts Attorney General has new and  
12 significant information that's incontrovertible.  
13 Could you explain in a summary fashion why you think  
14 that is the case?

15 MS. CURRAN: Okay. So are we moving on  
16 from the first question? I think that was Judge  
17 Young's next set of questions.

18 CHAIR YOUNG: Do you want to do that, give  
19 a summary now?

20 JUDGE TRIKOUROS: I thought we were  
21 actually done with that.

22 MS. CURRAN: Okay. I just want to --

23 CHAIR YOUNG: Is there any more from  
24 anyone on this sort of threshold issue?

25 MS. BARTLETT: Judge Young, could I just

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1 make a comment?

2 CHAIR YOUNG: Yes.

3 MS. BARTLETT: I did think that the  
4 language of the waiver rule was pretty clear in that  
5 we needed to have specific information to the plant in  
6 order to get that waiver. So we also did not think it  
7 applied to this situation.

8 It seems to me that the counsel for  
9 Entergy is almost trying to raise a second hurdle.  
10 The hurdle to get in to have a hearing is already  
11 pretty high. And if we before that stage have to jump  
12 over a hurdle to get a waiver of the rule, it seems to  
13 me a redundancy almost in the process.

14 We're already being required to show new  
15 and significant information. You had mentioned that  
16 earlier, that that is already a big requirement and  
17 that maybe that would be enough, that to have to do  
18 the two things is redundant. And so that's just the  
19 comment that I wanted to make. It seems like the bar  
20 keeps getting raised or the hurdles keep increasing  
21 for the public.

22 CHAIR YOUNG: I think the concern that Mr.  
23 Lewis raised -- and either of you or anyone can speak  
24 to this -- was this sort of floodgates, opening the  
25 floodgates, that if in this proceeding we were to find

1 that a contention alleging -- if we were to find that  
2 the information that is provided is new and  
3 significant under 51.53(c)(3)(4) and to allow that to  
4 be adjudicated, litigated in this adjudication, that  
5 that would encourage other future petitioners to just  
6 make allegations of new and significant information  
7 and by skipping the waiver process, it would open up  
8 every license renewal to a large number of challenges  
9 based on this section of the rule.

10 That was the concern that I understood.

11 MS. BARTLETT: It seems highly unlikely  
12 because you still have the option, even once we get  
13 past this conversation, of saying that the information  
14 is not new and not significant.

15 I mean, the floodgates argument, it seems,  
16 seems weak. I can't imagine that people are going to  
17 be, you know, bringing purely frivolous claims. It's  
18 a lot of work to bring anything forward. And I don't  
19 think that's a very strong argument.

20 MS. CURRAN: Judge Young, you had said  
21 just a minute ago you didn't think anybody addressed  
22 that. And I thought we did. So I just want to  
23 reiterate it's not a floodgate in our review. It's a  
24 very narrow door. Just as Ms. Bartlett says, we have  
25 a high burden of showing that information is new, of

1 showing that it's significant in the sense that it  
2 could significantly change the outcome of an  
3 environmental analysis.

4 That is a significant hurdle. So it's not  
5 a floodgate by any stretch.

6 CHAIR YOUNG: Let me ask this. Basically  
7 I think we're at this point. Staff and Entergy are  
8 arguing that to raise a new and significant  
9 information question in an adjudication, the only  
10 route is a waiver request because a petition for  
11 rulemaking takes it completely out of the adjudication  
12 and that where the -- based on the case that Mr. Lewis  
13 just cited, that where the alleged new and significant  
14 information applies to more than one plant, that that  
15 would not meet the waiver requirement. So that the  
16 issues raised by the petitioners here apart from  
17 whether we find them to be new and significant, in  
18 effect, cannot be raised in this adjudication.

19 You indicated that the town's interest is  
20 to have it heard somewhere. Do you want to add  
21 anything as to -- all we have authority over is the  
22 adjudication. Do you want to add anything to what has  
23 been said already about our authority on this and what  
24 standards we should apply?

25 MS. HOLLIS: In the protection of the

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1 public interest vis-a-vis the public interest that is  
2 represented here today; that would be, the Town of  
3 Plymouth and the other members of the public who wish  
4 to make statements later on, I think they have a very  
5 specific interest in assuring that the town and those  
6 surrounding the town, EPZ and surrounding environment  
7 are protected.

8 Obviously there is more than one way to  
9 get to that place where they would be protected. If  
10 there were a generic rulemaking, if that generic  
11 rulemaking were to have the effect of suspending this  
12 proceeding, the relicensing proceeding, to figure out  
13 how this information if the information is determined  
14 to be new and significant -- let's assume that for  
15 purposes of this discussion. The Town of Plymouth and  
16 the Commonwealth of Massachusetts and Pilgrim Watch  
17 and the other people who are here today from the  
18 public, how do they get protected if it is not  
19 considered in the context, the direct context, of this  
20 proceeding? I think that is the big question.

21 And what is the role? And what is the  
22 jurisdiction of the Board to be sure that, in fact,  
23 the petitioners and those who are concerned about  
24 these issues, while they may not be petitioners and  
25 may not be specifically raising a contention are

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1 protected?

2 So if the ~~waiver is only applicable~~ if  
3 it's one plant and that's it, you're out if you don't  
4 have a waiver and that contention can't be raised, it  
5 seems to present a very difficult scenario for  
6 everybody in the room here who is legitimately  
7 concerned.

8 They may not be able to tell of the basis  
9 of their own information as to whether it is new and  
10 significant, but they are depending on the Board and  
11 the NRC to determine whether it is new and  
12 significant.

13 And if it is new and significant, how does  
14 it circle back around to come into this proceeding?  
15 I think that's the big question. If generic means  
16 just more than one plant and, therefore, it goes down  
17 a rulemaking path, which is decided in a final rule  
18 six years from now and, in the meantime, the  
19 relicensing proceeding just goes forward, that does  
20 not address the issue in a timely fashion which would  
21 help in any way the Town of Plymouth or others in the  
22 same position to feel secure in the knowledge that  
23 this concern had been addressed in a way that helps  
24 them.

25 I think that is it in a nutshell with all

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1 of the niceties of the CEQ agreement with the NRC,  
2 which may or may not have been the final outcome of  
3 that entire process and the case law? There's nothing  
4 quite explicit on point. So it's the responsibility.  
5 Unfortunately, it's thrust upon you and the NRC to  
6 determine how best to address it in this context.

7 It's a thorny issue, and I appreciate you  
8 hearing us out. Thank you.

9 CHAIR YOUNG: Before we move on, let me  
10 just ask one question, maybe overly hopeful. How  
11 would the staff view -- and I guess I will ask Entergy  
12 as well -- the idea of if there -- well, we have been  
13 told there is going to be a petition for rulemaking?  
14 How would the staff feel about agreeing to suspending  
15 the proceeding, as has been suggested by the AG, and  
16 have them agree to suspending this proceeding pending  
17 the outcome of the petition for rulemaking?

18 MS. UTTAL: I don't think that's such a  
19 good idea.

20 MR. LEWIS: I certainly wouldn't agree  
21 pending a ruling on whether the petition is going to  
22 be granted. I mean, it's a different question if the  
23 NRC decides that the rule needs to be changed and  
24 institutes the rulemaking and grants the petition for  
25 rulemaking. I think in those circumstances, the NRC

1 has indicated that those rulemaking findings would be  
2 incorporated into the SEIS so it's a feedback into the  
3 current proceeding.

4 But simply suspending a proceeding because  
5 there is a request to the Commission would not in my  
6 mind be the appropriate procedure.

7 JUDGE COLE: That issue would be out of  
8 this proceeding because in the rulemaking --

9 MR. LEWIS: That's correct.

10 JUDGE COLE: -- they can go on and do  
11 whatever other business as well.

12 MR. LEWIS: But the Commission does have  
13 the authority to suspend an individual proceeding if  
14 there is a rulemaking proceeding that affects the  
15 provisions in the rules and in the statement of  
16 consideration.

17 If I could respond briefly to one point  
18 that members of the --

19 CHAIR YOUNG: Before you do --

20 MR. LEWIS: Okay.

21 CHAIR YOUNG: -- a question. What's the  
22 staff's and Entergy's position on the situation in  
23 which there is a rulemaking but the adjudication was  
24 not suspended?

25 Let's say the rulemaking continued past

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1 the end of the adjudication. And let's just say for  
2 sake of argument the granting of the license renewal  
3 request and then the rule is changed down the road  
4 that would have had an impact on what you needed to do  
5 to get your license renewed. I suppose you could say  
6 it depends upon what the rulemaking says.

7 But could the rule then apply  
8 retroactively to or could you be required to comply  
9 with the rulemaking at that point?

10 MR. LEWIS: To the limitations? I'm  
11 sorry, Judge. I haven't analyzed that scenario. I  
12 mean, I don't know if the Commission had determined  
13 that there was a generic finding that, in fact, wasn't  
14 supported and, therefore, it needed to supplement the  
15 GEIS? Could it go ahead and issue a renewed license?  
16 That would require more thought.

17 CHAIR YOUNG: No. Could it do something  
18 with regard to the renewed license that had already  
19 been granted? I think Ms. Hollis put her finger on it  
20 and the AG also argued that they're interested in  
21 seeing that the issue gets addressed in some manner  
22 with regard to this plant. And so that is why they  
23 are saying it doesn't matter which route is taken as  
24 long as whatever is done would apply to this plant as  
25 well as to any other plant out there for which a

1 renewal is sought.

2 MR. LEWIS: I'm trying to think where I  
3 saw the reference. It may have been on that page that  
4 Ms. Curran was citing where the Commission indicated  
5 what it would do if a member of the public identified  
6 a comment that resulted in a suspension of the rule,  
7 the last sentence. It is.

8 It's in that third column, "If the rule is  
9 suspended for the analysis, each supplemental EIS  
10 would reflect the corrected analysis until such time  
11 as the rule is amended."

12 So it seems to be the -- I'm not quite  
13 sure what it means, but the Commission is saying that  
14 they would do something to make sure that the  
15 supplemental EISEs reflected the corrected analysis.

16 I don't know how that would happen. I  
17 think the Commission is indicating that if it, in  
18 fact, determined that they had to amend its rules, it  
19 would do something to make sure that was reflected in  
20 the individual cases.

21 CHAIR YOUNG: Including the ones that had  
22 gone before?

23 MR. LEWIS: Ones that had gone before.  
24 Again, you're catching me completely cold. Generally  
25 the requirement to supplement applies to federal

1 actions that are not yet complete.

2 CHAIR YOUNG: Right.

3 MR. LEWIS: And I do not know and doubt  
4 that, in fact, there would be an obligation to reopen  
5 completed federal actions to supplement the  
6 environmental impact statement. That would be my  
7 educated opinion without having done any research on  
8 the issue at all.

9 CHAIR YOUNG: Okay. Then I understand  
10 that this is going to be a difficult question for you  
11 to answer. But let's assume for sake of argument, as  
12 Mr. Hollis suggested, that the information is new and  
13 significant, that it's something that needs to be  
14 addressed.

15 How do you suggest that the interest of  
16 the town and the public and so forth be protected? If  
17 you don't want to agree to suspend the proceeding,  
18 this proceeding, pending the outcome of the rulemaking  
19 -- and we don't know whether any petition would be  
20 granted or not at this point on this -- and if you  
21 don't think that the issue can be raised in the  
22 context of adjudication, then how do they have their  
23 interests protected?

24 MR. LEWIS: I don't think there's a need,  
25 for example, for the parties to guess which way to go

1 and that there's any person and petitioner could file  
2 a petition to waive the rule or, in the alternative,  
3 to institute rulemaking. And they could say, "We  
4 think there is some site-specific information. If you  
5 disagree and you think it is generic, we will  
6 institute a rulemaking."

7 That is not a very hard pleading to  
8 prepare. So it's not like you have this terrible  
9 Hobson's choice about which way you can do it. You  
10 could easily do one petition that says, you know,  
11 "Here are the facts, Commission. And we think it is  
12 this way, but if you think it's the other way, either  
13 way is effective."

14 I think the Commission if it decided that,  
15 yes, indeed, there is a need to institute a rulemaking  
16 would make the judgment at that point in time how  
17 pending proceedings would be affected. And I think it  
18 would depend on the facts in the case and the issue  
19 and --

20 CHAIR YOUNG: Right. But what they're  
21 saying is they want it to be in that pending  
22 proceeding. They don't want it to be in a completed  
23 proceeding. That's my understanding of what they're  
24 saying. They're saying they want to somehow be in the  
25 group that would be affected by whatever happens.

1 But to your argument, if this adjudication  
2 is not suspended and the rulemaking becomes final,  
3 then unless something were done especially or  
4 differently, the normal course would be that it would  
5 not be affected as a completed action.

6 MR. LEWIS: Adjudication. The Board will  
7 rule on other contentions. There may be some that are  
8 admitted. There may be some that aren't. There would  
9 be no point served whatsoever by suspending the  
10 litigation of other unrelated contentions. Those  
11 should go forward. It makes no sense waiting until --

12 CHAIR YOUNG: Right. I'm really just  
13 trying to get you to focus on the question of how do  
14 the public and the town get their interests protected  
15 in having a say or having some ability to participate  
16 on the issues that are raised in these two  
17 contentions?

18 MR. LEWIS: The contention really is  
19 generic and just hypothetically meets the new and  
20 significant standard and the Commission decides, "Yes,  
21 we need to waive a rule," the Commission says, "We  
22 need to suspend the rule and institute a rulemaking  
23 proceeding to supplement our GEIS," the town, the  
24 state, Pilgrim Watch, nobody will participate in the  
25 rulemaking. Like any other members of the public,

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1 they would be able to submit their comments, submit  
2 their views, and participate during the normal  
3 rulemaking process.

4 CHAIR YOUNG: And then what would happen  
5 with regard to this proceeding in this plant? If it's  
6 not suspended, at least with regard to that issue,  
7 what would happen?

8 MR. LEWIS: The contention would not be  
9 admitted. The category 1 finding would not be waived.  
10 Instead, the Commission would be amending the category  
11 1 finding by a rulemaking. And all interested persons  
12 would be protecting their interests by participating  
13 in that rulemaking to resolve the issue. And the only  
14 piece I'm not --

15 CHAIR YOUNG: I guess what I'm saying is  
16 where is the license -- what if the renewed licenses  
17 were granted by the time it gets --

18 MR. LEWIS: I think the Commission would  
19 have to grapple with that situation. I don't know  
20 whether they could issue a renewed license if they  
21 decided that there was a need to supplement the GEIS,  
22 but I have not looked at that issue.

23 It's a hypothetical situation. I mean, we  
24 are in a proceeding that has got another couple of  
25 years to go. If the Commission decided there was a

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1 need to amend its rules, there's plenty of time to do  
2 so. And I also think that possibility shouldn't  
3 affect the Board's ruling on whether a waiver is  
4 required or not.

5 JUDGE COLE: Mr. Lewis? And, Ms. Uttal,  
6 you could answer this, too. Have there been any  
7 instances where the Commission has gone back to their  
8 licensees and said, "We have identified a problem that  
9 we want you to address" and then told them to address  
10 that problem and then given them details about how to  
11 do that?

12 MS. UTTAL: Yes, absolutely.

13 JUDGE COLE: Have there been a lot of  
14 instances of this over the history of the Atomic  
15 Energy Commission and the Nuclear Regulatory  
16 Commission?

17 MR. LEWIS: Sir, there's been many  
18 instances of backfits on the safety side. What I  
19 couldn't answer is how many times there's been a  
20 requirement to go back and supplement a NEPA analysis  
21 after the fact.

22 But definitely if there is a need to do  
23 something to protect the public health and safety, the  
24 Commission has not been hesitant at all to impose  
25 those requirements.

1 JUDGE COLE: That's been my impression  
2 over the years also, yes.

3 MS. UTTAL: If the Commission engaged in  
4 rulemaking and decided there was something that had to  
5 be done with the spent fuel pools, then all licensees  
6 would have to comply in one way or another.

7 JUDGE COLE: That's how the public health  
8 would be protected.

9 MS. UTTAL: Yes.

10 MR. LEWIS: In fact, on that point, the  
11 Commission is doing a rulemaking with respect to the  
12 design basis threat. And it's been charged by statute  
13 to consider some of these issues.

14 CHAIR YOUNG: Anything further on this  
15 threshold issue?

16 (No response.)

17 CHAIR YOUNG: Okay. Well, then, do you  
18 want to come back and start a new -- we'll start new  
19 and significant after lunch. And 1:30 we'll come back  
20 and start on that and go until 5:00 o'clock, as far as  
21 we can, in the order of subjects that I went through  
22 this morning.

23 (Whereupon, a luncheon recess was taken at  
24 12:19 p.m.)

25 CHAIR YOUNG: All right. I think we're

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1 going to dive into "necessary and significant" at this  
2 point.

3 Just in passing there's no issue remaining  
4 on the motion for backfit order. That's before the  
5 Commission. There's nothing before us. There's  
6 nothing we need to address on that, correct?

7 MS. CURRAN: Not in our group.

8 CHAIR YOUNG: Okay.

9 MS. BARTLETT: Could I? Just before we  
10 move on, Pilgrim Watch brought forward the spent fuel  
11 issue in two different ways. We first argued that in  
12 the context of a SAMA analysis it is a Category 2  
13 issue, and then in the alternative, we argue we  
14 brought forward new and significant information.

15 So I didn't know whether you want to put  
16 that to rest before we move on to new and significant  
17 information or whether you want to deal with that  
18 afterwards.

19 CHAIR YOUNG: Do the parties have any --  
20 do other participants have any view on that?

21 Three is the other one you're talking  
22 about.

23 MS. BARTLETT: Right.

24 CHAIR YOUNG: Right, but three is the  
25 other one that you're talking about.

1 MS. BARTLETT: Right.

2 CHAIR YOUNG: That was not limited to  
3 spent fuel, was it?

4 MS. BARTLETT: No. What I'm talking about  
5 right now is part of Contention 4.

6 CHAIR YOUNG: But you're still --

7 MS. BARTLETT: And we brought forward the  
8 prospect of spent fuel fires in the SAMA context and  
9 argued that if it's brought forward --

10 CHAIR YOUNG: Okay, but all in the context  
11 of four.

12 MS. BARTLETT: Right, and if it's brought  
13 forward properly as a SAMA issue, then it's a Category  
14 2 issue.

15 CHAIR YOUNG: Okay. I see what you're  
16 saying. We can address that before or after  
17 "necessary and significant" or "new and significant."  
18 "New and significant." Pardon me.

19 Why don't we just do that next --

20 MS. BARTLETT: Yes.

21 CHAIR YOUNG: -- after this then?

22 Okay. Ms. Curran, you raised the "new and  
23 significant" primarily. So why don't you start for  
24 us, again trying to focus in on the matters in dispute  
25 between the parties?

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1 MS. CURRAN: Just to clarify, there's  
2 essentially three elements of new information here.  
3 One is that if a fuel is partially uncovered, that  
4 that's a more severe case than total instantaneous  
5 drainage of the pool. That was concluded in NUREG  
6 1738.

7 Also, that the age of the fuel, that fire  
8 can't be ruled out based on the age of the fuel.  
9 That's also NUREG 1738. And this has all been  
10 confirmed by the National Academy of Sciences.

11 And also the events of September 11th and  
12 the Commission's response to those events, and also  
13 the decision in the Mothers for Peace case established  
14 that intentional attacks are reasonably foreseeable  
15 and should be evaluated in EIS.

16 We have already briefed these issues, and  
17 I don't want to go over ground that's already been  
18 covered, but there were a couple of points that I  
19 wanted to raise. One was I just want to clarify that  
20 we think that the term "new," what "new" means is not  
21 having been considered in any previous EIS. It  
22 doesn't mean new in terms of how old it is. It means  
23 new as opposed to there isn't a relevant environmental  
24 impact statement where this information was  
25 considered, and we think this information is new.

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1 JUDGE COLE: So if the Commission had  
2 looked at that information and made some  
3 determinations as to whether it was significant or  
4 not, that might still be new information based upon  
5 your definition?

6 MS. CURRAN: Well, if they had addressed  
7 this information in an EIS, supposing they had done a  
8 supplemental GEIS and they had said, "We've looked at  
9 this information and we don't consider that it's  
10 significant," they would have had to put that out in  
11 draft. We would have commented on it, and we would  
12 have to live with whatever the final determination  
13 was. But that hasn't happened.

14 JUDGE COLE: But if they looked at that  
15 and the staff took a technical look at it and made  
16 some recommendations to the Commission?

17 MS. CURRAN: That wouldn't qualify.

18 JUDGE COLE: Okay.

19 MS. CURRAN: It's new. It wouldn't be  
20 old. It wouldn't be old. It would still be new  
21 because it wouldn't have been considered.

22 JUDGE COLE: I understand your position.

23 CHAIR YOUNG: Okay, and your position is  
24 also, as I understand it -- the parties appear to  
25 disagree on this, the participants here -- that even

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1       though the Commission may have known about something,  
2       unless they specifically made reference to it and  
3       addressed it in some way directly, that you would not  
4       consider that they had addressed it.

5               Whereas the other view is that if the  
6       Commission knew about it, they may have implicitly  
7       considered it even though they may not have directly  
8       addressed it.

9               That's the other point of view.

10              MS. CURRAN: Well, that argument being  
11       made that the Commission knew about it and implicitly  
12       made some kind of determination about it, we did point  
13       out that in the '79 GEIS there is a very oblique  
14       reference to the 1979 Sandia study, in which I think  
15       they said -- and we've quoted in our contention where  
16       the GEIS said something like the 1979 study indicated  
17       that partial drainage is a problem.

18              And then the GEIS said, "But this isn't a  
19       problem id you use the right rack design." Well, the  
20       right rack design is low density, and in fact, the  
21       GEIS, it's global conclusion was high density storage  
22       was acceptable from an environmental point of view.

23              So they didn't really deal with it. It  
24       was almost -- it was so indirect that you couldn't  
25       really draw anything from it in the sense that it had

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1 actually been considered.

2 So you know, how could you -- if they had  
3 really wanted to consider that, they would have said,  
4 "We can't reach a conclusion about high density  
5 storage because of this question that's been raised by  
6 the same Sandia report," but they didn't do that.

7 CHAIR YOUNG: I think an impression that  
8 has come out of reading the answers of staff and  
9 Energy is that the underlying studies that, for  
10 example, the NAS report was based on, are not new and  
11 that we should presume that the Commission was aware  
12 of those and implicitly somehow considered them in the  
13 GEIS.

14 So that's what I was --

15 MS. CURRAN: Okay. Well, for instance,  
16 okay, one of the key documents is NUREG 1353, which is  
17 relied on in the waste confidence decision, and in  
18 NUREG 1353 where we have a disagree about what was  
19 considered in that NUREG, and I don't want to go over  
20 all the citations that we had in our reply, but I  
21 would ask you to look at those where we quote the  
22 exact words of NUREG 1353, which were to the effect  
23 that this study looked at total instantaneous loss of  
24 water. It did not look at partial drainage.

25 And we also quote a staff characterization

1 of NUREG 1353 which was made in the Harris proceeding,  
2 where the staff said NUREG 1353 said that if fuel is  
3 sufficiently aged, it won't burn. That was their  
4 conclusion, and that's how the NRC staff interpreted  
5 NUREG 1353 in I think it was 2001.

6 So that to us is very ample support for  
7 the fact that this key document which underlies the  
8 waste confidence rule did not look at partial drainage  
9 of the pool. It did not analyze the question of age.  
10 It assumed that if fuel were sufficiently aged, it  
11 wouldn't burn, and those things were contradicted by  
12 NUREG 1738.

13 CHAIR YOUNG: Another thing that has been  
14 argued is that the significance level of not being  
15 able to rule out fires in the circumstances you  
16 described is not high enough to meet the new and  
17 significant test in effect, I believe.

18 That was sort of a paraphrasing of part of  
19 the argument.

20 MS. CURRAN: Maybe this is part of it.  
21 There's an argument that in a waste confidence rule  
22 the NRC and in NUREG 1738, well, in particular, in  
23 NUREG 1738, the NRC concluded that the overall  
24 probability of pool accident was very low. That's  
25 quoted in Energy's and NRC staff's, I think,

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1 responses.

2 But the really important thing to bear in  
3 mind about that conclusion was that it's based on a  
4 decommissioning plan. It's based on a plant where the  
5 reactor is no longer in operation, and right in NUREG  
6 1738, the report says, "If this were about operating  
7 reactors, it would be different because they have  
8 different characteristics." There's many more types  
9 of accidents that can occur at an operating reactor.  
10 You can't reach that conclusion for operating  
11 reactors.

12 That is a hugely important aspect of NUREG  
13 1738 that is overlooked.

14 JUDGE TRIKOUNOS: But how does that impact  
15 on the safety considerations of that decommissioning  
16 reactor doesn't have as many operating systems that  
17 might be available to counteract some problems  
18 associated with a spent fuel problem. So it might  
19 mitigate the other way.

20 MS. CURRAN: Well, that could be true, but  
21 they haven't looked at it, have they?

22 JUDGE TRIKOUNOS: Okay.

23 MS. CURRAN: And there are a lot more  
24 kinds of accidents that can happen. You have the  
25 whole array of reactor accidents that are assessed in

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1 NUREG 1150, and the IPEs and the IPEEEs. Those are  
2 all present, and in fact, the illustrative example  
3 that Dr. Thompson gives in his report is a reactor  
4 accident, and there's many ways that it could occur,  
5 but he pics one way that it could occur where the  
6 radiation level and the building, the pool and the  
7 reactor are in the same building, and the radiation  
8 level is high.

9 JUDGE TRIKOUNOS: Precludes the guy coming  
10 in with a hose.

11 MS. CURRAN: Exactly. Simple as that.

12 So you know, part of the handicap here is  
13 nobody has looked. Nobody has looked at what's the  
14 interaction between reactor accidents land pool  
15 accidents? Because there has been this assumption  
16 since a log time ago it can't happen.

17 Here's all of these at the end of the --  
18 it's almost like we don't have to look at the steps  
19 leading up to a pool fire because if you ever got that  
20 close, older fuel isn't going to burn, and the most  
21 severe case is total instantaneous loss of water, and  
22 we've analyzed that, and it's not such a concern.

23 So since they had those conclusions about  
24 the last phase of an accident, they never bothered to  
25 look at the steps leading up to it to see how could it

1 occur.

2 Well, now those basic conclusion of why we  
3 don't have to look have been called into question, and  
4 really the NRC is at this critical juncture, where  
5 NEPA requires it's time to look because this new  
6 information is enough to call into question all of  
7 your previous assumptions about the hazards posed by  
8 this.

9 JUDGE TRIKOUNOS: Yes, I understand your  
10 point, but do we have to look at the probability of  
11 the different events that have to happen before we  
12 reach that stage to then take a look at the overall  
13 probability of us getting to that stage? And is that  
14 a consideration in making a determination whether it's  
15 significant?

16 MS. CURRAN: Well, the purpose -- okay.  
17 First of all, the events that could lead up to a full  
18 fire are all events that the NRC already looks at in  
19 EISes. They may be dealt with generically, but the  
20 NRC acknowledges those are significant risks,  
21 precursors that need to be looked at. How could we  
22 avoid or mitigate those precursors?

23 And that's, you know, one of the essential  
24 elements of our contention, and this was part of we  
25 have an argument that if you look at the probability

1 of the types of reactor accidents that could lead to  
2 a pool accident, they're all things that fall within  
3 the probability range of what the NRC considers at  
4 least in that PFS case to be design basis.

5 Now, we have a dispute with the staff  
6 about what the --

7 JUDGE TRIKOUNOS: But if they're design  
8 basis accidents, the system is designed to stop them  
9 and to prevent them.

10 MS. CURRAN: Well, but they're not. I  
11 mean, what we're trying to point out is that it's  
12 clear that severe reactor accidents are not included  
13 in the design basis. But there is a case, the PFS  
14 case, which is a recent case. This is a case that's  
15 not a real old case based on the old -- I think the  
16 stack was saying the old design basis rationale was  
17 based on deterministic analysis versus probabilistic.

18 Well, this PFS case is only a couple of  
19 years old, and it's definitely based on probabilistic  
20 analysis, and it says for reactors anything more  
21 likely than ten to the minus seven ought to go in the  
22 design basis.

23 It seems inconsistent with some of the  
24 NRC's other decisions about NEPA decisions, like the  
25 Vermont Yankee decision, but there it is. There it is

1 saying this can kind of accident falls within the  
2 realm of what we consider to be credible. So we --

3 JUDGE TRIKOUNOS: Ten to the minus  
4 seventh.

5 MS. CURRAN: What?

6 JUDGE TRIKOUNOS: Ten to the minus  
7 seventh.

8 MS. CURRAN: Ten to the minus seventh.  
9 You look at that PFS case. It's cited in our brief.  
10 That's exactly what it says, and you know, we put this  
11 out because, frankly, I had been unaware of this case,  
12 and then I ran across it and I thought, well, this is  
13 not terribly consistent with, say, the Vermont Yankee  
14 case where that was another spent fuel pool case where  
15 the Commissioners said, "Well, ten to the minus four,  
16 we have to think about what that is."

17 And then over here you've got PFS saying  
18 ten to the minus sevenths is design basis. I don't  
19 know how those go together, but I do know that the  
20 Commissioners have said this, and we're relying on it,  
21 and I do know that NUREG 1150 looks at this type of  
22 accident, that environmental impact statements look at  
23 this type of accident. So --

24 CHAIR YOUNG: As to the level of  
25 significance.

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1 MS. CURRAN: Yeah, yeah.

2 JUDGE TRIKOUNOS: Well, Ms. Curran, I'm  
3 just trying to understand where you're going here.  
4 You're saying that a ten to the minus seven  
5 probability event is considered credible and should be  
6 judged to be credible? Because the NRC in their  
7 regulations don't acknowledge that as far as I know.

8 MS. CURRAN: I'm saying that the PFS case  
9 says that accidents greater than ten to the minus  
10 seventh ought to be considered and for ISFSIs, as I  
11 said, greater than ten to the minus six. That was  
12 their ruling in that case.

13 JUDGE TRIKOUNOS: Now, I'm not sure what  
14 the context of that was. Did they mean that any  
15 accident in a probabilistic safety analysis that has  
16 a negative outcome, but is ten to the minus seven or  
17 less should be considered in the summation of what  
18 goes into the total core melt probability? Because  
19 something like that, you know, that would be a  
20 threshold factor which all of the PRAs consider.

21 You know, that doesn't mean anything other  
22 than what I just said. In determining the overall  
23 core melt probability should include all events up to  
24 and including ten to the minus seven probability of  
25 events.

1           It doesn't mean that it is credible. It  
2 just means that it is a mathematical factor.

3           MS. CURRAN: Well, for instance, the PFS  
4 case concerning ISFSI out in Utah, and Mr. Gaukler is  
5 familiar with that one, too, and the Commissioners  
6 were trying to decide whether the ISFSI had to be  
7 designed against an airplane crash, and they had a  
8 whole evidentiary hearing about that, and they were  
9 looking to see whether in the total probability of an  
10 accident where a cask was breached and caused a  
11 release of radiation was ten to the minus six or  
12 greater, in which case the facility would have to be  
13 designed against that, and they made a comparison of  
14 that case with the way they analyzed reactor  
15 accidents.

16           So I would just refer you to the PFS case  
17 for the significance of that, but I think the most  
18 important thing is what we have with NUREG 1738 is we  
19 have new information about the last stages of a pool  
20 fire, that once the fuel is uncovered, what happens.

21           What we don't have is we don't have an NRC  
22 staff study about here's all the different ways that  
23 a pool fire could happen and here's their probability,  
24 but we do have Dr. Thompson's study which says a pool  
25 fire could be caused by a variety of accidents and in

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1 Table 6-1 he lists what they are and he shows that  
2 their likelihood falls within the range of what the  
3 NRC considers to be credible both under the PFS case  
4 that we cited and both, as an example, using NUREG  
5 1150 as an example of these at the kinds of accidents  
6 the NRC looks at.

7 And then he also gives an illustration of  
8 one particular scenario, how it would play out and  
9 that the total probability would be in that range, but  
10 again, that's purely illustrative. What we are  
11 seeking here is a comprehensive analysis of the  
12 potential for a pool fire. That's never been done,  
13 and I don't think it has even been done in a non-EIS  
14 context. There's not even a NUREG about it. It's new  
15 territory.

16 (Pause in proceedings.)

17 JUDGE TRIKOUNOS: Are there any comments  
18 from NRC staff or the applicant regarding this?

19 CHAIR YOUNG: Are you finished?

20 MS. CURRAN: I wasn't quite finished,  
21 but --

22 JUDGE TRIKOUNOS: Oh, I'm sorry.

23 MS. CURRAN: I also wanted to mention that  
24 at page -- I'm not sure what page it is, but the NRC  
25 staff criticizes Dr. Thompson for using outdated

1 information from an IPE and an IEEE that were prepared  
2 by Entergy, and he explains in his report at page 19  
3 and in Note 43 that the reason that he did not use the  
4 studies that were cited in the environmental report,  
5 a more recent IPE and IEEE, was because those  
6 documents were not available publicly.

7 We went to the PDR, and we asked them for  
8 all of the PRAs, the IPEs, et cetera, that they had  
9 for the Pilgrim plant, and what he got was all there  
10 was, what he used.

11 I don't have anything right at the moment.

12 JUDGE TRIKOUNOS: What's the context of  
13 this evaluation that you want done? Is it a  
14 probabilistic analysis? Is it a deterministic  
15 analysis? Is it random type failures? Is it failures  
16 that are terrorist related events? What's the  
17 context?

18 MS. CURRAN: Well, we would like a  
19 comprehensive environmental impact statement on the  
20 potential for a pool fire at the Pilgrim plant, and  
21 the potential including a credible range of causes:  
22 reactor accidents, earthquakes, cask drop, and again,  
23 to make an evaluation as to what's credible.

24 I know Entergy has argued that airplane  
25 crashes aren't credible. I don't know if that's true

1 or not, but I'm just telling you we're not asking for  
2 causes that are beyond the pale in terms of  
3 likelihood, but we would like basically the NRC to do  
4 the same type of EIS that has been done for reactor  
5 accidents, but looking at pool accidents this time and  
6 to look at alternatives for mitigating or avoiding  
7 those accidents.

8 And based on our experience of what EIS is  
9 that the NRC prepares are like, yes, they rely heavily  
10 on probabilistic risk assessment, and for some areas,  
11 they have to use qualitative judgment. For instance,  
12 it's not possible to do a PRA with respect to the  
13 likelihood of a terrorist attack, but you can  
14 certainly do a qualitative analysis as to what are the  
15 vulnerabilities, you know, the major vulnerabilities  
16 of the facility.

17 JUDGE TRIKOUNOS: So you're not adverse to  
18 a probabilistic risk analysis. You just want it to be  
19 more comprehensive than what's been done in the past.

20 MS. CURRAN: Right.

21 JUDGE TRIKOUNOS: Is that what I'm  
22 hearing?

23 MS. CURRAN: Nothing has been done.  
24 Nothing at all has been done. So anything would be  
25 more than what we have. Well, the last thing that was

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1 done is with 1979.

2 JUDGE TRIKOUNOS: This connection between  
3 reactor accidents and spent fuel pool cooling loss,  
4 this is a severe accident that we're talking about  
5 that causes radiation levels on the refueling floor to  
6 be higher than what a person could tolerate, and  
7 therefore you're seeing a connection there with spent  
8 fuel cooling loss?

9 I don't understand.

10 MS. CURRAN: Well, that's one scenario.  
11 That is one possible way that it could be caused, and  
12 that is the way that Dr. Thompson looked at. That was  
13 the scenario that he analyzed in more detail.

14 The Massachusetts Attorney General doesn't  
15 have the resources to do its own PRA. So we gave an  
16 illustrative example, and we don't think, and we don't  
17 think the Mass. AG is required to do that. That's for  
18 the NRC to do.

19 But we do feel we have an obligation to  
20 illustrate the need for that analysis, but I think  
21 there's other ways that an accident could happen. For  
22 instance, an earthquake could cause loss of water.

23 JUDGE COLE: But an argument about the  
24 possible damage caused by an earthquake is generally  
25 reactors are designed to withstand design basis

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1 earthquakes, and the spent fuel pools are usually  
2 designed to resist by their very structure itself.  
3 They'll go two to three times above the level of a  
4 design basis earthquake without any structural damage.

5 MS. CURRAN: Judge Cole, that's a good  
6 example of what we're talking about here. We're sort  
7 of making suppositions about what might happen without  
8 the PRA that you need to really analyze it.

9 For instances this was addressed in  
10 Entergy's brief, and we replied to it. Well, the  
11 Entergy pool is designed against an earthquake. Then  
12 the question is, well, what's the most severe accident  
13 that it's designed against, and if you took the most  
14 severe, credible accident, how much damage would it  
15 cause?

16 If you go back to NUREG 1353, the only  
17 thing they're worried about is an earthquake strong  
18 enough to bust open the pool and instantaneously drain  
19 all the water.

20 But there's a lot of things in between  
21 that that have never been looked at. That's what  
22 we're asking. Please look. Don't assume. Stop  
23 assuming is what has been done for all of these years,  
24 but look the same way that you look at reactor  
25 accidents.

1 JUDGE COLE: But you want us to bring this  
2 in under an environmental umbrella, and there's no  
3 obligation. There are rules against us considering  
4 accidents that severe under the environmental  
5 umbrella.

6 MS. CURRAN: Well, under the environmental  
7 umbrella, the NRC has to consider reasonably  
8 foreseeable accidents.

9 JUDGE COLE: Right.

10 MS. CURRAN: Even if their likelihood is  
11 low, if they're reasonably foreseeable, and the NRC  
12 has never landed on a probability number that they  
13 say, "This definitely is foreseeable and needs to be  
14 looked at."

15 They said ten to the minus seven we don't  
16 think is foreseeable. That was in the Harris case,  
17 but it has never been decided as you move up the  
18 ladder where is foreseeable.

19 And what we tried to show in our  
20 contention and Dr. Thompson shows in his report is  
21 that the accident, if you took that illustrative  
22 example, that probability is in the range of ten to  
23 the minus five, which is significantly more likely  
24 than ten to the minus seven.

25 So we --

1 CHAIR YOUNG: So which accident?

2 MS. CURRAN: The scenario that Dr.  
3 Thompson looked at was something times ten to the  
4 minus five. It was an estimate. This is not a PRA  
5 that he did. He did an estimate using some prudent  
6 assumptions and information from other studies.

7 CHAIR YOUNG: Where there would be less  
8 damage than an earthquake that would cause the  
9 instantaneous loss is what you're arguing.

10 MS. CURRAN: Well, it would be a different  
11 kind of an accident where in his scenario the  
12 radiation field would be high enough that you couldn't  
13 get in to make up water to the pool.

14 CHAIR YOUNG: Right. Sort of less  
15 apparent damage, but as a result of the combination of  
16 circumstances could have more severe consequences is  
17 what you're --

18 MS. CURRAN: Yeah.

19 CHAIR YOUNG: Or could have consequences  
20 is what you're arguing.

21 MS. CURRAN: And the NRC has the tools and  
22 the expertise to do the comprehensive analysis that  
23 would give the public some confidence that they had  
24 really looked at these impacts and looked at where the  
25 vulnerabilities are and looked at ways to mitigate

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1 those vulnerabilities, but that just isn't present  
2 anywhere.

3 JUDGE TRIKOUNOS: The situation you were  
4 describing earlier, were you talking about an uncovering  
5 of the spent fuel pool to some point and that would  
6 lead to a radiation field on the refueling floor? Is  
7 that what you were talking about?

8 MS. CURRAN: No.

9 JUDGE TRIKOUNOS: You were talking about  
10 the reactor and the--

11 MS. CURRAN: Dr. Thompson's example  
12 involves an accident in the reactor, and I think  
13 there's an earthquake as well. I mean, I'd have to go  
14 and look at it, but the radiation in the building  
15 prevents access to restore water to the pool that is  
16 leaking from the earthquake.

17 JUDGE TRIKOUNOS: Well, you know, one  
18 could always postulate a series of combined initiators  
19 that could lead to, you know, anything you want  
20 really, combining an anticipated transient without  
21 SCRAM, with a loss of coolant accident combined with  
22 something else.

23 And I haven't studied the details of what  
24 you're talking about, but are we in that space right  
25 now or are we talking about something that's credible

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1 that's within the realm of expected experience that  
2 should be then dealt with? Because, you know, on a  
3 resource basis one doesn't necessarily deal with any  
4 event. One deals with events that are credible.

5 MS. CURRAN: Okay. I'd like to just refer  
6 you to page 19 of Dr. Thompson's report where he  
7 describes this scenario. He starts by talking about  
8 the fact that the pool is in the same building with  
9 the reactor gives it an added vulnerability that, say,  
10 for example, is not present in I don't think any PWRs.  
11 They're in separate buildings. But in a BWR, they're  
12 in the same building.

13 So then he says, "These plants are,  
14 therefore comparatively likely to experience a pool  
15 fire that is accompanied by a reactor accident," and  
16 he explains why. He said, "This combination of  
17 accidents is the focus of discussion here. The pool  
18 fire and the reactor accident might have a common  
19 cause. For example, a severe earthquake could cause  
20 leakage of water from the pool while also damaging the  
21 reactor and its supporting systems to such an extent  
22 that a core melt accident occurs. In some scenarios,  
23 the high radiation field produced by a pool fire could  
24 initiate or exacerbate an accident at the reactor by  
25 precluding the presence and functioning of operating

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1 personnel.

2 "In other scenarios the high radiation  
3 field produced by a core melt accident could initiate  
4 or exacerbate a pool fire scenario, again, by  
5 precluding the presence of and functioning of  
6 operating personnel. Many core melt scenarios would  
7 involve the interruption of cooling to the pool."

8 JUDGE TRIKOUNOS: All right.

9 MS. CURRAN: So there's a --

10 JUDGE TRIKOUNOS: You don't have to read  
11 on.

12 MS. CURRAN: Well, I just wanted to  
13 emphasize that this is not just Dr. Thompson pulling  
14 unrelated events out of the air. This is an analysis  
15 of a common cause of an accident that could affect the  
16 reactor and the pool at the same time.

17 JUDGE TRIKOUNOS: Now, I think that what  
18 I'd like to understand here is that what you've  
19 postulated or what Dr. Thompson as postulated is an  
20 event which is within the design basis of the plant,  
21 namely, the maximum credible seismic event for the  
22 site at that plant; that all safety systems for that  
23 plant are designed to accommodate that event  
24 simultaneously.

25 In addition, probabilistic risk analyses

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1 have shown that there's significant margin above that  
2 level. Now, to then come back and say just  
3 arbitrarily in a sense that seismic event for which  
4 the plant is designed and for which it has great  
5 margin will cause multiple failures simultaneously is  
6 the assumption.

7 That's what you just said.

8 MS. CURRAN: Well, for one thing, we're  
9 not talking about design basis accidents here. We are  
10 talking about beyond design basis accidents.

11 JUDGE TRIKOUNOS: Well, a seismic event is  
12 a design basis event.

13 MS. CURRAN: Well, there's a design basis  
14 earthquake. The plant is not designed against any  
15 conceivable earthquake. There's a limit to the  
16 design, and then there are some earthquakes that go  
17 beyond the design basis, and that's what he's talking  
18 about.

19 JUDGE TRIKOUNOS: But not -- you know,  
20 again, there's a whole regulatory framework for which  
21 these plants are designed, and many people can  
22 probably speak better than I can about this, but that  
23 framework takes into account the maximum event that  
24 would occur at that site, and it's clear there would  
25 be a seismic event that's greater than that, but the

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1 whole evaluation that's done is with respect to that  
2 site, that location, and the design basis is formed  
3 around that.

4 Now, one could always postulate that, you  
5 know, a category Richter 10 would occur at the site,  
6 in which case every system in the plant would fail and  
7 that would be the end of it.

8 However, that is not, you know, within the  
9 range of credibility as judged by the regulatory  
10 process. So I just want to make sure that we're not  
11 so far outside the regulatory process that, you know,  
12 we're jumping through hoops that are not credible  
13 hoops to jump through.

14 So your initiating event, which is a  
15 seismic event that fails multiple systems is outside  
16 the regulatory framework significantly.

17 MS. CURRAN: Well, the regulatory  
18 framework in terms of the Atomic Energy Act design  
19 basis is not what we are talking about here. We are  
20 talking about accidents that are more severe than what  
21 was contemplated in the original design.

22 Now, this is all information that's been  
23 learned since Three Mile Island and Chernoble. There  
24 are accidents which can occur which do not fall within  
25 the design basis of a reactor which nevertheless

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1 should be considered in an EIS, and those are the  
2 kinds of accidents for which the SAMAs are intended to  
3 address, and that's the kind of accident that we are  
4 concerned about here.

5 Clearly, the plant is designed against  
6 certain accidents, but there are accidents less likely  
7 than design basis accident, but nevertheless credible  
8 that NEPA requires to be considered in an EIS, and for  
9 that we rely on the Limerick decision and the NRC's  
10 policy of looking at severe accidents in its EISEs.

11 JUDGE TRIKOUNOS: I understand.

12 CHAIR YOUNG: Let me see if I can  
13 understand this and sort of summarize what I  
14 understand at this point. It will be a very much  
15 paraphrased summary.

16 But you're saying that the issue of an  
17 accident that would cause partial water loss in the  
18 spent fuel pool has not been analyzed, and that you  
19 contend that the probability of such an accident, the  
20 significance of such an accident can be measured  
21 against the probability by comparison to what you say  
22 the PFS decision considered to be equivalent in PRA  
23 language to a ten to the minus seven or less, more  
24 than ten to the minus seven probability accident.

25 And you're saying that that has not been

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1 analyzed in that way, and that it has not been  
2 analyzed specifically in an EIS, and in that way it's  
3 new and significant.

4 Did I get that right?

5 MS. CURRAN: I'd add only just one or two  
6 more elements for support for that. It's not just the  
7 TFS case that supports the significance of those  
8 impacts. It is the NRC's policy of considering severe  
9 reactor accidents, comparable severe reactor  
10 accidents. It is NUREG 1150, which is the NRC's  
11 comprehensive PRA on reactor accidents. The kinds of  
12 accidents that could lead up to a pool fire fall  
13 within that same range, types of accidents'  
14 likelihood.

15 CHAIR YOUNG: And so that addresses the  
16 significance part.

17 MS. CURRAN: Yes.

18 CHAIR YOUNG: The new part of it is that  
19 the specific situation of partial loss has not been  
20 analyzed and also specifically analyzed in an EIS.

21 MS. CURRAN: Yes. The partial loss issue  
22 and also the aging issue.

23 CHAIR YOUNG: The aging issue.

24 MS. CURRAN: Yes. That's a very good  
25 summary of it.

1 JUDGE TRIKOUNOS: So what the Commission  
2 requires with respect to SAMA analysis with respect to  
3 reactor accidents you're saying is not done for spent  
4 fuel pools?

5 MS. CURRAN: That's right because they're  
6 not considered to be credible accidents.

7 CHAIR YOUNG: And then the third thing  
8 that you're bringing in, but as I understand it, it  
9 doesn't necessarily hinge on that, is the terrorism  
10 aspect.

11 MS. CURRAN: That's right. It is another  
12 one of the causative factors that we believe needs to  
13 be looked at for the purpose -- the ultimate purpose  
14 is to identify measures that can be implemented if  
15 they're cost effective to mitigate or void those  
16 impacts.

17 CHAIR YOUNG: You're asking for the  
18 analysis.

19 MS. CURRAN: That's all I have for now.

20 JUDGE TRIKOUNOS: And when you say partial  
21 uncovering, that's a two-edged sword in the sense that  
22 I think the NAS report showed that partial uncoveries  
23 of the certain magnitude are successful with respect  
24 to pooling, partial uncoveries of a different  
25 magnitude are unsuccessful with respect to pool

1 cooling within the realm of certain known analysis  
2 capabilities.

3 But is that what you're saying with  
4 respect to partial? Is this from the NAS report that  
5 you're talking?

6 MS. CURRAN: Actually my understanding of  
7 NUREG 1738 is their conclusion was if the water level  
8 falls to the top of the fuel assemblies, and I think  
9 they're referring to below the holes in the tops of  
10 the fuel assemblies, then there's no assurance a pool  
11 fire can be prevented.

12 MS. UTTAL: I think it was three feet  
13 above the top of the fuel.

14 MS. CURRAN: Okay. Just to explain,  
15 because this helped me, it's the chimney effect, that  
16 there's holes in the bottom. The fuel assembly fits  
17 in a sleeve, and there's holes in the bottom of the  
18 sleeve to let water go in, and there's holes in the  
19 top to let the water go out, and the water flows up  
20 because it warms up as it goes up when it gets in the  
21 hole, and then it comes out, and then it is sent  
22 through a heat exchanger and is pumped back into the  
23 pool.

24 If the water level falls to the point that  
25 the holes at the top are exposed to air, then you

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1 blast the chimney effect, and that was what was never  
2 taken into account before, that the heat can't be  
3 transferred effectively out of the fuel.

4 JUDGE TRIKOUNOS: Well, I don't think we  
5 want to go into any technical types of discussions  
6 here, but I think I understand what you're saying.

7 MS. CURRAN: Once again, the layman's  
8 understanding.

9 MS. UTTAL: Judge, I'd like to say  
10 something about the 1738 study. The staff made an  
11 assumption that if the water gets to the level three  
12 feet above, if the water boils down to a level three  
13 feet above the tops of the fuel assemblies, then they  
14 assume that there will be a fire. They weren't saying  
15 that there was going to be a fire, but for purposes of  
16 this study, they assumed there would be a fire. So it  
17 was a probability of one.

18 So that any partial uncovering or full  
19 uncovering is not material to the issue because they  
20 assumed that it would happen on matter what. So it's  
21 not a material factor that has to be determined.

22 MS. CURRAN: Can I make a comment on that?  
23 Well, it is material in the sense that the staff was  
24 unable to say, "We can't rule it out."

25 MS. UTTAL: They were unable to say, "We

1 can rule it out."

2 MS. CURRAN: That's right. They were  
3 unable to say, "We can rule it out." And it matters  
4 that this level of risk could occur when the water  
5 level is near the top of the fuel assemblies because  
6 that's an accident that happens faster or possibly  
7 much faster than total loss of water. So it is  
8 relevant.

9 JUDGE TRIKOUNOS: But I think in this  
10 particular case rather than go into a lot of technical  
11 detail that they didn't have to, they made a broad,  
12 simplistic assumption. In actual reactor operation,  
13 emergency operating procedures, levels are allowed to  
14 drop to the top of the active fuel before actions are  
15 taken, right to the top, not three feet above it.

16 And in fact, there are many other  
17 considerations below the top of the active fuel, but  
18 again, we're not going to get into many technical  
19 detail. I just wanted to make sure I understood where  
20 you were coming from. So that was one of the things  
21 you cited, was 1738 and three feet, and you still  
22 think that that is a technical consideration of three  
23 feet.

24 MS. CURRAN: Yes, and again, Ms. Uttal  
25 uses the word "assumption" as though it's just an

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1 assumption that's not necessarily based on fact, but  
2 they made that particular assumption because they had  
3 no other choice. They had no other analytical work  
4 that would allow them to use --

5 JUDGE COLE: They did not conduct a test.

6 MS. CURRAN: Well, no. They had no --  
7 their analysis didn't go further.

8 CHAIR YOUNG: You're saying the absence,  
9 that it has not been analyzed. That's the basic  
10 thrust of what you're saying, as I understand it,  
11 right?

12 MS. CURRAN: Analyzed enough. NUREG 1738  
13 analyzed it well enough to be able to say if the water  
14 level drops to the top of the fuel assemblies, we  
15 cannot rule out a fire. That's different than saying  
16 we assume a fire. To say we can't rule it out is  
17 different.

18 And they also said we cannot reach any  
19 conclusions that older fuel will not burn.

20 CHAIR YOUNG: We can go back and forth  
21 here. What's occurring to me just in terms of process  
22 is that we're starting to get into the issue of  
23 materiality, which I think you had challenged.

24 MS. UTTAL: Before we go beyond it,  
25 because I don't believe that it's a correct

1 characterization of what the staff said in 1738.

2 CHAIR YOUNG: Right.

3 MS. UTTAL: And I don't want to forget  
4 about --

5 JUDGE TRIKOUNOS: But I think we're going  
6 to move on to allow you to make comments after Ms.  
7 Curran is --

8 CHAIR YOUNG: Well, and after the others.

9 JUDGE TRIKOUNOS: And after the others.  
10 Excuse me.

11 CHAIR YOUNG: I mean, we can go piecemeal  
12 on the individual issues. I recall that you had made  
13 that argument, and I think we do need to address it,  
14 and it appears to be fairly central such that we don't  
15 want you to forget about it.

16 But would it be helpful to just go ahead  
17 and move into the issues of materiality, whether you  
18 raised a material, genuine dispute on a material  
19 issue? It has been argued that you have not. Would  
20 it be easier to just go ahead and cover that at this  
21 point since it is sort of being raised now?

22 MS. CURRAN: Whatever the Board would  
23 prefer.

24 CHAIR YOUNG: It seems like it might be  
25 more efficient to just go ahead and address it at this

1 point. It seems to be tied up in the rest of your  
2 argument.

3 As I understand it, the argument that's  
4 being made is it's not material because of this  
5 misunderstanding, misrepresentation of the staff's  
6 statements in NUREG 1738 because all the staff was  
7 doing is establishing sort of a bounding conservatism  
8 that shouldn't be interpreted like you're interpreting  
9 it, and Ms. Uttal will correct me if I'm  
10 mischaracterizing that.

11 And that it's not material because it  
12 wouldn't make any difference in the -- I think there's  
13 some dispute between whether it would make a  
14 difference in the SAMA analysis or a difference in the  
15 outcome of the case.

16 If you prefer to save the arguments on  
17 materiality in dispute until after the staff has made  
18 and Energy has made their argument, you can do that.

19 MS. CURRAN: I think the issues that we've  
20 just been talking about are so closely related that it  
21 might be better just to listen to the other parties  
22 and respond to that.

23 CHAIR YOUNG: Okay. Anything further?

24 JUDGE TRIKOUNOS: Actually there were two  
25 parts. The first was a probabilistic risk analysis

1 that would lead to some SAMA considerations for the  
2 spent fuel pool analogous to what's done for the  
3 reactor, and the other is the, quote, unquote, new  
4 information, and you're asserting that the fuel is  
5 within three feet of uncovering. It will not be able to  
6 be cooled.

7 Is that where we are, kind of the two  
8 separate things we discussed?

9 MS. CURRAN: Well, the new information is  
10 the information about the behavior of the fuel once  
11 it's uncovered, and then the question about what kind  
12 of analysis is required is just the question of once  
13 you have that new information, how does it get  
14 applied, and it gets put into an EIS which uses PRA.  
15 At least NRC EISes typically use PRA techniques to  
16 analyze accident rates. At least that's how those  
17 things relayed in my mind.

18 CHAIR YOUNG: Anything further from you at  
19 this point?

20 MS. CURRAN: No, not right now.

21 CHAIR YOUNG: Ms. Bartlett?

22 MS. BARTLETT: Okay. Well, I'll just  
23 describe ours in, I'm sure, much more general terms  
24 than the Attorney General's Office. They've got  
25 technical experts, et cetera.

1 We brought forward the issue of spent fuel  
2 fires in the context of the SAMA analysis that needs  
3 to be done at Pilgrim, and we first argued that it's  
4 a Category 2 issue because we're talking about SAMAs.

5 But we can put that aside, as you said,  
6 until later and just discuss in the alternative we  
7 brought forward new information or what we considered  
8 new information. And I think we took a more general  
9 approach to what new information is.

10 I think at some point the NRC is going to  
11 have to agree that little bits of information over the  
12 years is adding up to enough information at a certain  
13 point where a look at the risk of spent fuel fires  
14 needs to be done, and again, that's sort of a less  
15 technical look at what's new and what isn't new, but,  
16 for example, our first category of new information is  
17 the fact that the fuel is going to be left right  
18 across the bay over there in Plymouth for far longer  
19 than was originally anticipated, and evidence of that  
20 is, you know, right in the room.

21 Plymouth is going to start needing money  
22 to pay for additional safeguards if it's going to be  
23 a high level waste dump. It's a concern of the  
24 communities that are dealing with this problem. We're  
25 not moving any fuel off site any time in the near

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1 future, and as a result, the fuel that's in those  
2 fuels is being packed more and more densely than was  
3 ever originally foreseen when the plant was built.

4 So we consider that new information that  
5 necessitates a look at the risk inherent in having the  
6 fuel there.

7 And then the second category of new  
8 information is exactly what the Attorney General's  
9 Office is talking about, and that is that the risk of  
10 fires in those densely packed pools is greater than  
11 was previously known. We don't have experts on  
12 retainer. We haven't had special reports made, but we  
13 have relied on some of the published reports that  
14 we've found, and we've documented it in our  
15 contention.

16 Basically, as lay people it's very hard  
17 for us to understand how Entergy can be required to  
18 look at the possibility of severe accidents in the  
19 reactor and not in the spent pool fuel when those  
20 accidents are also possible. If there were some quick  
21 fix mitigation that Entergy could do to reduce the  
22 likelihood of those accidents, I think your average  
23 person would expect them to be looked at, and I guess  
24 that's just our common sense approach to this whole  
25 problem.

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1           Less technical, less sophisticated, but I  
2 think at some point the board of information reaches  
3 a tipping point, and the NRC is going to have to act  
4 on it.

5           CHAIR YOUNG: I'm just making sure that I  
6 don't have any questions.

7           MS. BARTLETT: Okay.

8           JUDGE TRIKOUNOS: I would just point out  
9 to you that the statement that, you know, a higher,  
10 more densely packed spent fuel pool has more inherent  
11 concern than a less densely packed one. I wouldn't  
12 necessarily call that new information, but it is  
13 common sense --

14          MS. BARTLETT: Right.

15          JUDGE TRIKOUNOS: -- information, and it's  
16 certainly true.

17          MS. BARTLETT: And the risk of the fires  
18 in those more densely packed pools, there's new  
19 information coming out, it seems to me, about what  
20 those risks are. Some of the information was in  
21 National Academy of Science's reports, that sort of  
22 thing.

23                 We also mention terrorism, but we prepared  
24 this contention with the idea that that was off the  
25 table. We hadn't read the full Ninth Circuit

1 decision. So we think the likelihood of accidents  
2 just as we have elaborated in here, the possibility of  
3 things being dropped in the pool, which has happened  
4 at other plants, displacing water that would bring the  
5 level down below the top of the fuel assemblies.  
6 Regular, old garden variety accidents are also costly  
7 and should be looked at as part of the SAMA analysis.

8 If they're not likely, you know, that will  
9 come out in the SAMA analysis.

10 JUDGE TRIKOUNOS: I mean, just for your  
11 information, there is a design basis event referred to  
12 as a fuel handling accident in which a fuel assembly  
13 is a rather heavy object that's dropped --

14 MS. BARTLETT: Dropped into the spent fuel  
15 pool.

16 JUDGE TRIKOUNOS: -- into the spent fuel  
17 pool and damages other assemblies.

18 CHAIR YOUNG: Okay. Do you want to start  
19 with the staff this time and you can make that  
20 correction in there?

21 MS.UTTAL: Well, I just want to make the  
22 correction because I think it's important. What the  
23 staff did in 1738 was assume for pool drain-down for  
24 pool evaporation or boil down incidents, that if it  
25 got to within three feet there was a 100 percent

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1 probability that there would be a fire, and for the  
2 drain-down, the instantaneous drain-down, if it  
3 started to drain down, it was one percent or -- excuse  
4 me -- 100 percent probability that a fire would start.

5 And they did that because they hadn't  
6 modeled the different configurations that would cause  
7 different reactions or different things to happen.

8 If there's a probability of one that  
9 something is going to happen, it can't get any worse  
10 than that. It can't be a probability of one-plus. So  
11 it subsumes in it the partial drain-down, the full  
12 drain-down, any of those events. So you can't get  
13 worse than what the staff assumed in 1731. That's why  
14 I'm saying the differences are not material to what's  
15 happening or to what we're discussing here because it  
16 makes --

17 CHAIR YOUNG: Between?

18 MS. UTTAL: Between a partial drain-down  
19 and a full drain-down. It has been analyzed as if a  
20 fire is going to happen.

21 JUDGE COLE: You mean 1738?

22 MS. UTTAL: Excuse me. Seventeen, thirty-  
23 eight. In 1738, it was analyzed, and when it got to  
24 the point in the analysis where there was some kind of  
25 drain-down effect or evaporation effect, then it was

1 assumed that a fire would ensue. It didn't matter,  
2 you know, how many assemblies or when the fire would  
3 ensue. It was just a 100 percent chance of it  
4 happening. It can't get worse than that. That's why  
5 the things are material.

6 That's the only thing I wanted to say, was  
7 just an assumption, a bounding assumption, a  
8 simplification assumption, but despite having done  
9 that, having decided that it's a 100 percent chance  
10 that it would happen or just assuming that, they came  
11 to the conclusion that the risk of the spent fuel pool  
12 accident happening is small, acceptably small.

13 JUDGE COLE: It's because of the  
14 probability of getting to that stage was low.

15 MS. UTTAL: Yes. Because in the  
16 evaporation there were many days. For example, there  
17 were many days before you got to the point where it  
18 was three feet above the tops of the --

19 JUDGE COLE: Was 1738 -- I haven't read it  
20 -- was it a probabilistic risk assessment?

21 MS. UTTAL: Yes.

22 JUDGE COLE: So it looked at the  
23 probability for decommissioned plants of a fire event,  
24 given all of the probabilistic assumptions.

25 MS. UTTAL: Yes. Actually I can go on

1 because there's been some statements that there have  
2 been no probabilistic studies of spent fuel pool fuel  
3 fires, and there is the 1738, but also, 1353 was a PRA  
4 essentially of the resolution of Generic Issue 82,  
5 discussed the beyond design basis accidents in spent  
6 fuel pools.

7 JUDGE COLE: What was that number?

8 MS. UTTAL: Thirteen, fifty-three.

9 Okay. That's all I wanted to say now.

10 CHAIR YOUNG: What about the language that  
11 Ms. Curran assigned to fires occurring with partial  
12 loss as opposed to complete loss can't be ruled out?  
13 Was that 1738? Was that what you were talking about?

14 MS. CURRAN: Yeah.

15 MS. UTTAL: They weren't ruled out. Staff  
16 didn't do the modeling, and there would be -- there's  
17 different configurations, different amounts of fuel,  
18 different way the pools are put that would affect the  
19 findings so that they couldn't say generically that it  
20 won't ever occur, but they didn't say that it would  
21 necessarily occur. So they just didn't model it.

22 CHAIR YOUNG: What was the ultimate  
23 conclusion?

24 MS. UTTAL: Of?

25 CHAIR YOUNG: Seventeen, thirty-eight.

1 MS. UTTAL: That the risk of spent fuel  
2 pool accidents is acceptably small.

3 JUDGE COLE: Just a very little  
4 likelihood. Were they the words?

5 MS. UTTAL: Low risk. It's probably in  
6 the executive summary. I'm looking for it right now.

7 Okay. They made four findings that they  
8 talk about in the executive summary. The risk at  
9 decommissioning plants is low and well within the  
10 Commission's safety goals. The risk is low because of  
11 the very low likelihood of a zirconium fire, even  
12 though the consequences from a zirconium fire could be  
13 serious.

14 The overall low risk in conjunction with  
15 important differences in dominant sequences relative  
16 to operating reactors results in a small change in  
17 risk at decommissioning plants if off-site emergency  
18 planning is relaxed.

19 I mean, the purpose of the -- the reason  
20 why the study was started to begin with had to do with  
21 whether they could relax emergency planning for  
22 decommissioning plants

23 CHAIR YOUNG: Read that last one again.  
24 Results in a small?

25 MS. UTTAL: A small change in risk in

1 decommissioning plants if off-site emergency planning  
2 is relaxed. The risk would change, a small risk  
3 change, if they relaxed the emergency planning.

4 CHAIR YOUNG: The risk would go up a small  
5 amount; is that --

6 MS. UTTAL: They just say a small change  
7 in risk. In the summary I can't tell. I mean, that  
8 might be the logical conclusion.

9 I think that's about all that's relevant  
10 here. JUDGE TRIKOUNOS: By the way, that guideline was  
11 ten to the minus six.

12 MS. UTTAL: Guideline?

13 JUDGE TRIKOUNOS: The NRC guideline for  
14 acceptable probabilistic outcome is ten to the minus  
15 six; is that correct?

16 MS. UTTAL: Ten to the minus five.

17 JUDGE TRIKOUNOS: Ten to the minus five?

18 CHAIR YOUNG: And this is the same thing  
19 as the 1979 Sandia study, right?

20 MS. UTTAL: No, no, it's different. This  
21 is the 2001 staff study. It's NUREG 1738, was what I  
22 was discussing.

23 CHAIR YOUNG: Where do you discuss that in  
24 your contention, Ms. Curran? Could you give me the  
25 page?.

1 MS. CURRAN: I'm sorry. Where we  
2 discussed what?

3 CHAIR YOUNG: NUREG 1738.

4 MS. CURRAN: It's starting on page 30 and  
5 continuing on 31.

6 CHAIR YOUNG: Okay. So you're relying  
7 largely there on what the NAS did in their analysis,  
8 including reliance on NUREG 1738, right?

9 MS. CURRAN: Well, we do cite pages 2-1  
10 through 2-2 of NUREG 1738, where they talk about  
11 complete and partial water loss. The word "partial  
12 water loss" is adiabatic. That's over on page 2-2,  
13 and it's very technical, but it's -- I'll find the  
14 exact words if you'll give me a minute.

15 MS. UTTAL: I'm not sure that's what  
16 adiabatic means.

17 MS. CURRAN: I think it is. It's when  
18 passive cooling is blocked.

19 MS. UTTAL: Well, it means it's kind of a  
20 closed --

21 MS. CURRAN: Well, maybe we shouldn't  
22 argue about that. I'm looking at a sentence on page  
23 2-2, which is at the end of the first full paragraph.  
24 It says, "The results using obstructed air flow," and  
25 then in parentheses it says "adiabatic heat up shows

1 that at five years after shutdown the release of  
2 fission products may occur approximately 24 hours  
3 after the accident.

4 So, in other words, it's possible that a  
5 pool fire would follow fairly quickly after the water  
6 level dropped

7 JUDGE TRIKOUNOS: You're characterizing  
8 that as new information?

9 MS. CURRAN: Yes. And then I think we  
10 also quoted the NAS study on page 31 of our contention  
11 because they essentially summarize what was concluded  
12 in 1738.

13 JUDGE TRIKOUNOS: Let me ask you. If  
14 that's the new information, then what was the old  
15 information?

16 MS. CURRAN: What was the old information?

17 JUDGE TRIKOUNOS: Yeah.

18 MS. CURRAN: The old information --

19 JUDGE TRIKOUNOS: You uncover fuel and it  
20 doesn't heat up?

21 MS. CURRAN: The old information was that  
22 the worst thing that could happen is that you lose all  
23 of the water from the fuel. Okay? That's the very  
24 worst thing that could happen, is total instantaneous  
25 loss of water.

1 CHAIR YOUNG: And that was in?

2 MS. CURRAN: That was 1353, and also the  
3 old information was that was okay if the fuel was over  
4 a couple years old because it wouldn't burn. You  
5 know, in our reply you can see it's stated very  
6 unequivocally older fuel will not burn, not to worry.

7 CHAIR YOUNG: Well, if I could just ask  
8 you one thing, and we're going back out of order, but  
9 this is in response to what Ms. Uttal said. That if  
10 the assumption that there's a probability of one that  
11 there will be a fire if the water goes down to within  
12 three feet of the tops of fuel assemblies was a  
13 bounding conservatism and that they still concluded  
14 that the likelihood was low, how do you respond to  
15 that in terms of the significance of it?

16 MS. CURRAN: Back to what we were talking  
17 about earlier, the overall likelihood is low in the  
18 NRC's view because we're talking about decommissioning  
19 plants. In other words, there are very few ways that  
20 you can cause a loss of water at a decommissioning  
21 plant, and we quote them in our reply.

22 Okay. It's on page 14 of our reply. We  
23 quoted NUREG-78 at page 5-2 where they said the staff  
24 found that the event sequences -- I'm sorry.

25 CHAIR YOUNG: Hold up one second. Give me

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1 a second.

2 MS. CURRAN: Sure, sure.

3 CHAIR YOUNG: There's not enough room and  
4 there are too many papers. What page?

5 MS. CURRAN: It's 14 of our reply. If  
6 you're in NUREG-1738, it's page 5-2. The quote is,  
7 "The staff found that the event sequences important to  
8 risk at decommissioning plants are limited to large  
9 earthquakes and cask drop events. For emergency  
10 planning assessments this is an important difference  
11 relative to operating plants where typically a large  
12 number of different sequences make significant  
13 contribution to risk."

14 That's the difference. It's a huge  
15 difference. It's like comparing apples and oranges,  
16 saying that 1738, the conclusion about overall risk in  
17 1738 cannot be fairly applied to a pool in an  
18 operating reactor.

19 MS. UTTAL: If I could go back for a  
20 minute, on page 14, the AG characterizes one of the  
21 staff's most important conclusions as being a partial  
22 drainage of the pool is more severe than total  
23 instantaneous drainage and that even A fuel may burn  
24 if it is uncovered and that this is a fundamental  
25 change in the understanding of spent fuel pool

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1 behavior, I guess, as represented in NUREG 1353.

2 And then they go on to say that that  
3 fundamental change has never been applied in EIS. Do  
4 you -- fundamental change, because I think that the  
5 staff was always aware of the partial drain-down  
6 possibility. I mean that's indicated in the 1979  
7 report.

8 But I think if you look at 1353, I don't  
9 think that the numbers are that much different than  
10 what is in 1738. If you'll give me a while, I'll  
11 point it out to you. In fact, if you give me until a  
12 break so that I can sit down and look at it because  
13 these are big documents.

14 JUDGE TRIKOUNOS: While you're looking at  
15 that, I want to make sure that one key difference is  
16 understood, that in a probabilistic risk assessment if  
17 one were to make the sort of overriding assumption  
18 that when the level reaches three feet above the top  
19 of the spent fuel that it would, in essence, be a  
20 total loss of the fuel in every respect, and that  
21 given that assumption the outcome is ten to the minus  
22 five and then one stop there; that's significantly  
23 different than going into, you know, a detailed  
24 evaluation of the phenomenology associated with  
25 partial uncovering of fuel.

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1           And so I just want to make sure that that  
2           distinction is understood, that if the staff or  
3           whoever did that evaluation didn't feel comfortable  
4           with defining the phenomenology or felt that it would  
5           take three or four years to adequately do that job and  
6           could make the assumption that it just simply happens,  
7           that that is often done just to simplify things.

8           It doesn't mean that the phenomenology is  
9           that if the water gets to three feet above the fuel  
10          that there will be a melt of all the fuel. It is the  
11          exact opposite of that. So I just want to make sure  
12          that that's understood because --

13          MS. CURRAN: Yeah, I think that is, but  
14          although I wouldn't call it the exact opposite. I'd  
15          call it the staff sometimes has to make conservative  
16          assumptions for when it doesn't know something, right?  
17          I mean, that's what this is. They don't know. They  
18          haven't taken the time to really analyze what would  
19          happen. So they have to make an assumption, and the  
20          assumption that you make is in favor of safety.

21          So you assume a conservative case, but  
22          that's a prudent judgment. It isn't a wild judgment.  
23          It isn't saying -- a conservatism always indicates  
24          there's a margin, you know, that you've got some idea  
25          of what you're dealing with, and then you're adding

1 some conservatism to it.

2 And here I think the important thing not  
3 to lose sight of is that the NRC staff in NUREG 1738  
4 realized that the situation was more dangerous than  
5 they had previously thought, and they don't know  
6 exactly how dangerous it is, but they know it's  
7 significantly more dangerous.

8 If you look at the language in NUREG 1353,  
9 it is much more sanguine, much more optimistic about  
10 what happens in a pool with a loss of water from a  
11 pool.

12 And this is saying wait a minute. We  
13 don't know. We can't say those things anymore.

14 CHAIR YOUNG: Let me see if I understand  
15 something, and I'm going to ask you, Ms. Curran, and  
16 you, Ms. Uttal, to correct me where I'm wrong in my  
17 understanding.

18 In NUREG 1738, the staff was looking at  
19 spent fuel pool fires in decommissioned plants.  
20 Because no modeling had been done, they assumed a  
21 probability of one for a fire if the water got down to  
22 within three feet of the tops of the fuel assemblies.

23 In spite of that, or with that assumption,  
24 they concluded that the risk was low at a  
25 decommissioning plant, realizing that there could be

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1 some difference at an operating plant. You, Ms.  
2 Uttal, you were saying that taking the assumptions  
3 that the staff made as to the one probability, fire at  
4 three feet above the assemblies, you're saying that  
5 that's misleading because that was just sort of a  
6 worst case assumption, bounding conservatism, and that  
7 to take that and then use it to say there is a greater  
8 likelihood of fires with partial loss of water is  
9 misleading.

10 MS. UTTAL: I don't think anybody is  
11 saying that there's a greater likelihood of fires with  
12 partial loss. I'm just saying it's -- what Ms. Curran  
13 is saying is that it's something that hasn't been  
14 looked at, not that there's a greater probability that  
15 it might happen.

16 CHAIR YOUNG: I thought there was some  
17 place where the --

18 MS. UTTAL: Yeah, I thought so, too.

19 CHAIR YOUNG: They say on page 14 that  
20 this --

21 JUDGE COLE: It's a more dangerous  
22 condition than all of the water being gone.

23 CHAIR YOUNG: More severe condition.

24 MS. UTTAL: Okay, but not that there's a  
25 greater probability that it's going to occur, just

1 that they're saying that it's a more severe condition.

2 CHAIR YOUNG: Okay.

3 MS. UTTAL: Okay?

4 CHAIR YOUNG: Thank you. All right.

5 And then what you are saying is that what  
6 you get from NUREG 1738 is that there could be, at  
7 least that there could be, and you're also saying that  
8 it could be more severe than total loss, there could  
9 be a fire with partial loss of water; that even though  
10 there's a low likelihood, as found by the staff, that  
11 NEPA requires consideration of low likelihood, but  
12 significant impacts, and that the likelihood and  
13 impact of a partial water loss fire at an operating  
14 plant has not been analyzed and that you would expect  
15 that there would be a greater -- here I may not be  
16 using the terms exactly right -- but a greater  
17 possibility of a fire and impact from a fire in an  
18 operating plant, and so the relevance of 1738 is that  
19 it supplies the possibility that a partial loss  
20 situation would create a more severe condition, and  
21 yet it's limited by the fact that it describes  
22 decommissioned plants as opposed to operating plants.

23 And so you're trying to point out an  
24 absence of analysis and asking for analysis on that  
25 point and using this to supply some of the indicators

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1 of significance.

2 Am I getting both parties arguments more  
3 or less right on that?

4 MS. CURRAN: I'm not sure that you --

5 CHAIR YOUNG: I'm sure I left things out.

6 MS. CURRAN: Yeah, I guess the main points  
7 of our interpretation of 1738 is that it contradicted  
8 some previous assumptions of the NRC staff about spent  
9 fuel behavior in pool.

10 CHAIR YOUNG: With regard to the partial  
11 loss versus complete loss.

12 MS. CURRAN: And with regard to the age of  
13 the field.

14 CHAIR YOUNG: Okay.

15 MS. CURRAN: And those two things are very  
16 important, and you were saying before when you were  
17 characterizing the staff's position that they hadn't  
18 done any modeling in NUREG 1738. That's not true.  
19 This is a PRA. They did what's called the  
20 thermohydraulic analysis. They did a lot of analysis,  
21 but they just couldn't do the whole thing. So there  
22 were some where there were areas where -- well, here.  
23 I'll just read you something that I think helps.

24 This is on page Roman nine, IX, it's in  
25 the introduction.

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1 CHAIR YOUNG: Of?

2 MS. CURRAN: Of NUREG 1738, and it's the  
3 second full paragraph, first sentence. "In its  
4 thermal hydraulic analysis documented in Appendix  
5 1(a), the staff concluded that it was not feasible  
6 without numerous constraints to establish the generic  
7 decay heat level," and in parentheses "and therefore  
8 a decay time," close parentheses, "beyond which a  
9 zirconium fire is physically impossible."

10 So they did the analysis, and they  
11 couldn't identify an age of fuel that was not  
12 susceptible to fire. So this doesn't say we didn't do  
13 an analysis. It's saying we didn't, and we found that  
14 all of our previous suppositions were gone, and we  
15 have to start all over and look again.

16 And so we're going to make this  
17 conservative assumption that the probability is one  
18 because everything is out the window. That's what  
19 happened with NUREG 1738. It blew away all of the old  
20 assumptions from NUREG 1353, and now they've got to go  
21 back to the drawing board. Well, in the meantime  
22 you've got to come up with some conservative  
23 assumptions why you try to figure it out.

24 And if you look at the NAS study, they are  
25 still working on NUREG 1738. They're still working on

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1 their understanding of it

2 CHAIR YOUNG: If I could go back to review  
3 for a minute and let me give you a little context for  
4 what I want to ask you, what we're sort of getting to  
5 here is whether there's a material dispute on a  
6 genuine -- whether there's a genuine dispute on a  
7 material issue of law or fact and whether there's  
8 anything that's new and significant.

9 And you're arguing that NUREG 1738 is not  
10 new and significant, and that there's no genuine  
11 dispute on any material issue because the AG has  
12 misinterpreted NUREG 1738.

13 Now, taking what Ms. Curran has just said,  
14 that in effect, they're using 1738 to point out an  
15 absence of analysis and to point out the possibility  
16 or likelihood, some likelihood, whatever word is most  
17 apt there, of fire when you've got partial drainage  
18 and you've got fire with aged fuel, that you can't  
19 rule those things out, that what they're trying to say  
20 is not that this proves anything so much as that it  
21 points up an absence of analysis on something that  
22 cannot be ruled out to the extent that there's no  
23 possible dispute on it.

24 Because what we have to decide is is there  
25 a genuine dispute. That's part of what we have to

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1 decide. So obviously the parties are in dispute with  
2 each other. What you seem to be saying is there's no  
3 genuine dispute because it's so clear that they're  
4 wrong that it's not even worth the argument or the  
5 litigation of the dispute in a hearing.

6 You know, we're not supposed to get to the  
7 merits here. All of this discussion we've been having  
8 in effect goes to the merits of the kinds of things  
9 that we'd be discussing if there were a hearing, but  
10 what I'm having trouble with is understanding how you,  
11 Ms. Uttal, for the staff are arguing that there's such  
12 a misunderstanding, mischaracterization of NUREG 1738  
13 and misunderstanding of how it has been considered by  
14 the Commission since it was produced that there's not  
15 even any dispute here that's worth -- well, that's  
16 what I'm trying to -- I'm trying to bring both  
17 arguments together and combine so that they're sort of  
18 not apples and oranges.

19 MS. UTTAL: That it was immaterial. What  
20 I'm saying is because 1738 assumed that there would be  
21 a fire if the water got to a certain level, that  
22 whether it was a partial drain-down or a complete  
23 drain-down is not -- is not -- I don't know if  
24 materials is the right word for it, but it's not a  
25 factor that has to be considered because it was

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1 assumed in 1738 that -- so it's subsumed by stopping  
2 at three feet above the water.

3 CHAIR YOUNG: Right. Even still there was  
4 still a low likelihood, but what the AG is saying in  
5 response to that is, well, but even with a low  
6 likelihood, you're still required to address that in  
7 EIS.

8 And one of the things that came out as a  
9 result of 1738 is that they had to assume certain  
10 things because they didn't know them, and they did  
11 not make the same assumptions that had been made in  
12 1353. In other words, there was a difference in what  
13 assumptions were made, and they must have taken  
14 something into account in deciding what assumptions to  
15 make there. So the relevance of it insofar as it  
16 points up an absence of analysis seems to be almost if  
17 not as important to the petitioners as what it  
18 actually does say with regard to partial water loss,  
19 spent fuel pool fires in operating reactors, which is  
20 what they're concerned about.

21 MS. UTTAL: Assume that the accident that  
22 she says is the most severe one has happened, is going  
23 to happen no matter what, and even with that there's  
24 a low probability or low risk of the accident  
25 happening. I don't know why you have to go any

1 further.

2 CHAIR YOUNG: Well, she's saying even if  
3 there's a low risk, it still needs to be addressed in  
4 an EIS if it hasn't been addressed in an EIS before.  
5 Am I right? Is that what you're saying?

6 MS. CURRAN: Well, yeah. I think we're  
7 talking past each other here, too, because maybe I'm  
8 wrong, but I think Ms. Uttal keeps referring back to  
9 the overall conclusion that the risk is low, that that  
10 risk is for decommissioning plants. So that needs to  
11 be dealt with.

12 But even if it's relatively low, if it's  
13 still foreseeable, then it has to be looked at. Now,  
14 you know, well, we're not arguing about a  
15 decommissioning plant. So it's possible that the risk  
16 of a pool fire at a decommissioning plant is so low  
17 that you wouldn't need to do an EIS about that pool  
18 fire, but this is different.

19 This may be a relatively low risk, but  
20 it's still within the realm of what is considered  
21 worthy of consideration in EIS by the NRC.

22 CHAIR YOUNG: So in a way what you're  
23 saying is what's important about or one of the things  
24 that's important about 1738 is not so much what it did  
25 say as what it didn't say, as what it did not say in

1 having to make the assumptions that it did about  
2 partial loss; is that --

3 MS. CURRAN: What it said is important,  
4 but, yeah, what it said is we can't -- okay. What  
5 NUREG 1350 -- to just go back and compare, NUREG 1353  
6 and NUREG 1738, if you look at page 15 of our reply,  
7 we quote something that the NRC staff wrote in another  
8 case involving spent fuel core accidents, and they  
9 summarize what NUREG 1353 said, and the sentence  
10 that's underlined, the two sentences, one says, "It  
11 also concluded that spent fuel three years out of the  
12 reactor could be air cooled even in high density  
13 racks. The report further found that zircaloy fires  
14 would not propagate PWR fuel stored in high density  
15 racks if the fuel had an approximate decay time of 730  
16 days."

17 So, in other words, if all of the water is  
18 lost from the pool and the fuel is old enough, nothing  
19 is going to happen. That's 1353.

20 Then you get to 1738, and the NRC says,  
21 well, we don't know about water loss. We're going to  
22 assume for any amount of water loss the probability is  
23 one.

24 So it goes from it won't happen to the  
25 probability is one. That's an amazing shift.

1 JUDGE COLE: But that was made as an  
2 assumption because they didn't have the detailed  
3 information.

4 MS. CURRAN: Well, yeah, they didn't have  
5 all of the details, but I just read you the sentence  
6 where they said we just can't say. That was on page  
7 9 where they said -- of the introduction.

8 CHAIR YOUNG: If they had followed 1353,  
9 they would have said it wouldn't have happened.

10 MS. CURRAN: Right. They would have said  
11 this can't happen.

12 MS. UTTAL: Judge, I just want to -- 1353,  
13 we had it before us, and it is true that that is what  
14 it says somewhere inside, but when they make their  
15 conclusion on page 4-42 of 1353, they say that -- is  
16 this the sentence? -- "subsequent propagation to even  
17 lower power assemblies by thermal radiation is highly  
18 unlikely, but with a substantial amount of fuel and  
19 cladding debris on the pool floor, coolability of even  
20 these lower power bundles is uncertain."

21 So when they reached their conclusion,  
22 they were less -- it was less sure than what was  
23 quoted from page 4-12.

24 CHAIR YOUNG: Let me ask you another  
25 thing, and again, here we have to rule based on the

1 contention of admissibility. Okay. We've talked  
2 about scope already, and I think where we are now is  
3 we're on whether there's a genuine dispute on a  
4 material issue of law or fact and whether there's  
5 enough of a basis.

6 And you're saying that 1738 doesn't supply  
7 that basis for the reasons you've given, and also that  
8 suggests that there's no real material issue.

9 But the NAS study seemed to -- didn't I  
10 say NAS? NAS -- that's what I meant to say -- study  
11 apparently relied on 1738, right, or do you dispute  
12 that as well?

13 I mean, because I guess what I --

14 MS. UTTAL: -- rely on some later  
15 information. I don't know what else.

16 CHAIR YOUNG: What I'm trying to get a  
17 handle on is it seems sort of obvious on the face of  
18 it that that parties here are in dispute with each  
19 other. Now, you're questioning whether it's a genuine  
20 dispute on a material issue. But in a way, just to  
21 look at the face of it again, it sounds like we're  
22 getting into a merits discussion of what all these  
23 things mean and what nuances there are here and there.

24 And I guess I'm having a hard time taking  
25 what you're saying and saying there's no genuine

1 dispute on any material issue because the issue is  
2 what has to be analyzed. Let's say we get past the  
3 scope issue, okay, and for the moment let's say we get  
4 past the new and significant issue or new and  
5 significant question. It seems pretty obvious that at  
6 least on the face of it unless I'm missing something  
7 that whether or not this issue of spent fuel pool  
8 fires, including the partial water loss and the aged  
9 fuel, in light of the NAS report and which was not  
10 considered by the Commission in the GEIS; whether that  
11 is new and significant enough to warrant taking  
12 account of it and doing an analysis of it in the  
13 environmental report and in the final supplemental  
14 EIS.

15 So I mean, we're going into a fair amount  
16 of detail and nuance in discussing this. So I'm  
17 having a hard time understanding how you say there's  
18 no real dispute here because isn't that what you're  
19 saying?

20 MS. UTTAL: Judge, just because two  
21 parties disagree doesn't mean that there's a material  
22 issue in the dispute. I mean, it's up to the --

23 CHAIR YOUNG: Explain it to me, why it's  
24 not.

25 MS. UTTAL: But we have gone far -- I must

1 admit we've gone far afield from what we should be  
2 discussing, and I think that we have to get back to  
3 the issue of whether this stuff is new and significant  
4 before we go any further, and it's the staff's  
5 position --

6 CHAIR YOUNG: Well, then safe it and come  
7 back to it afterwards because you also raised  
8 questions about genuine dispute of material issue,  
9 right?

10 MS. UTTAL: Yes, I did, and the thing is  
11 that to be a genuine dispute, it has to be material, a  
12 nd I've indicated that what they're talking about, the  
13 difference between a partial drain-down and a full  
14 drain-down is not material here because in 1738 it was  
15 assumed that it was a condition.

16 CHAIR YOUNG: But isn't it material in  
17 that the outcome would be whether or not that analysis  
18 needs to be included in an EIS? Doesn't that make it  
19 material? Isn't that the dispute?

20 MS. UTTAL: Because there's no dispute on  
21 the underlying issue because it's not -- there's no  
22 "there" there because it was assumed as a one, a  
23 probability of one. So it doesn't matter whether it's  
24 a partial drain-down or --

25 MS. BARTLETT: Objection. Could I address

1 this also at some point because this is also part of  
2 our contention. It, you know, again, may not be as  
3 detailed, but --

4 CHAIR YOUNG: I want you to. I'm going  
5 to try to just follow this just another step here, Ms.  
6 Uttal, and that is in order for us to say there's no  
7 genuine dispute on any material issue and there's  
8 nothing new -- well, let me back up on new and  
9 different.

10 Do we need to determine whether or not  
11 there is anything new and different or is not anything  
12 new and different at this stage or do we merely need  
13 to determine whether there is a genuine dispute on the  
14 issue of whether there is anything new and significant  
15 such that the EIS should include the analysis that is  
16 being sought here and -- and -- and if the NAS in this  
17 study has -- I know that there's been a disagreement  
18 with the NAS study, but again, what we look at here is  
19 not who's right and who's wrong, but is there a  
20 genuine dispute. And they do have experts and they do  
21 have studies, and I understand that the staff  
22 disagrees and I understand that Entergy disagrees.

23 But when it comes down to it, it seems  
24 like a little bit of a jump to say the disagreement is  
25 really not about anything that's material, and it's

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1 not really genuine about anything that's of any  
2 significance. Because isn't that sort of what you  
3 have to be saying in order for us to follow your view  
4 of things?

5 MS. UTTAL: You're breaking down the  
6 staff's position to too many little parts. What the  
7 staff is saying is that first of all the NAS study is  
8 on terrorism, which is not a subject --

9 CHAIR YOUNG: It includes a discussion of  
10 spent fuel pool fires, and it does include discussion  
11 of NUREG 1738, right?

12 MS. UTTAL: Well, okay. But I think what  
13 you have to do is back up to what the staff's whole  
14 position is. The position is that this contention is  
15 inadmissible because by regulation the issue of spent  
16 fuel pool accidents doesn't come in here.

17 CHAIR YOUNG: Right. I understand that.

18 MS. UTTAL: Okay. So --

19 CHAIR YOUNG: Hold on, hold on. I  
20 understand that one. I understand your argument about  
21 it should be done by a waiver, but let's say we get by  
22 those things. What I'm having a hard time  
23 understanding is whether or how there's no genuine  
24 dispute on a material issue if you get by those two  
25 other issues, and that's why I sort of broke it down

1 at first.

2 MS. UTTAL: I can't explain it any more  
3 than I've already explained it, but I don't think that  
4 you can just look at that part of the staff's  
5 argument. I mean, you have to take it whole cloth,  
6 and it's not admissible, and there is nothing --

7 CHAIR YOUNG: Well, but there's different  
8 --

9 MS. UTTAL: -- and there's nothing new and  
10 significant about what you're talking about. These  
11 same arguments have been heard before this Agency. I  
12 mean the first time I heard it was like 1999. So it's  
13 not new and significant information.

14 And as to 1738, the Commission was aware  
15 of that when they decided Turkey Point. So that's not  
16 new information. And I don't think I can explain what  
17 you're asking me for.

18 CHAIR YOUNG: So are you resting your  
19 whole -- I heard a suggestion for a break, and we're  
20 not going to forget about you, but are you suggesting  
21 that your argument really is essentially limited to  
22 it's out of the scope because of the GEIS and Turkey  
23 Point, and there's nothing new and significant because  
24 these things have been known and were known by the  
25 Commission when the GEIS was produced?

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1 MS. UTTAL: Those are my two major points,  
2 but I made other points in my brief, I think, and --

3 CHAIR YOUNG: That's what I was trying to  
4 get to, were the other points.

5 MS. UTTAL: Yeah, but the point I was just  
6 discussing with you, I can't say anything more than  
7 I've already said about it. I just --

8 CHAIR YOUNG: Well, I wasn't asking you to  
9 say anything about those two points.

10 MS. UTTAL: Oh, no, I'm --

11 CHAIR YOUNG: I was asking you to say  
12 something about the other points.

13 MS. UTTAL: I think I lost you.

14 CHAIR YOUNG: About the materiality and  
15 genuine dispute. That's the part that I wanted you to  
16 address.

17 MS. UTTAL: Whatever I said in my brief.

18 CHAIR YOUNG: Okay. Why don't we take a  
19 break and we'll come back and we'll start with you.

20 MS. BARTLETT: Okay. That's exactly on  
21 point, but if you want to.

22 CHAIR YOUNG: It's 3:20, and we're going  
23 to have to stop at five.

24 MS. BARTLETT: Okay, all right.

25 CHAIR YOUNG: So we can take a break

1 before the limited. So we'll come back and start with  
2 you and then try to wrap up this and maybe even get a  
3 start.

4 MR. LEWIS: We have an argument, too, on  
5 all of these points.

6 CHAIR YOUNG: They're first.

7 MR. LEWIS: Okay. Just a wrap-up part.

8 CHAIR YOUNG: Of course. We want to hear  
9 from you as well.

10 MR. LEWIS: Thank you.

11 CHAIR YOUNG: Okay. Let's come back in  
12 ten minutes.

13 (Whereupon, the foregoing matter went off  
14 the record at 3:21 p.m. and went back on  
15 the record at 3:33 p.m.)

16 CHAIR YOUNG: All right, now it's going on  
17 the record.

18 I was saying, we've been skipping around  
19 a little bit. But maybe I hope we're sort of focusing  
20 the issues a little bit more.

21 We're going to start back now with Pilgrim  
22 Watch. Before we go to you, Judge Trikouros wants to  
23 pose something to you to consider in your remarks.  
24 And then I guess we'll ask, go back and ask, if the  
25 staff counsel was finished. And then we'll move to

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1 Entergy - I'm sorry, and then we'll go to the town of  
2 Plymouth, and then if there are any further remarks  
3 from the petitioners, we'll do that, and hope we can  
4 get finished on this one.

5 I don't know if we'll get started on the  
6 next one or not today. But let's see if we can cover  
7 as much ground as possible.

8 And I guess we can save your argument on  
9 the SAMA analysis, unless it would be quick to cover  
10 now.

11 MS. BARTLETT: That's not what I was about  
12 to talk about. Is that what you're saying?

13 CHAIR YOUNG: No, no. I was just going to  
14 say, we can save that for later. And although if  
15 anybody thinks that might be more efficient to include  
16 that in your remarks now. I think that was more or  
17 less straightforward. It's whether the language in  
18 Turkey Point is essentially determinative of that  
19 issue or not.

20 In any event, go ahead.

21 JUDGE TRIKOUROS: I'll be very quick.

22 I just wanted to make sure that we all  
23 understand one thing, which I don't think we do at  
24 this point. And that is the - what was the state of  
25 knowledge at the time of the development of the

1 generic environmental impact statement with respect to  
2 the new information, quote unquote new information,  
3 that is being introduced.

4 Because if it were understood at the time,  
5 then it is not new information.

6 MS. BARTLETT: Okay. Well, I guess my  
7 remarks were going to address just exactly the topic  
8 that NRC staff and the attorney general's office has  
9 been talking about.

10 And that is, as our second pot of new  
11 information we also raised the issue of the increased  
12 risk of pool fires. And one of the quotes I've got on  
13 page 63 of our contention, taken from a 2003 report,  
14 Alvarez et al., seems on point for a couple of reasons  
15 which I'll explain in a moment.

16 And I'll just read it quickly: This dense  
17 packed fuel is kept subcritical by enclosing each fuel  
18 assembly in a metal box whose walls contain neutron  
19 absorbed in boron.

20 These boron-containing partitions would  
21 block the horizontal circulation of cooling air if the  
22 pool water were lost, greatly reducing the benefits of  
23 mixing recently discharge for the older, cooler fuel.

24 During a partial uncovering of the fuel,  
25 the openings at the bottoms of the spent fuel racks

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1 would be covered in water completely blocking air from  
2 circulating up through the fuel assemblies.

3 So the idea is that a partial loss of  
4 water results in a situation where you have neither  
5 water cooling the assemblies nor air cooling the  
6 assemblies, which you might get if you had a full and  
7 complete water loss.

8 And I raise this because again just to my  
9 comments since approach here, it seems to me far more  
10 likely that in an operating plant you might have a  
11 situation of partial water loss, whereas in a  
12 decommissioned plant, the likelihood of that, just  
13 because people aren't coming and going and moving  
14 things in and out, that that would be a less likely  
15 event.

16 So I'm just raising this to speak to the  
17 issue of the 1738, and how the fact that that - they  
18 said the overall risk was low in a decommissioned  
19 plant doesn't necessarily hold for our operating plant  
20 with a dense pool.

21 CHAIR YOUNG: One think you said, could you  
22 repeat or explain, you said that the partial  
23 uncovering would be more unlikely -

24 MS. BARTLETT: More dangerous than -

25 CHAIR YOUNG: Okay, more dangerous.

1 MS. BARTLETT: -- a complete water loss.  
2 And that's because if you had a complete loss of  
3 water, you might get air circulating in those chimneys  
4 that Ms. Curran was talking about.

5 CHAIR YOUNG: Right. The comparison that  
6 I thought I hear you making was between the operating  
7 point -

8 MS. BARTLETT: Oh, right. And this is - I  
9 don't have a cited report to back me up here. But to  
10 my mind an operating plant with fuel assemblies being  
11 put in the spent fuel pool and moved around a re-  
12 racked and stuff, it's far more likely you would have  
13 an accident that would cause a partial water loss than  
14 in a decommissioned plant where things I assume are  
15 pretty static.

16 JUDGE TRIKOUROS: And you are representing  
17 that as new -

18 MS. BARTLETT: Well, this is again relating  
19 to the 1738, Reg. 1738. I have a really layman's idea  
20 about what's considered new by the NRC, but it seems  
21 to me a risk that should be taken into account.

22 JUDGE TRIKOUROS: Right, and I just want to  
23 make clear, that is what is being represented as new  
24 information that is at the heart of your contention?  
25 I'm asking.

1 MS. BARTLETT: Well, that's part of it.

2 JUDGE TRIKOUROS: But that is a part of it?

3 MS. BARTLETT: That's part of it.

4 CHAIR YOUNG: Ms. Uttal, did you have  
5 anything further? We've sort of been taking it in  
6 bits and pieces.

7 MS. UTTAL: I guess the one thing I wanted  
8 to point out, as between 1353 and 1738 that they came  
9 to similar findings regarding the frequency of the  
10 accidents, even though one was decommissioning, for  
11 decommissioning reactors and one was for still  
12 operating reactors.

13 And they had a range, in 1353, a range  
14 between two times 10 to the minus six to 1.5 times 10  
15 to the minus seven. And for 1738 2.4 times 10 to the  
16 minus six to 5.8 times 10 to the minus seven. And  
17 they're not exactly the same, but they're within range  
18 of each other.

19 So even though they were looking at  
20 slightly different things, the conclusions were  
21 similar.

22 CHAIR YOUNG: Anything further?

23 MS. UTTAL: That's all I have.

24 CHAIR YOUNG: Okay, Mr. Lewis.

25 MR. LEWIS: Thank you.

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1           The attorney general and Pilgram Watch  
2           have not provided any basis demonstrating that their  
3           contention is significant or material.

4           That standard is the same. They are  
5           alleging that we are not complying with 5153(c)(3)(4),  
6           which is the provision relating to new and  
7           significant. And if they don't provide some basis  
8           showing you significant information that allegation  
9           fails.

10           They are also alleging that the findings  
11           have to be supplemented under NEPA, and the standard  
12           for supplementation is new and significant. So to  
13           establish a material issue, even if you get past the  
14           waiver provision - and I am jumping back for purposes  
15           of this argument - there has to be a showing of  
16           significance to show that there is a material dispute  
17           within the scope of the proceeding.

18           The reason that they have not established  
19           significance or materiality, again, being the same  
20           thing, is that they have not provided one whit of  
21           basis to show what the probability is of the sequences  
22           that would lead to spent fuel uncoverly.

23           And if those probabilities are remote,  
24           there is no obligation to consider those sequences  
25           under NEPA.

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1 CHAIR YOUNG: Are you suggesting that they  
2 should have done essentially a PRA?

3 MR. LEWIS: I'm saying that they should  
4 have provided some basis to assert that these are not  
5 remote accident scenarios.

6 Let me explain why in particular. There  
7 was a statement that you need to go back to the GEIS  
8 and see what the finding that the commission made.

9 The commission's finding in the GEIS was  
10 that the likelihood of a spent fuel accident leading  
11 a fuel cladding fire is highly remote. That's the  
12 generic finding in the GEIS. It's at page 6-75.

13 And to be significant and material, new  
14 information should show that that conclusion ought to  
15 be changed.

16 In the absence of that, there is no  
17 obligation under NEPA to do a further supplementation.  
18 And in fact it is undisputed by all the parties that  
19 NEPA case law holds that there is no obligation under  
20 NEPA to consider accidents that are sufficiently  
21 remote.

22 That's always been the case. That was the  
23 old case law in classified accidents that they were  
24 too remote and speculative to be considered.

25 Severe reactor accidents were already

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1 considered after the commission backed away from  
2 reactor accidents and said, we are no longer willing  
3 to consider them remote. But they've never backed  
4 away from the conclusion that spent fuel fires are  
5 remote.

6 CHAIR YOUNG: What about the discussion  
7 that Ms. Uttal was talking about earlier in 1738? I  
8 think she used the word, unlikely, or was the word,  
9 remote, used? I mean when we're using these words I'm  
10 not sure -

11 MR. LEWIS: We think 1738 is a very low  
12 likelihood.

13 CHAIR YOUNG: Very low likelihood? What's  
14 the difference between very low likelihood and highly  
15 remote?

16 MR. LEWIS: Just adjectives. They both  
17 indicate that they are very improbable events.

18 I think it's much more instrumental to  
19 look at the probabilities that have been estimated  
20 rather than looking at the adjectives. And I'm going  
21 to do that.

22 Let me just proceed a little bit with the  
23 discussion of the GEIS. The conclusion that the  
24 likelihood of these spent fuel pool accident scenarios  
25 is remote in the GEIS is based on a reference to the

1 1990 waste confidence decision. It's cited at 55  
2 Federal Register 38474.

3 And in that decision, the commission  
4 actually considered assertions that there should be a  
5 greater examination of spent fuel pool fires. And the  
6 specific allegation was raised by Public Citizen which  
7 said that there was a greater danger posed by an  
8 accident in which pool water escaped to uncover the  
9 fuel assemblies.

10 CHAIR YOUNG: Give me again the case.

11 MR. LEWIS: This is the September 18th,  
12 1990 Waste Confidence Decision, 55 Federal Register  
13 38474. This is the reference that the GEIS cites in  
14 support of its conclusions that spent fuel pool  
15 accidents are highly remote.

16 CHAIR YOUNG: Thanks.

17 MR. LEWIS: To refer you to this scenario,  
18 Public Citizen referred to a 1987 report, which is one  
19 of the references that both the Massachusetts and I  
20 think Pilgrim Watch - maybe I'm wrong, I think it's  
21 just the Massachusetts attorney general cites - its  
22 new reg 4982, and the Public Citizen allegation refers  
23 to a situation where the natural airflow permitted by  
24 high density storage racks is so restricted that  
25 potential for self sustaining cladding fire exists,

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1 and with high density racks providing severely  
2 restricted air flow the oxidation burning would be  
3 very vigorous, and the failure of both the fuel rods  
4 and fuel racks is expected.

5 The commission addressed -

6 CHAIR YOUNG: Did you give us the page  
7 that's on? 4982? Did you give us a page number?

8 MR. LEWIS: I have actually, unfortunately,  
9 a Lexis printout. I think this is also on page 38474  
10 of 55 Federal Register, but I can't swear to it.

11 MS. CURRAN: That's the first page.

12 MR. LEWIS: Is it on the first page? So my  
13 second page is my Lexis printout, and I apologize for  
14 not having the Federal Register copy.

15 It's right at the beginning of this waste  
16 confidence decision and it's under the heading, issue  
17 number 15. And if it's not on page 38474, it's got to  
18 be on page 38475.

19 CHAIR YOUNG: Okay, thanks.

20 MR. LEWIS: In addressing this assertion  
21 and comment -

22 MS. CURRAN: Excuse me. I've got the page  
23 number if that would help. It's page 38480.

24 MR. LEWIS: Okay, thank you.

25 In addressing this scenario, the

1 commission talked about the studies indicate that the  
2 dominant accident sequences which contribute to risk  
3 in a spent fuel pool is gross structural failure of  
4 the pool due to seismic events, and said, risk due to  
5 other accident scenarios such as pneumatic seal  
6 failures, inadvertent drainage, loss of cooling or  
7 makeup water, and structural failure due to missiles,  
8 air crashes, and heavy load drops, are at least an  
9 order of magnitude smaller.

10 So what the commission was saying in this  
11 was that these other scenarios that result in drain  
12 down of the spent fuel pool water to a level where you  
13 might get uncovering in these partial uncovering scenarios  
14 are a much more remote scenario than the one that  
15 we've examined, which is the catastrophic failure.

16 They are not addressing whether it burns  
17 or not; they're just saying these scenarios are highly  
18 remote, and an order of magnitude below what we've  
19 looked at as the scenario.

20 And they cited new reg 1353 in support of  
21 their conclusions. When you go to new reg 1353 that  
22 analysis looked at the risk of a number of different  
23 scenarios that might result in drain downs, slow drain  
24 downs, partial drain downs.

25 And with respect to the loss of cooling

1 with no recovery, which was defined as the probability  
2 of a full heat up resulting in boiling of the water  
3 for older type systems, the new reg 1353 concluded  
4 that the probability of that sequence was 3.5 times 10  
5 to the minus eight. This is a very low probability  
6 event.

7 They looked at a whole bunch of other  
8 scenarios. And they are dropped casts (phonetic), and  
9 they said the probability of that was 3.1 times 10 to  
10 the minus eight.

11 These are much lower probabilities that  
12 the severe reactor accident scenarios that are looked  
13 at in SAMA analyses in the EIS's.

14 They also explain the historical  
15 perspective on this issue. They explained how as far  
16 back as Worst 1400 (phonetic) the probabilistic risk  
17 assessments that it looked at - these are drain down  
18 scenarios - had concluded that it was highly unlikely  
19 that if you lost spent fuel pooling you wouldn't be  
20 able to recover it in the many days that you would  
21 have to do so.

22 And in fact in Worst 1400 the estimate at  
23 that time was that it was, if you lost spent fuel  
24 pool, the additional probability of not being able to  
25 recover was about 10 to the minus six. So if you

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1 assumed that there was a 10 percent chance of losing  
2 spent fuel pool cooling, the total probability of  
3 getting to an event where you were uncovered was about  
4 a 10 to the minus seven event.

5 In fact the documents that are now  
6 referred to, particularly new reg 1738, completely  
7 confirm those findings, and as I said before, there is  
8 not one document, not one whit of basis, to suggest  
9 that in fact this probability of getting a sequence  
10 where a burn might occur is any more likely or any  
11 more probable, and there is absolutely no basis for  
12 the characterization that these are within the range  
13 of probabilities that are considered foreseeable for  
14 purposes of NEPA. That is absolutely unsupported by  
15 any of the documents.

16 In new reg 1738 the NRC staff looked at  
17 the boil down scenario, and they looked at it from a  
18 whole bunch of different possibilities: loss of spent  
19 fuel cooling; loss of inventory; fires; CAS (phonetic)  
20 drops; air crashes; things that could make the spent  
21 fuel pool level drop to a point where the fuel is  
22 uncovered.

23 And they concluded that the probability of  
24 those events was 1.8 times 10 to the minus seven,  
25 again, a very low probability event.

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1                   Now the attorney general suggests that you  
2                   can't rely on those numbers because that was a  
3                   decommissioned plant, and therefore, there were risks  
4                   that weren't considered.

5                   But the statement they refer to is  
6                   actually completely irrelevant, because it is not  
7                   applying to the risk of spent fuel pool fires. At  
8                   page 5.2 of new reg 1738, which is the page that the  
9                   attorney general referred to, a commissioner is  
10                  explaining why with respect to emergency plants, you  
11                  might be able to eliminate emergency plants or a  
12                  decommissioned plant but still need them for an  
13                  operating plant.

14                  They're saying with a decommissioned plant  
15                  you only have spent fuel pool scenarios, and therefore  
16                  you might be able to get a writ of emergency planning.  
17                  But at operating reactors you have severe accident  
18                  risks, and that's why you have a different need for  
19                  emergency planning at an operating reactor.

20                  This statement says nothing about the  
21                  reactor affecting spent fuel pool risk. It simply  
22                  says, reactor accidents potentially exist on operating  
23                  reactors, and therefore there's different  
24                  considerations on whether you need emergency planning  
25                  in a decommissioned plant and whether you need it at

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1 an operating plant.

2 Moreover, the idea that the risk of spent  
3 fuel pool fires is less at a decommissioned plant  
4 doesn't make sense on its face.

5 First of all new reg 1738, they were  
6 trying to figure out whether they could eliminate  
7 emergency planning. They assumed, because the plant  
8 was in decommission, you shut down - you could shut  
9 down that, you would offload a full core into the  
10 spent fuel pool, as opposed to the one-third core that  
11 you do in an operating reactor.

12 And one of the main issues about how long  
13 you have to recover and how quickly the fuel boils off  
14 is that most recent core.

15 So in fact they were analyzing a situation  
16 that is far more significant than you would get at an  
17 operating reactor.

18 In addition the events that they were  
19 looking at are events that wouldn't be affected by  
20 whether the plant was operating or not. They were  
21 looking at events like a CAS drop. If you're moving  
22 spent fuel in and out of an IFSI (phonetic) at a  
23 decommissioned plant, you've got the CAS (phonetic)  
24 going in and out, and you've got the same risk of  
25 drops.

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1           If you're looking at the risks of  
2 airplanes crashing into the building, it's the same in  
3 any event.

4           If you're looking at the probability of  
5 fires, I don't know of a difference.

6           If you're looking at whether your spent  
7 fuel cooling system is going to fail, again, there is  
8 no showing why that risk estimate wouldn't apply in  
9 both situations.

10           The only scenario that they offer that has  
11 anything to do with the risk of getting to this stage  
12 where a fire might occur is Dr. Thompson's assertion  
13 that if you had a spent fuel pool fire there would be  
14 a 50 - I'm sorry, if you had a severe reactor accident  
15 it would be a 50 percent conditional probability of a  
16 spent fuel pool fire.

17           That is a statement, however, that is  
18 unsupported, and has no basis, and is pure  
19 speculation.

20           Dr. Gordon refers to the Sharon Harris  
21 proceeding where he says everybody agreed to that  
22 principle. But in fact when you read the Sharon  
23 Harris case, it's absolutely clear that's not the  
24 event. In the Sharon Harris case, the qualities that  
25 the licensing board addressed, a seven-step scenario,

1 and this is in our brief, that went from a severe  
2 accident to the likelihood of a spent fuel pool fire.

3 And the first two steps were the  
4 likelihood of a severe accident and large release, and  
5 the last five steps were the likelihood that that  
6 would lead to a spent fuel pool fire.

7 And if conditional probability between  
8 those two events in the staff was a factor of 166,  
9 less than one percent; not 50 percent.

10 In their reply the Massachusetts attorney  
11 general says, well, you know, there is another aspect  
12 of this case. At Sharon Harris there is four spent  
13 fuel pools in the same building. And we assumed that  
14 if two of the pools started burning, the remaining two  
15 would start burning, too.

16 But that doesn't relate to whether a  
17 reactor accident would necessarily lead to a spent  
18 fuel pool fire. What was said in that case is, there  
19 were four pools in there. They assumed they all lost  
20 cooling. They assumed that they all started boiling  
21 down to the point where they were uncovered. They  
22 assumed that the two pools with the greatest amount of  
23 heat load, the ones that had the most recent  
24 discharges, would start burning, and because the other  
25 fuel, even though it had a lower heat load, was also

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1 uncovered, that fire would propagate.

2 So they were talking about a situation  
3 where you had adjacent pools that were already full  
4 drained down - does the fire propagate? Again, it has  
5 nothing to do with the conditional probability of  
6 whether a severe reactor accident would necessarily  
7 cause a spent fuel pool fire.

8 Because of that lack fo any link, the only  
9 thing that they refer to provides no basis for any  
10 reasonable estimate of the probability of these  
11 events.

12 There is another extreme flaw in Dr.  
13 Thompson's analysis. His assertion is that there is  
14 this 50 percent conditional probability of a spent  
15 fuel pool fire given a large release frequency from  
16 the reactor.

17 We've given the large release frequencies  
18 in our environmental report based on the current IPE  
19 and IPEEE. That frequency is about 10 to the minus  
20 six.

21 Dr. Thompson says, well, I don't have  
22 those available, so I'm going back to some 1992  
23 numbers. And therefore he uses numbers that are a  
24 factor of 40 or 50 higher. He's not even using the  
25 current IPE and IPEEE.

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1           If you took the current numbers of 10 to  
2           the minus six for the release frequency, and you  
3           applied the sort of conditional probability that in  
4           fact was used in the Sharon Haris case, a factor of  
5           166, you've got a probability again that's below 10 to  
6           the minus seven.

7           So in fact the Sharon Harris case again  
8           supports the assertion that these scenarios are really  
9           so low that they are not anywhere near the same type  
10          of - in the range of reactor accidents that are  
11          considered under NEPA.

12          And in fact in the Sharon Harris case  
13          specifically the licensing board determined there that  
14          the risk of a spent fuel pool fire was in the 10 to  
15          the minus seven range, which they held was too remote  
16          under NEPA to be considered.

17          Let me just -

18          CHAIR YOUNG:    -- decision that you  
19          referred to, the reference to 10 to the minus seven or  
20          greater being within the design basis.

21          MR. LEWIS: Well, by design basis, that's  
22          determined deterministically. I'd have to go back and  
23          look at that case. But I don't believe it was a NEPA  
24          case. I don't think that case had anything to do with  
25          whether an accident scenario was sufficiently probable

1 or foreseeable to be seen under NEPA.

2 My recollection is that for external  
3 events the NRC staff has always applied some screening  
4 criteria. And if an external event is below 10 to the  
5 minus seven they don't even consider it.

6 If it looks like it's more probable than  
7 10 to the minus seven, they may require an analysis of  
8 it, but they don't necessarily require design  
9 mitigation.

10 And I think that is has to be below 10 to  
11 the minus six before they start actually requiring  
12 design features.

13 So I think that for looking at external  
14 events in the standard review plan that the staff  
15 uses, there are these screening steps. And I think  
16 the 10 to the minus seven reference is simply a screen  
17 that the staff has historically used in looking at  
18 external events to decide, do we need to analyze it.

19 In fact here we're talking about scenarios  
20 that are in this 10 to the minus seven range; you know  
21 that wouldn't even meet that screen when you look at  
22 the numbers that are actually in these reports.

23 I did want to make a couple of points  
24 about new reg 1783, just to put it in perspective?

25 JUDGE TRIKOUROS: 38, you mean?

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1 MR. LEWIS: Yes, that's my dyslexia, new  
2 reg 1738.

3 CHAIR YOUNG: Okay, make sure we're on the  
4 same page.

5 MR. LEWIS: I'll put my glasses on to make  
6 sure I can read it.

7 The staff analyzed how long it would take  
8 to boil down a pool, a typical pool, to three feet  
9 above the level of the fuel. And they came up with a  
10 number of hours - six hours, seven hours, I can't  
11 remember what it was.

12 They did not assume at that point that the  
13 fuel would burn. They just didn't do a further  
14 analysis. They said we're not going to consider -  
15 we're not further going to sharpen our pencils and  
16 figure what's the additional probability that you  
17 might be able to recover at that level.

18 So they absolutely did not assume that it  
19 would burn when the level of the water is three feet  
20 above the assemblies. They just used that three feet  
21 to calculate how long does it take to get close to  
22 there.

23 And in fact in describing their scenarios  
24 where they thought there was a possibility of a burn,  
25 they always described a situation where the fuel was

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1 uncovered.

2 In addition they did not assume that there  
3 was a probability of one that the fuel would burn if  
4 it was partially uncovered. They were trying to make  
5 - trying to determine whether they could make a  
6 generic determination whether after a certain amount  
7 of cooling fuel would no longer have the ability to  
8 burn.

9 They were trying to think about whether  
10 they could say, if a plant has been shut down for more  
11 than one year or two years or four years or whatever  
12 the period might be, there is no situation in which a  
13 fire could occur.

14 So they were just looking at, can we make  
15 this determination based on the age of fuel? And they  
16 said, no, we can't make it just based on the age of  
17 fuel, because configuration and a lot of other factors  
18 come in.

19 That doesn't mean that if you get partial  
20 uncovering, the probability of fire is one. It simply  
21 meant that there was some finite risk, some finite  
22 probability, that it could not be completely  
23 eliminated. It might be very, very low, but there  
24 remains a risk. And that's very different from saying  
25 they assumed that if there was uncovering, this fire is

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1 going to happen. That's not what new reg 1738  
2 establishes.

3 Let me just explain a bit, too, why these  
4 events are so low probability, such low probability  
5 events, even the event of a reactor accident. And I'd  
6 particularly underscore the lack of any basis that  
7 relates this to Pilgrim. The FSAR program at page  
8 10.3-3 describes how makeup is provided to the spent  
9 fuel pools. And it indicates that makeup can be  
10 provided from the condensate transfer system.

11 That's a system that has two tanks, and  
12 there are three separate pumps that can deliver that  
13 water to the spent fuel pools. And those pumps can  
14 deliver the water through three separate flow paths.

15 So there's multiple means for just that  
16 one system to deliver makeup to that spent fuel pool  
17 even if the spent fuel pool cooling system failed, by  
18 injecting this carbon safe water into this spent fuel  
19 pool cooling system, it would still flow into the  
20 pool, and it would still prevent a drain down and a  
21 fire.

22 That doesn't prevent any operator entry  
23 into the reactor building. That is the normal way  
24 water is provided to the spent fuel pool cooling  
25 system. So you could lose the spent fuel pool cooling

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1 system pumps, no power; you could still push power  
2 through with the three sets of pumps. There are three  
3 pathways from two different tanks.

4 The FSAR also indicates that there's two  
5 other means that can be used - actually there are  
6 three other means that can be used to provide coolant.  
7 One of them is, you can provide - not coolant, makeup.  
8 You can provide makeup from the demineralized transfer  
9 system. That would require an entry onto the 117-foot  
10 elevation which is where the top of the spent fuel  
11 pool is located.

12 But there is also an ability to provide  
13 makeup from - using one loop of the RHR. So once you  
14 have reached cold shutdown, you could use one loop of  
15 the RHR to provide water to the spent fuel pool  
16 cooling, so the spent fuel pool tanks.

17 JUDGE TRIKOUROS: Presumably, what you're  
18 doing is providing a basis for the 10 to the minus six  
19 or seven or whatever.

20 MR. LEWIS: I'm just underscoring how  
21 really remote it is that you lose all these methods.  
22 You have six or seven days to do this. You have all  
23 these diverse means. All these things have to fail.  
24 There is a very, very strong basis for all these  
25 findings that this is a 10 to the minus seven, 10 to

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1 the minus eight event.

2 To widen the RHR you would have to go in  
3 the reactor building, but you wouldn't go in that  
4 spent fuel pool for the 117 level. You'd go in a  
5 corridor at the 74-foot level, which is in a different  
6 ventilation zone from the 117-foot level.

7 In addition there is always the fire hose  
8 scenario.

9 I'm just saying that to say, there isn't  
10 any discussion anywhere in any of these petitions  
11 about the actual means of providing cooling at  
12 Pilgrim. There is nothing to show that this is a  
13 probable or likely or reasonably foreseeable scenario  
14 at Pilgrim.

15 All they have, the only support that they  
16 offer at all is this Gordon Thompson suggestion which  
17 is pulled out of thin air that if there is a severe  
18 accident, I think that a 50 percent chance of a pool  
19 fire. And when you pull that string, when you look at  
20 the Harris case he refers to, that fails. There just  
21 is nothing there.

22 And when you in fact look at the Harris  
23 case, and the conditional probability, and you apply  
24 that to the release frequency at Pilgrim, you're back  
25 in the 10 to the minus seven range, without any

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1 showing that you have much greater probabilities.

2 This question about whether if you did get  
3 uncover, might it burn or might not burn, is  
4 absolutely irrelevant. You just never get there.

5 And without some basis to show that in  
6 fact there is some reasonably foreseeable not remote  
7 risk that these events are going to happen, you never  
8 trigger this NEPA standard to supplement.

9 JUDGE TRIKOUROS: So the information  
10 regarding partial drain down, the implications of  
11 partial drain down would not alter, in your statement,  
12 would not alter that number?

13 MR. LEWIS: No, because these are the  
14 numbers of the probability that you get to when  
15 partial drain down starts to occur.

16 These are the probabilities of getting to  
17 uncover. If you never get to uncover, you never get  
18 to this partial drain down situation.

19 I should mention that this partial drain  
20 down was looked at in the 1979 Sandia report which is  
21 cited. And in there they looked at what sort of  
22 uncover would you get before you lose integrity.  
23 They were talking about uncover to about an 80  
24 percent level; you have to uncover about 80 percent of  
25 the fuel rods, I think, before the natural radiation,

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1 the natural cooling, would cause an ignition.

2 Those numbers may not be applicable any  
3 more, but certainly the scenario was no -

4 JUDGE TRIKOUROS: Are you saying 80 to 90  
5 percent of the fuel rods or of the fuel pool?

6 MR. LEWIS: The level had to get down so  
7 that 80 percent of the rods were exposed before they  
8 thought that ignition would occur in the '79 study.

9 I agree that they were looking at  
10 different rack configurations back then. I'm just  
11 saying that this scenario was known for a long, long  
12 time. The reason it never made a difference is  
13 because it never factored into the commission's  
14 decision.

15 The commission's decision was you don't  
16 get there. It's a 10 to the minus seven, 10 to the  
17 minus eight likelihood of even getting to the point  
18 where there is an uncovering of the spent fuel.

19 JUDGE TRIKOUROS: When the evaluations are  
20 done for the reactor side, would that lead to SAMA  
21 assumptions, is there a limitation there on  
22 probability for example? Are scenarios only looked at  
23 there that are 10 to the minus seven or greater?

24 Or are all scenarios kind of been  
25 evaluated, and then SAMA looked at. I'm talking about

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1 the reactor side now.

2 MR. LEWIS: Well, they definitely don't  
3 look at every possible reactor scenario. There's 12  
4 reactor sequences that are looked at, and there are  
5 probabilities assigned to each of them.

6 And if you are asking me, are any of those  
7 sequences in the 10 to the minus seven range, I can't  
8 tell you. But it's in the environmental report; it  
9 shows what the 12 sequences are.

10 The dominant sequence is the large break  
11 LOCA sequence, and that's definitely in the 10 to the  
12 minus - it's not 10 to the minus seven; it's a more  
13 likely scenario than that.

14 JUDGE TRIKOUROS: I'm just trying to  
15 address the question that we were discussing earlier  
16 with the Massachusetts attorney general regarding this  
17 - do the same evaluation for the spent fuel pool.

18 Is it because the likelihood in the spent  
19 fuel pool case is so much less than in the reactor's  
20 case? Or is there another reason why we sort of treat  
21 the spent fuel pool differently than we treat the  
22 reactor side?

23 JUDGE TRIKOUROS: I think I misspoke. I  
24 was thinking about the individual sequences. I think  
25 it's the total sequences altogether that get you to -

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1 there are a number of different ways you can reach -  
2 I think that the total sequences end up with a 10 to  
3 the minus six probability that you could have a severe  
4 accident with a release.

5 By necessity individual sequences must be  
6 below that, but it's the combination. I don't know of  
7 a combination of sequences for the spent fuel pool  
8 that makes it comparable.

9 JUDGE TRIKOUROS: Does staff have any?

10 CHAIR YOUNG: I have a question, actually,  
11 for Mr. Lewis before you move on.

12 Just looking at your answer, I want to  
13 make clear for myself the basic parts of your  
14 argument.

15 It seems like most of your argument is  
16 that the contention is outside the scope.

17 MR. LEWIS: That's the strongest point.  
18 It's category one, it can't be considered absent a  
19 waiver.

20 CHAIR YOUNG: Right. And on the waiver,  
21 you say they need to get a waiver. If they get past  
22 the waiver, it's not really new and significant. And  
23 at one point you say, on page 19, that they don't  
24 provide that necessary factual basis.

25 I don't recall - I was trying to go back

1 through here and refresh my memory as to whether you  
2 made the argument on the genuine dispute.

3 But assuming we get passed the waiver  
4 issue, on the new and significant issue, and the  
5 factual basis, I guess what I'd like for you to  
6 address is the issue of going into the merits.

7 Now as I understand your argument, it  
8 can't possibly - the contention can't possibly be  
9 within the scope, getting even past the waiver issue,  
10 unless it is new and significant.

11 So we actually have to make the  
12 determination that the issues raised are somehow new  
13 and significant to even find that they would be within  
14 the scope.

15 And if there is a dispute over whether  
16 there's something new and significant, you would say,  
17 we have to go farther than that. We have to resolve  
18 that dispute at this point to make the determination  
19 on scope.

20 And you are going into a fair amount of  
21 detail giving your analysis, the analysis of Entergy,  
22 as to why the analysis offered in the contentions is  
23 just wrong.

24 And this is the kind of thing that  
25 normally in a hearing you'd have testimony of experts

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1 and you'd have questioning of experts, and you'd  
2 balance all that. And you'd have an opportunity to  
3 really put some of these questions directly to the  
4 experts, not just to the lawyers in oral argument.

5 I have this uncomfortable feeling that  
6 what you are really sort of in effect asking us to do  
7 is get into the merits. And so I look back at the  
8 requirements for contention admissibility. And there  
9 is a requirement that it has to be within the scope of  
10 the proceedings.

11 But I guess it doesn't seem to me that it  
12 is quite so simple as you're arguing, among other  
13 reasons, because it takes you quite awhile to give  
14 your argument as to why the issue really is pretty  
15 much cut and dry, black and white, absolutely not.

16 And you know, can you respond to that?

17 MR. LEWIS: Absolutely. And I have two  
18 responses.

19 One, I do believe that in applying this  
20 new and significant standard, there should be a  
21 substantive look. Because if the test is only, is  
22 there a dispute, then my old flood gates argument  
23 really rings true.

24 But if you put aside the waiver issue, and  
25 you say, am I arguing the merits, no, I'm arguing lack

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1 of basis. I'm referring to the same documents that  
2 the Massachusetts attorney general and Pilgrim Watch  
3 referred to.

4 It took awhile for me to go through them  
5 just because they provided a lot of references; a lot  
6 of documents. The reason I went through them, and you  
7 don't have to accept the numbers, I just went through  
8 them to show these are the numbers in the documents.  
9 Where are the numbers that the interveners or the  
10 petitioners are pointing to that shows that this is a  
11 reasonably or foreseeable event.

12 So I simply referred you to those  
13 documents that the petitioner cited; pointed to the  
14 probabilities that are in there; and say, these don't  
15 provide a basis. These provide no basis to suggest  
16 this is a reasonably foreseeable event.

17 Then I looked at the only other thing that  
18 they looked at, which was this Dr. Gordon Thompson  
19 scenario, and I looked to the Harris case that he  
20 referred to. And I said, this provides no basis -  
21 forget the merits; the numbers just aren't there.

22 So you don't need to go to the merits.  
23 All you need to do is say, on the face of the  
24 documents advanced by the petitioners there is no  
25 information, there is not one whit of basis, that

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1 indicates that this is a reasonably foreseeable  
2 scenario that needs to be looked at under NEPA.

3 CHAIR YOUNG: Let me just ask you about the  
4 NAS report.

5 I think it goes to the cause that they  
6 talked about is terrorism. But apparently the  
7 analysis relies on new reg 1738, and I know that the  
8 NRC has disagreed with, I don't know, all or some at  
9 least of the conclusions of that report.

10 But I think probably the ordinary person  
11 on the street or even reasonably intelligent sixth  
12 grade educated or high school educated or college  
13 educated person on the street would think, okay, the  
14 National Academy of Sciences issues a report, and it  
15 raises some questions about spent fuel pool accidents.

16 And you're asking us to say that there is  
17 nothing new there; that this has all been resolved  
18 years ago; and that there is really no issue that we  
19 should find here.

20 And we see the quoted part of the NAS  
21 report. What do you do with that report? What are  
22 you asking us to do with that report, for example,  
23 which I think is the most recent one besides the  
24 Thompson and Beyae reports.

25 MR. LEWIS: Let me understand - I just want

1 to make sure I understand. The NAS report was dealing  
2 with terrorism.

3 JUDGE TRIKOUROS: That is correct.

4 CHAIR YOUNG: That was the cause.

5 JUDGE TRIKOUROS: It wasn't dealing with  
6 the types of probabilities that you're discussing?

7 MR. LEWIS: That is my response. I'm not  
8 aware of anything in the NAS report that says that any  
9 of these other nonterrorist-related sequences are  
10 probable or foreseeable. There is nothing -

11 CHAIR YOUNG: Everything hinges on the  
12 terrorism clause. The probabilities of all the other  
13 aspects of it are still so remote that the thing that  
14 brings it above the tipping point is the terrorism  
15 part.

16 MR. LEWIS: I don't think the NAS report  
17 has any independent analysis. I think they rely  
18 entirely on new reg 1738 and new reg 1353 for the  
19 prior analyses of what the probabilities are, and  
20 those are the probabilities that basically the  
21 commission relied on in the GEIS in saying, this is a  
22 remote risk, and concluding that was a sufficient  
23 response to it under NEPA.

24 JUDGE COLE: Mr. Lewis, just one or two  
25 questions. You were talking about new reg 1738, and

1 you said they had a boil down to within three feet of  
2 the top of the reactor, six to seven hours.

3 What were the conditions under which the  
4 boil down took place? Just the shut off of the heat  
5 system or what? Or the cooling system?

6 MR. LEWIS: Let me just check the  
7 reference. I think it's 3-35.

8 JUDGE COLE: What surprised me there was,  
9 at that rate of six to seven hours to get down to  
10 within three feet of the top of the pool, you'd have  
11 the tank drained in 16 hours. That seemed to be  
12 pretty quick.

13 MR. LEWIS: For a PDR, so on page 2-1, time  
14 to heat up and boil off, 145 hours, greater than six  
15 days, with a 60-day decay time. So this is - that  
16 accident happened 60 days after you had just  
17 discharged a fresh third of a core to cool, it was six  
18 days. That's page 2-1. What was I citing? Page 3-  
19 35.

20 JUDGE COLE: Did I mishear that when you  
21 said six to seven hours to get down to within three  
22 feet of the fuel?

23 MR. LEWIS: I hope I didn't say to six to  
24 seven hours. If I said six to seven hours, I meant  
25 six to seven days.

1 JUDGE COLE: Okay, thank you.

2 MR. LEWIS: I apologize.

3 JUDGE COLE: Okay, thanks.

4 CHAIR YOUNG: Anything further from you?

5 MR. LEWIS: Just one closing remark.

6 The Massachusetts attorney general's  
7 standard of new information, we didn't discuss what is  
8 significant. Their standard of new information is, if  
9 it's not discussed in the EIS it's new. That  
10 basically means if a party thinks that there is  
11 anything that should be different in an EIS and it's  
12 not there, it's new. That's no test at all. That is  
13 certainly not a realistic test that judges, the  
14 sufficiency of an EIS against the knowledge of the  
15 agency that prepared it.

16 CHAIR YOUNG: Well, but isn't it sort of a  
17 broad statement also, to say that the GEIS - we have  
18 to assume that the GEIS covers every bit of extant  
19 knowledge at the time it was issued, and therefore it  
20 forecloses anything?

21 MR. LEWIS: I think there is a happy middle  
22 ground. I think in this case, though, where there is  
23 this plethora of studies, new reg 1353, all these  
24 Sandia reports, all of which are cited in the waste  
25 confidence decision, which are in turn incorporated

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1 into the GEIS, you need to see this knowledge base by  
2 the NRC in making the GEIS statement. The GEIS  
3 conclusion specifically states, we studied this for  
4 years. There have been numerous studies. And I  
5 referenced the waste confidence decision which goes  
6 back, and then cites all these decisions. You really  
7 do need to take that as the knowledge base and simply  
8 say, well, there is no explicit discussion of this  
9 partial burn scenario; it doesn't make the information  
10 new; and it certainly doesn't make it significant when  
11 the probability of getting to that point is 10 to the  
12 minus seven, 10 to the minus eight.

13 CHAIR YOUNG: Ms. Hollis? You've waited a  
14 little while.

15 MS. HOLLIS: Tough act to follow.

16 From the town of Plymouth's perspective,  
17 I think there are a number of questions that arise  
18 from the very intense and thoughtfully argued, I must  
19 say, substantively, on the factual and legal issues.

20 The one thing that is obvious to us is  
21 that there is continuous buildup in the spent fuel  
22 storage at the site. And barring a miracle it doesn't  
23 look like that is going to change in the foreseeable  
24 future, based on the totality of the political and  
25 other courses that are stalemated, almost stalemated.

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1                   So we have to deal, the town of Plymouth,  
2                   has to deal with the reality that the spent fuel pool,  
3                   as it is today, is going to change dramatically over  
4                   time; it's going to get a lot larger. And there is no  
5                   panacea to address that.

6                   It's something we have to live with. And  
7                   we're looking not at a decommissioning, which is the  
8                   underlying theme of the studies, as I understand them,  
9                   that have been undertaken in the past, but rather a  
10                  recommissioning, a relicensing, in which the spent  
11                  fuel pool continues to cohabitate with a fully  
12                  function reactor.

13                  And I must say, despite the very informed  
14                  discussion by counsel, it is not clear to us what is  
15                  the true relationship between the reactor and the  
16                  spent fuel pool? What is the interaction in the case  
17                  of an accident or a deliberate act of a reactor, major  
18                  reactor accident, or disaster, with the spent fuel  
19                  pool, and vice versa, and what if both of them  
20                  happened at the same time.

21                  And just factually it isn't at all  
22                  entirely clear.

23                  Also, returning to the fact that so much  
24                  fo this is based on a 1979 study, and understanding  
25                  that science in 1979 was strong, that's a long time

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1 ago. And the additional studies that have been  
2 undertaken, that have been reflected in these  
3 different Noreg (phonetic) numbers, I think it still  
4 doesn't tell a very cohesive story, looking at it from  
5 the outside in, just as the town of Plymouth here, and  
6 without an entourage of scientists and physicists and  
7 the other safety planners and analysts that are  
8 available to both the applicant and the NRC.

9 And to a much lesser extent, but  
10 nevertheless, relied upon by the Massachusetts  
11 attorney general, and adopted by Pilgrim Watch.

12 So we're looking at a situation where  
13 you've got an aging plant; you've got increasing spent  
14 fuel pool issues; you've got the events of September  
15 11th, 2001; and you've got a total package where  
16 things have changed.

17 And so you listen to this entire  
18 discussion, and I think the town of Plymouth remains  
19 concerned, in sort of a general angst sense listening.  
20 Nothing here today has allayed those concerns, and I  
21 think that there are legitimate issues which have been  
22 raised which look to us - looking again from a  
23 slightly different perspective, and from a not  
24 scientifically fully substantively backed perspective,  
25 but basically gathering information that we've been

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1 able to glean from the NRC so far, and this process so  
2 far, is that there are legitimate issues, particularly  
3 for those who have the plant right down the road, and  
4 those who are affected by it. Any accident would  
5 effectively, even if there was no immediate damage to  
6 life and property, it would probably obliterate the  
7 economy, the tourism economy, for a substantial  
8 period.

9 And these are concerns which are real. So  
10 we are more than interested; we are committed to  
11 finding out where we stand, and hope that the NRC will  
12 take full account of these considerations that have  
13 been raised.

14 The question arises, is there anything  
15 with respect to the GEIS and these category one  
16 issues, they almost seem like they've been handed down  
17 on a stone tablet, looking at it again from the  
18 outside in as a participant here in the capacity that  
19 we're in, a participant not a party.

20 And you have to ask yourself, is there any  
21 thing, any issue that would be so vitally important  
22 and so new that it would cause the category one issues  
23 to be affected and modified, and take these issues  
24 into account.

25 It really is the same issue that we

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1 discussed this morning, and if so, how do you get that  
2 into the category one issues?

3 So that's where we are, very in depth  
4 discussion, and obviously well argued all the way  
5 around. But we really look to the NRC to help us and  
6 guide us in this, because sitting here with the  
7 factual, inescapable factual situation that we have,  
8 these are the concerns that we have, and continue to  
9 have.

10 Thank you.

11 CHAIR YOUNG: We've got a half hour until  
12 we close at 5:00 o'clock today. We obviously are  
13 going to come back at tomorrow morning at 9:00 o'clock  
14 and continue.

15 I would like to hear from Pilgrim Watch on  
16 the SAMA issue. And before you started, I wanted to  
17 get out my copy of Turkey Point.

18 But before we do that, did anyone have  
19 anything to add at this point?

20 Ms. Curran?

21 MS. CURRAN: Yes, I would like to reply on  
22 a couple of points?

23 CHAIR YOUNG: Okay.

24 MS. CURRAN: I'll try to be as quick as I  
25 can.

1           The first one was a comparison that Ms.  
2           Uttal made between the ultimate conclusion of new reg  
3           1353 and new reg 1738, that they were similar.

4           There is no basis for a comparison there.  
5           It's a meaningless comparisons. New reg 1353 has some  
6           erroneous assumptions in it, that instantaneous  
7           complete loss of water was the most severe case; that  
8           aged fuel wouldn't burn. So that is a suspect study.

9           And then comparing it to the global  
10          conclusion of new reg 1738 that the likelihood of a  
11          pool fire in a decommissioning pool is low, there is  
12          no basis for comparing those numbers. I just wanted  
13          to point that out.

14          Mr. Lewis has said that Dr. Thompson's  
15          assumption that there was a 50 percent conditional  
16          probability of a pool fire in the case of reactor  
17          accidents was pure speculation - that is absolutely  
18          not the case.

19          And it is clear from Dr. Thompson's report  
20          that he was relying on an agreement, a factual  
21          agreement among the parties in the Harris case about  
22          what would be the situation if there was a fire in two  
23          of the pools, how that would affect the other two  
24          pools.

25          And he wasn't suggesting that there could

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1 be exactly that situation at Pilgrim; obviously not.  
2 But he was trying to see what would be a comparable  
3 situation to a reactor accident with a high level of  
4 radiation inside the building. And that would be  
5 comparable to a situation where there are four fuel  
6 pools, and two of them catch on fire and have a  
7 radiation release. That was the point of that.

8 All that is documented in his report.  
9 It's footnoted. The titles of the pieces of testimony  
10 are noted.

11 We have provided the quotations in our  
12 reply brief for you.

13 So the idea that Dr. Thompson is just  
14 making this up and that he's way off base is totally  
15 without foundation.

16 It was part of the case. It wasn't the  
17 entire case. It wasn't the main scenario that the  
18 board required us to look at. But it was something  
19 that was discussed by the experts, and agreed upon by  
20 them. And it was reasonable of him to rely on that,  
21 and he didn't even use the same assumption. The  
22 assumption that the parties used in the Harris case  
23 was 100 percent probability, and Dr. Thompson used the  
24 50 percent estimate, which is not conservative.

25 MS. UTTAL: Judge, Ms. Curran or Dr.

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1 Thompson I believe is misstating what happened in the  
2 Sharon Harris case.

3 MS. CURRAN: Well, the documents speak for  
4 themselves. We quoted -

5 MS. UTTAL: Well, there's only partially  
6 available documents. The staff's documents have been  
7 removed and it's not publicly available any more.

8 But both Mr. Powell and I were on that  
9 case, and the staff did not agree with Dr. Thompson  
10 regarding the 50 percent conditional probability. It  
11 was a seven-step scenario, and -

12 CHAIR YOUNG: Excuse me, you just caught my  
13 attention by saying the documents are not available.

14 How can we determine what actually is  
15 available?

16 MS. UTTAL: I think that there is enough in  
17 the opinion written by the panel, Judge Voler  
18 (phonetic), Judge Leham (phonetic), and Judge Shaw,  
19 that gives the - will give this panel a flavor of what  
20 happened there.

21 Because in the seven-step scenario, Dr.  
22 Thompson reached a conclusion on the first step that  
23 there was a 50 percent probability that the first step  
24 would happen; that was the reactor accident. And then  
25 that didn't change from the first step to the seventh

1 step. It all remained the same.

2 And the staff did an analysis and came up  
3 with a much lower probability that the accident would  
4 happened. And the panel found that the staff's  
5 assessment was the most reasonable one, and that Dr.  
6 Thompson had used simplistic reasonings on several  
7 steps and didn't buy what he said.

8 So for him to come here - for him to say  
9 in his report that the staff agreed with him about any  
10 of the probabilities in the 50 percent probability  
11 that the accident would occur is a misunderstanding,  
12 a misstatement, a misrepresentation of what happened  
13 in that case.

14 And I would ask the board to go back and  
15 read the opinion in the case.

16 CHAIR YOUNG: Well, there is. Is there  
17 anything else that you were relying on that you wanted  
18 us to -

19 MS. CURRAN: Well, first of all, I would  
20 just like to point out that what was said that Dr.  
21 Thompson relied on was not the subject of the board's  
22 opinion, and so you will not see it in the opinion.

23 And if you would like a copy of Dr.  
24 Parry's (phonetic) testimony, I can provide that to  
25 you. But this is misleading to suggest that the

1 board's decision is going to give you the answer about  
2 this particular subject.

3 That is found in the testimony of the NRC  
4 staff witness, which we have quoted at page 26 of our  
5 reply. And I will read you the sentence that I copied  
6 from the NRC staff's testimony.

7 CHAIR YOUNG: Hold on one second. We'll  
8 get to the right document. Reply to the Entergy or  
9 the staff?

10 MS. CURRAN: This was NRC staff testimony.

11 CHAIR YOUNG: But is it our reply to both.

12 MS. CURRAN: Page 26.

13 CHAIR YOUNG: Page 26.

14 MS. CURRAN: There's quote. And the key  
15 sentence - it's a long quote, but the key sentence -  
16 there's two of them.

17 However, there will be fuel in pools A and  
18 B. Remember, there's four pools in the Harris fuel  
19 building. However, there will be fuel in pools A and  
20 B that is less than five years old, and loss of water  
21 in pools A and B would almost certainly result in an  
22 exothermic reaction.

23 At that point it is not likely that  
24 cooling could be restored to pools C and D. In other  
25 words, if there is a fire, in pools A and B, such that

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1 there is a high level of radiation in the room, it is  
2 not likely that you will be able to restore water to  
3 pool C and D. Therefore, pool C and D will experience  
4 a fire.

5 We simply relied on what Dr. Parry said.

6 MS. UTTAL: Your Honor, Judge, what that  
7 was, and what she's reading from is the portion of Dr.  
8 Parry's testimony where the staff was explaining why  
9 they were giving the possibility of - this was already  
10 at the seventh step, where we've already discussed the  
11 other seven steps.

12 And it was the point at which we were  
13 discussing why we were going to give the seventh step  
14 a probability of one.

15 CHAIR YOUNG: The seventh step of the  
16 accident sequence that you're talking about?

17 MS. UTTAL: I wish I could remember the  
18 seven steps.

19 JUDGE COLE: You had a fire in pools A and  
20 B, and the probably of C and D going on fire was one.

21 MS. UTTAL: It was the fire, when the fire  
22 happened. And what the staff said basically, was you  
23 can't get to that fire. Everything - this was after  
24 everything had happened.

25 What the staff said before that, it was

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1 highly unlikely, or remote and speculative, or  
2 whatever words we used, that this is ever going to get  
3 there.

4 MS. CURRAN: Right, the staff said, and the  
5 company said, you are never going to get to that  
6 point. It's way too improbable.

7 And that was a plant that was designed  
8 very differently. So the board decided against us  
9 before it even got to this step. By that time they  
10 thought the probabilities were too low.

11 But it doesn't matter. That part of is  
12 irrelevant.

13 What's relevant is, they agreed that if  
14 there was a high level of radiation in the room as a  
15 result of a pool fire, then it would not be possible  
16 to restore water to the other pools.

17 And the comparison is, in a BWR accident  
18 if a reactor core accident has caused a high level of  
19 radiation, that it is reasonable to infer it will not  
20 be possible to restore water to the pool in that case.  
21 It is a valid comparison.

22 JUDGE TRIKOUROS: Let me understand  
23 something here about the comparison you're making.

24 Number one, events that could occur that  
25 would lead to a core melt in the reactor side do not

1 necessarily lead to a loss of spent fuel pool cooling  
2 on that side.

3 Those systems have different purposes.  
4 They're in different locations. There is no direct  
5 correlation unless you connect them somehow with some  
6 sort of an event that is common mode like your very  
7 large earthquake or something like that.

8 But given that you do assume the  
9 simultaneous failure of both the spent fuel pool side  
10 systems and the systems on the reactor side, and  
11 severe - and it's a severe accident on the reactor  
12 side, which leads to significant radiation inside the  
13 dry well, the dry well and the reactor building floor  
14 are not in direct communication. There is a  
15 containment between; the dry wall containment  
16 separates those two parts of the building. They are  
17 both in the building, but they are separated by  
18 containment.

19 So did anyone do the evaluation -  
20 presumably that containment leaks at a technical  
21 specification rate of a certain amount per day into  
22 the entire remainder of the building.

23 Did anyone do an evaluation to determine  
24 what the radiation would be on the spent fuel pool  
25 level? Is that something somebody actually looked at?

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1 MS. CURRAN: Well, Dr. Thompson in section  
2 six of his report looked at an illustrative scenario.

3 CHAIR YOUNG: What page?

4 MS. CURRAN: This is page 19, and I think  
5 I've already read the section from section six on page  
6 19, where he says that the high radiation field  
7 produced by a core melt accident could initiate or  
8 exacerbate an accident -

9 CHAIR YOUNG: You're reading on page 19?

10 MS. CURRAN: -- yeah - at the reactor by  
11 precluding the presence and functioning of operating  
12 personnel.

13 Oh, I see, a radiation field produced by  
14 a pool fire could preclude the presence and  
15 functioning of operating personnel. In other  
16 scenarios, a high radiation field produced by a core  
17 melt accident could initiate or exacerbate a pool fire  
18 scenario, again, by precluding the presence and  
19 functioning of operating personnel.

20 I think the question of whether the  
21 containment around the reactor would contain the  
22 radiation is an actual one that we'd need Dr.  
23 Thompson's testimony on that. But he's an experienced  
24 scientist who looked at this question and thought that  
25 the radiation would be in the building with the pool.

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1 He's not here today.

2 JUDGE TRIKOUROS: Now all of this has a  
3 likelihood that is within the realm of the numbers  
4 we're talking about to be considered under NEPA?

5 MS. CURRAN: Yes.

6 JUDGE TRIKOUROS: So a core melt sequence  
7 on the reactor side is something that - and I don't  
8 know, the numbers vary from plant to plant, and I  
9 don't know what they are for Pilgrim - but they are on  
10 the order of 10 to the minus six.

11 MS. CURRAN: Well, you have to look at the  
12 table in Dr. Thompson's - I think it's Table 6-1 - to  
13 see, this is his evidence -

14 CHAIR YOUNG: What page is it on?

15 MS. CURRAN: It's on page 49.

16 CHAIR YOUNG: And could you also address  
17 where in this accident sequence this - this use of the  
18 material from the Sharon Harris came in? Am I  
19 understanding the staff to be saying that the  
20 quotation from the NRC witness is misleading because  
21 it concerned the last step in an accident; the first  
22 six steps of which were all very low probability. So  
23 to take that and put it earlier in the sequence would  
24 change the outcome? Is that what you're saying?

25 MS. UTTAL: Absolutely. This was the staff

1 - the staff just assumed the seventh step because they  
2 never got there. But they just assumed that it would  
3 have a one probability for purposes of this analysis.  
4 They didn't have to reach it.

5 MS. CURRAN: Well, you can read - it's  
6 important to read what is said by the witness.  
7 Because he has a reason for making that assumption.

8 And Dr. Thompson didn't put that - didn't  
9 stage that step in the accident into the wrong part of  
10 the accident. When the board, if you look at the  
11 board's decision it went through, and it asked the  
12 parties to do this, too, to go through every step of  
13 the accident, and for each step we were supposed to  
14 give a probability estimate, and then you add them up  
15 and come up with the total.

16 Now CP&L and the staff blended a few of  
17 the steps, and we went through each one separately.

18 But one of the steps they didn't blend  
19 together was the step of, if there is a fire in pools  
20 A and B, will there be a fire in pool C and D? And  
21 they said, yes, that is certain to occur. And that is  
22 in the passage that we quoted. That's how they did  
23 this in the CP&L case. They went step by step.

24 And so the question of, what is the  
25 probability of some other step, or what's the total

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1 probability, is irrelevant. What's relevant here is  
2 if you take one step that's comparable to the  
3 situation that we have here, and you can make an  
4 analogy, is that something that can be relied on.

5 CHAIR YOUNG: So what you're doing is,  
6 you're comparing the given of the fire in pools A and  
7 B with the accident and release from the reactor.

8 MS. CURRAN: Yes.

9 CHAIR YOUNG: And you're halving that,  
10 halving the probability of one.

11 MS. CURRAN: Well we actually used 50  
12 percent.

13 CHAIR YOUNG: That's what I mean, cutting  
14 it in off.

15 MS. UTTAL: Judge, we strong disagree with  
16 her. Because it is misstating what happened.

17 CHAIR YOUNG: We understand.

18 MS. UTTAL: And you just have to look at  
19 this chart that the board prepared at the end of the  
20 Sharon Harris case to see what kind of analysis-was  
21 done.

22 Where Dr. Thompson just analyzed the first  
23 step. And then for each step, although he said he  
24 analyzed it, he came up with the same figure:  
25 probability of one. Probability of one that step

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1 number three is going to happen; probability of one  
2 that step four is going to happen; probability of one  
3 that step five is going to happen.

4 CHAIR YOUNG: Okay, we've got about 10 more  
5 minutes. I think we're going to start on the SAMA  
6 first thing in the morning.

7 But see if we can just quickly bring this  
8 together. We understand that the staff is saying that  
9 Dr. Thompson misused, misinterpreted and misused, the  
10 quotation from the staff that's on page 26 of the  
11 attorney general's reply.

12 And we are referring to page 20 of  
13 Thompson's report.

14 Now, what would you like to add?

15 MR. LEWIS: Just explain what the two  
16 scenarios are.

17 Dr. Thompson says that given a release  
18 from the reactor there is a 50 percent probability of  
19 a spent fuel pool fire.

20 CHAIR YOUNG: Right.

21 MR. LEWIS: What that means is if there is  
22 a severe accident and a release from the reactor, in  
23 that 50 percent probability is the assumption that  
24 spent fuel poor cooling fails; that your multiple  
25 means of make up through your condensate pumps fails,

1 and that for over six days you can do nothing to  
2 restore that.

3 That all has to be a conditional  
4 probability fo 50 percent. Harris says nothing about  
5 that. The Harris case says, you've got four pools.  
6 They've all boiled down. They've all lost spent fuel  
7 pool cooling. You haven't been able to get them for  
8 the entire time, the water has got it, both, two  
9 ignite; what's the probability that the next two  
10 ignite.

11 So in there there is not probability about  
12 spent fuel pool cooling failing, or the inability to  
13 provide makeup or the inability to make an entry.  
14 It's already got to the point where both pools are  
15 boiled down, one ignites - two ignite, plus the  
16 probability that the other ignites.

17 It's just apples and oranges, pure and  
18 simple.

19 MS. CURRAN: I'd like to respond to that  
20 very quickly and then move on.

21 CHAIR YOUNG: Well, just very quickly, and  
22 then we'll let Ms. Bartlett say something quickly.  
23 And then we are going to take a break before the  
24 limited appearance statements.

25 MS. CURRAN: Just a couple of small points.

1 Dr. Thompson assumed that in a severe  
2 accident the functions of makeup water, et cetera,  
3 would be interrupted. And he says in his report on  
4 page 19, many core melts scenarios would involve the  
5 interruption of cooling the pool. This is a severe  
6 accident and earthquake where these functions are  
7 interrupted, stopped. Same situation that we were  
8 analyzing in Harris.

9 Another point is, there was - and I guess  
10 it gets back to what Mr. Lewis' long argument was  
11 really testifying on the merits as to why Dr.  
12 Thompson's analysis, he has lots of ideas as to why  
13 there would be systems that would compensate for the  
14 accident, but that the problem is, there hasn't been  
15 any kind of analysis, a technical analysis by  
16 scientists, to look at that.

17 And what we're here saying to the board  
18 is, there is enough information available to warrant  
19 that kind of analysis. And it's got to be more than  
20 Mr. Lewis telling us what he thinks would happen, or  
21 what is in the FSAR. We need an EIS by the NRC.

22 CHAIR YOUNG: One issue that I think has  
23 been pointed up here, and I think you were  
24 interrupted, is whether their reliance on the staff's  
25 testimony in the Harris case was a legitimate

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1 comparison. And obviously we'll go back and read  
2 those.

3 If you'd like to submit the testimony that  
4 would be fine.

5 MS. CURRAN: We'd be glad to send that in.  
6 We have it, and we'll send it to you.

7 CHAIR YOUNG: Okay, so that's the second  
8 thing. The first thing, I think the parties were  
9 going to give us cases on the waiver standard.

10 MS. CURRAN: And I had just one more thing,  
11 going back to his discussion of the waste confidence  
12 rule, and all the accidents that were looked at, it  
13 gets back to the fact that the waste confidence rule  
14 relied on new reg 1353. And I just want to emphasize  
15 on page 38481, middle column, it says: It should be  
16 noted that for a zircaloid (phonetic) cladding fire in  
17 a spent fuel storage pool, an earthquake or other  
18 event causing a major loss of cooling water would have  
19 to occur within two years after operation of a PWR or  
20 six months after operation of a BWR. In other words,  
21 you've got to have a total loss of water, and you've  
22 got to have it relatively soon after the fuel has been  
23 put into the pool.

24 And that's a really different situation  
25 that was looked at in new reg 1738.

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1 CHAIR YOUNG: Just quickly, where were you  
2 reading from?

3 MS. CURRAN: I was reading from the middle  
4 column of page 38481 of the waste confidence rule  
5 which is 55 Federal Register 38474 1990. And that's  
6 all.

7 CHAIR YOUNG: Ms. Bartlett.

8 MS. BARTLETT: Yes, I just want to  
9 reiterate what the AG office was saying just now.

10 Most of this discussion has been  
11 concerning the merits of the contentions. And we as  
12 petitioners did not come here today to defend the  
13 merits of the contentions, because this is not a  
14 hearing yet.

15 We were meant to bring forward a brief  
16 explanation of the basis; a concise statement of the  
17 alleged facts - so whether they're exactly true, or  
18 whether Mr. Lewis thinks they're true, or what is not  
19 the issue today.

20 And I understand that in terms of trying  
21 to figure out whether there's new and significant  
22 information being brought forward, you need to go into  
23 the bases a little bit more.

24 But I think you can take a qualitative  
25 look at the new and significant information. I don't

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1 think we need to go into the substance to the degree  
2 that we're doing right now.

3 Both the attorney general's office and  
4 Pilgrim Watch was saying that further analysis is  
5 required. So it would be crazy for us to be required  
6 to prove the results of that analysis. It would not  
7 make sense at this stage.

8 So I guess that's basically all I have to  
9 say about this discussion.

10 CHAIR YOUNG: All right. Did you have  
11 something?

12 JUDGE TRIKOUROS: I just wanted to say that  
13 it has been difficult for us to try to find a balance  
14 between not going into the technical details and  
15 looking at the merits, and trying to stay away from  
16 the details, but still be able to make a determination  
17 as to the validity of the complaint.

18 MS. BARTLETT: But it's a little unfair  
19 with the attorney general not having their expert here  
20 to have detailed questions about what the expert was  
21 relying on in his report. I understand your balancing  
22 act.

23 JUDGE TRIKOUROS: There was an enormous  
24 amount of technical discussion that did not take  
25 place.

1 CHAIR YOUNG: Well, I'd just say, as the  
2 lawyer member of the board, I really appreciate  
3 everyone's contributions to the discussion, and  
4 patience, sort of wading through some very complex and  
5 difficult issues.

6 And I think part of our job is making sure  
7 we understand what all the parties are saying, and  
8 then we will go back to our office and deliberate on  
9 all the arguments that have been made, and try to  
10 reach the decision that is called for under the law,  
11 and regulations.

12 So thank you all. I've been personally  
13 impressed by the quality of the presentations, in this  
14 case by all counsel, and we appreciate that.

15 We will adjourn at this time, and come  
16 back tomorrow morning at 9:00 o'clock. And we'll deal  
17 with the SAMA issue first thing.

18 Then I don't really know whether we have  
19 anything left on this contention any more. I had  
20 written down materiality and the dispute issue.

21 If anyone has anything else to say on  
22 that, be prepared to say it briefly. And then we'll  
23 move on fairly quickly, add that to Pilgrim Watch  
24 contention one.

25 MR. LEWIS: Before we go off the record,

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1 I'd like to pass out an REI response that was recently  
2 issued that has some bearing on Pilgrim Watch 3, and  
3 so I just wanted to make sure everybody is aware of  
4 it, and not spring it on people tomorrow.

5 CHAIR YOUNG: Okay, great. Thank you. You  
6 can pass that out now, I guess. And then we will come  
7 back, anyone who wishes, come back in half an hour,  
8 and we will open up the limited appearance session.

9 There is a sign-up sheet in the back which  
10 we will use to determine the order of who talks when  
11 everyone will have five minutes, and we will look  
12 forward to hearing from whoever is here.

13 Thank you.

14 (Whereupon at 5:00 p.m. the  
15 hearing in the above-entitled  
16 matter was adjourned)

17  
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CERTIFICATE

This is to certify that the attached proceedings  
before the United States Nuclear Regulatory Commission  
in the matter of:

Name of Proceeding: Entergy Nuclear Vermont  
Yankee, LLC and Entergy  
Nuclear Operations, Inc.

Oral Arguments

Docket Number: 50-293-LR and  
ASLBP No.06-848-02-LR

Location: Plymouth, MA

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