

# Official Transcript of Proceedings

## NUCLEAR REGULATORY COMMISSION

Title: Entergy Nuclear Generation Company  
Oral Arguments

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

Location: (telephone conference)

Date: Thursday, July 27, 2006

DOCKETED  
USNRC

July 31, 2006 (2:47pm)

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

Work Order No.: NRC-1171

Pages 457-493

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TEMPLATE = SECY - 032

SECY-02

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## ORAL ARGUMENTS ON CONTENTIONS

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IN THE MATTER OF:  
ENTERGY NUCLEAR GENERATION  
COMPANY AND ENTERGY  
NUCLEAR OPERATIONS, INC.  
(PILGRIM NUCLEAR POWER  
STATION)

## Teleconference

BEFORE:

NICHOLAS G. TRIKOUROS, Administrative Judge

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P R O C E E D I N G S

10:03 A.M.

JUDGE YOUNG: All right, let's go on the record.

This is Judge Young and Judge Colin, Judge Trikouros are also here, along with Jered Lindsay.

Let me just ask everyone to identify yourself. Let's start with the Staff.

MS. UTTAL: This is Susan Uttal, U-T-T-A-L. I'm representing the NRC Staff. I have with me Robert Palla, Alisha Williamson, Ram Subbaratnam and Robert Shaw from the Staff.

JUDGE YOUNG: If the Court Reporter needs any name spellings, we can do that at the end, I guess.

And Mr. Gaukler, you're going to be arguing on behalf of Entergy. Mr. Lewis is on the line, but at a remote location.

MR. GAUKLER: That's correct, Your Honor.

JUDGE YOUNG: Then Ms. Lampert, you're present for Pilgrim Watch.

MS. LAMPERT: That's correct. Not being a lawyer, I'll just have comments.

JUDGE YOUNG: And Ms. Curran and Mr. Brock are present for Massachusetts Attorney General.

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1 MS. CURRAN: That's right.

2 MR. BROCK: Yes, Your Honor.

3 JUDGE YOUNG: Did I leave anyone else?

4 MS. HOLLIS: This is Sheila Hollis.

5 JUDGE YOUNG: I'm sorry, thank you.  
6 Sheila Hollis.

7 MS. HOLLIS: And Your Honor, we may have  
8 comments, but we will not be participating in the  
9 argument per se.

10 JUDGE YOUNG: Okay, and actually, we may  
11 not need to spend too long this morning based on the  
12 information that was provided in the briefs and  
13 responses now.

14 I did have one question. We got Mr.  
15 Gaukler's letter and we got the Massachusetts Attorney  
16 General's response. We didn't get anything from the  
17 Staff and I wanted to make sure that was not a  
18 mistake.

19 MS. UTTAL: I'm sorry. I didn't file  
20 anything and I didn't think to send you a letter  
21 saying I wasn't going to file anything.

22 JUDGE YOUNG: Okay. Just wanted to make  
23 sure we weren't overlooking anything.

24 COURT REPORTER: I'm sorry. Who was that  
25 just speaking?

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1 JUDGE YOUNG: Susan Uttal just spoke right  
2 before me. Okay, we're going to be talking about the  
3 Massachusetts Attorney General contention and Pilgrim  
4 Watch contention four to the extent that we have any  
5 questions this morning.

6 Judge Trikouros, why don't you go ahead,  
7 first, with any questions?

8 JUDGE TRIKOUROS: Yes, I thank you very  
9 much for the responses. They were very good, very  
10 helpful.

11 I just want to make sure that I understand  
12 the big picture. So since we're here, I'll just  
13 pursue that.

14 When the Massachusetts Attorney General  
15 says that the failure probability would be much higher  
16 than evaluated in the reference documents, namely, the  
17 GEIS document, referenced in the GEIS document, NUREG  
18 1353, is the basis for that statement solely the  
19 argument that 0.25 conditional zirconium fire  
20 probability is too low?

21 MS. CURRAN: That's one of the bases.  
22 Another is that partial drainage is a more severe  
23 condition than complete and instantaneous drainage.

24 JUDGE TRIKOUROS: Right, but is that -- so  
25 let me understand, that is not included in what the

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1 quote unquote correct value for what the condition  
2 failure probability is? In other words, if the  
3 condition failure probability were one, that would  
4 encompass what you're saying now, right?

5 MS. CURRAN: Yes, I think so. You know,  
6 maybe I should have had Dr. Thompson on the phone to  
7 answer with technical precision, but you know, in  
8 essence, yes.

9 JUDGE TRIKOUROS: Okay.

10 MS. CURRAN: Whether he says it's one or  
11 something, close to one, that's slightly off one, but  
12 it's certainly approaching one.

13 JUDGE TRIKOUROS: And if it were not one,  
14 it would cover all possibilities. All right --

15 MS. CURRAN: I'm not sure I understand --  
16 yes, well, there are also -- all possibilities?

17 JUDGE TRIKOUROS: What I mean is that in  
18 the -- if the conditional probability of observed fire  
19 were one, given an uncover, then really whether it's  
20 partial uncover or a total uncover or anything in  
21 between, there's -- there would be a zirc. fire. So  
22 I just want to make sure we're on the same page with  
23 that.

24 MS. CURRAN: Yes. I think that what NUREG  
25 1738 said was that the NRC had not done enough

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1 technical work to say with confidence that it wasn't  
2 one.

3 JUDGE TRIKOUROS: Right.

4 MS. CURRAN: That's a little different.

5 JUDGE TRIKOUROS: Right, I understand. So  
6 however, if one assumes a value of one, then the  
7 conclusion of -- with respect to say the category one  
8 status of on-site spent fuel storage would rest with  
9 the determination of the probability of the fuel  
10 uncovering.

11 That's really where I want -- and I think  
12 that's kind of a given, but I just want to make sure  
13 that we're on the same page.

14 MS. CURRAN: I guess I'm not sure what the  
15 connection is. Category one is a category that rests  
16 on the conclusion that there's no significant impact.  
17 And so the category one finding depends on the  
18 conclusion that if there is uncovering of the fuel, it's  
19 that there is not a significant risk of a fire.

20 Is that --

21 So we are questioning the category one  
22 finding because we think there is significant evidence  
23 that that's wrong. And it's new evidence that has not  
24 been addressed in a previous EIS.

25 JUDGE TRIKOUROS: Okay, I really I don't

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1 want to get into a long discussion on this, but I  
2 think that the probability of the uncovering is somewhat  
3 important in this whole determination.

4 MS. CURRAN: Well, yes, that's true. And  
5 one part of our contention is the part that there's an  
6 analysis that reactor accidents that are considered  
7 within the realm of what should be analyzed in an EIS  
8 could cause uncovering of the fuel.

9 JUDGE TRIKOUROS: Right. Okay. Let's  
10 just move on then.

11 I only had one other area that I just  
12 wanted to get confirmed.

13 MS. CURRAN: This is Ms. Curran.

14 JUDGE TRIKOUROS: By the way, if anyone  
15 has a -- wants to chime in here, feel free to do that.

16 The next area that I wanted to just  
17 confirm was that if one looks at all of the events  
18 that were assumed, that might lead to an uncovering of  
19 the fuel, the argument that's being made by the  
20 Massachusetts Attorney General is that there's one  
21 event, if you will, or class of events, that was not  
22 considered, namely, the conditional probability of a  
23 zirc. fire given a reactor severe accident. Is that  
24 correct?

25 MS. CURRAN: Well, okay, neither the NRC

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1 hasn't looked in an EIS, hasn't looked at the  
2 conditional probability of a zirc. fire and also  
3 hasn't looked -- because the NRC has in various  
4 studies concluded that that is not a significant risk.  
5 The NRC hasn't looked at overall accident sequences  
6 that could lead to a fire because they basically, in  
7 a nutshell, said this really isn't going to happen.  
8 So we don't need to do the big analysis, the kind of  
9 analysis that say the NRC do a NUREG 1150 for reactor  
10 accidents.

11 We don't need to do that for pool  
12 accidents because if the fuel is uncovered, it's  
13 probably not going to burn.

14 I mean that's an oversimplification, but  
15 that's what's happened.

16 JUDGE TRIKOUROS: All right.

17 MS. LAMPERT: May I say something from  
18 Pilgrim Watch that also not looked at in the previous  
19 studies were in the new information that was mentioned  
20 in the Attorney General's brief was the consideration  
21 of acts of malice and also the interplay between the  
22 reactor and the spent fuel pool which is particularly  
23 important for both Vermont and Pilgrim because the  
24 spent fuel pool is located in the main building, in  
25 the attic, if you will. And both of those two factors

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1 were not looked at in the study that the EIS relied  
2 upon.

3 MR. GAUKLER: Your Honor, Paul Gaukler.  
4 I'd like to make the point that NUREG 1353 and 1738  
5 looked at the wide range of circumstances of events  
6 that could cause a spent fuel pool fire including  
7 drain down, etcetera.

8 The only thing not explicitly considered  
9 was the potential for a severe accident, reactor  
10 accident to cause a severe drain down and as we  
11 pointed out that was -- even if you want to assume  
12 that probability as following the Harris case, it  
13 would be very small and as set forth in the Harris  
14 case, the likelihood of a loss of cooling, even if you  
15 have a severe reactor accident is very small.

16 So therefore, basically the same  
17 probabilities that are set forth in NUREG 1353 and  
18 1738 would apply, even under those circumstances.

19 MS. CURRAN: This is Diane Curran. I'd  
20 just like to add something to that, because I think it  
21 illustrates earlier I was saying that the -- that one  
22 of the pieces of new information was that partial  
23 drying down is a more severe case than instantaneous  
24 drain down and Judge Trikouros asked isn't that just  
25 a part of the ultimate conclusion that the probability

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1 of a fire was .25.

2 But I think what Mr. Gaukler is saying,  
3 Judge, to this other point that I wanted to make which  
4 is that if you start out with the assumption that the  
5 most -- the thing you have to worry about is total and  
6 complete -- total and instantaneous drainage of the  
7 pool, then what the analyst is going to look at is  
8 very severe accidents that could cause that.

9 The analyst isn't going to look at  
10 accidents that are less severe and may be more  
11 probable, but that would only cause partial drainage.  
12 So that is a separate and independent problem with the  
13 analysis.

14 When you say okay, the worst thing that  
15 could happen to this pool is a very severe earthquake  
16 that would rupture the pool and cause it to drain  
17 immediately, and that's such a low probability, we  
18 don't need to worry about it. What the analysts would  
19 be overlooking is all the accidents that might lead to  
20 cracking of the pool which might be more probable  
21 accidents.

22 JUDGE TRIKOUROS: Okay.

23 MR. GAUKLER: I would make the point, Your  
24 Honor, as we set forth in our pleadings at length that  
25 1353 does consider partial drainage and that's clear

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1 from when they talk about the loss of cooling and  
2 makeup in NUREG 1353. And with respect to the case  
3 law that we've got, Your Honor, you are certainly free  
4 to go look at those NUREGs and make the determination  
5 yourself whether you believe that the NUREGs support  
6 the Attorney General's contention.

7 COURT REPORTER: I'm sorry. Who was that  
8 just speaking?

9 MR. GAUKLER: Paul Gaukler. Sorry.

10 MS. UTTAL: This is Susan Uttal. I just  
11 wanted to point out one thing about the Harris case  
12 and the holding letting the contention in. The  
13 Intervenorers were required to come up with a specific  
14 scenario that lead to the spent fuel fire. The  
15 specific reason why, what kind of accident there was  
16 in the reactor and the specific steps about how it  
17 occurred.

18 So even to me everything else, they  
19 haven't come up with a specific scenario and the  
20 contention is not admissible for that point.

21 JUDGE YOUNG: Let me just clarify  
22 something before we move on. You said that the  
23 interveners were required to come up with a scenario.  
24 Are you saying that at some point in the process that  
25 requirement was imposed or that the ruling encompassed

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1 a determination that their original contention had to  
2 include that?

3 MS. UTTAL: I believe that the ruling of  
4 the Board regarding the admission of the contention,  
5 not the final decision, talked about the fact that  
6 they needed a specific scenario leading up to the  
7 uncovering of the fuel in the fire. I think that is  
8 borne out by the Vermont Yankee case that preceded it,  
9 I think in the early 1990s.

10 MS. CURRAN: I'm sorry. Were you  
11 finished, Susan?

12 MS. UTTAL: Yes, I'm finished.

13 MS. CURRAN: Judge Young, this is Diane  
14 Curran. First of all, we do not think that to get  
15 admission of a contention one needs to present  
16 scenarios. But in any event, we did. It's just not  
17 correct to say that they we didn't provide a scenario.  
18 We did provide a scenario for illustrative purposes.  
19 The goal is to get a comprehensive analysis of the  
20 potential for a fuel pool fire including various  
21 causes such as severe accidents in the reactor,  
22 intentional attacks, accidents involving just the  
23 pool. But we did provide a sample, an example  
24 scenario. It's discussed in Dr. Thompson's report, so  
25 whether you know the fact is that if there is such a

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1 requirement, we did satisfy it.

2 MS. LAMPERT: And so did Pilgrim Watch.

3 JUDGE YOUNG: Okay, I do have one question  
4 and want to sort of switch gears here for a minute.  
5 This is Judge Young and my question will probably  
6 reflect the difference in our questions will probably  
7 reflect the technical judge versus legal judge  
8 background.

9 And I want to sort of preface my questions  
10 by speaking to an issue that seems to relate to  
11 various, the various sort of sub-issues involved in  
12 these contentions, one being whether an issue can be  
13 raised at the contention of admissability stage where  
14 in this, with these facts, without petitioning for a  
15 waiver or requesting a waiver or petitioning for  
16 rulemaking.

17 And then there's the interpretation of the  
18 new and significant, or the definition of that in the  
19 Reg Guide which refers to codification of issues.

20 And then third, there is the issue of the  
21 SAMAs and whether the rule on spent fuel pools, or  
22 storage of spent fuel and how that rule interacts with  
23 the rule on severe accidents and some SAMAs.

24 And I think in a way what we've got with  
25 all three of those situations is we've got rules that

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1 say, that contain certain words and then there are  
2 additional documents including case law and various  
3 guidance documents that have been posed or that  
4 provide what could be argued to be additional  
5 interpretations of what the actual rule means.

6 I guess that was, well that was part of  
7 the question I had on the part of the Reg Guide  
8 definition that referred to codification. In other  
9 words, we looked at the words of the rule. But my  
10 question has to do with the first issue which is  
11 whether issues can be litigated that would call into  
12 question category one subject based on asserted new  
13 and significant information.

14 And my question is this: on page five of  
15 Entergy's brief, Entergy refers to the SECY paper and  
16 the statement near the bottom of that page that says  
17 "litigation of environmental issues in a hearing will  
18 be limited to unbounded category 2 and category 3  
19 issues, now combined as category 2 issues unless the  
20 rule is suspended or waived."

21 Now, I don't find that language in the  
22 final Statement of Considerations and rule in the  
23 Federal Register, Sixth Volume 61. And I don't find  
24 it in the actual language. But I think as Entergy  
25 pointed out, the Commission approved that SECY

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1 document and that would be the kind of guidance  
2 document that could be looked to for some guidance on  
3 how a rule might be interpreted, for example.

4 In addition, in the Turkey Point case, the  
5 Commission discussed the need to request a waiver or  
6 more generally for more generic issues to petition for  
7 rulemaking. I also think there's some reference and  
8 I don't, I'm sorry I don't have it right in front of  
9 me. But there's some reference in one of these  
10 documents that seems to suggest that a rulemaking  
11 could cover -- actually, it may be in 61 Federal  
12 Register.

13 Yes, it is. It is on page 28, 470 under  
14 subsection A, about halfway down. It is talking about  
15 the changes, the major changes adopted as a result of  
16 the discussion with the CEQ. Under Section A,  
17 subsection A it says NRC's response to a comment  
18 regarding the applicability, the analysis of an impact  
19 caused by in the rule, to the plant in question may be  
20 a statement and explanation of its view that the  
21 analysis is adequate including, if applicable,  
22 consideration of the significance of new information.

23 It goes on to say if commenter is  
24 dissatisfied with such a response may file a petition  
25 for rulemaking under 10 CFR 2802. If the commenter is

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1       successful in persuading the Commission that the new  
2       information the new information does indicate that the  
3       analysis of an impact codified in the rule is  
4       incorrect in significant respect, and then there's the  
5       parenthesis, either in general or with respect to the  
6       particular plant, a rulemaking proceeding will be  
7       initiated.

8               Okay, that is a long preface to the  
9       question. Here's the question and it is for you, Ms.  
10      Curran, and anyone else who wants to add anything  
11      after she speaks.

12             In light of the information in the longer  
13      SECY document now provided by Entergy Counsel --

14             MS. CURRAN: Are you referring to SECY 93-  
15      032?

16             JUDGE YOUNG: Right, because the reference  
17      to litigation in a hearing will be limited to the  
18      category 2 and 3 issues unless the rule is suspended  
19      or waived. I don't think we had that when we were in  
20      oral argument before and I didn't find, and tell me if  
21      I'm wrong, reference to that in your reply brief. So  
22      can you address that in terms of what we should do  
23      with that, how we should consider that?

24             MS. CURRAN: Yes, and we did address it in  
25      our reply brief and we addressed it in the oral

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1 argument on September 6th. And I'm sorry I don't have  
2 the page numbers handy, but I'd just like to point out  
3 a couple of things and just ask the Board to go back  
4 and look at our reply, look at the discussion in the  
5 transcript of the argument.

6 JUDGE YOUNG: Let me ask --

7 MS. CURRAN: This was the reply on the  
8 contention, the admissability of the contention.

9 JUDGE YOUNG: Okay, well let me clarify a  
10 little bit then. You gave some regulatory history  
11 which was actually I don't think I had heard that  
12 before and it is very persuasive in some ways. But  
13 what I don't think we had is the quotation that  
14 Entergy provided on page five of the more recent, the  
15 July 21st brief.

16 Now maybe I missed that. I know when we  
17 tried to find 93-32, the SECY document, first we found  
18 a one page document, or a two page, and then we  
19 subsequently found the I guess 23-page document. And  
20 I know you had argued at oral argument that those were  
21 proposals of the staff and that the final rulemaking  
22 didn't include those.

23 And I think at oral argument, Entergy  
24 counsel had said well, that the Commission had  
25 approved the SECY document and so that represented the

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1 Commission's actual statement.

2 Now maybe we went over this and maybe just  
3 the fact that I had not at the point seen the longer  
4 SECY document approved by the Commission. But I guess  
5 to sort of focus the question a little bit, even  
6 though, I mean obviously it's better if rules contain  
7 all requirements and give notice to the public in that  
8 way and that sort of more clear way about what the  
9 standards are going to be with regard to any subject.

10 But as it was argued by Entergy at the  
11 oral argument, agencies can regulate through  
12 adjudication, so to speak. And the quotation provided  
13 on page 5 of the July 21st Entergy brief is something  
14 that I had at least had not focused on when we were  
15 together before.

16 So I guess what I would ask you to do is  
17 address how you would have us overlook the  
18 Commission's statement in Turkey Point on this and  
19 this quotation on page five of the brief.

20 MS. CURRAN: Okay. First of all, I think  
21 it is important that SECY 93-032 is discussed in the  
22 final rule. The SECY paper was written in 1993 and it  
23 may have been approved by the Commission, but it was  
24 apparently circulated to these other agencies and that  
25 if you look at page 28470 in the preamble to the final

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1 rule, which is dated 1996, June 5, 1996, the  
2 Commission talks about SECY 93-032 and how they have  
3 gone further.

4 They have, in a sense, reconsidered it.  
5 And so I think what's really important is to look at  
6 the preamble to the final rule. And in that the  
7 Commission talks about its requirement that license  
8 renewal applicants address if there is new information  
9 about category 1 impacts, that they have that new  
10 information has to be addressed in the ER. And we  
11 quote that language on page seven in our reply.

12 JUDGE YOUNG: Let me see if I can just  
13 sort of focus this a little bit further along. You do  
14 that and that is definitely persuasive on the issue of  
15 the responsibility of the applicant. What I'm not  
16 finding in the 1996 Federal Register final rule, or  
17 the preface to that, the Statement of Considerations,  
18 is much of anything with regard to adjudication.

19 MS. CURRAN: Right, and I agree with that,  
20 Judge Young.

21 You know, our situation, the Attorney  
22 General situation is that we are coming into a  
23 proceeding where it is -- our guide has to be the  
24 NRC's admissability regulation in 2.309F2. And so if  
25 you were -- it really -- what we need is we need to be

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1       able to raise this issue before the NRC.

2                   Whether it belongs before the Licensing  
3       Board or the Commission is not 100 percent clear. But  
4       we know that under NEPA we're entitled to raise it.  
5       You may rule that is not the appropriate for us to be.  
6       We think we had to file a contention before you that  
7       we had no other choice under 2.309F2. If we had not,  
8       we would have risked being told that you have not  
9       satisfied the regulations for raising your concern and  
10      you have missed your chance.

11                   Our main concern is getting this issue  
12      before the Agency in a timely way using the best  
13      possible interpretation we can make of these  
14      regulations. I agree with you that there isn't a  
15      statement in the 1996 preamble that says Category 1  
16      issues are subject to a hearing. But it certainly is  
17      clear from our perspective that if we want to  
18      challenge any NEPA issue, if we want to raise any NEPA  
19      issue in a license renewal case, there's only one door  
20      and that is to challenge the Environmental Report with  
21      a contention. That's what we've done.

22                   Now because it is a category 1 issue, you  
23      may say I think -- I think you have a basis to rule  
24      that the contention is admissible. But I think it is  
25      not 100 percent crystal clear. What is really

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1 important to us is to get the issue before the Agency  
2 in an appropriate and proper way. What we want is a  
3 ruling from you that we have done what we needed to do  
4 to raise this issue, that we gave a reasonable  
5 interpretation, used a reasonable interpretation of  
6 the Agency's regulations and that we have preserved  
7 our concern.

8 MR. BROCK: This is Matt Brock of Mass.  
9 AG. I'd just like to add to that. We do not think  
10 that we should have additional burdens put on us to  
11 get this issue before the Agency. We have in our  
12 filings indicated why we think we meet the contention  
13 standard for issues to address the Pilgrim Plant.

14 And whether or not this issue, the Agency  
15 determines this is "generic", applying to all plants.  
16 I'm looking at the quote in Entergy's filing on page  
17 five. It says "Petitioners with evidence that a  
18 generic finding is incorrect for all plants may  
19 petition the Commission".

20 We don't assume that burden nor do we  
21 think it is fair to put it on us whether the issues we  
22 are raising apply to "all plants or not". It applies  
23 to Pilgrim. We raised it. We think we meet the  
24 contention standard and we think it ought to be  
25 admitted on that basis.

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1 JUDGE YOUNG: Let me just follow up with  
2 one more question on this. Let's assume that for  
3 argument's sake that you meet the contention  
4 admissability standard. Then you have the Turkey  
5 Point case that says in addition to that, there's a  
6 requirement I think it is fairly longstanding in NRC  
7 law that you cannot challenge a rule. And the  
8 argument that has been made by the Massachusetts's  
9 Attorney General -- sort of essentially I'll  
10 paraphrase it to the effect that the language at  
11 5153C3iv, I think it is, sort of provides an exception  
12 to the category 1 rule which sort of distinguishes  
13 this situation from others, for example, that we're a  
14 rule that doesn't contain sort of an exception, so to  
15 speak, cannot be challenged.

16 MS. CURRAN: That is true, Judge Young.  
17 It doesn't appear that Turkey Point interpreted that  
18 regulation.

19 JUDGE YOUNG: But Turkey Point did talk  
20 about the possibility of new and significant  
21 information, I believe, and say that had to be raised  
22 through a request for waiver or a petition for  
23 rulemaking. And so we have the Commission's decision  
24 in Turkey Point.

25 Given the assumptions that I have just

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1       stated, what is your argument on how we should  
2       interpret and apply the Commission's Turkey Point  
3       decision.

4               MS. CURRAN: Well, as I said earlier, the  
5       Turkey Point decision did not interpret 10 CFR  
6       51.53c3iv. And so therefore we're asking the Board to  
7       rule on the admissability of our contention under that  
8       standard.

9               I had mentioned earlier that the Attorney  
10       General is planning to file a rulemaking petition, but  
11       Mr. Brock is right that we don't think we should have  
12       to do that. We think we have met the admissability  
13       standard and that our contention should be admitted.  
14       We're only doing it out of caution.

15              JUDGE YOUNG: Okay. Does anyone have  
16       anything to add on that sort of line of thought?

17              MS. HOLLIS: Your Honor, this is Sheila  
18       Hollis on behalf of Plymouth. Just sort of  
19       observationally here, it seems like if the issue is a  
20       legitimate issue that should be considered by the NRC  
21       whether in an individual plant setting or in a group  
22       of plants having similar characteristics for every  
23       plant in the country, however it gets to the NRC and  
24       however it is considered whether before the Licensing  
25       Board or by referral from the Licensing Board to the

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1 Commission or by the Commission in response to a  
2 rulemaking or on its own volition.

3 It seems like it is a significant enough  
4 issue that at some place in the very sophisticated  
5 arena of the NRC's technical capabilities, legal  
6 capabilities, that it is an issue that should be  
7 analyzed and understood before outright dismissal by  
8 the NRC.

9 I think that is our plea although we are  
10 not interveners in this case, just as an entity that  
11 is affected very directly by the existence of a  
12 nuclear plant in the confines of the town would seem  
13 just like logically that would make sense. I think  
14 Ms. Curran has identified whether it should be handled  
15 here in this context or in a broader context. In any  
16 event, it needs to be handled.

17 MS. CURRAN: Judge Young, I would like to  
18 maybe help offer something that might help. Whatever  
19 you -- you can sort of separate this into two issues.  
20 One is has the Attorney General filed an admissible  
21 contention under the standard in 2.309f2. And the  
22 other is what is the appropriate procedural way to  
23 resolve the Attorney General's concerns ultimately.  
24 It's important to us, we think it is essential that  
25 the Board rule on the admissability of the contention

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1 because that is legally the way that petitioners are  
2 required to raise their issues before the Commission.

3 If the Commission decides that this is not  
4 an issue that should be before the Licensing Board,  
5 that is a different question. But we are asking the  
6 Board to make a ruling on the admissability of our  
7 contention.

8 MS. UTTAL: Judge, can I say a few things?  
9 This is Susan Uttal.

10 JUDGE YOUNG: Go ahead.

11 MS. UTTAL: I don't think that the  
12 Commission could have been clearer either in the rule  
13 or in the Federal Register notice cited or in Turkey  
14 Point that the issues being raised by the  
15 Massachusetts Attorney General are not permitted to be  
16 raised in a hearing and without a waiver. To say that  
17 they didn't consider the regulation as cited by Ms.  
18 Curran would just obviate everything in the rulemaking  
19 and in Turkey Point because they're saying that if  
20 there is new and significant information that an  
21 intervener seeks to raise, they must bring it before  
22 the Commission either as a waiver or a rulemaking.

23 I don't know how else they could clearer.  
24 And regarding what has to be decided in this case, I  
25 don't think the Board can get around the fact that the

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1 information, the issues being raised are not  
2 appropriately brought before this Board. Therefore,  
3 it must be, the contention must be dismissed. There  
4 is absolutely not reason to rule on its admissability  
5 because on its face it should not be here.

6 MS. CURRAN: This is Diane Curran. You  
7 know, the citations that the Staff and Entergy give to  
8 the idea that we're not allowed to raise our  
9 contention under 5153c34 are all statements from SECY  
10 papers. There's statements in preambles to rules or  
11 in the EIS that are not put into regulations. It  
12 seems to us that our first obligation is to comply  
13 with the regulations and that suggestions in SECY  
14 papers are really trumped by the regulations  
15 themselves.

16 MS. UTTAL: But the rule itself in  
17 Appendix B and in the rule states that Category 1  
18 issues are not appropriate for a hearing and that a  
19 waiver has to be fought. So it is in the ruling.

20 MS. CURRAN: But in the rule there is also  
21 a way to consider new and significant information  
22 which is a very important requirement.

23 MS. UTTAL: New and significant  
24 information -- excuse me. It is in the explanation.  
25 It is written the Commission's hands that you have to

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1 go before the Commission.

2 MR. GAUKLER: Judge Young, Paul Gaukler  
3 here. I just would like to make a couple points.  
4 First, it is clearly a rule that the Massachusetts  
5 Attorney General is challenging in terms of that  
6 Category 1 issues are not to be litigated in NRC  
7 proceedings.

8 Furthermore, the process by which the  
9 Attorney General or anyone could bring this issue  
10 forward is set forth both in the SECY paper and in the  
11 Statement of Considerations of the rule, the portion  
12 of the Statement of Considerations that you  
13 identified, specifically discussed one type of  
14 situation where a commenter raises an issue and it  
15 sets forth the other process that if the commenter  
16 doesn't link the way the NRC staff resolves it, then  
17 it goes to the Commission by waiver or by petition for  
18 rulemaking.

19 MS. UTTAL: Let me interrupt you.

20 MR. GAUKLER: And as we set forth in our  
21 brief, the process, the standard process for treating  
22 the EIS, etc. is the same and must be applied in the  
23 adjudicatory proceeding.

24 MS. UTTAL: One more thing, Judge. If  
25 there was any question about it, it was all put to

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1 rest Turkey Point, where the Commission was specific  
2 that the issues have to raised before them.

3 MS. CURRAN: Judge Young, I just wanted to  
4 point out -- this is Diane Curran.

5 JUDGE YOUNG: Hold on for just a second.  
6 If I could just clarify before we move on. Ms. Uttal  
7 referred to something in the rule and then Mr. Gaukler  
8 referred to something in the Statement of  
9 Considerations and I want to make sure that I  
10 understand what you're referring to.

11 Ms. Uttal, when you said that there was a  
12 place in the rule that said that the hearing -- that  
13 in a hearing you couldn't consider --

14 MS. UTTAL: Judge, I misspoke. I meant to  
15 say in the Statement of Considerations. What it is in  
16 the rule is that Category 1 issues are not to be dealt  
17 with in the EIS.

18 JUDGE YOUNG: You're talking about the  
19 part that says "No such consideration is required for  
20 Category 1 issues in appendix B to subpart A of this  
21 part under C33".

22 Is that what you're talking about?

23 MS. UTTAL: Yes, I believe so.

24 JUDGE YOUNG: Okay, and then the next  
25 question was and I'll go ahead and address it to you

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1 since you just now said it was in the Statement of  
2 Considerations was what you and Mr. Gaukler are  
3 referring to there -- the reason I'm asking is because  
4 I think what Mr. Gaukler may have been saying is that  
5 all the discussion about what happens in the EIS  
6 process should be applied to the hearing process  
7 procedurally, that the same procedure is followed  
8 which I guess my only question there is that in the  
9 SECY paper, and I think there was also an earlier  
10 transcript of a meeting with the Commission and its  
11 lawyer at the time in which the Commission asked  
12 "Well, what happens with regard to hearings". And  
13 then the SECY paper makes a specific reference to  
14 hearings and the Statement of Considerations doesn't  
15 seem to make a specific reference to hearings unless  
16 I'm missing something.

17 What I want to hear from you is am I  
18 missing something? Is there a specific reference that  
19 I'm not finding and, if so, can you point me to the  
20 place?

21 MR. GAUKLER: Judge Young, I will speak  
22 for myself. Paul Gaukler here. I was referring to  
23 the points that you make on page five of the brief  
24 where specifically we refer to I believe the same  
25 portion of the Statement of Considerations that you

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1 just read us in terms of what a petitioner, or  
2 commenter, must do with respect to a comment that  
3 provides new and significant information.

4 JUDGE YOUNG: Okay, so what page? On page  
5 28470, there's reference to commenters in the EIS  
6 process. What I'm trying to find is are you saying  
7 that there's some specific reference to the  
8 adjudication hearing context in the Statement of  
9 Considerations? If there is, I'd appreciate being  
10 pointed to it.

11 MR. GAUKLER: I'm not saying that, Your  
12 Honor. What I'm saying is they set forth clearly the  
13 process for EIS and as set forth in the case law we  
14 cite in our brief the same process must be applied to  
15 the adjudicatory process.

16 JUDGE YOUNG: And Ms. Uttal, are you  
17 finding something there that I missed?

18 MS. UTTAL: No, I'm reading through the  
19 Statement of Considerations now. But I think that the  
20 question -- I have a discussion of it in my initial  
21 response and I believe that if you look at the  
22 Statement of Considerations and what was said in  
23 Turkey Point, it's clear that the same process that is  
24 laid out in the Statement of Considerations is  
25 applicable to the hearing process as Mr. Gaukler just

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1 pointed out.

2 JUDGE YOUNG: Do you know, you may not  
3 know, but do you know why the more specific reference  
4 to hearings was not included in the Statement of  
5 Considerations and how we should interpret that?

6 MS. UTTAL: I do not know why it was not  
7 included, but it was certainly made clear in Turkey  
8 Point by the Commission.

9 JUDGE YOUNG: Okay. Anything else on this  
10 issue? We appreciate your filing these additional  
11 briefs and being available this morning to answer our  
12 questions. We have one final thing, or Judge  
13 Trikouros has one final thing, a statement that he  
14 would like to make before we adjourn. Am I cutting  
15 anybody off? Okay, go ahead.

16 JUDGE TRIKOUROS: Yes, I would like to  
17 read a disclosure statement into the record. I'm  
18 doing this --

19 MS. LAMPERT: Who is speaking, please?

20 JUDGE TRIKOUROS: This is Judge Trikouros.

21 MS. LAMPERT: Thank you.

22 JUDGE TRIKOUROS: I would like to read the  
23 disclosure statement into the record and the reason  
24 I'm doing this is because specifically because both  
25 the Massachusetts Attorney General and Pilgrim Watch

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1 reference the National Academy of Sciences report.  
2 And in my career, I've had an intersection with that  
3 report and I wrote this statement with regard to that.  
4 So I'll just proceed to read it.

5 The disclosure statement of Judge Nicholas  
6 Trikouros regarding the Pilgrim License Renewal  
7 Application. I'm placing this in the record of  
8 Pilgrim Boiling Water License Renewal Proceeding in  
9 order to provide full disclosure of certain  
10 information that may be perceived to be a conflict of  
11 interest in this proceeding.

12 Early in 2004, Panlyon Technologies of  
13 which I was a principal, was commissioned by Entergy  
14 Northeast to provide best estimates separate effects  
15 of valuation of the time available for recovery action  
16 given the loss of coolant from potential malicious  
17 acts in an Entergy-owned pressurized water spent fuel  
18 pool.

19 Scenarios considered included various  
20 degrees of partial uncovering of spent fuel as well as  
21 complete drainage of the pool. While I was not the  
22 principal investigator, I did provide a management  
23 overview of the project and was consulted regarding  
24 modeling assumptions and the viability of the results  
25 as they progressed. Work was completed in 2005.

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1           Entergy provided preliminary results from  
2           this work in a presentation to the National Academy of  
3           Sciences in Washington, D.C. on May 10, 2004, in which  
4           I participated as one of several presenters. I have  
5           had no other communications with the National Academy  
6           prior to or since that day.

7           As it turned out, statements regarding  
8           these presentations were included in support of the  
9           findings in Section 3 of the subsequent NAS report  
10          entitled "Safety and Security of Commercial Spent  
11          Nuclear Fuel Storage: Public Report" which has been  
12          referenced in the contentions of the Massachusetts  
13          Attorney General and Pilgrim Watch in this case.

14          I've evaluated the impact of my  
15          involvement in the technical effort described above  
16          and I have concluded that a reasonable person knowing  
17          all of the relevant facts and circumstances about my  
18          work for Entergy would have no reasonable basis to  
19          question my impartiality in this case.

20          The work was not associated with the  
21          Pilgrim Nuclear Plant nor with any other boiling water  
22          reactor. The study was performed in an independent  
23          manner using a commonly accepted methodology. We had  
24          complete freedom to choose the methodology, the  
25          modeling inputs, and the analysis assumptions. At

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1       Entergy's request, the final documentation of this  
2       work was provided to the NRC staff.

3               This was just one of many technical tasks  
4       regarding spent fuel pool pooling that I have been  
5       associated with throughout my career. The background  
6       understanding that brings my current adjudicatory role  
7       was generated in part by carrying out consulting work  
8       for more than a dozen clients in the nuclear industry,  
9       including Entergy.

10              This work put me in a better position to  
11       fulfill one of the responsibilities as a Licensing  
12       Board Judge, i.e. to review and to question the  
13       material presented from a knowledgeable, technical  
14       perspective. The above circumstances will not affect  
15       my impartiality or independence of judgement in this  
16       case, but I have concluded that disclosure was  
17       necessary to avoid the possibility of any  
18       misunderstanding or misperception.

19              JUDGE YOUNG: All right.

20              MS. CURRAN: May I ask a question? This  
21       is Diane Curran. Judge Trikouros, are you going to  
22       send that statement out to the parties? I would  
23       appreciate it because I don't know when the transcript  
24       is going to be available.

25              JUDGE TRIKOUROS: Sure, I have no problem

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1 with it.

2 MS. CURRAN: Thank you.

3 JUDGE YOUNG: Okay. If there is nothing  
4 else, again we appreciate you making yourselves  
5 available today and we'll be issuing a decision  
6 containing our ruling as soon as possible and is there  
7 anything else? Thank you, I think that concludes this  
8 conference unless anyone else has anything else?  
9 Thank you very much.

10 (Whereupon, at 10:58 a.m., the  
11 teleconference was concluded.)  
12  
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CERTIFICATE

This is to certify that the attached proceedings  
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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: via teleconference

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



Eric Hendrixson  
Official Reporter  
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