

# Official Transcript of Proceedings

## NUCLEAR REGULATORY COMMISSION

Title: Vermont Yankee Nuclear Power Station

Docket Number: 50-271-LR

Location: Brattleboro, Vermont

Date: Tuesday, August 1, 2006

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

\* \* \* \* \*

ATOMIC SAFETY AND LICENSING BOARD PANEL

ORAL ARGUMENTS

\* \* \* \* \*

\_\_\_\_\_  
IN THE MATTER OF:                    ||  
ENTERGY NUCLEAR VERMONT            ||  
YANKEE, LLC, and ENTERGY            ||  
NUCLEAR OPERATIONS, INC.            ||  
(Vermont Yankee Nuclear            ||  
Power Station.)                        ||  
\_\_\_\_\_

Docket No. 50-271-LR

Tuesday,  
August 1, 2006  
Brattleboro, Vermont

The above-entitled matter came on for oral  
argument, pursuant to notice, at 8:00 a.m., Alex S.  
Karlín, Chair, presiding.

BEFORE:

- ALEX S. KARLIN, Chair
- THOMAS S. ELLEMAN, Administrative Judge
- RICHARD E. WARDWELL, Administrative Judge

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18                   Marcia Carpentier, Law Clerk

19                   Jonathan Rund, Law Clerk

20                   Karen Valloch, Administrative Assistant

21                   Cynthia Harbaugh, Security

22                   Diane Screnci, Public Affairs

23

24

25

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## I N D E X

Call to Order, Opening Remarks and Introductions	46
Opening Statements:	
Anthony Z. Roisman, Esq. on behalf of the State of Vermont	63
Matthew Brock, Esq. and Diane Curran, Esq. on behalf of the State of Massachusetts Attorney General	67
Karen Tyler, Esq. on behalf of New England Coalition	70
Dan MacArthur, on behalf of the Town of Marlboro	72
David R. Lewis, Esq. on behalf of Entergy	74
Steven C. Hamrick, Esq. on behalf of the NRC Staff	76
Oral Argument of Contention 1 of the State of Massachusetts:	
Diane Curran, Esq. on behalf of the State of Massachusetts	79
David Lewis, Esq. on behalf of Entergy	93
Mitzi Young, Esq. on behalf of the NRC Staff	111
Rebuttal Argument of Contention 1 of the State of Massachusetts:	
Diane Curran, Esq. on behalf of the State of Massachusetts	130
Oral Argument of Contention 2 of the State of Vermont:	
Anthony Z. Roisman, Esq. on behalf of the State of Vermont	139
David R. Lewis, Esq. on behalf of Entergy	155
Steven Hamrick, Esq. on behalf of NRC Staff	164
Rebuttal Argument of Contention 2 of the State of Vermont:	
Anthony Z. Roisman, Esq. on behalf of the State of Vermont	172
Oral Argument of Contention 1 of the State of Vermont:	
Anthony Z. Roisman, Esq. on behalf of the State of Vermont	181
David Lewis, Esq., on behalf of Entergy	189
Steven C. Hamrick, Esq. on behalf of the NRC Staff	202

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Rebuttal Argument of Contention 1 of the State of  
Vermont:

Anthony Z. Roisman, Esq. on behalf of the State  
of Vermont 210

Oral Argument of Contention 3 of the State of Vermont:

Anthony Z. Roisman, Esq., on behalf of the State  
of Vermont 218

David Lewis, Esq., on behalf of Entergy 225

Steven C. Hamrick, Esq. on behalf of the  
NRC Staff 234

Rebuttal Argument of Contention 3 of the State of  
Vermont:

Anthony Z. Roisman, Esq., on behalf of the State  
of Vermont 239

Oral Argument of Contentions of the  
New England Coalition

Ronald Shems, Esq. 249

David Lewis, Esq. on behalf of Entergy 262

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P R O C E E D I N G S

9:02 a.m.

1  
2  
3 CHAIR KARLIN: Good morning, my name is  
4 Alex Karlin. I'm one of the Judges with the ASLBP and  
5 I'd like to call this meeting to order, this pre-  
6 hearing conference to order.

7 Is the microphone working? I'll try to  
8 get a little closer. Is that better? Okay.

9 I'd like to call this meeting of Vermont  
10 Yankee License Renewal, Atomic Safety and Licensing  
11 Board Prehearing Conference to order. This matter is  
12 in the U.S. Nuclear Regulatory Commission's Docket No.  
13 50-271-LR and ASLBP No. 684903LR. The LR stands for  
14 license renewal as opposed to uprate which is a  
15 separate proceeding as some of you are aware of.

16 Pursuant to a memorandum and order that we  
17 issued on July 18th, we're holding this meeting. That  
18 order was published in the Federal Register on July  
19 24th and lays out how we would like to proceed with  
20 this meeting and the sequence of the oral argument  
21 we'd like to hear.

22 For the record, today's date is August 1,  
23 2006 and we're located in the Brattleboro High School  
24 in Brattleboro, Vermont.

25 First, I'd like to introduce the Atomic

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1 Safety and Licensing Board. On my right is Dr.  
2 Richard Wardwell, a Ph.D. in Civil Engineering,  
3 specializing in geotech groundwater issues. Dr.  
4 Wardwell was formerly the chair of the Board of  
5 Environmental Protection of the State of Maine.

6 To my left is Dr. Thomas Elleman, Ph.D. in  
7 Physical Chemistry, formerly the head of the Nuclear  
8 Engineering Department of North Carolina State and  
9 formerly a Certified Health Physicist.

10 As I mentioned, my name is Alex Karlin.  
11 I'm a lawyer and one of the Judges here and I serve as  
12 the chair. Because I'm a lawyer, I serve as the chair  
13 for procedural issues.

14 Also, I'd like to introduce a few other  
15 people from the Atomic Safety and Licensing Board  
16 Panel. To our far right here are two lawyers who work  
17 for us. They are our law clerks. To the far right  
18 Marcia Carpentier and next to her is Jonathan Rund.  
19 They help us with many of the legal issues we have to  
20 work with here.

21 Also, we have Karen Valloch, who is in the  
22 back table and if anyone has any questions -- Karen,  
23 if you could raise your hand. She might be able to  
24 help us in logical questions if anyone has those.

25 I'd also like to thank the Brattleboro

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1 School District for making these facilities available.  
2 They seem to be quite good and hopefully if the air  
3 conditioning holds, we'll all be able to get through  
4 these two days here. Ms. Kathy Roleau was very  
5 helpful and Mr. Putnam is the building and maintenance  
6 manager who helped us with this.

7 I'm glad at least there were some people  
8 who were able to come out here today. I know it's a  
9 hot, summer day and I appreciate your interest in  
10 these proceedings.

11 At this point, perhaps we could ask the  
12 parties to introduce themselves, the counsel and who  
13 is here.

14 Maybe we could start with our far right  
15 here. If you could introduce yourself and anyone else  
16 in your party.

17 MR. SHEMS: This is Karen Tyler. My name  
18 is Ron Shems. We're with the law firm of Shems  
19 Dunkiel Kassel & Sounders of Burlington. We're  
20 representing the New England Coalition.

21 CHAIR KARLIN: Thank you. Are we picking  
22 that up? I think we -- are we?

23 (Microphone adjustments.)

24 MR. SHEMS: I'm sorry, I'll start over.

25 CHAIR KARLIN: Yes, please.

1 MR. SHEMS: To my left is Karen Tyler. My  
2 name is Ron Shems. We're both with the law firm of  
3 Shems Dunkiel Kassel & sounders in Burlington,  
4 Vermont. We're representing the New England  
5 Coalition. Our client representative for the New  
6 England Coalition is in the front row behind me.

7 CHAIR KARLIN: Good morning. Thank you,  
8 Mr. Shems.

9 MR. SHEMS: Thank you for having us.

10 CHAIR KARLIN: Welcome. Vermont?

11 MR. ROISMAN: Good morning, Mr. Chairman.  
12 My name is Anthony Roisman. I represent the  
13 Department of Public Service which is the official  
14 representative of the State of Vermont. With me is  
15 the Public Advocate for the Department of Public  
16 Service and the Nuclear Engineer, Sarah Hofman and  
17 Bill Sherman.

18 CHAIR KARLIN: Good morning, welcome.

19 MR. ROISMAN: Good morning.

20 CHAIR KARLIN: Massachusetts.

21 MS. CURRAN: Good morning. My name is  
22 Diane Curran. I'm here representing the Commonwealth  
23 of Massachusetts in the person of the Attorney  
24 General. With me today is Assistant Attorney General  
25 Matthew Brock on my right and our expert, Dr. Gordon

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1 Thompson on my left.

2 CHAIR KARLIN: Good morning, welcome.

3 MS. YOUNG: Good morning, my name is Mitzi  
4 Young representing the United States Nuclear  
5 Regulatory Commission Staff. With me on my right is  
6 my colleague, Steven Hamrick, also of the Office of  
7 the General Counsel and seated behind me is the  
8 plant's project manager, safety project manager, Mr.  
9 Jonathan Rowley. Seated beside him is Mr. Robert  
10 Palla, who is one of the technical experts for the  
11 Staff. And to the right of him is Mr. Richard Emch  
12 who is the environmental project manager for Vermont  
13 Yankee license renewal.

14 CHAIR KARLIN: Thank you, Ms. Young, good  
15 morning.

16 MR. LEWIS: Good morning, my name is David  
17 Lewis. I'm with the law firm of Pillsbury Winthrop  
18 Shaw Pittman. With me is Mr. Matias Travieso-Diaz,  
19 also from the same firm and we're representing Entergy  
20 Nuclear Vermont Yankee and Entergy Nuclear Operations,  
21 the Applicant for the renewed license in this  
22 proceeding.

23 CHAIR KARLIN: Great, good morning, Mr.  
24 Lewis.

25 I am not sure whether the Town of Marlboro

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1 has its representatives here? Yes, please. If you  
2 would perhaps come to one of the mics. We do want to  
3 acknowledge that you're here and will have a chance to  
4 speak.

5 MR. MacARTHUR: Thank you. My name is Dan  
6 MacArthur and I'm here representing the Town of  
7 Marlboro.

8 CHAIR KARLIN: Great, Mr. MacArthur, we're  
9 glad you're here.

10 Will Ms. Newton be here as well?

11 MR. MacARTHUR: No.

12 CHAIR KARLIN: Okay, so you'll be speaking  
13 for the Town of Marlboro. All right, fine.

14 If that's all right, perhaps he could  
15 share that table with you for at least the opening  
16 statement section. Great, thank you.

17 Okay, thank you for introducing  
18 yourselves. Now a few words of housekeeping and a  
19 little bit of introductory material before we start.  
20 Housekeeping matters, first turn off your cell phones,  
21 put them on vibrate and if you have any conversations,  
22 please take them outside, either cell phone or  
23 otherwise, out in the hall, please.

24 The media is welcome. I'm not sure  
25 whether any of their representatives are here. We

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1 think it's an excellent way to inform the public of  
2 what's going on and there are rules regarding using  
3 ambient light and that sort of thing and Ms. Valloch  
4 in the back has those regs, if you want to see them.  
5 But welcome to the media.

6 There will also be a transcript, just for  
7 the public to know, is being taken of this proceeding  
8 by Mr. Holland, off to our left here and that  
9 transcript will be made available on the NRC's public  
10 website in about two weeks probably. So a verbatim  
11 transcript and the public is welcome here, but will  
12 not get the opportunity to speak because only the  
13 parties, the litigants who have filed pleadings here  
14 today will have -- are going to speak on those  
15 pleadings.

16 For the benefit of the public and any  
17 media, I thought it would be useful to talk, as I  
18 always try to do, a little bit about the three points,  
19 the role of the Atomic Safety and Licensing Board, the  
20 history of this proceeding and the purpose of this  
21 proceeding. So with that, I will cover those three  
22 topics.

23 The nature and role of the Atomic Safety  
24 and Licensing Board, there's a handout in the back on  
25 the table where Ms. Valloch is sitting that explains

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1 a little bit of what the Board is about, but the  
2 basics are that the federal law, the Atomic Energy Act  
3 creates a Nuclear Regulatory Commission. There are  
4 five Commissioners on the NRC. They're appointed by  
5 the President, confirmed by the Senate. So the  
6 Commissioners have a large regulatory staff working  
7 for them, a large staff, several thousand  
8 professionals and they are represented here at this  
9 table, the NRC Staff. The Board is a third entity  
10 whose role is very different. The Atomic Safety and  
11 Licensing Board Judges are appointed, basically for  
12 life. We are not part of the Staff. We are not part  
13 of the Commissioners. We are asked and instructed and  
14 our responsibility is to hear cases that are brought  
15 before us by litigants, parties who raise questions  
16 and we try to address and rule on the legal and  
17 factual issues that come before us.

18 The only communications that we receive  
19 about the case in front of us is what's been filed by  
20 the parties. We don't sit and talk with the Staff  
21 about it. We don't sit and talk with the  
22 Commissioners about it. That's entirely prohibited.  
23 Nor do we talk with any of the other parties, the  
24 State of Vermont, State of Massachusetts. This is  
25 just an ex parte communication which is not

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1 permissible. We may say hello, good morning, nice  
2 weather, is there a nice restaurant in town, but  
3 beyond that, there's no discussion of the substance of  
4 the case and that's as it should be to keep us  
5 separate from the matter.

6 Ultimately, we'll have to render a  
7 decision on the matters that are brought before us and  
8 when we do if anyone is unhappy with that decision  
9 they can appeal it to the Commissioners. The  
10 Commissioners are an appellate body, as it were, who  
11 can overrule us if they want, but they don't talk with  
12 us about our ruling and we don't talk with them about  
13 it. We write our decision. We do our best and then  
14 it can be appealed and reversed, either by the  
15 Commission or by the Courts, if someone wants to  
16 appeal it even further.

17 I just want the public, the main point is  
18 the public to understand that when we talk about the  
19 NRC, there are really three entities to keep in mind  
20 for purposes of this proceeding. There are the five  
21 Commissioners. There is the NRC Staff. And then  
22 there is the Atomic Safety and Licensing Board and our  
23 Board is independent. The Commission can't hire us.  
24 They can't fire us. They can't give us a raise. They  
25 can't give us a performance review. There's very

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1 little they can do to us in terms of influencing our  
2 decisions. We call them as we see them and hopefully  
3 it's good enough and if it's not, you can appeal it to  
4 the Commission or the Courts.

5 A brief history of this proceeding, some  
6 of you may know more about it than we do, but I think  
7 it's worth summarizing that on January 25th of this  
8 year, Entergy filed an application to the NRC Staff  
9 for a renewal, a license renewal to extend the time  
10 period of its license for the Vermont Yankee Nuclear  
11 Power Station by 20 years, to go from 2012 to 2032, if  
12 it's granted by the Staff. The Staff is currently  
13 reviewing that application. They have technical  
14 people. They have legal people who are reviewing that  
15 application in detail.

16 In March, March 27th, the Commissioners  
17 issued a notice in the Federal Register saying --  
18 announcing that the application for the license  
19 renewal had been filed and giving any interested  
20 person 60 days within which to file a petition with  
21 contentions challenging or raising issues concerning  
22 the proposed license renewal.

23 So 60 days later, four entities filed  
24 requests, formal requests with the Commission and  
25 ultimately this Board, challenging the license

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1 renewal. Vermont Department of Public Service  
2 requested a hearing and raised three issues. New  
3 England Coalition filed its petition and has raised  
4 six contentions. Attorney General for the State of  
5 Massachusetts has one contention that they have filed.  
6 And the Town of Marlboro has also filed a letter which  
7 we will take to be a contention. So those are the  
8 four petitioners and we will hear from them today.

9 In addition, there's Entergy who is the  
10 Applicant and we will hear from them and the Staff  
11 also.

12 In order to deal with this dispute, the  
13 Commissioners set up this board and asked us to rule  
14 on it. We've read all the pleadings. They're  
15 voluminous and generally helpful and good. So we're  
16 going to try to hear arguments today on them.

17 Final point regarding history is just to  
18 recognize that this is not the uprate. Entergy has a  
19 separate proceeding where they've requested an uprate.  
20 That's been pending for a couple of years and that is  
21 not what we're dealing with here today.

22 The purpose of today's proceeding, third  
23 major point, is for the Board to decide whether any of  
24 the requests for hearing should be granted, whether or  
25 not the Petitioners, any of the four Petitioners have

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1 filed what's known as admissible contentions. We  
2 have, NRC has a regulation that we are bound to  
3 follow. It's 10 Code of Federal Regulation  
4 2.309(f)(i) and that provision 309(f)(i) has six  
5 criteria, six elements that every contention must meet  
6 and we've got to go through each contention and see  
7 whether they meet those six criteria.

8 The criteria include things like "provide  
9 a brief explanation of the basis for the contention."  
10 Another requirement is that the contention the  
11 Petitioner has to "provide a specific statement of law  
12 or fact to be raised or controverted." So we will be  
13 talking today and probing the Petitioners about each  
14 of their contentions and try to figure out whether  
15 they really met these requirements. And if they did,  
16 we will rule that the contention is admissible. And  
17 if they didn't, we are obliged to rule that the  
18 contention is not admissible.

19 After we hear the oral argument here  
20 today, we'll go back and we will issue a written  
21 decision or ruling. We won't rule today from the  
22 bench on these contentions because they're probably  
23 too complicated for us to do that at this point.

24 If we find that some of the contentions  
25 are admissible, admissible contentions, then we will

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1 schedule an evidentiary hearing to hear the  
2 contentions and people will put on evidence. That's  
3 more like your witnesses will testify. They may be  
4 examined or cross examined by the Board and we will  
5 have an actual trial in terms of evidentiary hearing.  
6 You're not going to see any witnesses testify today.  
7 This is just a day for the lawyers to argue about the  
8 admissability of the contention.

9 And so, as I said, one of the elements is  
10 the public doesn't, as in many of these proceedings,  
11 some of them held by the Staff, where the public gets  
12 to give a presentation, members of the public can  
13 speak, this is just for the litigants to argue about  
14 the admissibility of their contentions. But the  
15 public is entitled to file limited appearance  
16 statements, written limited appearance statements.  
17 And in our order that we sent out on July 18th laid  
18 out how you could do that and who you would send it  
19 to. You can send it by email. You can send it by  
20 letter. And there may be a session for oral limited  
21 appearance statements later, if contentions are  
22 admitted.

23 At this point, I'd like to ask my two  
24 colleagues up here if there's anything more they think  
25 we need to add or raise at this point?

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1 JUDGE ELLEMAN: No, sir.

2 JUDGE WARDWELL: That's fine.

3 CHAIR KARLIN: Okay. All right, before we  
4 start, I want to talk a few things about format and  
5 logistics. This next two days breaks down to the two  
6 main sort of segments. First, we'll hear opening  
7 statements or presentations by each of the four  
8 Petitioners by the Staff and by Entergy. I would  
9 propose that we go in the following order: Vermont,  
10 Massachusetts, NEC, Town of Marlboro, Entergy and then  
11 the Staff. Each one will get 10 minutes to give an  
12 uninterrupted opening statement to us.

13 Then we will turn to reviewing the  
14 admissability of individual contentions. As a general  
15 rule, we've allocated 45 minutes for each contention.  
16 Petitioner will get 20 minutes. Entergy will get 15  
17 and the Staff will get 10. For some contentions where  
18 we think we have more questions we have allocated a  
19 bit more time such as the Massachusetts contention.  
20 For some contentions where we don't have any questions  
21 such as the Town of Marlboro, we have not allocated  
22 time for that particular contention. We just don't  
23 have any questions. The purpose of the 45 minutes or  
24 hour is not to hear speeches from you all, but for us  
25 primarily to ask questions and if we don't have any

1 questions we just didn't schedule something.

2 The Law Clerk, Marcia Carpentier, will  
3 keep the time and we'll try to keep this relatively  
4 crisp. She'll give you a one minute warning and then  
5 she'll call time and then at that point, please finish  
6 your sentence and that will be the end of the  
7 presentation. We're going to try to keep it  
8 relatively crisp if we can.

9 The sequence of the hearing of the  
10 contentions or logic for what it's worth is that we  
11 thought that the State of Massachusetts has only one  
12 and they could get done and leave this morning if they  
13 want to go home. Same with the Vermont Department of  
14 Public Service. They have three and they might  
15 finish, hopefully finish up today and they might go  
16 home if they need to. NEC has six. We thought that  
17 would overlap over two days period, so we thought we  
18 would ask you to go essentially third on this. That  
19 was our sequence and particularly because we think the  
20 Massachusetts contention and the Vermont contention  
21 No. 2 are related. We want those to go in sequence.  
22 So that was our theory there.

23 There are some subjects which we really  
24 don't anticipate we will have any questions on and we  
25 would suggest you not spend any time on, unless we ask

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1 you a specific question. Those would include  
2 standing, motions to adopt contentions. We don't need  
3 to hear anything on that. Motions to strike portions  
4 of the replies, we don't need to hear anything on  
5 that. Vermont's motion under 274L of the Atomic  
6 Energy Act and the right to cross examination, we  
7 don't need to hear that. Selection of hearing  
8 procedures, inasmuch as no one has -- none of the  
9 Petitioners have spent a whole lot of time on any of  
10 that, we're not going to hear argument on that either.  
11 And the backfit petition of the State of  
12 Massachusetts, as we understand it, is not something  
13 they intend to be before us anyway, so we're not going  
14 to hear anything on that, unless we ask a specific  
15 question. We really don't need to focus on those.

16 Finally, I think we would note that on  
17 Friday afternoon at 2 p.m. Entergy filed some hundred  
18 pages of materials in a letter and submitted it for  
19 our information. We also note, I think it was Mr.  
20 Shems filed an objection in a letter form. We're  
21 going to strike that submission. We are not in the  
22 business of receiving FYI letters from any party with  
23 attachments of any length. If you've got something to  
24 say to us, file a motion, file a request for  
25 supplemental pleadings, file something formal. We are

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1 not here to receive FYI submissions.

2 We'd like to complete this by 3 p.m.  
3 tomorrow. We're not sure. We intend to go to 5 or  
4 maybe 6 this evening, depending on where we are and  
5 start tomorrow, I guess at 9.

6 At this point, I want to ask if the  
7 parties have any questions before we proceed to  
8 opening statements. But does any party or litigant  
9 have any urgent matter that needs to be raised at this  
10 point?

11 MR. BROCK: Judge Karlin, just for  
12 clarification, Massachusetts would like to divide its  
13 time --

14 JUDGE WARDWELL: Speak into the mic.  
15 There's a fair amount of white noise. Of course, I'm  
16 not speaking into the mic.

17 (Laughter.)

18 MR. BROCK: Is that coming through? Okay.  
19 Massachusetts would like to divide its time on the  
20 opening statement. I would make a few introductory  
21 comments and then turn to co-counsel, Attorney Curran  
22 to complete the opening statement if that is  
23 satisfactory to you?

24 CHAIR KARLIN: As a general rule, for any  
25 given matter or contention, only one attorney or

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1 representative to speak, but for the opening statement  
2 that's okay, so long as you're not breaking it into  
3 two parts. You're both going to do it sequentially?

4 MR. BROCK: That is correct, Your Honor.

5 CHAIR KARLIN: That will be fine. Ten  
6 minutes.

7 Okay, with that, let's see, what did we  
8 say? I think Vermont, Mr. Roisman, Ms. Hofman, 10  
9 minutes and we'll give you a one-minute warning before  
10 your time is up and then we'll call time.

11 OPENING STATEMENT OF ANTHONY Z. ROISMAN, ESQ.

12 ON BEHALF OF THE STATE OF VERMONT

13 MR. ROISMAN: Mr. Chairman, given the  
14 nature of the microphone, with your permission, I'd  
15 like to remain seated for my presentation, rather than  
16 holding a mic in my hand.

17 CHAIR KARLIN: Yes, please, go ahead.  
18 Everyone can remain seated.

19 MR. ROISMAN: Thank you. First, we'd like  
20 to welcome the Board to Vermont. Notwithstanding  
21 today's weather and the weather that's expected for  
22 tomorrow, it's still a beautiful state. We are proud  
23 of the natural beauty of this state and we'll be  
24 talking about that substantively as we discuss our  
25 second contention later on.

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1           This site that we're at is only a few  
2 miles from where the nuclear power plant sits on the  
3 banks of the Connecticut River, one of the most  
4 important and beautiful rivers in this nation. And it  
5 is, in part, because of our concern as representatives  
6 of the State of Vermont that Vermont Yankee is  
7 proposing to extend by 50 percent the time that it  
8 intends to use that site for a nuclear power plant and  
9 to extend indefinitely the time in which it intends to  
10 use that site for the storage of nuclear fuel that we  
11 are here today.

12           We are also here today because the  
13 principal concern of the state is that this Board and  
14 the Commission and the Staff have a full evidentiary  
15 record before they make this most important decision  
16 about this nuclear power plant.

17           Historically, when Vermont Yankee was  
18 proposed to be built in this state, it was a matter  
19 that was ultimately decided by the Vermont legislature  
20 and by a vote in which there was only a one vote  
21 majority of where Vermont Yankee was accepted by the  
22 state legislature as an acceptable proposal for the  
23 state. So the State of Vermont has always maintained  
24 a special interest in the Vermont Yankee plant. It's  
25 proud that the plant is here. It's proud of the

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1 record that the plant has exhibited. It is concerned  
2 that the plant maintain that level of integrity, if it  
3 is to be allowed to operate now at an uprated level of  
4 20 percent for an additional 50 percent of its life.

5 In order for the Board to have all the  
6 information, we have framed our contentions primarily  
7 within the framework of 2.309(f)(1)(iv) which provides  
8 in relevant part that if the Petitioner believes that  
9 the application fails to contain information on a  
10 relevant matter as required by law, the identification  
11 of each failure and the supporting reasons for the  
12 Petitioner's belief are the principal bases for the  
13 contention that is offered.

14 And as we go through our contentions,  
15 you'll see that each of them is addressed to the  
16 failure of the Applicant to provide relevant  
17 information; first, relevant information regarding new  
18 and significant information that bears on land use at  
19 this particular site. We are not raising a generic  
20 concern. We are raising a site-specific concern. How  
21 much longer beyond the proposed 20-year extension will  
22 the Vermont Yankee plant site be a nuclear site and  
23 will those impacts be on the surrounding land uses?

24 Secondly, we have been and we remain  
25 concerned about the security of the plant site. We

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1 were always concerned with it like all Americans after  
2 9/11. The level of that concern has been heightened  
3 significantly. And so one of our contentions is  
4 focused on the security question.

5 And finally, we are concerned that the  
6 long-term operation of this plant have the level of  
7 heightened maintenance that is mandated by the Nuclear  
8 Regulatory Commission for extending the life of  
9 facilities that were originally believed to have at  
10 most a 40-year useful life. And therefore, we have  
11 raised a contention regarding the failure of the  
12 Applicant to submit information as to how it will  
13 engage in the relevant maintenance activities for  
14 critical portions of the plant, particularly the  
15 concrete that surrounds the reactor containment.

16 Those are what our principal concerns are.  
17 Those are what our focuses will be. If the Board will  
18 allow at the end of the hearing an opportunity to  
19 close, I would like to reserve what time I have left  
20 for a closing statement at the end of the day  
21 tomorrow.

22 CHAIR KARLIN: We're not currently  
23 planning on closing statements.

24 MR. ROISMAN: Okay, well, I have nothing  
25 further to say in my opening.

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1 CHAIR KARLIN: We may change our minds.

2 MR. ROISMAN: You can add that on to some  
3 other time of mine, if you wish.

4 CHAIR KARLIN: All right.

5 MR. ROISMAN: Thank you.

6 CHAIR KARLIN: Although we're not going to  
7 allow reservation of time between different  
8 contentions.

9 MR. ROISMAN: I understand.

10 CHAIR KARLIN: State of Massachusetts, Ms.  
11 Curran? Mr. Brock?

12 OPENING STATEMENT OF MATTHEW BROCK, ESQ.

13 ON BEHALF OF THE STATE OF MASSACHUSETTS

14 ATTORNEY GENERAL

15 MR. BROCK: Yes, thank you, members of the  
16 Board. My name is Matt Brock, an Assistant Attorney  
17 General for the Commonwealth of Massachusetts. The  
18 Vermont Yankee plant is located in close proximity to  
19 the Massachusetts border and that is why the  
20 Massachusetts Attorney General has filed a contention  
21 in this proceeding because decisions by this Board  
22 will affect citizens in Massachusetts.

23 I want to say on behalf of the  
24 Massachusetts Attorney General, that he does not  
25 oppose nuclear power and in general, has not opposed

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1 the application by Entergy for a license extension.  
2 However, before that license extension is granted, the  
3 Massachusetts Attorney General is requesting that the  
4 NRC and Entergy first comply with federal law that  
5 requires them to address the safety and environmental  
6 concerns surrounding the storage of spent fuel at the  
7 Vermont Yankee nuclear power plant. This includes an  
8 evaluation of the risks of a serious accident at the  
9 Vermont Yankee fuel pool and an examination of the  
10 ways to reduce those risks.

11 As part of that evaluation, the  
12 Massachusetts Attorney General also is requesting that  
13 the NRC address the environmental impacts of  
14 intentional destructive acts against the Vermont  
15 Yankee plant as required by the National Environmental  
16 Policy Act. While such events are unlikely, they are  
17 foreseeable and the NRC needs to address this issue as  
18 part of the NEPA process.

19 Moreover, as this Board is aware, the  
20 Ninth Circuit recently held that the NRC should  
21 consider as part of the NEPA process the potential  
22 impacts of an intentional attack on a fuel storage  
23 facility. We think that issue is relevant to this  
24 proceeding and we are asking this Board to apply the  
25 Ninth Circuit decision here.

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1                   Finally, the Attorney General is engaged  
2                   in this process in an effort to ensure that the  
3                   Vermont Yankee plant operates both in a safer manner  
4                   and complies with applicable law.

5                   Thank you.

6                   MS. CURRAN: I'd just like to add that our  
7                   contention specifically addresses Entergy's failure to  
8                   fulfill the requirement of 10 CFR 51.53(c)(3)(iv)  
9                   which requires it to identify new and significant  
10                  information of which it is aware that could bear on  
11                  the environmental impacts of its proposed action in  
12                  this case, the 20-year renewal of Entergy's license.  
13                  We have presented the Licensing Board with new and  
14                  significant information showing that assumptions made  
15                  in the license renewal GEIS, particularly that aged  
16                  fuel will not burn and that the most severe case,  
17                  accident case is the total and instantaneous drainage  
18                  of the spent fuel pool, that those assumptions are  
19                  incorrect and that in fact, that fuel of any age can  
20                  burn and that the most severe case is partial drainage  
21                  of the pools. This affects the ultimate estimate of  
22                  probability of a pool accident.

23                  And we are asking the Licensing Board to  
24                  admit a contention which challenges the adequacy of  
25                  Entergy's environmental report to address this new and

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1 significant information. We also ask the -- as Mr.  
2 Brock was saying, we ask the Licensing Board to  
3 consider the fact that intentional attacks on the  
4 Pilgrim pool are reasonably foreseeable and should be  
5 included in the range of accidents that is examined in  
6 the environmental report and in a supplemental EIS for  
7 the facility.

8 The Attorney General's ultimate goal here  
9 is to obtain a supplemental environmental impact  
10 statement regarding the risk of pool fires in the  
11 Vermont Yankee pool and that also examines reasonable  
12 alternatives for avoiding or mitigating those impacts.  
13 And such alternatives are available and feasible to  
14 Entergy, including a combined low-density storage and  
15 dry storage of the spent fuel.

16 Thank you.

17 CHAIR KARLIN: Thank you. New England  
18 Coalition, please.

19 OPENING STATEMENT OF KAREN TYLER, ESQ.

20 ON BEHALF OF NEW ENGLAND COALITION

21 MS. TYLER: New England Coalition would  
22 emphasize, as a preliminary matter, that the standard  
23 its required to satisfy for admission of its  
24 contentions is not an excessively demanding one. NRC  
25 is only required to show what prior NRC decisions have

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1       termed a minimal showing, quote unquote, that material  
2       facts concerning issues within the scope of the  
3       proceeding are in dispute and that an inquiry of depth  
4       into those issues is therefore appropriate.

5                NEC has submitted six contentions, one  
6       environmental contention and five that concern safety  
7       and aging-management issues. And it has satisfied  
8       this minimal showing standard with respect to each of  
9       them.

10               NEC's first contention, an environmental  
11       contention, concerns whether or not Entergy has taken  
12       the hard look required under NEPA concerning the  
13       cumulative impacts of increased thermal discharges  
14       into the Connecticut River that result from the  
15       extended power uprate of plant and whether Entergy has  
16       evaluated the impact of those discharges over the full  
17       20-year term of the renewed license.

18               Entergy has taken the position on this  
19       issue that the attachment of an expired state permit  
20       that remains only temporarily in effect to its  
21       application is adequate to satisfy NEPA requirements  
22       and NEC disagrees.

23               NEC's contention 2 disputes whether  
24       Entergy has submitted an adequate program to monitor  
25       and manage reactor components that its own analysis

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1 indicates are vulnerable to environmentally-assisted  
2 metal fatigue over the extended license term.

3           NEC's contention 3 disputes the adequacy  
4 of Entergy's strategy to monitor the -- monitor and  
5 manage the aging of the plant's steam dryer.

6           NEC's contention 4 disputes the efficacy  
7 of Entergy's plan to monitor and manager aging of the  
8 plant piping due to flow-accelerated corrosion over  
9 the extended license term.

10           NEC's contention 5 disputes Entergy's  
11 assertion that it is not necessary to monitor and  
12 manage aging of the plant's condenser which mitigates  
13 the off-site release of radioactive gas in the event  
14 of an accident at the plant and Entergy's contention  
15 that it's unnecessary to manage this plant component  
16 over the extent of the license.

17           And finally, NEC's contention 6 disputes  
18 Entergy's plan to manage aging of the primary  
19 containment boundary and to address moisture and  
20 corrosion issues in the dry well shell.

21           Thank you.

22           CHAIR KARLIN: Thank you, Ms. Tyler.

23           Mr. MacArthur?

24           OPENING STATEMENT OF DAN MacARTHUR

25           ON BEHALF OF THE TOWN OF MARLBORO

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1 MR. MacARTHUR: Thank you. I'd like to  
2 clarify that the Town of Marlboro will have this  
3 opening statement and this is the sum total of our  
4 hearing today is that -- today and tomorrow -- is that  
5 correct, there will be no further time for Marlboro to  
6 interact?

7 CHAIR KARLIN: That's right.

8 MR. MacARTHUR: Okay, given that situation  
9 then and thank you for doing that, that allows me to  
10 go home fairly soon here, thanks for taking the time  
11 to hear all of these contentions here. It is  
12 meaningful to the people of this region to have our  
13 concerns heard. And thank you for considering what  
14 you take to be a contention and we appreciate that,  
15 that Marlboro should be included in an amended  
16 license, if it should be extended.

17 Our original request for hearing spells  
18 out our case for including Marlboro in the EPZ and we  
19 believe that it complies with all the facets of  
20 2.309(f). Our arguments for this inclusion are based  
21 on common sense and are based on the current situation  
22 in the region. Our arguments represent the financial,  
23 social and spiritual well-being of the citizens of the  
24 Town of Marlboro today as well as for many years into  
25 the future as others have already pointed out.

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1                   Marlboro's inclusion in the EPZ of the VY  
2 plant is not an evacuation issue. It is an issue of  
3 being able to live comfortably with this reactor and  
4 its radioactivity, both within the reactor and in the  
5 stored waste as others have pointed out, for our lives  
6 and the lives of all of our children and  
7 grandchildren.

8                   I looked through the legal precedence as  
9 much as I've been able to find access to and found no  
10 replicas of Marlboro's situation, no precedent of  
11 legal decisions based on conditions exactly similar to  
12 Marlboro's, so we hereby request that this Board  
13 require that the Town of Marlboro, Vermont be included  
14 in the EPZ of the Entergy Vermont Yankee Nuclear Plant  
15 when and if the license is extended and we further  
16 request that under 10 CFR 2.315(c) Marlboro requests  
17 that we be given status to participate in the hearings  
18 of each of the contentions when the hearings are held  
19 that are coming before the Board today, that we be  
20 granted status to be participants in each of those  
21 areas, not only our contention, but the other ones as  
22 well.

23                   I will be the representative during that  
24 time and I thank you for time.

25                   CHAIR KARLIN: Thank you, Mr. MacArthur.

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1                   Entergy, Mr. Lewis.

2                   OPENING STATEMENT OF DAVID R. LEWIS, ESQ.

3                   ON BEHALF OF ENTERGY

4                   MR. LEWIS: Thank you. Entergy would also  
5 like to welcome you to Vermont and thank you for  
6 presiding over this proceeding.

7                   As you mentioned, Entergy has applied for  
8 a 20-year license extension for the Vermont Yankee  
9 Nuclear Power Station. That application is based on  
10 and includes a comprehensive evaluation coded  
11 "Integrated Plant Assessment" that examines the aging  
12 of all important systems, structures and components as  
13 defined in the NRC rules and demonstrates that those  
14 components can be managed such that the aging will not  
15 prevent those components from performing their  
16 credited function.

17                  Our application is also based on and  
18 includes an environmental report which addresses those  
19 environmental issues that the Commission has specified  
20 require examination by an applicant.

21                  We are opposing the contentions in this  
22 proceeding and do not do so lightly, but we do so  
23 because we think it's appropriate under the NRC rules.  
24 For example, the NRC has resolved a number of  
25 environmental issues, generically, in the generic

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1 environmental impact statement and they've codified  
2 their findings on those issues in a table in the NRC  
3 regulations.

4 We are opposing contentions that seek to  
5 raise those issues in this proceeding, not because  
6 they're unimportant and not because they've been  
7 ignored, but rather because they've been addressed  
8 fully and resolved generically and therefore there is  
9 no further role in this proceeding for a site-specific  
10 consideration.

11 There are other issues that we've opposed  
12 based on a failure of the Petitioners to demonstrate  
13 a genuine material issue, one that makes a difference.  
14 I won't argue those now. We'll have plenty of time  
15 during the arguments on individual contentions, but we  
16 have fully addressed those matters which the NRC  
17 regulations requires to be addressed and I look  
18 forward to your ruling on this matter.

19 CHAIR KARLIN: Thank you, Mr. Lewis.

20 Ms. Young or Mr. Hamrick?

21 OPENING STATEMENT OF STEVEN C. HAMRICK, ESQ.

22 ON BEHALF OF THE NUCLEAR REGULATORY COMMISSION

23 MR. HAMRICK: This is Steve Hamrick for  
24 the NRC Staff.

25 The Staff stands on its pleadings

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1 regarding the admissability of the contentions filed  
2 by all four of the Petitioners: NEC, Massachusetts  
3 Attorney General, the Vermont Department of Public  
4 Service and the Town of Marlboro. Other than that, we  
5 have very little to say at this point.

6 We look forward to providing answers to  
7 any questions the Licensing Board may have with  
8 respect to these issues. That's all we have at this  
9 point, thank you.

10 CHAIR KARLIN: Great. Thank you.  
11 Everyone gets an A for being short and sweet for the  
12 first 10 minutes. This is helpful.

13 All right, now we're going to proceed to  
14 the oral argument on the individual contentions. We  
15 will start with the State of Massachusetts and its one  
16 contention. Before we start, two things, one, having  
17 read the pleadings, I was struck by -- troubled by the  
18 -- let me put it this way. When I look at the  
19 admissability of contentions, I go by the regulation  
20 2.309(f)(1) through (6) and it would be very helpful  
21 to me when you focus your arguments, you tell me how  
22 you have met or have failed to meet each of those six  
23 elements. Rather than using words, let us cite the  
24 regulations in reference to the words of the  
25 regulations in cases which interpret them.

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1           Some of the briefs on these issues failed  
2           to cite the regulation more than once or twice in  
3           dozens and dozens of pages. It really helps me if you  
4           can ground your arguments on those specific regulatory  
5           provisions. For example, the word "basis" is used in  
6           many different ways and I'm not sure which subpart  
7           you're referring to, but there's only one subpart that  
8           is used in and that is 309(f)(1)(ii) and many other  
9           uses confuse me. So if we could focus on that, that  
10          would be helpful.

11           The other point is that we have in each of  
12          the Petitioners' cases, I think an automatic  
13          reservation of five minutes of time for rebuttal. If  
14          you wish to change that, please let me know at the  
15          outside.

16           Ms. Curran, you have 30 minutes, as I  
17          understand it. How much do you want to reserve for  
18          rebuttal?

19           MS. CURRAN: I'd like to reserve half the  
20          time.

21           CHAIR KARLIN: You said a maximum of 10  
22          minutes for rebuttal.

23           MS. CURRAN: I was hoping since you'd  
24          given us 30 minutes that you were going by  
25          proportions.

1 CHAIR KARLIN: No. Ten minutes?

2 MS. CURRAN: Okay.

3 CHAIR KARLIN: Okay, great. So you have  
4 20 minutes. Please proceed.

5 ORAL ARGUMENT OF DIANE CURRAN, ESQ.

6 ON BEHALF OF THE MASSACHUSETTS ATTORNEY GENERAL

7 MS. CURRAN: There's three issues I'd like  
8 to address. The first one is is the Attorney General  
9 in the correct forum. The second is is their  
10 contention admissible? Have we satisfied the standard  
11 in 10 CFR 2.309(f). And the third is the  
12 applicability of the Mothers For Peace decision.

13 Entergy argues and the NRC Staff both  
14 argue that the Attorney General has brought its  
15 concern to the wrong forum, that we were under the  
16 Turkey Point decision cited in their responses, that  
17 we were required to go to the Commission with either  
18 a waiver petition or a rulemaking petition.

19 We believe that we were required by 10 CFR  
20 2.309(f)(2) to address the sufficiencies of the  
21 environmental report and that is what we have done.  
22 That's an iron clad obligation with the Intervenors  
23 and we did not feel we had the luxury of picking  
24 another door to go in, but I would like to say that --

25 CHAIR KARLIN: Are you suggesting that

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1 2.309(f)(2) requires you to file this contention?

2 MS. CURRAN: Well, it requires that if we  
3 want to raise a contention under the National  
4 Environmental Policy Act, we must start by criticizing  
5 the environmental report. In the preamble to the  
6 final rule in 1989, when the Commission promulgated  
7 this rule, it said that it wanted to increase the  
8 efficiency of these proceedings by requiring that the  
9 environmental report should be the initial focus of  
10 all contentions, that if the draft environmental  
11 impact statement were to change what was in the  
12 environmental report, the Petitioner would be required  
13 to amend its contention, but that Petitioner is  
14 required to start by challenging the environmental  
15 report or risk being deemed to have waived its  
16 opportunity to participate in the proceeding.

17 So we believe that we were not only  
18 entitled, but essentially required to raise our  
19 concerns with respect to the environmental report in  
20 the first instance. Because the Turkey Point case  
21 indicates that the Commission thinks that issues that  
22 are generic should be addressed in the rulemaking  
23 petition, we are also planning to file a rulemaking  
24 petition with the Commission out of an abundance of  
25 caution. As stated in our reply brief, however, we

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1 think that we have brought our concern to the correct  
2 forum and we're asking the Licensing Board to make a  
3 ruling on the admissability of our contention.

4 It's also clear to us that a waiver  
5 petition would be completely inappropriate here and  
6 that we couldn't satisfy one of the basic elements for  
7 a waiver petition which is that the circumstance needs  
8 to be unique to the particular plant.

9 While the consequences of accidents in  
10 spent fuel pools may vary from plant to plant, the  
11 design of the BWR reactors that the Attorney General  
12 is concerned about, Vermont and Pilgrim, are common to  
13 all BWRs and many of the issues are also common to all  
14 nuclear plants including PWRs.

15 CHAIR KARLIN: May I ask this, Turkey  
16 Point on page 12, everyone cited us to page 12 many  
17 times. And that's the section that talks about the  
18 options that are available to a citizen's group or a  
19 citizen who is unhappy and thinks there is new and  
20 significant information that requires consideration.

21 Do you consider that list exhaustive? Is  
22 that an exhaustive list of the options available to  
23 the Petitioner?

24 MS. CURRAN: I'm sorry, I don't have the  
25 case in front of me. There are two options, to my

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1 recollection, of Turkey Point cases that offers -- or  
2 three options. And we did discuss those in our reply.  
3 One is a petition for a waiver. The other is a  
4 petition for rulemaking, and the third is to comment  
5 on the draft EIS. And we think that -- I'm not  
6 certain and if one were to go the commenting group  
7 that one would preserve one's right to go to Court.  
8 I don't know the answer to your question and I  
9 wouldn't count on it.

10 CHAIR KARLIN: Does Turkey Point -- seems  
11 to require -- let me read on page 11, no one seems to  
12 be citing page 11 enough. At the bottom, it says in  
13 addition, even where the GEIS has found the particular  
14 impact applies generically, i.e., category 1, the  
15 Applicant must still provide additional analysis if  
16 new and significant information may bear on the  
17 applicability of the category 1 finding.

18 Do we understand your position to be the  
19 Applicant is obliged to provide any new and  
20 significant information concerning a category 1 issue  
21 under the part 51 regs?

22 MS. CURRAN: Yes, that's correct and if  
23 you look at the history of the rulemaking, in the  
24 proposed rule the Commission proposed to only require  
25 the licensee to address category 2 and 3 issues in its

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1 environmental report. But after receiving comments  
2 from the Counsel on Environmental Quality, the  
3 Commission changed the rule to broadly require the  
4 Applicant to address any new and significant  
5 information.

6 CHAIR KARLIN: But what do you do about in  
7 the Statement of Consideration on page 28470? Do you  
8 have that? They refer to SECY 93032. Doesn't that  
9 tell us that the Commission has decided that this  
10 cannot be litigated before Boards?

11 MS. CURRAN: Well, I'll get that and look  
12 at it but I can see the page --

13 CHAIR KARLIN: You haven't looked at it?

14 MS. CURRAN: No, I've looked at it so many  
15 times, I remember what it says. It seems to me that  
16 the Commission circulated SECY 0392 and that was what  
17 provoked the comment from the CEQ --

18 CHAIR KARLIN: That's not correct. The  
19 EPA and the CEQ raised the comments in SECY 93032 was  
20 the Staff's and the Commission's response and  
21 discussions with CEQ and EPA regarding their concerns.

22 Middle of the page, about halfway down  
23 there's a reference to SECY 9332.

24 MS. CURRAN: I'm sorry. You know, this  
25 sound system in here so strange I almost hear every

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1 other word you're saying.

2 CHAIR KARLIN: I'll try to speak into the  
3 mic more closely.

4 Well, let's go back to Turkey Point.  
5 Turkey Point on page 11 and I want to ask the  
6 Applicant and the Staff to address this says that in  
7 the ER, the Applicant is obliged to address new and  
8 significant information regarding category 1 issues.  
9 It then says on page 12 that the Staff is obliged to  
10 address new and significant information regarding  
11 category 1 issues. That's an interpretation of 5195C.

12 Are we to understand that although both  
13 the Environmental Report must include new and  
14 significant information and the Staff must address new  
15 and significant information on category 1 that this --  
16 and if they fail to do so, you would have no remedy,  
17 Massachusetts would no remedy except to file a  
18 rulemaking petition?

19 MS. CURRAN: Well, the Turkey Point  
20 decision doesn't specifically address that question.  
21 But 10 CFR 2.309 --

22 CHAIR KARLIN: Well, it does address that.  
23 It does hold to exactly that it seems to me that the  
24 Petitioners have no right. If you go to page -- let's  
25 see, 23 -- it says that we hold the GES precludes the

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1 litigation of these issues.

2 Aren't we bound by that?

3 MS. CURRAN: Well, in Turkey Point it is  
4 not clear to me that the contention itself addressed  
5 51.53(c)(3)(iv). So there isn't a discussion, it's  
6 not the situation we have here where the Petitioner  
7 comes in and claims under the regulation a failure to  
8 satisfy this particular section. And so I don't find  
9 --

10 CHAIR KARLIN: I think you're right. I  
11 think you're right on that that the --Mark Onvcavage -  
12 - he's the Petitioner there.

13 MS. CURRAN: Yes.

14 CHAIR KARLIN: He did not say -- he did  
15 not seem to raise I am presenting new and significant  
16 information. He seemed to be raising information  
17 that he never characterized as new and significant.  
18 So perhaps the formal holding of Turkey Point may be  
19 indistinguishable on that basis. But it seems that  
20 the dicta is pretty strong against you, if that's what  
21 it is.

22 MS. CURRAN: We realize that this is new  
23 territory for the Commission. This particular  
24 instance, the challenge to a category 1 finding under  
25 51.53(c)34, there isn't another case that addresses

1 that to my knowledge.

2 CHAIR KARLIN: Well, Turkey Point  
3 addresses it, you just may say it's not the holding.

4 MS. CURRAN: Yes, and Turkey Point is not  
5 clear on that question. It doesn't address that  
6 particular question.

7 If you find that we are in the wrong  
8 forum, then we would accept that ruling but we need a  
9 finding that we appropriately challenged this  
10 environmental report in all other respects.

11 JUDGE WARDWELL: So what you're saying is  
12 you don't necessarily disagree with Turkey Point in  
13 regards to our inabilities to litigate the lack of new  
14 and significant information. You're trying to  
15 establish a basis that, in fact, you've recognized  
16 that this is a deficit and then can proceed from there  
17 as far as your ultimate goals.

18 MS. CURRAN: We don't think Turkey Point  
19 controls this particular case. But if the Licensing  
20 Board disagrees with us on that question, we ask the  
21 Licensing Board, nevertheless, to make a ruling that  
22 we appropriately challenged a failure to comply with  
23 NRC environmental regulations by an environmental  
24 report and that we have not -- that were this the  
25 appropriate door to go in, would have done it

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1 correctly. That's important to us.

2 JUDGE WARDWELL: Isn't your burden here to  
3 demonstrate for us to adjudicate it, that we, in fact,  
4 have authority to litigate it, and then your second  
5 part is you have to show that there is new and  
6 significant information in your assessment.

7 MS. CURRAN: Right.

8 JUDGE WARDWELL: I assume you'll be  
9 getting on to your discussion --

10 MS. CURRAN: That's right and I would like  
11 to move on to that part of the argument.

12 Our obligation in this contention is to  
13 show a specificity and basis that there is new and  
14 significant information not considered in the license  
15 renewal GEIS which bears the environmental impacts of  
16 renewing the Entergy license. And we believe that we  
17 have more than met the admissability standard for that  
18 by citing a variety of technical reports showing new  
19 information that was not previously considered in a  
20 license renewal GEIS. Those are the Thompson Report,  
21 NUREG 1738, the NRC Staff's technical study of  
22 decommissioning plants and spent fuel pool accidents  
23 at decommissioning plants and the National Academy of  
24 Science's study done in 2005.

25 JUDGE WARDWELL: Of all your arguments,

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1 I've kind of boiled it down to this and comment on  
2 whether I've boiled it down correctly or too  
3 simplisticly in my mind, but I viewed your new and  
4 significant information to really have four  
5 components, that you're talking about a partial loss  
6 of water, rather than a full loss of water; you're  
7 talking about it associated with high-density reacts  
8 as opposed to normal reacts. You're saying that it's  
9 potential fire with any age, not necessarily new fuel.  
10 And I gleaned out of this as I condensed this that  
11 this would take place during operations.

12 That's what I considered, as I read  
13 through this as the heart of what you considered to be  
14 new and significant information. Is that a fair  
15 assessment or did I miss something?

16 MS. CURRAN: I'm sorry, do you mean by  
17 during reactor operations, is that what you're --

18 JUDGE WARDWELL: Yes.

19 MS. CURRAN: In contrast to NUREG 1738  
20 which looked at decommissioning of plants?

21 JUDGE WARDWELL: Correct.

22 MS. CURRAN: I would add two things to  
23 that. One is that we show that a range of accidents  
24 that are considered worthy of consideration in the EIS  
25 by the NRC could lead to the uncovering of fuel and the

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1 spent fuel pool fire. And also, that intentional  
2 attacks should be included in the range of accidents  
3 that is examined in the EIS.

4 JUDGE WARDWELL: Let's talk about that a  
5 bit. I had trouble envisioning how we might see a  
6 partial loss as opposed to a full loss because as I  
7 gather from the heart of your argument that it's this  
8 partial loss that's so new and that everything  
9 previously had really looked at full loss in your  
10 contention.

11 Can you explain some triggering mechanisms  
12 to have only a partial loss that wouldn't, in fact, be  
13 addressed during normal operations?

14 MS. CURRAN: Well, for instance, an  
15 earthquake -- if you look at say NUREG 1353, they were  
16 looking at very, very severe earthquakes that would  
17 crack and basically destroy the pool so much so that  
18 the pool would drain immediately.

19 One can imagine earthquakes of less  
20 severity that would have the effect of draining the  
21 pool more slowly.

22 CHAIR KARLIN: Well, may I ask this --

23 JUDGE WARDWELL: Can I ask their technical  
24 expert, rather than just whisper in her ear, if they  
25 want to they can go ahead and speak directly.

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1 CHAIR KARLIN: No, no, no. Just the  
2 attorney. He's not here to give testimony.

3 MS. CURRAN: Also boil down accidents,  
4 there's a variety of ways that the pool could lose  
5 water in a boil down. And those accidents, one of our  
6 concerns here is that one of the reasons the NRC has  
7 said that a pool fire is so very unlikely is that it  
8 has only looked at accidents that are severe enough to  
9 cause total instantaneous drainage and those accidents  
10 are less probable than ones that would cause less  
11 damage, partial drainage of the pool.

12 CHAIR KARLIN: Didn't the Sandia report in  
13 1979 acknowledge that partial drainage could be more  
14 severe? Didn't your own experts says that? So what's  
15 new? This is 25 years old.

16 MS. CURRAN: If you look at the history of  
17 the NRC's consideration in its NEPA study, the NRC did  
18 not fully consider --

19 CHAIR KARLIN: Aren't you just saying the  
20 NRC -- I mean, as I hear it, it's more Dr. Thompson  
21 disagreeing with the NRC, but there's nothing new  
22 here. You're just saying you didn't fully consider  
23 it, you didn't consider it well enough, you didn't  
24 consider it the way I consider it and therefore you're  
25 wrong and I'm right.

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1                   What's new other than Dr. Thompson has an  
2                   opinion?

3                   MS. CURRAN: New means anything that was  
4                   not considered in the EIS for spent fuel pool storage.  
5                   If you go back to the 1979 EIS that basically cited  
6                   the Sandia report in a footnote; go to the license  
7                   renewal GEIS that didn't cite the Sandia report at all  
8                   --

9                   CHAIR KARLIN: I mean, if I may --

10                  MS. CURRAN: I'm sorry.

11                  CHAIR KARLIN: The spent fuel fires and  
12                  high density racking has been around for 25, 30 years,  
13                  every since Carter eliminated reprocessing and we've  
14                  been analyzing this dozens of times. I just don't see  
15                  anything new other than is every time a new expert  
16                  issues a new opinion, is that new and significant  
17                  information?

18                  MS. CURRAN: We have much more than one  
19                  expert's opinion.

20                  JUDGE WARDWELL: Did you see any reference  
21                  in regards to looking at partial loss of high racks,  
22                  partial loss of fluid with high racks in the GEIS?  
23                  Was there any reference or indication that that was  
24                  one of the situations that they evaluated in the GEIS?

25                  MS. CURRAN: No, because the GEIS -- just

1 let me point out that the GEIS relied primarily on  
2 NUREG 1353.

3 MS. CARPENTIER: Sorry, one minute.

4 JUDGE ELLEMAN: Ms. Curran, it appears to  
5 me in looking at the contention that most of the new  
6 and significant information relates to what happens to  
7 the fuel after it's uncovered. It relates to the  
8 oxidation of the zircaloy. Is there anything in the  
9 new and significant information that alters the  
10 calculation of the probability of the fuel being  
11 uncovered in the first place?

12 MS. CURRAN: Yes. Uncovered to the extent  
13 that fire is initiated, yes.

14 JUDGE ELLEMAN: I'm sorry, I have the same  
15 trouble with the sound system you're having. Could  
16 you repeat that?

17 MS. CURRAN: Yes, uncovering --

18 MS. CARPENTIER: Time.

19 JUDGE ELLEMAN: Go ahead and finish your  
20 sentence.

21 MS. CURRAN: Uncovering to the extent that  
22 initiates fire.

23 CHAIR KARLIN: Okay, thank you.

24 JUDGE ELLEMAN: I'm not sure I followed  
25 that. Are you saying that there is a change in our

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1 perception as a result of this new and significant  
2 information on the likelihood of the fuel being  
3 uncovered in the first place?

4 MS. CURRAN: Well, the new and significant  
5 information demonstrates that the probability of  
6 uncovering of the spent fuel leading to fire is greater  
7 than the NRC has considered in its previous EIS  
8 because the NRC was only looking at the probability of  
9 total and instantaneous drainage.

10 So yes, there is no significant new  
11 information on that point.

12 CHAIR KARLIN: All right, thank you. Time  
13 is up. You'll have 10 more minutes for rebuttal.

14 I think do we have 25 minutes for Entergy  
15 on this one?

16 MR. LEWIS: Twenty.

17 CHAIR KARLIN: Is it 20?

18 MR. LEWIS: Twenty.

19 CHAIR KARLIN: Okay, 20, 2-0. Mr. Lewis.

20 ORAL ARGUMENT OF DAVID LEWIS, ESQ.

21 ON BEHALF OF ENTERGY

22 MR. LEWIS: Thank you, Judge Karlin. This  
23 issue concerning how significant new information is  
24 considered in a license renewal proceeding involves  
25 the Commission's attempt to balance finality against

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1 the need to supplement when appropriate.

2 The Commission promulgated the rules in  
3 51.53(c)(3) specifically to resolve issues generically  
4 and it made that very clear during the rulemaking. It  
5 stated the environmental impacts that can be evaluated  
6 generically will not have to be evaluated for each  
7 plant.

8 The rules specifically state that there's  
9 no requirement that the environmental report include  
10 analyses of category 1 issues.

11 CHAIR KARLIN: Wait a second. I'm not  
12 sure whether they say that or not. What do we do with  
13 -- I understand there is 51.53(c)(1), but what about  
14 51.53(c)(4) which says the environmental report must  
15 include new and significant information? And the  
16 decision in Turkey Point which holds that includes new  
17 and significant information concerning category 1,  
18 isn't that directly contrary to what you just said?

19 MR. LEWIS: No. It's not directly  
20 contrary because the Turkey Point decision does not  
21 explain the procedure that applies when an Applicant  
22 indicates that he's aware of some significant new  
23 information.

24 What the Commission did when it  
25 promulgated this rule --

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1 CHAIR KARLIN: But the Turkey Point  
2 decision says the ER must include new and significant  
3 information regarding category 1 issues on page 11.  
4 You didn't cite page 11 in your brief very often.  
5 What are we going to do with that?

6 MR. LEWIS: What you need to recognize is  
7 that the Applicant does have an obligation to identify  
8 significant and new information of which it's aware.  
9 That is a subjective requirement is if we believe  
10 there's significant and new information, we should  
11 disclose it to the Commission. That doesn't mean that  
12 we have to revalidate category 1 issues or that we  
13 have to address information some other party thinks is  
14 significant and new. And we have addressed that  
15 requirement in our environmental report. We have  
16 stated in I believe it's Section 5 that we are aware  
17 of no new and significant information.

18 CHAIR KARLIN: So you agree then if you  
19 were aware of new and significant information  
20 regarding a category 1 issue, you would be obliged  
21 under 51.53(c)(4) to include it in your ER?

22 MR. LEWIS: Yes. We would have to  
23 disclose that information. What the Turkey Point  
24 decision does not address is what is the procedure  
25 that happens when an Applicant does that. And I

1 submit it's the same procedure that happens if a  
2 commenter raises it or if an intervenor raises it or  
3 a state or interested municipality raises it.

4 The Commission explains what happens in  
5 these circumstances. The Staff is meant to look at  
6 the information and determine whether it warrants a  
7 waiver of the rule. If it warrants a waiver of the  
8 rule, the Staff then takes it to the Commission --

9 CHAIR KARLIN: No, now wait a second. Let  
10 me stop you there. Doesn't the regulation say that if  
11 the Staff is aware of new and significant information  
12 regarding a category 1 issue, that the Staff has to  
13 include that in its draft supplemental EIS and final  
14 supplemental EIS, whether or not you brought it up or  
15 not?

16 MR. LEWIS: What I believe is missing from  
17 that Turkey Point decision, but is very clear in the  
18 Statement of Consideration and in the SECY paper is  
19 the intermediate step that the Commission intended and  
20 that intermediate step is essential in order to  
21 balance finality against the need to supplement.

22 What the Commission said is we're going to  
23 have a safety valve. It may be that a generic finding  
24 does not survive the test of time and needs to be  
25 supplemented. So we're going to have these methods

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1 where persons including the Applicant, including  
2 members of the public can tell us if they think that  
3 there's something new. In those cases, the Staff will  
4 then take the issue to the Commission and get a waiver  
5 and by that means the proceeding will be broadened.  
6 It is true the information will then be analyzed, but  
7 the clear intent from the Statement of Consideration,  
8 from the SECY paper, from the Turkey Point case is  
9 that when this information is identified, the  
10 appropriate course is to bring that information to the  
11 Commission. If it is generic, the Commission has said  
12 the appropriate course is a rulemaking petition.

13 CHAIR KARLIN: That does seem to be one  
14 interpretation, but it's troubling to me in the sense  
15 of here we have an obligation in the regs, let's say,  
16 for the Applicant to include in its environmental  
17 report any new and significant information that it's  
18 aware of regarding category 1 issues.

19 MR. LEWIS: Which we've done.

20 CHAIR KARLIN: Let's posit for a moment  
21 that you are aware of new and significant information  
22 regarding a category 1 issue and you failed to include  
23 it in your environmental report. So there would be a  
24 noncompliance, as it were, with that regulatory  
25 requirement should we say or that Turkey Point

1 requirement.

2 The Petitioners are powerless to do  
3 anything about it in this proceeding? This Board is  
4 powerless to do anything about it, except to go  
5 through the waiver or rulemaking process which is  
6 outside of this proceeding?

7 MR. LEWIS: I believe that's correct. If  
8 we have indicated that we're subjectively not aware of  
9 any new and significant information, we fulfilled our  
10 obligation to alert the Commission whether we think  
11 there should be any expansion of this proceeding. If  
12 another party wants to expand the proceeding, they  
13 should follow the proper avenue and take the matter to  
14 the Commission through a waiver or for a petition for  
15 a rulemaking. That is consistent with what the  
16 Commission said in the SECY paper. That is consistent  
17 with what the Commission said in the Statement of  
18 Consideration.

19 As an example --

20 CHAIR KARLIN: Where did it say in the  
21 Statement of -- I see they reference the SECY paper,  
22 but they don't really discuss it. You have to read  
23 the SECY paper to have any idea of what they're  
24 talking about. I don't see it flatly said in the  
25 Statement of Consideration. Can you give me a quote

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1 on that?

2 MR. LEWIS: They give one scenario in the  
3 Statement of Consideration. They don't go through all  
4 the possibilities, but the scenario they give is that  
5 if a member of the public submits a comment asserting  
6 that there's new and significant information, the NRC  
7 Staff will evaluate that information and --

8 CHAIR KARLIN: Where? Can you give me a  
9 -- probably 28470.

10 MR. LEWIS: It's 28470. If a commenter  
11 provides new information that demonstrates analysis is  
12 incorrect --

13 CHAIR KARLIN: What column are you on?

14 MR. LEWIS: Third column, down in C.

15 CHAIR KARLIN: B or C?

16 MR. LEWIS: Staff will seek Commission  
17 approval to waive the application of the rule with  
18 respect to that analysis.

19 CHAIR KARLIN: Well, okay, let me stop you  
20 there. I mean we've read that page. It lists three  
21 options, A, B and C. Likewise, on page 12, 12 of the  
22 Turkey Point that you quote so many times or cite so  
23 many times, it says if there's new and significant  
24 information, the generic findings need to be  
25 revisited, that the Commission can do the following

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1 things in the hearing process, and then it goes on to  
2 say, for example, Petitioners can seek a waiver or the  
3 Petitioner may ask the Commission to issue a fresh  
4 rulemaking or they can ask the Staff and the  
5 Commission, but they don't say that's an exhaustive  
6 list. They don't say and that's all that you can do  
7 and they don't say and you cannot file a contention on  
8 it.

9 It's a little bit frustrating to this  
10 Board to see, to assume for a moment that there is a  
11 noncompliance with an obligation to include new and  
12 significant information in your ER and they raise it  
13 and this Board says sorry, we can't do anything about  
14 that.

15 MR. LEWIS: First, I would respectfully  
16 submit there's been no noncompliance and --

17 CHAIR KARLIN: I understand. I was just  
18 assuming that for our discussion.

19 MR. LEWIS: But I do believe that you need  
20 to try and balance the Commission's clear intent to  
21 provide finality for generically resolved issues.  
22 There is no doubt the Commission can resolve issues  
23 generically. There's been two Supreme Court cases  
24 that held that they have that authority and resolving  
25 issues generically specifically means they're resolved

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1 by rule and therefore cannot be waived. That was  
2 manifestly what the Commission intended to do in this  
3 proceeding.

4 When CEQ raised the issue that perhaps the  
5 GEIS down the road might be stale and there might be  
6 some mechanism for these issues to be brought to the  
7 Commission's attention, the Commission came up with  
8 this carefully structured compromise where it  
9 indicated, yes, people can bring this information to  
10 our attention and we will direct the Staff to  
11 determine whether there is grounds for a waiver. Or  
12 an Intervenor could bring it, state to us. But what  
13 they could not do is back off from the finality that  
14 they intended to provide. There's no statement  
15 anywhere in the rulemaking record that the Commission  
16 indicated that generic category 1 issues can now be  
17 litigated freely, simply on a mere allegation.

18 CHAIR KARLIN: But there's no reg that  
19 says they can't. There's no reg that says they can't.

20 MR. LEWIS: There is a regulation that  
21 says an Applicant is not required to provide analysis  
22 of a category 1 issue.

23 CHAIR KARLIN: There is a reg that says  
24 you're required to provide new and significant  
25 information on category 1 issues.

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1 MR. LEWIS: It doesn't mention  
2 specifically category 1 issues, but those two  
3 regulations need to be reconciled. How do you  
4 reconcile those two regulations? And also reconcile  
5 the generic category 1 findings in Table (b)1 of part  
6 51 which are generic findings that can't be  
7 collaterally attacked under the Commission's rules.

8 The only way that you can reconcile these  
9 provisions is to recognize that new and significant  
10 information is the standard for a waiver and that is  
11 all it is. And therefore it a party, if a commenter,  
12 if an Intervenor or if the NRC Staff believes that  
13 there is new and significant information, the  
14 appropriate course is to take it to the Commission so  
15 that the Commission can expand the proceeding by a  
16 waiver. Without such a waiver the category 1 issues  
17 resolve with finality.

18 Let me just address the new information  
19 assertion and what is addressed in the generic  
20 environmental impact statement. The generic  
21 environmental impact statement concluded that the risk  
22 of accidents that might result in a pool fire is  
23 highly remote. That's at page 6-75 of the GEIS.

24 JUDGE WARDWELL: Can you point us to where  
25 NUREG 1437 or the GEIS itself specifically says that

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1 a valuated partial loss of a high density rack fuel  
2 storage?

3 MR. LEWIS: Yes, but it's not direct. On  
4 this page, on page 6 --

5 JUDGE WARDWELL: So your answer is no, but  
6 I can give you indirect?

7 MR. LEWIS: I can show that they  
8 considered it, but they did not explicitly discuss it.

9 At page 6-75 of the GEIS where they make  
10 the statement that the likelihood of fuel cladding  
11 fire is highly remote, they cite 55 Federal Register  
12 38474. That is the 1990 Waste Confidence decision.  
13 That is where the analysis is and that is what they  
14 relied upon.

15 JUDGE WARDWELL: And you're saying the  
16 Waste Confidence rule specifically addressed partial  
17 loss of high density rack?

18 MR. LEWIS: If you look at this Waste  
19 Confidence decision, September 18, 1990 at page 55  
20 Federal Register 38480, you'll see in the third column  
21 that public citizen raised the comment. They stated  
22 that the danger posed by an accident in which enough  
23 pool water escaped to uncover the irradiated fuel  
24 assemblies would be greater than the operational  
25 incidents described above.

1           So public citizen raised the scenario that  
2           you might have a drain down situation in which the  
3           fuel is uncovered. They then referred to the fact  
4           that the natural air flow permitted by high density  
5           storage racks is so restricted that the potential for  
6           self-sustaining fighting fire exists, so they  
7           specifically raised in the Waste Confidence decision  
8           the possibility that high density racks would restrict  
9           the cooling of the racks in the event of a drain down  
10          situation.

11                   JUDGE WARDWELL: And what was the response  
12          to that comment?

13                   MR. LEWIS: The Commission noted that its  
14          dominant accident sequence was the severe seismic  
15          drain down event because the probability of that event  
16          was two chances in a million per year of reactor  
17          operation. This is at page 38481. And it stated that  
18          the probability of other accident scenarios such as  
19          risks of pneumatic seal failure is inadvertent  
20          drainage, loss of cooling or makeup water or  
21          structural failures during missiles, aircraft crashes  
22          or other heavy load drops or at least an order of  
23          magnitude smaller.

24                   So what they said is the risks of this  
25          severe seismic event is  $2^{10-6}$  which they called

1 extremely rare and these other scenarios, including  
2 the partial drain down scenario is at least an order  
3 of magnitude smaller. That is, in fact, supported  
4 very precisely by NUREG 1353 and when you look at the  
5 waste confidence decision, they cite to that NUREG  
6 extensively in addressing this specific comment. In  
7 NUREG 1353, the Commission looked at boil down due to  
8 loss of cooling or makeup. This was not a  
9 catastrophic immediate drain down scenario. It was a  
10 slow, boil off scenario of the type that the State of  
11 Massachusetts is positing could result in a partial  
12 drain down. And they determined that the probability  
13 of that event, including these loss of cooling or  
14 makeup from a seismic event was on the order of  $10^{-8}$ .  
15 That's at pages 4-22 through 4-28 and 4-36 of NUREG  
16 1353.

17 In NUREG 1738 which is the --

18 CHAIR KARLIN: If I may, let me ask  
19 2.309(f)(1) says that all the Petitioner has to do is  
20 make -- provide a concise statement of the alleged  
21 fact or expert opinions which support their position,  
22 their position that there is new and significant  
23 information in this case, I guess.

24 They don't have to prove that there's new  
25 and significant information. You don't have to

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1 disprove that there's new and significant information.  
2 This is not the issue here.

3 Haven't they at least achieved that  
4 minimal threshold or are we to get into the merits of  
5 whether there really is -- how do we avoid -- this is  
6 our question. How do we avoid getting into the merits  
7 of whether there is new and significant information?  
8 They've given us a pile of materials, NAS report. We  
9 don't want to get into whether there really is new and  
10 significant information. We just want to decide  
11 whether they met their minimal showing of providing a  
12 concise statement of the alleged facts or expert  
13 opinions which support their position. And they seem  
14 to have done that, haven't they?

15 MR. LEWIS: No, they haven't. Not  
16 remotely. There's two aspects of this. One is it  
17 underscores the need for a waiver, because if you're  
18 going to open a category --

19 CHAIR KARLIN: That's a legal argument, I  
20 understand there's a legal argument.

21 MR. LEWIS: There should be a substantive  
22 determination, but in looking at whether an accident  
23 scenario is sufficiently foreseeable to be evaluated  
24 further under NEPA, the Board can look at the  
25 documents that the Intervenor cite, to see whether on

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1 their face they show that these accidents are  
2 sufficiently probable. And I refer you to the Yankee  
3 Atomic Electric case, LBP 96-0243 NRC 61, a decision  
4 written by Judge Bollwerk where he said specifically  
5 that the documents that the Intervenors provide as  
6 their basis can be and should be scrutinized by the  
7 Board to see --

8 CHAIR KARLIN: We know that.

9 MR. LEWIS: -- on their face supported.

10 CHAIR KARLIN: Okay.

11 MR. LEWIS: What I am saying is when you  
12 look at NUREG 1353, you'll see a 6 times  $10^{-8}$   
13 probability of this drain down scenario. When you  
14 look at NUREG 1738 which is the information of the  
15 document they cite as now being new, you see a 1.8  
16 times  $10^{-7}$  probability --

17 CHAIR KARLIN: How about 9/11 and how  
18 about San Luis Obispo Mothers for Peace, aren't they  
19 both pieces of new information?

20 MR. LEWIS: Yes, but that's a very  
21 different argument all together. That is an instance  
22 where the Commission has determined in a series of  
23 cases, including license renewal proceedings that NEPA  
24 does not require the consideration of terrorism, and  
25 it has made that whole link.

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1 San Luis Obispo has challenged that in the  
2 context of an ISFSI, but that decision is not yet  
3 effective. The mandate of that decision has not been  
4 issued. And I submit to you that on that legal point  
5 until that mandate is issued and the Commission  
6 provides some direction --

7 CHAIR KARLIN: So if we wait until  
8 September 1st, then we can use it?

9 MR. LEWIS: I think that you should rule  
10 on this contention currently and apply the NRC  
11 precedent.

12 CHAIR KARLIN: But surely your whole point  
13 is not just simply that the mandate hasn't issued.  
14 San Luis Obispo Mothers for Peace doesn't challenge  
15 it. It demolishes it, doesn't it? I mean if it's a  
16 good law, then that's the end of the Commission's  
17 position.

18 MR. LEWIS: It may not be good law though.  
19 I understand that the Commission is seeking  
20 certiorari.

21 CHAIR KARLIN: We don't know. Maybe the  
22 Staff will address that.

23 MR. LEWIS: There is a separate point to  
24 be made on the San Luis Obispo case and that is in the  
25 GEIS, in fact, the Commission states that if it had to

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1 consider a terrorism, in fact, the consequences of a  
2 terrorist event wouldn't be any different from a  
3 severe accident caused by other consequences.

4 The GEIS therefore has something that San  
5 Luis Obispo doesn't have. It has a determination of  
6 that even if we had to consider it, here are the  
7 bounding consequences and in fact, when you look at  
8 the documents where the Commission has looked at spent  
9 fuel pool fires in the past, the Commission has said  
10 that those consequences for spent fuel fire are, in  
11 fact, comparable to severe reactor accidents. That  
12 finding --

13 MS. CARPENTIER: One minute.

14 MR. LEWIS: -- has not been challenged at  
15 all by the decision in the San Luis Obispo case.

16 I guess my very last statement, if I can  
17 make is the assertion that a reactor accident can  
18 cause a spent fuel pool fire. I just wanted to point  
19 out that at Vermont Yankee in the FSAR, Vermont Yankee  
20 has a safety-related environmentally qualified,  
21 seismically qualified, standby fuel pool cooling  
22 system. So in addition to having two trains of long  
23 safety-related spent fuel pool pooling system, it also  
24 has two trains of a safety-related and environmentally  
25 qualified, seismically qualified spent fuel pooling

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1 system. Beyond that, it has the ability to inject  
2 makeup and do so with a reactor building entry.

3 So the possibility that a severe reactor  
4 accident is going to cause a drain down of the fuel  
5 pool is truly remote.

6 MS. CARPENTIER: Time.

7 CHAIR KARLIN: Okay. Thank you.

8 JUDGE ELLEMAN: Ms. Curran, you quoted a  
9 number of 2 times  $10^{-6}$  as a probability from the GEIS  
10 of a severe pool fire. And in your contention, Ms.  
11 Curran, I believe you have a number of 2 times  $10^{-5}$  as  
12 your claim for that probability.

13 Can you give us the basis --

14 CHAIR KARLIN: We're not going to be able  
15 to hear from Ms. Curran at this point.

16 JUDGE ELLEMAN: We can't clarify what the  
17 difference is?

18 CHAIR KARLIN: No. We'll wait for her  
19 rebuttal for that.

20 JUDGE ELLEMAN: Okay, all right.

21 MR. LEWIS: Could I just say --

22 CHAIR KARLIN: No. Dr. Elleman, do you  
23 have a question for him?

24 JUDGE ELLEMAN: No.

25 CHAIR KARLIN: You have a question for Ms.

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1 Curran.

2 JUDGE ELLEMAN: I will wait.

3 CHAIR KARLIN: Let's do it on her  
4 rebuttal.

5 JUDGE ELLEMAN: Okay, sure.

6 CHAIR KARLIN: Thank you. Sorry for that.  
7 What do we have 20 minutes for the Staff?

8 MS. CARPENTIER: Yes.

9 CHAIR KARLIN: All right, great.

10 ORAL ARGUMENT OF MITZI YOUNG, ESQ.

11 ON BEHALF OF THE NRC STAFF

12 MS. YOUNG: Thank you, Judge Karlin. The  
13 Staff also agrees that information regarding partial  
14 drain down of spent fuel pools has already been  
15 considered in documents related to the generic  
16 environmental impact statement. The GEIS specifically  
17 references the 1990 revision of the Waste Confidence  
18 rule. That rule cited NUREG 1353 and NUREG 1353, as  
19 you're aware, has references to the Sandia Report,  
20 1979, which talked about the partial drain down  
21 situation.

22 The Staff's position is that there has  
23 been no information raised by this Petitioner that  
24 indicates that there is both new and significant  
25 information with respect to the likelihood of spent

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1 fuel pool accidents of the nature they allege. So to  
2 that extent the Staff would not on its own file a  
3 petition seeking waiver of the rule.

4 The Intervenors, if they persist in their  
5 position and Ms. Curran has indicated that she  
6 believes that this is a generic concern applicable to  
7 reactors other than just Vermont Yankee and Pilgrim,  
8 they should file their petition for waiver and she's  
9 indicated that they plan on doing -- excuse me,  
10 petition for rulemaking, and she's indicated that they  
11 plan to do that.

12 So if there's anything else you want to  
13 hear from the Staff on this point --

14 CHAIR KARLIN: Well, yes. We're hoping  
15 you could clarify all of this for us, set the record  
16 straight.

17 (Laughter.)

18 But we grapple with -- I'm grappling with  
19 Turkey Point and you cited page 12 of that decision,  
20 the Commission's decision which talks about the -- if  
21 generic issues, new and significant information  
22 arises, you can file a petition for waiver, you can  
23 file a petition for rulemaking, blah, blah, blah.

24 But let's back it up a little bit. I mean  
25 do you agree that on page 11, as stated on page 11 of

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1 that decision at the bottom that the Applicant has a  
2 duty in its environmental report under  
3 251.53(c)(3)(iv) that to raise any new and significant  
4 information it has even concerning a category 1 issue.

5 MS. YOUNG: Certainly the Staff would  
6 agree with that, but as Mr. Lewis pointed out, that is  
7 of which the Applicant is aware, and that could be  
8 interpreted as a subjective standard.

9 CHAIR KARLIN: Right.

10 MS. YOUNG: I mean we have controversy  
11 where between the Staff, the Applicant and Petitioners  
12 with respect to what's the significance of this  
13 information.

14 The Staff's position is that it's very  
15 similar to things that the NRC has been considering  
16 over the past 25 years.

17 CHAIR KARLIN: Right.

18 MS. YOUNG: Now granted the NRC has not  
19 specifically highlighted in every turn what aspects of  
20 various analysis of spent fuel pool accidents it chose  
21 to emphasize, but the scenario that they are alleging  
22 here, this new and significant information has been  
23 considered generally.

24 CHAIR KARLIN: Right, well let me -- let's  
25 posit for a moment that there is new and significant

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1 information. That's a separate issue which we'll  
2 probably have some questions about.

3 But assuming that there is new and  
4 significant information of which the Applicant is  
5 aware, Staff acknowledges that the reg and page 11  
6 says that the environmental report needs to include  
7 that new and significant information.

8 MS. YOUNG: Correct.

9 CHAIR KARLIN: And that the Staff also  
10 under the regs, if there is new and significant  
11 information that it needs to address that new and  
12 significant information in the final SEIS. Do you  
13 agree with that?

14 MS. YOUNG: That's correct. That's  
15 correct, if we were to take that position. In other  
16 words --

17 CHAIR KARLIN: If there is new and  
18 significant information.

19 MS. YOUNG: If we see the world the same  
20 way Petitioners do.

21 CHAIR KARLIN: Now the next jump is  
22 assuming there is new and significant information,  
23 then the Applicant has the duty and the Staff has the  
24 duty, is it not troubling that the Staff can fail or  
25 I'm sorry, the Applicant, one assumes in this

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1 scenario, could fail to meet that requirement and yet  
2 in every other case contentions come into us and they  
3 say the environmental report is not adequate because  
4 it doesn't include this and it doesn't include that.  
5 And we admit the contention.

6 Here, the environmental report is not  
7 adequate because it doesn't include the new and  
8 significant information regarding a category 1 which  
9 you and the Applicant both agree it must include. And  
10 we say yes, that's all true, State of Massachusetts,  
11 but you don't get this contention admitted because  
12 it's verboten and we need to have some law which says  
13 and it's verboten because -- I'd like to cite a reg,  
14 but I don't find one. Why isn't it admissible?

15 MS. YOUNG: Well, I think the reg that you  
16 would cite is 2.335 with respect to how you weigh the  
17 applicability of a rule in a proceeding.

18 CHAIR KARLIN: No, no, no, no. 2.335 just  
19 says you can't challenge a regulation. What  
20 regulation prohibits them? In fact, the reg is on  
21 their side. They're right. The environmental report  
22 is supposed to include this new and significant  
23 information which they posit exists and they say  
24 doesn't. And if they're right, then there's no reg  
25 that says you can't challenge that.

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1 MS. YOUNG: But every contention has to be  
2 redressable within the scope of the proceeding and the  
3 only way that that concern could be redressed is by a  
4 ruling on the Commission that the rule should not be  
5 applied.

6 What prohibits litigation on spent fuel  
7 pool storage issues is the license renewal rule. So  
8 if you're going to have a concern where the Applicant  
9 has failed to include information in the environmental  
10 report, or the Staff has failed to analyze which we  
11 haven't come to that point since the environmental  
12 impact statement hasn't been prepared, it has to be  
13 redressable and the only way to address that is to get  
14 over the hurdle of the rule that proposed  
15 consideration in this proceeding.

16 CHAIR KARLIN: That's assuming the result.  
17 You're saying it's not redressable because you can't  
18 handle it because it's not redressable. Well, if we  
19 took it, it would be redressable.

20 MS. YOUNG: But again --

21 CHAIR KARLIN: Let me ask this, is there  
22 a difference -- some Petitioners, perhaps it was in  
23 the Turkey Point case and I think there's a  
24 distinction perhaps to be made. Sometimes a  
25 Petitioner will come in and say I don't like those

1 GEIS determinations. I don't like the category 1  
2 determinations or classifications. They were wrong.  
3 I don't like them. I have a different opinion. I  
4 want to challenge that. And we say oh no, no, no.  
5 That's not permissible. But under NEPA and Marsh and  
6 those sort of things, is it a different scenario if  
7 the Petitioner comes in and says I'm not trying to  
8 challenge that original interpretation. I'm just  
9 saying there's new and significant information now and  
10 under Marsh and regs, that has to be included.

11 Is that different than simply frontally  
12 challenging the original interpretation versus saying  
13 I'm not challenging that. I'm just saying you need to  
14 take into account new and significant information?  
15 Is that different, vis-a-vis the admissability of a  
16 contention?

17 MS. YOUNG: I see those issues as the  
18 same. Basically, you have here a Petitioner who  
19 believes that there's information that would warrant  
20 a reconsideration of whether these issues are category  
21 1 and should not be treated in individual proceedings.

22 So basically the information that they're  
23 raising is whether the generic findings should be  
24 applicable to this facility and to other facilities.  
25 So no matter how you slice it, there's a direct

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1 challenge to the Commission's regulation here.

2 I mean sure they've identified a partial  
3 failure that they allege for information being absent  
4 from the environmental report, but what relief can you  
5 get from that? How is that redressable? You've got  
6 to be able to get over the hurdle of the rule which  
7 would include consideration of spent fuel storage  
8 issues in this proceeding.

9 CHAIR KARLIN: I don't understand the  
10 relief question that assumes the result. The question  
11 is can we accept the petition? If we could, we'd  
12 grant some relief unless the Commission overruled us.  
13 The relief would be we'd have a hearing on whether or  
14 not there is new and significant information. If we  
15 said that there was or found that there was, then we'd  
16 tell the Applicant to amend its environmental report  
17 to include the new and significant information. I'm  
18 not sure how much relief that is, but that's kind of  
19 the way these things work, it seems.

20 MS. YOUNG: But even the Applicant at this  
21 point could take the information that Petitioners have  
22 posed, including the environmental report and there's  
23 no contention if you're going to look at it from the  
24 strict standpoint is it a contention of omission.

25 CHAIR KARLIN: Right.

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1 MS. YOUNG: So you know, I don't know --

2 CHAIR KARLIN: That's what happens to all  
3 contentions of omission. They immediately disappear  
4 as soon as --

5 MS. YOUNG: I don't know what -- I think  
6 that the Petitioners' concern is deeper than that  
7 though. I don't think it's simply the information is  
8 absent. I think it's that this information is  
9 important. They have a concern about the risk of  
10 spent fuel pool accidents and they have a perception  
11 on the likelihood of those accidents that's different  
12 than rulemaking and Waste Confidence rule findings  
13 done by the Commission over the last 20 some odd years  
14 and currently the Applicant's view of what's a  
15 significant hazard that's posed at its site. So again  
16 --

17 CHAIR KARLIN: So what are you going to do  
18 with San Luis Obispo and Mothers for Peace? Are you  
19 going to petition for cert., petition for  
20 reconsideration?

21 MS. YOUNG: Unfortunately, the Commission  
22 has special lawyers which don't include myself and Mr.  
23 Hamrick. We're not privy to those discussions.

24 CHAIR KARLIN: Yes.

25 MS. YOUNG: I assume that the Commission

1 will analyze that decision, decide on what its impact  
2 is for NRC licensing activities, including whether  
3 there's any concern about its current rules and  
4 regulations and what other changes should be made.

5 Until we get a guidance like that or a  
6 directive, we have to maintain addressing petitions  
7 raised in individual proceedings in the context of the  
8 existing rules.

9 And yes, September 1st may be the magic  
10 day.

11 JUDGE WARDWELL: In addition to addressing  
12 these legal issues of whether or not we can adjudicate  
13 this particular contention, we have the second  
14 challenge is new and significant information.

15 I'd like to, as I heard you speak, it's my  
16 impression or -- not impression, I think you stated  
17 that the Staff is comfortable and in fact, this issue  
18 of partial loss has been addressed in the GEIS, is  
19 that a correct interpretation of what you said?

20 MS. YOUNG: Yes. In other words, there  
21 have been spent fuel pool accident scenarios that the  
22 Staff has considered and included among those as  
23 partial drain down events of the type that Petitioners  
24 alleged.

25 JUDGE WARDWELL: So you're saying that in

1 your review of such things as NUREG 1353, 1437, the  
2 Waste Confidence rule, let me rephrase this.

3 In my review of 1353, 1437, the Waste  
4 Confidence rule, CR 4982 and 6451, I still came away  
5 with an uneasy feeling that, in fact, partial loss of  
6 water with high density racks of any age fuel during  
7 power plant operations wasn't fully addressed  
8 potentially. And you reinforce that with a statement  
9 you made just before you started this legal dialogue  
10 where you said something it wasn't considered  
11 generally, just 15 minutes ago, whatever it was.

12 And that's what I pick up a lot on reading  
13 these particular documents is this generally  
14 evaluated. And it seems to me that raises a doubt of  
15 whether, in fact, there's some argument that ought to  
16 be aired.

17 How would you comment on that? Even --  
18 well, Mr. Lewis was reading today, someone, a  
19 reasonable person could come up with a different  
20 interpretation of how that applies to their particular  
21 contention and said, gee, enough questions there. We  
22 ought to talk about whether or not it's really new or  
23 significant. And yes, we have a problem because it's  
24 not on its merits, but we have to scratch the surface  
25 a little bit to see whether or not there's some

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1 technical merit in whether or not it's new or  
2 significant and I would be interested in your comments  
3 on reinforcing why you feel -- apparently to be a very  
4 definitive opinion that those issues have been  
5 addressed: partial loss of water and high density  
6 racks at any age during power plant operations.

7 MS. YOUNG: Judge Wardwell, I believe that  
8 information in the Waste Confidence rulemaking of the  
9 Commission considered both of those activities or  
10 factors in terms of spent fuel accidents. High  
11 density racks was specifically referenced in  
12 quotations that Mr. Lewis read you from the 1990 Waste  
13 Confidence rulemaking and the 1979 Sandia report was  
14 specifically referenced in NUREG 1353 and NUREG 1353  
15 was referenced in the 1990 Waste Confidence. And the  
16 1990 Waste Confidence was referenced in the generic  
17 environmental impact statement for license renewal.

18 So again, the thread is not direct in the  
19 sense that you will not find a reference to the Sandia  
20 report specifically in the GEIS which would conditions  
21 of the type that we're discussing, but there is -- you  
22 have to look at the whole regulatory scheme.  
23 Environmental impact statements can be --

24 JUDGE WARDWELL: Doesn't that make sense  
25 then to let's go ahead and look at the whole

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1 regulatory scheme in an adjudicatory hearing?

2 MS. YOUNG: Well, I guess I don't  
3 understand what you mean. In terms of the information  
4 that the Intervenors have raised, there is information  
5 in the reports and various documents related to the  
6 generic environmental impact statement and a specific  
7 statement in the environmental impact statement on  
8 page 5-18 that talks about what the Commission  
9 believed or the Commission Staff believed the impacts  
10 of spent fuel pool accidents would be vis-a-vis  
11 internally initiated events.

12 You have, unlike the Mothers of Peace  
13 situation, you have information about impacts of spent  
14 fuel accidents here. What we're talking about today  
15 though is whether they have identified new and  
16 significant information such that there should be some  
17 waiver or suspension of the Commission's rule.

18 JUDGE WARDWELL: The date of when anything  
19 was published is somewhat irrelevant, isn't it? It's  
20 more of a matter of was it truly looked at when a GEIS  
21 was prepared, regardless of the date. And that's  
22 where it gets a little bit fuzzy in regards to how  
23 specifically they technically evaluated that  
24 particular scenario in the preparation of it.

25 CHAIR KARLIN: Let's get her saying yes to

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1 that.

2 MS. YOUNG: That's correct. That's  
3 correct. I mean, just when Intervenors file  
4 contentions, even if it turns to late filing, if they  
5 were relying on information that was available at the  
6 time they filed their petitions initially, just  
7 because someone creates a document later doesn't make  
8 it new information. So again --

9 JUDGE WARDWELL: But the corollary is even  
10 though the document was prepared in the 1800s, if it  
11 hasn't been evaluated than it is new and significant.  
12 Is that not fair to say?

13 MS. YOUNG: That's correct, but you know  
14 it's not so much whether that specific document was  
15 considered but were there conditions in that document  
16 or factors in the accident scenario was considered.  
17 And the best information that the Staff has available  
18 is these things have been considered. Were they  
19 articulated in excruciating detail in some of the  
20 documents that are relevant to license renewal? The  
21 Staff would submit no.

22 But there is information --

23 CHAIR KARLIN: May I ask? I think this is  
24 a corollary to what Dr. Wardwell is raising. Aren't  
25 we getting into the merits? This is just the

1 admissability, minimum showing admissability of  
2 contention. This is awfully deep stuff here at this  
3 point.

4 We're not here to hit the merits. Have  
5 they not given us a simple factual statement with an  
6 expert's support that gets them in? Assuming this is  
7 legally admissible, the next question is haven't they  
8 supported new and significant information enough to  
9 get in on a contention at all?

10 MS. YOUNG: Well, I think the parties have  
11 an obligation to look at the documents that they rely  
12 on.

13 CHAIR KARLIN: Right.

14 MS. YOUNG: And that the parties who may  
15 be evaluating that position in the context of  
16 representing their clients have the same obligation to  
17 look to other areas of those documents --

18 CHAIR KARLIN: Ironclad, I thought it was.  
19 Ironclad obligation.

20 MS. YOUNG: To identify information that's  
21 either consistent with that proposed by the  
22 Petitioners or inconsistent and I think you're going  
23 to find information that's inconsistent with their  
24 position to the extent that they allege that this is  
25 new information in the very same documents that they

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1 identify that's basic for their contention.

2 So in terms of getting into the weeds on  
3 every issue, no, the Staff would agree that's not  
4 appropriate at the contention threshold stage. But  
5 you have to look at the bases for the contention being  
6 raised to see if there is foundation laid for the  
7 arguments of the Petitioners.

8 CHAIR KARLIN: Let me ask the Staff's  
9 position, interested state 2.315(c), if a  
10 Massachusetts contention were not admissible, would it  
11 be an interested state?

12 MS. YOUNG: If another party's contention  
13 were admitted in this proceeding?

14 CHAIR KARLIN: No, if Massachusetts'  
15 contention were not admitted, would it qualify in the  
16 Staff's eyes as an interested state under 2.315(c)?

17 MS. YOUNG: Again, another Petitioner's  
18 contention would have to be admitted in this  
19 proceeding in order to participate.

20 CHAIR KARLIN: Yes, assuming another --  
21 assuming that.

22 MS. YOUNG: Yes. If there were another  
23 Petitioner admitted, they could participate as an  
24 interested state, if they request that from the Board  
25 and I assume they would do that today.

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1 CHAIR KARLIN: Okay, I just wanted to  
2 understand that.

3 Any further questions for Ms. Young?

4 JUDGE ELLEMAN: A quick one, on the issue  
5 of new and significant information, in one of the  
6 filings there is reference to NRC writing a submission  
7 to the licensees recommending that they take actions  
8 to lower the storage of spent fuel in their fuel pools  
9 or consider other alternatives.

10 I was wondering if that reflected a  
11 perception of new and significant information relevant  
12 to hazards on NRC's part?

13 MS. YOUNG: Can you tell me what you're  
14 specifically referring to?

15 JUDGE ELLEMAN: I was trying to find it  
16 and I didn't. If you don't remember it, I'll have to  
17 look for it.

18 MS. YOUNG: Well, I can ask the Staff who  
19 is here, they may be vaguely familiar with what you're  
20 asking.

21 I can't address what your concern is. If  
22 you could let us know that later, we'll try to get you  
23 the information.

24 JUDGE ELLEMAN: Okay.

25 CHAIR KARLIN: Anything else?

1 MS. YOUNG: Nothing further from the  
2 Staff.

3 CHAIR KARLIN: Thank you.

4 MR. ROISMAN: Mr. Chairman?

5 CHAIR KARLIN: Yes.

6 MR. ROISMAN: I wonder if it would be  
7 possible to take a break? We've been at this for an  
8 hour and 50 minutes.

9 CHAIR KARLIN: I'd like to finish this up,  
10 if we could. We have 20 minutes and I think we can --  
11 we've got 10 minutes.

12 MS. CURRAN: I could use even a three-  
13 minute break, please.

14 CHAIR KARLIN: Okay, I don't want to  
15 impose. We will have a biological break here. Okay,  
16 I understand. A lot of coffee this morning. Let's  
17 see here. It's about 10 of now, 11. Let's reconvene  
18 in 10 minutes. Thanks.

19 (Off the record.)

20 CHAIR KARLIN: Okay, the Atomic Safety and  
21 Licensing Board for the Entergy renewal is now back in  
22 session and on the record.

23 We are going to proceed with 10 minutes  
24 for State of Massachusetts' rebuttal, but before we do  
25 that, Judge Elleman has a question for the Staff and

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1 I think we could answer this in a minute or so.

2 JUDGE ELLEMAN: Yes, I finally found what  
3 I was trying to ask about in my earlier question. On  
4 page 16 of Entergy's response, there is the following  
5 statement in a footnote. It says that in a July 2004  
6 letter, the NRC directed licensees to implement  
7 additional spent fuel mitigation measures, as  
8 appropriate, including reconfiguration of the fuel as  
9 recommended by the NAS study.

10 I was wanting to ask if that doesn't  
11 reflect an acknowledgement of new and significant  
12 information in this particular issue?

13 (Pause.)

14 CHAIR KARLIN: Your 10 minutes are up.

15 (Laughter.)

16 MS. YOUNG: Well, Judge Elleman, you  
17 caught me on something that I'm not intimately  
18 familiar with and didn't have much change to discuss  
19 it with the Staff, but basically, the NRC is always  
20 looking for ways to improve reasonable assurance of  
21 facilities. And information of this type with respect  
22 to actions taken to decrease potentials for spent fuel  
23 accidents is the type of thing the NRC considers to  
24 do. I'm not sure that that letter and I haven't read  
25 it myself, specifically challenges the Staff's

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1 impression in terms of the likelihood of spent fuel  
2 pool accidents although with respect to whether they  
3 can be considered remote or highly unlikely.

4 So again, while the Staff may and the  
5 Commission may from time to time take additional  
6 actions and encourage licensees to take additional  
7 actions to ensure that the potential for accidents is  
8 decreased, it wouldn't necessarily construe that as  
9 meaning that it's new and significant information in  
10 the context of environmental impacts with respect to  
11 license renewal because it may not change the findings  
12 in the GEIS with respect to the low likelihood of  
13 those accidents.

14 And you know, you have two things, whether  
15 it's new and whether it's significant and the  
16 significant has to be with respect to environmental  
17 impacts associated with that.

18 JUDGE ELLEMAN: Thank you.

19 CHAIR KARLIN: All right, Ms. Curran, 10  
20 minutes for your rebuttal. Hopefully, you'll sort  
21 this all out for us now.

22 MS. CURRAN: Oh, I hope so.

23 REBUTTAL ARGUMENT OF DIANE CURRAN, ESQ.

24 ON BEHALF OF THE STATE OF MASSACHUSETTS

25 MS. CURRAN: To follow up on your

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1 question, Judge Elleman, I would just like to refer  
2 you to pages 19 and 20 of our reply brief on the  
3 admissability of the contention because we talk there  
4 about what we think is the significance of these  
5 enforcement orders that in fact they do support our  
6 position.

7 And we also cite case law for the  
8 proposition that by addressing safety issues or  
9 security issues under the Atomic Energy Act, the NRC  
10 does not fulfill its NEPA obligations which are  
11 separate and independent.

12 I'd also like to address another question  
13 you raised about our, in our contention we posit that  
14 the likelihood of a spent fuel pool fire, an accident  
15 involving such a fire is now in the order of  $10^{-5}$ .  
16 And if we go back to the factors that Judge Wardwell  
17 identified earlier that the partial loss of water, the  
18 use of high density racks, the fact that any age fuel  
19 can burn, the fact that this is during operation and  
20 not a decommissioning plant. If you look at all those  
21 factors, then the overall probability of a reactor  
22 accident resulting in a fire is higher than previously  
23 thought by the NRC.

24 CHAIR KARLIN: On that, may I ask didn't  
25 Dr. Thompson address that in the Sharon Harris

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1 decision at some length? Isn't this just a re-hash of  
2 that?

3 MS. CURRAN: No, it's not a rehash of that  
4 case because the factual -- first of all, that was a  
5 PWR. This is BWR. The conditions that could lead to  
6 an accident are different. The BWR is more vulnerable  
7 because the pool is above ground, the pool is in the  
8 reactor building. You cannot make a comparison of the  
9 overall probability of the accident, the particular  
10 accident that was evaluated in the Harris case. But  
11 Dr. Thompson does make a comparison of one particular  
12 aspect of that case which is if there is a fire in  
13 pools A and B, high level of radioactivity in that  
14 building, how does that affect the potential for a  
15 fire in pool C and D? And that is addressed in our  
16 reply brief.

17 On the issue of new and significant  
18 information, there's been several arguments made here  
19 about whether or not partial drainage was considered  
20 in NUREG 1353, or the Waste Confidence rule or  
21 implicitly the license renewal GEIS. I would like to  
22 refer the Board to a briefing that was conducted  
23 recently in the Pilgrim case regarding some of these  
24 vary same arguments.

25 The initial briefs were filed on July

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1 21st, and all of the parties filed reply briefs on the  
2 26th. And all of the parties addressed those very  
3 same issues in those briefs.

4 I would like to refer to one in  
5 particular, the argument that the Waste Confidence  
6 rule in response to a comment from Public Citizen  
7 discuss the issue of what are the impacts of a partial  
8 drainage accident. The rule itself is quite clear  
9 that in making this evaluation, the NRC was looking at  
10 complete and instantaneous drainage of fuel that was  
11 aged.

12 I'm going to read you the language from  
13 the Federal Register notice. It should be noted --

14 CHAIR KARLIN: What page?

15 MS. CURRAN: I'm at page 55, Federal  
16 Register 38481 through 82. It should be noted that  
17 for zircaloy cladding fire in a spent fuel storage  
18 pool, an earthquake or other event causing a major  
19 loss of cooling water would have to occur within two  
20 years after operation of a PWR or six months after  
21 operation of a BWR, which simply and completely  
22 undermines Entergy's and the Staff's argument.

23 And I also think it is important to bear  
24 in mind that I thought Judge Wardwell put it very  
25 well. What the standard is here for admission of this

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1 contention, the way he put it was are there enough  
2 questions that we really should talk about it.

3 We think we have made a very strong case  
4 and that it is time to talk about this issue. It has  
5 been delayed for too long. There is a great deal of  
6 evidence that has mounted now that this issue needs to  
7 be addressed, this issue, which was never addressed in  
8 any EIS that involves spent fuel pool storage, not  
9 with the degree of care and consideration that is  
10 required by NEPA.

11 CHAIR KARLIN: Let me focus on that a  
12 little bit. I mean, are you just -- is Dr. Thompson  
13 just saying they are wrong? He said they're wrong  
14 before. Is he saying they are wrong again or is there  
15 something really new here other than him saying it's  
16 wrong?

17 I mean, look at his report, his  
18 declaration. I tried to read that. I thought it was  
19 a very good report, I just was searching for anything  
20 new in there.

21 MS. CURRAN: Yes.

22 CHAIR KARLIN: Now on page 11 of that  
23 report at the bottom, he refers to neither of the two  
24 GEISs nor the September 90 review, the Waste  
25 Confidence decision provided technically defensible

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1 examination, the statement of each are inconsistent  
2 with the findings of subsequent more credible studies.  
3 Now it sounds good but it sounds like he's just saying  
4 he disagrees and then he goes on to refer to the  
5 inconsistent findings of subsequent, more credible  
6 studies, as his own studies. The February 2001,  
7 there's a study, there's the Alvarez Report, which he  
8 was a party to.

9 Is there something new here? What's new?  
10 Didn't they know about partial uncovering? Didn't they  
11 know about high density racking? Hasn't this been  
12 litigated so many times?

13 MS. CURRAN: As we have gone over in our  
14 contention and in our reply, in the previous EIS is  
15 the NRC did not look at partial drainage, did not  
16 examine the consequences of the partial drainage  
17 accident. The code that was --

18 CHAIR KARLIN: But they said that they  
19 did. They cite things to it.

20 MS. CURRAN: Well, we have material  
21 disputed fact and we cite language in NUREG 1353  
22 saying the computer code that was used to make  
23 probability estimates did not consider partial  
24 drainage, emphatically did not. So although the words  
25 partial drainage may appear in that report, the

1 computer code which yielded probability estimates  
2 which are the ultimate issue here did not do that.

3 CHAIR KARLIN: Okay, let me --

4 MS. CURRAN: And did not consider high  
5 density storage for BWR fuel.

6 CHAIR KARLIN: Well, let me switch a  
7 little bit. I guess this is what I have as sort of  
8 the flood gates question, which is as I see the  
9 regulatory structure here for a renewal and  
10 environmental NEPA considerations on category 1, there  
11 is a strong impetus on the part of the Commission,  
12 whether we like it or not, that that on a number of  
13 issues are category 1. They're going to be dealt with  
14 generically and that's the end of them and they're not  
15 going to be able to be brought up in an adjudicatory  
16 hearing.

17 MS. CURRAN: Yes.

18 CHAIR KARLIN: Start with that  
19 proposition. But you posit there is an exception to  
20 that proposition which is ah, but if there is new and  
21 significant information under Marsh CQ regs, that has  
22 to be considered and it's litigable as a contention.

23 Assuming that's true and we granted that,  
24 would that not open the floodgates and basically  
25 vitiate the whole category 1 because every time

1 someone wanted to litigate something, they would just  
2 simply say well, we have some new and significant  
3 information, the threshold is minimal, let's get in  
4 here and litigate it.

5 MS. CURRAN: That's why I'm stuck on this  
6 term floodgate because I think the situation here is  
7 that we've got a flood building up on the other side  
8 of the gate and you can't hold back a flood.

9 CHAIR KARLIN: All I'm suggesting is that  
10 thousands of contentions, the whole point of the regs  
11 which was to keep it only to category 2 would be  
12 vitiated by the exception, the exception would swallow  
13 the rule --

14 MS. CARPENTIER: One minute.

15 MS. CURRAN: Two things in answer to your  
16 question. NEPA is an action forcing statute is a  
17 nondiscretionary statute. The NRC is obligated to  
18 consider new and significant information, cannot  
19 legislate the refusal to do that.

20 CHAIR KARLIN: And Union of Concerned  
21 Citizens indicates that the Commission can handle the  
22 NEPA issues on a generic basis and that's what it's  
23 done.

24 MS. CURRAN: The Commission has to offer  
25 some way for parties to raise that information and we

1 had done that here. No one can argue that we have  
2 failed to provide support for our position. This is  
3 not somebody that comes in and says I think maybe the  
4 Commission should take another look. We have  
5 exhaustively reviewed the topic and showed that there  
6 is a great deal of evidence which contradicts what the  
7 Commission has said for years. And yes, some of this  
8 information existed before, but it was never  
9 evaluated.

10 MS. CARPENTIER: Time.

11 MS. CURRAN: It's not just a mere  
12 disagreement. It's a question of failure to consider  
13 factual circumstances.

14 CHAIR KARLIN: Okay. Any other Judges  
15 have questions? Okay, thank you, Ms. Curran.

16 MR. LEWIS: Judge Karlin, could I just say  
17 a procedural thing?

18 CHAIR KARLIN: No, this is contention.

19 MR. LEWIS: Okay.

20 CHAIR KARLIN: Only contention. That  
21 contention is over with. We'll now turn to the next  
22 contention which I guess is the State of Vermont  
23 contention 2 which has, we believe some similarities  
24 and it appears to be an environmental contention  
25 raising what it says as new and significant

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1 information on what some categorizes as a category 1  
2 issue.

3 Let's see here, you have 25 minutes, Mr.  
4 Roisman?

5 MR. ROISMAN: Yes, and I'd like to reserve  
6 10 minutes for rebuttal, but I'd like to request that  
7 if at the end of my 15 minutes, the Board still has  
8 questions, you take that from my rebuttal time.

9 CHAIR KARLIN: That's fine.

10 ORAL ARGUMENT OF ANTHONY ROISMAN, ESQ.

11 ON BEHALF OF THE STATE OF VERMONT

12 MR. ROISMAN: You've covered conceptually  
13 much of what is involved with contention 2, but I  
14 think it's important and I want to focus on what is  
15 the difference in this contention 2 and the contention  
16 that the Commonwealth of Massachusetts has raised.

17 First of all, I want to focus because I  
18 think that's where the principal dispute is, on  
19 Section 2.309(f)(1)(iii). The real question here is  
20 is this an issue that is appropriate for Licensing  
21 Board?

22 Number one, there's no dispute. We now  
23 have the Applicant and the Staff agree that the  
24 Applicant has an absolute duty to report new and  
25 significant information.

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1           Number two, Section 2.309(f)(1)(vi)  
2 explicitly acknowledges that a legitimate contention  
3 is one that -- and I quote: "if the Petitioner  
4 believes that the application fails to contain  
5 information on a relevant matter as required by law,  
6 the identification of each failure and the supporting  
7 reasons for the Petitioner's belief."

8           So there's certainly no question that we  
9 are entitled to make the argument that we have made  
10 here, namely that the Applicant has failed to produce  
11 new and significant information relating to a matter  
12 in contention under the GEIS.

13           Third --

14           CHAIR KARLIN: Could we just ask you to  
15 pause for a minute, stop the timer. I just wanted to  
16 get some materials, if that's okay.

17           MR. ROISMAN: Okay.

18           (Pause.)

19           CHAIR KARLIN: Okay, please continue. I'm  
20 sorry.

21           MR. ROISMAN: Third, I think it's also  
22 beyond dispute that if there is new and significant  
23 information related to a category 1 matter in the  
24 GEIS, it is supposed to be addressed by the regulatory  
25 staff in the environmental impact statement.

1           Now we'll get to the question what do you  
2 do if they don't do it, but for the moment it's clear  
3 and that's the Statement of Consideration, the page  
4 that we've all been citing to which is 28470 lists  
5 those different things to be done when new and  
6 significant information comes up and they all talk in  
7 terms of the Staff shall and the Staff will. So it's  
8 clear the Staff has a duty if there's new and  
9 significant information to do something about it in  
10 the environmental impact statement. And to take  
11 certain actions with regard to getting Commission's  
12 permission to either convene a new generic rulemaking  
13 or to make an exception to the generic rule for the  
14 purposes of the case.

15           So why is it that we start with the ER?  
16 And I think that's an important consideration. I  
17 believe that the reason the Commission has been so  
18 adamant and has put into the regulations this  
19 obligation on an Applicant is to assist the Staff in  
20 carrying out its duties. If the Applicant knows new  
21 and significant information and doesn't tell the Staff  
22 about it, how can the Staff do its job? Keep in mind  
23 that this hearing is more the aberration than the  
24 norm. The norm would be the Applicant submits an  
25 application. The Staff reviews it. Does an

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1 environmental impact statement. And the Commission  
2 makes a decision.

3 The hearing is the exception. The normal  
4 course would be that this would happen without an  
5 Intervenor. If the Applicant doesn't fulfill its  
6 duty, the Staff can't fulfill its duty. It can't know  
7 all things. It has to depend upon an Applicant,  
8 particularly whereas here, environmental impact that  
9 is the underlying core of contention 2 is a site-  
10 specific impact.

11 This respect is different than the  
12 Commonwealth because we're not saying that there's a  
13 generic cause. That's why I mentioned in my opening  
14 that this is a unique and now more beautiful place  
15 with the sun out and that this unique place will be  
16 impacted in a way that is different than other sites  
17 because this area would be indefinitely taken out of  
18 use.

19 JUDGE WARDWELL: Isn't that argument a bit  
20 precarious for you by stating that the main purpose of  
21 this is as a tool for the Staff or usefulness for the  
22 Staff to address a particular issue in the EIS? If  
23 then we turn to the Staff and they said yeah, we don't  
24 need this, doesn't your house of cards crumble?

25 MR. ROISMAN: Well, first of all, I think

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1 the short answer is no, I don't think it does, but  
2 more importantly, I don't think you have to cross that  
3 bridge.

4 We have not made a contention that the  
5 draft EIS is defective and we will not assume that the  
6 Staff will not do its duty. So at this stage of the  
7 proceeding, it's not necessary for the Board to  
8 answer, although I understand the temptation and the  
9 curiosity that underlies it to answer the question  
10 what will we do if new and significant information  
11 exists and for whatever reason the Staff decides it  
12 doesn't think it's new and significant or it doesn't  
13 think that it should do anything about it, even though  
14 it acknowledges that it's new and significant.

15 JUDGE WARDWELL: Then we should agree with  
16 Turkey Point and the Commissioners, although you may  
17 not agree with it, but someone's position of Turkey  
18 Point and in fact, this Board can't litigate that  
19 particular -- I'm sorry, that's category 1 issues.

20 But if, in fact, the Staff already has  
21 been put on notice, why do we have to bother  
22 litigating this then, in fact? Because we'll just  
23 wait until the EIS has come in.

24 MR. ROISMAN: Because I believe the  
25 Applicant probably knows more than we know and that

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1 imposing on the Applicant a duty to disclose all the  
2 new and significant information that it has about the  
3 inability of having a place to put its spent fuel 30  
4 years after the license extension expires, assuming  
5 that all of that happens, in other words, after 2062,  
6 may enlighten all of us.

7 In this great scheme of things, the  
8 greatest amount of knowledge is likely to be in the  
9 possession of Entergy. They have the largest dog in  
10 the fight. They have the most to gain or lose if  
11 spent fuel storage is not solved. And they went to  
12 Court and we've cited you to that case.

13 JUDGE WARDWELL: We'll determine whether  
14 -- you can evaluate that once the Staff comes out with  
15 their EIS and determine whether or not they inquired  
16 enough into the Applicant in regards to addressing  
17 this on-site land use issue and whether they had  
18 interrogated in the adequacy of their review at that  
19 point. Isn't that the best time to do it?

20 MR. ROISMAN: We don't think that the  
21 regulations give us the ability to challenge the  
22 manner in which the Staff carries out its duties in  
23 that respect. In other words, that we could -- it's  
24 sort of like prosecutorial discretion. I don't think  
25 we would be able to make a contention. Let's say the

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1 draft EIS comes out, but that's contention time. And  
2 we think the Staff did a sloppy job, which I don't  
3 think they will do. But if we thought that, I don't  
4 think that would be a contention that we could raise  
5 with you.

6 What we could raise with you and what we  
7 would raise with you is that the Staff has incorrectly  
8 determined that new and significant information  
9 doesn't exist or that it exists but it doesn't change  
10 anything or that it changes anything, but they don't  
11 think it warrants going to the Commission and asking  
12 that anything be done.

13 JUDGE WARDWELL: What about Turkey Point?  
14 Isn't the teaching of Turkey Point the ruling, the  
15 holding as it were is that this, we posit, we ask,  
16 they answered the ER is supposed to include new and  
17 significant information on category 1 issues. The EIS  
18 is supposed to include new and significant information  
19 regarding category 1 issues. You've reminded that of  
20 us and to have acknowledged that. But they say so  
21 what? There can be no admissible contention. Your  
22 remedy is to file comments on the draft EIS and to  
23 seek a waiver or to seek a rulemaking.

24 Your reply on page 17 seems to get it  
25 right. The central thesis of the argument is advanced

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1 by the NRC Staff and Entergy is that the Commission  
2 has contrary to all reason and contravention of well  
3 established legal principle declared that no  
4 Intervenor might ever present for consideration by an  
5 ASLB issue of whether new and significant information  
6 not considered in the GEIS exists warranting further  
7 analysis.

8 That does seem to be the central thesis.  
9 That does seem to be the holding of Turkey Point.

10 MR. ROISMAN: I think first of all let's  
11 understand that we were not parties to Turkey Point.

12 JUDGE WARDWELL: No, no. But it's a  
13 precedent that we are bound by if it applies.

14 MR. ROISMAN: Yes, but you're also bound  
15 by the regulations and I would point you to two  
16 regulations that impose duties on this Board that I  
17 cannot square with the holding in Turkey Point and I  
18 don't know why they were not cited and they may not  
19 have been raised by the party in Turkey Point. And  
20 we've cited them, first of all, 10 CFR Section 51-  
21 95(c)(4) which we cited at pages 35 and 36 of our  
22 reply.

23 This is the regulation that imposes on the  
24 Board certain obligation. It says and I'm quoting in  
25 part from subpart 4 "in order to make its

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1 recommendation and final conclusion on the proposed  
2 action, the NRC Staff adjudicatory officers and  
3 Commission shall integrate the conclusions as  
4 amplified by the supporting information and the  
5 generic environmental impact statement for issues  
6 designated category 1 with the exception of off-site  
7 radiological impacts or collective effects and the  
8 disposal of spent fuel and high level waste." We're  
9 not raising any of those issues here. We're not  
10 talking about disposal of waste. "Or resolve category  
11 2 information, developed for those open contention 2  
12 issues applicable to the plant in accordance with  
13 51.52(c)(3)(iii) and any significant new information."

14 So the duties imposed upon this Board to  
15 take into account significant new information  
16 resolving then the ultimate question of whether or not  
17 the balance supports leaving this as an option for  
18 Entergy for the state to then decide whether they  
19 approve or not or rejecting it.

20 Secondly, the Board has a duty under  
21 Section 51.104(a)(3) which imposes on it the general  
22 duties and environmental matters. In the proceeding,  
23 the presiding officer will decide those matters in  
24 controversy among the parties within the scope of NEPA  
25 and its subpart.

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1           So if, as we believe is the case, there is  
2 a dispute between us and the Applicant at the moment  
3 as to whether or not there's new and significant  
4 information and maybe down the line between us and the  
5 Staff as to whether there's new and significant  
6 information, the regulations require that the Board  
7 must address it.

8           Let me step back for a second. Let's take  
9 a look at what is the option. Let's assume, as you  
10 have indicated in your discussion with the  
11 Commonwealth, let's assume that there is new and  
12 significant information and it has not been included.  
13 What are your options?

14           Well, one option would be to follow the  
15 Applicant and the Staff's position which is to say  
16 well, this has to be done by rulemaking or by waiver  
17 or one of those other special exceptions that are  
18 discussed and I agree with your suggestion earlier  
19 that the listing on page 28470 of the Statement of  
20 Considerations does not purport to be definitive. It  
21 certainly lays out some specific actions that may be  
22 taken, but it doesn't say and that's it.

23           But putting that aside, one option is you  
24 follow what they say. But if you follow what they  
25 say, what are you supposed to do? Remember, NEPA is

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1 the overarching statute that's controlling here, not  
2 the Nuclear Regulatory Commission's Atomic Energy Act.  
3 What do you do? I think you have only one choice.  
4 You put the hearing into suspension while all those  
5 procedures are completed in front of the Nuclear  
6 Regulatory Commission. You can't proceed otherwise.

7 In fact, there's a case and I regret my  
8 computer needs a power cord. The power cord is in my  
9 suitcase. The suitcase is in the system of the  
10 Continental Airlines. I have on my computer the  
11 citation to this case. It's called Natural Resources  
12 Defense Counsel versus NRC. It involved a GESMOF, the  
13 general impact statement on mixed oxide fuels. The  
14 holding in the case was that the Commission could not  
15 proceed to license individual plants while a generic  
16 issue that it acknowledged was relevant to that was  
17 still unresolved, the generic issue happened to be  
18 ironically security and safeguards.

19 So you could not go ahead and license this  
20 plant for an extension if you acknowledge that there  
21 was new and significant information that might bear on  
22 the answer to whether it should be licensed and that  
23 new and significant information --

24 MS. CARPENTIER: One minute.

25 MR. ROISMAN: -- now needed to go through

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1 some process.

2 Lastly, I believe just to at least give  
3 lip service to your concerns about the other criteria,  
4 that our contention is specific and it's site  
5 specific, that we've explained the basis I think quite  
6 well in our pleadings, that the impacts are obvious.  
7 They are going to effect this plant because we're  
8 talking about the incremental spent fuel storage  
9 problem that will be created by generating 20 more  
10 years of spent fuel.

11 We're not challenging whether or not  
12 there's a place for the spent fuel to go that is going  
13 to be generated and has been generated under the  
14 original license. And we presented numerous facts.

15 I would say what we have presented is  
16 evidence of a perfect storm. Everything that was  
17 believed possibly could happen --

18 MS. CARPENTIER: Time.

19 MR. ROISMAN: -- and evaluated  
20 individually, has now come about in the most extreme  
21 fashion. And the Applicant knows it and they kept it  
22 out of their environmental report and we believe that  
23 therefore we have a legitimate admissible contention.  
24 Thank you.

25 CHAIR KARLIN: Thank you, Mr. Roisman.

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1 We'll have a rebuttal.

2 JUDGE WARDWELL: I'll hold for a rebuttal.

3 MR. ROISMAN: Okay, I don't mind asking a  
4 question now and taking it out of the rebuttal time.

5 JUDGE WARDWELL: Okay, let's go ahead with  
6 that. Your last statement is referring to the amount  
7 of information provided to demonstrate that you have  
8 got new and significant information, is that what  
9 you're alluding to?

10 MR. ROISMAN: Yes.

11 JUDGE WARDWELL: A couple factors in that  
12 regard. One of your statements led to the conclusion  
13 that you created that there's potential for indefinite  
14 storage now required on site, that in fact with all  
15 these potential circumstances coming up, Yucca  
16 Mountain will never be cited. I think there was a  
17 statement that you made that there will be indefinite  
18 storage potential, and therefore has to be addressed  
19 in regards to onsite land use.

20 Isn't that a lot of just how the wind  
21 happens to be blowing on a given day? I mean, because  
22 things have changed since you've submitted your  
23 contention. Now there seems to be a better light in  
24 regards to how Yucca Mountain is evaluated. Isn't  
25 that something that really is out of our control, and

1 really not a criteria that we should be looking at as  
2 in regards to how political winds are blowing in this  
3 country?

4 MR. ROISMAN: Well, let me answer that  
5 this way. First of all, our point about Yucca  
6 Mountain is that we're not doubting that maybe some  
7 day they will have a facility there and that it will  
8 have -- there's a statute that limits the amount of  
9 nuclear waste it can receive, and that amount of  
10 nuclear waste will be fulfilled by the reactors that  
11 are operating now and that will continue to operate  
12 through about 2020, I think.

13 So that the spent fuel we're talking  
14 about, even if Yucca Mountain comes on line in  
15 schedule, will not have a place to go at Yucca.  
16 There's no interim storage facility for spent fuel.

17 The political winds, however, only  
18 underscore the inherent uncertainty that was believed  
19 back when the GEIS was put together, that inherent  
20 uncertainty was not going to be an insurmountable  
21 problem. Now we have seen just what you said -- the  
22 wind blows this way, the wind blows that way, someone  
23 is President, someone else is in charge of the House,  
24 someone else is in charge of the Senate. But all  
25 we've seen is that that has demonstrated that no one

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1 has ever been in charge who has been able to move the  
2 ball significantly forward. That's number one.

3 So the political winds really underscore  
4 our concern that this new spent fuel won't have a  
5 place --

6 JUDGE WARDWELL: Yes, but that's a weak  
7 argument, isn't it? You could present that for almost  
8 any contention if you wanted to keep it that generic  
9 and say gee, we will never be able to handle anything  
10 because Administrations will change and the whole  
11 policy of the Commissioners will change, and I think  
12 that's awfully broad reaching and based on your  
13 conjecture and speculation rather than anything that  
14 we can deal with in a concrete manner in addressing  
15 whether that is or isn't a potential problem area,  
16 especially at Yucca Mountain.

17 MR. ROISMAN: Let me assume for a moment  
18 that you're right, that the political argument is too  
19 all encompassing. You're still left with the fact  
20 that under the current plan, the current statutes,  
21 there is no room at Yucca for the new waste that will  
22 come from this extension. There is no interim storage  
23 facility --

24 JUDGE WARDWELL: Again, I'll interrupt  
25 because that's conjecture also because they can, when

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1 in fact, if you interpret it to mean as soon as the  
2 second site is sited, you can still go back to Yucca.  
3 There is a whole realm of things that are so far in  
4 the future that it would be impossible for us to  
5 evaluate those in any definitive manner in regards to  
6 what is created in the regulation for a viable  
7 contention.

8 MR. ROISMAN: What you just described is  
9 the classic definition of why the word indefinite was  
10 invented. It is indefinite. What do we look at now,  
11 at this moment when we decide whether to license this  
12 plant. Shouldn't the Board consider the real  
13 possibility that this spent fuel will be there long  
14 after 2062 and what are the implications of that on  
15 land use in a state that values its land very highly,  
16 particularly its river front land.

17 JUDGE WARDWELL: What state doesn't value  
18 their land highly?

19 MR. ROISMAN: Well, I would suggest that  
20 some states value it differently than others do. This  
21 state, we have a special act called Act 250 which  
22 requires that everything, except nuclear power plants  
23 and some other power facilities, must go through a  
24 series of steps to demonstrate that their process and  
25 their project meets environmental criteria that are

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1 not applicable in other states. So I submit and I'm  
2 a New Hampshire, that Vermont is a unique state and  
3 that we're talking about a unique --

4 JUDGE WARDWELL: Okay, we'll move on. I  
5 suggest you don't fly from New Hampshire to here next  
6 time on Continental.

7 (Laughter.)

8 CHAIR KARLIN: Okay, thank you, Mr.  
9 Roisman.

10 Marcia, you'll inform how much time  
11 remains when we get back.

12 MS. CARPENTIER: Yes, there will be five  
13 minutes left.

14 CHAIR KARLIN: Okay, fine. That's great.  
15 Let's see. Entergy, Mr. Lewis I guess and you have 20  
16 minutes. Is that right?

17 MR. LEWIS: That's right, Judge Karlin.

18 CHAIR KARLIN: All right. Proceed.

19 ORAL ARGUMENT OF DAVID LEWIS, ESQ.

20 ON BEHALF OF ENTERGY

21 MR. LEWIS: Let me address the assertion  
22 that this is a unique site specific issue as opposed  
23 to a generic issue. The Waste Confidence rule and the  
24 findings in that rule are the prototypical generic  
25 issues. Indeed, when the Commission explained in

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1 license renewal why it had promulgated the Waste  
2 Confidence rule that incorporated it into the license  
3 renewal regime, it explained that its purpose was "to  
4 address high level waste disposal generically, rather  
5 than unnecessarily to revisit the same waste disposal  
6 questions license by license when reviewing individual  
7 applications".

8 And it did so because it said spent fuel  
9 management "is a national problem of essentially the  
10 same degree of complexity and uncertainty for every  
11 renewal application. It would not be useful to have  
12 a representative consideration of the matter". I'm  
13 quoting the Oconee decision, CLI 99-1149 NRC at 345.

14 The assertion that there is a site  
15 specific issue because there is going to be an  
16 definite storage --

17 CHAIR KARLIN: Well, let me ask on Oconee,  
18 did that case involve an allegation of new and  
19 significant information under NEPA? I don't think so.

20 MR. LEWIS: I don't recall the underlying  
21 context. I'd have to go back and look. We did cite  
22 it in our answer.

23 CHAIR KARLIN: Yes, okay.

24 MR. LEWIS: I would say though that the  
25 assertion that the impact that's not been looked at is

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1 indefinite storage is, in essence, simply a  
2 repudiation of the Waste Confidence decision. It is  
3 simply a statement that there is no confidence that  
4 Yucca Mountain or a second repository will ever be  
5 built in this country and those were the central  
6 findings of the Waste Confidence decision.

7 CHAIR KARLIN: Well, let me ask on page  
8 17, the State of Vermont's reply, what I quoted to Mr.  
9 Roisman, is that correct? The central thesis of your  
10 argument is that the Commission has declared that no  
11 Intervenor may ever present for consideration by an  
12 ASLBP the issue of whether new and significant  
13 information not considered in the GEIS analysis is  
14 litigable?

15 MR. LEWIS: That's not quite correct. I  
16 would assert that they can bring it to the Board, but  
17 they have to bring it to the Board through a petition  
18 for a waiver if it is really a site specific issue.  
19 The Board then has the precise procedure to follow.  
20 They look at the petition for waiver, determine  
21 whether it makes a prima facie showing and if it does  
22 they certify it to the Commission. So in fact, there  
23 is a very well established policy and procedure for  
24 how you expand a proceeding.

25 CHAIR KARLIN: Well, what waiver is not

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1 appropriate? I guess you're saying first, let me  
2 understand. No one can ever get a contention in on  
3 new and significant information?

4 MR. LEWIS: Only be seeking a waiver.

5 CHAIR KARLIN: And the waiver is  
6 applicable when there are special circumstances unique  
7 to a particular site? Is there anything --

8 MR. LEWIS: That is correct and that is  
9 for a very good reason. As I just read the  
10 Commission's intent, was really to address this issue  
11 generically by ruling. If there are generic  
12 implications, it as a matter of policy does not want  
13 to litigate them over and over and over again. So in  
14 fact, the reason is taken to the Commission so the  
15 Commission can specifically decide is this generic?  
16 If there is something new and significant, have we  
17 addressed it in the rule to further our policy of not  
18 having to litigate this issue every 12 months.

19 CHAIR KARLIN: So okay, it does seem that  
20 your position is accurately characterized by -- that  
21 it's not litigable before the Board and that may be  
22 the position of the Turkey Point Commissioner's  
23 decision. Is that comport with NEPA's requirement for  
24 doing an EIS?

25 MR. LEWIS: Yes, it does completely. As

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1 I said, there's two Supreme Court cases that hold that  
2 the Commission can resolve the NEPA issues generically  
3 by rule. That means that they can preclude  
4 consideration of an issue absent a waiver and if there  
5 is a need to supplement, they can supplement by  
6 rulemaking.

7 Supplementing a GEIS by rule is a perfect  
8 comport with NEPA's requirements to supplement an EIS  
9 if it is necessary. The procedure that the Commission  
10 has crafted here of requiring a waiver or requiring a  
11 petition for rulemaking allows the Commission to make  
12 those determinations when its appropriate.

13 Let me just address one other point and  
14 that is the assertion that they're not really  
15 challenging the Waste Confidence rule because they're  
16 not disputing Yucca Mountain may be licensed. It's  
17 the second repository. In our answer we pointed out  
18 that part of the Waste Confidence decision is also  
19 assurance that if down the road there is a need for an  
20 additional repository the Commission has confidence  
21 that the nation would do what is appropriate and that  
22 is part of the Waste Confidence decision.

23 However, if you are really looking just at  
24 the political winds and saying well, Senator Domenici  
25 made a statement here and someone has referred to

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1 geomapping, so that's new and significant information.  
2 In fact, if you look at those bills, one of the recent  
3 bills is a DOE bill that would eliminate the capacity  
4 of limitation for Yucca Mountain.

5 I would simply submit to you that trying  
6 to reopen the Waste Confidence rule every time there's  
7 a political statement or a bill would defeat its very  
8 purpose and certainly if the Commission is going to  
9 reopen this very generic national, very generic  
10 rulemaking and address this national issue, the matter  
11 should be brought to the Commission's attention and  
12 not decided in each individual proceeding simply based  
13 on assertion that there's some new political  
14 statement.

15 CHAIR KARLIN: So if were to rule as you  
16 propose, what's the best citation you would give us or  
17 we should put in there for support for the proposition  
18 that this cannot be litigated in a contention? Is  
19 there a reg? Is there a case that deals with new and  
20 significant information? I mean Turkey Point doesn't  
21 really focus on new and significant information. It  
22 talks about it, but that was not raised, it didn't  
23 seem to me, by Petitioner.

24 What's the best authority we can have?

25 MR. LEWIS: 51.23 is the Waste Confidence

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1 rule. This is a challenge, a collateral check on the  
2 Waste Confidence rule that 2.335 prohibits. This is  
3 also a collateral check on the category 1 finding in  
4 Table B1 which says that the impacts of spent fuel  
5 storage and management generically would be small for  
6 all plants and it's an attack on 51.23(c)(1) I  
7 believe, which says there's no requirement to have an  
8 analysis of category 1 issues in an environmental  
9 report.

10 CHAIR KARLIN: So this is different --

11 MR. LEWIS: All those rules basically  
12 prohibit this issue from being raised absent a  
13 petition for waiver and finally, the SECY paper which  
14 really is the deal that was struck with DEQ has a flat  
15 out statement that says that category 1 issues can't  
16 be litigated absent a waiver.

17 CHAIR KARLIN: Did you all argue the SECY  
18 paper in your brief?

19 MR. LEWIS: Yes, we cited a portion. It's  
20 a clear statement in that SECY paper. I'm not going  
21 to be able to find it quickly enough.

22 CHAIR KARLIN: Well, if you did, we'll  
23 find it. I don't want you to take up your time.

24 MR. LEWIS: You'll see in our answer  
25 there's a reference to the SECY paper and a specific

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1 block quote that says category 1 issues may not be  
2 litigated absent a waiver.

3 CHAIR KARLIN: Okay.

4 MR. LEWIS: That's all I have.

5 CHAIR KARLIN: Any questions? Dr.  
6 Elleman?

7 JUDGE ELLEMAN: Vermont on there, I think  
8 it's in their reply, yes, on page 23, says that  
9 neither the Staff nor the Applicant deny and then they  
10 list what I categorized as three statements. I was  
11 wondering whether you do deny it? The profound  
12 potential impacts on local land use for Vermont State  
13 resources that can occur, spent fuel remains on site  
14 indefinitely following a closure of the reactor. That  
15 storage of spent fuel at Vermont Yankee may well  
16 extend beyond on any date assuming the GEIS and that  
17 stored offsite for any time in the foreseeable future.

18 MR. LEWIS: Let me say several things.  
19 First of all, the GEIS definitely looked at land use  
20 as an impact and I can give you references to page 6-  
21 78 and 6-81 and likewise the Waste Confidence decision  
22 49 Federal Register 34665 all looked at land use.

23 What they did not look at land use and I  
24 would agree with the state they did not look at  
25 indefinite storage as a land use impact because that

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1 is what the Waste Confidence decision was intended to  
2 eliminate from consideration.

3 The whole reason the Waste Confidence  
4 decision was promulgated was to avoid the need for  
5 having to assess the impacts of treating every storage  
6 site as a de facto disposal site.

7 So I would agree that land impacts of  
8 indefinite storage were not analyzed, but they don't  
9 have to be because of the Waste Confidence decision.  
10 As far as the length of time that spent fuel will be  
11 stored, the Waste Confidence decision is that spent  
12 fuel can be stored safely and without any significant  
13 environmental impact for 30 years beyond the  
14 expiration of the license which may include a renewal  
15 term, so if the license is being renewed from -- we've  
16 extended from 2012 to 2032, basically the Waste  
17 Confidence is that there are no significant safety or  
18 environmental impacts associated with the storage  
19 through 2062, I believe is the date.

20 And to the extent that there is an  
21 assertion there's going to be storage beyond that,  
22 first I would assert that that's highly speculative,  
23 but second I would assert that it's simply  
24 inconsistent with the Waste Confidence decision.

25 CHAIR KARLIN: Any other questions? All

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1 right, I think we'll go to Staff.

2 Mr. Hamrick?

3 MR. HAMRICK: Yes.

4 CHAIR KARLIN: Okay, great.

5 ORAL ARGUMENT OF STEVEN HAMRICK, ESQ.

6 ON BEHALF OF NRC STAFF

7 MR. HAMRICK: I'd like to start by trying  
8 to draw page 11 from Turkey Point to page 12 and  
9 trying to connect the two ideas. On page 11 of Turkey  
10 Point, the Commission states that on many issues the  
11 NRC found that it could draw generic conclusions. And  
12 then proceeds for a paragraph or two to talk about the  
13 category 1 status, contention 2 status of different  
14 issues and discusses that. Then when you get to page  
15 12, it states clearly that the Commission recognizes  
16 that even these generic findings, category 1 findings,  
17 contention 2 findings may need revisiting.

18 They need this revisiting when new and  
19 significant information arises.

20 CHAIR KARLIN: Could you get to the mic a  
21 little closer?

22 MR. HAMRICK: Sorry. And when this new  
23 and significant information is available, that's when  
24 these generic findings may need revisiting.

25 And so that draws the idea of category 1

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1 and category 2 responsibility on the part of the  
2 Applicant.

3 To the page 12 point where it says clearly  
4 in the hearing process where a Petitioner is seeking  
5 to have a contention admitted and they may seek a  
6 waiver. Now the question has been raised of whether  
7 the list of waiver rulemaking or comment on the EIS is  
8 an exhaustive list. While it certainly does not  
9 appear exhaustive from the text that the Commission  
10 cites, one would have to ask yourself why a Petitioner  
11 would seek a waiver of the rule if they were -- if it  
12 wasn't a requirement.

13 The Petitioner seeks a waiver of a rule  
14 because otherwise it is in effect, if the rule in this  
15 case the Waste Confidence or the category 1 status of  
16 high level waste, spent fuel, and land use are not  
17 waived, then there is no enforceable obligation on the  
18 part of the Applicant in the hearing process to  
19 address any allegedly new and significant information.

20 CHAIR KARLIN: Okay, so do I understand  
21 you to say on page 12 we have a list that does not say  
22 that is exhaustive of options available to Petitioner  
23 who thinks that new and significant information is out  
24 there. And one of those options is to seek a waiver  
25 from the reg, and you're suggesting that the

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1 question at issue here, whether Mr. Oncavage may  
2 obtain a hearing on spent fuel risk arising during a  
3 reactor's operating life. As we hold in the text, it  
4 is part 51, it is the underlying GEIS that precludes  
5 litigation of that issue. That seems to be a  
6 characterization of their holding whether they really  
7 said it very well in the text or not that litigation  
8 of this issue was precluded. You just say yes.

9 MR. HAMRICK: Yes.

10 (Laughter.)

11 MR. HAMRICK: Correct. The footnote  
12 addresses the fact that Waste Confidence rule only  
13 speaks to issues after the reactor's operating life is  
14 over. The generic environmental impact statement  
15 addresses these issues with respect to the 20 year  
16 renewal period. The contention as is drafted and  
17 proposed discusses indefinite storage which seems to  
18 imply, they're discussing periods either during  
19 operation and after. That is the -- it's the after  
20 period, the 30 years after is covered by the Waste  
21 Confidence rule, and then after that they're not  
22 required to discuss those impacts by the Waste  
23 Confidence rule itself.

24 CHAIR KARLIN: Well, a lot of the, it  
25 seems like the Staff's brief here, I was a little

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1 surprised. I don't think you all confronted Draft  
2 51.53(c)(3)(iv), you know. And is our analysis of  
3 this contention similar or the same as the analysis  
4 for the State of Massachusetts and that they're  
5 alleging new and significant information and there is  
6 a legal question whether that's even permissible. Or  
7 is this some very different issue dealing with the  
8 Waste Confidence rule?

9 MR. HAMRICK: The issue is similar. In  
10 fact, 51.53(c)(4) states that the Applicant is  
11 required to provide any new and significant  
12 information of which it is aware with respect to any  
13 environmental impacts. It would seem that  
14 environmental impacts that are encompassed by the  
15 Waste Confidence rule would be include in that as  
16 they're not expressively excluded from that.

17 CHAIR KARLIN: So the Applicant would need  
18 to address new and significant information relating to  
19 waste confidence issues in its ER and the staff  
20 likewise would need to address those in its EIS but  
21 it's not litigable here?

22 MR. HAMRICK: Correct. Well, it's not  
23 litigable here for the threshold issues that we have  
24 discussed. However, if a Petitioner, excuse me, if an  
25 Applicant includes new and significant information of

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1 which it is aware, that it believes is new and  
2 significant in its application, the Staff then in  
3 creating its draft, Environmental Impact Statement,  
4 would then have to itself petition for a waiver of the  
5 rule. That's discussed in the Statement of  
6 Consideration for the part 51 rule.

7           However, again we would state that if you  
8 look at the Oconee case, this information is, wouldn't  
9 be really characterized as new and significant  
10 information. Oconee did not new and significant.  
11 What it did state was that the Commission, it  
12 recognized that the Commission has been aware of  
13 uncertainties with the respect to high level waste  
14 disposal for decades and has always acknowledged them  
15 but has decided these uncertainties will be overcome.  
16 That's the crux of the Waste Confidence rule.

17           Any political or technical issues raised  
18 in the petition amount simply to the same sorts of  
19 uncertainties that the Commission has been faced with  
20 for the past 20 years since the Waste Confidence rule  
21 was first promulgated.

22           JUDGE WARDWELL: I didn't see a lot of  
23 discussion in your answer in regards to if, in fact,  
24 for some reason the Board found a mechanism and found  
25 it appropriate to litigate this. There didn't seem to

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1 be response in here in regards to whether or not the  
2 information Vermont provided was new and significant.

3 Do you feel that, in fact, if it was  
4 appropriate for this Panel to litigate it, that it is  
5 new and significant information it provided?

6 MR. HAMRICK: No. In our pleading, we  
7 relied mostly on the ideas from the Oconee case that  
8 these issues are not new and significant because with  
9 them, technical problems, political problems, for at  
10 least 20 years. The Staff has a standard that it  
11 shares with Applicants for its Reg Guide 4.2 which  
12 discusses what should be included in a license renewal  
13 application. It includes a definition of new and  
14 significant information on page 4.2-S-4 and discusses  
15 information that was not considered in the analysis  
16 summarized in the GEIS that would lead to an impact  
17 finding different from that codified in Appendix B.

18 The impact finding in Appendix B is for  
19 land use impacts, for storage of spent fuel, is small  
20 --

21 MS. CARPENTIER: Time.

22 MR. HAMRICK: Is small and there is  
23 nothing that they've provided that would change that.

24 JUDGE WARDWELL: What is the definition of  
25 onsite versus offsite land use?

1 MR. HAMRICK: I'm not certain of the  
2 definition. The GEIS focus is mostly on onsite  
3 impacts.

4 JUDGE WARDWELL: They've got a couple of  
5 categories on offsite that are category 2 issues. I  
6 would delineate between the two.

7 MR. HAMRICK: I don't -- I would believe  
8 onsite impacts would be those associated with the  
9 reactor operation with the facility itself versus  
10 transportation type issues or I suppose high level  
11 waste would be offsite eventually as well.

12 JUDGE WARDWELL: In this case the  
13 Petitioner is claiming adverse facts on the land, not  
14 only as I interpret what they're trying to say and  
15 I'll ask them if I have time during the rely, that any  
16 spent fuel will be physically residing at the  
17 facility, but also the effects<sup>^</sup> of that on the land  
18 surrounding that.

19 MR. HAMRICK: Correct.

20 JUDGE WARDWELL: Where do we draw the line  
21 between offsite and onsite?

22 MR. HAMRICK: At the --

23 JUDGE WARDWELL: Or would that all be  
24 onsite in your view?

25 MR. HAMRICK: The clear delineation would

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1 be the site boundary, just for a -- the plain meaning  
2 of what does onsite mean, I would say that.

3 JUDGE WARDWELL: Thank you.

4 CHAIR KARLIN: Mr. Roisman, five minutes  
5 for rebuttal.

6 REBUTTAL ARGUMENT OF ANTHONY ROISMAN, ESQ.

7 ON BEHALF OF THE STATE OF VERMONT

8 MR. ROISMAN: First of all, let me talk  
9 about the last things that Mr. Hamrick talked about.  
10 Reg. Guide 4.2 which had not been previously cited in  
11 this proceeding, but he quoted from it and I  
12 appreciate that, demonstrates that what we're talking  
13 about is new and significant information. That  
14 definition, as I heard it, fits to a T exactly what  
15 we're claiming exists in this case. The fact that the  
16 Staff may not think that it's new and significant  
17 information doesn't change the fact that it fit that  
18 definition.

19 And remember, our contention here and I  
20 want to keep going back to this is not that the Board  
21 should at this point decide whether it will litigate  
22 the question of whether you need to amend the GEIS or  
23 anything else, the only issue before you now and the  
24 only issue that could be before you is did the  
25 Applicant fail in its duty to present new and

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1 significant information?

2 CHAIR KARLIN: So that takes us back to  
3 the issue we talked about with Massachusetts, whether  
4 or not there's a requirement if you can litigate that  
5 issue at all?

6 MR. ROISMAN: Right, and I believe that  
7 it's clear that we can and in fact, if we took their  
8 theory of where we go next, we have to litigate it  
9 because they say we must make a waiver argument. If  
10 you look at the wavier regulation 2.335(b) it says "a  
11 party to any adjudicatory proceeding subject to this  
12 part may petition that the application of a specific  
13 Commission, etcetera, etcetera."

14 We can't be a party if we don't have a  
15 contention, number one.

16 Number two, it's clear that the waiver  
17 takes place after contentions <sup>^</sup>are ruled on, number  
18 two.

19 Number three --

20 CHAIR KARLIN: Have you requested a  
21 waiver?

22 MR. ROISMAN: We did not.

23 CHAIR KARLIN: Are you going to?

24 MR. ROISMAN: We'll see what you do.

25 CHAIR KARLIN: No, I mean -- we did have

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1 Massachusetts indicate that they might be filing -- I  
2 mean we only have got a few minutes.

3 MR. ROISMAN: And I think that that's a  
4 possibility, but again my position is that it's early.  
5 I think we're entitled before we file for a waiver to  
6 have the benefit of the information the Applicant is  
7 supposed to put in its application.

8 We're supposed to frame contentions --

9 CHAIR KARLIN: Let me ask. A couple of  
10 points. One, I'm not sure that the Applicant has any  
11 great secret information about what Senator Domenici  
12 is going to be doing. This is what you assert as new  
13 and significant information that the Administration  
14 has got a new GNEP program or that Senator Domenici  
15 has got a new bill or that various political things  
16 are going on.

17 Do they have some <sup>^</sup>inside track as to that?

18 MR. ROISMAN: No.

19 CHAIR KARLIN: That's not new and  
20 significant information. That's just political  
21 information that is going to be going on as Dr.  
22 Wardwell pointed out all the time.

23 MR. ROISMAN: I want us to get off of that  
24 because that's only one piece of what we say is new  
25 and significant. What's also new and significant is

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1 what the Applicant managed to convince the Federal  
2 Court of Claims to rule in 2005, namely, that this  
3 aborted effort in 2004 to reinstitute the DCS process  
4 signals that no disposal of spent nuclear fuel will  
5 occur during 2010, taking into account the 63-month  
6 period between designation and collection, and  
7 moreover, that disposal may not occur within any  
8 foreseeable time in the future, no repository is  
9 available.

10 Now the Applicant went to Court and got  
11 that ruling. We don't know what evidence they  
12 submitted to support that ruling. They sued the DOE  
13 over that and this ruling, by the way, that factual  
14 finding is collateral estoppel against them in this  
15 case because they were a party to it. They had a full  
16 opportunity to present it. That was Entergy in that  
17 case. So our point is if we're to make a waiver  
18 argument we should have the benefit of the  
19 environmental report --

20 MS. CARPENTIER: One minute --

21 MR. ROISMAN: -- to be fully completed.

22 This environmental report is noticeably deficient. We  
23 believe the Applicant has other information. It  
24 doesn't have to be political. And we don't say that  
25 it's political. We point out that Yucca Mountain, for

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1 instance, they discovered in-linkage at Yucca  
2 Mountain. That's a technical issue.

3 JUDGE WARDWELL: In that regard, what  
4 evidence do you have even when the first Yucca  
5 Mountain studies were created that said there is in-  
6 leakage in Yucca Mountain, whoever assumed that and  
7 what's your evidence that someone assumed that when  
8 they started those studies?

9 MR. ROISMAN: We've cited starting at page  
10 23 of our reply and focusing particularly at page --  
11 sorry, 29, from the U.S. Nuclear Waste Technical  
12 Review Board's report issued in 2006.

13 MS. CARPENTIER: Time.

14 MR. ROISMAN: What it is that the  
15 Technical Review Board believed they found in that  
16 one-year period that underlay that report. So --

17 JUDGE WARDWELL: They found some in-  
18 leakage, but they never assumed -- do you know if they  
19 assumed or went into any studies as far back as when  
20 this was first initiated in '85 that said the  
21 hypothesis is and the reason we're siting at Yucca  
22 Mountain is because there is no in-leakage?

23 MR. ROISMAN: I can't cite you to chapter  
24 and verse on that, but it does go to the merits, I  
25 would submit.

1 JUDGE ELLEMAN: Your concern is with  
2 spent fuel that's going to be generated many years  
3 from now. You're looking to the life extension part  
4 of the generated fuel.

5 MR. ROISMAN: That's correct.

6 JUDGE ELLEMAN: Would you not acknowledge  
7 that there are a number of potentially very reasonable  
8 solutions like a private offsite storage facility that  
9 could emerge in that long-time interval that would  
10 resolve your concern?

11 MR. ROISMAN: I would agree that there are  
12 potentially a lot of ways that we could solve the  
13 problem, assuming the waste was generated, but that's  
14 very different than taking a look at both the GEIS,  
15 the Waste Confidence rule, the S3 Table and  
16 discovering that nobody has evaluated the probability  
17 of those.

18 Why should it be the case that all of the  
19 doubts when we're in the area of uncertainty are  
20 resolved in favor of some pie in the sky hope that  
21 something will happen when every single deadline that  
22 has been implemented and ordered since the date that  
23 the Waste Confidence rule was promulgated has been  
24 missed. It doesn't seem to me reasonable.

25 So if we get down to the merits, which as

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1 I said, I don't think you need to for purposes of  
2 deciding this question, but if you get down to the  
3 merits, there's no place in the GEIS, in the Waste  
4 Confidence rule, in the S3 Table or anyplace else  
5 where the Commission has taken a hard look at the  
6 question of whether or not spent fuel might actually  
7 have to remain at a site like this well beyond the 30-  
8 year period. And for that reason we think that the  
9 new and significant information may lead us to seek a  
10 waiver or may give us a basis for asking you to decide  
11 the question.

12 CHAIR KARLIN: Well, let me -- this is a  
13 floodgates question again. If we admit this  
14 contention, then on what basis do we admit this  
15 contention and every other ASLBP proceeding also a --  
16 must also admit this contention? How would it be  
17 different? What narrowing factor<sup>A</sup> would we apply her  
18 and say ah, here it's admissible and it doesn't  
19 violate the Waste Confidence rule, but everywhere  
20 else, the Waste Confidence rule still is valid?

21 MR. ROISMAN: Because first of all, if  
22 there is the volume of evidence that we've submitted  
23 suggesting that there's new and significant  
24 information including information involving this  
25 particular Applicant dealing with this particular

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1 issue, namely spent fuel storage, if that existed, all  
2 you would be doing is saying that an Applicant has a  
3 duty to put that in their environmental report.  
4 That's not much of a floodgate. I would call that at  
5 most a trickle.

6 All you're doing is making an Applicant do  
7 its duty. The regulation is unequivocal. They are  
8 required to produce new and significant information.  
9 So the only contention you're being asked to admit by  
10 us, at least, is that they be required to fulfill that  
11 duty. We can litigate that with them or if I were  
12 they and I'm not, I would simply say okay, here's all  
13 this stuff that's new. We don't think any of it is  
14 significant, now go pound sand.

15 So I don't think there's a bit floodgate  
16 issue here. Yes, down the road if we decide to make  
17 the argument to you that the<sup>^</sup> draft supplemental  
18 environmental impact statement is deficient, and new  
19 and significant information should have been  
20 considered by the Staff and that we're really talking  
21 about the merits of the environmental impacts, then at  
22 least we'll have to address the floodgates issue, but  
23 we have the option of the waiver. We can't get to the  
24 waiver. We couldn't even file for one at this point  
25 because we're not a party to the proceeding.

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1 CHAIR KARLIN: Thank you. Any other  
2 questions?

3 All right, I appreciate that. I think  
4 we've moved pretty efficiently so far. I guess we'll  
5 take a lunch break now and return to Vermont  
6 Contention 1.

7 Let's reconvene at 1:30. That will give  
8 us about an hour and 20 minutes, I think. At 1:30,  
9 we'll restart the proceeding. Thank you.

10 (Whereupon, at 12:11 p.m., oral argument  
11 was recessed, to reconvene at 1:30 p.m.)  
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A F T E R N O O N     S E S S I O N

1:31 P.M.

CHAIR KARLIN: Good afternoon, we're back on the record and I think we're now turning to the State of Vermont's two remaining contentions, contention 1 and 3, I guess. And I believe you have 45 minutes for the first one, a total of 45 minutes. You will have 20, 15 and 10. The state would have 20 minutes.

How do you want to allocate that time?

MR. ROISMAN: I'd like to do what I did before, reserve 10 minutes and take from that reserve time, if there are any questions the Board has that extend beyond the first 10 minutes.

CHAIR KARLIN: Okay, fine.

ORAL ARGUMENT OF ANTHONY Z. ROISMAN, ESQ.

ON BEHALF OF THE STATE OF VERMONT.

MR. ROISMAN: If you'll pardon the pun, the first contention is very concrete and specific, I believe, and it meets that requirement. It focuses on the primary containment concrete. The issue is not in my judgment particularly complex at the admissibility stage. We have identified what we believe is sufficient evidence to raise a material dispute of fact as to whether or not the concrete that surrounds

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1 the containment is subject to temperatures in excess  
2 of 150 degrees Fahrenheit which, if it does, then  
3 there should be age management associated with that  
4 concrete that surrounds the containment.

5 And we have indicated that the purpose of  
6 that is structural. The Applicant has identified in  
7 its UFSAR that it takes credit for the structural  
8 integrity of the containment concrete. Therefore, if  
9 there is a danger that over time the heat from the dry  
10 well will cause a deterioration in the strength of  
11 that concrete, the Applicant should have to manage it  
12 by applying the age management criteria to the  
13 concrete.

14 The Applicant's position is no, we don't  
15 have to do that. Essentially, they disagree with us  
16 on the question of whether or not the potential  
17 temperature of the concrete will be, in fact, in  
18 excess of 150 degrees which is the sort of cut point  
19 for this consideration. They've cited to some facts.  
20 We've cited to some contrary facts. I'm happy to go  
21 into those, but I think that they are really well  
22 beyond what the Board should be concerned with at this  
23 stage.

24 We have a factual dispute about whether or  
25 not the temperature of the concrete can exceed 150

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1 degrees in a general area.

2 Now there is a definitional problem. No  
3 party, including us, I confess, have given you any  
4 specific citation to authority to distinguish between  
5 localized and general. And I sympathize with the  
6 frustration that that creates and I'm going to try to  
7 address that in the following manner.

8 I think that the answer has to be that it  
9 matters if we look at it from a practical perspective.  
10 If there were a spot where the concrete was located  
11 and that spot, let's say, a 4-foot square area, was  
12 likely to get temperatures in excess of 150 degrees,  
13 it would be difficult I think for us to make any  
14 argument that that square, having more than 150 degree  
15 temperature, would endanger the integrity of the  
16 containment concrete itself.

17 What we have identified is a strip of  
18 concrete that goes completely around the dry well.  
19 It's roughly 20 feet high, so a band roughly 20 feet  
20 high where the temperatures, we believe, will exceed  
21 150 degrees Fahrenheit.

22 CHAIR KARLIN: Isn't, where, can you refer  
23 to your submittals on where someone would glean those  
24 particular dimensions from?

25 MR. ROISMAN: Yes. In looking at the

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1 reply, there's a discussion that begins at the bottom  
2 of page 14 and continues through the end of page 16  
3 that discusses the elevation levels where Mr. Sherman  
4 has supported his prior affidavit statement to the  
5 effect that the dry well temperatures would be closely  
6 matched by the temperatures at the concrete, and he  
7 identifies in that discussion on page 15 and 16 and  
8 attaches a document that the Applicant had submitted  
9 identifying different elevation levels that there is  
10 a 20-foot area --

11 CHAIR KARLIN: I remember seeing the  
12 elevations. I see you can't find it right off the,  
13 immediately --

14 MR. ROISMAN: I'm sorry. it's --

15 CHAIR KARLIN: -- so let's not, let's not  
16 go for it.

17 MR. ROISMAN: Okay. ^

18 CHAIR KARLIN: I just remember your  
19 submitting that, or someone did at least talk about  
20 the evaluations. Well, what wasn't clear was that  
21 that entire elevation zone was going to be at those  
22 higher temperatures.

23 MR. ROISMAN: Right. And --

24 CHAIR KARLIN: And that's what you're  
25 saying is what you meant by that.

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1 MR. ROISMAN: That's correct. If we  
2 weren't clear I apologize for that. We intended to  
3 indicate that based upon, and we want to be clear that  
4 we still have limited information. We're, we believe  
5 that the Applicant has or will eventually produce more  
6 detailed calculations of the temperature measurements  
7 inside the containment.

8 But we had, and again a document that we  
9 produced for the Board in which the Applicant gave  
10 some average temperatures and the average temperature  
11 at the elevation at issue here which I believe was  
12 above 270 feet on the bulb was at 170 degrees and so  
13 we did our calculation -- I'm sorry, 155 degrees. We  
14 did our calculation using that average number from  
15 them.

16 So we don't have it down to knowing the  
17 exact temperature measurement. We don't even know how  
18 many thermacouples they had to produce that average  
19 numbers.

20 CHAIR KARLIN: While we're on that  
21 subject, Entergy is asserting that your contention,  
22 original contention is vague and unsupported by an  
23 adequate basis. I'm not sure exactly which subpart of  
24 309(f)(1)(i) through (vi) that is, but I will take it  
25 that that is subpart 5, "provide a concise statement

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1 of the alleged facts or expert opinions which support  
2 the requester's petition position on the issue.

3 Did you do that in your original petition?

4 MR. ROISMAN: Yes.

5 CHAIR KARLIN: Where?

6 MR. ROISMAN: We believe we did. We  
7 submitted the affidavit of a mechanical engineer whose  
8 area of specialty, it's all disclosed in his résumé  
9 and so forth, includes he transferred. So we have an  
10 expert opinion of somebody who knows how he transfers  
11 and drew that conclusion.

12 In our reply, after challenged about that,  
13 Mr. Sherman then laid out what he already knew and  
14 didn't feel was necessary to put into his initial  
15 affidavit, keep sticking with the concise and brief  
16 requirements that relate to bases and supporting  
17 evidence, the calculation that showed that his  
18 judgment was correct.

19 CHAIR KARLIN: There is a question about  
20 whether that's entirely kosher or not. What I would  
21 have preferred you to do in your reply was to say oh  
22 no, we were quite specific in our original petition.  
23 Let us point you to the page at our original petition  
24 and the attachment in our original petition and where  
25 we addressed that issue. Rather than doing that, you

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1 added an entirely new affidavit or declaration where  
2 it would appear you're attempting to rehabilitate a  
3 problem.

4 You may have a viable contention just on  
5 the original contention. I would prefer you address  
6 that rather than get into some band or other issues  
7 you raise in your reply.

8 MR. ROISMAN: Let me answer the underlying  
9 question. And I think this is an issue which occurs  
10 at least with our contentions. The question is what  
11 is the standard --

12 MS. CARPENTIER: One minute.

13 MR. ROISMAN: -- the Board is supposed to  
14 apply and I believe the standard the Board has based  
15 upon what the Applicant and the Staff have submitted  
16 is a standard similar to what is pornography. We  
17 don't know it, how to define it,<sup>^</sup> but we know it when  
18 we see it.

19 I submit that there's a better standard  
20 that case law better supports and that is that  
21 basically we're looking at summary judgment. A party  
22 who is submitting a contention should at least make  
23 effectively a prima facie showing, enough evidence  
24 that it meets the sufficiency standard to resist  
25 summary judgment.

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1           There's well-established case law around  
2 the country that the admissible opinion of an expert  
3 on a topic is itself sufficient to withstand a summary  
4 judgment motion.

5           So we have an expert whose areas of  
6 expertise includes the question of heat transfer --

7           MS. CARPENTIER: Time.

8           MR. ROISMAN: -- who offers this opinion  
9 that there is a close relationship between the  
10 interior temperature and the temperature of the  
11 concrete just on the other side of this two and a half  
12 inch steel shell.

13           MR. ROISMAN: Okay, thank you. Any other  
14 questions? We have a rebuttal here.

15           JUDGE ELLEMAN: Your contention does not  
16 in any way imply, does it, that the concrete will  
17 deteriorate at this higher temperature. It's simply  
18 pointing out a disparity between the ASME standard and  
19 the statement in the application.

20           MR. ROISMAN: I think the important part  
21 of the contention is that we're seeking that there be  
22 management, age management of this particular area of  
23 the structure during the extended license operation.

24           Our goal would be that by doing that there  
25 will not be a failure, but the Applicant has said we

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1 don't have to do that. We don't have to age manage  
2 that because we fall at 150 or lower. So we're not --  
3 I guess our position would be that if they don't  
4 manage it, if there's no age management, then the risk  
5 that there will be a failure is unacceptable.

6 JUDGE ELLEMAN: Okay.

7 CHAIR KARLIN: Okay, thank you. Mr.  
8 Lewis, 15 minutes.

9 ORAL ARGUMENT OF DAVID LEWIS, ESQ.

10 ON BEHALF OF ENTERGY

11 MR. LEWIS: Thank you. Let me start by  
12 pointing out that in the original Vermont contention  
13 there was no basis provided for the assertion that the  
14 concrete temperatures will match the ambient  
15 temperature inside the dry well.

16 CHAIR KARLIN: Well, wait a second.

17 JUDGE WARDWELL: Besides just a reasonable  
18 looking at it, that if it's this high and it's that  
19 thin, a reasonable person might conclude that, in  
20 fact, they are.

21 MR. LEWIS: They didn't even offer that.  
22 They made that assertion in the contention, but Mr.  
23 Sherman's affidavit had no expert opinion that support  
24 that statement. So the basis --

25 JUDGE WARDWELL: He had his expert

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1 opinion. You may not agree with it, but he had -- he  
2 has an expert opinion unless you feel he isn't an  
3 expert.

4 MR. LEWIS: No, I'm simply saying that his  
5 original declaration did not contain that statement.  
6 His original declaration made no assertion about the  
7 concrete matching the ambient temperature inside the  
8 dry well, it was simply lacking. It was missing.  
9 There was nothing offered in support of that assertion  
10 of the contention.

11 CHAIR KARLIN: Isn't that a reasonable  
12 inference even a non-technical person, lawyer like I  
13 could reach that if two pieces of equipment are within  
14 two inches of each other and one is 165 degrees, then  
15 there's a possibility, a reasonable possibility that  
16 the one two inches away may be over 150. Now it may  
17 be or may not, but we ought to have a hearing on that.

18 MR. LEWIS: I think as a matter of  
19 engineering, it isn't a reasonable supposition and if  
20 you look at what has been done in other license  
21 proceedings you find that there's quite a significant  
22 delta t between the inside of the --

23 CHAIR KARLIN: I think there could be.  
24 Let me take you back. You said there is no basis for  
25 this?

1 MR. LEWIS: I'm saying no basis is offered  
2 in the original contention for that assertion.

3 CHAIR KARLIN: Let's go back to the reg,  
4 2.309(f)(1) basis. Are you using that in the sense of  
5 2?

6 MR. LEWIS: No, I'm using that in the  
7 sense of 4 and 5.

8 CHAIR KARLIN: Then don't say the word  
9 basis because that's in that reg. What are you  
10 saying? Based on what you're saying.

11 MR. LEWIS: With respect to prong 5, they  
12 did not offer sufficient information to show there was  
13 a genuine dispute with the application.

14 CHAIR KARLIN: They didn't provide a  
15 concise statement of the alleged facts or expert  
16 opinions which support their petition?

17 MR. LEWIS: It's 5 which is failure to  
18 provide sufficient information to demonstrate a  
19 genuine dispute on a material issue.

20 CHAIR KARLIN: No, I'm reading 5, "provide  
21 a concise statement of the alleged facts or expert  
22 opinions which support the requester's petition."

23 JUDGE WARDWELL: You're referencing 6,  
24 aren't you?

25 MR. LEWIS: I'm sorry, I'm referencing 6.

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1 CHAIR KARLIN: You're referencing 6,  
2 "provide sufficient information to show that a genuine  
3 dispute" -- certainly they provided an expert's  
4 opinion. He has made an inference, it seems not  
5 unreasonable, at least litigable. You know, there is  
6 a dispute because you certainly hotly disagree with  
7 what they're saying. What's the problem?

8 MR. LEWIS: The problem is in the original  
9 contention there was no support offered for that.  
10 It's only been provided in the reply. In the reply,  
11 it's very flawed and by providing it in the reply  
12 they've effectively denied us the ability to address  
13 it. We're willing to do so now.

14 CHAIR KARLIN: I don't think we need to  
15 get to the reply at all to -- I'm ignoring the reply's  
16 attachment and just a genuine dispute exists on a  
17 material issue. They have an expert. He has provided  
18 a declaration. His qualifications are unchallenged.  
19 There seems to be an inference that's being made as  
20 these things that are two inches apart that there will  
21 be a temperature relationship of some sort.

22 MR. LEWIS: Again, I'm saying that there  
23 is no such inference in his declaration. When you  
24 look at his declaration it's entirely silent on that  
25 point. There's no assertion anywhere in Mr. Sherman's

1 original declaration that the concrete is going to  
2 match or be anywhere close to the temperature inside  
3 the dry well.

4 CHAIR KARLIN: Now why didn't you all  
5 produce an expert to tell us that and say there's no  
6 possible connection and have an affidavit attached?

7 MR. LEWIS: Because in responding to  
8 contentions, you don't address the merits. You don't  
9 provide countering affidavits that --

10 CHAIR KARLIN: So we don't get into the  
11 merits.

12 MR. LEWIS: I'm simply saying that he  
13 never provided the original basis for the contention.

14 CHAIR KARLIN: Okay.

15 MR. LEWIS: I also just heard the state  
16 tried to provide for the very first time a definition  
17 of what a general area concrete temperature means at  
18 a local area temperature means, but again, I heard  
19 absolutely no reference to any authority or any  
20 standard that supported that assertion.

21 I would note, since this has just been  
22 raised for the first time that in other proceedings,  
23 the Staff has taken this position. I'm reading from  
24 the Brunswick Safety Evaluation Report, NUREG 1856 at  
25 page 3-364. And here, by the way, they did that

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1 calculation and showed there was a 19 degree delta t  
2 between the steel to the concrete. But they said  
3 "because the elevated temperatures are localized and  
4 confined in the upper elevation of the dry well, and  
5 the actual concrete temperatures on a gradient through  
6 the dry well wall, the upper elevation of a dry well  
7 is considered a local, rather than general area  
8 temperature." It's considered a local, rather than  
9 a general area.

10 JUDGE WARDWELL: Do they define local  
11 versus general?

12 MR. LEWIS: Only in the statement that I  
13 just read.

14 JUDGE WARDWELL: Is that the first and  
15 only time "local" versus "general" comes in in regards  
16 to the temperatures within the dry well, to your  
17 knowledge?

18 MR. LEWIS: Yes. The ASME code itself  
19 does not use those terms and does have a definition,  
20 but this is the instance that I could find where the  
21 Staff had applied it and explained how they applied  
22 it. And I would submit unless there was something  
23 that the state could offer to suggest otherwise, if  
24 you applied this Staff position that means that it's  
25 incumbent upon the state to show that those local

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1 temperatures are both 200 degrees before there would  
2 be any discrepancy with the ASME code.

3 JUDGE WARDWELL: Do you agree that if, in  
4 fact, it can be shown that a general area had  
5 temperatures greater than 150 degrees that an age  
6 management plan is a prudent thing to be developed?  
7 Is that universally accepted?

8 MR. LEWIS: If there were general area  
9 temperatures above 150 degrees, we would have had to  
10 provide more information explaining why the effect  
11 didn't need to be managed or how it was managed, one  
12 or the other.

13 This was simply a screening that allowed  
14 us to say here's the general standard, if the general  
15 area temperature is below 150, there is no need and if  
16 the localized area temperature is below 200, there's  
17 no need to manage that aging effect.

18 Finally, just in case the reply is  
19 considered, the declaration of Mr. Sherman models the  
20 gap between the dry well shell and the concrete as  
21 being filled with sand, but their own exhibit which is  
22 Vermont Reply Exhibit 1, it's our amendment to the  
23 application, at the very last page, shows that the  
24 sand stops at elevation 238.

25 What that means is instead of assuming two

1 inches of air which is not a good conductor, they've  
2 assumed two inches of sand and done a thermal  
3 conductivity analysis that greatly skews the result.  
4 My only point is if you're going to accept the reply,  
5 it doesn't model our plant conditions and if it  
6 doesn't model our plant conditions, I would submit to  
7 you that it can't possibly provide sufficient  
8 information to demonstrate a genuine dispute on a  
9 material issue.

10 JUDGE ELLEMAN: To your knowledge, does  
11 the ASME code that is referenced give any  
12 clarification of the distinction between local and  
13 general?

14 MR. LEWIS: To my knowledge, I've asked  
15 that question to technical folks at Entergy and I  
16 believe it does not, based on the response I've been  
17 given.

18 JUDGE WARDWELL: To your knowledge, do you  
19 know of any temperatures approaching 200 degrees in  
20 the dry well?

21 MR. LEWIS: Yes. What I would like to do  
22 if I could, again, if the reply is considered, the  
23 state has referred to a 1984 Environmental  
24 Qualification Report as providing thermocouple data,  
25 but they've already provided a portion of that. I

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1 have the report with the complete appendix that shows  
2 where all the data was and what I would like to do is  
3 pass out to the Board and the parties so you can see  
4 exactly where the temperatures were, where they exceed  
5 150.

6 What that reports shows is that there are,  
7 in fact, no average temperatures above 150 degrees  
8 below the 280-foot elevation which is about where the  
9 dry well transitions.

10 JUDGE WARDWELL: You're swamping me  
11 already and as I hear you discuss it, it seems like  
12 you're supporting the fact that maybe we ought to hear  
13 about this from all parties. How do you address this?

14 MR. LEWIS: No, I'm ont. Again, there's  
15 no temperatures above 150, no ambient average  
16 temperatures in the dry well above 150 degrees,  
17 basically below the point where it transitions to a  
18 cylinder.

19 Above the transition, in the cylindrical  
20 ranges, there are average temperatures that exceed  
21 150, but in that area, there is no sand between the  
22 dry well and the concrete and there is still no basis  
23 therefore for the assertion that --

24 JUDGE WARDWELL: Basis? Basis?

25 MR. LEWIS: There is not sufficient

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1 information to demonstrate a genuine dispute on a  
2 material issue. There is not sufficient information  
3 to show that there is really a genuine contention that  
4 that concrete is going to give out at 150 degrees.

5 Is the Board interested in receiving the  
6 more complete copy of the reply exhibit?

7 CHAIR KARLIN: No. No, this is not the  
8 place for additional information.

9 It seems to me, just taking their  
10 contention, it's, in essence, sort of pithiness, what  
11 they say in paragraph 1, ASME code says the concrete  
12 area, general area temperatures don't exceed 150.  
13 Paragraph 2 says, 3 says you've got the dry well area  
14 is 135 and 165 and then it says since the concrete  
15 surface behind the steel shell will closely match the  
16 dry well ambient temperature, the statement, blah,  
17 blah, blah is a problem and there's a consistency  
18 issue. And then they have an affidavit from Mr.  
19 Sherman.

20 MR. LEWIS: There's also a lack of any  
21 discussion in that contention or in the declaration of  
22 what a general area temperature means or a localized  
23 area temperature -- what a localized temperature  
24 means.

25 CHAIR KARLIN: Right, they're not

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1 asserting anything about the local area temperature.  
2 They're talking about the general area.

3 MR. LEWIS: All I'm saying is that if you  
4 apply that definition as the NRC Staff has in other  
5 proceedings, the fact that that concrete might exceed  
6 150 degrees and I'm not conceding it does, would not  
7 present any consistency with the ASME code.

8 CHAIR KARLIN: Let me ask you this, Mr.  
9 Roisman has posed the standard for thinking about this  
10 which is the Motion for Summary Disposition standard  
11 and asserts that this would clearly meet the motion.  
12 Do you agree with that?

13 MR. LEWIS: No, I don't. I don't believe  
14 it even meets the standard for admissability as a  
15 contention.

16 CHAIR KARLIN: I would ask the standard  
17 for admissability of contention is significantly lower  
18 than standard for summary disposition, is it not?

19 MR. LEWIS: Yes.

20 CHAIR KARLIN: So it is a lower standard  
21 and it doesn't meet that, you're suggesting.

22 MR. LEWIS: I'm not arguing though that it  
23 should be dismissed on summary disposition. I'm  
24 arguing that there are a number of important elements  
25 that are totally lacking in what they present to show

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1 that there's a genuine issue. One of those elements  
2 is the assertion that there are concrete general area  
3 temperatures that will see 150 because they have not  
4 pointed to any information that defines that term and  
5 in fact, when you look at the safety evaluation in the  
6 Brunswick proceeding, I pointed to it, it's clear that  
7 the Staff has a very different understanding of that  
8 term.

9 Without some contrary basis, without some  
10 contrary information to support their assertion, this  
11 contention does not demonstrate a genuine material  
12 issue.

13 JUDGE WARDWELL: Yes, I've learned not to  
14 use the phrase "basis" in front of Judge Karlin.

15 (Laughter.)

16 MR. LEWIS: I'm learning.

17 JUDGE WARDWELL: Could you help us in  
18 maybe more generic or general terms where you would  
19 draw the line between proving your case and raising a  
20 sufficient amount of information for a dispute?  
21 Because this and other contentions that we'll deal  
22 with over the next 24 hours come back to this a lot.  
23 And I'd like to probe you a little to see when you  
24 would actually see a contention that you would like  
25 and admit.

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1 MR. LEWIS: Well --

2 JUDGE WARDWELL: Have you ever seen one  
3 that you like and would recommend --

4 MR. LEWIS: Yes, I have. If the expert  
5 opinion had been provided in the reply, had been in  
6 the original contention, that certainly would have  
7 made the original contention --

8 MS. CARPENTIER: One minute.

9 MR. LEWIS: -- stronger. The problem with  
10 the expert opinion in the reply is that it simply  
11 mismodeled our plant. It assumed that the entire gap  
12 up past the transition zone was filled with sand when  
13 their own exhibit they attached so that the sand area  
14 ceases at elevation 238, so the fact that they say  
15 there's higher temperatures at elevation 270 really is  
16 immaterial.

17 JUDGE WARDWELL: But your real problem  
18 with the reply is that you feel it's additional  
19 information, isn't it, that it's new evidence?

20 MR. LEWIS: I do and it really has  
21 effectively denied us the ability to present this kind  
22 of information I'm now trying to provide on the fly,  
23 giving a written answer at the time the contentions  
24 originally came in.

25 JUDGE WARDWELL: The three-page exhibit

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1 that you referred to as being incomplete earlier in  
2 your remarks, contains in it a table entitled "Dry  
3 Well Temperature" and it quotes peak temperatures --

4 MS. CARPENTIER: Time.

5 JUDGE WARDWELL: -- that range from 150 to  
6 270 degrees. And there's no further elaboration, but  
7 it would suggest that we need further information and  
8 further explanation of these temperatures.

9 MR. LEWIS: What that report had was an  
10 appendix that had the entire set of data and Vermont  
11 did not include that appendix. I have a copy of that  
12 report with the appendix that has all the data, but  
13 they only included that summary table which is  
14 unfortunately very incomplete.

15 CHAIR KARLIN: Okay, any other questions?  
16 Thank you.

17 Staff?

18 ORAL ARGUMENT OF STEVEN HAMRICK, ESQ.

19 ON BEHALF OF NRC STAFF

20 MR. HAMRICK: First of all, let me point  
21 the Board to 2.309(f)(1)(vi) which I think provides  
22 the standard by which this contention should be judged  
23 which we have discussed here previously. The  
24 Petitioners must provide sufficient information to  
25 show that a genuine dispute exists with the Applicant

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1 or licensee on material issue of law or fact.

2 Several Licensing Boards have read that  
3 phrase to lead to the conclusion that the Petitioners  
4 have an obligation to provide the factual information  
5 and expert testimony necessary to support its  
6 contention. This is their obligation --

7 CHAIR KARLIN: Well, wait a second, wait  
8 a second. Aren't you going over to 5 now, provide a  
9 statement of the facts or expert opinion? How is that  
10 different -- are you talking about 6 or 5?

11 MR. HAMRICK: Parts of them are --

12 CHAIR KARLIN: I think the decisions that  
13 deal with concise statement of facts or expert opinion  
14 are dealing with 5, not 6. But I don't know, if you  
15 can cite me to something.

16 MR. HAMRICK: Well, the point I was trying  
17 to make is that if you're dealing with 6, there is a  
18 standard that says you must be sufficient which means  
19 there must be some level of expert opinion which is  
20 insufficient.

21 CHAIR KARLIN: But isn't the criterion for  
22 that really found in 5. The key of 6 is to provide  
23 sufficient evidence to show that a genuine dispute  
24 exists with regard to a material issue.

25 Now clearly, this is a material issue.

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1 MR. HAMRICK: Certainly.

2 CHAIR KARLIN: There does seem to be a  
3 dispute.

4 MR. HAMRICK: Absolutely.

5 CHAIR KARLIN: Now the question is is  
6 there sufficient information. I think the better  
7 standard for evaluating that is 5, "provide a concise  
8 statement of the alleged facts or expert opinion to  
9 support it."

10 How much more is needed? Are we here at  
11 a summary disposition stage? Are we here at the  
12 merits?

13 MR. HAMRICK: We're not here at the  
14 merits. The cases that --

15 CHAIR KARLIN: This is not a bald or  
16 conclusory statement, is it? It makes imminent sense  
17 to me what they said. This is 165 degrees. This is -  
18 - there's a standard of 150. They're close together.  
19 There could be a problem here.

20 JUDGE WARDWELL: I'll give you more time  
21 to think by interjecting one other thing, although I  
22 may just confuse the issue, but and that is just the  
23 desire by everyone to submit more of this information.  
24 It kind of says there is the proof in the pudding that  
25 it needs to be looked at.

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1 MR. HAMRICK: The obligation is to provide  
2 that expert opinion. Judge Karlin seems to think that  
3 it's not a speculative or a conclusory statement. But  
4 I think there's sensitive and detailed engineering  
5 evaluations that I certainly am not qualified to  
6 discuss or I can't do those calculations. There are  
7 several things that from a layman's perspective I  
8 cannot explain to you, heat transfer calculation data.  
9 So I can't make an inference. Yes, it's close, so  
10 therefore the temperatures are going to be the same.

11 There are several examples. A thermos can  
12 keep my soup warm in the winter, even though the soup  
13 is close to the outside area. So you can't  
14 necessarily take that layman's inference. They need  
15 to provide scientific data to support the statement.

16 JUDGE WARDWELL: But there are portions of  
17 that thermos that are higher than what you feel on the  
18 outside of that thermos and so there's portions of  
19 that metal that, in fact, will be higher, analogous.

20 MR. HAMRICK: Certainly.

21 JUDGE WARDWELL: Do you know what the  
22 purpose of the two-inch gap is above the bulb portion  
23 of the dry well?

24 Let me rephrase it. Is there any reason  
25 not to believe that that's for thermal expansion and

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1 not for cooling? There's no cooling attributes of  
2 that that is used for, is that a fair assessment?

3 MR. HAMRICK: I can't tell you whether or  
4 not that's a fair assessment. I know there's air in  
5 that gap and I assume the air circulates and has some  
6 impact on --

7 JUDGE WARDWELL: It's there for thermal  
8 expansion.

9 MR. HAMRICK: I don't know the answer to  
10 that.

11 JUDGE WARDWELL: And if so, there's a  
12 chance that with that expansion the dry well at times  
13 would likely be very close, if not touching the  
14 concrete. Is that a fair assessment?

15 MR. HAMRICK: I do not know. Getting to  
16 the issue of whether there's sufficient factual and  
17 expert testimony, there are cases that have stated  
18 that even an expert can't make a speculative or  
19 conclusory statement.

20 CHAIR KARLIN: Can you cite me a case that  
21 actually holds that? I've seen Fansteel and a number  
22 of cases say that. Give me a holding by the  
23 Commission. I don't think there are any.

24 MR. HAMRICK: No, that's why I said that  
25 Licensing Board cases have stated. I think that's

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1       been the holding of the -- the ultimate holding of any  
2       case of which I'm aware. It's guidance, certainly.

3               CHAIR KARLIN: If I remember the origin of  
4       the bald statement that there's a dispute is not  
5       adequate. This is certainly not a bald statement that  
6       there's a dispute. There's a statement, 150 degrees,  
7       165 degrees, an expert's declaration is attached.  
8       This isn't some vague bald statement that there's a  
9       dispute.

10              MR. HAMRICK: The Clinton case which said  
11       that even from an expert it seemed to mean to me that  
12       just because you attach an expert's affidavit, doesn't  
13       get you in the door.

14              CHAIR KARLIN: The Clinton case did not  
15       hold that. They were just repeating a pernicious  
16       canard, I would say so.

17              MR. HAMRICK: Absolutely.

18              CHAIR KARLIN: Okay.

19              JUDGE ELLEMAN: If I follow your point,  
20       you're not saying that the surface of the concrete  
21       isn't 165. You're simply saying there's not enough  
22       significant information to infer that from the  
23       contention.

24              MR. HAMRICK: Absolutely. The Petitioner  
25       has an affirmative obligation to provide just the

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1 concise statement of alleged facts and expert opinion  
2 under 309(f)(5) and as well, under 6, they must  
3 provide sufficient information.

4 The SOC, the Statement of Considerations  
5 for the proposed rule states that from -- this 66  
6 Federal Register 19623 states that the requirement to  
7 have specific contentions where the supporting of the  
8 facts alleged or expert opinion that provide the bases  
9 for them in all hearings should focus litigation on  
10 the real concrete issues and result in a better, more  
11 understandable record for decision.

12 So that's what we're talking about here.  
13 We will have the bases for them to focus -- I realize  
14 that's not the right word --

15 CHAIR KARLIN: No, I think the reason I  
16 raise that is I think it's important to distinguish  
17 what a basis is and what the other thing is and it's  
18 easily slipped over and I have trouble reading the  
19 cases and understanding where they're going.

20 Basis to me seems to be provide a brief  
21 explanation of the basis for the contention. That's  
22 number two. And that's not what we're talking about  
23 here and that's really the logic or the rationale, not  
24 factual. Whereas here, you're talking about factual,  
25 as I understand it, support in the form of an

1 affidavit or a specific calculation or something,  
2 right?

3 MR. HAMRICK: It's our interpretation of  
4 the rule that all of these parts of (f)(1)(i) through  
5 (vi) provide the basis for the contention, the  
6 specificity for the contention.

7 CHAIR KARLIN: We want to make sure we  
8 have a real concrete issue to litigate that is not  
9 just some vague "I hate nuclear plants" type of  
10 contention.

11 MR. HAMRICK: Correct.

12 CHAIR KARLIN: This seems to be more than  
13 that. It seems to be there's a specific problem here.  
14 I don't know.

15 MR. HAMRICK: It's an inadequate statement  
16 to simply say that the temperatures closely match. It  
17 does not provide the threshold support needed.

18 MS. CARPENTIER: One minute.

19 MR. HAMRICK: And just in closing, I  
20 suppose, I would like to second, if I may, the  
21 statement that was made earlier about the reply and  
22 how heat transfer calculation was provided in the  
23 reply, assumes temperatures at an elevation of 280  
24 feet and then assumes, performs the calculation  
25 through the sand bed region even though the document

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1 provided by the State of Vermont in Entergy's May 15,  
2 2006 letter, the very last page states that the sand  
3 bed stops at the elevation of 238.

4 So I'm not challenging the performance of  
5 the calculation, but the inputs appear to be, based  
6 upon what the State of Vermont has provided us, the  
7 inputs into the calculation appear to be facially  
8 invalid.

9 JUDGE WARDWELL: So you don't believe  
10 that's new evidence? You just say it's wrong  
11 evidence.

12 MR. HAMRICK: I believe they selectively  
13 cite sections from their own submittals.

14 MS. CARPENTIER: Time.

15 MR. HAMRICK: To provide that threshold  
16 support.

17 Thank you.

18 CHAIR KARLIN: Thank you.

19 Mr. Roisman?

20 MR. ROISMAN: How much time do I have?

21 MS. CARPENTIER: You have nine minutes.

22 REBUTTAL ARGUMENT OF ANTHONY ROISMAN, ESQ.

23 ON BEHALF OF THE STATE OF VERMONT

24 MR. ROISMAN: Let me start with this first  
25 question. Candidly, I don't know how it's happened,

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1 but neither the Applicant or the Staff have found in  
2 Mr. Sherman's affidavit attached to the initial  
3 petition, page 2, paragraph A that answers the  
4 question "Did Mr. Sherman use his expert opinion to  
5 conclude that the dry well temperature and the  
6 temperature of the concrete would closely match?"  
7 I'll read paragraph A.

8 "Since the normal environment maximum of  
9 165 degrees Fahrenheit is above the cutoff limit of  
10 150 degrees Fahrenheit, and since the concrete surface  
11 behind the steel shell will closely match the dry well  
12 ambient temperature, the statement at 3.5-8 of the LRA  
13 is not accurate and reduction of strength and modulus  
14 of concrete structures due to elevated temperature is  
15 an aging effect requiring management."

16 So we have a qualified expert offering the  
17 precise opinion that Entergy and the Staff say was not  
18 offered by anybody in this case, number one.

19 Number two, that's not a conclusory  
20 statement when it's made by someone who has mechanical  
21 engineering and heat transfer background. It is an  
22 opinion of an expert.

23 Number three, 309(f)(1)(iv) says provide  
24 a concise statement of the alleged facts or expert  
25 opinions. We have provided a concise statement of the

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1 expert opinions. When the issue was raised by the  
2 Applicant and the Staff, I believe inappropriately,  
3 saying well, you haven't provided enough, we went  
4 ahead in the reply and provided the additional  
5 information that underlay the expertise opinion. It  
6 seems to me, as in any litigation that if the other  
7 side opens the door, we're entitled to present the  
8 evidence. They opened the door. They said that this  
9 statement by an expert has no support. We provided  
10 the support. So I think that the reply, if you feel  
11 it necessary, is a reliable place to go and look for  
12 the information.

13 Number four --

14 CHAIR KARLIN: I question whether that's  
15 really the law here in the NRC proceedings. I really  
16 think that a reply can respond to actual allegations  
17 made in answer. If the answer says something which  
18 you say is totally false, that's one thing. If the  
19 answer says aha, the Petitioner failed to provide a  
20 concise statement of the alleged facts or expert  
21 opinions which supports their petition. And you say  
22 ah, well, we'll fix that. We'll give you a concise  
23 statement of the facts in your reply. That's not  
24 kosher. I don't think you can do that.

25 MR. ROISMAN: And I don't believe that's

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1 what we've done. What they said was that Mr. Sherman  
2 had no basis for the statement that he made. That was  
3 a factual assertion by them. We provided them the  
4 basis for his expert opinion, the basis here in the  
5 non--

6 CHAIR KARLIN: You provided a concise  
7 statement of alleged facts or expert opinion. You  
8 provided a supplement and I think that's problematic,  
9 but the question is whether the original petition was  
10 sufficient.

11 MR. ROISMAN: I would like, however,  
12 because it answers the question that Dr. Wardwell  
13 asked as well, I would like to point out that looking  
14 at the attachment 1 and this factual dispute that's  
15 now raised by the Applicant and the Staff about where  
16 does the sand level stop, that the chart or the  
17 drawing which is a detail, in other words, it's  
18 allegedly a representative of something or another and  
19 not a comprehensive statement of the sand transition,  
20 is at best an ambiguous drawing, the level of  
21 information provided with the drawing is thin, but in  
22 the text of the very same document at the bottom of  
23 the first page, they make this statement: "above the  
24 transition zone" about which there's no dispute -- the  
25 transition zone is the place where the light bulb's

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1 roundness turns into the straightness, if I can use  
2 nontechnical terms. "Above the transition zone  
3 between the spherical and cylindrical portions" --

4 CHAIR KARLIN: Could I ask where are we?  
5 Are we in the reply?

6 MR. ROISMAN: We're in the reply on the  
7 first page of Exhibit 1 to the reply. Reply Exhibit  
8 1 and actually when I say the first page, it's the  
9 first page of the attachment that goes with the letter  
10 that came from the Applicant to the Staff dated May  
11 15, 2006.

12 CHAIR KARLIN: Thank you.

13 MR. ROISMAN: So at the very bottom under  
14 VNPS primary containment design. Okay?

15 CHAIR KARLIN: Okay, okay.

16 MR. ROISMAN: "Above the transition zone  
17 between the spherical and cylindrical portions, the  
18 dry well is separated from the reinforced concrete by  
19 a two-inch gap." The clear implication of that  
20 statement is that it's not separated by a two-inch gap  
21 below that point.

22 By the way, Dr. Wardwell, it then goes on  
23 to say "this gap allows for dry well expansion."

24 So at a minimum, this document which  
25 incidentally came into existence on May 15, 2006, so

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1 it comes into existence relatively late in this  
2 process anyway, provides at least a factual issue  
3 about whether or not the gap is present where we did  
4 the measurement or whether there was sand present  
5 where we did the measurement, but we think we had an  
6 adequate basis to point to that.

7 Now Applicant then cites to an opinion  
8 given by the Staff in another case with the  
9 proposition that general area and specific area mean  
10 something different than we suggested it means.  
11 That's another factual dispute. I would submit that  
12 the expert opinion of the Staff is just that, an  
13 expert opinion. I would note that it was not  
14 mentioned in the response that they had to our  
15 contention, although the general area/specific area  
16 question was sitting there like a ripe melon waiting  
17 for someone to pick it, if they thought it was an  
18 interesting issue.

19 And finally, with regard to this entire  
20 issue, it seems to us that every one of the criteria  
21 that the Commission has laid down for admissability of  
22 the contention are met. The statement of our expert  
23 was certainly concise. Applicant and Staff wanted  
24 more. I do respect, Mr. Chairman, I don't think that  
25 what we provided in the reply was a concise statement.

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1 It was a much more expansive statement, brought about  
2 only by their challenge to the expert opinion.

3 And I think that the question in 6 which  
4 the Applicant and Staff seem to not be sure whether 6  
5 or 5 are applicable here, has to do with sufficiency.  
6 I go back to the analogy to summary judgment.  
7 Sufficiency would mean if we had offered the opinion  
8 of someone who was not an expert at all. I think you  
9 would be entitled to say well, that's insufficient.  
10 Even though it's an expert opinion, it's insufficient  
11 because that person has no expertise on the subject  
12 that they're offering an opinion on.

13 CHAIR KARLIN: Don't you agree --

14 MS. CARPENTIER: One minute.

15 CHAIR KARLIN: -- with Entergy that the  
16 criteria for motions for summary disposition are more  
17 stringent than the criteria for admission of  
18 contentions?

19 MR. ROISMAN: I do, but I think that in  
20 this case even if it were the summary judgment  
21 standard that we would have met that.

22 CHAIR KARLIN: Okay.

23 MR. ROISMAN: Lastly, I'm concerned by the  
24 Applicant's position --

25 CHAIR KARLIN: I think that's time. Was

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1 that time?

2 MR. ROISMAN: No, she --

3 CHAIR KARLIN: Okay, one minute.

4 MR. ROISMAN: I'm concerned by the  
5 Applicant's position that says well, we can't give you  
6 an affidavit or submit any documents because that  
7 would be challenging on the merits which we're not  
8 allowed to do, but what we can do is we can offer the  
9 opinion of lawyers who with all due respect went into  
10 law because they didn't understand science and at  
11 least we have one lawyer from the Staff concede that  
12 he's not sure whether this is a thermos bottle or a  
13 containment vessel.

14 CHAIR KARLIN: Do you include yourself in  
15 that category?

16 MR. ROISMAN: Absolutely, absolutely.  
17 That's why I have an expert sitting next to me.

18 CHAIR KARLIN: All right.

19 JUDGE ELLEMAN: Does he pour your coffee  
20 also?

21 MR. ROISMAN: Yes, exactly. So what we  
22 have is a situation in which the Applicant is trying  
23 to hide behind well, we don't want to make a merit  
24 statement, but we still want you to accept what we're  
25 telling you is true.

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1 Under this record, the only thing that's  
2 true is the sworn affidavit of Bill Sherman, an expert  
3 on the subject which is this contention. That, I  
4 think, trumps anything else on this contention.

5 Thank you.

6 CHAIR KARLIN: Okay, any questions? All  
7 right, thank you.

8 Let's move to Vermont contention 3 then.  
9 Again, you have 20 minutes, Mr. Roisman. And how  
10 would you like to allocate that, the same way?

11 MR. ROISMAN: Yes, I would like to do the  
12 same, if I may.

13 CHAIR KARLIN: Okay, so we'll go with  
14 what?

15 MR. ROISMAN: Ten minutes, but we can eat  
16 into that as much as your questions warrant.

17 ORAL ARGUMENT OF ANTHONY Z. ROISMAN, ESQ.

18 ON BEHALF OF THE STATE OF VERMONT

19 MR. ROISMAN: So the third contention, let  
20 me start by saying that I agree there's a problem with  
21 contention 3, but I believe it's a problem that we  
22 cannot solve sufficiently within the context of  
23 contentions and the seriousness of the safeguards  
24 restrictions that are imposed by the Nuclear  
25 Regulatory Commission and that we take very seriously.

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1           One member of this team that you see in  
2 front of you has security clearance sufficient to  
3 actually know what are the safeguards of the plant.  
4 Neither Ms. Hofman nor I have a security clearance at  
5 this point. Therefore, Mr. Sherman cannot even tell  
6 me what the specific pieces of the safeguard system  
7 are that are vulnerable to deterioration over time and  
8 whose failure might lead to the failure of safety-  
9 related equipment as a result of allowing a terrorist  
10 to get past what should have been a barrier of some  
11 kind or a preventive measure and get to a safety  
12 system at the reactor.

13           So almost inherently contention 3 lacks  
14 the kind of specificity that we would normally expect,  
15 that you would have expected and we provided you on  
16 contention 1 or contention 2.

17           That said, I think that it would  
18 celebrating form over substance if that were to  
19 produce an inadmissability of a contention, which  
20 cannot be understated.

21           CHAIR KARLIN: let me ask with this  
22 problem, are there solutions? I mean isn't there,  
23 rather than just sort of saying well, I can't be  
24 specific, don't you have options that you should  
25 pursue with us or with the Commission?

1 MR. ROISMAN: We do have options, but  
2 we're working under a 60-day time frame. What would  
3 need to happen, what we will do, if this contention is  
4 admitted or if the Board rules in some way that  
5 requires this, Ms. Hofman and I will have to get a  
6 security clearance from the Nuclear Regulatory  
7 Commission so that we can communicate with Mr. Sherman  
8 and then we would have to file all of our  
9 substantively specific pleadings with the Board under  
10 those kinds of restrictions, serving them only on  
11 those people in the proceeding who have demonstrated  
12 that they have similar security clearance. I don't  
13 even know, for instance, if the Applicant's lawyers  
14 have these clearance. I assume that at least some of  
15 their technical people do.

16 But some of that detail may be somewhat  
17 unnecessary. We don't have to know the specifics to  
18 know that there are mechanical pieces of equipment and  
19 that there are operating pieces of equipment and that  
20 there are physical barriers of various kinds, that  
21 must be part of the security system. We can just  
22 imagine the security system in our own homes where we  
23 have motion detectors, if it is very sophisticated,  
24 and we have alarms and we have systems that call the  
25 police or call the security company to tell them to

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1 come and so forth and so on.

2 All of those things and things I'm sure  
3 vastly more sophisticated than that are vulnerable to  
4 aging over time. Which is why you pay someone, if you  
5 have a system like that in your home, to come out and  
6 do maintenance once a year or so to make sure that  
7 everything is in working order.

8 JUDGE WARDWELL: Well, isn't the  
9 performance of this security equipment required as  
10 part of operational maintenance? I mean, your 73.55  
11 says it's got to be maintained. So what is the  
12 problem?

13 MR. ROISMAN: Absolutely. 73.55 applies  
14 to every single component that is significant in the  
15 plant including these. Notwithstanding that, the GALL  
16 report extends a special age management review to  
17 systems whose aging effects may be impacted by the  
18 license extension.

19 So the NRC already recognizes that the  
20 normal maintenance that has to be done on every  
21 nuclear plant for all of its safety related and some  
22 nonsafety related equipment isn't in and of itself  
23 sufficient.

24 We have the GALL Report and all of its age  
25 management special provisions to deal with these

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1 license extensions. Our argument here is that the  
2 relevant portions of the security and safeguards  
3 systems at this plant should fall under that  
4 heightened, more detailed, more specific age  
5 management review. We don't doubt that those systems  
6 are now meeting 73.55. But so are every other piece  
7 of equipment that the Applicant is required by  
8 regulation to apply the GALL and age management review  
9 procedures to. So that's the crux of the argument  
10 that we're making about these pieces of equipment.

11 JUDGE ELLEMAN: Is your concern focusing  
12 perhaps on new equipment that has been added given the  
13 new security requirements rather than systems that  
14 have been operating for decades and checked for  
15 decades and monitored on a continuing basis?

16 MR. ROISMAN: Not necessarily. That is  
17 some of the older systems, which like the older safety  
18 systems in the plant, have been operating under 73.55  
19 that now have to meet age management review  
20 requirements, so too for safety equipment. So all  
21 safety and safeguards equipment that may not be  
22 supplemented with newer and sophisticated safeguards  
23 equipment is equally relevant to this. I confess it  
24 is difficult for me because I'd love to try to give  
25 you a specific example, and Mr. Sherman appropriately

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1 has said I can't give you one and you shouldn't have  
2 and we shouldn't talk about it in a public setting.

3 But I think that it is a reasonable  
4 assumption that is sufficient for purposes of getting  
5 the contention admitted that there are going to be  
6 some of those systems that are just as vulnerable to  
7 aging and requiring the heightened age management  
8 review as are safety systems, or nonsafety related  
9 systems that may impact safety related systems that  
10 are already going to be covered by age management.

11 CHAIR KARLIN: Could you address the issue  
12 Entergy has raised, Staff as well, as 50.44(a)(2)?  
13 Whether or not these are covered under the scope of  
14 the aging management review covers safety related,  
15 that's 50.44(a)(1) and then nonsafety related systems  
16 whose failure could prevent satisfactory  
17 accomplishment of any of the functions. And there's  
18 a question there, you know, how direct that must be.

19 MR. ROISMAN: Well, and I agree. There's  
20 a question there as to how direct that must be. But  
21 we don't have an authoritative answer on that  
22 question. I can't imagine anything more direct if I  
23 might hypothesize a group of determined terrorists  
24 getting through an improperly age managed piece of  
25 protection and reaching a piece of safety related

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1 equipment with the clear intent of doing it damage.

2 I don't know anything that would be more  
3 direct than that kind of damage. And the way that  
4 terrorist is prevented from reaching that piece of  
5 equipment is by a piece of safeguards or several  
6 pieces of safeguards equipment which have not been  
7 properly age managed.

8 And in addition, the recent decision of  
9 the Ninth Circuit, Mothers for Peace, that you've  
10 already discussed earlier today, says that since 9/11,  
11 considerations of safeguards is heightened and needs  
12 to be considered in the licensing process. We're not  
13 suggesting that the Mothers for Peace decision  
14 directly bears on this, but it illustrates a reality  
15 which is that after 9/11, the world changed.

16 CHAIR KARLIN: Well, but Mothers for Peace  
17 is a NEPA decision. It's not a safety decision. In  
18 fact, the interesting thing is the reverse of Mothers  
19 for Peace says --

20 MS. CARPENTIER: One minute.

21 CHAIR KARLIN: -- if the Commission is  
22 going to take terrorists' threats so seriously on the  
23 safety side, then it needs to take them at least  
24 somewhat seriously on a NEPA side. And you're going  
25 back to the safety side I think here. This is a

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1 safety contention.

2 MR. ROISMAN: Right. Well, and the point  
3 is that in this particular instance, at least the  
4 Applicant, we don't what the Staff's substantive  
5 position on this will be, the Applicant is not taking  
6 this security issue seriously by not putting these  
7 safeguard measures under the heightened age management  
8 review process. And that's what we're seeking, to  
9 have them put in that category.

10 Just to summarize, if the contention is  
11 admitted and hopefully approved, it's a process -- you  
12 don't automatically get it, for security clearance  
13 sufficient to see the safeguards material --

14 MS. CARPENTIER: Time.

15 MR. ROISMAN: And we'll be able to submit  
16 the information to the Board under the appropriate  
17 seals that are dictated in the Commission's  
18 regulations for consideration of those kinds of  
19 issues.

20 Thank you.

21 CHAIR KARLIN: Okay, thank you. Mr.  
22 Lewis?

23 ORAL ARGUMENT OF DAVID LEWIS, ESQ.

24 ON BEHALF OF ENTERGY

25 MR. LEWIS: Thank you. This issue

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1 involves the scope of equipment that must be managed  
2 under part 54 and in particular under 54.4 and here  
3 we're not working in a vacuum. There's a specific  
4 Commission statement when the rule was promulgated  
5 explaining that safeguards equipment is not within the  
6 scope of license renewal.

7 The Commission stated age-related  
8 degradation of safeguards equipment is not a license  
9 renewal issue because it's an issue that's being  
10 currently experienced and managed. This is at NUREG  
11 1412 at page 13-11.

12 And specifically, the Commission said  
13 because of the general performance objectives the  
14 requirements in 10 CFR 73.55(a) and the site-specific  
15 commitments contained in individual security plans,  
16 normal inspection activities will force the  
17 replacement of the graded equipment or subject the  
18 licensee to enforcement action.

19 CHAIR KARLIN: Are you reading from your  
20 brief --

21 MR. LEWIS: I was --

22 CHAIR KARLIN: -- that I can follow?

23 MR. LEWIS: The quote, yes.

24 CHAIR KARLIN: Okay. But is it from your  
25 brief? Do you have a page?

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1 MR. LEWIS: Yes, it's on page 25 of the  
2 Answer.

3 CHAIR KARLIN: Okay.

4 MR. LEWIS: Similar statements were made  
5 in the Federal Register notice with the promulgation  
6 of this rule. In essence, the Commission has stated  
7 that -- and very explicitly -- that security equipment  
8 is simply not within the scope of equipment that has  
9 to be examined in the license renewal proceeding,  
10 because they have confidence based both on the rule  
11 and on what they know is in security plans, and I  
12 don't.

13 But I go on what the Commission says, that  
14 the specific commitments that are required in those  
15 security plans, plus the requirements of the rule,  
16 provide adequate assurance that security equipment  
17 will perform its intended function.

18 Now, the state is trying to use an  
19 indirect provision to bring into scope equipment that  
20 the Commission has stated has been explicitly  
21 excluded. I would agree with the state that there is  
22 some question about how direct versus indirect it  
23 needs to be, but I would say it's easy to draw the  
24 line where the Commission has said, "This equipment is  
25 out." And I think it would be inappropriate to use an

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1 indirect provision to bring into scope equipment that  
2 the Commission has specifically said is outside of  
3 scope.

4 CHAIR KARLIN: Is, for example, the  
5 strength of a concrete ballard or other thing, is that  
6 covered in day-to-day operational current licensing  
7 basis over 40 or 60 years?

8 MR. LEWIS: Are you talking about secure  
9 barriers? No. I mean --

10 CHAIR KARLIN: Yes. If there's a security  
11 type of barrier made of concrete, it gets old I guess  
12 over the years. Can it age? Can it become less  
13 strong? Is that covered in the current licensing  
14 basis, that the concrete has to be replaced every 10  
15 years or something?

16 MR. LEWIS: I don't know what the  
17 specifics are. I have asked the security folks at  
18 Vermont Yankee. I'm not safeguards cleared, so I  
19 don't know the specifics. I am told that there is  
20 specific aging management requirements in the security  
21 plan for those barriers, but I do not know what they  
22 are.

23 CHAIR KARLIN: I mean, these are the  
24 passive type of things that are more akin to the aging  
25 management area in general. But you're saying it's

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1 covered otherwise by the current licensing basis.

2 MR. LEWIS: Again, I don't know all of  
3 what is covered. I --

4 CHAIR KARLIN: Okay.

5 MR. LEWIS: -- for --

6 CHAIR KARLIN: No. I'm not asking you to  
7 testify or anything. If you don't know, you don't  
8 know.

9 MR. LEWIS: Well, I was trying very hard  
10 not to go beyond what is inappropriate to say.

11 CHAIR KARLIN: Absolutely.

12 MR. LEWIS: But what I do know  
13 specifically is that the Commission, in excluding this  
14 equipment and explaining why it was excluded, said  
15 there are specific commitments in security plans, and  
16 those, plus the general performance objective, is good  
17 enough to manage that equipment. And for that reason  
18 they did not include it within scope.

19 They did provide a number of examples of  
20 the sorts of things that are included within scope  
21 under the 54.482 criteria. This is the class of non-  
22 safety-related equipment whose failure could cause a  
23 safety-related piece of equipment to not perform its  
24 functions.

25 The examples they give are all physical

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1 interactions. They are what's known as seismic two  
2 over one. An example where a piece of pipe of a non-  
3 safety-related system is located above a safety-  
4 related system. And if an earthquake -- it falls it  
5 could literally physically impact that safety-related  
6 equipment.

7 CHAIR KARLIN: Right. Well, let me ask on  
8 that. I mean, that's page 26 of your brief. And I  
9 was struck by something, because you quote -- you have  
10 a quote there on the Statement of Consideration  
11 talking about seismic qualified equipment located near  
12 non-seismic qualified equipment, and, you know, how an  
13 earthquake could cause a problem that could trigger a  
14 problem in I guess the non-safety-related and the  
15 safety related.

16 And in the next sentence you say,  
17 "Obviously, the failure of a security system has no  
18 direct effect on whether a safety-related system would  
19 fail. Rather, the effects would be caused by an  
20 intervening event." Now, that's what I didn't  
21 understand, because in seismic the fact that a  
22 structure is seismically in poor shape is not a  
23 problem until you have an intervening event, an  
24 earthquake. And then, all of a sudden it's important.

25 Likewise, if you have a safety system

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1 that's weak in some regard, it's not a problem until  
2 there's an intervening event, i.e. some terrorist  
3 tries to get in there and break through the window or  
4 the concrete. So aren't they both intervening events?  
5 Isn't an earthquake an intervening event? Isn't a  
6 terrorist attack an intervening event?

7 MR. LEWIS: You can call them intervening  
8 events. What I really meant by that statement is if  
9 there is a security barrier and it falls down, it  
10 fails, it's not going to have any direct automatic  
11 effect. It requires, at the same time, that there be  
12 some opponent force who right at that moment breaches  
13 the plant and then performs an act of malice. And I  
14 simply --

15 CHAIR KARLIN: Sort of a subsequent event.

16 MR. LEWIS: It's not analogous to a  
17 situation where a pipe falls and directly impacts a  
18 piece of safety-related equipment, or where some  
19 necessary support system like cooling water fails and  
20 causes a safety-related piece of equipment to --

21 JUDGE WARDWELL: Yes, but --

22 MR. LEWIS: -- not perform its functions.

23 JUDGE WARDWELL: -- seismically-designed  
24 facilities have aging management plans, correct? The  
25 same with fire barrier types of systems and

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1 components, correct?

2 MR. LEWIS: This class of equipment -- the  
3 two over one equipment is subject to aging management  
4 specifically for that reason, because if it fell it  
5 would impact safety-related equipment, yes.

6 JUDGE WARDWELL: But it would only fail  
7 if, in fact, an earthquake or a fire occurred. So it  
8 has the same type of intervening event, it seems to  
9 me, that terrorism does.

10 MR. LEWIS: Well, there are other  
11 potential interactions. You could also have pipes  
12 that carry fluid, which if they cracked and leaked  
13 could drain down fluid on the piece of safety-related  
14 equipment and cause it to short out.

15 JUDGE WARDWELL: Yes, I'm not talking  
16 about those. I'm talking about the other ones that  
17 are required -- the seismically-designed ones are part  
18 of aging management. Those seismically-designed SSCs  
19 require an intervening event for something to happen.

20 Therefore, to exclude the security ones  
21 because it needs an intervening event seems a  
22 contradiction between what is at least one or two  
23 examples that require intervening events that do have  
24 aging management -- that is, fire barriers and  
25 seismically-designed.

1 MR. LEWIS: I'm just pointing out that the  
2 scenario that the state postulates is different from  
3 the types of examples that the Commission gave on this  
4 A2 criteria that unlike these other events that, yes,  
5 you have an accident initiator, that causes a failure  
6 and as a result creates the potential for a piece of  
7 non-safety-related equipment to impact the safety-  
8 related equipment.

9 In the scenario that the state posits,  
10 you're talking about an outside human force coming in  
11 and causing acts of malice. And I just think that's  
12 a very different situation from all the examples the  
13 Commission gave when it described what A2 was meant to  
14 cover.

15 Again, I think the most important point to  
16 observe is that the Commission has explicitly stated  
17 this equipment is outside scope, because it's already  
18 adequately managed under 73.55(g) and the commitments  
19 in the security plan. And, therefore, when you --  
20 when you're trying to figure out where to draw the  
21 line under the A2 criterion I get -- there is line  
22 drawing, I agree.

23 As I said before, I think there is a  
24 question of where you draw the line on this provision.  
25 But I think it's easy to draw the line with equipment

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1 when the Commission has said this equipment is outside  
2 scope, because we're confident it is already managed  
3 and we're confident that it's already managed, because  
4 not only in the performance objective in 73.55(g),  
5 because of the specific commitments that we, the  
6 Commission, know are in security plans.

7 CHAIR KARLIN: All right.

8 MR. LEWIS: That's it.

9 CHAIR KARLIN: Any other questions?

10 (No response.)

11 Thank you.

12 Mr. Hamrick?

13 ORAL ARGUMENT OF HAMRICK, ESQ.

14 ON BEHALF OF THE NRC STAFF

15 MR. HAMRICK: Thank you. First of all,  
16 I'd like to reiterate that the Commission has stated  
17 on four -- at least four separate occasions that  
18 issues with respect to security are not within the  
19 scope of license renewal. They stated it in the 1991  
20 final rule, in the 1995 final rule. The Commission  
21 stated it in the adjudicatory proceedings as well, in  
22 the McGwire Catawba renewal, as well as in the  
23 Millstone renewal.

24 In the Millstone renewal, they said -- and  
25 I quote -- "We want to emphasize that security issues

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1 at nuclear power reactors, while vital, are simply not  
2 among the aging-related questions at stake in a  
3 license renewal proceeding." The reason for this, as  
4 was alluded to earlier, is the existence of 73.55(g).

5 In a 1995 final rule, the Commission  
6 stated that where the design bases of systems,  
7 structures, and components can be confirmed, either  
8 indirectly by inspection or directly by verification  
9 of functionality through test or operation, a  
10 reasonable conclusion can be drawn that the CLB,  
11 current licensing basis, is or will be maintained.

12 And if you'll look at 73.55(g), that's  
13 exactly what it does. It requires that all alarms,  
14 communication equipment, physical barriers, and other  
15 security devices shall be maintained in an operable  
16 condition. That meets what the Commission stated in  
17 the 1995 final rule.

18 It also -- it goes further than the  
19 Commission requires for license renewal purposes and  
20 states that they must also take compensatory measures  
21 in the event of a failure.

22 The counsel for the State of Vermont  
23 brings up the Mothers for Peace case to indicate that  
24 perhaps the Commission has -- is -- has this rule that  
25 security is not within the scope of license renewal,

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1 just because we don't want to address it, and that's  
2 certainly not the case.

3 As we can see by 73.55, the Commission has  
4 addressed it, and this is completely opposite of the  
5 Mothers for Peace case, where the allegation in that  
6 case was that we had not addressed security and  
7 terrorism in the guise -- I'm sorry, for that  
8 particular spent fuel installation.

9 Here there is no allegation with respect  
10 to NEPA, as you've indicated earlier.

11 Counsel for Vermont also used the magic  
12 phrase "if I might hypothesize." This hypothetical is  
13 exactly what the Commission stated also in the  
14 Statement of Consideration from 1995. 54.4(a)(2) that  
15 -- is not about -- on page 22467 of Volume 60 of the  
16 Federal Register, the Commission stated the same  
17 sentence twice, once in the middle column and once on  
18 the right-hand column, that the consideration of  
19 hypothetical failures that could result from system  
20 interdependencies that -- and then it italics "are not  
21 part of the CLB, and that have not been previously  
22 experienced is not required." That's twice on the  
23 same page they say, "We're not talking about  
24 hypotheticals here. We're talking about system  
25 interdependencies that are part of the CLB."

1           So you can't just come up with your  
2 hypothetical failure of the day and have that provide  
3 the threshold support for the contention.

4           JUDGE WARDWELL:    On page 20 of your  
5 answer --

6           MR. HAMRICK:    Yes.

7           JUDGE WARDWELL:    -- the last paragraph  
8 down, I got a bit confused, and specifically about the  
9 third sentence -- full -- one, two, three, four, five  
10 lines down, the sentence that starts, "The integrated  
11 plan assessment of Section 54.21 only requires that  
12 for those SSCs within the scope of 54.4 the applicant  
13 -- application identify and list those structures/  
14 components subject to aging management review."

15           By terms of Section 54.21 not all within  
16 the scope of 54.4 are subject to aging management  
17 review.  Are you saying that the IPA requires an  
18 application to identify those structures and  
19 components subject to it, but that 54.21 doesn't  
20 require that you actually complete the aging  
21 management review?  I didn't understand those  
22 sentences.

23           MR. HAMRICK:    That was probably a little  
24 unclear.  I apologize for that.  The --

25           JUDGE WARDWELL:    No, it was a lot unclear.

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1 (Laughter.)

2 MR. HAMRICK: Okay. Well, the point that  
3 I unartfully attempted to make was that because the  
4 Commission, on four separate occasions, has stated  
5 clearly and without reservation that security issues  
6 are not within the scope of license renewal, that even  
7 if you could make some hypothetical discussion under  
8 54.4(a)(2) basically we don't need to go there.

9 JUDGE WARDWELL: I see. Let me ask you  
10 this, then. Are the requirements of 73.55(g) on a  
11 level comparable to 54.21?

12 MR. HAMRICK: Well, again, that's going to  
13 get into a -- if you want specifics, I'm not -- I'm  
14 not the one who can --

15 JUDGE WARDWELL: Okay. Thank you.

16 MR. HAMRICK: -- can give to you. But I  
17 can say on a general basis what 73.55(g) does is it  
18 first requires the licensees to maintain the equipment  
19 in an operable condition; and, second, requires the  
20 licensees to develop and employ compensatory measures,  
21 including backup systems basically, to assure the  
22 effectiveness of the security system.

23 And that's basically what any proper plan  
24 would include -- maintain it, make sure it works, and  
25 provide backup in the event that it doesn't work.

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1 CHAIR KARLIN: How do you decide whether  
2 a concrete wall is operable condition or have a backup  
3 to it, you know?

4 MR. HAMRICK: I -- there would be testing,  
5 I would assume.

6 CHAIR KARLIN: Oh, okay.

7 MR. HAMRICK: But that -- I cannot answer  
8 that question.

9 But if -- I don't have anything else at  
10 this point other than just to reiterate --

11 CHAIR KARLIN: Okay.

12 MR. HAMRICK: -- our findings. Thank you.

13 CHAIR KARLIN: All right. Thank you.

14 Any other questions at this point? No?

15 (No response.)

16 Okay. Mr. Roisman, rebuttal? Do we have  
17 rebuttal now? Okay.

18 REBUTTAL ARGUMENT OF ANTHONY ROISMAN, ESQ.

19 ON BEHALF OF THE STATE OF VERMONT

20 MR. ROISMAN: Yes. Thank you, Mr.  
21 Chairman. Where to begin. All right.

22 CHAIR KARLIN: What do we do about all of  
23 these cases and these regs that say you can't consider  
24 this sort of thing in aging management? It seems like  
25 they've got a lot of law to cite there. You'd better

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1 read it.

2 MR. ROISMAN: Yes, they do, and you  
3 should. And I think what you will find is that  
4 they're not really addressing the specific issue that  
5 we're talking about. We are not asking that the Board  
6 here make a safeguards review of this plan. We're not  
7 challenging the adequacy of the safeguards measures  
8 that are in place at Vermont Yankee. We're not  
9 challenging the adequacy of the NRC's regulations  
10 regarding safeguards.

11 What we are saying is that to the extent  
12 there are safeguards systems in place, age management  
13 review requires more attention to that piece of  
14 equipment than would be required under 73.55. And we  
15 discuss that in -- on page 44 of our reply brief and  
16 point out the difference between, for instance,  
17 73.55(g)(1) that requires only that all alarms,  
18 communication equipment, physical barriers, and other  
19 security-related devices or equipment shall be  
20 maintained in operable conditions, which is something  
21 functionally equivalent to say that the applicant  
22 shall do good, love mercy, and walk humbly with God.

23 It does not give them any specific  
24 guidance, as compared to what you would find if you  
25 went to 54.21, for instance under 10 CFR 54.21(a)(3)

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1 for vehicle barriers, bullet-resistant enclosures, and  
2 other similar equipment, the applicant would have to  
3 "demonstrate the effects of aging will be adequately  
4 managed, so that the intended functions will be  
5 maintained consistent with the CLB for the period of  
6 extended operation." Now, we submit that those are  
7 two different standards.

8 Assume for a moment that the applicant and  
9 staff are right that they're the same standards.  
10 Then, what's the problem? Why don't they say in their  
11 environment -- in their UFSAR, "We're going to comply  
12 with the age management review requirements and 73.55  
13 with regard to all of the relevant security  
14 equipment"?

15 If there were no difference, why are they  
16 wasting your time about this? They acknowledge that  
17 there's a difference. It's going to take more work.  
18 It's going to take more attention. And we submit that  
19 after 9/11 it deserves more work and more attention.

20 Now, most of what they cite --

21 CHAIR KARLIN: Let me focus on that if I  
22 may. I mean, I thought the whole point of this  
23 license renewal regs as the Commission has written  
24 them is to say there is such a thing called the  
25 current licensing basis, and this deals with

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1 operational activities that go on from day to day, and  
2 that is not the subject of the license renewal  
3 proceedings.

4 MR. ROISMAN: Correct.

5 CHAIR KARLIN: And they seem to further be  
6 saying I guess that the safeguards issues are part of  
7 the current licensing basis. I guess that's what  
8 they're saying here, and, therefore, they don't need  
9 to be addressed. And you say, "Well, if they've got  
10 nothing to hide, why don't they address them here"?  
11 And we say, "Well, then they'd have to start  
12 addressing everything that's in the current licensing  
13 basis."

14 MR. ROISMAN: No, because --

15 CHAIR KARLIN: Just to make you feel  
16 better.

17 MR. ROISMAN: No, but that's not the  
18 point. Our point is that it's inherent from the way  
19 they're conducting themselves that they recognize that  
20 if they were under age management review they would  
21 have to give more attention to the management and age  
22 management of this equipment than they would have to  
23 give under the current licensing basis for this  
24 equipment.

25 So there is a difference, and that's --

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1 that's my point. In other words, there is a  
2 difference here, and we wouldn't be fighting about  
3 this if it weren't the case.

4 JUDGE WARDWELL: So the heart of your  
5 contention, really, is that 73.55(g) is not on a part  
6 with 54.21 in some instances.

7 MR. ROISMAN: Exactly. And the  
8 illustration on page 44 is just -- in our reply is  
9 just an example of where we see that substantive  
10 difference.

11 The second thing is is that the language  
12 of 54.4 clearly encompasses the kind of things that  
13 we're talking about. The applicant has hypothesized  
14 for you a situation in which some security-related  
15 barrier falls down, and then a second event occurs --  
16 namely, terrorists show up at the plant fortuitously  
17 just after the barrier fell down.

18 I submit the better hypothetical is assume  
19 the barrier we're talking about is a door, and it's a  
20 door that is designed to keep terrorists out. It's  
21 got all the special protections, whatever those might  
22 be that make it very hard to get through it. But the  
23 door has aged in a way that makes it more vulnerable  
24 to the terrorist's initial attack, so the barrier is  
25 knocked down by the door, much like the barrier is

1 knocked down by the earthquake.

2 What is the natural direct consequence of  
3 that? The terrorist has gained access to a place that  
4 they're not supposed to get to.

5 Now, are these threats hypothetical? When  
6 the Commission wrote most of the language that was  
7 being cited here, and, admittedly, in their subsequent  
8 cases, we were all pre-9/11. That was 1991. The  
9 probability of these events were deemed remote. The  
10 world changed. We all know now that those  
11 probabilities were miscalculated then.

12 If we had had today's pressures on 9/10,  
13 we might not have had 9/11. So now the question is:  
14 what should we do in light of that 9/11 situation? I  
15 submit that the Commission's regulation 54.4 includes  
16 anything that has a direct impact, and that the only  
17 thing that kept security equipment out of it before  
18 was the argument that the applicant has made here.

19 It's not direct because it's so remote, so  
20 unlikely that the event -- a) the terrorist showing up  
21 -- is going to occur that it's not sufficiently in our  
22 -- in our can that we should be concerned with it.  
23 Now that has changed. Now we know --

24 CHAIR KARLIN: Well, now, wait a second.  
25 As we talked about San Luis Obispo's Mothers for

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1 Peace, it seems to me in the safety area that the  
2 Commission has done a number of things to respond to  
3 9/11. I'm not sure whether they're in everyone's eyes  
4 totally adequate, but they have taken quite a few  
5 measures in the safety area, not the NEPA area, but  
6 the safety area, and they have not said, "Oh, it's so  
7 remote it will never happen." It's remote and  
8 speculative. It's not something we need to worry  
9 about.

10 To the contrary, they've done a lot of  
11 things on the safety side, the Atomic Energy Act side  
12 of the house, on terrorist issues. Now, maybe they  
13 haven't deal with the airplane attack, but they've  
14 dealt with ground-based attacks. And so for you to  
15 say they've said it was too remote and speculate to  
16 worry about on the safety side, I don't think that's  
17 quite accurate.

18 MR. ROISMAN: I'm sorry. If I left that  
19 impression, I left the wrong impression.

20 CHAIR KARLIN: Okay.

21 MR. ROISMAN: I was talking about the  
22 aging question.

23 CHAIR KARLIN: Okay. All right.

24 MR. ROISMAN: Yes. What has happened is  
25 is that the Commission has upped these security

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1 systems, and they have now made them more important  
2 based upon a recognition that there is a direct  
3 relationship between a plausible terrorist attack on  
4 the one hand and a failure of safety systems on the  
5 other. That, we submit, triggers the language in 54.4  
6 that says that you're supposed to be doing your age  
7 management under 54.21 for anything that indirectly  
8 may impact on the performance of safety systems. So  
9 our position --

10 CHAIR KARLIN: So all of the authorities  
11 that they've cited are pre-9/11, and so 9/11 changed  
12 everything?

13 MR. ROISMAN: No. I would like to say  
14 that they're decided either just before or just after.  
15 There's a 2001 case -- I can't tell from this cite,  
16 and I don't remember whether it's pre- or -- I think  
17 that was Millstone, which was reconsidered, but I  
18 don't know on what issue, in 2002. And then, there's  
19 the Catawba case, which is 2002.

20 So those two cases are decided after, but  
21 I believe that those cases do not stand for the  
22 proposition which we're urging --

23 MS. CARPENTIER: One minute.

24 MR. ROISMAN: -- which is not that the  
25 Board reconsider the probability of a terrorist

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1 attack, the adequacy of the safety measures that are  
2 laid down in place, but only the narrow question  
3 whether or not whatever safety systems are in place to  
4 deal with a terrorist attack need to be under age  
5 management review. And that's the issue that  
6 contention 3 is focused on.

7 We want to make sure that all of the  
8 upgrading of security that 9/11 warrants is put into  
9 place, including the application of 54.4, and through  
10 it the application of 54.21.

11 Thank you.

12 CHAIR KARLIN: Thank you. Any questions  
13 from the --

14 (No response.)

15 Okay. I think, if I understand it  
16 correctly, we have finished with the State of  
17 Vermont's three contentions. And we will take a break  
18 right now for about, oh, 15 minutes. Let's reconvene  
19 at 10 after. Maybe that's a little less, but 10  
20 after, when which we'll take the New England  
21 Coalition's contentions, start with Mr. Shems. All  
22 right?

23 Thank you.

24 (Whereupon, the proceedings in the  
25 foregoing matter went off the record at

1 2:57 p.m. and went back on the record at  
2 3:15 p.m.)

3 CHAIR KARLIN: Please be seated.

4 All right. Now we will turn to the New  
5 England Coalition. Mr. Shems, Ms. Tyler, you have six  
6 contentions. Our plan I guess -- we might as well  
7 talk about it a little bit here -- is to ask you to  
8 address two of them this afternoon. That will be  
9 about 45 minutes each, total an hour and a half, and  
10 then probably adjourn around 4:30, 4:45 for the day.

11 We could go a little bit further, and I'm  
12 open to suggestions. But I think we'll have -- be  
13 able to finish the four other ones tomorrow in the  
14 morning, in the first half of the day anyway,  
15 particularly if we convene a little bit earlier  
16 tomorrow morning, possibly at 8:30. If that's  
17 acceptable to everyone, that's what we would plan to  
18 do. Might avoid the heat of the day in the afternoon  
19 tomorrow afternoon if we can get it done. Okay?

20 MR. SHEMS: That's fine with us.

21 CHAIR KARLIN: Great. Speak close to the  
22 mike. You have, what, 20 minutes on your contention  
23 number 1. How do you want to allocate your time, sir?

24 MR. SHEMS: I'd like to have seven minutes  
25 for rebuttal, please.

1 CHAIR KARLIN: Seven for rebuttal. All  
2 right. Proceed.

3 ORAL ARGUMENT OF RONALD SHEMS, ESQ.

4 ON BEHALF OF THE NEW ENGLAND COALITION

5 MR. SHEMS: Thank you. It's a pleasure to  
6 be here. Thank you to members of the Board, Your  
7 Honors --

8 CHAIR KARLIN: Speak into the mike,  
9 please. It's not very --

10 MR. SHEMS: Please remind me to speak up,  
11 because I tend to have a soft voice anyways, and this  
12 makes it that much --

13 CHAIR KARLIN: Can everyone hear?

14 JUDGE WARDWELL: I don't think the mike is  
15 picking up.

16 MR. SHEMS: I feel like a rock star.

17 (Laughter.)

18 CHAIR KARLIN: Don't worry about it.

19 MR. SHEMS: Do you know "Feelings"? Stop  
20 me if I lapse into song here.

21 (Laughter.)

22 Well, again, thank you. I will be  
23 handling contention number 1, and my associate, Karen  
24 Tyler, will be handling the remaining contentions.

25 Starting with contention number 1, I'd

1 like to remind the Board of the standard that we're  
2 dealing with, that it's a minimal showing of the  
3 material, factual, or legal issue, and I believe that  
4 we amply meet that standard.

5 Going down through the criteria of  
6 2.309(f)(1), number 1 is the --

7 CHAIR KARLIN: Please, you're really going  
8 to need to speak up, if you would.

9 MR. SHEMS: Okay. Number 1, the specific  
10 statement requirements -- are specific statement of  
11 the contention is whether Entergy's environmental  
12 report sufficiently assesses the impacts of the  
13 increased thermal discharges from now through the end  
14 of the requested 20-year extended license term. In  
15 terms of number 2 -- and that can be found on page 13  
16 of our contentions.

17 Criterion 2, a brief explanation of the  
18 basis. Our basis derives mainly from deficiencies in  
19 Entergy's environmental report. There was no  
20 assessment of the cumulative impacts. And the record  
21 remains as is; there is no assessment of the  
22 cumulative impacts, and that's required.

23 Subpart 3, is it within --

24 CHAIR KARLIN: Well, let me just stop you  
25 there. Page 10 -- is it page 10? I don't know. I'm

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1 trying to find your contention. I'm sorry. What page  
2 are you on for -- where does your contention begin?  
3 What page does the discussion of that begin --

4 MR. SHEMS: On page 10.

5 CHAIR KARLIN: Page 10. All right. I'm  
6 sorry. Page 10, you have there: 1) Contention 1,  
7 Entergy failed to assess impacts to water quality. Is  
8 that your contention?

9 MR. SHEMS: Yes, and it's more  
10 specifically stated on page 13, where I run through  
11 the criteria and provide --

12 CHAIR KARLIN: Okay.

13 MR. SHEMS: -- a specific statement.

14 CHAIR KARLIN: Okay. But if we were to  
15 admit your contention, would -- what would it -- how  
16 would it read? It would read, "Entergy failed to  
17 assess impacts to water quality."

18 MR. SHEMS: "The cumulative impacts of the  
19 increased thermal discharges from now through the end  
20 of the requested 20-year extended license term."

21 JUDGE WARDWELL: So what you have written  
22 on page 15 is your elaborate -- is your true  
23 contention, in that what is printed on page 10 is  
24 merely the title of that section?

25 MR. SHEMS: Yes.

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1 JUDGE WARDWELL: That's what you follow  
2 all through with all six of your contentions?

3 MR. SHEMS: Some are more specific than  
4 others. It depends on whether or not we could fit it  
5 into a heading and --

6 CHAIR KARLIN: Well, wait a second. So  
7 where is the contention?

8 MR. SHEMS: On page 13.

9 CHAIR KARLIN: Page 13. I see it. Where?  
10 I mean, are we supposed to dig out from somewhere in  
11 this page what your contention is?

12 MR. SHEMS: I run through the criteria and  
13 cite 2.309(f)(1)(i).

14 CHAIR KARLIN: So where is the quote?

15 MR. SHEMS: It's at the top of the --  
16 well, the very last section of page 12, "The specific  
17 issue of fact and law is" --

18 CHAIR KARLIN: You need to speak into the  
19 mike.

20 MR. SHEMS: Turning on to page 13,  
21 "Whether Entergy's environmental report sufficiently  
22 assesses the impacts of increased thermal discharges  
23 over the requested 20-year license extension." 10 CFR  
24 2.309(f)(1)(i).

25 CHAIR KARLIN: Are you -- okay. Go ahead.

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1 MR. SHEMS: Okay. Going to (ii), a brief  
2 explanation of the basis. The basis, as I mentioned  
3 before, is the deficiencies, the several deficiencies  
4 in Entergy's environmental report. Also, there's the  
5 basis that's provided in the contention and in  
6 supporting information, and we can further address the  
7 basis as part of subsection 6 which -- where I can go  
8 into the material dispute in more detail.

9 Sub (iii), is it within the scope of this  
10 proceeding? And it is. It's -- this is a category 2  
11 impact. Our contention arises directly from Entergy's  
12 environmental report that's specific to this plant.  
13 It's not a challenge to a rule, as Entergy claimed in  
14 its answer. Simply disagreeing with Entergy as to  
15 what constitutes a 316 determination doesn't mean that  
16 we're challenging an NRC rule.

17 Further, NRC rules can and have to be  
18 reconciled with NEPA's requirement that a hard look be  
19 given to environmental impacts. And Entergy's  
20 environmental report doesn't come close to this hard  
21 look standard in terms of the cumulative impact of its  
22 thermal discharge.

23 Sub (iv), is this material to this  
24 proceeding? This contention is very material to this  
25 proceeding because NEPA mandates consideration, or, as

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1 I said, a hard look at this impact before an extended  
2 license -- renewed license can issue. Therefore, it's  
3 a finding or a consideration, as studied, that the NRC  
4 or the Board will have to give before an extended  
5 license issues or is denied. And, therefore, it's  
6 material to this proceeding.

7 Sub (v), our concise statement of facts  
8 and/or expert opinion. We attach a declaration from  
9 Dr. Ross Jones. He cited numerous studies, recent  
10 studies, none of which were cited by Entergy either in  
11 its 316 demonstration or in its environmental report.  
12 There are far more recent studies, like I believe that  
13 all of the studies in Entergy's 316 demonstration were  
14 relatively old, and the studies we're citing are  
15 relatively new. And that provides concise statement  
16 of facts and expert opinions.

17 JUDGE WARDWELL: But as I read Mr. Jones'  
18 affidavit, it seemed to me he basically said, "Gee, we  
19 don't know, and we're not going to know for a long  
20 time." He didn't -- wasn't really persuasive in  
21 regards to the fact that what are the thermal impacts  
22 on specifically the American shad.

23 MR. SHEMS: Well, the literature says that  
24 there is an impact. It's just the extent of the  
25 impact that's not fully known. But the purpose of

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1 NEPA is to find out, and the purpose of NEPA is to  
2 have either the applicant or the agency make that  
3 determination, so it can be considered as part of the  
4 decisionmaking process.

5 JUDGE WARDWELL: Well, it will be the  
6 agency, it's not the applicant, that performs the EIS,  
7 correct?

8 MR. SHEMS: Well, under -- under NRC  
9 rules, the applicant has to put together an  
10 environmental report, which is the --

11 JUDGE WARDWELL: They have to provide the  
12 information.

13 MR. SHEMS: -- that staff starts with.

14 JUDGE WARDWELL: And if you took the Jones  
15 affidavit, it would be, "Here's the information; it's  
16 non-conclusive" as I read the Jones affidavit.

17 MR. SHEMS: And here's the information  
18 that should have been looked at and wasn't looked at  
19 by Entergy, because it's not up to an intervenor, such  
20 as NEC to conduct the impact statement or to draft the  
21 environmental report for Entergy. NEPA case law is  
22 very, very clear on that point, that we just have to  
23 raise a reasonable issue, and that's consistent with  
24 the standard for a contention being granted.

25 You know, are we making a minimal showing

1 that has some type of factual basis?

2 JUDGE WARDWELL: How do you counteract the  
3 statement that 316(b) of the Clean Water Act preempts  
4 any NEPA analysis required by the agency that is, in  
5 fact, the effective EIS if you will, that the  
6 alternatives evaluated under 316 of the Clean Water  
7 Act --

8 MR. SHEMS: Well, I guess --

9 JUDGE WARDWELL: -- address those?

10 MR. SHEMS: -- I would have two responses  
11 to that question, Your Honor. The first is that there  
12 is no 316 determination that has been issued. That's  
13 one of the issues, material issues of fact or law,  
14 that we're raising. The applicant, in their answer,  
15 attached an -- a term that's expired. It's only  
16 temporarily in effect until a new permit issues.

17 JUDGE WARDWELL: So there is one in  
18 effect, though? I mean, they have --

19 MR. SHEMS: Well, there's an NPDES permit.  
20 There's no 316 determination.

21 JUDGE WARDWELL: But they have an NPDES  
22 permit.

23 MR. SHEMS: Yes. But that's different  
24 from a 316 determination. And there is no 316  
25 determination, and that's something we'll be able to

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1 prove on the evidence at a hearing.

2 The second answer --

3 JUDGE WARDWELL: Nor will there ever be  
4 one?

5 MR. SHEMS: I don't know. Right now, the  
6 amended permit is -- has been appealed. It's being  
7 reviewed de novo. So whatever issue, it will likely  
8 be very different from what Entergy submitted with its  
9 answer.

10 Also, there is an application for a new  
11 permit that is pending. It has been pending for over  
12 a year now.

13 CHAIR KARLIN: Well, I have a question  
14 about this NPDES permit stuff. Pending, final, we can  
15 debate what status it's in. But if you will turn to  
16 51.71, do you have the regs in front of you, in the  
17 CFR, page 31 actually of the yellow book -- you have  
18 the gray one, but perhaps -- and there is a footnote  
19 that deals with the obligation of the staff to do a  
20 draft environmental impact statement.

21 And in footnote 3 it says, "Compliance  
22 with the environmental quality standards and  
23 requirements of the federal Water Pollution Control  
24 Act imposed by EPA or a designated state is not a  
25 substitute for, and does not negate, the requirement

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1 for NRC to weigh all environmental effects of the  
2 proposed actions and to consider alternatives." So  
3 why didn't you point that out to us in your reply?

4 MR. SHEMS: I apologize for not, but I did  
5 point out that what Entergy submitted isn't sufficient  
6 under -- under NEPA.

7 CHAIR KARLIN: Well, assuming they had a  
8 NEPA permit. I don't care whether they did. This  
9 seems to say that's not relevant. NEPA requires the  
10 agency to do an environmental impact analysis, and the  
11 fact that you have a NEPA permit does not dispense  
12 with or moot that requirement. Section 511 does not  
13 change that in one way -- of the Clean Water Act.

14 MR. SHEMS: I have two answers to that as  
15 well. Let me -- if I can finish my second answer to  
16 Judge Wardwell.

17 CHAIR KARLIN: Okay.

18 MR. SHEMS: The second part of the answer  
19 is that NRC rules have to be read consistently with  
20 NEPA in terms of requiring that hard look, and  
21 shouldn't be read to create a conflict with NEPA  
22 requirements.

23 Getting to your question, Judge Karlin,  
24 there are two answers to that. The first is that as  
25 far as we -- it gets into what Mr. Roisman was talking

1 about earlier, which is that the interface between --  
2 where Entergy leaves off and staff picks up in terms  
3 of the NEPA process, in terms of drafting the  
4 environmental impact statement, is not particularly  
5 clear here.

6 MR. RUND: One minute.

7 CHAIR KARLIN: Thank you, Jonathan. Mr.  
8 Rund.

9 JUDGE WARDWELL: Be still my heart.

10 MR. SHEMS: The rules seem to be set up so  
11 that the environmental report should serve as a clear  
12 and relatively comprehensive foundation for the EIS  
13 that staff will then draft, and we don't have that  
14 here.

15 Quickly going to the material or the  
16 genuine dispute of material on material issues, there  
17 are numerous issues here. One is whether or not there  
18 has been a 316 determination. The second is whether  
19 Entergy assesses the cumulative impact, whether the  
20 permit attached to Entergy's answer is, in fact, a 316  
21 determination, whether a 316 determination exists.

22 We contend that it doesn't. There are a  
23 lot of both mixed issues of fact and law regarding --

24 MR. RUND: Time.

25 MR. SHEMS: -- the actual permit itself,

1 the validity of an expired permit, the one that was  
2 attached by Entergy.

3 If I could make one more point and have  
4 that time taken off from my rebuttal.

5 CHAIR KARLIN: All right.

6 MR. SHEMS: The permit that was attached  
7 makes it clear that there is -- that Entergy hasn't --  
8 Entergy characterizes its discharge as a one degree  
9 increase, but it's a one degree increase in the  
10 Connecticut River. And as the permit they attached to  
11 their answer makes clear, it's a one degree increase,  
12 but it's actually a one to five degree increase, 1.4  
13 miles downstream from the discharge.

14 So the thermal discharge -- the increased  
15 thermal discharge over the course of 20 years is huge.  
16 It's enormous. And that needs to be assessed and  
17 shouldn't be minimized as a mere one degree increase  
18 the way that it has been characterized both by Entergy  
19 and somewhat by staff.

20 CHAIR KARLIN: I mean, the one degree  
21 increase, isn't that after the mixing zone, which is  
22 apparently 1.4 miles long, and within that mixing zone  
23 apparently temperatures are going to be considerably  
24 higher than that at various times, but ultimately the  
25 limitation is at the end of the mixing zone 1.4 miles

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1 downstream the temperature increases one degree.

2 MR. SHEMS: That's correct.

3 CHAIR KARLIN: So it does not take away  
4 from the fact that it's higher upstream. Okay.

5 MR. SHEMS: Absolutely.

6 CHAIR KARLIN: Yes, I understand that.

7 MR. SHEMS: And most importantly, why  
8 what's attached to Entergy's answer is not a 316  
9 determination is that on its face it requires  
10 significant further study in order for the state to  
11 make a determination as to whether or not the  
12 increased thermal discharge will be allowed in the new  
13 permit that it's currently considering.

14 CHAIR KARLIN: All right. Thank you.

15 Mr. Lewis, 15 minutes.

16 MR. LEWIS: Thank you, Judge Karlin. That  
17 contention is barred by the NRC's rules. Under the  
18 NRC's rules at 51.53(c)(3)(ii)(b), an environmental  
19 report is only required to provide an assessment of  
20 thermal impacts if the applicant does not provide a  
21 316(a) variance. In this proceeding, we have provided  
22 the 316(a) variance and the supporting documents  
23 that's required by the rule.

24 CHAIR KARLIN: Where? When did you  
25 provide that?

1 MR. LEWIS: We provided it at several  
2 different points in time. At the time the license  
3 renewal application was filed, the --

4 CHAIR KARLIN: You're not suggesting that  
5 the -- are you suggesting the NPDES permit is a  
6 316(a)?

7 MR. LEWIS: Absolutely, yes.

8 CHAIR KARLIN: Does it say that?

9 MR. LEWIS: A 316 variance is the state  
10 approval of alternative thermal effluent limitations  
11 in the permit.

12 CHAIR KARLIN: I used to be an NPDES  
13 enforcement attorney at EPA.

14 MR. LEWIS: Okay.

15 CHAIR KARLIN: And we never thought that  
16 an NPDES permit was the same thing as a 316(a), the  
17 water quality certification or a thermal discharge.

18 MR. LEWIS: The thermal effluent  
19 limitations in that NPDES permit are the thermal  
20 effluent limitations that have been approved by the  
21 state pursuant to 316(a), that the fact sheet which is  
22 basically the agent -- permitting agency's explanation  
23 of its amended permit, explicitly states that they are  
24 approving the 316(a) demonstration that Vermont Yankee  
25 provided with respect to the increase in temperature

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1 from June through October.

2 They granted a partial approval of that  
3 temperature increase, and in addition that fact sheet  
4 makes the 316(a) findings that are required the  
5 finding that the thermal effluent limitations imposed  
6 are sufficient to ensure a balanced and -- a balanced  
7 indigenous population of fish.

8 So when you look at the NPDES permit, the  
9 final amended permit that we attached to our answer,  
10 and if you look at the fact sheet and the  
11 responsiveness summary, which was also included, it is  
12 absolutely clear that the state has provided a 316(a)  
13 variance, and that we have met the NRC's environmental  
14 report requirement in its entirety.

15 CHAIR KARLIN: Well, let's look at the reg  
16 you cite, 51.53(3)(b) I guess it is -- (2)(b). If the  
17 applicant's plant utilizes once-through cooling water  
18 or cooling pond heat displacing systems, the applicant  
19 shall provide a 316(b) determination, and, if  
20 necessary a 316(a) variance, or equivalent. That's  
21 fine.

22 You're suggesting you've done that.  
23 You're saying you've done that. Does that mean no --  
24 are you saying that that means no -- the environmental  
25 report does not need to deal with thermal impacts in

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1 the river?

2 MR. LEWIS: That's correct. If you read  
3 the next sentence, Judge Karlin --

4 CHAIR KARLIN: If the applicant cannot  
5 provide these documents, it shall provide an  
6 assessment of the impacts on fish and shellfish  
7 resources resulting from heat shock, impingement, and  
8 entrainment. Now impingement and entrainment are 316  
9 issues.

10 MR. LEWIS: 316 --

11 CHAIR KARLIN: That's not the problem they  
12 are raising.

13 MR. LEWIS: That's right.

14 CHAIR KARLIN: Heat shock is only a very  
15 limited element of the problem they seem to be  
16 raising. There seems to be a great -- much more  
17 significant -- not just heat shock but general thermal  
18 impact in the river. That does not answer the  
19 question of the entire environmental, you know,  
20 assessment of the impacts of thermal in the river.  
21 It's not just heat shock impingement and entrainment,  
22 but that's all that seems to be limited to.

23 MR. LEWIS: The issue that is defined in  
24 this regulation, in 51.53(c)(3)(ii)(b), the prime --

25 CHAIR KARLIN: In 51.53(c), okay, (b), the

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1 same reg we're talking about.

2 MR. LEWIS: -- defines the scope of the  
3 assessment that the applicant must include in the  
4 environmental report. This is the provision that says  
5 what we must provide in the environmental report. To  
6 have a contention, the intervenors, the petitioners,  
7 need to indicate that we have not provided some  
8 information required by the regulations to be included  
9 in our environmental report. This is the provision  
10 that says, "What is the category 2 issue that we must  
11 address?"

12 CHAIR KARLIN: Well, I understand, but  
13 this says this is required, but it doesn't say that's  
14 all that's required. Where do you -- can you cite me  
15 something that says "and no other analysis"? I mean,  
16 this is a category 2 issue, right? So the  
17 environmental report and the applicant needs to deal  
18 with the thermal impact on the river. This is part of  
19 it.

20 MR. LEWIS: Well, I think this is all of  
21 it.

22 CHAIR KARLIN: This is all of it. Is there  
23 something that supports that, a statement of  
24 consideration that says that?

25 MR. LEWIS: No. If you wanted to go back,

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1 you'd have to go back to the generic environmental  
2 impact statement, which looked at thermal impacts more  
3 generally to find the additional piece of information  
4 that they needed from the applicant in the  
5 environmental report and what that generic  
6 environmental impact statement said is -- we need a  
7 copy of the 316(a) and 316(b) determination -- the  
8 316(a) determination with respect to heat shock,  
9 316(b) with respect to entrainment and impingement.

10 If we have that information, we can  
11 prepare our EIS. If we don't have that information,  
12 then we need a further assessment. So we have  
13 provided the documents that are required by the NRC  
14 rules. An assertion that we have to provide more than  
15 this is simply a challenge to the adequacy and  
16 sufficiency of the NRC rules.

17 CHAIR KARLIN: Well, let's go to page 31  
18 of the CFR. That's the 51.71 footnote 3 I was  
19 referring to with Mr. Shems.

20 JUDGE WARDWELL: Before you ask, can I  
21 just -- can I ask a clarifying question? Where do you  
22 say that would be under -- would that be in the NUREG-  
23 1437, that -- what you just said is stated?

24 MR. LEWIS: There is an assessment, yes,  
25 in NUREG-1437 of the impacts of operation, including

1 thermal impacts.

2 JUDGE WARDWELL: Okay. Thank you. Sorry.

3 CHAIR KARLIN: No. Thank you. 51.71  
4 draft environmental impact statement D, analysis,  
5 talks about what's required in the draft environmental  
6 impact statement and towards the end, just before E on  
7 the left side of page 31 of the yellow book, the  
8 version that I start reading, "The environmental  
9 impact of the proposed action will e considered in the  
10 analysis, irrespective of whether a certification or  
11 license from the appropriate authority has been  
12 obtained."

13 Footnote 3, "Compliance with the  
14 environmental quality standards and requirements of  
15 federal water pollution control is not a substitute  
16 for and does not negate the requirements for NRC to  
17 weigh all environmental effects and to consider  
18 alternatives."

19 MR. LEWIS: That's absolutely correct, and  
20 that's not in conflict at all.

21 CHAIR KARLIN: So the fact that they've  
22 got a certification or not, or an NPDES permit or not,  
23 does not substitute for or dispense with the  
24 requirement that an environmental assessment or impact  
25 statement cover the thermal impacts of the river.

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1 MR. LEWIS: Let me explain what that  
2 provision means.

3 CHAIR KARLIN: Okay.

4 MR. LEWIS: The Commission has to weigh  
5 all the impacts, so they have to look at all of the  
6 costs and benefits to determine whether they should go  
7 ahead and issue the renewed license. There are a  
8 number of different inputs to that, including the  
9 category 1 issues.

10 On the thermal impacts, from a once-  
11 through cooling system, the Commission takes let's  
12 call it the cost of those impacts, what is the  
13 magnitude of those impacts, into account in balancing  
14 all of the costs and benefits. The issue, though, is  
15 whether they have to do their own independent  
16 assessment of the magnitude of those impacts or  
17 whether they can adopt the permitting agency's  
18 assessment.

19 If you look at footnote 3 on this page, it  
20 indicates that where an assessment of aquatic impacts  
21 from the plant discharge is available from the  
22 permitting authority, the NRC will consider the  
23 assessment in its determination for the magnitude of  
24 the environmental impacts.

25 CHAIR KARLIN: Sure.

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1 MR. LEWIS: What means is --

2 CHAIR KARLIN: Sure.

3 MR. LEWIS: -- whereas here the state has  
4 issued a 316(a) variance and has made the finding that  
5 there will be no significant environmental impacts,  
6 the Commission is to factor that assessment into its  
7 EIS when it weighs the relative costs and benefits.  
8 That is why all we need to do is provide the 316(a)  
9 variance and supporting documents in our ER --

10 CHAIR KARLIN: Sure the NRC will consider  
11 -- where the state has done something, the NRC will  
12 consider it, but that doesn't say neither the  
13 applicant -- that that's all they'll do, or they can  
14 stop their inquiry at that, does it?

15 MR. LEWIS: Well, in fact, we cited our  
16 NRC precedent in our answer. I believe it was the  
17 Robinson case, and also a Court of Appeals case  
18 involving Seabrook, where the Commission -- in the  
19 Robinson case it was the Appeal Board, excuse me, it  
20 wasn't the Commission level, but it was the Appeal  
21 Board, indicated that where a state had assessed the  
22 impacts from a cooling water system, the state was  
23 obliged -- sorry, the NRC was obliged to accept that  
24 assessment at face value.

25 All of this stems from Section 511 of the

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1 Clean Water Act, which is basically an exception to  
2 the normal NEPA standard which requires an agency to  
3 assess everything again and independently. 511 says  
4 that the Commission cannot impose any alternative  
5 limitation or review of limitation that's issued by  
6 the state under the Clean Water Act.

7 CHAIR KARLIN: Well, I've got in front of  
8 me Section 511, the Clean Water Act, (c)(2). Nothing  
9 in NEPA shall be deemed to authorize any federal  
10 agency authorized to issue a license or permit or  
11 conduct any activity to review any effluent limitation  
12 or other requirement established pursuant to this act  
13 or Section 401.

14 So all that says to me is that NRC -- NEPA  
15 does not authorize NRC to impose effluent limitations.  
16 And effluent limitations are very specifically defined  
17 under the Clean Water Act, and we're not proposing to  
18 do that. They're just asking for an environmental  
19 impact analysis to be done.

20 MR. LEWIS: I urge the Board to look at  
21 the case law that we have cited on our page 14 of our  
22 answer, in particular the New England Coalition case  
23 where the NRC accepted as dispositive EPA's  
24 determinations on -- here it says one aspect of their  
25 overall impact. But when you look at this case, in

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1 fact, it is the 316(a) determination that the EPA  
2 made. The court said that the NRC was justified in  
3 accepting that as dispositive.

4 If you look below at the Robinson case  
5 cited at the bottom of the page, it says, "Where an  
6 EPA or an authorized state has assessed the aquatic  
7 impacts in improving a plant's cooling water system,  
8 the NRC must take that assessment at face value."

9 The NRC does not have the ability, and  
10 should not get into second-guessing a state when the  
11 state has the substantive authority to determine what  
12 is an appropriate effluent limitation and --

13 CHAIR KARLIN: We're not proposing --  
14 they're not asking for us to -- NRC to impose an  
15 effluent limitation. 511 talks about effluent  
16 limitations. No one is asking for that. This is  
17 Public Service's New Hampshire case. I've read that.  
18 The Atomic Licensing Appeal Board, back in 1977, got  
19 it wrong. That's not what the law is. 511 doesn't do  
20 that.

21 MR. LEWIS: Well, I would --

22 CHAIR KARLIN: Is there any more recent  
23 citation you've got for that proposition? Any other,  
24 you know, support? I mean, certainly there must be  
25 other agencies that deal with 511.

1 MR. LEWIS: Well, I would respectfully  
2 submit that that is the law of the NRC. I don't  
3 believe I got it wrong. I think that they view a  
4 determination -- the NRC's attempt to review the  
5 underlying basis for a 316(a) variance as reviewing  
6 that variance. And I -- what the NRC has long decided  
7 is that they can and should accept as dispositive the  
8 permitting entity's assessment. They should factor  
9 that into their final impact statement.

10 CHAIR KARLIN: Well, let me ask this. Let  
11 me ask this. An environmental -- NEPA requires the  
12 agency to do an environmental assessment. Now, let's  
13 say NRC is doing the -- is the agency in question. A  
14 facility may have to get a RCRA permit for dealing  
15 with hazardous wastes. They may have to get an air  
16 permit. They may have to get a water permit. They  
17 may have to get zoning from the state, or they may  
18 have to get some -- dozens of permits or licenses.

19 Does the fact that they get those licenses  
20 mean that NRC doesn't have to consider the  
21 environmental effects, or do an environmental  
22 assessment every time someone gets a license, say,  
23 "Well, we'll carve that out, we don't have to include  
24 that in our EIS, because we're getting the permit"?  
25 No.

1           The obtaining of those permits is a given.  
2           That's a requirement. Of course you're going to get  
3           the permits. There's nothing amazing about that, but  
4           that doesn't dispense with the requirement to do an  
5           environmental impact analysis of the project and make  
6           a call under NEPA, does it?

7           MR. LEWIS: No. But the difference here  
8           is Section 511, which does --

9           CHAIR KARLIN: Right.

10          MR. LEWIS: -- constrain the NRC's and  
11          NEPA authority under --

12          CHAIR KARLIN: And says we can't impose  
13          effluent limitations.

14          MR. LEWIS: Well, it says more than that.  
15          It says that you --

16          CHAIR KARLIN: Or other requirements  
17          established pursuant to this Act. And --

18          MR. RUND: One minute.

19          JUDGE WARDWELL: I also heard something  
20          else from you that I want to explore a little bit.  
21          You started off saying that based on the citations you  
22          were quoting us that the only thing NRC requires of  
23          you in your ER is in fact a demonstration of the  
24          316(a) variance.

25          MR. LEWIS: That's correct, yes.

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1 JUDGE WARDWELL: What is your experience  
2 with how the staff then handles that in preparing the  
3 SEIS for a license renewal?

4 MR. LEWIS: The NRC will take the  
5 assessment that is provided in the permit and 316(a)  
6 demonstration and put it in its draft EIS, put it out  
7 for public comment, and later finalize it. If they  
8 take the information that is provided in the state's  
9 assessment as the input to their EIS, as I said, we  
10 may --

11 JUDGE WARDWELL: And they don't augment it  
12 what -- to any degree in regards to evaluating other  
13 impacts or the cost benefits, weighing options, the  
14 hard look?

15 MR. LEWIS: They usually --

16 MR. RUND: Time.

17 JUDGE WARDWELL: No, you can proceed.

18 MR. LEWIS: Can I answer the question?  
19 Yes, they respond to comments. I have not seen any  
20 license renewal where they have had a finding that was  
21 different from the state's assessment.

22 JUDGE WARDWELL: But did they raise other  
23 options and alternatives in their -- in their EIS?

24 MR. LEWIS: Another option or alternative  
25 in that case would be an alternative effluent

1 limitation. The --

2 JUDGE WARDWELL: Well, that's one. There  
3 may be others that deal with this same issue that  
4 isn't an effluent standard, wouldn't there?

5 MR. LEWIS: I'm not sure what other  
6 alternatives you would have other than if they can't  
7 review or impose an -- a different requirement under  
8 the Clean Water Act, I'm not sure how they could  
9 consider another alternative to address this issue.

10 CHAIR KARLIN: All right. With my -- with  
11 the permission of my colleagues, perhaps I can ask  
12 another question. On page 16 of your brief, Mr.  
13 Lewis, you talk about the NPDES permit is under  
14 de novo appeal and the -- the NEC argues that the  
15 NPDES permit is under de novo appeal and is not final.  
16 And it also argues that it's only valid for five  
17 years.

18 You then say the permit is final on its  
19 face, and is captioned final, and, therefore, it is  
20 effective once issued unless stayed. Under the  
21 federal regulatory scheme at EPA, 40 CFR 124.15(b)(2),  
22 it is not final unless stayed. It is immediately not  
23 final as soon as it's challenged. Is the state  
24 regulatory scheme different that that?

25 MR. LEWIS: My understanding --

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1 CHAIR KARLIN: It's not final under the --  
2 if it's appealed, then it's not final under the -- in  
3 EPA. Is the state different?

4 MR. LEWIS: Maybe we're talking semantics.  
5 By "final" I mean it is --

6 CHAIR KARLIN: Not effective.

7 MR. LEWIS: No, it is effective.

8 CHAIR KARLIN: Not effective in the EPA  
9 scheme. If you've got a final NPDES permit, "final,"  
10 and within 30 days someone appeals it, then it is not  
11 effective.

12 MR. LEWIS: My understanding -- and I'm  
13 not the state law expert, but my understanding is that  
14 this permit is effective. It is in effect. It is the  
15 governing permit and that's --

16 CHAIR KARLIN: And that's going to be  
17 different than the federal, because I command you to  
18 look at 124.15(b)(2). I used to litigate that issue,  
19 and it came up a lot.

20 Okay. Thank you.

21 Staff, 10 minutes.

22 MS. YOUNG: I'm not sure I have much to  
23 add to the discussion that has been held so far, to  
24 the extent that the staff did not object to the  
25 admission of this contention on a limited basis.

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1           But I would like to point out, in  
2 listening to the exchange between Judge Karlin and Mr.  
3 Lewis, the question became whether the NRC would do an  
4 analysis of impacts on water quality due to thermal  
5 discharges. Certainly, the NRC would do that and  
6 would use as a basis for its information any permit  
7 that was issued by the state.

8           On 51.71, which Judge Karlin pointed to  
9 earlier, that footnote 3 talks about where there is an  
10 assessment of aquatic impacts on plant discharges  
11 available from the permitting authority, the NRC will  
12 consider that assessment as determinations of the  
13 magnitude of environmental impacts, the striking and  
14 overall cost balance at the various stages, including  
15 license renewal -- in other words, whether it would be  
16 unreasonable to preserve their license renewal option.  
17 So this is information we will consider.

18           I understand that at this stage the task  
19 of the petitioners is to challenge the adequacy of the  
20 environmental report. That's why the staff's response  
21 was only limited to the extent that they had  
22 adequately identified an issue as regarding a dispute  
23 on whether that environmental report was complete.

24           JUDGE WARDWELL: Could you clarify what  
25 your limited admission is and why it differs from what

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1 the petitioner is really requesting?

2 MS. YOUNG: Well, I guess I don't  
3 understand how it differs, because in their initial  
4 petition they were concerned about the one degree  
5 increase in thermal discharges and argued that that  
6 permit, given that it was of limited duration -- only  
7 for five years -- did not really provide an assessment  
8 of impacts.

9 But, again, we have 10 CFR 51.53, which  
10 has been cited before by Mr. Lewis and by staff, that  
11 indicates you're supposed to provide that discharge  
12 permit, which actually controls what the discharges  
13 should be. And so if there's a permit that already  
14 indicates what the authorized thermal effluents are  
15 that can come from a facility, the NRC takes that  
16 information and an assessment provided in that permit  
17 as its baseline in terms of analyzing impacts for  
18 license renewal.

19 And the only obligation the applicant has  
20 in terms of submitting its environmental report is to  
21 provide the current permit.

22 JUDGE WARDWELL: Thank you. That's what  
23 I thought also.

24 CHAIR KARLIN: I had a question. On  
25 page 9 of your brief you seem to suggest -- first, you

1 indicate on page 8 that you don't admit -- object to  
2 the admission of this contention, and you talk about  
3 limiting it to one degree in American shad. I don't  
4 really know whether that's really the -- why you would  
5 limit it in such a way.

6 MS. YOUNG: Well, basically --

7 CHAIR KARLIN: I mean, the contention --  
8 they gave as an example, I thought, American shad.  
9 But that wasn't -- that was just a piece of evidence  
10 that they presented. Why should -- we don't want to  
11 limit the contention to that, only that, do we?

12 MS. YOUNG: Well, understand that the  
13 Commission's pleading requirements for its contentions  
14 has over the years -- the threshold has gotten higher  
15 and higher. Initially, it was just a notice and  
16 comment provision. You could generally identify an  
17 issue that you had with respect to an application.

18 Then, with the rulemaking in the '89  
19 timeframe, you had this additional of the element of  
20 having to establish a dispute as to a material issue  
21 of fact.

22 CHAIR KARLIN: Right.

23 MS. YOUNG: And the requirement to -- the  
24 Commission put more body around its -- its demand in  
25 terms of strict pleading requirements, to provide more

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1 basis and specificity for your concerns. When the  
2 staff read the petition --

3 CHAIR KARLIN: Right.

4 MS. YOUNG: -- it saw concern about one  
5 degree, it saw in the writeup in NEC's petition that  
6 the concern was about American shad, and then when it  
7 went to the declaration of Dr. Ross the elucidation of  
8 potential impacts on American shad were talked about  
9 in great detail. Whereas just general statements  
10 about water quality and thermal shock were in other  
11 parts of the petition.

12 And the Commission, you know, as recently  
13 as April of this year, in the USEC decision, CLI06-10  
14 at 63 NRC 451, page 72, has indicated that an expert  
15 opinion can't really state a conclusion without  
16 providing a reasoned explanation for the basis for  
17 that conclusion.

18 So when you're looking at a contention  
19 being raised by a petitioner, you're looking at the  
20 concern, whether it's stated in a title or a phrase  
21 that indicates what the issue is the petitioner is  
22 trying to raise, and how that concern is supported.  
23 And that's the basis and specificity.

24 And so to the extent that the staff read  
25 intervenor's --

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1 CHAIR KARLIN: No, no, no. Wait a second.

2 MS. YOUNG: -- petition --

3 CHAIR KARLIN: Wait a second. Let's go  
4 back --

5 MS. YOUNG: -- the issue with American  
6 shad --

7 CHAIR KARLIN: Let's break out basis and  
8 specificity, again basis, bases -- which one are we  
9 talking about? The contentions are admitted, not  
10 bases, right?

11 MS. YOUNG: Yes, but bases --

12 CHAIR KARLIN: Okay.

13 MS. YOUNG: -- articulate --

14 CHAIR KARLIN: And the --

15 MS. YOUNG: -- what the concern is in a  
16 contention.

17 CHAIR KARLIN: And the Commission has  
18 ruled that in a contention at the outset the  
19 petitioner is not obliged to provide an exhaustive  
20 list of its bases, right?

21 MS. YOUNG: I would agree.

22 CHAIR KARLIN: And the rule also requires  
23 a concise statement of alleged facts or expert  
24 opinions, which would support -- it doesn't have to  
25 have all the facts. It doesn't have to have all of

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1 the expert opinions, certainly not put all their  
2 evidence in. They just have to have enough to get in  
3 the door to show there's a dispute.

4 So if they say, "Well, for example, there  
5 could be a problem with shad," are we to then say,  
6 "Well, your contention is limited to shad"? Maybe  
7 they have trout, maybe they have rockfish, maybe they  
8 have guppies, I don't know. But because they only had  
9 time to get one of them in the door, and maybe it's  
10 legit -- let's assume it's legit, I don't know -- then  
11 are we to say that's all we can litigate now?

12 MS. YOUNG: Well, I don't think the  
13 intervenors here said -- I mean, excuse me,  
14 petitioners said that, for example, American shad is  
15 a concern. I think the statement in the declaration  
16 of Dr. Ross and the arguments in the petition  
17 themselves focus on the fate of American shad as being  
18 particularly sensitive to thermal discharges.

19 So you have to take a contention pleading  
20 on its face. What type of information does it give  
21 you about circumscribing the boundaries and parameters  
22 of a concern? And so what the staff does when it  
23 looks at petitions, you know, even though like NEC's  
24 which was a little bit hard to tell what was the  
25 contention and what were the bases in terms of the way

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1 they pled their issue, was to try to find out, what is  
2 the crux of the concern here?

3 And the concern seemed to be with respect  
4 to the impacts of thermal discharges associated with  
5 a one degree increase in an NPDES permit -- we're not  
6 going to argue the status -- its impact on a  
7 particular species in the aquatic biota and that being  
8 American shad.

9 CHAIR KARLIN: But the one degree is at  
10 the edge of the mixing zone I guess, which is 1.4  
11 miles downstream. They also talked in that affidavit  
12 I believe of higher temperatures in other parts of the  
13 I guess -- they didn't use the word "mixing zone," but  
14 I think that's what they're talking about.

15 MS. YOUNG: Well, but they didn't really  
16 talk about the 1.4 mile distance until the reply.  
17 So --

18 CHAIR KARLIN: Right.

19 MS. YOUNG: -- you know --

20 CHAIR KARLIN: But they did talk about  
21 higher temperature.

22 MS. YOUNG: -- if you were just -- it's  
23 hard to understand what was the concern without --  
24 without trying to do a fair and reasoned assessment of  
25 what was the information being pled in the petition,

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1 and how was it supported by the expert opinion and the  
2 facts cited by the expert with respect to the issue  
3 that they're trying to raise.

4 CHAIR KARLIN: Now, on page 9 of your  
5 brief, you seem to say at the end of the first  
6 paragraph, it's a partial paragraph, the contention  
7 basis that remains, however, is the alleged absence of  
8 an assessment of the impacts of the discharge  
9 temperature, which can be cured by the submission of  
10 an amended permit, amended NPDES permit. Are you  
11 suggesting that all they have to do is slap an NPDES  
12 permit on the table and this contention goes away?

13 MS. YOUNG: If the NPDES permit contains  
14 an assessment of the impacts on the aquatic biota,  
15 yes, that's correct.

16 CHAIR KARLIN: Well, the NPDES permit  
17 won't contain an assessment of that. I will contain  
18 effluent limitations. It will contain -- maybe it  
19 will contain a 316 discharge, maybe it will contain a  
20 316(b), but it won't contain an assessment. That's  
21 what you have to do under NEPA.

22 MS. YOUNG: Well, please understand the  
23 staff --

24 CHAIR KARLIN: Isn't that what footnote 3  
25 says?

1 MS. YOUNG: -- the staff has seen the  
2 NPDES permit that -- the renewed permit, and it does  
3 contain an assessment of biota.

4 JUDGE WARDWELL: And if it doesn't, then  
5 you won't be satisfied, is that correct?

6 MS. YOUNG: That's correct. We couldn't  
7 even rely -- we'd have to do our own analysis.

8 CHAIR KARLIN: It contains an assessment  
9 of -- does it contain a NEPA assessment?

10 MS. YOUNG: It contains an assessment of  
11 the impacts of an increased thermal discharge on the  
12 aquatic biota in the river -- in the Connecticut  
13 River.

14 CHAIR KARLIN: It discusses --

15 MS. YOUNG: And it references studies and  
16 all sorts of things associated with an assessment.

17 CHAIR KARLIN: And it also requires  
18 additional studies to be done, does it not?

19 MS. YOUNG: Well, there's different --

20 CHAIR KARLIN: And it also --

21 MS. YOUNG: -- different monitoring.

22 CHAIR KARLIN: -- lasts five years --

23 MS. YOUNG: I'm sorry. I don't mean to  
24 talk over you.

25 CHAIR KARLIN: And it only lasts five

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1 years. How about the 25, 26 years we're talking about  
2 here?

3 MS. YOUNG: Well, obviously, the staff,  
4 when it does an analysis of impacts, has to take that  
5 discharge permit at the baseline for what the  
6 operation would be over the 20 years. Until the state  
7 changes the effluent limits, the discharges that are  
8 authorized for Vermont Yankee, there wouldn't be any  
9 difference in terms of the staff's analysis of  
10 carrying out the impacts over the 20 years of  
11 operation.

12 So the staff -- there is no disagreement  
13 here as to what the staff is required to do. What the  
14 petitioner has done at this threshold stage is to  
15 identify what it believes to be deficiencies in the  
16 environmental report. And the staff was addressing  
17 that in this petition. It was not getting to what  
18 requirement was there for the NRC to do with respect  
19 to --

20 MR. RUND: Time.

21 MS. YOUNG: -- analysis of impacts.

22 JUDGE WARDWELL: If that assessment isn't  
23 there in the NPDES permit, and you feel an obligation  
24 to, you know, elaborate on it in order to meet the  
25 requirements of submitting an EIS, will you then go

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1 back to the applicant to augment in essence their ER  
2 by providing you with more information to be able to  
3 do that, or would you have sufficient information  
4 based on what's available between what they did submit  
5 in their 316 and any other information that might be  
6 in the NPDES?

7 MS. YOUNG: Well, to extent that NRC  
8 regulations only require an applicant to submit his  
9 current permit, the staff can ask the applicant --  
10 excuse me.

11 CHAIR KARLIN: I didn't hear what you just  
12 said. I'm sorry.

13 MS. YOUNG: To the extent that the  
14 Part 51, 51.53, whatever it is, talks about submitting  
15 the primary -- and that's what a licensee needs to do  
16 in terms of providing information regarding an  
17 assessment of impacts on the aquatic biota, the staff  
18 would have that information and would also ask the  
19 applicant to provide any additional information on  
20 studies it has.

21 But the staff also has resources through  
22 contacts with the State of Vermont, and, you know,  
23 other studies and things done to determine what is the  
24 -- you know, like a literature review, that any  
25 scientist or engineer does in terms of their field to

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1 find out what is the information available about  
2 impacts on aquatic biota for the Connecticut River.

3 So it would not end its inquiry there,  
4 but, you know, again this petition is really focused  
5 on what ingredients have to be present in an  
6 environmental report submitted by an applicant. They  
7 are at the point of challenging the NRC's  
8 environmental impact statement, which is yet to be  
9 written.

10 CHAIR KARLIN: Okay. Thank you.

11 Any more questions? Go ahead.

12 JUDGE WARDWELL: Well, I don't know  
13 whether I should. It details with an issue that I  
14 feel is new evidence. I'm sure curious, but I won't  
15 ask.

16 CHAIR KARLIN: Okay.

17 JUDGE WARDWELL: Because it's a curious  
18 question.

19 CHAIR KARLIN: All right. And we have,  
20 what, seven minutes reserved for rebuttal?

21 MR. RUND: Five.

22 CHAIR KARLIN: Five. Five. Could you  
23 speak up, Mr. Rund? We couldn't hear you. The  
24 mike --

25 MR. RUND: Five. Five minutes.

1 MR. SHEMS: Okay. Thank you. I want to  
2 start off by addressing NRC staff's contention that  
3 all that's needed is a permit. I'm looking at the  
4 regulation, which is 51.53(d), which requires a copy  
5 of the current Clean Water Act 316(b) determination,  
6 and, if necessary, a variance. Nowhere is the word  
7 "permit" mentioned.

8 My second point as to that is that that  
9 regulation has to be read consistently with NEPA  
10 obligations, and so I'd agree with your earlier point  
11 that it can be read to require a broader submittal of  
12 information from an applicant.

13 JUDGE WARDWELL: Yes. But doesn't the  
14 staff do the NEPA evaluation? The applicant doesn't?

15 MR. SHEMS: Staff is ultimately  
16 responsible for the NEPA evaluation.

17 JUDGE WARDWELL: And if they've stated  
18 what they need to do that NEPA analysis --

19 MR. SHEMS: What they need is stated in  
20 the regulation, which is different from what you just  
21 heard here. Staff was just arguing that a permit is  
22 all that's needed when the regulation requires a  
23 316(b) determination or a 316(a) variance. And that's  
24 very different from an NPDES permit.

25 JUDGE WARDWELL: Well, I thought that's

1 what they meant by what they require. I mean, that's  
2 also what the applicant -- representative of what  
3 their obligations are to submit. So there's agreement  
4 there that that has to be submitted as part -- as  
5 their ER.

6 MR. SHEMS: Assuming I'm misunderstanding  
7 staff's use of the word "permit," absolutely.

8 CHAIR KARLIN: But the question is whether  
9 that's exhaustive, right? I mean, yes, they've got to  
10 submit that, but is that all they've got to submit?

11 MR. SHEMS: Moving to my next point,  
12 Entergy argues that they have a 316(a) variance, and  
13 that they argued that the fact sheet that accompanies  
14 their amended permit, the one that's expired, is such  
15 a variance. Let me read you from this fact sheet.

16 They describe it as a partial approval of  
17 a 316(a) demonstration result. And then, on the next  
18 page, page 5, they go on to say why it's only partial,  
19 because significant further study is required in order  
20 to grant a 316(a) variance.

21 So this is not a 316(a) variance, what  
22 they have, on the face of the fact sheet. So, again,  
23 I think there's significant dispute of material fact  
24 here as to whether or not they have submitted what  
25 they're supposed to submit. And in the absence of on

1 its face a valid 316(a) variance is -- we go back to  
2 the environmental report and is that sufficient.

3 In terms of state law, if it's appealed  
4 it's not final. It is, as Mr. Lewis said, in effect,  
5 but only temporarily. It's in effect only because our  
6 state Administrative Procedure Act allows a permit to  
7 remain in effect --

8 CHAIR KARLIN: Do you mean the prior  
9 permit remains in effect, but the --

10 MR. SHEMS: The prior permit remains --

11 CHAIR KARLIN: -- new permit is not in  
12 effect?

13 MR. SHEMS: The new permit is -- it hasn't  
14 issued yet.

15 CHAIR KARLIN: A final permit is issued,  
16 but it's been appealed --

17 MR. SHEMS: An amendment to the existing  
18 permit issued in March.

19 CHAIR KARLIN: Okay.

20 MR. SHEMS: The amendment has been  
21 appealed.

22 CHAIR KARLIN: Okay.

23 MR. SHEMS: A new permit has been pending  
24 and has not issued, because the permit that was  
25 amended in March expired in March. It was amended the

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1 day before it expired.

2 CHAIR KARLIN: Okay.

3 MR. SHEMS: And so under our  
4 Administrative Procedure Act it remains in effect  
5 until there is a decision on the new permit  
6 application.

7 CHAIR KARLIN: The old permit remains in  
8 effect. The new permit has been appealed, or the  
9 amended permit has been --

10 MR. SHEMS: The amended permit has been  
11 appealed.

12 CHAIR KARLIN: -- appealed, so that permit  
13 -- it being appealed, it is not in effect. It follow  
14 the same as the federal rules. Its appeal  
15 automatically stays the effectiveness of the amended  
16 permit. The prior permit remains in effect under the  
17 Administrative Procedures Act, state Administrative  
18 Procedures Act. So that's like the federal rule,  
19 sounds like.

20 MR. SHEMS: I want to address a point made  
21 about Section 511 of the Clean Water Act. I view that  
22 provision as being fairly narrow and as essentially  
23 avoiding collateral attacks on state decisions.  
24 Various federal agencies under their own mandates,  
25 using informed decisionmaking, which is what NEPA

1 requires, can be stricter than what the state requires  
2 following their own mandates, and we see that all the  
3 time when other federal agencies issue permits. They  
4 can be stricter than what a state requirement would be  
5 because of their overall mandate.

6 I just want to close by saying what NEPA  
7 requires --

8 MR. RUND: One minute.

9 MR. SHEMS: What NEPA requires is a hard  
10 look, and so far the hard look requirement is not met.  
11 If it's a per se hard look under the rules, and of  
12 essentially a 316(a) variance or 316(b) determination,  
13 that's not present, nor will it be present any time  
14 soon.

15 Absent that type of a determination there  
16 has been no assessment of the cumulative impacts in  
17 the environmental reports. Therefore, the  
18 requirements that Entergy is supposed to meet under  
19 NEPA to get staff started to meet its own NEPA  
20 obligations to draft an environmental impact statement  
21 just haven't been met.

22 Thank you.

23 CHAIR KARLIN: Thank you.

24 Okay. All right. We'll turn to your  
25 contention number 2, I guess. Give us a minute here

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1 before we start, so we can -- I can get my materials  
2 organized.

3 (Pause.)

4 MS. TYLER: I'd like to reserve half my  
5 time for rebuttal.

6 MR. RUND: How much did you say?

7 MS. TYLER: I'd like to reserve half, 10  
8 minutes. NEC's contention --

9 CHAIR KARLIN: Give us a minute before you  
10 start --

11 MS. TYLER: Oh. Oh, I'm sorry.

12 CHAIR KARLIN: -- if you would.

13 MS. TYLER: Sure.

14 CHAIR KARLIN: I don't want you to use up  
15 your time while we're still fiddling around here.

16 (Pause.)

17 Okay. Ms. Tyler, go ahead. Whenever  
18 you're ready.

19 MS. TYLER: Okay. Entergy's -- or NEC's  
20 contention 3 is quite straightforward. Entergy's  
21 application reports the results of its analysis of the  
22 impact of environmentally-assisted metal fatigue on  
23 certain plant components. That analysis indicates  
24 that several of those components basically won't last  
25 for the full term of their renewed license.

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1           This is a safety issue both due to the  
2 potential that these components could crack and fail,  
3 a failure of the component itself would cause a safety  
4 problem. It's also a problem in that when the metal  
5 components crack and deteriorate chunks of metal can  
6 become loose, migrate through the plant, potentially  
7 lodge in other parts of the plant and cause a safety  
8 hazard in that manner.

9           Entergy has proposed to address this  
10 problem mainly through refinement of its metal fatigue  
11 analysis to demonstrate that, in fact, this isn't  
12 really a problem. The application does not explain  
13 how the initial analysis was done, why it might be  
14 reasonable to refine it, and how it would be refined.

15           Our technical expert on the subject, Dr.  
16 Joe Habenfeldt, who is a mechanical engineer, has told  
17 us that based on what's in the application he can't  
18 evaluate this alleged -- this proposal to refine the  
19 analysis. He can't say whether it's reasonable or  
20 legitimate.

21           In the event that the refinement doesn't  
22 eliminate this problem, Entergy proposes to develop an  
23 inspection and maintenance program at some point in  
24 the future. This program is not described in the  
25 application, so we don't know what the criteria would

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1 be for inspection and maintenance, how they'd be  
2 determined, how the schedule would be determined, what  
3 the schedule would be, so --

4 JUDGE WARDWELL: I got the impression that  
5 you objected to the fact that they were reanalyzing  
6 things, and that was --

7 MS. TYLER: Yes.

8 JUDGE WARDWELL: -- intuitively  
9 uncomfortable to you, but yet now listening to you it  
10 sounds like that's okay as long -- but they just  
11 didn't provide enough information for you to judge  
12 whether it was an appropriate reanalysis or not.

13 MS. TYLER: It could be possible. It  
14 could be the refinement of the analysis is legitimate.

15 JUDGE WARDWELL: Okay.

16 MS. TYLER: That that's totally  
17 conjectural at this point. Our technical expert can't  
18 comment on that one way or the other.

19 So essentially at this point the  
20 application isn't complete. It doesn't contain a plan  
21 to manage these components that won't last the full  
22 term of the -- the full length of the second license  
23 term. And that, NEC submits, is inadequate.

24 I would emphasize that this contention is  
25 not a pure contention of admission. It's a contention

1 of admission to the extent that the application  
2 currently doesn't include this information, and NEC  
3 submits that it should be amended to include this  
4 information. But NEC's real concern is with the  
5 quality and substance of what NEC -- or what Entergy  
6 does eventually propose to do.

7 So this contention 2 does encompass NEC's  
8 concern with the quality and the substance of what  
9 it's going to eventually propose, and its intent to  
10 critique that at the time that it's made available.

11 JUDGE WARDWELL: And did I read that you  
12 are comfortable with the Class 1 and the CLB non-  
13 Class 1 analyses? It's only the environmentally-  
14 assisted fatigues that are your concern?

15 MS. TYLER: I think that our contention  
16 does encompass -- we haven't -- Entergy hasn't  
17 explained how the whole metal fatigue analysis was  
18 done. So the metal fatigue analysis was done  
19 initially, as I understand it, and then it was  
20 adjusted for environmentally-assisted fatigue.

21 So when Entergy eventually explains how  
22 this entire analysis was conducted, we potentially  
23 would have concerns with the underlying unadjusted  
24 metal fatigue analysis as well as with the means by  
25 which it was adjusted to account for the environmental

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1 conditions in a plant.

2 JUDGE ELLEMAN: Could you comment a bit on  
3 what degree of specificity you feel is appropriate in  
4 a proper presentation of a plan? For example, would  
5 you want to know the frequency of non-destructive  
6 analysis? Where the analyses are to be carried out?  
7 What particular techniques are to be used? Where is  
8 the boundary between an appropriate outline of a plan  
9 and complete detail on the plan?

10 MS. TYLER: That's a difficult question  
11 for me to address. That really would be a question  
12 for Dr. Habenfeldt to address. All I can tell you is  
13 that what he has told us is that based on what  
14 information is currently provided, he really is unable  
15 to determine whether the initial analysis was  
16 legitimate, whether the plan to refine it is  
17 legitimate, how the refinement would be done. So  
18 should we have a hearing on the subject, we could  
19 explore that issue in more depth.

20 CHAIR KARLIN: Another question on that.  
21 What regulatory provision -- we're talking about,  
22 what, 51 -- 54.21(c).

23 MS. TYLER: Yes.

24 CHAIR KARLIN: I'm sorry to always be  
25 going back to the regs, but it's helpful to me as a

1 lawyer, because that's where I ground my thinking.

2 MS. TYLER: I do it a lot.

3 CHAIR KARLIN: And it says (c)(1) -- among  
4 other things, it says, "The applicant shall  
5 demonstrate that," and then there are these three  
6 options. And you point that out in your brief at page  
7 15, I think it is, or maybe it's 14. And I guess they  
8 attempted, as I understand it, to meet this  
9 requirement with regard to metal issues, metal  
10 fatigue, by option 1 and option 3, "shall  
11 demonstrate."

12 But let's focus on option 3 for a minute,  
13 because I think you focused on it. "The applicant  
14 shall demonstrate three" -- and these are options, one  
15 or the other, they don't have to do both. "The  
16 applicant shall demonstrate the effects of aging on  
17 the intended functions will be adequately managed for  
18 the period of extended operation."

19 So they've got to make a demonstration  
20 that it's going to be adequate, that it will be  
21 adequately managed. And you suggest that a plan to  
22 develop a plan is not sufficient to meet that  
23 requirement.

24 MS. TYLER: That's right.

25 CHAIR KARLIN: What -- you know, what --

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1 is there any legal support for that proposition other  
2 than just the basic logic there?

3 MS. TYLER: Well, I think that that  
4 proposition would allow Entergy and other applicants  
5 for license renewal to avoid any public evaluation of  
6 their aging management plans by suggesting that they  
7 want to develop them later for one reason or another.  
8 And I think that that really would undermine the  
9 ability of NEC and other organizations like it, and  
10 other members of the public to participate in the  
11 process.

12 CHAIR KARLIN: So if they just came in and  
13 said, "We promise to keep an eye on it and take care  
14 of it if something goes wrong," then that that would  
15 not be adequate to demonstrate that it will be  
16 adequately managed.

17 MS. TYLER: I think that would not be  
18 adequate.

19 CHAIR KARLIN: Well --

20 MS. TYLER: That's basically saying,  
21 "Trust us, we'll take care of this."

22 CHAIR KARLIN: Right. But every part of  
23 this subparagraph is sort of a prospective thing. It  
24 says the effects will be adequately managed. How can  
25 they demonstrate today that something 10, 20 years

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1 from now will happen without having at least some  
2 component of that being a promise or a plan that says,  
3 "We can't demonstrate to you today that in 15 years  
4 we're going to adequately manage it, so we -- but we  
5 will do this, and we'll do this, and we'll do that,  
6 and -- and if something else comes up, we promise to  
7 take care of it"? Isn't there some promise involved  
8 in all of this?

9 MS. TYLER: I think what they have to --  
10 I think they have to put forward some strategy for  
11 monitoring these vulnerable components, for inspecting  
12 them, and for performing maintenance, and they have to  
13 explain in more detail than what they've done how  
14 they'll do that.

15 CHAIR KARLIN: Okay. So it's a level of  
16 detail. And can you give us any guidance or criteria  
17 as to how we would judge whether the detail is enough?

18 MS. TYLER: Well, I think --

19 CHAIR KARLIN: How we --

20 MS. TYLER: -- at this point there's no  
21 detail at all.

22 CHAIR KARLIN: Okay.

23 MS. TYLER: They've said, "We'll tell you  
24 how we plan to take care of this at some point in the  
25 future." So at this point we have no detail

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1 whatsoever. I think what we'd like to see is  
2 something that explains to some extent how -- why we  
3 the public, why NEC's members should feel confident  
4 that this problem will be adequately addressed.

5 CHAIR KARLIN: Okay.

6 MS. TYLER: We also would note that we  
7 need to have license conditions by which Entergy can  
8 be held accountable. So the requirements that are  
9 attached to the renewal of the license have to be  
10 sufficiently specific to mean something.

11 CHAIR KARLIN: All right. Let me ask on  
12 your contention on page 14, you talked about  
13 contention of --

14 MR. RUND: One minute.

15 CHAIR KARLIN: -- admission -- omission or  
16 -- or not, I mean, the contention as written says that  
17 the application does not include a plan to manage  
18 aging due to metal. That sounds like a contention of  
19 omission. The very next sentence says it does not  
20 include an adequate plan to monitor and manage the  
21 effects of aging.

22 You need to write contentions that we  
23 don't have to rewrite. If we are to accept your  
24 contention, it is merely a contention of omission.  
25 Are you suggesting it's not just omission?

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1 MS. TYLER: I think it has been difficult  
2 to draw that distinction in this case, because what  
3 has been included in the application is so general --

4 CHAIR KARLIN: But that's what you  
5 alleged. You alleged its omission. All you said is  
6 it didn't include one. You didn't say it wasn't  
7 adequate until you got to the narrative. I mean, what  
8 we have to do is when we admit contentions, we have to  
9 know what contention we're admitting. And I don't  
10 know which one it is.

11 MS. TYLER: I think what we --

12 MR. RUND: Time.

13 MS. TYLER: Our contention is that the  
14 plan is inadequate. And once the plan is more fully  
15 explained, we intend to critique its content.

16 CHAIR KARLIN: All right.

17 JUDGE WARDWELL: So, in fact, it would be  
18 a contention of omission because they will submit this  
19 additional information, and that will meet this  
20 contention, and then you will evaluate it and then may  
21 or may not come back with whether or not it addresses  
22 the issues of your concern once you see this  
23 additional information.

24 MS. TYLER: Right.

25 JUDGE WARDWELL: Is that a fair

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1 assessment?

2 MS. TYLER: That's what we contemplate.

3 CHAIR KARLIN: Okay. Entergy, Mr.  
4 Travieso-Diaz? Good to hear from you this morning --  
5 this afternoon.

6 MR. TRAVIESO-DIAZ: Members of the Board,  
7 good afternoon. Can everybody hear me?

8 CHAIR KARLIN: A little closer would  
9 probably be good.

10 MR. TRAVIESO-DIAZ: Okay. All right.

11 CHAIR KARLIN: Yes, it's hard.

12 MR. TRAVIESO-DIAZ: I want to begin by  
13 touching on the last point that was asked. I'm going  
14 to refer to the text of the contention. Contention 2  
15 says, "Entergy's license renewal application does not  
16 include a plan to manage aging due to metal fatigue  
17 during the period of extended operation." That is  
18 just wrong.

19 There is a plan that is in Section 4.3 of  
20 the application. There is a plan that in Appendix B  
21 of Section 4 of the application. So I don't think  
22 they mean that, and if they mean that it's wrong.  
23 there is a plan.

24 I think where I'm going to go is try to go  
25 to where they think it's wrong. But it's not that

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1 there is no plan.

2 JUDGE ELLEMAN: Could you tell us in what  
3 detail this is expressed in the application? Since we  
4 haven't seen it.

5 JUDGE WARDWELL: Yes. Or is it merely a  
6 plan that says, "We will write a plan that will meet  
7 CFR blank-blank-blank"?

8 MR. TRAVIESO-DIAZ: If I could go to that  
9 point in a logical way. What they are concerned about  
10 is something known as cumulative usage factors, CUFs.  
11 The CUFs are -- one of the questions -- one of the  
12 questions they raised in their reply is that they  
13 don't know how the CUFs were computed or where -- how  
14 those came about.

15 That is very surprising to me, because  
16 both the application and the standard review plan tell  
17 you how they are -- how they are obtained. They are  
18 -- for Class 1 components they are part of the stress  
19 analysis of record for those components. Those are  
20 performed under ASME 3. Some of them have been in  
21 effect for many, many years, and so they -- the  
22 analysis for Class 1 components, you don't need to be  
23 told, but, in fact, we tell you in the application how  
24 those components were --

25 JUDGE WARDWELL: Do you have any idea of

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1 why the staff didn't seem to feel comfortable that  
2 there was a full enough description of these  
3 cumulative use factors?

4 MR. TRAVIESO-DIAZ: Yes. Because they --  
5 for non-Class 1 components, what Entergy, for lack of  
6 site-specific information has done, it has taken  
7 generic information from NUREG-6220 -- 6260, and in  
8 fact it is footnoted in Table 431 how they used that  
9 information. I believe that the concern that staff  
10 has is that they would like to have a better way of  
11 coming up with CUFs for those components that are not  
12 ASME Class 1.

13 But that doesn't mean that they don't  
14 exist. It's just that maybe they could be computed  
15 differently. And so that is -- goes to the CUFs.

16 JUDGE WARDWELL: And is this related  
17 directly in this case to the fact of the power uprate  
18 and that there isn't a great deal of benchmark  
19 information related to the performance of this under  
20 the power uprate?

21 MR. TRAVIESO-DIAZ: Absolutely not. The  
22 simple -- the simple explanation is because some of  
23 these components were designed to ANSI B31.1. The  
24 stress analysis under the code that ASME requires  
25 wasn't done for that. So they had to use generic

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1 information because there was no plant-specific  
2 analysis in existence that dealt with that particular  
3 component.

4 JUDGE ELLEMAN: The concern over CUFs  
5 appears to be just a part of the contention. The  
6 other part is there is not a clear definition of what  
7 non-destructive testing is to be used, where it's to  
8 be used. Could you speak to those aspects?

9 MR. TRAVIESO-DIAZ: Yes, let me get to  
10 that, because the next step in the chain is that due  
11 to the resolution and the consent rate by Generic  
12 Safety Issue 190, the NRC has recommended, and Entergy  
13 has adopted, the concept that you want to modify your  
14 CUFs to take into consideration potential  
15 environmental impacts on the component. That may  
16 result in CUFs whose value is less than one or greater  
17 than one.

18 That translation -- again, that NEC says  
19 they don't know how it was done -- it is very clearly  
20 said in the application how it was done. It was done  
21 pursuant to the guidance in what is known as the GALL  
22 report, G-A-L-L. I believe it is the Generic Aging  
23 Lessons Learned report, NUREG-1801, and NUREG-1801  
24 refers you to two NUREGs, NUREG-CR6583 for carbon and  
25 low alloy steels and NUREG-CR5704 for austenitic

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1 stainless steels.

2 That is how the environmentally-induced or  
3 environmentally-assisted fatigue came about. Anybody  
4 who knows how to do analysis knows how to come up with  
5 the numbers that Entergy did.

6 See, I think one of the problems with this  
7 contention, or perhaps other parts of the NEC  
8 contentions, is that they expect or want or require to  
9 see a degree of detail in the license renewal  
10 application that it is not necessary. Once you tell  
11 them how you do your analysis, you follow the guidance  
12 from 1801, and 1801 refers you to these two NUREGs.  
13 Any competent engineer can compute what the values  
14 are, and that's how Entergy did it. There is no  
15 mystery to it. Absolutely none.

16 Now, the contention actually deals --

17 CHAIR KARLIN: Mr. Travieso-Diaz, may I  
18 ask -- I need to get grounded in your answer a little  
19 bit. It would help me anyway. If you go to page 21  
20 of your answer, is that what you're talking about? I  
21 mean, I understand the CUF issues. You indicate there  
22 to account for the effects of environmentally-assisted  
23 fatigue, Entergy evaluated limiting locations for  
24 environmentally-assisted CUFs by factor blah-to-blah.

25 For each location with a projected

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1 environmentally-adjusted CUF greater than one, the  
2 applicant commits -- the application commits Entergy  
3 to manage the effects of aging prior to entering the  
4 period of extended option by implementing one or more  
5 of the following, one, two, three.

6 One, further refinement of the fatigue  
7 analysis to show that the CUF is really less than one.  
8 That, I take it, parallels with 54.21(c)(1)(i).

9 MR. TRAVIESO-DIAZ: Correct.

10 JUDGE WARDWELL: And you haven't done that  
11 yet, correct?

12 CHAIR KARLIN: You haven't done that.

13 MR. TRAVIESO-DIAZ: Well, actually, it is  
14 -- could I go on to explain how the table --

15 CHAIR KARLIN: Let me --

16 MR. TRAVIESO-DIAZ: Okay.

17 JUDGE WARDWELL: But he hasn't done that  
18 yet.

19 CHAIR KARLIN: You haven't done that yet,  
20 correct?

21 MR. TRAVIESO-DIAZ: Well --

22 CHAIR KARLIN: You're committing to do it,  
23 but you hadn't done it yet.

24 MR. TRAVIESO-DIAZ: Okay. Let me just  
25 explain it this way. For some --

1 JUDGE WARDWELL: No, wait, you'd better  
2 not, because I'm getting the evil eye. He wants to  
3 come with --

4 (Laughter.)

5 MR. TRAVIESO-DIAZ: -- for some --

6 CHAIR KARLIN: I'm on a roll here.

7 JUDGE WARDWELL: We'll get back to it.  
8 He's on a roll. Let him go on and roll.

9 (Laughter.)

10 MR. TRAVIESO-DIAZ: I will get to your  
11 question, but I need to explain.

12 JUDGE WARDWELL: Okay.

13 MR. TRAVIESO-DIAZ: For some components --

14 CHAIR KARLIN: No, no, let me -- let me  
15 ask --

16 JUDGE WARDWELL: Let him finish.

17 CHAIR KARLIN: So on page 21 --

18 MR. TRAVIESO-DIAZ: Yes.

19 CHAIR KARLIN: -- number 1, you commit --  
20 Entergy commits to manage the effects of aging by  
21 implementing one or more of the following. One,  
22 further refinement of fatigue to show it's really less  
23 than 1 CUF. That's the first -- see 54.21(c)(1)(i).

24 The second, management of fatigue at  
25 affected locations by an inspection program that has

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1       been approved by NRC, e.g. period non-destructive  
2       examination, blah-to-blah.

3                   Three, repair or replacement. Now that  
4       sounds -- if that's -- I don't know whether there's a  
5       whole lot more in the application, but that sounds  
6       pretty vague to me, which is to say, "Look, we --  
7       you've got to demonstrate -- you must demonstrate that  
8       the effects of aging will be adequately managed." And  
9       what you say is, "We commit to either recalculate or  
10      to manage the fatigue by an inspection program, and do  
11      the right thing if the inspection program finds a  
12      problem." That's -- is that all that's in the  
13      application?

14                   MR. TRAVIESO-DIAZ: Well, that's what the  
15      application says, but you have to understand how it is  
16      done.

17                   CHAIR KARLIN: Is that a demonstration?  
18      Does that adequately demonstrate that it will be  
19      adequate? Or is it just a plan?

20                   MR. TRAVIESO-DIAZ: No, it does  
21      demonstrate. It is something that can be inspected,  
22      too, by the NRC staff, and they can determine whether  
23      they have done it or not.

24                   CHAIR KARLIN: But if you said, you know,  
25      "We will do an inspection program that consists of

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1 inspecting this frequency, these locations, this type  
2 of inspection, and we'll do it, you know, over the  
3 following X years, and if something happens then we'll  
4 -- if we find something, we'll do A, B, C, or D," I  
5 don't know what level of detail is required, but it  
6 does seem like a demonstration is more than just a  
7 promise.

8 MR. TRAVIESO-DIAZ: Well, it is -- let me  
9 explain to you the sequence, and you probably  
10 understand better why this is sufficient. This is  
11 done -- these are three consecutive, not concurrent,  
12 steps. The first step is for those components they  
13 are -- not all of them. There are like seven  
14 components for which the environmentally --

15 MR. RUND: One minute.

16 MR. TRAVIESO-DIAZ: -- affected CUFs are  
17 greater than one. They are going to do a reanalysis.  
18 The reanalysis may show that some of the components in  
19 fact come back to be less than one. You don't know  
20 which are going to remain being greater than one after  
21 that.

22 For each component they will have to do an  
23 inspection program that is tailored to the type of  
24 component you have. The inspection that you do for a  
25 nozzle is different than the inspection that you do

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1 for a vessel. So you cannot define how you are going  
2 to inspect until you know what you are going to  
3 inspect.

4 JUDGE WARDWELL: So why haven't you done  
5 these reanalyses for the ones that are over one?

6 MR. TRAVIESO-DIAZ: Well, they're in the  
7 process of doing that, but that takes time.

8 JUDGE WARDWELL: So doesn't that -- well,  
9 doesn't it say that your application is premature?  
10 Why didn't you do it as part of the application before  
11 you submitted it?

12 MR. TRAVIESO-DIAZ: Well, they -- because  
13 these actions are going to be taken 15 -- actually,  
14 the inspection won't have to be taken immediately. It  
15 will have to be taken as you are running out of  
16 cycles.

17 JUDGE WARDWELL: Yes. But for us to see  
18 a demonstration and have any confidence that there is  
19 some control over this --

20 MR. TRAVIESO-DIAZ: Well --

21 JUDGE WARDWELL: -- it seems like this  
22 would be a logical thing you would do as part of your  
23 submittal.

24 MR. TRAVIESO-DIAZ: You do a reanalysis --

25 MR. RUND: Time.

1 JUDGE WARDWELL: You can finish.

2 MR. TRAVIESO-DIAZ: You do a reanalysis.  
3 If the reanalysis still shows that your CUFs is  
4 greater than one, you define an inspection program  
5 tailored to that component. And the NRC has to  
6 approve it. If the NRC doesn't approve it, you don't  
7 do it that way; you do it some other way.

8 And if that inspection shows that in fact  
9 you don't meet -- you're going to have failure of a  
10 fatigue, then you do repair and replacement. That's  
11 the reason why there's only three steps.

12 JUDGE WARDWELL: Thank you.

13 CHAIR KARLIN: Any other questions?

14 (No response.)

15 Okay. Staff? Who is taking this one?  
16 Ms. Young?

17 MS. YOUNG: Thank you, Judge Karlin.  
18 Again, this is a contention that the staff thought  
19 petitioners had done a minimally sufficient job to  
20 identify a potential omission from the application.  
21 And to that extent, they identified a dispute with  
22 respect to the applicant on how it had satisfied the  
23 requirements for license renewal.

24 But, again, looking at the information  
25 supplied in the declaration attached to their

1 petition, and the arguments in the petition, it looked  
2 like the scope of that challenge was narrowed to the  
3 lack of information on how cumulative usage factors'  
4 values were calculated, the frequency of monitoring  
5 and inspection, and the criteria for determining the  
6 inspection frequency.

7 The staff would agree with the Board, or  
8 at least the impression they got from the Board's  
9 questions, that some of the elements of an aging  
10 management program are prospective and involve  
11 commitments about how things should be done. But, you  
12 know, it's difficult to assess the adequacy of any  
13 inspection program without criteria for what the scope  
14 of the inspection would be and what -- the  
15 acceptability of the various findings and any program  
16 and when you have to repair/replace.

17 So that's the gist of the staff's remarks.  
18 And any other questions you have, we'd be happy to  
19 answer.

20 JUDGE WARDWELL: Here's a curious question  
21 that I will ask, not asking my other curious question  
22 I wanted to ask of you. What's the process -- or why  
23 didn't you ask for this information during the --  
24 before the application of a submittal and your  
25 interactions with the applicant? I assume you have

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1 interactions prior to the submittal of the actual  
2 application.

3 MS. YOUNG: There were a lot of  
4 interactions. And if you looked at that GALL report,  
5 it is thick. You know, you could stop two heavy doors  
6 with it, keep them from closing.

7 JUDGE WARDWELL: I look at it just about  
8 like that.

9 MS. YOUNG: So, you know, we expect  
10 licensees to identify their consistency with GALL.  
11 This general scheme that's in here in terms of the  
12 three-tiered process on how they approach this issue,  
13 that is something that is acceptable in GALL, but the  
14 staff, in doing its review with respect to each item  
15 in GALL, if they believe that it's not sufficient --  
16 or the staff believes it's not sufficient information  
17 on a particular issue, questions will be raised about  
18 inspection frequencies, criterias, and things like  
19 that.

20 So that yet remains to be done. Is an  
21 application minimally sufficient when it kind of hits  
22 the basic foundation of programs like this? Yes, it's  
23 sufficient in terms of --

24 JUDGE WARDWELL: So your answer was that  
25 the application when it came in certainly had enough

1 information to be deemed complete. Once you're  
2 getting into it, you would --

3 MS. YOUNG: And complete enough for the  
4 staff to begin a review.

5 JUDGE WARDWELL: Yes.

6 MS. YOUNG: It doesn't necessarily mean  
7 complete enough to grant the approval of the action  
8 that's requested.

9 JUDGE WARDWELL: Sure. Thank you.

10 CHAIR KARLIN: Perhaps you can give us  
11 some further help on this regulation 54.21(c), which  
12 calls for the applicant to make a demonstration. And  
13 they have these three alternative -- they're not  
14 sequential, they're alternative demonstrations,  
15 options. They're options, basically.

16 And as I understand it, they are working  
17 on -- they assert that they have done the first and  
18 the third. But if we can focus on the third just --  
19 how should we -- how does the staff or should the  
20 Commission evaluate or decide whether the  
21 demonstration -- that the effects of aging will be  
22 adequately managed? I mean, that's kind of -- there's  
23 a future context to that.

24 And are there criteria that you use, that  
25 we should use, in evaluating that? What's between the

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1 line of a promise and a full-blown, 30-page inspection  
2 program with details as to exactly what they're going  
3 to do? Somewhere along that continuum, what are the  
4 criteria that can be used to determine -- to  
5 distinguish between a promise and a demonstration that  
6 it will be -- that compliance will be achieved?

7 MS. YOUNG: Well, I think the staff has  
8 review guidance that addresses that. Obviously, there  
9 is a certain amount of flexibility from application to  
10 application with respect to the detailed criteria.  
11 But anytime there is an activity to be taken by an  
12 applicant or licensee on a future basis, there is an  
13 understanding of what criteria will be used for that  
14 activity and what periodicity in terms of the review  
15 of the actions of an activity are done.

16 And then, there is an assessment from an  
17 engineering standpoint of what's the reasonable nature  
18 of the periods and the criteria identified. For this  
19 contention threshold stage, however, I don't think the  
20 Board has to get into all that level of detail,  
21 because again the staff raised this merely as a  
22 contention of omission with respect to the information  
23 that petitioners believe that should have been in the  
24 application.

25 And, you know, to the extent that Entergy

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1 may some day provide that information, this contention  
2 would be moot.

3 CHAIR KARLIN: All right. Okay. Any  
4 other questions?

5 (No response.)

6 Okay. Thank you. You're done for the day  
7 I think.

8 Mr. Shems, how much -- oh, I'm sorry, Ms.  
9 Tyler.

10 How much time do we have?

11 MR. RUND: Ten minutes.

12 CHAIR KARLIN: Ten minutes.

13 MS. TYLER: I'd like to start just by  
14 reading what the license renewal application actually  
15 says about the monitoring program. It says, "Should  
16 Vermont Yankee Nuclear Power Station select the option  
17 to manage environmental-assisted fatigue during the  
18 period of extended operation, details of the aging  
19 management program such as scope, qualification,  
20 method, and frequency will be provided to the NRC  
21 prior to the period of extended operation."

22 So that's what it says. I think we could  
23 all agree that that's extremely vague.

24 CHAIR KARLIN: And is that all that it  
25 says?

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1 MS. TYLER: That is all that it says. It  
2 says if they decide to manage they'll develop the  
3 program at some point in the future, scope,  
4 qualification, method, and frequency.

5 I'd also like to read a section of the NRC  
6 practice manual that addresses this type of situation  
7 in which an application is arguably somewhat  
8 incomplete, and it states that the standards for the  
9 admission of our contention are lower in this context.

10 This is citing an NRC decision, Wisconsin  
11 Electric Power Company, 14 NRC 853, and it says that  
12 when an application for a license amendment is itself  
13 incomplete, the standard for admission of contentions  
14 is lowered because it is easier for petitioners to  
15 have reasons for believing that the application has  
16 not demonstrated the safety of the proposed procedures  
17 for which an amendment is sought. And I think this is  
18 a fairly obvious -- obviously point, really.

19 I'd also like to address the issue of  
20 whether this is a contention of omission. I think if  
21 it's interpreted as a contention of omission it really  
22 has little meaning, because that basically -- whatever  
23 they might submit moots our concern. That's  
24 definitely not the way NEC views the situation.

25 However, if the Board does choose to view

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1 it in that way, I would note that Rule 2.309 -- it's  
2 hard to get all the numbers right -- (f)(2), I  
3 believe, provides for the amendment of a contention in  
4 the event that new information becomes available. And  
5 I would submit that should the Board choose to  
6 interpret this contention as strictly one of omission,  
7 NEC should certainly be permitted to amend the  
8 contention based on the submission of the additional  
9 information.

10 And I have nothing further.

11 CHAIR KARLIN: Okay.

12 MS. TYLER: Happy to answer questions.

13 CHAIR KARLIN: Any questions?

14 (No response.)

15 I think that may do it for the day.  
16 Appreciate everyone's effort and working hard and  
17 responding to our questions. Hopefully we -- I think  
18 we've learned something, and this will be helpful to  
19 us.

20 What I'd like to suggest or want to --  
21 I'll do, is that we will reconvene tomorrow at 8:30,  
22 I think, unless someone objects to that. We will  
23 convene a little bit earlier and plan to proceed with  
24 the NEC's remaining four contentions. And perhaps we  
25 can get done by noon or lunchtime and that would be

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1 fine. If we can't, we'll keep going until whatever it  
2 takes, but I think with the current -- current  
3 efficiencies we're doing okay, we'll get it done.

4 MS. YOUNG: Judge Karlin?

5 CHAIR KARLIN: Yes.

6 MS. YOUNG: The staff doesn't object to  
7 starting earlier, but it would note that to the extent  
8 that this proceeding was noticed to begin at 9:00 each  
9 day, that there are members of the public that might  
10 be hardship. Whether half an hour is a big deal, I'm  
11 not going to argue, but always keep that in mind when  
12 we change the schedule.

13 CHAIR KARLIN: Yes. We're aware that the  
14 notice did say 9:00, and we hope that -- that the  
15 members of the public can attend at 9:00. They can  
16 certainly be there at 9:00, and they probably -- I'm  
17 not sure whether they'll miss that much. I think --  
18 I hope that will be sufficient.

19 But given the heat here, it's probably  
20 better to get things done in a relatively cooler time  
21 of the morning if we can. We're not running to catch  
22 a plane or anything. Our flight is at 8:00 p.m. or  
23 something tomorrow night, so we've got all day as far  
24 as that's concerned.

25 With that, unless there is anything

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1 that --

2 MS. HOFMANN: Mr. Chairman?

3 CHAIR KARLIN: -- anyone needs to raise --  
4 yes, Ms. Hofmann?

5 MS. HOFMANN: Today at the beginning you  
6 did say you wouldn't be taking up any of the motions,  
7 and I assume that's true for the second day as well,  
8 even if we finish early?

9 CHAIR KARLIN: That's right.

10 MS. HOFMANN: Thank you very much.

11 CHAIR KARLIN: That's right. We're not  
12 taking -- are you planning to not attend tomorrow, you  
13 think?

14 MS. HOFMANN: No, we'll be attending.  
15 It's whether I ask Mr. Roisman to come back as well.

16 CHAIR KARLIN: Oh, okay. I see.

17 MS. HOFMANN: Thank you.

18 CHAIR KARLIN: Fine. All right. Well,  
19 with that, we stand adjourned, and we'll reconvene  
20 tomorrow at 8:30.

21 Thank you. Thank you.

22 (Whereupon, at 4:42 p.m., the proceedings  
23 in the foregoing matter were adjourned,  
24 to reconvene at 8:30 a.m., the following  
25 day.)

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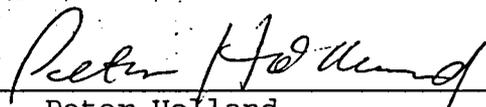
This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of:

Name of Proceeding: Entergy Nuclear Vermont  
Yankee, LLC and Entergy  
Nuclear Operations, Inc.  
Oral Arguments

Docket Number: 50-271-LR and

Location: Brattleboro, Vermont

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



Peter Holland  
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