

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
ENTERGY NUCLEAR VERMONT YANKEE,)	Docket No. 50-271-LR
LLC, and ENTERGY NUCLEAR)	
OPERATIONS, INC.)	ASLBP No. 06-849-03-LR
)	
(Vermont Yankee Nuclear Power Station))	

NRC STAFF'S BRIEF IN OPPOSITION TO
MASSACHUSETTS ATTORNEY GENERAL'S APPEAL OF LBP-06-20

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October 13, 2006

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(a), the Staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby responds to the "Massachusetts Attorney General's Brief on Appeal of LBP-06-20," dated October 3, 2006 ("AG Brief"). In LBP-06-20, the Atomic Safety and Licensing Board ("Board") denied admission of the Attorney General's sole contention. Memorandum and Order (Ruling on Standing, Contentions, Hearing Procedures, State Statutory Claim, and Contention Adoption). 63 NRC __ (Sept. 22, 2006), slip op. at 23. For the reasons discussed below, the Commission should affirm the Board's decision.

BACKGROUND

By letter dated January 26, 2006, Entergy Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively, "Entergy" or "Applicant") submitted an application, under 10 C.F.R. Part 54, to renew Operating License No. DPR-28 for the Vermont Yankee Nuclear Power Station ("VYNPS"). In practical terms, the proposed renewal would renew the operating license to authorize the Applicant to operate VYNPS for an additional 20 years beyond the current expiration date of March 21, 2012. In response to the notice of acceptance for

docketing and opportunity for hearing published in the *Federal Register*,¹ the Attorney General, the New England Coalition (“NEC”), the Town of Marlboro, Vermont, and the Vermont Department of Public Service timely filed intervention petitions.² On June 8, 2006, an Atomic Safety and Licensing Board was established to preside over the proceeding.³ On June 22, 2006, Entergy and the Staff filed answers opposing the Attorney General’s hearing request.⁴ On June 30, 2006, the Attorney General filed a reply.⁵

Following oral argument on the Attorney General’s contention on August 1, 2006, the Board, on September 22, 2006, issued LBP-06-20, in which it denied the Attorney General’s hearing request, finding its sole contention inadmissible. LBP-06-20, slip op. at 23. The Board granted the hearing request of DPS, admitting one of DPS’s three contentions. The Board also granted NEC’s hearing request, admitting four of NEC’s six contentions, and denied the hearing request of the Town of Marlboro. On October 3, the Attorney General filed his notice of appeal and supporting brief. In his brief, the Attorney General argues that the Board improperly

¹ See “Entergy Nuclear Operations, Inc.; [VYNPS]: Notice of Acceptance of Docketing of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License No. DPR-28 for an Additional 20-Year Period,” 71 Fed. Reg. 15220 (Mar. 27, 2006).

² See “[NEC] Petition for Leave to Intervene Request for Hearing and Contentions,” dated May 26, 2006; “Massachusetts Attorney General’s Request for a Hearing and Petition for Leave to Intervene With Respect To Entergy Nuclear Operations Inc.’s Application for Renewal of the Vermont Yankee Nuclear Power Plant Operation and Petition for Backfit Order Requiring New Design Features to Protect Against Spent Fuel Accidents,” dated May 26, 2006; “Vermont Department of Public Service Notice of Intention to Participate and Petition to Intervene,” dated May 26, 2006; Letter from Town of Marlboro Selectboard and Emergency Management Director, dated April 27, 2006.

³ See “Establishment of Atomic Safety and Licensing Board,” dated June 6, 2006. 71 Fed. Reg. 34397 (June 14, 2006).

⁴ See NRC Staff Answer Opposing Massachusetts Attorney General’s Request for Hearing and Petition for Leave to Intervene and Petition for Backfit, (June 22, 2006) (Staff Answer); Entergy’s Answer to the Massachusetts Attorney General’s Request for Hearing, Petition for Leave to Intervene, and Petition for Backfit Order (June 22, 2006) (Entergy Answer).

⁵ See Massachusetts Attorney General’s Reply to Entergy’s and NRC Staff’s Responses to Hearing Request and Petition to Intervene With Respect to Vermont Yankee License Renewal Proceeding, (June 30, 2006) (Attorney General Reply).

applied the *Turkey Point* case to his contention and that the Commission's decision in *Turkey Point* is inconsistent with both the Commission's regulations and the National Environmental Policy Act ("NEPA"). AG Brief at 12-15 (citing *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3 (2001)).

LEGAL STANDARDS

I. Legal Standards for the Admission of Contentions

To gain admission to a proceeding as a party, a petitioner, in addition to establishing standing, must proffer at least one contention that satisfies the admissibility requirements of 10 C.F.R. § 2.309(f). See 10 C.F.R. § 2.309(a). See also *AmerGen Energy Company, LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 63 NRC ___, slip op. at 7 (2006). For a contention to be admissible, the petitioner must satisfy the following six requirements:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
- (ii) Provide a brief explanation of basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) Provide a concise statement of the alleged facts or expert opinions which support the . . . petitioner's position on the issue and on which the petitioner intends to rely at the hearing, together with references to the specific sources and documents on which the . . . petitioner intends to rely to support its position on the issue; and
- (vi) Provide sufficient information to show that a genuine dispute exists with the . . . licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

10 C.F.R. § 2.309(f)(1)(i)-(vi). These contention requirements are “strict by design.” *Oyster Creek*, CLI-06-24, slip op. at 7. A contention that fails to comply with these requirements will not be admitted for litigation. *Id.*

II. License Renewal Environmental Review

In 1996, the Commission amended 10 C.F.R. Part 51 to establish environmental review requirements for license renewal applicants.⁶ The environmental review for license renewal is divided into generic and plant-specific components. See 10 C.F.R. Part 51, Subpart A, Appendix B; see also *Turkey Point*, 54 NRC at 11. Underlying the environmental review framework is an extensive, systematic study of the potential environmental consequences of operating a nuclear power plant for an additional 20 years. *Id.* (citing NUREG-1437, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants," Final Report, Vol. 1 ("GEIS")(May 1996)).

On many issues, the NRC found that it could draw generic conclusions applicable to all existing nuclear power plants, or to a specific subgroup of plants, issues referred to as "Category 1." *Id.* (citing 10 C.F.R. Part 51, Subpart A, App. B). License renewal applicants need not submit in their site-specific Environmental Reports an analysis of these generic Category 1 issues. See 10 C.F.R. § 51.53(c)(3)(i). For those issues, applicants instead may reference and adopt the generic environmental impact findings codified in Table B-1, Appendix B to Part 51. *Turkey Point*, 54 NRC at 11.

All other environmental issues for which the Commission was not able to make environmental findings on a generic basis, are referred to as "Category 2" issues. See 10 C.F.R. Part 51, Subpart A, App. B. License renewal applicants must provide a plant-specific review of these issues. *Turkey Point*, 54 NRC at 11. Additionally, the applicant must provide

⁶ Final Rule, “Environmental Review for Renewal of Nuclear Power Plant Operating Licenses,” 61 Fed. Reg. 28,467 (June 5, 1996).

additional analysis for Category 1 issues in its Environmental Report if new and significant information may bear on the applicability of the Category 1 finding at its particular plant. *Id.* (citing 10 C.F.R. § 51.53(c)(3)(iv)).

DISCUSSION

I. The Attorney General's Contention

The Attorney General's contention argued that Entergy's Environmental Report "does not satisfy the requirements of 10 C.F.R. § 51.53(c)(3)(iv) and NEPA . . . because it fails to address new and significant information regarding the reasonably foreseeable potential for a severe accident involving nuclear fuel stored in high-density storage racks in the Vermont Yankee fuel pool." Petition at 21. The Attorney General argued that, although an NRC sponsored study conducted in 1979 raised the potential for a severe accident in a high-density fuel storage pool if water is partially lost from the pool,⁷ the NRC failed to take that risk into account in every NRC Environmental Impact Statement ("EIS") prepared since then, including the 1996 GEIS, upon which the Vermont Yankee license renewal application relies. *Id.*

The Attorney General claims that such new and significant information exists based on five "facts or expert opinions:" (1) the expert declaration and report of Dr. Gordon Thompson; (2) the expert declaration and report of Dr. Jan Beyea; (3) excerpts from NUREG-1738; (4) the 2006 "Safety and Security of Commercial Spent Nuclear Fuel Storage" report of the National Academy of Sciences; and (5) the terrorist attacks of September 11, 2001. *Id.* at 22. The Attorney General also argued that Entergy's ER failed to contain severe accident mitigation alternatives (SAMAs) for a spent fuel pool fire. *Id.* at 47.

Entergy and the Staff opposed admission of the Attorney General's contention. Both argued that the environmental impact of onsite spent fuel storage is identified as a Category 1

⁷ NUREG/CR-0649, *Spent Fuel Heatup Following Loss of Water During Storage* (March 1979) ("Sandia Report").

issue in Appendix B to 10 C.F.R. Part 51. Entergy Answer at 11-12; Staff Answer at 11-12. Therefore, according to section 51.53(c)(3)(i), Entergy's ER need not contain a discussion of the environmental impacts of Category 1 issues. *Id.* The Staff and Entergy argued that, in order to litigate a Category 1 issue, a petitioner must first petition for a waiver of the generic Category 1 determination, or petition for a change in the rule. *Id.* Additionally, both the Staff and Entergy argued that the information provided by the Attorney General was not new and significant. See Staff Answer at 16-22; Entergy Answer at 13-25.

In LBP-06-20, the Licensing Board held "that the failure of an ER to include known new and significant information concerning a Category 1 issue as required in 10 C.F.R. § 51.53(c)(3) cannot give rise to an admissible contention." LBP-06-20, slip op. at 23. In its ruling, the Licensing Board relied upon the Commission decision in *Turkey Point*, concluding that Category 1 issues are not litigable. *Id.* On appeal, the Attorney General argues that *Turkey Point* is inapplicable to his contention and that the Commission's decision in *Turkey Point* is inconsistent with both the Commission's regulations and the National Environmental Policy Act ("NEPA"). AG Brief at 12-15.

II. The Licensing Board's Decision Should Be Affirmed

A. The Licensing Board Correctly Applied Turkey Point to This Proceeding

The Attorney General argues that *Turkey Point* is not applicable to his contention. AG Brief at 12. The Attorney General distinguishes his contention from that involved in *Turkey Point* by noting that the *Turkey Point* petitioner challenged the ER's failure to consider a Category 1 issue, whereas the Attorney General's contention challenges Entergy's failure to discuss new and significant information concerning a Category 1 issue in its ER. AG Brief at 12. Admittedly, the Attorney General's contention is not an exact copy of the *Turkey Point* contention. However, the Commission in *Turkey Point* nonetheless removed any doubt regarding the proper course of action in this case and the Board appropriately considered and

applied the Commission's interpretation of the interplay between 10 C.F.R. § 51.53(c)(3)(i) and (iv). The Commission in *Turkey Point* specifically addressed the methods by which a petitioner may "alert the Commission to *new and significant information* that might render a generic finding invalid." 54 NRC at 12 (emphasis added). This very situation arises in the instant case. Therefore, the Board's reliance upon *Turkey Point* in making its decision was wholly appropriate.

In *Turkey Point*, the Commission recognized "that even generic findings sometimes need revisiting in particular contexts," and stated that its "rules thus provide a number of opportunities for individuals to alert the Commission to new and significant information that might render a generic finding invalid, either with respect to all nuclear power plants or for one plant in particular." 54 NRC at 12. "In the hearing process," the Commission continued, "petitioners with new information showing that a generic rule would not serve its purpose at a particular plant may seek a waiver of the rule" pursuant to 10 C.F.R. § 2.758 (now § 2.335). *Id.* Petitioners with evidence that a generic finding is incorrect for all plants have the opportunity to "petition the Commission to initiate a fresh rulemaking" pursuant to 10 C.F.R. § 2.802. *Id.* The Attorney General pursued none of these avenues.⁸ In making this list in *Turkey Point*, the Commission did not expressly state that litigation without waiver of the rule was not an available option. *Id.* However, as the Board in this case concluded, adding the option of filing a contention without first obtaining a waiver of the rule "would obviate the other three [options], because a logical petitioner would always opt for it and skip the extra burdens associated with" the enumerated options. LBP-06-20, slip op. at 23.

Turkey Point makes clear that litigation of Category 1 issues is not available to the Attorney General because 10 C.F.R. § 51.53(c)(3)(i), which precludes litigation of Category 1

⁸ The Attorney General has subsequently filed a rulemaking petition. See [Attorney General] Petition for Rulemaking to Amend 10 C.F.R. Part 51 (Aug. 25, 2006).

issues, remains in effect unless waived. 54 NRC at 12-15. A Licensing Board may not admit a contention unless it is within the scope of the proceeding. 10 C.F.R. § 2.309(f)(1)(iii). As long as the rules that preclude the consideration of Category 1 issues remain in effect, the Attorney General's contention is outside the scope of this proceeding. See LBP-06-20, slip op. at 26-27, n.32. The Board reiterated this point by citing a later passage in *Turkey Point* where the Commission stated that "Part 51 treats all spent fuel accidents, whatever their cause, as generic, Category 1 events not suitable for case-by-case adjudication." LBP-06-20 at 23 (citing 54 NRC at 22). In holding that Category 1 issues are not litigable absent a waiver of Commission rules, the Board correctly applied the precedent from *Turkey Point* to the Attorney General's contention.

B. The Licensing Board's Regulatory Interpretation is Correct

The Attorney General next argues that the Board erred by relying on regulatory history in interpreting the regulations. AG Brief at 12-13. The use of extrinsic aids, he argues, is only appropriate to resolve ambiguities in the regulation. *Id.* (citing *Wrangler Laboratories, et al.*, ALAB-951, 33 NRC 505, 513-14 (1991)). According to the Attorney General, 10 C.F.R. § 51.53(c)(3)(iv), which requires the discussion of new and significant information regarding the environmental impacts of license renewal, is not ambiguous, so reliance upon regulatory history for interpretive guidance is unnecessary and inappropriate. *Id.*

The Attorney General also acknowledges the proposition that "an interpretation of a regulation should be consistent with the overall regulatory scheme." *Id.* at 14 (citing *Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2)*, LBP-05-10, 61 NRC 241, 299 (2005)). When reading the regulations independently, there is little, if any, ambiguity. However, when the two regulations are read in concert, and in the context of the overall regulatory scheme, ambiguity arises:

The environmental report must contain any new and significant information regarding the environmental impacts of license renewal of which the applicant is aware.

10 C.F.R. § 51.53(c)(3)(iv).

The environmental report for the operating license renewal stage is not required to contain analyses of the environmental impacts of the license renewal issues identified as Category 1 issues in appendix B to subpart A of this part.

10 C.F.R. § 51.53(c)(3)(i).

There is, arguably, a conflict in Part 51 for the scenario presented here, where a petitioner seeks to challenge a license renewal application for its failure to provide new and significant information with respect to an issue designated as Category 1. The Attorney General ignores this ambiguity - 10 C.F.R. § 51.53(c)(3)(i) is not mentioned once in his Appeal Brief. The Board recognized this ambiguity, and recognized that it can be resolved by following the direction given at various times by the Commission. LBP-06-20, slip op at. 26. First and foremost, the Board cited the *Turkey Point* case, where the Commission states that a petitioner must seek a waiver of the rule in order to litigate the issue, or, in the alternative, may petition for a new rulemaking. *Id.* at 23. Second, the Board cited SECY-93-032, a Staff memorandum to the Commission, which stated that litigation would not extend to Category 1 issues unless the rule was waived. *Id.* at 24 (citing SECY 93-032, Memorandum from James M. Taylor, EDO, to the Commissioners (Feb. 9, 1993)). This paper was approved by the Commission. *Id.* (citing Memorandum from Samuel J. Chilk, Secretary, to James M. Taylor, EDO (Apr. 22, 1993)). Finally, the Board cited a colloquy between Commissioner James R. Curtiss and Martin Malsch, the Deputy General Counsel for Licensing and Regulation, wherein the Commissioner was twice assured that a petitioner could not litigate the issue of whether there was new and significant information on a Category 1 issue without first obtaining a waiver of the rule.

Id. at 25 (citing Public Meeting, “Briefing on Status of Issues and Approach to GEIS Rulemaking for Part 51,” (Feb 19, 1993) at 14-15).

When two NRC regulations may be in conflict, it is appropriate for the Board to seek interpretive guidance from Commission caselaw, as well as other Commission documents. In this case, in order to resolve the apparent conflict between 10 C.F.R. § 51.53(c)(3)(i) and (iv), the Board appropriately relied upon these sources, which reinforced its reading of *Turkey Point*. LBP-06-20, slip op. at 24-26.

The Attorney General also argues that the Board’s interpretation of *Turkey Point* is inconsistent with the NRC’s regulatory scheme for evaluating generic environmental impacts of license renewal as contemplated by the Commission. AG Brief at 14. On the contrary, it is the Attorney General’s interpretation that is inconsistent with the Commission’s regulatory scheme. The Commission has stated on numerous occasions that, absent waiver, generic Category 1 issues are not subject to litigation. See discussion *supra* at 9-10. Allowing petitioners to request and receive a hearing based on allegations that license renewal applicants have failed to provide new and significant information regarding a Category 1 issue would undermine the Commission’s express intent to avoid litigation of these issues. Therefore, the Board’s interpretation of 10 C.F.R. Part 51 properly relied upon regulatory history, is consistent with the NRC’s regulatory scheme, and should be affirmed.

C. Turkey Point is Consistent With NEPA

Next, the Attorney General argues that the Board’s ruling is erroneous because *Turkey Point* is not consistent with NEPA, and the NRC’s scheme for implementing NEPA. AG Brief at 14. In fact, the Attorney General contends that the Commission should reconsider its ruling in *Turkey Point* because that case weakens the agency’s NEPA process by shielding licensees from litigation when they fail to comply with 10 C.F.R. § 51.53(c)(3)(iv). *Id.* This protection of licensees, the Attorney General claims, shifts the burden of identifying new and significant

information from the licensees to the public and the NRC Staff, which may decrease the quality of information considered. *Id.*

Turkey Point is consistent with NEPA and the NRC's scheme for implementing NEPA and it is not necessary for the Commission to reconsider it here. In *Turkey Point*, the Commission provided a lengthy justification for this regulatory framework, explaining how it fits within the bounds of NEPA caselaw. 54 NRC at 13-15. The Attorney General ignores this pertinent discussion in his brief by failing to address the Commission's comments. In *Turkey Point*, the Commission noted that its practice of tiering environmental analyses by first performing a generic review, with "findings that address impacts common to all nuclear power plants, supplemented by a narrower review of plant-specific issues, reflects a commonplace NEPA approach." *Id.* at 14 (citing 40 C.F.R. § 1508.28 (Council on Environmental Quality Regulations addressing "tiering" of NEPA documents)).

Next, the Commission cited its "longstanding practice, repeatedly upheld on judicial review" of addressing specific environmental issues generically through rulemaking, because "NEPA does not require agencies to adopt any particular internal decisionmaking structure." *Id.* (citing *Balt. Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 100-01 (1983)). In situations, like license renewal, where there are environmental effects that would be essentially similar for all or a commonly identifiable sub-category of nuclear plants, "[a]dministrative efficiency and consistency of decision are both furthered by a generic determination of these effects without needless repetition of the litigation in individual proceedings, which are subject to review by the Commission in any event." *Id.* at 14 (citing *Balt. Gas & Elec.*, 462 U.S. at 101).

The Commission also relied upon a court of appeals decision, which reached a similar conclusion, that "even where an agency's enabling statute expressly requires it to hold a hearing, the agency may rely on its rulemaking authority to determine issues that do not require

a case-by-case consideration A contrary holding would require the agency continually to relitigate issues that may be established fairly and efficiently in a single rulemaking proceeding. *Kelly v. Selin*, 42 F.3d 1501, 1511 (6th Cir.), *cert. denied*, 515 U.S. 1159 (1995); *see also Minnesota v. NRC*, 602 F.2d 412, 416-17 (D.C. Cir. 1979) (Where factual issues do not involve particularized situations, an agency may proceed by a comprehensive resolution of the questions rather than relitigating the question in each proceeding in which it is raised). In addition to holding that the use of generic findings does not violate NEPA, each of these decisions also recognizes the ultimate reason for a generic determination: to avoid unnecessarily relitigating generic issues. *See Balt. Gas & Elec.*, 462 U.S. at 101; *Kelly v. Selin*, 42 F.3d at 1511; *Minnesota v. NRC*, 602 F.2d at 416-17.

The Attorney General's appeal fails to explain how *Turkey Point* "weakens the process by shielding licensees from litigation," or "effectively shifts accountability for identifying new and significant information from the licensee to the NRC Staff and the public." *See* AG Brief at 15. Nor does he explain how, if this were so, it would be inconsistent with NEPA. *Id.* The Commission has decided, as a matter of policy, that Category 1 issues should not be litigated in individual hearings. *See* discussion *supra* at 9-10. However, if there is new and significant information regarding a Category 1 issue at an individual plant, a petitioner may simply petition for a waiver of the rule, under 10 C.F.R. § 2.335, and, if successful, proceed to litigate the issue.

If, on the other hand, a petitioner who seeks to challenge the alleged failure of an applicant or the staff to include new and significant information that is generic may file a rulemaking petition. *Turkey Point*, 54 NRC at 11. The Attorney General's brief indicates that he has filed such a petition pursuant to 10 C.F.R. § 2.802. AG Brief at 7-9. The existence of this option further undermines his argument. Assuming, *arguendo*, that there is new and significant information regarding all or a readily identifiable subcategory of nuclear power plants,

the Commission has the authority, consistent with its tiering approach described above, to address this generic new and significant information through a rulemaking. See *Balt. Gas & Elec.*, 462 U.S. 87; *Kelly v. Selin*, 42 F.3d 1501. The Attorney General's argument fails to identify why the Board's ruling is contrary to NEPA, or provide a reason to question the ruling in *Turkey Point*.

The Attorney General apparently accepts "that the Commission has discretion to address the concerns raised in [his] contention through a rulemaking."⁹ AG Brief at 2. By recognizing this principle, the Attorney General seems to acknowledge that neither the Commission in *Turkey Point* nor the Board below erred in holding that the Commission may decide to address Category 1 issues generically through rulemaking. Nevertheless, he seeks Commission review of LBP-06-20 to "clarify the considerable confusion created by the *Turkey Point* decision." *Id.* at 3. *Turkey Point* did not create confusion, instead, it provided clarification to the extent that the Attorney General concedes the Commission can address his concerns through a rulemaking petition. The Attorney General has failed to demonstrate that *Turkey Point* is inconsistent with NEPA. Therefore, the Commission should decline to reconsider *Turkey Point* and affirm the Board's decision.

D. The Attorney General's Contention is Inadmissible

As noted above, the Board correctly found the Attorney General's contention inadmissible because it seeks to litigate a Category 1 issue. However, in addition to addressing the Board's basis for its decision to not admit the contention, the Attorney General's brief also addresses issues of admissibility not reached by the Board in its decision, and requests the

⁹ However, the Attorney General argues that, in evaluating his rulemaking petition, the Commission would not have discretion to determine whether the information he provides is actually new and significant, in order to justify a new rulemaking. See AG Brief at 2 ("The Commission has no discretion, however, to deny both this appeal and the rulemaking petition"). The Commission certainly has discretion to determine that the information provided by the Attorney General is not new and significant, in either a rulemaking or an adjudication.

Commission not only reverse the Board's decision, but affirmatively admit the contention for hearing. AG Brief at 16. The Attorney General argues that it "clearly meets" the standards for contention admissibility found in 10 C.F.R. § 2.309(f)(1).

In holding that the Attorney General's contention is inadmissible, the Board limited its decision to the fact that the contention was outside the scope of the proceeding pursuant to *Turkey Point*. The Board did not address whether the contention was otherwise admissible.¹⁰ The Board did not err in finding it unnecessary to address factual claims because it ruled, as a threshold matter, that the contention was not litigable. Thus, the only issue before the Commission on appeal is whether the Board's decision regarding litigation of Category 1 impacts is correct.

The Attorney General's request that the Commission not only reverse the Board's decision, but affirmatively admit the contention ignores the structure of Commission adjudication. The Commission has delegated to the Licensing Board the authority to address, in the first instance, the admissibility of contentions under 10 C.F.R. § 2.309.¹¹ If the Commission agrees with the Attorney General that the contention is not barred by *Turkey Point*, the correct procedure is to remand the decision to the Board for a complete determination of admissibility under section 2.309. As such, any discussion of whether the contention is otherwise admissible under section 2.309 is premature.

¹⁰ "[B]ecause we conclude that, as a matter of law, the failure of an ER to include new and significant information relating to a Category 1 issue is not litigable, we need not determine whether the multiple declarations and documents proffered by the AG in fact provide sufficient information to at least support the admissibility of this contention." LBP-06-20, slip op. at 27-28.

¹¹ In this case, the Secretary of the Commission referred the Attorney General's hearing request to the Atomic Safety and Licensing Board Panel for appropriate action in accordance with 10 C.F.R. § 2.346(i). See Memorandum from Annette L. Vietti-Cook, Secretary, to G. Paul Bollwerk, Chief Administrative Judge, Atomic Safety and Licensing Board Panel, "Requests for Hearing with Respect to the License Renewal Application for the Vermont Yankee Nuclear Power Station," dated June 7, 2006.

The Attorney General also argues that the Commission should apply a recent decision addressing the evaluation of the impacts of terrorism under NEPA, *San Luis Obispo Mothers for Peace v. NRC*. 449 F.3d 1016 (9th Cir. 2006). In rejecting the terrorism aspect of the Attorney General's contention, the Board did not ignore the *Mothers for Peace* case. See LBP-06-20, slip op. at 28. Instead, the Board, held that the Attorney General's argument, alleging Entergy failed to provide new and significant information regarding the environmental impacts of terrorism, is not litigable.¹² *Id.* The Attorney General does not explain how the Board could consider the *Mothers for Peace* decision when his contention is not litigable. Therefore, the Attorney General failed to demonstrate error and the Board's decision should be affirmed.

CONCLUSION

For the reasons stated above, the Commission should affirm the Board's decision.

Respectfully submitted,

/RA/

Steven C. Hamrick
Counsel for NRC Staff

Dated at Rockville, Maryland
this 13th day of October 2006

¹² In any event, as the Board recognized, the *Mothers for Peace* decision is not applicable here because the Commission held in *McGuire* that the license renewal GEIS already considered acts of sabotage, unlike the Staff NEPA analysis for the Diablo Canyon Independent Spent Fuel Storage Installation. *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-26, 56 NRC 358, 365 n.24 (2002) (citing GEIS at p. 5-18). In *McGuire*, the Commission stated that "the GEIS concluded that, if such an event were to occur, the resultant core damage and radiological releases would be no worse than those expected for internally initiated events." *Id.*

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
ENTERGY NUCLEAR VERMONT YANKEE,) Docket No. 50-271-LR
LLC, and ENTERGY NUCLEAR)
OPERATIONS, INC.) ASLBP No. 06-849-03-LR
)
(Vermont Yankee Nuclear Power Station))

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S BRIEF IN OPPOSITION TO MASSACHUSETTS ATTORNEY GENERAL'S APPEAL OF LBP-06-20" in the above-captioned proceeding have been served on the following by electronic mail with copies by deposit in the NRC's internal mail system or, as indicated by an asterisk, by electronic mail with copies by U.S. mail, first class, this 13th day of October 2006.

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