

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S BRIEF IN OPPOSITION TO
MASSACHUSETTS ATTORNEY GENERAL'S
PETITION FOR REVIEW OF LBP-06-23

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November 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-06-23," dated October 31, 2006 (MassAG Appeal). In LBP-06-23, the Atomic Safety and Licensing Board (Board) denied admission of the Attorney General of Massachusetts' (MassAG) sole contention. For the reasons discussed below, the Staff respectfully requests that the Commission deny the MassAG's appeal.

BACKGROUND

This case arises from the January 25, 2006 application by Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (collectively, Entergy) to renew the operating license for the Pilgrim Nuclear Power Station (Pilgrim) for an additional twenty-year period.¹ On March 27, 2006, the NRC published a notice of acceptance for docketing and opportunity for

¹ See Letter from Michael Balduzzi, Entergy Nuclear Operations, to U.S. NRC, Re: License Renewal Application, (January 25, 2006) (Agencywide Documents and Access Management System ("ADAMS") Accession No. ML060300028).

hearing regarding the license renewal application.² In response to the *Federal Register* notice, Pilgrim Watch and the MassAG filed intervention petitions.³ Subsequently, on June 5, 2006, Pilgrim Watch gave notice pursuant to 10 C.F.R. §§ 2.309(f)(3) and 2.323 of its adoption of the contention filed by the MassAG.⁴ On June 16, 2006, the MassAG filed a letter requesting that the Board apply the June 2, 2006 decision of the U.S. Court of Appeals for the Ninth Circuit in, *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006), in ruling on its contention.

On June 7, 2006, the Board was established to preside over the proceeding. The Staff filed its response to the MassAG's Petition on June 22, 2006.⁵ Entergy filed its Answer to the MassAG's Petition on June 22, 2006.⁶ On June 29, 2006, the MassAG filed a combined reply to the answers of Entergy and the Staff.⁷

On July 6 and 7, 2006, the Board held oral argument, in Plymouth, Massachusetts, on the admissibility of the petitioners' contentions, with Pilgrim Watch, the MassAG, the NRC Staff, Entergy, and the Town of Plymouth participating. Following oral argument the participants filed

² 71 Fed. Reg. 15,222 (March 27, 2006).

³ See Request for Hearing and Petition to Intervene, May 25, 2006; Massachusetts Attorney General's Request for a Hearing and Petition to Intervene with Respect to Entergy Nuclear Operations, Inc.'s Application for Renewal of the Pilgrim Nuclear Power Plant Operating License and Petition for Backfit Order Requiring New Design Features to Protect Against Spent Fuel Pool Accidents, May 26, 2006 (MassAG Petition).

⁴ See Request for Hearing and Petition to Intervene by Pilgrim Watch (May 25, 2006).

⁵ See NRC Staff Answer Opposing Massachusetts Attorney General's Request for Hearing and Petition for Leave to Intervene and Petition for Backfit Order (June 22, 2006).

⁶ See Entergy's Answer to the Massachusetts Attorney General's Request for a Hearing, Petition for Leave to Intervene, and Petition for Backfit Order (June 22, 2006).

⁷ See Massachusetts Attorney General's Reply to Entergy's and NRC Staff's Responses to Hearing Request and Petition to Intervene With Respect to Pilgrim License Renewal Proceeding (June 29, 2006).

supplemental briefs pursuant to the Board's Order dated July 14, 2006.⁸ On July 27, 2006, the Board held a telephone conference to discuss the supplemental briefs. On October 16, 2006, the Board issued an order denying the MassAG's hearing request.⁹ In its Order, the Board concluded that the MassAG had failed to advance at least one admissible contention. *Id.*, slip op. at 31. On October 31, 2006, the MassAG filed the instant appeal asserting that the Board erred in its refusal to hear its contention.¹⁰

DISCUSSION

A. LEGAL STANDARDS

1. Legal Standard for Interlocutory Appeal of Licensing Board Order Denying a Petition to Intervene or Request for a Hearing

Pursuant to 10 C.F.R. § 2.311(b), an order denying a petition to intervene and/or request for hearing may be appealed by the petitioner on the question as to whether the request should have been granted.

⁸ See NRC Staff's Response to July 14, 2006 Licensing Board Order (July 21, 2006); Entergy's Brief on New and Significant Information in Response to Licensing Board Order of July 14, 2006 (July 21, 2006); Massachusetts Attorney General's Brief Regarding Relevance to this Proceeding of Regulatory Guide's Definition of "New and Significant Information" (July 21, 2006).

⁹ See Memorandum and Order (Ruling on Standing and Contentions of Petitioners Massachusetts Attorney General and Pilgrim Watch), LBP-06-23, 63 NRC _ (October 16, 2006) (Contention Order). The Contention Order also granted the hearing request of Pilgrim Watch as to Contentions 1 and 3 which relate, respectively, to the aging management program for Pilgrim with regard to inspection for corrosion of buried pipes and tanks and detection of leakage of radioactive water that might result from undetected corrosion and aging; and to certain input data that Pilgrim Watch asserts should have been considered by the Applicant in its severe accident mitigation alternatives (SAMA) analysis. The Order further denied admission of Pilgrim Watch's contentions 2, 4, and 5. On October 31, 2006, Pilgrim Watch filed an appeal, under 10 C.F.R. § 2.311, requesting Commission review of the Board's decision denying admission of Contention 4. See Pilgrim Watch Brief on Appeal of LBP-06-23, October 31, 2006. Contention 4 is similar to the MassAG's contention, in that they both raise issues concerning spent fuel pool accidents. Contention Order at 20-21.

¹⁰ See Massachusetts Attorney General's Brief on Appeal of LBP-06-23 (October 31, 2006) (MassAG Appeal).

2. Legal Standards for the Admission of Contentions

To gain admission to a proceeding as a party a petitioner for intervention, 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, e.g., *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 333 (1999). For a contention to be admissible, the petitioner must set forth each contention with particularity and 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 the 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 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 applicant... 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)-(iv). These contention requirements are "strict by design." *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01024, 54 NRC 349, 358 (2001). A contention that fails to comply with any of these requirements will not be admitted for litigation. *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); Changes to Adjudicatory Process [Final Rule]

69 Fed. Reg. 2182, 2221 (Jan. 14, 2004). The petitioner must do more than submit bald or conclusory allegations of a dispute with the applicant. *Millstone*, CLI-01024, 54 NRC at 358. There must be a specific factual and legal basis supporting the contention. *Id.* at 359. A contention will not be admitted if it is based only on unsupported assertions and speculation. *See Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003). If a petitioner fails to provide the requisite support for its contentions, then a Board may neither make factual assumptions that favor the petitioner, nor supply information that is lacking. *Louisiana Energy Services, LP* (National Enrichment Facility), LBP-04-14, 60 NRC 40, 56 (2004) (citing *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001)).

3. License Renewal Environmental Review

The MassAG's contention alleges a violation of NEPA and of the NRC regulations implementing NEPA.

The environmental requirements for license renewal are found in 10 C.F.R. Part 51.¹¹ The Part 51 review for license renewal is divided into generic and plant-specific components. *See Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 11 (2001). 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 has drawn 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

¹¹ Final Rule, "Environmental Review for Renewal of Nuclear Power Plant Operating Licenses," 61 Fed. Reg. 28,467 (June 5, 1996).

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, CLI-01-17, 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*, CLI-01-17, 54 NRC at 11. Additionally, even where the GEIS has found that a particular impact applies generically (Category 1), the applicant must provide additional analysis 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)).

B. THE MASSACHUSETTS ATTORNEY GENERAL'S CONTENTION

The MassAG's Contention asserts that Entergy's Environmental Report (ER) "does not satisfy the requirements of 10 C.F.R. § 51.53(c)(3)(iv) and NEPA [the National Environmental Policy Act] . . . 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 Pilgrim fuel pool." MassAG Petition at 21; *see also* MassAG Appeal at 4. The MassAG 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,¹² the NRC has failed to take that risk into account in every Environmental Impact Statement (EIS) it has prepared since then, including the 1996 GEIS, upon which the

¹² NUREG/CR-0649, *Spent Fuel Heatup Following Loss of Water During Storage* (March 1979) (Sandia Report).

Pilgrim license renewal application relies. MassAG Petition at 21; see *also* MassAG Appeal at 4-7.

The MassAG supported his allegation that such new and significant information exists with 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, *Final Technical Study of Spent Fuel Pool Accident Risk and Decommissioning Nuclear Power Plants* (January 2001), (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. MassAG Petition at 22-23. The MassAG also argued that Entergy’s ER failed to contain severe accident mitigation alternatives (SAMAs) for a spent fuel pool fire. MassAG Appeal at 5 n.5.

The Staff opposed admission of the MassAG’s contention and argued that the environmental impact of onsite spent fuel storage is identified as a Category 1 issue in Appendix B to 10 C.F.R. Part 51. 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. Staff Answer at 6. In order to litigate a Category 1 issue, the Staff argued that a petitioner must first petition for a waiver of the generic Category 1 determination, or petition for a change in the rule. Staff Answer at 11.

In LBP-06-23, the Licensing Board held that “notwithstanding the responsibility of an Applicant in its ER (and the NRC Staff in the SEIS) to address ‘new and significant information’ relating even to Category 1 issues, an *alleged failure to address* such ‘new and significant information’ does not give rise to an admissible contention, absent a waiver of 10 C.F.R. § 51.53(c)(3)(i), which provides that Category 1 issues need not be addressed in a license renewal.” LBP-06-23, 63 NRC __ slip op. at 31. In its ruling, the Licensing Board relied upon the Commission decision in *Turkey Point*. *Id.*, slip op. at 31-46.

The contention proffered by the MassAG in the instant case is almost identical to the contention submitted by the MassAG in the *Vermont Yankee* proceeding.¹³ On September 22, 2006, the Licensing Board hearing the *Vermont Yankee* matter, issued its decision regarding requests for hearing and petitions to intervene, denying the MassAG's request for hearing and refusing admission of the contention for the same reasons as the Board in this case: that on-site spent fuel storage is a Category 1 environmental issue that is not subject to litigation in individual license renewal proceedings absent Commission waiver of the rules. *Id.* The MassAG has filed an appeal of LPB-06-20,¹⁴ and the Staff and Entergy have opposed the appeal.¹⁵ The arguments raised in the instant appeal of LBP-06-23 and the arguments raised in the appeal of LBP-06-20 are essentially the same, are without merit, and should be rejected for the reasons set forth herein and in the Staff's brief in opposition to the appeal of LBP-06-20.

C. THE LICENSING BOARD'S DECISION SHOULD BE AFFIRMED

The MassAG has incorporated into his brief on appeal in this matter, the arguments he made in his brief on appeal in the *Vermont Yankee* matter. See MassAG Appeal at 14.

1. Turkey Point is Applicable to This Case

The MassAG's contention argues that Entergy failed to include new and significant information about the environmental impacts of spent fuel pool accidents, a Category 1 issue, in its ER. MassAG Petition at 21-22. In *Turkey Point*, the Commission recognized "that even

¹³ See *Entergy Nuclear Vermont Yankee, LLC*. (Vermont Yankee Nuclear Power Station), LBP-06-20, 63 NRC __ (2006), slip op., Memorandum and Order (Ruling on Standing, Contentions, Hearing Procedures, State Statutory Claim, and Contention Adoption) (Sept. 22, 2006).

¹⁴ See Massachusetts Attorney General's Notice of Appeal of LBP-6-20 (Oct. 3, 2006) and Massachusetts Attorney General's Brief on Appeal of LBP-6-20 (Oct. 3, 2006) (MassAG VY Appeal).

¹⁵ See NRC Staff's Brief in Opposition to Massachusetts Attorney General's Appeal of LBP-06-20 (Oct. 13, 2006); Entergy's Brief in Opposition to the Massachusetts Attorney General's Appeal of LBP-06-20 (Oct. 13, 2006).

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.” *Turkey Point*, CLI-01-17, 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 MassAG 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 MassAG’s contention challenges Entergy’s failure to discuss new and significant information concerning a Category 1 issue in its ER. See MassAG VY Appeal at 14. Admittedly, the MassAG’s contention is not an exact copy of the *Turkey Point* contention. However, the Commission in *Turkey Point* nonetheless removed any doubt regarding the appropriate 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).

Turkey Point makes clear that litigation of Category 1 issues is not an option available to the MassAG because 10 C.F.R. § 51.53(c)(3)(i), which precludes litigation of Category 1 issues, remains in effect unless waived. *Turkey Point*, CLI-01-17, 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 the Board stated in its decision, ““adjudicatory hearings in individual license renewal proceedings will share the same scope of issues as our NRC Staff review.””

LBP-06-23, slip op. at 39 (quoting *Turkey Point*, CLI-01-17, 54 NRC at 10). As long as the rules obviating the requirement to discuss Category 1 issues remain applicable, the MassAG's contention is outside the scope of this proceeding.

As discussed above, 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." *Turkey Point*, CLI-01-17, 54 NRC at 12 (emphasis added). Such a petitioner may seek a waiver of the rule if the concern applies to a particular plant, may seek to petition for a fresh rulemaking if the concern is generic, or may choose to participate in the notice-and-comment process for the supplemental EIS for a particular plant. *Id.*; see also LBP-06-23, slip op. at 40. The Board stated that "the Commission made clear that its intent was that these options were to be the exclusive options open to members of the public on the issue, stating that 'Part 51 treats all spent fuel accidents, whatever their cause, as generic, Category 1 events *not suitable for case-by-case adjudication*'" LBP-06-23 at 40 (citing *Turkey Point*, CLI-01-17, 54 NRC at 23 n.14).

2. Turkey Point is Consistent With NRC Regulations

The MassAG next argues that *Turkey Point* is inconsistent with NRC regulations. MassAG Appeal at 14. The MassAG argues that the Board erred by relying on regulatory history in interpreting the regulations. *Id.* at 14-15; MassAG VY Appeal 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 MassAG, 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 this regulatory history for interpretative guidance is unnecessary and inappropriate. MassAG Appeal at 14-15; MassAG VY Appeal at 13. But, as the Board recognized, the regulation is not without ambiguity 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 MassAG dismisses the ambiguity and the Board's discussion thereof. See MassAG's Appeal at 15 n.16. But, as the Board noted, any ambiguity was resolved by the Commission. See *discussion at* LBP-06-23, slip op. at 44-45 n. 170. 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.* 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 41-42. (citing Memorandum for James M. Taylor, EDO, to the Commissioners (Feb. 9, 1993)). This paper was approved by the Commission. *Id.* at 42. (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, then NRC 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 or significant information on a Category 1 issue without first obtaining a waiver of the rule. *Id.* at 42-43 & n.167 (citing Public Meeting, "Briefing on Status of Issues and Approach to GEIS Rulemaking for Part 51," (Feb 19, 1993)). Thus, it is clear that the Commission always intended that litigation of Category 1 issues, including an allegation regarding new and significant information, would not be permitted absent a waiver of the rule.

The *Turkey Point* decision is consistent with the NRC's regulatory scheme for evaluating generic environmental impacts of license renewal. As discussed by the Board, the Commission has stated on numerous occasions that, absent waiver, generic Category 1 issues are not subject to litigation.

3. Turkey Point is Consistent With NEPA

Next, the MassAG argues that if the Board's interpretation of *Turkey Point* is correct, then the Commission should reconsider *Turkey Point* because it is not consistent with NEPA, and the NRC's scheme for implementing NEPA. MassAG Appeal at 16. The MassAG argues that *Turkey Point* 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.*

Turkey Point is consistent with NEPA. In that case, the Commission provided a lengthy justification for this regulatory framework, explaining how it fits within the bounds of NEPA case law. *Turkey Point*, CLI-01-17, 54 NRC at 13-15. The MassAG ignores this highly pertinent discussion in his brief. The Commission noted that its practice of 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 *Baltimore Gas & Electric 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 *Baltimore Gas & Electric*, 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. *Kelley v. Selin*, 42 F.3d 1501, 1516, 1511 (6th Cir.), *cert. denied*, 515 U.S. 1159 (1995); *see also Minnesota v. NRC*, 602 F.2d 412, 416 (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.

The MassAG’s appeal fails to explain how *Turkey Point* “weakens the process by shielding licensees from litigation.” See MassAG Appeal at 16. 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 LBP-06-23, slip op. at 40. 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.

Alternatively, petitioners seeking to challenge the alleged failure of an applicant to include more generic new and significant information may file a rulemaking petition.

Turkey Point, CLI-01-17, 54 NRC at 11. The MassAG’s brief indicates that he has filed such a petition pursuant to 10 C.F.R. § 2.802. MassAG Appeal at 8. The existence of this extra avenue 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 is well within its authority, as described above, to address this generic new and significant information through a rulemaking. See *Baltimore Gas & Electric*, 462 U.S. 87; *Kelley v. Selin*, 42 F.3d 1501. The MassAG has failed to distinguish this case from the precedent cited in *Turkey Point*, that the Commission may choose to address generic issues through rulemaking. As discussed in *Turkey Point*, “NEPA does not require agencies to adopt any particular internal decisionmaking structure.” *Turkey Point*, CLI-01-17, 54 NRC at 14 (citing *Baltimore Gas & Electric*, 462 U.S. at 100-01).

The MassAG apparently accepts “that the Commission alternatively has the discretion to reconsider its Category 1 designation of spent fuel pool accidents through a rulemaking.”¹⁶ MassAG Appeal at 19. He nevertheless seeks Commission review of LBP-06-23 to clarify what he alleges is confusion created by the Board’s interpretation of the *Turkey Point* decision. *Id.* at 17. Neither the Board in interpreting, nor the Commission in deciding *Turkey Point*, created confusion. Instead, they provided clarification regarding the avenues that may be followed in challenging a NEPA document in a license renewal proceeding. To the extent that the MassAG concedes the Commission can address his concerns through a rulemaking petition, the MassAG agrees. The MassAG has failed to demonstrate that *Turkey Point* is inconsistent with NEPA. Therefore, the Commission should affirm the Board’s decision.

4. The Massachusetts Attorney General’s Contention is Inadmissible

For the reasons stated above, the MassAG’s contention is inadmissible. However, in addition to addressing the Board’s basis for its decision not to admit the contention, the MassAG’s brief also addresses factual considerations, not reached by the Board in its decision, and requests the Commission not only reverse the Board’s decision, but affirmatively admit the

¹⁶ However, the Attorney General fails to recognize that, in evaluating his rulemaking petition, the Commission would have discretion to determine whether the information he provides is actually new and significant, in order to justify a new rulemaking. MassAG Appeal at 3 (“The Commission has no discretion, however, to deny both this appeal and the rulemaking petition”).

contention for hearing. MassAG Appeal at 13 & n.14. The MassAG argues that it has met the standards for contention admissibility found in 10 C.F.R. § 2.309(f)(1). MassAG Appeal at 13-14 & n.14. The MassAG 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).¹⁷ MassAG Appeal at 18.

In making its decision that the MassAG'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. "Although the Attorney General has recently filed a Petition for Rulemaking with regard to the matters at issue in its Contention, neither the AG nor Pilgrim Watch have sought a waiver, and thus the contention must be ruled inadmissible insofar as it seeks to challenge the absence of alleged new and significant information in the Applicant's ER." LBP-06-23 slip op. at 44-45. "Thus we need not address, and have not addressed herein, the question whether there is indeed new and significant information in this instance." *Id.*, slip op. at 45 n. 173. Therefore, the only issue before the Commission on appeal is whether the Board's decision regarding litigation of Category 1 impacts is correct.

The MassAG requests 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,

¹⁷ The *Mothers for Peace* decision is not applicable here because, as the Licensing Board acknowledged, the Commission stated in *McGuire* that the license renewal GEIS already considered acts of sabotage. *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). There, 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.*

the admissibility of contentions under 10 C.F.R. § 2.309.¹⁸ If the Commission agrees with the MassAG 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 the contention's admissibility under section 2.309 or the applicability of *Mothers for Peace* is premature.

CONCLUSION

For the reasons stated above, the Commission should deny the Attorney General's appeal and decline to review the Board's decision.

Respectfully submitted,

/RA/

Susan Uttal
Counsel for NRC Staff

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

¹⁸ 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 Pilgrim Nuclear Power Station," dated June 6, 2006.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S BRIEF IN OPPOSITION TO MASSACHUSETTS ATTORNEY GENERAL'S PETITION FOR REVIEW OF LBP-06-23" in the above-captioned proceeding have been served on the following by electronic mail and deposit in the U.S. Mail Service or by deposit in the U.S. Nuclear Regulatory Commission's internal mail system as indicated by a single asterisk(*), or by deposit in the U.S. mail system, as indicated by a double asterisk (**) this 13th day of November, 2006.

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