

RAS 13879

Official Transcript of Proceedings
NUCLEAR REGULATORY COMMISSION

Title: Shearon Harris Nuclear Power Plant

Docket Number: 50-400-LR; ASLBP No.: 07-855-02-LR-BD01

Location: Raleigh, North Carolina

Date: Tuesday, July 17, 2007

DOCKETED
USNRC

July 19, 2007 (9:30am)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Work Order No.: NRC-1664

Pages 1-186

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SECY-02

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

(10:04 a.m.)

1
2
3 CHAIR YOUNG: Good morning. My name is
4 Ann Marshall Young. I'm the Chair and lawyer member
5 of the Licensing Board. And I'm going to ask Judge
6 Lam and Judge Mignerey to introduce themselves, and
7 then I'll ask the parties to do the same.

8 JUDGE MIGNEREY: I'm Alice Mignerey, and
9 I am one of the technical judges, and my background is
10 nuclear chemistry, radio chemistry, and basically
11 nuclear physics.

12 JUDGE LAM: Peter Lam, Nuclear Engineer.
13 My specialty is in reactor safety and risk assessment.

14 CHAIR YOUNG: Let's start with Mr. Lewis.
15 And if you could introduce yourselves and all the
16 people that you have with you, and then we'll go to
17 the Staff, and then to the Petitioners.

18 MR. O'NEILL: Mr. Lewis has deferred to
19 his elder, so I'm John O'Neill, and David Lewis and I
20 represent Progress Energy. With us from Progress
21 Energy today are Bob Kitchen, who's the Manager of
22 License Renewal and New Plant Licensing. Next to him
23 is Roger Stewart, who is the Supervisor of License
24 Renewal. Next is Tony Pilo, who is the Fleet
25 Coordinator of Emergency Preparedness; John Caves is

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1 the Manager of Technical Services for the Harris
2 Plant; and way in the back out the door is Julie Hans,
3 who is the Site Communications Coordinator for the
4 Harris Plant.

5 CHAIR YOUNG: Thank you. And, Court
6 Reporter, if you need to interrupt us at any time to
7 get spellings, please feel free. All right?

8 Ms. Uttal, why don't you introduce the
9 Staff people.

10 (Off mic comment.)

11 MR. ROTH: I'm David Roth with the Staff.
12 With us today, we have the Project Manager for Safety,
13 and we also have a Project Manager for Environmental
14 Review, Sam Fernandez.

15 CHAIR YOUNG: And this is Ms. Uttal with
16 you.

17 MR. ROTH: This is Ms. Uttal.

18 CHAIR YOUNG: All right. And Mr. Runkle?

19 MR. RUNKLE: Good morning. My name is
20 John Runkle. I'm representing the Petitioners, the
21 North Carolina Waste Awareness and Reduction Network,
22 generally referred to as NC WARN, and the Nuclear
23 Information and Resource Service, NIRS. And with me
24 at counsel table is Jim Warren, who is the Executive
25 Director of NC WARN.

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1 CHAIR YOUNG: Well, it's nice to see you
2 all this morning. As I indicated in our last order
3 setting out certain questions, we're going to try to
4 move things along as quickly as possible on things
5 that -- well, we're going to try to apportion the time
6 to those things where we have the most questions. And
7 our thought was that we would begin by hearing
8 argument on standing, and then the environmental
9 contentions with the argument on Environmental
10 Contentions I and II together, since the issues of the
11 aviation attacks is involved in both of those. Then
12 hear brief argument on the backfit issue. Do all that
13 this morning, and then set aside the afternoon to hear
14 argument on the Technical Contention I on fire
15 protection issues. That's the one that we have the
16 most questions on, and to sort of apportion our time
17 most effectively, we thought that that would be a good
18 way to proceed. Does any party have any objection to
19 proceeding in that manner?

20 All right. Then on standing, I think the
21 main objection appears to be that the member groups
22 did not authorize the organizations to represent them,
23 and I think we can deal with this fairly quickly. In
24 the reply, Mr. Runkle indicated that if that was a
25 requirement to state that specifically, even though

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1 the affidavits had been provided to the organizations'
2 counsel, that he could do that at the oral argument.
3 So if we could start with Mr. Runkle, if you could
4 just address that, and then we could hear from the
5 Staff and the Applicant on that issue. We'll try to
6 get through this fairly quickly.

7 MR. RUNKLE: Well, the objection is
8 whether the word "authorized" is in the affidavit, as
9 opposed to whether the affiants authorized the
10 organizations to go ahead and act in their behalf.
11 And if that's a code pleading word, if we need to have
12 authorization, that they say we authorize these
13 organizations to represent our interests in front of
14 this board, we can do that. We haven't done it. We
15 don't feel that that's a necessary part of standing.
16 You have standing, and until somebody questions it,
17 you don't have to show that standing.

18 Now, certainly they authorized us to act
19 in their behalf. They signed the affidavits, and it
20 was a clear understanding that we had with the
21 affiants why they were doing it. They were our
22 members. We asked them for help. They said we need
23 you to show that you're within, certainly, a
24 geographical distance from the plant that would show
25 your effect. The affiants themselves, several are

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1 handicapped or have family members that are, and are
2 concerned about being evacuated, certainly would meet
3 all the other requirements. And if that's the problem
4 with the standing, is that specifically in their
5 affidavits they did not use the word "authorization",
6 well, then we can -- I mean, that doesn't seem to be
7 a problem. They authorized us to --

8 CHAIR YOUNG: Why don't you, if you would
9 like to do that, why don't you -- could you submit
10 that by the end of the week?

11 MR. RUNKLE: Certainly.

12 CHAIR YOUNG: All right.

13 MR. RUNKLE: That would be no problem. We
14 could go down and certainly get an amended affidavit
15 saying they authorize us to act in their behalf.

16 CHAIR YOUNG: All right.

17 MR. RUNKLE: There's no question.

18 CHAIR YOUNG: All right. And then we'd
19 like to hear from the Staff and the Applicant. And I
20 guess the main question that we would have for you is,
21 one, was not the authorization pretty implicit in the
22 affidavits, in the fact that the affidavits were
23 provided to the petitioner's counsel. And two, if
24 it's not implicit, is this not something of the nature
25 that could be cured? We can start with the Staff if

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1 you like. Mr. Roth.

2 MR. ROTH: Well, on the second question
3 first, we do think it's something in the nature that
4 can be cured. I don't think anyone objects to
5 providing that authorization. Now with regards to the
6 implicitness, as we put in our written answer, we look
7 to see if they have the word "license renewal", do
8 they have agent management issue, is there anything
9 that would show for the record for the future that
10 these people were authorizing this action for this
11 license renewal, and we didn't see it. I mean, if
12 they want to cure it, they can go ahead, and we won't
13 object to that.

14 CHAIR YOUNG: All right. Mr. O'Neill.

15 MR. O'NEILL: The Commission, on June 28th
16 issued a decision in the Consumers Energy Palisades
17 license transfer that reiterated its views that this
18 was not simply something that could be implicit. It
19 had to be stated clearly. Quoting from page 3 of the
20 slip opinion, "Petitioner's latest assertions here are
21 not supported by affidavits, or other forms of
22 authorization by the members who purportedly live
23 close to the Palisades Power and either Petitioner to
24 represent their interest. We have explained this
25 authorization requirement in our case law, most

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1 recently in CLI-07-18, in the same case. This
2 longstanding requirement precludes Petitioners from
3 persuasively claiming they could not have reasonably
4 anticipated the need to submit evidence of
5 authorization, or that CLI-07-18 erred in citing this
6 omission as a reason why Petitioners had not shown
7 proximity-based standing."

8 And in CLI-07-18 the Commission stated,
9 "They must demonstrate that the member has, preferably
10 by affidavit, authorized the organization to represent
11 him or her, and to request a hearing on his or her
12 behalf."

13 CHAIR YOUNG: What's the cite for the one
14 you're reading from? CLI?

15 MR. O'NEILL: The first one is CLI-07-22
16 on slip opinion 3. And the second one was in CLI-07-
17 18 slip opinion at 89.

18 CHAIR YOUNG: Okay.

19 MR. O'NEILL: Now, yes, you have broad
20 discretion to allow the intervener to cure that, but
21 I agree with the Staff that the cure is not simply the
22 authorization, but also the affidavit must allege a
23 particularized injury that is fairly traceable to the
24 challenged action, and is likely to be redressed by a
25 favorable decision.

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1 In this case -- sorry.

2 CHAIR YOUNG: Let me just interrupt you
3 there. Doesn't the proximity presumption take care of
4 all that?

5 MR. O'NEILL: It doesn't to the extent
6 that the only issue they have raised is emergency
7 planning, which is not in this proceeding, so it is
8 not a --

9 CHAIR YOUNG: Well, as to standing, the
10 proximity presumption is a replacement for having to
11 show the injury, redressability, and the third part of
12 that.

13 MR. O'NEILL: I agree that the standing
14 for individuals has certainly been given with
15 proximity within 50 miles. Whether the organization,
16 however, has a particularized injury that can be
17 resolved by this proceeding, where the only issue
18 raised by the individuals authorizing that
19 organization is emergency planning, which is not
20 within the scope of this proceeding, I would suggest
21 is not going to give the organization standing.

22 CHAIR YOUNG: Even representational
23 standing?

24 MR. O'NEILL: Representational, but the
25 organization still has to show that as an

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1 organization, that it's going to be harmed, and that
2 the individuals that claims the organization should
3 represent its interest, has to represent something
4 that's within the scope of this proceeding.

5 JUDGE LAM: Mr. O'Neill, without
6 addressing the merits of your argument, do you object
7 to allowing the Petitioner to remedy their affidavit?

8 MR. O'NEILL: I do not believe that I'm in
9 a position to object to the Board using its broad
10 discretion, so we certainly would not object to it.

11 JUDGE LAM: Thank you.

12 MR. O'NEILL: You have the discretion to
13 do that. But we also believe that the affidavit has
14 to dot all the Is, cross all the Ts, and meet all the
15 requirements.

16 JUDGE LAM: That's a separate matter.

17 CHAIR YOUNG: Could we ask the Staff just
18 to provide your viewpoint on the requirement to show
19 an injury, in addition to having a member show that
20 they're within the 50-mile radius, in order to
21 establish standing?

22 MR. ROTH: I believe, Your Honor, that
23 it's our past practice that the 50-mile radius, not
24 necessarily 50 mile, but the proximity presumption --

25 CHAIR YOUNG: Right.

1 MR. ROTH: -- is sufficient for license
2 renewal.

3 CHAIR YOUNG: Okay. Anything further on
4 standing?

5 JUDGE LAM: Mr. Runkle, may I interrupt?
6 The question to the Staff. Mr. Roth, did I hear you
7 correctly, the proximity presumption, in your
8 estimation is sufficient for the particularized
9 injury, in fact?

10 MR. ROTH: Yes, Your Honor.

11 JUDGE LAM: Thank you.

12 MR. RUNKLE: Just looking at the
13 declarations, one of Judy Hogan, "I'm concerned about
14 Shearon Harris because of fire safety, and airplanes
15 flying near the plant. The evacuation plans are not
16 good, and the people in the community do not know
17 them. We cannot hear the warning sirens in our house.
18 The evacuation plan has never been practiced. If an
19 accident happens, I expect to be stuck in traffic and
20 die."

21 Now she's concerned about Shearon Harris
22 because of fire safety and airplanes. I think it's
23 more than just implied that you're concerned - the
24 only reason you'd want to evacuate in case there was
25 an accident based on a problem with fires or aviation

1 attacks.

2 Again, I don't want to be put in the
3 position that we're getting into some kind of code.
4 If you tell me that I need to have line and verse of
5 what they need to say in an affidavit; yes, they've
6 authorized us to represent them. They're concerned
7 about accidents. They're also concerned about if
8 there's an accident, getting out of there.

9 CHAIR YOUNG: If you want to submit
10 anything in the nature of affidavits setting out
11 authorization to cure that defect, you're free to. If
12 you could get that to us by Friday, electronically.

13 MR. RUNKLE: We'll have to see, based on
14 people's schedule. I think that most of the
15 affidavits will be around, since they're limited
16 income, and I don't think they're going on any lengthy
17 vacations.

18 CHAIR YOUNG: If there's any problem, let
19 us know.

20 MR. RUNKLE: Thank you.

21 CHAIR YOUNG: But if you'd like to do
22 that, either submit them by Friday, or just let us
23 know when you can do that within the next week or two.

24 MR. RUNKLE: Certainly. Thank you.

25 CHAIR YOUNG: Okay? All right. Then if

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1 there's nothing further on standing, let's move on to
2 Environmental Contentions I and II. And then either
3 as a part of that, or immediately after, the backfit
4 issue.

5 And I guess, Mr. Runkle, I want to ask our
6 main questions here to you; and that is, one, the
7 precedential effect of the Commission's decision,
8 which I indicate is in the nature of an Appellate
9 Court decision, by analogy, in the Oyster Creek
10 decision, CLI-07-8, and this license renewal
11 proceeding, which is more in the nature of a trial
12 court proceeding. And whether you're alleging that
13 there are distinguishing factors in this case.

14 And then, two, the precedential effect of
15 the U.S. Supreme Court's denial of cert. I think you
16 have a bit of a burden to overcome on that score based
17 on the precedent that would bind us. Certainly, if
18 the Supreme Court had said clearly in a decision that
19 this applies nationwide, and that parties in these
20 cases, moreover, have the right to raise these in
21 adjudicatory proceedings, then we would be bound by
22 the Supreme Court. But these cases that I've cited
23 all pretty much say that a denial of cert doesn't
24 carry with it any statement on the merits of the case,
25 one way or the other.

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1 MR. RUNKLE: Yes. I mean, we can start
2 with the cases you cite on the denial of certiori. I
3 think they go back to the Singleton case. There's a
4 common thread in there, but they all pretty much say
5 the same thing. A denial of cert by the Supreme Court
6 is not a ruling on the merits of the case, one way or
7 the other. Then it has no -- they're not agreeing
8 with the Ninth Circuit case, they're not disagreeing
9 with the Ninth Circuit case. But what I think that
10 the precedential effect is, is that each time the
11 matter comes before a trial court, or the Nuclear
12 Regulatory Commission, that they need to address the
13 same issues that were presented in the Ninth Circuit
14 case, the San Luis Obispo Mother's for Peace case, to
15 looking at those issues why aviation attacks, whether
16 they're terrorist related or some kind of other
17 purpose, or other reasons that somebody might want run
18 an airplane into a nuclear power plant.

19 I think you need to fully address those
20 same issues that have arised in that case. And I
21 think that's the precedential value. You're certainly
22 -- the Supreme Court's decision by denying the cert is
23 not telling you one thing or the other. And it's not
24 telling the Commission, itself, one thing or the
25 other. What it is doing is in line with the Ninth

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1 Circuit case, and any case that comes up, I think the
2 precedential value is that you and the Commission on
3 the review of your decision has to go through the same
4 kind of analysis, and make a determination in case-by-
5 case situations that you do not need to, or the
6 applicant does not need to address aviation attacks.

7 CHAIR YOUNG: Well, let me ask you two
8 questions here. First, in the Oyster Creek decision,
9 the Commission said, I think they even went more
10 broadly than referring to terrorist attacks, to any
11 malevolent acts, that they're not admissible issues
12 for contentions in license renewal proceedings. And
13 second, I believe the Ninth Circuit in its decision
14 also said that the Commission can choose how it
15 decides to address an issue, which might be through
16 adjudication, and might be otherwise. So the
17 situation that the Board finds itself in is that there
18 is precedent from the Commission, along with precedent
19 language in the Ninth Circuit decision which would
20 seem to support the Commission's determination to
21 handle this otherwise than in adjudication
22 proceedings. And we would be bound by that Commission
23 precedent in that context, wouldn't we? How would you
24 argue that we wouldn't be?

25 MR. RUNKLE: Well, it's apparent that the

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1 Commission has not resolved this issue in any manner.
2 We're going back to, as we cite in the initial
3 petition, the Argonne study back in '78, and a series
4 of studies throughout the 80s and 90s that showed that
5 the nuclear power plants cannot withstand an aviation
6 attack under any conditions, so we're talking about 20
7 years of no action of plants that have been unsafe
8 from aviation attacks.

9 CHAIR YOUNG: But I'm going to be
10 interrupting people today, I think we all are, so
11 excuse me. But what the Commission has said is that
12 these issues are not -- cannot be the basis for an
13 admissible contention in a proceeding like this, so
14 that even though you might argue to the Commission in
15 some other context, for example, that they should be
16 considered, just as they're being required to consider
17 them in a context pretty much of their choosing, as I
18 understood the Ninth Circuit; that they're not
19 admissible, they're not the sort of issue that would
20 be the basis for an admissible contention. And I
21 think the Oyster Creek decision would seem to bind us
22 in this case, so rather than go into the merits of why
23 the issue is important, and why it should be
24 considered in some way, or in some manner, how would
25 we fall outside the precedential effect of the

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1 Commission's order in CLI-07-08 in the Oyster Creek
2 case?

3 MR. RUNKLE: Okay. Looking at that, I
4 think I recite that in our reply as the Amergen Energy
5 case, but it's a 2000 Oyster Creek decision. I think
6 that our position is that you need to address this on
7 a case-by-case, looking at whether the conditions at
8 the Shearon Harris plant, based on everything that's
9 happened since 1978, whether they can withstand that
10 attack, and whether they can provide a reasonable
11 assurance that in an extended license period, that
12 they will go ahead and be able to address a severe
13 impact from an aviation attack.

14 CHAIR YOUNG: Can you point me to what in
15 the Commission's decision would support you on that in
16 the Oyster Creek case?

17 MR. RUNKLE: Well --

18 CHAIR YOUNG: You urge us to reconsider
19 the scope of the decision.

20 MR. RUNKLE: Yes.

21 CHAIR YOUNG: But the decision is in a
22 license renewal case which is outside the Ninth
23 Circuit, and I'm not seeing how we are any different
24 from the Licensing Board in the Oyster Creek case.
25 And the Commission has said that these issues are not

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1 appropriate for contentions that would be admissible
2 in the license renewal case. And I'm not hearing how
3 you're distinguishing that.

4 MR. RUNKLE: I understand your position.
5 I understand the position of the Staff and the
6 Applicant on it. I mean, our opinion is it's clear in
7 the brief, and we think that the Commission acted
8 improperly in that. And that you, even as a Trial
9 Board, you may feel yourself bound to it, but you need
10 to address the substantive issues behind the
11 contention; otherwise, what you're allowing is the
12 last 20 years of non-compliance to stand, no
13 consideration in the initial licensing, looking at the
14 next 20 years where the license is impacting, and 20
15 years after that.

16 Now I'm not asking you as this Board to
17 review the policy as it relates to this issue, as it
18 relates to all the nuclear power plants in the
19 country, but at the Shearon Harris Power Plant, the
20 only that's in front of us, you need to address those
21 issues.

22 CHAIR YOUNG: But let me ask -- let's
23 think of an analogy here. If a trial court has a case
24 that's pretty much identical, in so far as the legal
25 issues are involved, as those in a prior case in which

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1 a Court of Appeals has ruled, whatever the trial court
2 may think about that Appellate Court decision, unless
3 there's something, some higher Appellate authority
4 that would say that the trial court should follow the
5 higher authority, then the Appellate authority that's
6 there governs the trial court. Right?

7 MR. RUNKLE: Certainly.

8 CHAIR YOUNG: And that's sort of the
9 situation we're in here, aren't we?

10 MR. RUNKLE: But the way that the
11 Commission responded to the Ninth Circuit case was to
12 say we're not going to do anything about it, and so if
13 that sets your precedent, you need to rule that way,
14 and then we can take it to the Commission and ask them
15 to reconsider their decision, and we can take it to
16 the Fourth Circuit.

17 CHAIR YOUNG: Okay.

18 MR. RUNKLE: And it seems -- going back
19 throughout our arguments, we've made the argument that
20 there needs to be a reasonable assurance that the
21 plant will operate safely. And we think that's
22 inherent in the Atomic Energy Act, we think that's
23 inherent in the relicensing looking at the NUREGS,
24 that you have to assure as you issue, as the NRC
25 issues the license, extends it into the year 2047,

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1 that there's a reasonable assurance that it will meet
2 fire protection rules, that it will meet aviation
3 protection, that the emergency response is adequate.
4 And we don't see that by ignoring the issue, as the
5 Commission has, there's any reasonable assurance that
6 the Shearon Harris plant will minimize, mitigate,
7 eliminate the impact from an aviation attack.

8 CHAIR YOUNG: All right. So your real
9 beef here is with the Commission's order, and you want
10 to raise that on appeal, and you want to make your
11 record here on that.

12 MR. RUNKLE: I don't know if it's our real
13 beef, but I think that we would urge this Board to
14 look at the merits of the issue, and get into the
15 factual differences that we may have with the Staff
16 and the Applicant on whether the Shearon Harris plant
17 can safely, or sort of mitigate the impacts from the
18 aviation attack.

19 CHAIR YOUNG: Okay. Just quickly, and I
20 think Judge Lam also has a question, but quickly for
21 me; if you could just wrap-up solely on the issue of,
22 do you see any distinguishing factors about this case
23 that would make it different from the Oyster Creek
24 case; and, therefore, permit us to distinguish our
25 situation from that described by the Commission in the

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1 Oyster Creek case?

2 MR. RUNKLE: And that was also in 2006.
3 I don't see any substantive difference in the time
4 period between 2006 and --

5 CHAIR YOUNG: It's 2007, actually.

6 MR. RUNKLE: We don't see any difference
7 at the time, the terrorist attack or aviation attack
8 would have the same impact. Certainly, that issue was
9 raised at the initial licensing at Harris. I'm not
10 sure if it was raised at the Oyster Creek. I think it
11 was summarily dismissed back then, but that was 20
12 years ago. I think that the difference is, if there
13 is any, is that the Applicant and the Shearon Harris
14 plant has known about it. I have no idea whether
15 Amergen Energy at Oyster Creek knew anything about the
16 possibilities of an aviation attack. That certainly
17 might be a matter of fact. Whether this Applicant is
18 aware that they cannot withstand that kind of attack
19 now, they can't withstand it for the rest of their
20 licensing, and the license extension, those are matter
21 of facts, I think after even fundamental discovery, we
22 should be able to get to.

23 CHAIR YOUNG: Judge Lam.

24 JUDGE LAM: Mr. Runkle, I have a couple of
25 questions for you.

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1 MR. RUNKLE: Certainly.

2 JUDGE LAM: The first one is, your basic
3 reading of Oyster Creek, CLI-07-08, is that you are
4 basically agreeing with what my reading is, which is,
5 the Commission had clearly spoken outside of the Ninth
6 Circuit territory, any licensing board shall not
7 consider terrorist attack. I think that
8 understanding, based on what you just said, I think
9 you have that understanding. But what you're urging
10 us to do is, perhaps, saying you disagree with that
11 conclusion of the Commission. Is that a correct
12 interpretation of what I just heard from you?

13 MR. RUNKLE: Yes. To carry out your
14 responsibility in relicensing, we would urge you to
15 examine the facts behind those contentions that deal
16 with aviation attacks at the Shearon Harris plant.

17 JUDGE LAM: Okay. The second question is,
18 in the future, assuming this case is closed in
19 whichever fashion it would, in the future, if there's
20 a change in the Supreme Court review, or if there is
21 a change in Commission policy of following the Ninth
22 Circuit, not only in the Ninth Circuit territory, how
23 would you litigate your client's case on terrorist
24 attack after this case is closed?

25 MR. RUNKLE: Well, assuming that we would

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1 lose.

2 JUDGE LAM: Well --

3 MR. RUNKLE: The assumption is that we
4 would lose on the -- at this Board level on this
5 issue.

6 JUDGE LAM: I hate to say that, but
7 assuming that --

8 MR. RUNKLE: Assuming.

9 JUDGE LAM: -- is the case, how would you
10 protect your client's interest? Let us say a year
11 from now, two years from now, the high court had
12 another decision, the Commission had another --

13 MR. RUNKLE: Well, what is -- what would
14 be more likely is that we would take the issue to the
15 Commission, and have them to reconsider your decision
16 on the issues. There are other kind of things, we
17 could go to Congressional. But from a litigation
18 point of view, if we took it to the Fourth Circuit,
19 we're convinced that the Fourth Circuit would rule the
20 same way the Ninth Circuit would. I mean, it's a
21 clear issue that terrorism attacks, or aviation
22 attack, whatever malicious acts, are something that
23 should be considered in the licensing of nuclear power
24 plants. And, so, then we would come back after the
25 Fourth Circuit, which we would think would agree with

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1 the Ninth Circuit. There's maybe not a precedential
2 value in it, but certainly a collegial value between
3 the different circuits. And, certainly, the factual
4 basis -- and if we need to take that up as one of my
5 client's near us has been active in some of the other
6 relicensing in different circuits, certainly, the
7 Oyster Creek is in a different circuit court. I mean,
8 that issue alone can be litigated up and down.

9 JUDGE LAM: So you do have means at your
10 disposal to protect your client's interest in this
11 regard. And assuming the Fourth Circuit not going
12 with you, then you have a good case to go to the high
13 court, because of two different Appellate Court
14 rulings.

15 MR. RUNKLE: Certainly. And, again, that
16 assumes that you'll rule against us.

17 JUDGE LAM: Okay.

18 CHAIR YOUNG: From the Staff, let's hear
19 what you have to say on this issue, just briefly, if
20 you have anything further to add.

21 MR. ROTH: Nothing in particular to add.
22 The Ninth Circuit could be used as persuasive
23 authority, that the Commission is our controlling
24 authority, and the Commission has spoken and said that
25 the license renewal, NRC has already examined

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1 terrorism under NEPA and found the impacts to be
2 already analyzed, and that they reiterated, and this
3 is from Oyster Creek that I'm reading, that they
4 reiterate their longstanding view that the NEPA
5 terrorism, the NEPA bands on terrorism --

6 CHAIR YOUNG: Pardon me?

7 (Off the record comments.)

8 CHAIR YOUNG: Okay. Mr. O'Neill.

9 MR. LEWIS: Mr. Lewis.

10 CHAIR YOUNG: Mr. Lewis.

11 MR. LEWIS: Sorry, we're trading up on
12 you. Let me just stress a couple of points that Mr.
13 Runkle raised. He argued -- he agreed, first of all,
14 that the Supreme Court's denial of cert is in no way
15 a decision on the merits; and, therefore, the Ninth
16 Circuit is the law only in the Ninth Circuit, but
17 argued that it was still incumbent upon the NRC to
18 look at the San Luis Obispo issues in each proceeding.

19 The Oyster Creek precedent that the Board
20 cited; in fact, looked at every one of the issues that
21 was addressed by the court in San Luis Obispo, so the
22 Commission's precedent in Oyster Creek did exactly
23 what Mr. Runkle said, and addressed that precedent,
24 and explained why the Commission was not following it,
25 why the Commission continues to believe that the

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1 effects of a terrorist action are not causally related
2 to license renewal. A license renewal, the Commission
3 held, is not the proximate cause of the effects of a
4 terrorist action; and, therefore, those effects do not
5 have to be considered under NEPA.

6 I did not hear Mr. Runkle distinguish that
7 case in any meaningful way. When I looked at the
8 answers and replies, the only attempt I saw to
9 distinguish that case was the assertion that not all
10 aviation attacks are caused by terrorism. However,
11 the Commission's decision in Oyster Creek clearly does
12 not depend on the terrorist label. What the
13 Commission held in Oyster Creek was that NEPA imposes
14 no legal duty to consider intentional malevolent acts.
15 The Commission held that the environmental effects
16 caused by third-party miscreants is too far removed
17 from the expected consequences to be required to be
18 considered under NEPA. Therefore, calling it
19 terrorism or calling it an intentional attack is not
20 a distinguishing factor.

21 The other assertions that Mr. Runkle made,
22 that maybe we know some information about
23 vulnerabilities is simply not a factor that's raised
24 by the Commission's precedent Oyster Creek. Again,
25 what the Commission said is, there is no proximate

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1 cause. Proximate cause is required, and so I heard
2 nothing that addressed that issue. If a case was
3 going to be distinguished, you'd have to look at what
4 the Commission held, and explain why that does not
5 apply to our plant, and that has not been done.

6 I think NC WARN is also arguing that the
7 Board needs to rule, so somehow their argument is
8 preserved. That's not correct. The Board can deny
9 this contention based on the binding precedent in
10 Oyster Creek, and should. And it's longstanding NRC
11 law that licensing boards are bound to comply with the
12 directives of a higher tribune, whether they agree
13 with them or not. I'm citing the South Carolina
14 Electric & Gas case, ALAB-710-17NRC-25 at 28, but
15 there's many cases. It's just longstanding precedent
16 that Boards follow Commission precedents. And here,
17 you have a precedent that's completely on point, and
18 completely binding.

19 CHAIR YOUNG: What was the cite you just
20 gave?

21 MR. LEWIS: South Carolina Electric & Gas
22 Company, Virgil C. Sumner, ALAB-710-17NRC-25 at 28,
23 1983. That's just one citation. There's many
24 citations where licensing boards have been required to
25 follow the precedent of appeal boards and commission's

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1 decisions.

2 CHAIR YOUNG: Thank you.

3 MR. LEWIS: The licensing board here can,
4 and should, follow the Oyster Creek precedent. If the
5 petitioners believe that that ruling is wrong, they
6 can appeal it to the Commission, and they can pursue
7 judicial review, so there is no need for a hearing in
8 order for them to preserve their right to challenge
9 this legal ruling farther down the road.

10 CHAIR YOUNG: While we are with you, just
11 move back the other direction on the -- well, before
12 we do on the backfit issue; actually, before we do -
13 Mr. Runkle, do you have any reply to anything that the
14 Staff or Applicant has argued here?

15 MR. RUNKLE: Only that the Staff asserted
16 that when the Commission says it has reviewed and said
17 that there was no possibility of a terrorism attack,
18 an aviation attack, we find that conclusion ludicrous.
19 Now whether you have to follow that decision or not,
20 I think goes out of -- I think it's a major step out
21 of what this Board needs to do when looking at the
22 relicensing for another 20 years. And whether you
23 need to --

24 CHAIR YOUNG: But --

25 MR. RUNKLE: Excuse me, ma'am.

1 CHAIR YOUNG: Go ahead.

2 MR. RUNKLE: Whether you need to follow
3 the precedents or not, it's the outcome. The
4 Commission has not reviewed the problem. It has known
5 for 20 or 30 years that there is a problem.

6 CHAIR YOUNG: Okay. I think I will
7 interrupt you, because what I really would like to
8 hear from you is the reply on whether or not we do
9 have to follow the Commission decision. Do you have
10 any authority for us not being bound by the Commission
11 precedent on the issue of whether malevolent attacks
12 are something that can be the basis of an admissible
13 contention in a license renewal proceeding? Because
14 that's really all that it would appear we have the
15 authority to decide. You may disagree with the
16 Commission's decision, and you may take it up with the
17 Commission, and take it up to higher courts, but I
18 think the primary issue that you need to address, and
19 that I wanted to hear your reply on, was the issue of
20 whether or not we have to follow what the Commission
21 has ruled in precedent in another license renewal case
22 involving the same issue, in effect.

23 MR. RUNKLE: Well, if you're to fulfill
24 your responsibilities in reviewing the application for
25 relicensing and the validity of the contentions, and

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1 whether it protects public health and safety, our
2 position is that if you feel that the Commission
3 decision does not do that, you need to investigate
4 that, and put that issue in front of them.

5 CHAIR YOUNG: Well, let me ask you here.
6 You're talking about our responsibility to investigate
7 and to review. I think we need to be a little bit
8 more precise about what our responsibility is. We
9 don't have investigative powers. The Staff is the
10 entity that investigates any factual matters. We have
11 the jurisdiction that's granted us in the law, and the
12 rules, and by the Commission when it refers a case to
13 us. And we're bound by precedent, just as any trial
14 court would be bound by precedent of an Appellate
15 authority, so I want to caution you about making
16 somewhat broad statements about how you view our
17 responsibility, without giving us some legal authority
18 for your argument, because I don't hear that legal
19 authority from you.

20 MR. RUNKLE: You're right, ma'am.

21 CHAIR YOUNG: Okay. Can you finish up,
22 and then move on to the backfit issue? And then I
23 want to hear from --

24 MR. RUNKLE: I'm finished on that issue.

25 CHAIR YOUNG: Okay. ON the backfit issue,

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1 would you -- did you want to go ahead, or shall we go
2 back to the Applicant, and then move back this
3 direction?

4 MR. RUNKLE: I mean, if we're finished
5 with that issue, we could go to the backfit --

6 CHAIR YOUNG: Okay. Do you want to
7 address that one, at this point?

8 MR. RUNKLE: Well, in light of the --

9 CHAIR YOUNG: And, again in this -- pardon
10 me for interrupting again, but again, this speaks to
11 our authority, and where that authority would
12 originate with regard to your request for backfit
13 here.

14 MR. RUNKLE: I think that's a remedy
15 that's available to you as this Board, as part of
16 determining that one of the contentions is valid,
17 after hearing that contention, after making your
18 decision. As part of that, the remedy is to deny the
19 licensing or to backfit and take care of the problem
20 as it stands. And the fire issue certainly can be
21 backfitted, and so the aviation attacks, again, but I
22 think that's a remedy, as opposed to something that
23 you need to start out at the beginning looking at.
24 It's just as we were putting the petition together, we
25 wanted to make sure that we weren't leaving that out

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1 of a remedy as we require as a possible resolution to
2 one of the contentions that was admitted and heard.

3 CHAIR YOUNG: Okay. And we may come back
4 to this in the discussion of the fire protection
5 contention, but when we do, in the interim, I'd like
6 to ask you to look at 10 CFR 54.30. In an
7 adjudicatory proceeding, from time to time the grant
8 of a license, license amendment, could be a renewed
9 license, may be conditioned on certain things which
10 may, to some extent, have the same effect. But in the
11 license renewal context, I think you need to look at
12 that particular regulation, when we get back to the
13 fire protection, or if you want to address it now. I
14 don't think we need to spend a whole lot of time on
15 this, but that would be one thing that I would want
16 the parties to look at on that issue.

17 Okay. Mr. Roth.

18 MR. ROTH: With regards to the backfit,
19 the Board is not the proper place for filing the
20 backfit issue. And the most recent case on it, as
21 pointed out in the order, was Pilgrim Power Station in
22 CLI-06-26.

23 CHAIR YOUNG: Okay.

24 MR. ROTH: And given that that reiterates
25 that in this case people had a petition for a backfit

1 order, and the NRC or the Commission pointed out the
2 rule governing adjudicatory proceedings don't provide
3 for such petitions for backfit.

4 CHAIR YOUNG: All right.

5 JUDGE LAM: And -- excuse me.

6 CHAIR YOUNG: Go ahead.

7 JUDGE LAM: Mr. Roth, I think your
8 argument about this licensing board is not the proper
9 avenue for backfit request. And in your pleadings,
10 you specifically mention perhaps 2.206 petition would
11 be a more appropriate way for the Petitioners to
12 address their grievances. Is that correct?

13 MR. ROTH: That's correct, Your Honor.

14 JUDGE LAM: May I ask you, Mr. Roth,
15 within the past 20 years of agency enforcement
16 activities, how many 2.206 requests have been granted?

17 MR. ROTH: I don't have that information
18 with me, Your Honor.

19 JUDGE LAM: My recollection is very, very
20 few of them has ever been granted. Of course, the
21 agency has an established process for considering
22 2.206 requests. The reason I raise this point is
23 this, if such a process usually does not lead to a
24 meaningful conclusion to the petitioner, do you have
25 another recommendation for the petitioner?

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1 MR. ROTH: The alternate one would be a
2 petition for rule making.

3 JUDGE LAM: So besides the 2.206, the
4 petition for rule making would be another means they
5 can come before the agency.

6 MR. ROTH: That's correct, Your Honor.

7 JUDGE LAM: And beyond that?

8 MR. ROTH: Well, they could take it up to
9 an Appellate Court if they didn't like how the
10 Commission had ruled on a particular issue.

11 JUDGE LAM: Okay. Thanks. Ms. Uttal, you
12 have any thoughts to add to this?

13 MS. UTTAL: Well, they could raise
14 appropriate issues in an appropriate application. The
15 issues may not fit in this particular application for
16 renewal, it may fit somewhere else.

17 CHAIR YOUNG: A different application by
18 the applicant with regard to --

19 MS. UTTAL: By the applicant.

20 CHAIR YOUNG: What about the issue of
21 conditioning the grant of a license, or license
22 amendment, or license renewal, on certain actions?
23 That has certainly been done in proceedings in the
24 past.

25 MS. UTTAL: I don't recall having been

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1 done in license renewal space.

2 CHAIR YOUNG: No, not in license renewal,
3 but in general, would there be anything that would
4 distinct that from the situation in license renewal
5 from other cases in which there have been conditions
6 placed?

7 MS. UTTAL: No, but any conditions that
8 are placed would have to be related to license
9 renewal, be related to aging management, or the
10 environmental issues that fall within license renewal.
11 The problem with the issues raised here is that
12 they're outside the scope of license renewal, so
13 they're inappropriate for this --

14 CHAIR YOUNG: Anything further from the
15 Staff?

16 MR. ROTH: No, Your Honor.

17 MR. LEWIS: Thank you, Judge Young. I
18 agree with the Staff, that the Commission's decision
19 in CLI-06-26 indicates that backfit requests are not
20 appropriate for license renewal. And I also agree
21 with Ms. Uttal's observation that the scope of this
22 proceeding is limited. It's limited on the safety
23 side to age-related issues. These two contentions,
24 though, are labeled as "Environmental Contentions";
25 and, therefore, I don't think they even raise a

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1 safety-related issue. If they did, the safety-related
2 aspects of security and operations are not within the
3 scope of the proceeding.

4 With respect to the environmental review,
5 the scope are those environmental issues that are
6 identified in 51.53(c)4 of the NRC's regulations, and
7 that also limits the scope of this proceeding, and the
8 Board's review. And the significance of the Oyster
9 Creek decision is that the effects of terrorism are
10 not proximate cause effects of license renewal; and,
11 therefore, don't have to be considered, so they're not
12 within the scope of a NEPA review.

13 I would like to briefly address Judge
14 Lam's pointed about 2.206 petitions. I think it's
15 somewhat of a myth that 2.206 petitions aren't
16 granted. In fact, there was a decision in the
17 Millstone license renewal proceeding a while back
18 where the County of Suffolk requested to raise
19 emergency planning in license renewal for Millstone,
20 and I think the licensing board in that proceeding
21 indicated that -- or expressed some skepticism about
22 whether the 2.206 mechanism was an adequate avenue for
23 the County of Suffolk to raise those concerns. And
24 the Commission addresses that specifically in CLI-05-
25 24, 62NRC-551, at page 565, Note 63, going on to the

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1 next page, specifically noted that "Sixteen of this
2 decade's 26 director's decisions granted at least some
3 of the relief requested." And the Commission in that
4 case explicitly discussed, this is a real process, and
5 it's one that we provide under the rules, and it's not
6 a sham.

7 JUDGE LAM: Thank you for that info.
8 You're saying 16 out of -- there's 16 approvals for
9 2.206?

10 MR. LEWIS: I'll read it. "Sixteen of
11 this decade's 26 DDs (Director's Decision), granted at
12 least some of the requested relief, either by a direct
13 grant, or by noting that the Staff action prior to the
14 DD's issuance had already provided the relief sought."
15 And then the Commission cited 16 Director's Decisions.

16 JUDGE LAM: Thank you for the information.
17 That means within one decade, the agency granted 16
18 requests out of whatever the number of total requests
19 is.

20 MR. LEWIS: That's all.

21 CHAIR YOUNG: Anything further on backfit?

22 MR. RUNKLE: If I may just on that point,
23 that information --

24 (Off mic comment.)

25 CHAIR YOUNG: Your microphone.

1 MR. RUNKLE: If I may just address that
2 last point, that 16 out of the 26 Director's Decision
3 addressed at least in passing some aspect of the 2.206
4 position, at least to reflect that the Staff had
5 looked at that issue, does not mean that a 2.206
6 petition is the way to get anything done. I think
7 there's a big difference of looking at an issue, and
8 saying that the Staff has looked at it, as to
9 resolving that in favor of the Petitioner in a 2.206
10 petition. We have not seen that as any avenue of
11 raising concerns, except, again, to try to get the
12 issue before the Commission.

13 CHAIR YOUNG: All right. Let's take a
14 short break and come back, and discuss Environmental
15 Contention III. And you have our questions on those,
16 which will serve as a sort of start point for
17 discussion. So let's see, let's take 10 minutes, 15
18 minutes? Fifteen minutes, and I'm not sure my watch
19 is right, but 15 minutes from now, which would be
20 11:15. Okay.

21 (Whereupon, the proceedings went off the
22 record at 10:58:40 a.m., and went back on the record
23 at 11:17:25 a.m.)

24 CHAIR YOUNG: All right. If everyone is
25 ready, on Contention EC-III, our main question had to

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1 do with comparing the contention in this case to the
2 one we ruled on in the Pilgrim case. I say we, I was
3 on that board with two other technical judges - in any
4 event, in that board, the petitioners challenged some
5 specific inputs to the SAMA analysis, and we limited
6 our admission of that contention to three specific
7 inputs to the SAMA analysis. And we would like for
8 you to address the admissibility of your contention,
9 in light of the situation with the Pilgrim contention.
10 And then the second had to do with the extent to which
11 a 2.206 action, or a rule making petition, would
12 address your concerns.

13 MR. RUNKLE: I'll be glad to address both
14 issues. Since there has been some discussion of the
15 2.206 petition, if you don't mind, we'll start with
16 that.

17 CHAIR YOUNG: Okay. Can you hear? Are
18 you getting him all right? Okay.

19 MR. RUNKLE: And your question is whether
20 enforcement of a 2.206 petition or a rule making
21 petition would address our concerns. I suppose if a
22 2.206 petition was -- the ruling was favorable to our
23 position, or a rule making petition would change, then
24 yes, that would meet our concern, but our concerns are
25 not dealing specifically with those enforcement and

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1 rule making issues. What it is, is at the Shearon
2 Harris Nuclear Power Plant, there has been such a
3 significant change of circumstances that the emergency
4 plan 20 years ago never would have forecast that the
5 population had gone up from - I don't recall the exact
6 numbers, but it went up a significant - 10 times in
7 two decades, and could go up from 15,000 up to 160,000
8 by the time the license extension was. So in looking
9 at the contention, it's really the change of
10 circumstances that went into the initial emergency
11 planning, that was totally unforeseen, and so any
12 deficiencies in the present plan will be carried out
13 for the next 20 years as this license runs out, and be
14 exacerbated by the significant growth of population,
15 and the changes of land use in the area. So to
16 suggest that these matters are not subject to the
17 renewal review, because they can be addressed by
18 enforcement of a rule making petition, I really think
19 begs the question. The question is whether this panel
20 needs to address this issue as part of the licensing
21 renewal.

22 CHAIR YOUNG: But did you, or your
23 clients, look at the application, the environmental
24 report portion of the application relating to
25 population and evacuation?

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1 MR. RUNKLE: Yes, ma'am.

2 CHAIR YOUNG: And, I guess to get more to
3 the first question, I don't recall seeing any specific
4 challenges to the figures in the application on
5 population, and evacuation in the SAMA analysis. And
6 I know you mentioned the SAMA issue generally in your
7 introductory portions of your petition, but I don't
8 recall that you specifically discussed the SAMA
9 analysis in your contention.

10 MR. RUNKLE: Well, the contention adopts
11 a preliminary legal position, that you have to do the
12 SAMA analysis as these issues arise. And, certainly,
13 in the emergency planning, that if the analysis is not
14 there, to be based on the variance in the numbers, or
15 based on whether the emergency plan can evacuate
16 people safely, or that special populations of home-
17 bound people are not being addressed. Certainly, the
18 contention raises all those issues. Whether there's
19 a -- we're basing the contention on that there are
20 significant changes of circumstances, and that the
21 plan does not address the impacts of so many more
22 people in that area, and so many more people that
23 could not be safely evacuated from at least a 10-mile
24 EPZ, if not the 50-mile EPZ.

25 CHAIR YOUNG: Well, on the population, the

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1 application does say that -- refer to the 2000
2 population.

3 MR. RUNKLE: Yes.

4 JUDGE MIGNEREY: It's unclear to me where
5 your contention is going. Is it related to the
6 population estimates, and your contention that you
7 don't think those are appropriate, or that the
8 evacuation procedures for the population that is
9 estimated is inappropriate, or both?

10 MR. RUNKLE: In looking at - we used the
11 2000 figures, that's from the census. I'm sure that
12 the numbers are fundamentally the same between what's
13 in the application documents, and what's in the
14 affidavit of Dr. Wing, looking at the population of
15 about 60,000. But we're also looking at the time
16 period from 2027 to 2037.

17 CHAIR YOUNG: Well, now the application
18 does say that they project for the year 2040.

19 JUDGE MIGNEREY: They have made specific
20 projections to 2040 in the application.

21 MR. RUNKLE: Okay. I understand that
22 there are projections into the future from both --
23 from our things, but that's the reason why any
24 deficiencies that are in the application now, and any
25 deficiencies that were in the application 20 years

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1 ago, will be compounded in 2027 when the current
2 license runs out, and between 2027 and 2047, which is
3 the relicensing period. And so, if you're looking at
4 the deficiencies, those are grossly compounded by the
5 changes in land use, more population, looking at the
6 initial --

7 CHAIR YOUNG: You say when you're looking
8 at the deficiencies, and I think the question was, if
9 they projected to 2040, what deficiency are you
10 alleging with regard - let's start with the population
11 project to 2040.

12 MR. RUNKLE: Oh, I don't think that's --
13 the issue is not what the population number is,
14 whether the gross population is, as we've suggested,
15 would be 220,000, is what they've suggested in 2040.
16 I mean, those are just projections, but that's the
17 reason why you need to look at the deficiencies in the
18 evacuation plan as it is now. There will be so many
19 more elderly people, so many more children, so many
20 more home-bound people, looking at the affiant members
21 of NC WARN, double-amputee, cannot get out of the
22 evacuation, but there would be many more of those
23 people. And if the present system does not take care
24 of those people now, and is not projected to take care
25 of those people in 2027, how can we expect it to do

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1 anything better by 2047?

2 CHAIR YOUNG: What would be helpful for me
3 would be if you could look at the portions of the
4 application that deal with population and evacuation,
5 and point out -- you're using phrases like "if it's
6 not sufficient now", or "if it's deficient now". What
7 specifically is deficient about what the application
8 says about evacuation, and how did you address that in
9 your contention?

10 MR. RUNKLE: In the -- the numbers of
11 projection of total population I think are matters of
12 concern. You can put the numbers out there.

13 CHAIR YOUNG: Okay. What numbers? Let's
14 try to get to the specifics of it.

15 MR. RUNKLE: Either our numbers that go
16 out to 2047, or the application's numbers that go to
17 2040. They're fundamentally the same.

18 CHAIR YOUNG: The what?

19 MR. RUNKLE: Those numbers are --

20 JUDGE MIGNEREY: Fundamentally the same.

21 CHAIR YOUNG: Oh, fundamentally the same.
22 Okay.

23 MR. RUNKLE: Yes. We're not arguing that
24 their numbers are wrong as gross numbers. You can put
25 out the numbers, but if you don't have a plan how to

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1 take care of those people in times of an accident to
2 safely evacuate them, if you can't do it for 15,000
3 people, you can't do it for 60,000 people, you can't
4 do it for 200,000 people.

5 CHAIR YOUNG: Okay. Let me see if I can
6 narrow the issue just a little bit. Did I understand
7 you to say that you're not raising a challenge about
8 the population numbers?

9 MR. RUNKLE: No, we are not.

10 CHAIR YOUNG: Okay. So what you're
11 challenging is solely related to the evacuation?

12 MR. RUNKLE: Yes.

13 CHAIR YOUNG: And --

14 MR. RUNKLE: There is no showing that you
15 can safely evacuate, even in the 10-mile EPZ, 15,000
16 people, that was 20 years ago, to 60,000 plus that are
17 there today, or the 200,000 that are there by 2047.

18 CHAIR YOUNG: So did your expert challenge
19 the, for example, evacuation speed of 1.2 meters per
20 second was selected based on data in the HNP
21 evacuation time study, that indicated 243 minutes to
22 evacuate the EPZ, which includes a 15-minute delay.
23 Did your expert take that into account in his
24 statements about the circumstances of evacuation for
25 the children, and senior citizens --

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1 MR. RUNKLE: There are certain --

2 CHAIR YOUNG: -- and so forth?

3 MR. RUNKLE: Excuse me. I'm sorry. Since
4 we're having a conversation --

5 CHAIR YOUNG: That's okay, go ahead.
6 We'll tell the court reporter to stop us if we do talk
7 over each other so he can get everything on the
8 record. But in talking about the children, the senior
9 citizens, or nursing home residents, and so forth, did
10 he say that the evacuation speed, and so forth, did
11 not take those into account?

12 MR. RUNKLE: He did not specifically
13 address the purported speed of safely evacuating the
14 10 miles in the EPZ. What he did say is that he went
15 to the basic assumptions of that time period that do
16 not address the additional population, the number of
17 people, road conditions, and the ability to get people
18 65 and older, or home-bound, or children, or people in
19 nursing homes out of there.

20 CHAIR YOUNG: You say "growth conditions",
21 meaning growth in population?

22 MR. RUNKLE: Yes, ma'am.

23 CHAIR YOUNG: But at this point, you're
24 not challenging the population figures?

25 MR. RUNKLE: No, we are not.

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1 CHAIR YOUNG: Okay.

2 MR. RUNKLE: But the assumptions are, that
3 go into that six-hour time period to evacuate, the
4 expert directly addresses.

5 CHAIR YOUNG: And those assumptions, if
6 you'll help me here, come from where? And how do they
7 relate to what's in the application?

8 MR. RUNKLE: Well, the assumptions - we're
9 addressing the assumptions that go into the
10 application.

11 CHAIR YOUNG: And point me to where I can
12 see what those are.

13 MR. RUNKLE: Basically, the six-hour time
14 period? Is that what you're --

15 CHAIR YOUNG: Where can I find the
16 assumptions that went into the - whatever time period
17 it was, the 243 minutes?

18 MR. RUNKLE: Oh, I see what you're saying.
19 I would need to contact the expert and have them go
20 through the license renewal application to be able to
21 really answer that with any specifics.

22 JUDGE MIGNEREY: To be a little more
23 specific, what I'm understanding from the conversation
24 is that your expert is not, necessarily, arguing with
25 this mean value, but arguing that the increased

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1 population will significantly affect the smaller
2 population of people who are not easily evacuated.

3 MR. RUNKLE: Well, but also in terms of
4 looking at the road conditions, if the assumption that
5 went into the six-hour evacuation time addresses the
6 current roads, we're looking at all the roads being
7 impassable, and the major highways in the area being
8 impassable by -- let's see if I can get the date on
9 that -- I think it's within 20 years of when the roads
10 will be impassable. And, again, that goes back to the
11 population increases that have been so significant,
12 and the critical populations that need to be taken
13 care of.

14 CHAIR YOUNG: Here's a sort of fundamental
15 problem I'm having. As compared to the Pilgrim
16 situation, where the specific inputs in the
17 application, in the SAMA analysis were challenged.
18 What your contention refers to is the adequacy of the
19 evacuation plan, which is a plan that, as I understand
20 it, is produced at the local level, state or local
21 level, and then sort of referred to by the licensees
22 and the NRC. But in the application, in the SAMA
23 analysis -- and the context for all of this is the
24 Commission has clearly said that opening up these
25 emergency planning and evacuation planning issues are

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1 not admissible safety issues in a license renewal
2 proceeding.

3 In Pilgrim, the contention raised in an
4 environmental context, specific challenges to certain
5 of the input data used in the SAMA analysis. What I
6 don't see in the contention are challenges to the
7 specific input data used in the SAMA analysis. It
8 refers to the evacuation plan, but I can't tell from
9 that whether that's the same thing that was used in
10 the application or not. The application is much more
11 specific than just talking about the evacuation plan,
12 and so the argument that you have raised a genuine
13 dispute on a material issue of fact or law carries
14 some persuasiveness in the context of a contention
15 based on an expert's opinion that the evacuation plan
16 doesn't take certain things into account, certain
17 assumptions don't take certain things into account.
18 But the dispute has to be with the application, and
19 I don't see - maybe I've missed it, and that's why I'm
20 asking you to address that - how your contention
21 raises a specific dispute with the actual application.

22 JUDGE MIGNEREY: What I think we're
23 looking for is some more specifics related to this
24 input that is in Section E-3.4 in the evacuation
25 section of the license renewal, which states the

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1 values used, "These values have been used in similar
2 license renewal SAMA analysis." So this is an input
3 into the SAMA analysis. We'd like some more specific
4 details.

5 CHAIR YOUNG: Did your expert -- I don't
6 think he referred to the SAMA analysis. Did your
7 expert, was he aware of what was in the SAMA analysis,
8 the input data that was used in it, specifically? And
9 does he know, or do you know that, in fact, the data
10 that was used in the SAMA analysis is the same, or
11 different than what was in the evacuation plan, and
12 whether it is based on assumptions that you're
13 challenging? I mean, that's --

14 MR. RUNKLE: I think I have to answer all
15 those questions no.

16 CHAIR YOUNG: All right. Let me see if I
17 understand it. You're saying that he did not know
18 about, or challenge the specific data in the SAMA
19 analysis. Did I understand you right?

20 MR. RUNKLE: I thought I was -- the
21 questioning I was answering, do I know whether he did
22 or not, and I don't.

23 CHAIR YOUNG: Okay.

24 MR. RUNKLE: Okay. I don't. He had
25 documents in front of him. I don't know what he based

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1 his conclusions on. Certainly, looking at Attachment
2 5 to the initial petition, one of the local
3 governments raised the same issues about the adequacy
4 of the plan, and whether they had the reference of the
5 SAMA analysis in front of them or not, I don't know.
6 I can't tell you today.

7 CHAIR YOUNG: In that context, how do you
8 argue that you've raised a genuine dispute on a
9 material issue of fact, for example? If you don't
10 know that there's a specific dispute with the
11 application, you're -- that's why we asked you to
12 compare this to Pilgrim, where they did raise a
13 specific dispute with the application, the input to
14 the SAMA analysis.

15 MR. RUNKLE: Yes, ma'am. I can't answer
16 that.

17 CHAIR YOUNG: Okay. Anything further on
18 that?

19 MR. RUNKLE: No.

20 CHAIR YOUNG: Do you have any more
21 questions?

22 JUDGE MIGNEREY: No.

23 CHAIR YOUNG: Mr. Roth, or Ms. Uttal.

24 MR. ROTH: Just with regard to emergency
25 planning, as we put in our written response, the

1 emergency planning issues are outside the scope of the
2 license renewal, and the Commission has consistently
3 held this. From what I have heard, and how we read
4 the petition, I've not seen anything that would
5 suggest that they're even within scope at all, from
6 what he's saying. He hasn't identified an issue with
7 the amendment, itself. He's uncertain of whether his
8 expert has looked at the SAMA analysis or not.
9 There's just not we see that's admissible about this,
10 either straightforward, or from the fact that the rule
11 and the Commission already said that it's outside the
12 scope.

13 JUDGE LAM: Now, Mr. Roth, I think the
14 Commission has clearly spoken in Turkey Point, and
15 Millstone on emergency plan should not be an issue
16 admissible in license renewal proceeding. That said,
17 I think in your pleading, you also mention "ongoing
18 regulatory process through mandate that review and
19 drills on emergency evacuation plans, the Commission
20 is making sure that the existing plan is adequate."
21 Let me ask you, do we assume, if the license renewal
22 is granted, if, that this is the same practice on
23 Commission review on the emergency plan as time goes
24 on will continue?

25 MR. ROTH: Since this particular license

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1 renewal would be 20 years in the future, we would just
2 be speculating as to what the rules would specifically
3 be, what the inspection program would be. But I'm
4 unaware of anything at the moment that would change
5 our inspection program, based on whether it's renewed
6 or non-renewed license for emergency planning.

7 JUDGE LAM: So the current licensing basis
8 would ensure that within the current license period
9 any population increase would not adversely impact on
10 the existing plan. If so, the existing plan would be
11 revised. That's what your pleading implied.

12 MR. ROTH: That's my understanding. Yes,
13 Your Honor.

14 JUDGE LAM: And then I would assume that
15 same implication would apply to amend the license's
16 renewal, because otherwise, how do you manage? You
17 see, the petitioner raised a valid point, admittedly
18 outside the scope of this proceeding, when times moves
19 on, there be population increase in the urban area,
20 and that can lead to difficulty of evacuation. The
21 current licensing basis adequately address that,
22 according to your pleading, through mandatory review,
23 and drills, and whatever other measure the agency,
24 Staff will do. After that -- but the issue of
25 population increases and compounding difficulty of

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1 evacuation is real. The Commission has clearly
2 prohibited that type of issue to be addressed in
3 license renewal because of the rationale that you
4 explained. The Commission does not want to open the
5 floodgate of revisiting all the issues that is under
6 the current licensing basis. But that issue, this
7 issue that Petitioner had raised about population
8 increase is real, so perhaps I would like to hear from
9 you what assurance would you give to the public
10 outside of this particular proceeding how this issue
11 is being handled right now?

12 CHAIR YOUNG: Before you answer, let me
13 just add another aspect to the question. I noticed a
14 news article in the NRC website's news section where
15 they provide articles about issues related to nuclear
16 power, and so forth, that with regard to the Oyster
17 Creek Nuclear Power Plant, that the New Jersey
18 Department of Environmental Protection, in cooperation
19 with the New Jersey State Police, was going to be
20 holding a public hearing, annual public hearing to
21 determine the adequacy and effectiveness of the New
22 Jersey Radiological Emergency Response Plan, and
23 inviting the public to come and comment, and so forth.
24 And the issues specifically included how evacuation
25 from around the area of the power plant would be

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1 handled. Is that the same type of thing that's done
2 nationwide, and specifically, would be done here?

3 MR. ROTH: To answer it best as to how the
4 current emergency planning inspections go, I would
5 have to consult with the appropriate emergency
6 planning staff. At this point, I'm not prepared to go
7 into details of our emergency planning inspection
8 process.

9 JUDGE LAM: But you know there is an
10 inspection process.

11 MR. ROTH: It's subject to an ongoing
12 regulatory review, as the Commission has repeatedly
13 said.

14 JUDGE LAM: Thank you.

15 CHAIR YOUNG: All right. Mr. O'Neill.

16 MR. O'NEILL: I'm going to address your
17 first question first, I think. And let me first state
18 that the contention is not the contention you were
19 trying to formulate with Mr. Runkle. It never
20 mentioned SAMA, it never pointed to a deficiency in
21 the SAMA --

22 CHAIR YOUNG: I'm going to caution you to
23 not characterize what I was doing as trying to
24 formulate a contention.

25 MR. O'NEILL: No, I was just saying that

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1 the discussion that you had was novel, I think,
2 compared to what Mr. Runkle said in his pleadings; and
3 Dr. Wing said in his affidavit. Dr. Wing's affidavit
4 referred to the 1987 emergency plan, and said it
5 should be updated to current populations. That's all
6 it said. There was no specificity there, at all.

7 Mr. Runkle, given a number of chances,
8 including both the Staff and the Applicant, and noting
9 that this was not an environmental contention, he was
10 actually challenging the emergency plan, did not deny
11 that he was challenging the emergency plan. And,
12 again, today he basically says he's challenged the
13 emergency plan, which is what his contention says, is
14 that he finds the emergency plan not adequate to
15 protect public health and safety. That's his
16 contention, which, of course, is outside the scope.

17 But even assuming that he meant to,
18 because he characterized it as an environmental
19 contention; and, of course, the only way he can an
20 environmental contention in, because the only thing
21 that's in the environmental report is the SAMA, even
22 if that's what he was characterizing; of course, as
23 your discussion with him indicates, and I would simply
24 be piling on to note that he doesn't meet the
25 requirements of 2.309(f), as to the specificity and

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1 what he is challenging with respect to the SAMA that
2 relates to the evacuation time estimates. And,
3 therefore, there's no basis for a contention relating
4 to - and you can contrast it quite effectively with
5 Pilgrim, where as the Chair noted, there was very
6 specific specified arguments with the inputs to the
7 Pilgrim SAMA; and, therefore, those were admitted to
8 be litigated. Here, there is no, there is no
9 specified disagreement with the inputs into the SAMA.

10 To make sure that the Board is aware,
11 there was discussion of the New Jersey Plan, the North
12 Carolina plan, of course, is comparable, but there's
13 also a Harris plan. And the Harris plan can be found
14 at Adams, and this is Rev. 52 of the Harris plan, can
15 be found at Adams at ML-070100384. It was released in
16 Adams June 19, but it was submitted to the NRC - this
17 is Rev. 52 - January 3, '07. And I mention that
18 because that is the plan, and it has been updated 52
19 times, apparently.

20 And with respect to the issue of
21 evacuation times, 5.6 of the plan on page 82 of 123,
22 specifically states that the Harris Nuclear Plant
23 evacuation time estimates will be considered valid
24 until the population within a 10-mile EPZ has
25 increased by greater than 10 percent since the last

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1 ETE was determined. If the population is found to
2 have increased by greater than 10 percent, then a
3 revised ETE will be established using appropriate
4 guidance in NUREG CR-4831, "State-of-the-art in
5 evacuation time estimate studies for nuclear power
6 plants. An ETE updated shall be performed every five
7 years to ensure the adequacy of other evacuation
8 assumptions." That is the requirement in the
9 emergency plan. The last published ETE was 2002,
10 which is referred --

11 CHAIR YOUNG: Excuse me, I'm sorry. ETE,
12 again?

13 MR. O'NEILL: Is the Evacuation Time
14 Estimate.

15 CHAIR YOUNG: Time Estimate. Okay.

16 MR. O'NEILL: ETE, Evacuation Time
17 Estimate. That wasn't input into the SAMA, as you
18 noted, and the time used there was 243 minutes to
19 evacuate the EPZ. And that was based on the 2002, not
20 1987 or some previous, study.

21 The update is now ongoing, and will be
22 published this year, which is the five-year update.
23 And so it is ongoing to ensure that there is an
24 understanding of how long it will take to evacuate the
25 citizens. Specifically, in the ETE you will find a

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1 discussion of special needs populations, and the
2 issues related to schools, nursing homes, daycare
3 centers, and what the special needs are to evacuate
4 those populations. So this is all part of an ongoing
5 process. And, of course, as the Staff noted, there
6 are drills, and continuous evaluation with the state,
7 and the county, and the local law enforcement of the
8 adequacy of emergency plans. And there has been
9 nothing, other than generalized statements that
10 they're inadequate, but there's been no specificity.
11 And, in fact, I believe Dr. Wing was thinking that the
12 emergency plan was based on 1987 data, because that's
13 what he said.

14 So I think it's fair to say that this, to
15 answer your question, is very distinguishable from
16 Pilgrim, and that it is also absolutely clear that
17 this isn't really a SAMA contention; and, therefore,
18 is outside the scope of this proceeding. But even if
19 it were, you couldn't put together a contention that
20 would meet the requirements of 2.309(f).

21 JUDGE LAM: So, Mr. O'Neill, are you
22 saying, are you really saying the Commission's
23 prohibition of consideration of evacuation plan in
24 license renewal has a genuine basis, is not arbitrary
25 and capricious exclusion. Rather, there is an ongoing

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1 process of evaluation?

2 MR. O'NEILL: I believe that the
3 Commission, when it determined the narrow scope of
4 license renewal, specifically addressed emergency
5 planning as something that was continually evaluated,
6 updated, and determined to be adequate. And,
7 consequently, it would not be necessary to look at
8 this issue in the context of a proceeding which is to
9 focus on aging management, and not on the overall
10 operation of the plant under its current licensing
11 basis. So the Commission made that decision carefully
12 and thoughtfully, to ensure that the Commission would
13 only focus on those issues that are unique to an
14 additional 20 years of operation.

15 JUDGE LAM: So calling it out of scope is
16 not something capricious, or saying hey, this doesn't
17 belong here, go elsewhere.

18 MR. O'NEILL: I think it was determined by
19 the Commission after many years of public input in a
20 rule making process, in determining what the scope of
21 this proceeding should be. So it was certainly not
22 arbitrary and capricious.

23 To answer the question number two, and
24 there has been -- which are the other ways that a
25 petitioner or a citizen might be able to address

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1 concerns related to, in this case emergency planning,
2 Mr. Lewis discussed what is the careful statement by
3 the Commission in Millstone. And, in fact, defending
4 the 2.206 petition as an appropriate way to address
5 such concerns, and one that is provided by the
6 Commission. In fact, they also chastize, I think it's
7 fair to say, the licensing board there for suggesting
8 that it was not a real process, and somewhat of a
9 sham.

10 This, I found a decision that addressed
11 all of these particular opportunities to address
12 petitioner's concern that the Chair is certainly
13 familiar with, which is LPB-02-4, 55 NRC 49, 2002,
14 Duke Energy McGuire and Catawba, where the Board
15 noted, "Challenging the Commission rule falls out to
16 decide the jurisdiction of the licensing board;
17 however, there are other avenues through which
18 petitioners may seek relief, including filing an
19 enforcement petition under 10 CFR 2.205, a rule making
20 petition under 10 CFR 2.802, or request to the
21 Commission under 10 CFR 2.335, to make an exception or
22 waive a rule based on special circumstances with
23 respect to the subject matter of the particular
24 proceeding, such that the rule would not serve the
25 purposes for which it was adopted."

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1 The Commission, some time ago,
2 specifically found that "An effective way to address
3 problems affecting nuclear reactors is to petition the
4 Commission to promulgate an amendment to its rules
5 under 10 CFR 2.802." That is some years ago in
6 Cleveland Electric Illuminating Company, Perry, LPB-
7 81-57, 14 NRC 1037, at 38-39, 1981.

8 So I believe that it's the Commission's
9 view, and the view of, I believe, the Board, that
10 these are adequate approaches to addressing concerns
11 that are outside the scope of this proceeding.

12 JUDGE LAM: Now, if I may, I want to
13 clarify for the record, the word "sham" was only used
14 by license applicant counsel in the current debate
15 here. I, for one, would not categorize the 2.206
16 petition process using that vocabulary. And, also,
17 I'd like to clarify, in my discussion on 2.206, it was
18 raised for a reason. To me, for those of us who are
19 in the business of protecting public health and
20 safety, when we hear there are a process to address
21 their grievances, the process must be transparent,
22 have reasonable chances of success. And, therefore,
23 the common citizens' grievances would be appropriately
24 addressed. That was my intent of raising the issue of
25 2.206.

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1 Now the licensee's counsel using the word
2 "sham", perhaps needs clarification from Mr. O'Neill.
3 One thing is clear --

4 MR. O'NEILL: I, actually, was referring
5 to the decision in LPB-05-16, in Millstone, that was
6 rejected by the Commission, where the licensing board
7 there said, "The Staff appears to concede there are no
8 other means by which the county's interests will be
9 protected, but Dominion trots out the venerable
10 provisions of 10 CFR 2.206. That regulation holds out
11 the promise that those dissatisfied with Staff or
12 Commission action can, outside the adjudicatory
13 process, file with the Staff a petition seeking the
14 modification of existing license. The venerability of
15 Section 2.206 is also, it's undoing for present
16 purposes, when Board members inquired at oral argument
17 about its usefulness, it was virtually conceded that,
18 as we suspected, the number of times that provision
19 has been successful invoked in the past 30 years can
20 be counted on very few fingers."

21 That was -- obviously, this Board was
22 misinformed, and I believe that the Commission was
23 making it crystal clear at Footnote 63, that, in fact,
24 this is a viable provision, and not a venerable
25 provision which really has no effect. I used the word

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1 "sham" to characterize what that word said there.

2 JUDGE LAM: Great. Thank you for the
3 clarification, because I don't think none of us intend
4 to have derogatory comments about the agency's
5 processes. Thank you again, Mr. O'Neill, I
6 appreciate that.

7 MR. O'NEILL: And particularly when I
8 quoted from a Board decision that was chaired by the
9 Chair here, in finding that those opportunities --

10 CHAIR YOUNG: In the Duke case.

11 MR. O'NEILL: In the Duke case, were
12 appropriate.

13 JUDGE LAM: Thank you.

14 CHAIR YOUNG: Just to follow-up a little
15 bit on this. First of all, did you get the Adams
16 number to look at the latest terrorist plan, because
17 I think we'd encourage you to look at that, and have
18 your expert look at that; because, obviously, you've
19 raised something that's of concern to your clients,
20 and it may be that it's not based on the most recent
21 information, and it may be that by looking at that,
22 that may address some of your concerns.

23 And then I also wanted to ask, we've
24 mentioned these NRC processes for addressing issues,
25 the 2.206 process, the 2.802 rule making petition

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1 process, and the 2.335 request for a waiver process,
2 and we -- I mentioned that state agencies who address
3 these issues often have public hearings where the
4 public can come in and take part in that process.
5 Just for informational purposes, when Harris develops
6 its plan and updates its plan, is there any process
7 for public participation in that, or how is that done?
8 Is there any information we can provide to the
9 petitioners on that?

10 MR. O'NEILL: I don't think when Harris
11 publishes its revised plan, Rev. 52, there is any
12 public participation, except to the extent that it is
13 done with coordination of local governments, county
14 governments, and state governments, with respect to
15 the emergency plan only operates with all of these
16 agencies working together with the licensee.

17 CHAIR YOUNG: And, so the appropriate
18 local government, and state government entities would
19 be an avenue for concerned citizens to raise their
20 concerns.

21 MR. O'NEILL: Of course.

22 CHAIR YOUNG: Okay. Just for
23 informational purposes.

24 MR. RUNKLE: Ma'am, may I address that
25 last point?

1 CHAIR YOUNG: Sure.

2 MR. RUNKLE: Because the petitioners have
3 been talking to representatives from the local
4 governments, and their needs are not being met by the
5 current evacuation plan, as Orange County, but other
6 local governments of the counties around the plant,
7 and the cities and towns. They don't have the
8 resources, they're not part of the planning. They are
9 expected to carry out functions --

10 CHAIR YOUNG: "They", being?

11 MR. RUNKLE: The local governments that
12 either paid staff or volunteers are putting themselves
13 in the way of danger. They don't feel they have the
14 resources and ability to at all shelter anybody
15 outside of it, so to say -- to make a decision based
16 on Mr. O'Neill's assertion that somehow or another
17 this plan is fully accepted, and goes through this
18 process that meets all these needs, that's not
19 happening. And I think going to -- we're trying to
20 address this in the contention, of getting the local
21 governments to say why they're not. They haven't been
22 able to get copies of it. I will give them the Adams
23 number on this, because local governments have tried
24 for months to get copies of the current evacuation
25 plans, to see how their role in these plans are going

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1 to be taken care of. So in the real world, this is
2 not happening. And in the real world, the NRC, this
3 process of emergency plan around Shearon Harris, is
4 just not happening. And you can't make a decision on
5 that, whether the contention doesn't make the criteria
6 or have adequate basis, you can make that, but you
7 cannot say that the current process is addressing the
8 needs of the people or the local governments, because
9 it's just not.

10 CHAIR YOUNG: Well, I think you're right.
11 Our decision is not to be based on anything other than
12 the contention admissibility rule, and the case law
13 that's interpreted that. And there's no question
14 about that. And that's one of the reasons I wanted
15 you to address the comparison with the Pilgrim
16 contention.

17 MR. RUNKLE: I understand.

18 CHAIR YOUNG: And to address the specifics
19 of whether the application had been specifically
20 challenged. However, obviously, a long time ago, I
21 did some work having to do with juvenile law, and one
22 of the problems that we dealt with was the fact that
23 sometimes kids would fall between the cracks, so to
24 speak, when one agency or one source couldn't handle
25 a kid, and another, or a child, and they also didn't

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1 meet the criteria for another agency - what we worked
2 on was trying to make sure that kids didn't fall
3 through the cracks. And, obviously, all of our
4 systems had great demands placed on them since 9/11,
5 and there's not perfection out there.

6 The purpose for discussing some of these
7 alternative means, I think, is really to just provide
8 information to the petitioners, who have some strong
9 concerns here. And Mr. O'Neill has provided the
10 reference to the current plan, and that may be helpful
11 to the petitioners, but that's sort of a separate
12 issue than whether or not we admit the contention
13 based on the law and regulations relating to
14 contention admissibility.

15 And since we're on this, I just wanted to
16 provide the opportunity for any information that might
17 otherwise be falling through the cracks, or that
18 people might not be aware of, to be provided, since
19 there is precedent for at least providing that
20 information in the interest of informing the public,
21 and letting the public know about ways to approach
22 issues. Sometimes we get contentions that raise
23 significant concerns, but they're simply not within
24 our jurisdiction, and we have to keep that clear, as
25 well.

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1 So, with that said, is there anything
2 further that anyone would like to provide in the way
3 or information, or any other questions that we can
4 address on this subject before we break for lunch?

5 MR. RUNKLE: There was just one statement
6 I think that will come up in the discussion this
7 afternoon. Mr. O'Neill said that we can't address
8 anything in the current license base, and only aging
9 issues. I think that's very relevant to the fire
10 protection contention, and --

11 CHAIR YOUNG: We're going to get into
12 those issues when we address the fire protection.

13 MR. RUNKLE: Okay.

14 CHAIR YOUNG: Obviously, from our order,
15 you may have gleaned that most of our questions, and
16 I think a lot of the discussion will focus on some of
17 the issues related to fire protection, and the
18 questions that we've raised, along with any related
19 ones. Anything further? Mr. O'Neill, did you have
20 anything you wanted to --

21 MR. O'NEILL: No, ma'am.

22 CHAIR YOUNG: All right. It's about
23 12:15. Is that right? Let's come back at 1:15, and
24 be ready to discuss Contention EC-1.

25 MR. RUNKLE: I missed the time, ma'am.

1 CHAIR YOUNG: 1:15.

2 MR. RUNKLE: Yes, ma'am.

3 CHAIR YOUNG: All right. Thank you all.

4 (Whereupon, the proceedings went off the
5 record at 12:06 p.m., and went back on the record at
6 1:18 p.m.)

7 CHAIR YOUNG: On the record. All right.
8 I think you can probably -- We're on the record, okay.
9 I think you can probably tell from our comments this
10 morning and from the questions that we sent you that
11 most of the questions we have really relate to this
12 technical contention about fire protection. Among the
13 issues and I'll just sort of summarize them briefly
14 and then we'll hear your arguments and interrupt as
15 we've been doing if we have questions, but among the
16 issues are whether the contentions and contentions
17 relating to fire protection are within the scope of
18 license renewal, whether the contention brings in
19 aging issues and then the relevance of this language
20 from the standard review plan suggesting that the
21 staff reviews whether there's a reasonable assurance
22 that licensed activities will continue to be conducted
23 in accordance with the current licensing basis during
24 the renewed license term.

25 And if as the Commission said in Turkey

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1 Point the scope of adjudicatory hearings are the same
2 as the scope of the staff's review, whether
3 notwithstanding aging issues, the question of whether
4 the fire protection activities associated with the
5 parts raised by the contention, whether those will
6 continue to be conducted or will be conducted in the
7 license renewal term in accordance with the current
8 licensing basis. If I left out a verb there, pardon
9 me. And we've set out these questions and there are
10 other instances of language in the standard review
11 plan both for the license renewal and for safety
12 analysis reports in general, their references to
13 license renewal in there we've been sort of looking at
14 and would like you all to address.

15 And then finally, the staff mentioned in
16 their response, I'm sorry, in the Director's decision
17 that there would be a license amendment proceeding at
18 any time at which the requirements for fire protection
19 were changed and the relevance of that to this
20 proceeding.

21 So just giving that sort of brief summary
22 to set the stage, we would like to hear from you on
23 these issues. We could do this in one of several
24 ways, I guess. The first question would be -- I tend
25 to think that it might be better to address all of the

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1 issues together, but the last one is sort of
2 separable. So we could address the different issues
3 separably. Do the parties have any viewpoint on that?

4 Well, then let's just go ahead with all of
5 them and we'll ask the Petitioner to start here for us
6 and then we'll probably have questions as we go for
7 all of you.

8 MR. RUNKLE: Thank you. Well, as this
9 contention was developed, the parties and several
10 other parties besides the Petitioners had submitted a
11 2206 petition to the Commission on the fire protection
12 rules and this contention in large part reflects the
13 same allegations in the 2206 petition with basis in
14 fact and the same basis in law.

15 And rather than to go into all the details
16 of what is in the 2206 petition, it's apparent that at
17 least since 1989 the Shearon Harris Plant has been out
18 of violation of the fire protection rules.

19 CHAIR YOUNG: In violation?

20 MR. RUNKLE: Yes. In violation.

21 CHAIR YOUNG: You said "out of violation."

22 MR. RUNKLE: Has been, yes.

23 CHAIR YOUNG: Out of compliance.

24 MR. RUNKLE: Out of compliance, yes.

25 Excuse me. Has been out of compliance with the fire

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1 protection rule since 1989 and that over the years
2 there has been a lot of documents and a lot of actions
3 by the NRC staff to correct the problem, several
4 directions and there was even some consent orders
5 entered into with some of the other reactors, but
6 Carolina Power and Light, now Progress Energy, has
7 made continual promises that they would come in
8 compliance with the fire protection rules.

9 They have not and the way that this has
10 been handled by the NRC staff is to allow them -- They
11 have this sort of discretionary enforcement and as
12 long as they're making the promises that they will
13 come into compliance, they can do that. So we brought
14 this as a 2206 petition. They are out of compliance.
15 We want to have enforcement action.

16 Between the time that we filed the
17 petition and the present time the Director has given
18 a decision. There is other information that might
19 come out between now and the hearing. My
20 understanding is that the Government Accountability
21 Office is doing an investigation of how the NRC has
22 handled the fire protection issues at Harris and some
23 of the other plants in the same situation.

24 So there's been a lot of activity around
25 this issue and of the issues that we've presented to

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1 this Board, it's really the one that's been most
2 fleshed out because there's been a lot of
3 documentation. There are reams and -- As we've cited
4 in the petition and also in the reply, there have been
5 several documents that have been filed and they've
6 been, I think, very adequately referenced in citations
7 to primarily NRC documents and to a lesser respect,
8 Progress Energy documents that they're out of
9 compliance. They've been out of compliance for 20
10 years.

11 So in bringing the contention to the
12 Board, there are really two issues. One is since
13 1989, so 18 years, if they've been out of compliance,
14 can they show that they will be in compliance in 2027
15 and through the time period between 2027 and 2047.
16 There has been no time schedules, no assurances, that
17 no meaningful -- In the record as far as we can tell,
18 that they will be in compliance in 2027, that these
19 problems will continue to reoccur, the reliance on
20 unlawful installation of the cables that are important
21 for fire protection, these manual actions that have
22 never been analyzed, never been tested, other kind of
23 activities around the plant to do fire protection.
24 There has been no reasonable assurance at this point
25 that they're in compliance now or that they will be in

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1 compliance for the time period for the relicensing.

2 So I want to address the reasonable
3 assurance because I think that's an important part and
4 as we sort of walked around it in this morning's
5 discussion, there is this presumption of compliance in
6 the NRC rules. In looking at the '95 Statement of
7 Consideration, the regulatory process provides a
8 reasonable assurance that there is compliance with
9 current license basis, the CLB. And this reasonable
10 assurance, I think, echoes through the rules. We
11 think that one of the primary determinations that this
12 Board has to make is that the plant is in compliance
13 and will be in compliance during the period for the
14 relicensing.

15 There has to be some kind of reasonable
16 assurance that the way things are going now that there
17 is compliance. In looking at the 2005 Review Plan
18 which is that NUREG 1800, it gives us really the scope
19 of the review and it says, "In addition to the
20 technical information under 10 CFR 54.21, general
21 information and other technical specification changes
22 and environmental information." And to quote, "the
23 application must be sufficiently detailed to permit
24 the reviewers to determine (1) whether there is
25 reasonable assurance that the activities authorized by

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1 the renewed license will continue to be conducted in
2 accordance with the CLB" and if they're not in
3 compliance with the CLB now and there's no assertion
4 or even time schedule that they will be in compliance
5 with the CLB, we don't see how this Board can make its
6 determination that there's a reasonable assurance that
7 they will be in compliance later on, sometime in the
8 future.

9 And especially with this fire protection
10 because it's been so well documented and it's been the
11 subject of the staff investigation that was part of
12 the Director's decision in 2206, they're out of
13 compliance. They've been out of compliance. The NRC
14 staff has not done its job to ensure that they will
15 come into compliance.

16 There's been a lot of directives. There
17 have been a lot of memos. There have been a lot of
18 notices about coming into compliance. There have been
19 proposals for changes of rules to change the fire
20 protection laws and to this date, they're not out of
21 compliance. I mean I think that's well shown. The
22 Director's decision talks about being out of
23 compliance since 1989.

24 JUDGE LAM: Excuse me. I'm going to
25 interrupt, Mr. Runkle. Would you be able to provide

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1 some concrete examples of this noncompliance and in
2 whatever you've been talking about and that you're
3 saying?

4 MR. RUNKLE: Yes. In looking at the 2206
5 petition, the primary requirements for the -- the
6 primary rules are qualified three hour fire barrier
7 system. This is for the electric lines in the
8 conduits. So a three hour fire protection barrier or
9 a one hour barrier plus smoke detectors and sprinklers
10 or a minimum 20 foot separation.

11 At Harris it has relied on the hemic
12 systems, the HT systems and a number of these fire
13 barriers that don't last three hours. They don't last
14 one hour. It's been really -- It's been clear since
15 all the testings and all the directives from the NRC
16 that you cannot rely on these particular fire barriers
17 with any kind of reliance.

18 And in several places, there aren't a 20
19 foot separation between the electric cable treads.
20 That has been documented. There are those kinds of
21 problems that have been throughout the plant and miles
22 of miles of these conduits don't have the adequate
23 fire barriers and they don't have the 20 foot
24 separation.

25 What Shearon Harris -- What they have done

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1 at Shearon Harris instead to comply is these operator
2 manual actions and we've documented a couple of those.
3 I'm not sure if you are familiar with how those work,
4 but there are a list of tasks that an operator has to
5 do. So if there's a fire, you pull out your book and
6 see what you have to do. We have one part of one of
7 them documented in the report that was part of the
8 fire protection. You have to place a generator
9 circuit breaker control, then place a motor circuit
10 control, then run down the road and you have to run a
11 quarter mile to a closet and turn some valve.

12 These operator manual actions have never
13 been assessed. They've never been analyzed. They've
14 never been approved by the NRC. We don't know if they
15 work. We don't know if they make the problem worse.
16 It's this kind of reliance on these unapproved --
17 There was a rulemaking a couple years ago by the
18 industry to try to get the operator manual actions as
19 part of the rules as a substitute for the three hour
20 barriers and the 20 foot separation. The NRC said,
21 "No. "We're not going to change the rules and allow
22 those." So this thing has been going on and
23 everybody, I think, understands that you can't
24 substitute these unanalyzed, unapproved actions for
25 the fire protection rules.

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1 So at this point with the Director's
2 decision which we incorporate by reference that
3 they're out of compliance and the relevancy, I think,
4 to this Board's decision is they've been out of
5 compliance for 18 years. Will they be in compliance
6 from now until when their licensing expires and is
7 there any reasonable assurance given what has happened
8 over the last 18 years, will they be in compliance
9 with fire protection rules from 2027 to 2047?

10 We don't think so. We think it's a matter
11 for a hearing. There are factual allegations. I'm
12 sure my colleagues here will talk about plans that
13 they have in place now to come into compliance with
14 FPA 805 or whatever the number is on that. But those
15 kind of assurances have been made for the last 10, 15,
16 18 years that they will come into that and until there
17 is this reasonable assurance that there -- We think
18 that your determination should be whether there's a
19 reasonable assurance or compliance with the CLB today.
20 But certainly, there is no reasonable assurance given
21 the record on the fire protection that they will be in
22 compliance with the CLB during the period for the
23 relicensing.

24 Of the contentions, this is the one that's
25 most documented and it's the most troublesome to us

1. because the Shearon Harris plant has been notified for
2. years that they're out of compliance and they have
3. made numerous promises as in the record and as the
4. Director and the staff determined in their decision.
5. There have been another lot of assertions that they
6. will become into compliance. Those have never been
7. met.

8. And so if they come into compliance in the
9. next five, eight, ten years, that may be one thing.
10. Let them come back for a relicensing application at
11. that time. But if they're coming to you for a
12. relicensing today, they're out of compliance. They're
13. going to be out of compliance for the next 20 years.
14. They're going to be out of compliance during the next
15. 20 years.

16. You also asked a question about looking at
17. a specific section in the license renewal application
18. and looking at Section 2.3.3.3-1 which addresses fire
19. protection, I think it's telling that in looking at
20. the system description which is on page 2.3-114, it
21. talks about what the fire protection system at the
22. Harris plant is, what the design features of the
23. Harris are: water supply and distribution system;
24. automatic suppressing system; fire detection system;
25. manual fire responsive equipment and number five,

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1 certain types of fire barriers, i.e., fire doors and
2 penetrations for piping, electrical cable conduit and
3 HVAC ducts.

4 They're admitting that those are part of
5 the fire -- They are a very important part of the fire
6 protection system and as part of their 54.21 technical
7 review, they state that they are looking at the fire
8 protection system. But if you will go along and look
9 at what's not in part of their technical review, they
10 don't look at the (5) certain types of barriers and in
11 particular, the electrical cable conduit and the
12 different cable separation. There's no analysis of
13 that as part of their technical review.

14 So we know they're out of compliance.
15 They haven't looked at it as part of the relicensing.
16 There's no reasonable assurance that things are going
17 to change. They haven't reviewed it to see if it's in
18 compliance.

19 I think the last point we really need to
20 address is whether this Board is required just to look
21 at aging in the technical information, whether just to
22 look at aging components and I need to go back to this
23 reasonable assurance. We think that that's very much
24 a part of it. Aging, you get to the aging once you
25 adopt, accept, the presumption of reasonable assurance

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1 of compliance.

2 Now this, I don't think that this opens up
3 all possible licensing issues from the original
4 license that are now in the CLB. But I think it opens
5 up those where you're out of compliance, that you have
6 a history of compliance and they're significant. So
7 the reasonable assurance, I think, is that this plant
8 can be operated safety and protective of the public
9 health and the environment. So once you -- If this
10 Board would adopt the presumption that the Plaintiff
11 is in compliance, then you can look at aging, look at
12 some of the aging issues.

13 For the certain types of fire barriers and
14 electrical cable and conduits, there is an aging
15 component of that. As the cables themselves age,
16 there's a breakdown in the sheathing and sparking
17 could cause a malfunction either to impair proper
18 shutdown or cause some kind of improper reading
19 somewhere or not work if you needed to shut down. So
20 there's an aging component.

21 But we don't feel you even need to get
22 that far into the analysis. This reasonable
23 assurance, I think, is telling in certain given the
24 NUREG 1800 restrictions so show that there is
25 compliance, that there's going to be compliance with

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1 CLB. In this instance, there isn't. They've been
2 warned about it. They have made promises to correct
3 the problem. They have not done so and so we can't
4 see that there's any assurance, let alone reasonable
5 assurance that this problem will be corrected by 2027
6 and I guess, at a hearing we could argue about whether
7 any plans to correct the problem will happen before
8 then or after then or what they're planning on doing.
9 But given the record and it's fairly extensive after
10 the 2206, we don't see any assurances that this
11 problem is going to be correct in the near future or
12 even in the long future.

13 Do you have any other questions? I think
14 I've addressed the issues that you've laid out.

15 CHAIR YOUNG: Well, the third one was --
16 I think the Director's decision mentioned page seven
17 and eight.

18 MR. RUNKLE: Oh certainly. Let me --

19 CHAIR YOUNG: The license amendment for
20 transition whenever there's a petition for or an
21 application for a license amendment, then there would
22 be an opportunity to petition for a hearing and the
23 relevance of that to the admissibility of the
24 contention in this license renewal proceeding.

25 MR. RUNKLE: Okay. As I understand the

1 Director, if they do change what rules they need to
2 comply on, there's a new procedure where you can look
3 at -- do a complete analysis and do fire rules and do
4 that instead of complying with the specific fire
5 protection rules, the barrier separation, the
6 different regulatory specific requirements. If they
7 do go along that route after they do their
8 investigation, they can change the practices. That
9 would be a licensing amendment proceeding.

10 There is no reasonable assurance that
11 that's ever going to happen. That's another promise
12 that that's one way that they could go ahead and get
13 into compliance if they go down that route. Whether
14 they go down in one year, five years or 40 years,
15 there's nothing at this point. We would feel a lot
16 more comfortable on this contention if they had gone
17 through a licensing amendment and come into compliance
18 either with the rules as they stand now or with FPA
19 805 which is the analysis of all the different risks
20 and that kind of thing.

21 But we're here in 2007 and similarly to
22 what we talked about this morning as an opportunity
23 for us to have our issues heard, you can have your
24 2206 to have your things heard or we have something in
25 the future, some amendment proceeding. But at this

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1 point, that proceeding hasn't been started. There's
2 no timetables for it. There's no assurance that it
3 will ever happen and they will continue to be out of
4 compliance as they have been for the last 18 years.

5 JUDGE LAM: Now, Mr. Runkle, I am sure
6 you're familiar with our regulation 54.30, matters not
7 subject to a renewal review and it appears this
8 specifically talks about the issue that you are
9 dealing with now. This part of the regulation tells
10 me if I read it correctly whatever deficiency under
11 the current licensing basis the licensee shall take
12 care of it with appropriate measures. Therefore,
13 these type of matters are not permissible issues to be
14 reviewed in a license renewal proceeding.

15 How would you -- I hear loud and clear
16 what you are saying. How would you reconcile the
17 regulation as we have before us relative to what you
18 were saying that there was a deficiency for 15 years.
19 One would expect the deficiency to continue well into
20 the license renewal?

21 MR. RUNKLE: There is a significant
22 difference between the 54.30, matters not subject to
23 renewal review. We are not challenging whether
24 they're in compliance or not with the CLB, the current
25 licensing basis. We took the advice, went to the 2206

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1 route trying to address that they're out of compliance
2 today. We're not asking for you to review whether
3 they're in or not in compliance today.

4 We're saying they're out of compliance
5 today after going through the 2006 process. They're
6 not going to be in compliance for the rest of the
7 initial permitting process. But there is no
8 reasonable assurance given the history that they're
9 going to be in compliance from 2027 to 2047. So those
10 are different things.

11 The actual factual basis and the proof for
12 both the 2006 and the large part at a hearing would be
13 fairly similar. So show that -- We're not asking them
14 to come into compliance. We're saying that you cannot
15 grant -- You can't relicense them until they are in
16 compliance or at least, there's a reasonable assurance
17 that they're going to be in compliance in the
18 relicensing period. And, see, that's a difference,
19 sir.

20 JUDGE LAM: So what you're saying is based
21 on their history of noncompliance, you extrapolate,
22 based on that historical record, into the license
23 renewal period and make the allegation that they would
24 not be in compliance because of the historical,
25 factual performances and that's what you want us to

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1 consider.

2 MR. RUNKLE: Yes. And we're not just
3 extrapolating that they're out of compliance. We're
4 also extrapolating that there is no specific assertion
5 or no specific timetable or that they will be in
6 compliance. So it's worse than being out of
7 compliance. They're not even saying we will be in
8 compliance by such and such a date or as a firm
9 enforced guideline.

10 Now we've seen promises that have happened
11 a number of times in the past that haven't been lived
12 up to. If there was a firm date that you can be in
13 compliance by your next re-outing or we will shut down
14 the plant, that goes a long way to showing that they
15 will be in compliance. But at this point, they're not
16 only out of compliance. There's really no plan to be
17 in compliance. So we're extrapolating, but we're also
18 saying that there's nothing between now and 2027 that
19 shows us that they will become in compliance.

20 CHAIR YOUNG: Thank you. Let's go to the
21 staff. Which one of you wants to address these issues
22 and we really do want to hear from the staff on some
23 of these things. I think it can be said that this
24 argument about the reasonable assurance that the
25 Applicant will be in compliance during the term of the

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1 license renewal is something that I've not seen in
2 other cases and it's based on the staff's own
3 directives basically in the standard review plan. So
4 go ahead and give us your responses and arguments on
5 these issues and we might have questions.

6 MR. ROTH: Yes. Sure. Well, for starts,
7 the 10 CFR 54.30, the matter is not subject a renewal
8 review, that supersedes anything that might be written
9 in the SRPs, whether it's the license renewal SRP or
10 the other cited SRP that's a regulation and that's the
11 one that says their compliance is not within the scope
12 of the license renewal.

13 CHAIR YOUNG: Well, let's -- And this is
14 where we need to probably start asking you questions
15 because I think what the Petitioners are saying as I
16 understand it is -- The thing that's not within the
17 scope of license renewal is the licensee's compliance
18 with the obligation to take measures under its current
19 license and what the Petitioners are saying is that
20 the reasonable assurance that they will be in
21 compliance, not take measures but be in compliance in
22 the license renewal term is a separate issue than what
23 they're going to do in order to get in compliance and
24 that the staff still looks and therefore we must still
25 at the likelihood that they will be in compliance

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1 during the term of any renewed license that might be
2 issued.

3 MR. ROTH: I think the Commission in a
4 rulemaking, in 1995 rulemaking, has directly spoken to
5 whether you're in compliance or not and the Commission
6 has said that the Commission does not contend that all
7 reactors are in compliance with their respective CLBs
8 on a continuous basis. From that, it's reasonable to
9 say that it would apply both during the extended
10 license or the renewed license and the current
11 license, the compliance part of it and that's 60 Fed
12 Reg 2247(3) and (4) or page 17 of our answer.

13 CHAIR YOUNG: I think the argument can
14 still be made that even though the Commission doesn't
15 assume that you're always in compliance that there is
16 still this responsibility on the part of the staff to
17 determine whether there is reasonable assurance that
18 they will be in compliance in the license renewal term
19 and the Petitioners have presented quite a bit of
20 support for their argument that there is not
21 reasonable assurance that they will be in compliance
22 during the license renewal term and I haven't heard
23 you zero in right onto that issue yet.

24 MR. ROTH: Well, what they're -- As I
25 understand what they are alleging, it's that because

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1 they had allegedly been out of compliance and there's
2 even enforcement discretions, we can say there's been
3 noncompliances that in license renewal space that the
4 Board's current review has to say how it's going to go
5 into the future.

6 Our review guidance goes for how to look
7 at items that are included in the scope of license
8 renewal, aging management, time limited aging analysis
9 items, not the inspection process 20 years in the
10 future, 19 years in the future for this plant.

11 CHAIR YOUNG: But what the staff's
12 standard review plan does say is that the reviewers
13 have to determine whether there's a reasonable
14 assurance that the activities authorized by the
15 renewed license will continue to be conducted in
16 accordance with the current licensing basis in the
17 renewed term. So that's still part of the
18 responsibility of the staff reviewers.

19 And the Commission has said that the scope
20 of adjudication is the same as the scope of the staff
21 review. I think recently another Board has said that
22 -- This is in the, let's see, July 11th memorandum in
23 order in the Oyster Creek case. Citizens may rely
24 upon relevant information arising from the issue in
25 that case. To support their challenge to the

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1 frequency of the, it was an ultrasonic testing
2 monitoring program for underground pipes, I think, for
3 the period of extended operation.

4 So I hear you sort of going around the
5 outsides of the issue here, but I don't hear you
6 really addressing the issue raised by this reasonable
7 assurance language in the staff's own review plan.

8 MS. UTTAL: Can you give us one minute?

9 (Off the record discussion.)

10 CHAIR YOUNG: One of the reasons we sent
11 these questions out was because we wanted you to be
12 able to be prepared to address these issues arising
13 out of the review plan.

14 MR. ROTH: And withing that, Your Honor,
15 I hope that my answer was on point for that with
16 regards with the compliance, the concern, we don't
17 have any way to show that there's current compliance
18 and that's somehow within the Board --

19 CHAIR YOUNG: I'm sorry. You don't have
20 any?

21 MR. ROTH: Any way to show that we will
22 have the compliance in the future but lone current
23 compliance. That's what we're hearing and that's what
24 the 2206 has alleged.

25 CHAIR YOUNG: And I think the current

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1 compliance is not on the table. What's on the table,
2 what's been raised, is the future compliance during
3 the renewed term.

4 MR. ROTH: And the concern there is to get
5 around the language in or to address the language that
6 shows up in the SRP and the SRP --

7 (Off the record discussion.)

8 MR. O'NEILL: Judge, Your Honor, could I -

9 -
10 CHAIR YOUNG: Very briefly.

11 MR. O'NEILL: Just something to help in
12 this area. The SRP summarizes, actually the paragraph
13 in the SRP summarizes --

14 CHAIR YOUNG: Just a very short -- Hold
15 on. Just a very short, brief, on-point statement you
16 can make. But I don't want to open up to your
17 argument at this point. We're hearing from the staff.

18 MR. O'NEILL: I'm not. 54.29, if you look
19 at 54.29 and read it, you'll find that the language in
20 the standard review plan summarizes that but it
21 doesn't include the last charter which if you read it
22 puts it in better context and gets you out of the do
23 hoop that we're in.

24 CHAIR YOUNG: Okay. You can make that
25 argument when we get to you. Thank you.

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1 MR. O'NEILL: I'm just trying to --

2 CHAIR YOUNG: Thank you.

3 (Off the record discussion.)

4 MR. ROTH: And, Your Honors, on page 16 of
5 our answer, we addressed the 54.29 already and as the
6 counsel for the staff or, pardon me, the counsel for
7 the Applicant has said, there's the standard for
8 renewed license and the future assurance of compliance
9 during that renewed term is not one of the standards
10 for issuance. That reasonable assurance that
11 activity's authorized will continue to be --

12 CHAIR YOUNG: Repeat what you just said
13 and could you speak up a little bit or hold the mike
14 a little bit closer because you're speaking very
15 softly.

16 MR. ROTH: Well, we mentioned 54.29. We
17 cite that already in our answer and within 54.29, my
18 reading of it, is if there is reasonable assurance
19 that an activity is authorized by the renewed license
20 will continue to be conducted in accordance with the
21 CRB of the current licensing basis. For the assurance
22 part of it, if we get to the Director's decision on
23 that, the Director's decision describes what the staff
24 is doing and what the Applicant is doing to bring
25 itself within compliance and also mentions the planned

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1 June 2008 license amendment where it transitions to
2 its new fire protection program under 54.30(c).

3 I would assert that if the concern is that
4 we don't have anything right now that would overcome
5 the allegedly 18 years of noncompliance, that the
6 Director's decision is describing how the compliance
7 is going to occur.

8 CHAIR YOUNG: But that, I mean, in terms
9 of this proceeding, what's in the Director's decision
10 about how this is going to be addressed is not -- That
11 almost goes to the merits of the contention in this
12 proceeding and I don't think you're saying that the
13 Director's decision would be binding in some way.

14 MR. ROTH: No, but I believe the concern
15 is how is the demonstration of current license
16 compliance, how is that going to be shown 20 years
17 from now that they're going to be in compliance for
18 issuing a renewed license.

19 CHAIR YOUNG: But what I'm saying is that
20 your argument that the Director's decision explains
21 that seems to me to go to the merits of the question
22 of how it's going to be shown, doesn't it?

23 MR. ROTH: Yes, that would somewhat go to
24 the merits, Your Honor.

25 JUDGE LAM: Now if I may interrupt, Mr.

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1 Roth, the way I read 54.29, it appears to support the
2 Petitioner's reasoning. The way I read 54.29, it says
3 for the renewal of a license to be issued there must
4 be reasonable assurance that the activities authorized
5 by the renewal license would continue to be conducted
6 in accordance with the CLB. The Petitioner made the
7 allegation that there's no reasonable assurance that
8 the renewal license would continue to be conducted in
9 accordance with the current CLB because right now the
10 CLB is not compliance in terms of fire protection. So
11 when you point us to 54.29 for guidance for denying
12 the Petitioner's contention, do you have a different
13 interpretation of how 54.29 should be read?

14 MR. ROTH: Well, let me jump to Turkey
15 Point which I think will help us figure out what that
16 regulation is requiring and Turkey Point which the
17 order reflected, not the order, the order on this
18 question says that if during a review there is not
19 reasonable assurance during the current license term
20 that activities will be conducted in CLB. The
21 licensee will take measures under its current license
22 to ensure the intended functions of those systems,
23 components or structures will be maintained in
24 accordance with the CLB throughout the license.

25 To me what that says is that if they have

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1 the current issue that that's what stabilizes the
2 current issue that that is outside the scope of
3 license renewal. Turkey Point goes on to say the
4 adequacy of these measures for the current license is
5 not within the scope of license renewal. To me, at
6 Turkey Point, the Commission is saying that if we find
7 an issue, the fire protection is noncompliant, that
8 that's addressed currently. It's not allowed to be
9 separated off into the renewed license and
10 presumptively if this was the last day of license
11 renewal for the last day of the current license, I
12 guess -- I withdraw that comment. That's too much
13 speculation.

14 CHAIR YOUNG: I think the argument you may
15 want to be making based on what Mr. O'Neill pointed
16 out is that the reasonable assurance language about
17 the activities authorized by the renewed license will
18 continue to be conducted in accordance with the
19 current licensing basis is that that is limited to
20 managing the effects of aging, time limited aging
21 analyses. Was that your argument?

22 MR. O'NEILL: Precisely. That's what it
23 says.

24 CHAIR YOUNG: Okay. So maybe that's where
25 we need to focus and I want to hear from you, Mr.

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1 Runkle, on that again, too. But --

2 JUDGE LAM: Is that what it says? I
3 didn't -- I only see after the period the regulations
4 says "These matters are" and then proceed to list two
5 of them.

6 MR. O'NEILL: I'm sorry, Judge Lam. The
7 word "matters" is in the first line and so if you read
8 the entire, beginning with "matters." "With respect
9 to the matters identified in this paragraph" that's
10 what the license renewal is all about. There is a
11 standard and to make it crystal clear, it says what is
12 it that we're looking at. These matters are one and
13 two, where if you go to 54.30, matters not subject to
14 renewal review, it makes it very clear that what isn't
15 subject to it which is what Turkey Point said.

16 So I believe, and we can also go through
17 other parts of the standard review plan and find that
18 it is clear later than it is in the introduction
19 because it's consistent with the rules and the rules
20 do not allow you to come in with the rebuttal
21 presumption and the reasonable assurance that between
22 2027 and 2047 that the licensee is going to meet the
23 current licensing basis as part of the staff review.
24 You can't get from here to there.

25 CHAIR YOUNG: Okay.

1 JUDGE LAM: Now you say the first line.
2 First line of what? 54.29?

3 MR. O'NEILL: A). Actions have been
4 identified --

5 (Off the record comments.)

6 JUDGE LAM: Okay.

7 MR. O'NEILL: That's where "matters" comes
8 in. So that the predicate for matters.

9 JUDGE LAM: Okay. Thanks.

10 CHAIR YOUNG: Let me -- Going back to the
11 staff. Let me ask the staff and if you need to ask
12 the people who are here with you who do the actual
13 review or were in charge of the actual review, feel
14 free. But what -- On fire protection, just looking at
15 the section, the part of the application. Hold on.
16 Let me find the part of the application that has to do
17 with fire protection. I had it a moment ago. There
18 are too many papers here. Right?

19 (Off the record discussion.)

20 CHAIR YOUNG: Here it is. All right. I
21 guess this is where we get to the parts of the
22 application. Looking at the discussion of fire
23 protection in the application -- And Mr. Runkle made
24 some reference to aging issues to the extent that it's
25 necessary to consider those, but I think he argued

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1 that you don't even have to get to that point. But
2 let's assume we do. The part of the application that
3 deals with fire protection, at least, it doesn't leap
4 out at you which parts or how all the parts that are
5 discussed in that section are related to aging in some
6 way. And so what does the staff do not just with this
7 plant, but I was going through trying to make space in
8 my office recently and found these 20 volumes of the
9 case file from the McGuire Hobbie license renewal and
10 noticed that fire protection was throughout that.

11 What does the staff review in terms of
12 fire protection and how do they separate out those
13 issues relating to fire protection that are related to
14 aging and that are not related to aging and which ones
15 do you contend -- Do you contend that all presumably
16 based on the argument that Mr. O'Neill just began to
17 make that's based on 54.29 that the only things the
18 staff should be reviewing are those things related to
19 aging? I'm not sure how many times the word "aging" -
20 - I think it did appear at least once. But does the
21 staff do other than this case, in other cases, on fire
22 protection? What does their review consist of?

23 (Off the record discussion.)

24 MR. ROTH: Allow me to consult with the
25 staff to make sure I'm giving you the best possible

1 answer.

2 CHAIR YOUNG: Okay.

3 MR. ROTH: But before doing that,
4 regarding aging, that is the focus of the license
5 renewal is the aging management issue.

6 CHAIR YOUNG: Right. There is no question
7 about that and so you could make the argument, but
8 there's no question that aging is the focus of license
9 renewal. The Commission has said that and the rules
10 say that. This issue of reasonable assurance is not
11 something that generally comes up and that application
12 itself does not appear to tie these issues really
13 closely to aging and the Commission also said in
14 Turkey Point that the scope of what we look at in an
15 adjudication proceeding is the same as what the staff
16 reviews. So that's why I'd like some elucidation on
17 what it is the staff reviews and first generally and
18 then as it relates to this particular part of the
19 application and then there may be other questions.
20 But do you want to take a break to talk to your
21 people?

22 MR. ROTH: Sure.

23 CHAIR YOUNG: Okay. Let's take ten
24 minutes and then we'll come back. Thank you. Off the
25 record.

1 (Whereupon, the foregoing matter went off
2 the record at 2:10 p.m. and went back on the record at
3 2:28 p.m.)

4 MR. ROTH: And well, your Honor, I believe
5 the question is, how is the review done, both here and
6 at other sites.

7 CHAIR YOUNG: On fire protection, right?

8 MR. ROTH: On fire protection.

9 CHAIR YOUNG: And what does it include?

10 MR. ROTH: Within the NUREG, 1800 Rev 1
11 which is the Standard Review Plan for license renewal,
12 it describes an overall process for our reviews.
13 Within that, the Applicant submitted to us what they
14 think was within the scope. Our inspectors will then,
15 our reviewers would interview and decide, is some --

16 CHAIR YOUNG: I'm going to have to ask you
17 to speak up a little bit and a little more clearly.
18 I'm losing some of your words.

19 MR. ROTH: I'm sorry.

20 CHAIR YOUNG: And also, if you could help
21 me out by when you refer to the review plan, to point
22 me to specific parts of it.

23 MR. ROTH: Well, just overall before
24 getting to the specific part, the first step is, as I
25 understand it, is everything properly scoped? Did the

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1 applicant identify the items within -- that are within
2 the scope of license renewal? Did they omit something
3 that should have been within the scope of license
4 renewal? And our staff review that based on their --
5 the available documentation, along with review with
6 the plant drawings, of basis documents and in light of
7 NRC's other guidance and the staff's experience, our
8 written guidance on that is again, NUREG 1800.1,
9 getting to the -- and pardon me, after the scoping
10 review, what if we look at something and we think that
11 something should have been in scope and they said it
12 wasn't?

13 What if age related degradation of a fire
14 barrier we thought should have been in scope and the
15 applicant did not identify that? And we would ask
16 that in an RAI and say, "Why isn't this item in the
17 scope and the Applicant would respond to us and tell
18 us why they think it's not in scope and, perhaps, they
19 would put it in scope and the staff would go from
20 there.

21 CHAIR YOUNG: RAI is capital R, capital A,
22 capital I, by the way. Go ahead.

23 MR. ROTH: After the scope meeting and
24 screening results, they would also review the actual
25 aging management programs to decide is -- are the

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1 items being managed appropriately for aging. And this
2 is just generically, not necessarily specific to fire
3 protection. And again, the details are in the SRP, in
4 the Standard Review Plan. We also look at the time
5 limiting aging analysis, meaning something, was
6 something in the plant only actually good for 40
7 years? Did we had some analysis on it that said that
8 it wouldn't last longer than 40 years? Are these
9 items properly captured and identified. The staff
10 have their guidance and technical documents to assist
11 them with that.

12 Getting to the fire protection specific
13 portion of it, bear with my while I search through
14 here, on page -- if you have the SRP pulled up, on
15 page 2.2-3, there's an example they provide where it
16 says, "The applicant did not identify a fire
17 protection pump house that is within the scope of
18 license renewal". The reviewer might review or may
19 review the plant's commitments to the fire protection
20 regulation to verify a particular structure does not
21 perform any intended function at the plant.

22 MR. O'NEILL: Sorry, what page was that?

23 MR. ROTH: 2.2-3. Now, we don't have our
24 fire protection experts here today. We have the
25 safety project manager and the environmental project

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1 manager and so the actual people who are doing the
2 review specific to fire protection aren't here to tell
3 me exactly what they're doing.

4 In a general -- I'm searching through the
5 SRP.. And I'm looking for items where it's reviewing
6 fire protection just for compliance at the outside of
7 aging related.

8 CHAIR YOUNG: I'm sorry.

9 MR. ROTH: I'm looking -- as I'm looking
10 here, I'm searching through this plan of fire
11 protection looking for items that would support the
12 staff having to review for non-aging related
13 compliance 20 years in the future. As I understand it
14 was the issue that --

15 CHAIR YOUNG: The question is what do they
16 do?

17 MR. ROTH: And for that, they --

18 CHAIR YOUNG: I mean, what do they do on
19 fire protection?

20 MR. ROTH: The fire protection is going to
21 be not treated any special way from the other
22 programs. It's going to be were the items identified
23 within scope? Did they miss a fire barrier? Was it
24 a passive item that should have been reviewed to see
25 how it's aging missed? Were all the proper items in

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1 scope?

2 JUDGE LAM: I would like to hear you
3 finish your thought, Mr. Roth, on when you're
4 searching for fire protection non-related to aging,
5 what were you going to say?

6 MR. ROTH: Yeah, well --

7 CHAIR YOUNG: Sorry.

8 MR. ROTH: Yeah, well, what I'm looking
9 for is to try to find something that says that we're
10 looking for non-aging related fire protection issues
11 within the Standard Review Plan and I'm not locating
12 any item that says that we're verifying a non-aging
13 related issue relative to fire protection and license
14 renewal.

15 JUDGE LAM: You did not find any.

16 MR. ROTH: That's why I'm searching
17 through right now through the SRP.

18 CHAIR YOUNG: How are you looking for that
19 by the way, just --

20 MR. ROTH: I have the documents, a pdf
21 file of it and I'm searching for the word "fire
22 protection", and skimming it as I'm going here.

23 CHAIR YOUNG: Okay, but --

24 MR. ROTH: It's an active search right
25 now.

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1 CHAIR YOUNG: Right, what I was trying to
2 ascertain was how you were separating out aging
3 related and non-aging related in your search. It
4 sounded as if you were looking for things that were
5 non-aging related and I didn't know how you were going
6 to separate it out. Would that be helpful, to go to
7 the Applicant and then come back to you?

8 MR. ROTH: Certainly.

9 CHAIR YOUNG: Did you have anything
10 further to --

11 MR. ROTH: Well, just on the contention
12 itself, back to the heart of the issue, the license
13 renewal, I would like to point that in the actual 2206
14 petition prior to the license renewal application
15 existing, the petitioners, two of them were
16 signatories on the 2206 petition said that the NRC
17 should not accept a license renewal application until
18 these compliances are addressed. That was before
19 there was any application for them to do a review. So
20 clearly their concern is not a concern with the actual
21 application.

22 There's no deficiency that they were
23 concerned about there. It's instead an attack on the
24 NRC's rules, saying that they -- that we have to have
25 compliance, current compliance with a current license

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1 and basis prior to accepting a license renewal
2 application. And such attack is an impermissible
3 attack on the regulations and outside the scope.

4 CHAIR YOUNG: Okay, you sort of switched
5 off the specific question of what's included in the
6 review, in the fire protection review.

7 MR. ROTH: Yes, that's right. And
8 certainly so, the goal to get back to how we are
9 reviewing the licensees, pardon me, the petitioner's
10 petition and that is a concern with the current
11 licensing basis with current fire protection issues
12 rather than a concern than any aging related items and
13 the application.

14 CHAIR YOUNG: Okay, is your switching over
15 to that an indication that you have no further
16 information on what the staff does to review the fire
17 protection aspects of the application and to review
18 fire protection generally as it relates to license
19 renewal?

20 MR. ROTH: My understanding, your Honor,
21 is that we were going over to the Applicants and
22 during that time I was going to continue discussions
23 with the staff to --

24 CHAIR YOUNG: Okay, we were going to go
25 over, so you can come back and address the question

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1 that we were on. What confused me was that you
2 switched to another issue and I didn't understand what
3 happened to the original question.

4 MR. ROTH: That's -- back to the gist of
5 our argument, that's quite correct. We're back to the
6 thrust of our argument rather than the specific
7 details but we'll get back to those after I consult
8 with staff more.

9 CHAIR YOUNG: How much more argument do
10 you have on -- do you want to just finish your
11 argument? Is that what you were basically asking
12 for?

13 MS. UTTAL: No, I don't think he was
14 asking for that. We will defer to the Applicant while
15 he continues his --

16 CHAIR YOUNG: Okay, why don't you then,
17 moving over to Applicant's counsel, address one, what
18 is -- what you've included in the fire protection --
19 in the application relating to fire protection and
20 what you understand that -- what you understand the
21 staff's review to be? What do you have to provide to
22 the staff?

23 MR. O'NEILL: What I propose to do is
24 point out those sections of the application, license
25 review application, that discuss aging management and

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1 fire protection. That is what every system, structure
2 or component that is discussed in this application is
3 screened to determine whether or not aging management
4 applies and then discusses how it will be addressed.

5 Fire protection is no different than any
6 other system in that regard. The fire protection
7 system is evaluated for its structures and components
8 and as to how aging management will be addressed to
9 insure that the component structures and systems will
10 function as required over the extended life. That is
11 what this entire application is all about.

12 CHAIR YOUNG: Right, right, but what I was
13 trying to get some understanding of was how this
14 discussion at Section 2.3.3.31 -- I know the heading
15 has the word "aging" in it but the word "aging" is not
16 used frequently. I did a search earlier on but I
17 don't have my computer here, is not mentioned very
18 much through the discussion of what the application
19 characterizes as being within the scope of license
20 renewal.

21 Just for example, on page 2.3-116 and 117,
22 that's where the Senate said, I think we quoted in our
23 order, "The fire protection system is in the scope of
24 license renewal because it contains components that
25 are safety related and relied upon to remain

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1 functional during and following design basis events",
2 and so forth. And maybe I'm missing it but there
3 doesn't appear to be real specific tying of any of
4 these things to aging.

5 MR. O'NEILL: Okay, I would recommend that
6 we first look at page 2.3-1 which is the introduction
7 to the section which you quoted from.

8 CHAIR YOUNG: Okay, let's see, let me get
9 that. Oh, okay, 2.3-1?

10 MR. O'NEILL: Yes, so this is the
11 introduction to --

12 CHAIR YOUNG: I quoted from 2.3.3.31 but
13 let me find 2.3 -- say it again.

14 MR. O'NEILL: 2.3-1.

15 JUDGE MIGNEREY: You don't have a
16 numerical page number, do you?

17 MR. O'NEILL: No.

18 MR. RUNKLE: It's page 61 of 346 in the
19 PDF.

20 JUDGE MIGNEREY: 2.3?

21 MR. O'NEILL: It's Section 2.3. It's the
22 heading. So if you can just click on that, you can go
23 to that, too, you can link it.

24 JUDGE MIGNEREY: Got it.

25 MR. O'NEILL: So what this section is all

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1 about is the screening of mechanical systems for
2 determining the compliments within the scope of 54.4,
3 that meet the requirements of 54.21(A)(1) which is,
4 "The identified compliments consequently require an
5 aging management review for license renewal". That's
6 what this is all about. Every section here, every
7 system, is reviewed for that sole purpose.

8 CHAIR YOUNG: All right, every section --

9 MR. O'NEILL: Every mechanical system that
10 is in this Section 2.3 --

11 CHAIR YOUNG: Section of the application.

12 MR. O'NEILL: -- of the application is
13 reviewed for aging management. It's screened to see
14 what will require aging management.

15 JUDGE LAM: So anything related to non-
16 aging phenomena is not part of the application.

17 MR. O'NEILL: It's screened out
18 effectively. I mean, but what this is telling you is
19 how you get from here to there. It is not part of the
20 application, that is correct.

21 JUDGE LAM: So given how big the
22 application is, you do not put in this section -- you
23 do not put in aging related pluses on every line. Is
24 that what this is here?

25 MR. O'NEILL: This gives the results of

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1 the screening. Here's what was done and then later we
2 will show you that results in tables.

3 JUDGE LAM: So my point is, you got
4 application.

5 MR. O'NEILL: Correct.

6 JUDGE LAM: You clearly spell out your
7 intent what the scope is which is only specifically
8 related to aging out in the introduction. And once in
9 awhile you will come back and re-emphasize that, but
10 there's no need for you to say well, this is aging
11 every line, every single line.

12 MR. O'NEILL: Because that's what the --
13 if you look back at 2.3, and you look at what the
14 regulations are talking about at 54.21(A)(1), that's
15 what this whole thing is about. It's not about
16 anything else.

17 CHAIR YOUNG: Here's my question or a
18 question; I understand what you're saying. What I'm
19 not following is are you also saying that the purpose
20 of having the Section 2.3.3.31 Fire Protection System
21 in the application is not to say what's relevant but
22 to provide a data base to screen to further narrow
23 down to what's relevant?

24 MR. O'NEILL: This says, here is the fire
25 protection system.

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1 CHAIR YOUNG: I see your people nodding
2 back here.

3 MR. O'NEILL: Right.

4 CHAIR YOUNG: Tell them to say it to you
5 so you can say it on the record.

6 MR. O'NEILL: Well, I was going to say,
7 the answer is yes. It says, 2.3.3.31 describes the
8 system, in this case fire protection system and talks
9 about the scoping and screening of the systems, talks
10 about what is considered to be subject to aging
11 management and it's a relatively short provision which
12 if you go to 2.3.117, then says, "Component subject to
13 aging management review". And it begins to list in
14 broad terms those components subject to aging
15 management review.

16 Then you go onto the next system. But
17 that doesn't end the discussion but that is the
18 summary under the screening of the mechanical systems.

19 CHAIR YOUNG: Give me a second here.

20 MR. O'NEILL: Sure.

21 CHAIR YOUNG: All right, maybe this takes
22 special skill to read but I guess I'm not -- it's not
23 self-evident that the purpose of the fire protection
24 section is merely to provide context for what's really
25 relevant and that the only things that are really

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1 relevant at those things that start in Table 2.3.3-27.

2 MR. O'NEILL: That's not the end of the
3 story.

4 CHAIR YOUNG: Part of the reason I say
5 that is because at the bottom of 2.3-116 where we
6 quoted it says, "The fire protection system is in the
7 scope of licensing because it contains", and then it
8 lists four things. Now --

9 MR. O'NEILL: If it wasn't important to
10 safety, you wouldn't have to worry about aging
11 management. So you have to justify going through this
12 exercise. That's all that does. There is nothing in
13 this application other than an evaluation, screening
14 and evaluation of aging management. You have general
15 descriptions of what systems you're looking at and why
16 it's important and why you'd want to manage aging in
17 the first place, whether it's directly a safety system
18 or it is related to a safety system in some way, but
19 that's the whole purpose of this entire 1600 and some
20 page document.

21 JUDGE LAM: So everything in there talk
22 about fires protection system, it's only put in there
23 for the sake of discussion of aging management --

24 MR. O'NEILL: Correct.

25 JUDGE LAM: -- for us.

1 MR. O'NEILL: So if you then --

2 CHAIR YOUNG: No, it's only there for the
3 purpose of providing a context --

4 MR. O'NEILL: A context of course.

5 CHAIR YOUNG: -- for narrowing down to
6 those smaller parts of it that you say are subject to
7 aging management or time limited aging analysis.

8 MR. O'NEILL: Sure this is the -- yes,
9 there are certain -- a fire protection system has
10 certain structures, it has certain components, it has
11 certain materials. Now, in there what do we have to
12 look at and what need not be reviewed for aging
13 management? That's the scoping. And then we go --
14 then if you go further, you see more results. So
15 perhaps you could turn to 3.3-34 which is --

16 CHAIR YOUNG: I'm sorry, say that over
17 again.

18 MR. O'NEILL: Page 3.3-34.

19 CHAIR YOUNG: 3.3, going back in other
20 words.

21 MR. O'NEILL: Well, 3.3.

22 CHAIR YOUNG: I'm sorry, 3.3, okay, got
23 it.

24 MR. O'NEILL: Page 34. This says, "Aging
25 management review results". This is the big picture

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1 because you can see it's only a little over a page,
2 and it's an outline of materials, environment, aging
3 effects requiring management, aging management
4 programs.

5 CHAIR YOUNG: One moment, please.

6 MR. O'NEILL: And if you look under aging
7 management programs, for example, there's a fire
8 protection program.

9 MR. RUNKLE: Excuse me, I'm getting a
10 little behind myself here. Can you slow down just a
11 minute?

12 CHAIR YOUNG: That's 3.3-34, right?

13 MR. O'NEILL: And 35, yes.

14 CHAIR YOUNG: I guess one question I would
15 have is why you didn't make these points, or if you
16 did, where did you make these points in your answer?

17 MR. O'NEILL: Well, I don't think we ever
18 thought was would get to this kind of discussion since
19 it's outside the scope of license renewal. But you
20 raised --

21 CHAIR YOUNG: Since what is outside the
22 scope of license renewal?

23 MR. O'NEILL: Fire protection is outside
24 the scope of license renewal.

25 CHAIR YOUNG: Well, fire protection is not

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1 outside the scope of license renewal.

2 MR. O'NEILL: Except for aging management,
3 excuse me, yes.

4 CHAIR YOUNG: Okay, but did you say that?

5 MR. O'NEILL: Yes, we said that and, of
6 course, there was no issue raised with respect to
7 aging management. There was no section of this
8 license application that we were directed to that
9 fault was found with that we should address. So I
10 wasn't going to just give you a tutorial on this
11 entire application without something with specificity
12 that I should be looking at. That's why we didn't
13 address that.

14 JUDGE LAM: Well, there was a theory,
15 earlier theory that fire protection system, per se,
16 was mentioned in the application. That anything we
17 did to the fire protection system, per se, is fair
18 game for license renewal since in the application you
19 talk about that. Now, your clarification right now
20 has to do with well, we talk about fire protection
21 system in our application only for age management
22 review and nothing else.

23 MR. O'NEILL: And indeed it's the same for
24 every other system. Then the --

25 CHAIR YOUNG: I think there's probably

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1 some middle ground that could have been reached in
2 your answer to the effect of although -- and let me
3 see if I understand your argument. Although the
4 contention raises fire protection which has some
5 aspects which are related to aging, the contention did
6 not specify which aspects, if any, that it's talking
7 about are related to aging. That was not the argument
8 that you made anyway. Let's move on from that and
9 get to what you're saying at this point.

10 MR. O'NEILL: The Standard Review Plan
11 wasn't raised until the reply.

12 CHAIR YOUNG: Right, but --

13 MR. O'NEILL: So therefore, there was --
14 that issue wasn't even on the table. And we had
15 nothing to direct our answer to until that reply and
16 your question.

17 CHAIR YOUNG: Well, all right.

18 MR. O'NEILL: Then if you really want to
19 get to the bottom line substance, there are a series
20 of tables that began at page 3.3-261 and continue on
21 to 3.3-291, that summarized the aging management
22 evaluation of the fire protection system.

23 CHAIR YOUNG: Before -- let's move back a
24 second to the previous page. Okay, "The following
25 fire protection system aging effects require

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1 management change in material property". All right,
2 the contention mentions certain things, fire barriers,
3 I think, right. So, I mean, to have made a
4 contention, there has to be a certain level of
5 specificity. There needs to be a reference to the
6 application. This contention does refer to the
7 application and it does talk about certain types of
8 fire barriers, fire doors and penetrations for pipes,
9 electrical cable, conduits, HVAC ducts and Mr. Runkle
10 talked about, as an example, the cable covering being
11 subject to breaking down.

12 And I don't think --

13 MR. O'NEILL: Your Honor, I don't read the
14 contention that way at all. I've read a contention
15 that said --

16 CHAIR YOUNG: I'm just reading from the
17 contention. I'm not interpreting it. I'm reading
18 from it on page 19.

19 MR. O'NEILL: It has to do with present
20 compliance. That's what the contention is all about.

21 CHAIR YOUNG: Okay, look at page 19 of the
22 petition. The second paragraph under support of
23 contention, "The present license renewal application
24 at Section 2.3.3.31 in the technical information",
25 which is where we got the section to look at --

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1 MR. O'NEILL: Sure.

2 CHAIR YOUNG: -- "in the technical
3 information describes fire protection systems and as
4 encompassing a number of systems including certain
5 types of fire barriers, fire doors and penetrations
6 for pipes, electrical cables, conduits and HVAC
7 ducts". And then it goes on to discuss further, the
8 materials in some of the fire barriers.

9 Now --

10 MR. O'NEILL: Nothing about aging
11 management.

12 CHAIR YOUNG: All right, but what I want
13 to ask you is just as a factual matter, when this
14 refers to change in material properties, do any of
15 those changes in material properties relate to any of
16 these fire barriers, fire doors, penetrations for
17 pipe? I mean, I would assume that they would,
18 wouldn't they?

19 MR. O'NEILL: I'm sorry, where are you
20 reading change in material properties?

21 JUDGE MIGNEREY: On page 3.3-34 of your
22 application.

23 MR. O'NEILL: Oh, I was looking -- you may
24 hit a level where I'm not sure I can answer whether or
25 not change in material properties would refer to a

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1 fire barrier. Some things, as you know, chemically
2 will change over time. I don't know because I haven't
3 gotten to that level of detail, to say and answer the
4 question that a fire barrier -- a material of the fire
5 barrier will change in properties. I don't know.

6 CHAIR YOUNG: Okay.

7 JUDGE LAM: Even if it does, even if it
8 does, I don't know who our reading the contention in
9 TC-1 would make that nexus. I don't want to do
10 anybody's bidding. How would the Board read TC-1 to
11 make that direct --

12 MR. O'NEILL: One of my colleagues has
13 brought to my attention that with respect to fire
14 barrier assemblies, what Table 3.5.2-2 says is
15 reviewed --

16 JUDGE MIGNEREY: 3.5?

17 MR. O'NEILL: 3.5.2-2, the aging effect
18 requiring management is the loss of material and
19 cracking in the fire barrier. So that is -- there are
20 many tables actually throughout this. I picked the
21 most largest groups which for every system and a lot
22 of systems will have fire barriers with respect to the
23 cables in those systems. There will be a fire
24 protection system, there will be other systems that
25 have barriers and they will be included in a table

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1 which will talk about how materials or components or
2 structures are managed for aging throughout the
3 renewed license life of the plant.

4 CHAIR YOUNG: Okay, let me see if I can
5 sort of recap something here. Now, I think probably -
6 - well, you tell me, had the contention gone on after
7 mentioning these certain types of fire barriers and
8 fire doors and so forth and so on, had they said,
9 "These are subject to aging management because of the
10 materials in them as demonstrated at Table 3.5,
11 whatever --

12 MR. O'NEILL: I would have said, yes.

13 CHAIR YOUNG: -- that you would have said
14 that that was in scope.

15 MR. O'NEILL: Right.

16 CHAIR YOUNG: And in making rulings on
17 contentions, there is range -- there's a spectrum and
18 at one end a contention is not admissible. It may not
19 even mention the application. At the other end, it
20 would be the nature that I've just described to you.

21 This contention does mention the application, does
22 mention a section of the application, does specify
23 certain types of fire barriers. It does not focus in
24 on aging. It focuses --

25 MR. O'NEILL: Or what's defective about

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1 the aging management program.

2 CHAIR YOUNG: Right, it focuses on the --
3 whether these things are going to continue or going to
4 be in compliance in the term of the license renewal.

5 MR. O'NEILL: Well, that doesn't say that
6 in the contention, your Honor. That was new in this
7 argument. This contention speaks only to the present
8 day. This contention, as written, only says, "We
9 should not consider license renewal until we're in
10 compliance". That was a revisionist's view of the
11 contention because of the Director's decision. So we
12 didn't certainly address that because that was not the
13 contention.

14 CHAIR YOUNG: I think you're right, that
15 that was the general -- the way you describe it was
16 the general crest of the contention but the extended
17 period of operation is mentioned at least in the
18 contention. So I'm just trying to take a fresh look
19 at it based on the arguments you're making now.

20 JUDGE LAM: So as you see it, Mr. O'Neill,
21 this contention as it stands, has two faults. One, it
22 does not talk about aging. Two, it does not make any
23 allegation of how efficient the aging management
24 system is in the application.

25 MR. O'NEILL: There is no statement with

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1 basis and specificity of what is deficient in aging
2 management for the fire protection system or barriers
3 or anything else for that matter. That's number one.
4 Number two, this is obviously not a time to discuss
5 the merits. But let me -- if you read the Director's
6 decision, it does not support a basis for there is a
7 problem with reasonable assurance of public health and
8 safety with respect to the present fire protection
9 system at the Harris Plant.

10 Indeed, the two --

11 CHAIR YOUNG: I'm not sure I followed that
12 sentence. Would you say it over again?

13 MR. O'NEILL: Okay, I'm sorry. The basis
14 that Mr. Runkle said over and over again for his
15 allegations that we are out of compliance and the
16 plant is not being operated safely, we had to listen
17 to that over and over again, there is no basis for
18 that. What he argues is the basis is the Director's
19 decision. The Director's decision carefully says why
20 the applicant or the licensee in this case, is
21 operating within public health and safety. They've
22 done a safe shutdown analysis to show that the fire
23 protection system as it is presently operated, works
24 just fine. So we could get into a long discussion of
25 what the licensing basis, current licensing basis but

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1 it includes the use of AMC and MT (phonetic). Indeed
2 we litigated this issue at the original licensing of
3 the plant and the current licensing basis has not
4 changed. So there is no big, you know, we've been out
5 of compliance since 1989 and operating the plant. If
6 we were, the NRC would obviously not be doing their
7 job and the Director's decision explains that --

8 CHAIR YOUNG: All right, all right.

9 MR. O'NEILL: -- in careful detail.

10 CHAIR YOUNG: All right.

11 MR. O'NEILL: No basis.

12 CHAIR YOUNG: All right, slow down for
13 just a second. I believe what the Director's decision
14 says, among other things is that the applicant intends
15 to file a license amendment application at some point
16 in the future and that 50.48 says that licensees who
17 wish to use performance based methods instead of the
18 other requirements, fire protection requirements,
19 shall submit a request in the form of an application
20 for license amendment. And it sounds at though what
21 they're concerned about, what the petitioners are
22 concerned about is that no license amendment
23 application has been submitted and that while there's
24 an intent to do it in the future, there's this interim
25 period where there's no compliance with either set of

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1 approaches. And as I understand it, what those
2 performance based methods are going to be is not --
3 has not actually been resolved at this point and
4 there's some dissension about that.

5 So I think you're right, you were right in
6 your introduction to that last point, which is that we
7 don't necessarily want to get into the merits. It
8 seems to me at this point, I want to hear from
9 everyone, but it seems to me at this point the
10 question is, whether the failure to tie the barriers
11 and other components or equipment to, specifically to
12 aging questions, to specifically challenge the aging
13 management of those, is the -- is becoming sort of a
14 determinative issue here.

15 Is there -- and I want to hear from you.

16 MR. RUNKLE: Your Honor, I may be able to
17 stop the argument. I'd be glad to stipulate on the
18 record that the contingent does not address the aging
19 of the fire protection cables or conduits. It
20 doesn't. It goes into the reasonable assurance and
21 the lack of compliance.

22 CHAIR YOUNG: Okay, then --

23 MR. RUNKLE: We don't have an expert. We
24 haven't brought that in front of you and if you would
25 rewrite the contingent to do that, we could not defend

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1 it.

2 CHAIR YOUNG: Well, here's -- then it
3 takes us back -- you're right, that does short-circuit
4 things. Then what that does is it takes us back to
5 54.29.

6 MR. RUNKLE: Yes, ma'am.

7 CHAIR YOUNG: And the fact that the
8 reasonable assurance that you're talking about is
9 there limited -- is limited in that rule to the
10 matters identified in paragraphs (A)(1) and (A)(2), in
11 other words, managing the effects of aging and time
12 limiting aging analysis.

13 MR. RUNKLE: Yes, I've been looking at
14 54.29 and I don't think it really effects our argument
15 that there's a preliminary determination that you have
16 to make that there's going to be a reasonable
17 assurance of compliance. I mean, we've made our
18 argument on that.

19 CHAIR YOUNG: Well, let me ask you then,
20 the argument that was made about the introductory
21 language of NUREG 1800 was that that was introductory
22 and that later on in the body of the NUREG it goes
23 into more specifics. And indeed, the language that
24 you quote in your reply from NUREG 1800 from the
25 introduction, let's see, is broader but that the rule

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1 limits that further to the aging -- managing the
2 effects of aging and time limited aging analysis.

3 Now, the next question I had for the staff
4 was, well, what does the staff review? Does the staff
5 review only those things that are related to managing
6 the effects of aging and time limited aging analysis
7 or does the staff's review go -- is it broader than
8 that?

9 MR. RUNKLE: Well, I think you --

10 CHAIR YOUNG: And we haven't gotten an
11 answer to that yet.

12 MR. RUNKLE: I think you mis-asked the
13 question. The question is not what you review. The
14 question should be what are you supposed to review.
15 And I think the --

16 CHAIR YOUNG: Well, that's another
17 question, certainly.

18 MR. RUNKLE: Yeah, I think those are two
19 different questions because they'll -- I mean, what
20 they do may not be what they're required to do. And
21 if you look at the NUREG 1800, that was promulgated
22 subsequent to the issuance of the Rule 54.29. It's
23 the interpretation of what the means and may I suggest
24 that 54.29 is permissive, that may be issued by the
25 Commission but it doesn't not say what is the complete

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1 review of the staff. The complete review of the
2 staff comes under NUREG 1800 which is to look at
3 technical information, general information, necessary
4 technical specification, environmental review and
5 going back to our reasonable assurance language. And
6 whether they only look at aging because, as the
7 applicant said, that's the only thing that they think
8 is -- that should be reviewed, and the staff is
9 saying, that's the only thing they review, I think
10 that begs the question of what should they be
11 reviewing.

12 CHAIR YOUNG: Okay, but let's back up a
13 second. The reason for asking what the staff does
14 review is because the Commission has said that the
15 scope of an adjudicatory proceeding is the same as the
16 scope of the staff's review. So the issue of what the
17 staff reviews may come into play and may bring into
18 play things that have otherwise been excluded by the
19 Commission in Turkey Point and in its regulations. So
20 when you ask what should the staff be reviewing, the
21 rules govern, the Commission's interpretation of those
22 rules govern.

23 Normally guidance documents such as a
24 Standard Review Plan, while they may be persuasive,
25 they're not binding on a licensing board for example,

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1 in making our rulings. Now, under sort of common
2 sensical or equitable or whatever kinds of principles,
3 and actually I once went to a presentation by the
4 former General Counsel of the NRC, Peter Strauss, who
5 now teaches administrative law at Columbia University,
6 arguing that the guidance document should, in fact, be
7 binding on the staff.

8 So, when you identified this paragraph,
9 and looking at Turkey Point saying the scope is the
10 same, and you show us this broad paragraph that says
11 the staff needs to look to see whether -- let's see,
12 where there's reasonable assurance that the
13 activities, general open, authorized by the renewed
14 license, will continue to be conducted in accordance
15 with the CLB, then that possibly opens this up further
16 than just aging issues.

17 But when you compare that to the rule, the
18 argument that the applicant is making that this is
19 sort of a summary of part of that rule and that the
20 rule goes into more detail later on and limits it to
21 the aging issues which the Commission has certainly
22 said and which has -- I mean, there's no doubt about
23 the fact that the Commission has probably limited the
24 scope of license renewal proceedings more narrowly
25 than in any other type of proceeding. That argument

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1 does make some sense.

2 MR. RUNKLE: Well, let me suggest though
3 that NUREG 1800, I just quoted from sort of the
4 initial introduction, it's a fairly substantial
5 document that is -- that has a whole lot of other
6 things in it than just aging. It's a -- I think NUREG
7 1800 has like 1800 pages to her.

8 CHAIR YOUNG: Well, right, and that's why
9 I want to know -- I want to know what the staff's
10 review consists of but for example, on page 2.2-2
11 there are two references to acceptance criteria, "For
12 the applicant's implementation of its methodology to
13 be acceptable to staff should have reasonable
14 assurance that there has been on omission of plant
15 level systems instructors within the scope of license
16 renewal", and then below that under Section 2.2.2.1,
17 at the end, "Systems instructors relied on a safety
18 analysis, and plan evaluations to perform a function
19 that demonstrates compliance with NRC regulations for
20 fire protection", and then it gives a cite 50.48,
21 Environmental Qualification PTS, Pressurized Thermal
22 Shock, ATWS, I don't know that one and station
23 blackout and then it gives citations to the rules for
24 those.

25 I agree, we need to hear more from the

1 staff on what the staff's review consists of and
2 whether it is strictly limited to aging issues, the
3 safety review or whether it's broader than that. And
4 I think there's no question that this fire protection
5 issue is a significant issue. The question is whether
6 there is authority for us admitting the contention
7 given that there's no reference to aging. And I
8 thought you had a good argument, the argument in your
9 response that says, the language that you quoted from
10 the Standard Review Plan is sort of a summary or
11 reference to a part of 54.29 but that 54.29 is more
12 specific and it's the rule that governs.

13 That argument makes sense to -- certainly
14 to an extent and it may end up foreclosing the
15 contention. So I think that's what you need to
16 address and in addition we need to hear from the staff
17 what their fire protection review does consist of.

18 MR. RUNKLE: I'm afraid that any further
19 argument I give will just be rehashing the same
20 ground. I mean, I think our position is clear on
21 that. We've briefed it out. I don't have much more
22 in my quiver to send over your way. I mean, our
23 argument has been made on that. The staff -- the
24 determination, we think is a -- this presumption of a
25 reasonable assurance of compliance has to be

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1 addressed. And that goes beyond the aging
2 requirements. And I understand the limitations of
3 saying that we're not just looking at the, you know,
4 electrical conduits as they age. That may even be a
5 generic problem, I don't know. We don't have the
6 expertise or the -- you know, the expert affidavits.
7 You know, that -- if we would try to bring that up at
8 this point, we don't have the support and the
9 affidavit to really say, I mean, in the petition to
10 really make that argument.

11 JUDGE LAM: Now, Mr. Runkle, do I
12 understand what you are saying? Do I understand
13 you're saying number one, you're willing to stipulate
14 contention number one has nothing to do with aging.
15 Two, even if you were allowed to rewrite the
16 contention, even if, you have no technical expert to
17 support that contention related to aging?

18 MR. RUNKLE: Yes.

19 JUDGE LAM: Thank you.

20 MR. RUNKLE: Because our issue is the
21 initial determination has to be whether there's a
22 reasonable assurance of compliance given the history
23 and projection into the future. And that's the
24 contention. And there are -- I mean, it's a legal
25 matter. I mean, it's not based on -- we have the

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1 record in front of us that's all based on if I was
2 bringing it to a hearing, you could take judicial
3 notice. I mean, I think there's substantive evidence
4 that can be presented on it, but it all goes to the
5 basic legal argument of whether being out of
6 compliance now and not being in compliance at some
7 future date is relevant to the relicense.

8 CHAIR YOUNG: I think the barrier that --
9 barrier, no pun intended, that you need to hurdle is
10 54.29 and what Mr. O'Neill pointed out, the limitation
11 of the reasonable assurance concept to managing the
12 effects of aging and time limited aging analysis.

13 MR. RUNKLE: Well, and that's why --

14 CHAIR YOUNG: So why don't you --

15 MR. RUNKLE: That's why the NUREG 1800 is
16 so important because that is the staff's
17 interpretation of their responsibility for reviewing
18 a relicensing. And whether that's what they think
19 their responsibility is or not, or if that's what they
20 actually do as part of their review, that lays out the
21 scope of their review.

22 CHAIR YOUNG: But if, in fact, let's --
23 you know, I haven't gone through every line of the SRP
24 but if in fact, the introduction gives the general
25 principle and then arguendo in keeping with 54.29 in

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1 the body of the NUREG goes into that with more
2 specifics, such that it is, in fact, limited to these
3 aging issues, which is the generally understood
4 approach to the safety review in all the license
5 renewal proceedings which the Commission went over in
6 Turkey Point, then I don't -- at this point, I don't --
7 - I'm not seeing any way that your argument -- that
8 there's a broader responsibility to look at reasonable
9 assurance than what's stated in 54.29, I'm not seeing
10 that. The answer lies in the body of this and what
11 the staff tells us.

12 MR. RUNKLE: Okay, I mean --

13 CHAIR YOUNG: And if you have anything
14 further to offer on that, you -- you know, the door
15 has been opened to the SRP. If there's anything
16 further in there that we need to look at, we can look
17 at that. But --

18 MR. RUNKLE: But if the staff tells us on
19 the record the scope of their review as it relates to
20 fire protection, that's in the record. And if that's
21 the -- if that's what they do as opposed to what they
22 should be doing, that's an appealable matter.

23 CHAIR YOUNG: And also, you're arguing
24 what they should be doing. What I don't -- I haven't
25 heard yet is the authority that there's anything other

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1 -- there's anything to support that other than this
2 one statement in the introduction.

3 MR. RUNKLE: Oh, the -- I mean, I mean, we
4 reference NUREG 1800 but it's a fairly substantial
5 document that --

6 CHAIR YOUNG: Right, I know.

7 MR. RUNKLE: Oh, do you have a copy?

8 CHAIR YOUNG: Yes, I do.

9 JUDGE MIGNEREY: We do.

10 CHAIR YOUNG: And we can take a break and
11 you're welcome to --

12 MR. RUNKLE: No, my argument is out on the
13 table and that's what I've got.

14 MR. O'NEILL: Judge Young, before you put
15 1800 away --

16 CHAIR YOUNG: We're not putting it away.

17 MR. O'NEILL: -- there is one very
18 important section which I didn't have a chance to
19 mention, so I want to make sure it's on the record.

20 CHAIR YOUNG: Okay.

21 MR. O'NEILL: It's 4.7.1.

22 CHAIR YOUNG: Of?

23 MR. O'NEILL: Of 1800, page 4.7-1.

24 CHAIR YOUNG: Okay, hold on just a second,
25 4. --

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1 MR. O'NEILL: 7.1.

2 CHAIR YOUNG: That's near the end, okay.

3 MR. O'NEILL: 4.7.1.

4 CHAIR YOUNG: 4.7-1?

5 MR. O'NEILL: -1 excuse me, -1. It's
6 Section 4.7.1.

7 CHAIR YOUNG: Other plant specific time
8 limited aging analysis.

9 MR. O'NEILL: And you look at the areas of
10 review, third paragraph, I can read it to you or you
11 can read it.

12 CHAIR YOUNG: "License renewal reviews" --
13 go ahead and read it.

14 MR. O'NEILL: "License renewal reviews
15 focus on the period of extended operation. Pursuant
16 to 10 CFR 50.3, if the review is required by 10 CFR
17 54.21(A) or (C) show that there is not reasonable
18 assurance during the current license term that license
19 activities will be conducted in accordance with the
20 CLB, the licensee is required to take measures under
21 its current license to insure that the intended
22 function of those systems, structures or components
23 are" --

24 CHAIR YOUNG: Excuse me, you're quoting
25 the same language that we put in our question on page

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1 2, right?

2 MR. O'NEILL: No, because it's -- your
3 question, I think, on page 2 was the introductory
4 language.

5 CHAIR YOUNG: Well, look on page 2 of --

6 MR. O'NEILL: Oh, I'm sorry.

7 CHAIR YOUNG: Well, it's there and
8 actually let me tell you one of the reasons for
9 putting that there.

10 MR. O'NEILL: That's the one that goes to
11 what the review -- the scope of the license renewal
12 review which then ties in with Turkey Point.

13 CHAIR YOUNG: Right, okay, but read the
14 last sentence of that and this is an interesting
15 paragraph.

16 MR. O'NEILL: "The adequacy of the
17 measures for the term of the current license is not
18 within the scope of the license renewal vehicle".

19 CHAIR YOUNG: Right. It doesn't say the
20 adequacy or how well the licensee -- the compliance of
21 the licensee with the current licensing basis in the
22 term of the extended license is not within the scope
23 of the license renewal.

24 MR. O'NEILL: Well, it doesn't say that,
25 you're correct.

1 CHAIR YOUNG: Right.

2 MR. O'NEILL: But it's also not what the
3 contention was all about or is there any basis for
4 such an allegation.

5 CHAIR YOUNG: Well, let's not change over
6 to that subject right now. We're talking about this
7 language right now and this language, actually,
8 reading it, at first one might take it to mean that
9 you can't look at whether the license will continue to
10 be in compliance with the CLB during the term of the
11 renewed license, but then the last sentence in saying
12 what's not within the scope of license renewal review,
13 limits it to the adequacy of the measures for the term
14 of the current license.

15 So one could argue that if that's what not
16 within the scope, then the adequacy of compliance
17 within the extended term, one could argue, would be
18 within the scope. So, I mean, I think obviously --

19 MR. O'NEILL: You're going to have to turn
20 it on its head, I guess, but --

21 CHAIR YOUNG: No, no, I don't think you
22 turn it on its head. I think there's even a Latin
23 principle that means something to the effect of if
24 it's excluded, then it's not meant to be included
25 within the principle that you're -- that's a very poor

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1 translation of it, but in any event, I don't think
2 this necessarily supports your argument.

3 MR. O'NEILL: Except to the extent that
4 this as the introductory all have to be consistent
5 with 54.29.

6 CHAIR YOUNG: But this thing that you
7 quoted doesn't even reference 54.29. It references
8 54.30.

9 CHAIR YOUNG: Well, 54.30 is that's not
10 included.

11 CHAIR YOUNG: Well, right, and then it
12 says what's not included is the adequacy of the
13 measures for the term of the current license. So you
14 know, I mean, I think the least that can be said is
15 that this is not a model of crystal clear drafting.

16 MR. O'NEILL: Well, it's currently also
17 said that the contention that was proffered by this
18 petitioner which goes only to the current license term
19 is certainly not consistent with this language and
20 certainly with Turkey Point.

21 CHAIR YOUNG: Well, yeah, that's your
22 argument and you know, I'm not sure that it -- I think
23 the focus of it is, as you say, that the renewed
24 license shouldn't be granted until they can show that
25 they can comply with it now or some time in the near

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1 future. But there is -- I don't think that it
2 completely leaves out any reference to the renewal
3 term. So again, I think we get back to your strongest
4 argument, the staff's strongest argument is relying on
5 54.29 but as Mr. Runkle points out, NUREG 1800 is a
6 fairly large document and it may warrant further
7 consideration. And again, I would still like to hear
8 from the staff on is there anyone from the staff who
9 knows who can talk about NUREG 1800 and who can tell
10 us, unequivocally that there's nothing in here that
11 the staff reviews that has anything to do with
12 anything other than aging, for example.

13 MR. ROTH: It's our understanding that
14 that's correct. This isn't an aging review. It may
15 be helpful, too, I want to go to a Commission Policy
16 Statement that addressed what the staff is looking at
17 in license renewal and that was in COI 98.18 which is,
18 "Policy and the Conduct of Adjudicatory Proceedings".
19 And in that the Commission wrote, and I'll just read
20 from that page.

21 CHAIR YOUNG: Hold on a second. I may
22 have that. Let me just see if I do.

23 MR. O'NEILL: May I have the citation
24 again, COI?

25 MR. ROTH: COI 98.18.

1 MR. O'NEILL: 90?

2 MR. ROTH: 98, that's from July 28, 1998.

3 CHAIR YOUNG: Okay, go ahead.

4 MR. ROTH: In it the particular language
5 says, "The scope of the proceeding; and as the
6 consequence the scope of the contentions that may be
7 admitted is limited by the nature of the application
8 and pertinent Commission regulations. For example,
9 with respect to license renewal, under the governing
10 regulations in 10 CFR Part 54, the review of license
11 renewal applications is confined as to matters
12 relevant to the extended period of operation requested
13 by the Applicant. The safety review is limited to the
14 plant, system, structures and components as delineated
15 in 10 CFR 54.4 that will require an aging management
16 review for the period of extended operation or are the
17 subject of an evaluation at the time limited -- of
18 time limited aging analysis". So what's that --

19 CHAIR YOUNG: What's the page number for
20 that?

21 MR. ROTH: Actually, I have West law, one
22 second.

23 CHAIR YOUNG: I think that was published
24 in the NRC Reporter, wasn't it?

25 JUDGE MIGNEREY: Yes.

1 MR. ROTH: Yeah, and I just have to pull
2 it up here.

3 MR. RUNKLE: Can you cite to your answer,
4 your response to the initial petition? Do you have a
5 page number there? It might be easier to follow you?

6 MR. ROTH: I don't believe I cited 98.18
7 in my response if that's what you're looking for.

8 MR. RUNKLE: Well, then, your Honor, it's
9 hard for me to respond to a document that hasn't been
10 brought out on the table till today. I'm sure that we
11 could all get on the Adams system and find all kind of
12 documents, but I just can't respond to some policy
13 statement from 1998 without at least a little bit of
14 warning.

15 MS. UTTAL: Judge, I wanted to add -- did
16 you --

17 MR. ROTH: Yes.

18 MS. UTTAL: I just wanted to add something
19 about the staff's review of these matters. I think
20 that the scope of the staff's review would be borne
21 out by all the SERs that we have done in license
22 renewal space. They only deal with the aging issues
23 and the TLAA. Even though they're fairly thick
24 documents, that's all you'll see there. And it is in
25 compliance with the regulations and we're limited by

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1 the regulations also as to what we would be looking
2 for.

3 CHAIR YOUNG: But would you agree -- would
4 you agree that this introductory language in the
5 Standard Review Plan is pretty open-ended, and from
6 the outside looking in, that it would make sense to
7 read it like the petitioners are reading it?

8 MS. UTTAL: Which particular paragraph?
9 I'm starting to lose things.

10 CHAIR YOUNG: The one that we quoted in
11 our question from the introduction. I'll try to find
12 that.

13 MR. ROTH: And I believe the cite you're
14 looking for would be 48 NRC 18 at 22 but I'm looking
15 at a West law version, so I'm looking at the asterisk
16 numbers to make sure I have --

17 JUDGE MIGNEREY: I'm not doing anything
18 else.

19 CHAIR YOUNG: Okay, hold on just a second.
20 I'll try to find this page from -- all right, it's the
21 one we quote.

22 MS. UTTAL: Yeah, I found it, on page 2 of
23 the Board's order.

24 CHAIR YOUNG: Right, right.

25 MS. UTTAL: I don't think you can divide

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1 the thing up like that. What's under review in
2 license renewal space is the age, the aging of the
3 components and the limited environmental issues. I
4 don't think that you can -- and you're talking about
5 the extended period.. The reasonable --

6 CHAIR YOUNG: Okay, let's back up, I'm
7 sorry, to get us all on the same page. Look at the
8 introduction to NUREG 18, third paragraph.

9 MS. UTTAL: The third paragraph in the
10 introduction?

11 CHAIR YOUNG: Right.

12 MS. UTTAL: Let me find it.

13 CHAIR YOUNG: The first thing it says
14 that, "In addition to the technical information
15 required by 54.21", so right there it opens up, "In
16 addition to a license renewal application must contain
17 general information", okay.

18 MS. UTTAL: General information would --

19 CHAIR YOUNG: Then the --

20 MS. UTTAL: -- would be the descriptions
21 of the systems that they're looking at, so we know
22 where we are in time and space.

23 CHAIR YOUNG: All right, I'm not asking
24 you to interpret at this point.

25 MS. UTTAL: Okay.

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1 CHAIR YOUNG: What I'm asking you to do is
2 read this and read it from the standpoint of a neutral
3 outsider reading this for meaning.

4 MS. UTTAL: Uh-huh, I don't --

5 CHAIR YOUNG: Consider how easy it would
6 have been to say, "A license renewal must contain
7 general information relating to aging, necessary
8 technical specification relating to aging and
9 environmental information. It must be sufficiently
10 detailed to permit the reviewers to determine whether
11 there's a reasonable assurance that activities
12 authorized by the renewal license insofar as they are
13 related to aging, will continue to be conducted in
14 accordance with the current licensing basis.

15 MS. UTTAL: Despite the fact that that's
16 kind of repetitious --

17 CHAIR YOUNG: Well, it's not repetitious
18 because it doesn't say that anywhere in that
19 paragraph.

20 MS. UTTAL: But Judge, this is not -- this
21 is an interpretation or an introduction to the staff
22 SRP. This is not --

23 CHAIR YOUNG: This is the staff's
24 statement on what they're going to do when they
25 review.

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1 MS. UTTAL: Yes, and what the staff is
2 going to do is exactly what's here, "general
3 information as required by 54.19", okay, "necessary
4 technical specifications change as required by 54.22,"
5 so we're in license renewal space and we're looking at
6 aging management and TLAA, and environmental
7 information as required by 54.23.

8 I don't -- I think it's pretty clear to a
9 reasonable person what is meant there, what is meant
10 there. You just have to --

11 JUDGE LAM: So everything that is within
12 the space of 54 --

13 MS. UTTAL: Yes.

14 JUDGE LAM: -- and that's license renewal.

15 MS. UTTAL: License renewal and we only
16 are talking about aging management.

17 CHAIR YOUNG: Probably it would have been
18 helpful to mention aging somewhere in the first three
19 paragraphs. There's no mention whatsoever. I think
20 there is a reference to it in the fourth paragraph,
21 and what you're telling us is that the staff, even
22 though there is some indication that activities that
23 will be authorized by the renewed license or that
24 would be, if granted, even though there's some
25 indication that those activities would not be

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1 conducted in compliance with the CLB, if those
2 activities are not related to aging, then they're not
3 -- that would not stop issuance of the license.

4 MS. UTTAL: According to what the
5 Commission has held and what the regulatory scheme is,
6 no, it would not. I think the Commission has been
7 pretty clear about that.

8 CHAIR YOUNG: Do you have anything to add
9 about what the staff actually does?

10 MR. ROTH: Certainly, your Honor.
11 Inspection procedure 71002.

12 CHAIR YOUNG: And that's in --

13 MR. ROTH: That's in the NRC inspection
14 manual.

15 CHAIR YOUNG: 71?

16 MR. ROTH: 71002.

17 CHAIR YOUNG: No dots?

18 MR. ROTH: No dots and it can be pulled
19 off NRC's website. I don't have an Adams number for
20 it.

21 CHAIR YOUNG: Okay.

22 MR. ROTH: And a review of the inspection
23 procedure describes --

24 CHAIR YOUNG: What is the Adams number?

25 MR. ROTH: I don't have the Adams number

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1 for it.

2 CHAIR YOUNG: Oh, I thought you said you
3 did have it.

4 MR. ROTH: No. It's on the website.

5 MS. UTTAL: It's on the website.

6 CHAIR YOUNG: Inspection procedure 71002.

7 MR. ROTH: 71002.

8 CHAIR YOUNG: Okay.

9 MR. ROTH: And when it gets to the
10 specific inspection requirements, it has inspection
11 guidance, some guidance documents, specific inspection
12 requirements are that they have to include the effects
13 -- or they have to show that items are not going to be
14 impaired by age related degradation. They have to
15 have an aging management program inspection as well
16 and it says that the effects of aging will be
17 adequately managed. So to me there's more specific
18 items.

19 And it doesn't get into fire protection.
20 It's a broad guidance. It's six pages long but the
21 specific guidance would indicate it's all aging
22 related consistent with the regulation. Nothing to do
23 with future potential compliance or non-compliance.

24 CHAIR YOUNG: There was another question
25 I wanted to ask.

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1 JUDGE LAM: Ms. Uttal, is it correct to
2 assume what you are saying is this in terms of the
3 SRP, the 54.29/54.30 supersede any staff review
4 documents and the staff review document is not binding
5 on the agency staff? That's my understanding of point
6 number one.

7 Point number two, I think you had
8 indicated that you looked and you did not find any
9 activity within the Standard Review Plan on license
10 renewal indicating any review of phenomenon not
11 related to aging. Therefore, the two points come
12 together even if there were activities reviewed by the
13 staff, within the SRP, that due to things that's not
14 related to a 54.29, 54.30, would apply.

15 MS. UTTAL: That's correct, 54.29 and
16 54.30. The regulations trump the staff review
17 documents. It's not binding on the staff, it's not
18 binding on the public and --

19 MR. ROTH: With regards to a look,
20 understand as we discussed earlier, the look was
21 dynamic as I was searching through it right there. I
22 can't attest that I've read every single page of the
23 SRP to verify that statement.

24 JUDGE LAM: So you're looking results is
25 not that reliable.

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1 MR. ROTH: It's a cursory look in a
2 limited time.

3 JUDGE LAM: So your argument related to
4 the earlier point Ms. Uttal make, that 54.29, 54.30 is
5 binding.

6 MR. ROTH: That's right, those are our
7 regulations. They've been promulgated, they're
8 controlling.

9 JUDGE LAM: Thank you.

10 CHAIR YOUNG: Another part of 54.29 --
11 well Part B refers to 10 CFR Part 41, the
12 environmental review, and then Part C refers to any
13 matters raised under 2.335 which I think is request
14 for rule waiver, is that correct?

15 MR. ROTH: If I recall right, yes.

16 MS. UTTAL: I believe so.

17 CHAIR YOUNG: I'm trying to recall but it
18 seems as though the Commission has -- I'm trying to
19 recall the case but --

20 MR. ROTH: If I may, your Honor --

21 CHAIR YOUNG: -- the Commission has
22 interpreted that -- has essentially -- I may be wrong
23 about this but I'm trying to recall it so that I can
24 ask you about it, a situation in which a petitioner
25 was in an effect asking for a waiver of the rule to

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1 raise another issue and the Commission considered that
2 without a formal request. Does that ring a bell?

3 MS. UTTAL: No, in license renewal space
4 or just in general?

5 CHAIR YOUNG: In general. Let's see.

6 MR. ROTH: Well, your Honor, perhaps COI
7 0524 is the one you're thinking of.

8 CHAIR YOUNG: What case is that?

9 MR. ROTH: Millstone.

10 CHAIR YOUNG: That might be Millstone.
11 What does it say?

12 MS. UTTAL: There was -- the Board issued
13 a memorandum and order certifying to the Commission
14 the question of whether the Grand Suffolk County's
15 request for an exemption or waiver of the final
16 sentence of 50.47(A)(1) providing that emergency
17 planning issues are not germane to license renewal
18 determination. That was decided against the -- that
19 was decided against the intervener, decided against
20 Suffolk County, I think.

21 CHAIR YOUNG: Uh-huh. If it comes to me,
22 I'll ask you about it.

23 (Discussion held off the record.)

24 CHAIR YOUNG: Well, it's not coming to me
25 right now, so let me just ask, any further argument?

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1 You indicated that you, Mr. Runkle, had given
2 basically all of the argument that you had earlier.
3 Based on what you've heard since, is there anything
4 that you'd like to add in terms of what other
5 authority there would be besides the introductory
6 language to suggest that the review goes further than
7 the aging issues as set forth in 54.29?

8 MR. RUNKLE: Well, again, the introductory
9 paragraph to the NUREG 1800 is also reflected in that
10 Section 9.500 which you cited on page 2 of your order,
11 but we need to -- if you determine that Section 54.29
12 restricts the review of the staff, then you need to
13 read the whole section.

14 CHAIR YOUNG: The whole --

15 MR. RUNKLE: The whole section, 54.29. It
16 says, "A renewed license may be issued by the
17 Commission if the Commission finds A, B and C". May
18 is a permissive word and if you say that they may, if
19 they don't find that, are they still -- are they still
20 able to issue a renewal license? What if they find
21 out that matters pursuant to 2.3.3.5 have not been
22 addressed? Can the Commission then? And I think that
23 given the staff's interpretation of the NUREG 1800
24 this also means that there may be other reasons why
25 besides those listed specifically in 54.29 that the

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1 Commission may not issue the renewal -- license
2 renewal and we think that, again, the reasonable
3 assurance for compliance is something that echos
4 throughout the whole discussion and all the citations
5 and through the NUREG 1800 and I think going back to
6 the basic premises of the Atomic Energy Act to protect
7 public health and safety.

8 And so they may issue it, they may not
9 issue it. They may not issue it on some other
10 grounds.

11 JUDGE LAM: So you say "may" is not
12 "must". That's what you're saying.

13 MR. RUNKLE: And it's not shall.

14 JUDGE LAM: It's not shall, it's not must.

15 MR. RUNKLE: Go ahead, sorry.

16 CHAIR YOUNG: Well, I was just going to
17 say, I think we're sort of getting back to where we
18 were a couple times this morning, and that is there's
19 no dispute that the Commission's case law binds us.
20 I mean, obviously -- if there was something that
21 reversed a Commission ruling by the Court of Appeal or
22 the Supreme Court, you know, that would lead to a
23 different result. But the argument that you're making
24 is essentially that there's another consideration that
25 pretty much runs counter to what the Commission has

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1 said in Turkey Point and all the succeeding decisions
2 that it has issued on license renewal.

3 And it keeps -- the Commission reiterates
4 over and over again in those decisions how narrow the
5 scope of license renewal is. And so the -- I think
6 the way that you might have gotten in the door was if
7 the staff's review encompassed other things and this
8 Commission has said that the scope of the staff's
9 review is the same as -- or determines the scope of
10 our review. Then that would be a way to get it in.

11 But --

12 MR. RUNKLE: But my reading of the Turkey
13 Point was that it did not limit -- it didn't limit the
14 review to just aging. Those were the issues brought
15 before the Commission. The question of reasonable
16 assurance is something that the staff should be
17 looking at and we've argued that several -- gone
18 around that several times today, that that question
19 has not been brought squarely to the Commission. And
20 so given a ruling in our favor, the Commission would
21 be telling the staff that that's something they need
22 to be looking at, that they don't and so, again, it
23 goes down to the legal interpretation.

24 CHAIR YOUNG: Well, but the Commission was
25 pretty definite in Turkey Point. That may be that --

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1 you know, if you can point to a part of it that would
2 support your argument, that would --

3 MR. RUNKLE: Well, the only issues that
4 were brought to them were the anti-aging issue so they
5 limited their ruling to the anti-aging issues but
6 there have been other issues about you know,
7 substantial non-compliance over the years and no
8 reasonable assurance that they would be in compliance,
9 there may have been a different ruling on the Turkey
10 Point.

11 CHAIR YOUNG: Well, I'm not sure. The
12 Commission also uses some language that's very
13 limiting and I'm not sure that -- I think there might
14 have -- I don't recall what all the contentions were
15 there, but the thrust of the Commission's decision in
16 Turkey Point was certainly limiting, not just based --
17 you know, not just on the issues that were brought.
18 It's -- the general tenor of it was we've been asked
19 to comment on these two things and we're commenting on
20 these two things only. The thrust of it is, our
21 license renewal process is intended to be narrow and
22 goes into some detail on how it's supposed to be
23 narrow.

24 So while we're still here, in NUREG 1800,
25 there were some references to license renewal. There

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1 were a few references to license renewal, let's see.
2 On page 9.5.1-6, there's a reference to RG 1.188, Reg
3 Guide, I guess that is, Revision 1, Standard Format
4 and Content for applications to renew nuclear power
5 plant operating license is -- then on page 9.5.1-8,
6 License Renewal, "The staff reviews applications for
7 license renewal to insure that fire protection SSC
8 systems, structures and components required for
9 compliance with 50.48 are included within the scope of
10 license renewal in accordance with 10.CFR 54.4(A).
11 For those SSCs identified as being in scope, the staff
12 identifies those components that are subject to aging
13 management review in accordance with 10 CFR
14 54.21(A)(1).

15 Appendix B of this SRP provides additional
16 guidance for such review.

17 MR. O'NEILL: You put in 0800, Judge.

18 CHAIR YOUNG: Yes.

19 MR. O'NEILL: You said 1800, that's why I
20 was --

21 CHAIR YOUNG: Oh, I'm sorry, 800, yes.

22 MR. O'NEILL: It sounded like 0800.

23 CHAIR YOUNG: Thank you, yes. Which would
24 seem to support the staff's and applicant's argument.
25 And then in Appendix B, there is a reference to NUREG

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1 1800, a discussion of NUREG 1800 and fire protection
2 in the third paragraph of Appendix B, "In accordance
3 with general design criteria in 3, Fire Protection,
4 the scope of equipment required to comply for 10 CFR
5 Part 50.48 is broad". Now, that's -- it starts out
6 talking about NUREG 1800 but then it says, "The scope
7 under 50.48 is broad and also include fire protection
8 SSCs needed to minimize the effects of a fire and to
9 prevent the release of radioactive material to the
10 environment, i.e., equipment important to safety.

11 If applicable, the scoping methods used by
12 an applicant should include review of any commitments
13 made for compliance with Appendix A to branch
14 technical position APCS 9.5-1 guidelines for fire
15 protection for nuclear plants docketed prior to July
16 1st, 1976 or 10 CFR Part 50, Appendix R, Fire
17 Protection Program for nuclear power facilities
18 operating prior to January 1st, 1979".

19 I'm not sure why -- how that relates to
20 license renewal other than the fact that NUREG 1800 is
21 mentioned there. Then it goes, "10 CFR 54.21 states
22 that for those components with intended functions that
23 are identified within the scope of license renewal,
24 those components which are passive (do not perform
25 their functions with moving parts) and long-lived (are

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1 not subject to replacement based on qualified life or
2 routine replacement) are subject to an aging
3 management review. Examples would include examples of
4 fire protection components which are passive and long-
5 lived and that therefore, would be subject to an aging
6 management review include fire barriers, EG ceilings,
7 damper housing, doors, floors, penetration seals in
8 walls, sprinkler heads, fire suppression system piping
9 and valve bodies and fire protection tanks and pump
10 casings and fire hydrant casings.

11 Active components are defined as
12 components that perform an intended function as
13 described in 10 CFR 54.4 with moving parts, but with
14 a change in configuration of properties and they are
15 excluded from the aging management review". And then
16 it goes on to discuss other, "Smoke heat detectors are
17 active and excluded, certain passive and long-lived
18 components are considered consumables and therefore,
19 not subject to inclusion. System filters, fire
20 extinguishers, fire hose, air packs within the scope
21 of license renewal may be excluded on a plant specific
22 basis from AMR, Aging Management Review, under 10 CFR
23 54.21(A)(1)(2)."

24 I got tired of reading but I guess the
25 third paragraph, where it says, "The scope of

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1 equipment required to comply with 10 CFR Part 50.48 is
2 broad and also includes fire protection SSCs needed to
3 minimize the effects of a fire and prevent the release
4 of radioactive material to the environment, i.e.,
5 equipment important to safety, and the scoping method
6 should include review of any commitments made for
7 compliance with Appendix A to Branch Technical
8 Position APCS 9.5-1, Guidelines for Fire Protection",
9 that sounds broader than just aging.

10 MR. O'NEILL: Your Honor, can I address
11 that, Judge?

12 CHAIR YOUNG: Yes.

13 MR. O'NEILL: That is -- when we started
14 going through the license application, we talked about
15 the screening process. Remember what we said is we
16 were looking at systems, components and -- systems,
17 structures and components, not only that were directly
18 safety systems but also ones that were -- could be, as
19 they use the term here, important to safety. So the
20 scope of what is looked at for purposes of aging
21 management has to be broad, that's what that says and
22 indeed, it says, "Now, if you have some commitments
23 made, we want to make sure that you look at those
24 commitments because if those commitments are important
25 to insure the effectiveness of your fire protection

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1 system, then you need to look at those commitments and
2 look at any systems related to those.

3 CHAIR YOUNG: How are they related to
4 aging?

5 MR. O'NEILL: And this is just
6 identification of those components that are subject to
7 aging management, that's what that's all about,
8 scoping and screening.

9 CHAIR YOUNG: Well, the way this is
10 written, the way this is written, the next paragraph
11 after that identifies which of those are subject to
12 aging management review.

13 MR. O'NEILL: Well, I think the first one
14 says we have a Reg Guide in the NEI document which
15 provides the methodology for scoping and screening.
16 The next one subject -- you know, topic sentence says,
17 and 10 CFR Part 54.21 tells you what -- for those --
18 tells you that for those components with intended
19 functions that are identified within the scope, that
20 some are passive, some are active and they go through
21 a further clarification. Again, this is all about
22 aging management, scoping, screening, identification
23 of the aging management requirement for all of this.
24 I don't think you can read anything more than that
25 into it.

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1 It goes into consumables, some of which
2 have to be reviewed and some which don't.

3 CHAIR YOUNG: In the Pilgrim case, there
4 was a contention about, I think, Mr. Lewis was
5 involved in that case, right?

6 MR. LEWIS: Yes.

7 CHAIR YOUNG: There was a contention about
8 monitoring and there was an argument made that not all
9 underground piping -- monitoring for leaks and there
10 was an argument made that not all pipes are subject to
11 aging management review and I think that the Board,
12 and I was a member of the Board, ruled that obviously,
13 some were and that we weren't going to exclude the
14 whole contention based on the argument that some were
15 not. And I'm not sure that that contention went into
16 detail on which things were subject to aging
17 management review.

18 What I will do is probably go back and
19 review that.

20 MR. LEWIS: If I can address that just
21 quickly because there's been a lot of confusion of
22 what scoping and screening is and how it feeds into
23 the application. But in essence the scope of systems
24 is --

25 CHAIR YOUNG: I will caution you not to

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1 reargue Pilgrim here.

2 MR. LEWIS: I won't reargue it, I promise,
3 but the scope of system structures and components
4 within the scope of license renewal are defined in
5 54.4 and they are safety-related components and then
6 a number of additional classes of components including
7 system structures and components that are relied of
8 for compliance with the fire protection rule.

9 So a threshold issue in a license new
10 application is to identify all the system, structures
11 and components that meet 54.4. That is scoping and,
12 therefore, in looking at what's in scope, you have to
13 look at your commitments for satisfying the fire
14 protection rule to figure out what have I committed
15 and what am I relying on to comply with the fire
16 protection regulations.

17 Screening is the next step and when you
18 look at the requirements for an integrated plant
19 assessment in 54.21, in (A)(1) the first step is for
20 those system, structures and components that are
21 within the scope, that identified those that basically
22 are passive and long-lived. That's paraphrasing but
23 that's the screening process. So all of Chapter 2 of
24 the license renewal application is basically first
25 identifying which system structure components are

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1 within 54.4 and then when we get down to passive,
2 long-lived structures and components.

3 The third step in this whole process is
4 the aging management review and demonstration. That's
5 in Chapter 3 of the application and there what you're
6 doing is demonstrating that with respect to the
7 components that are left after the scoping and
8 screening, you have a program that adequately manages
9 aging.

10 So when you look at a license renewal
11 application, that's the structure. Chapter 2 is
12 here's scope, here's our screening, then you look at
13 Chapter 3 and it's here's the aging management program
14 that's credited for those components. That is the --
15 in essence, the sum total of the process.

16 CHAIR YOUNG: And your point with regard
17 to Pilgrim was?

18 MR. LEWIS: I wasn't going to reargue
19 Pilgrim. No, I was --

20 CHAIR YOUNG: You said you had a relevant
21 point to make, that's what --

22 MR. LEWIS: No, I was just trying to
23 clarify it because there was a lot of confusion about
24 what scoping and screening is and why this discussion
25 in Chapter 2.

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1 CHAIR YOUNG: Okay.

2 MR. LEWIS: I was just trying to lay out
3 the logic.

4 MR. O'NEILL: What he's saying is he
5 didn't think I did that well enough earlier.

6 CHAIR YOUNG: Okay, okay, all right. Let
7 me suggest that we take 10 minutes here and reconvene
8 and then see if we have anything further to cover
9 before 5:00 o'clock. I don't want to leave anything
10 out and I want to give everyone a chance to sort of
11 gather their wits. And I'd like for us to be able to
12 do that same thing and confer a little bit before we
13 close out this oral argument. I know we're going to
14 go into limited appearance statements at 5:30 and
15 we've set the closing time for 5:00 o'clock. So let's
16 be back at around 4:20.

17 (A brief recess was taken.)

18 CHAIR YOUNG: On the record. I guess the
19 only question I had and Judge Mignerey might have
20 another question whether -- And we have not been able
21 to find the thing that I was trying to put my finger
22 on but whether something that a petitioner is raising
23 can ever be construed as implicitly raising a request
24 for waiver and whether that can be raised later on in
25 the proceeding. The case I'm trying to put my finger

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1 on involved a situation where, I think, but it had
2 gotten to the Commission and the Commission remanded
3 whatever case I'm thinking about to the Board to
4 consider whether a waiver might be appropriate and I
5 may not be remembering that right. But it seemed, my
6 vague memory of it is that the Commission seemed to
7 imply that a request for waiver is not necessarily
8 that kind of thing that needs to be raised at the
9 outset and could be considered down the line.

10 If any of you have any thing on that, any
11 response that you'd like to offer on that, I'd be glad
12 to hear it because we have not been able to put our
13 finger on that issue and that at this point at least
14 in my mind, the two ways in which this contention
15 might come in if (1) it otherwise meets the criteria
16 would be if there is something in NUREG 1800 or in the
17 staff's review that does go beyond aging that would
18 suggest that this would fall into that kind of
19 category and then (2) whether there is any sort of
20 implicit request for waiver under 2.335.

21 I know you're also arguing, Mr. Runkle,
22 that the language may grant a license in 54.29. It's
23 broader than other parts of the rule and that other
24 rules than what the Commission has said in Turkey
25 Point. At this point, I'm not so sure about that.

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1 But in any event, based on that, do any of you have
2 anything that you would like to add to the argument
3 and then Judge Mignerey may have a question as well?

4 MR. O'NEILL: I never addressed your third
5 question. If you don't need to hear about it, that's
6 fine.

7 CHAIR YOUNG: The third question about the
8 license amendment proceeding?

9 MR. O'NEILL: Correct.

10 CHAIR YOUNG: Go ahead please.

11 MR. O'NEILL: I mean I --

12 CHAIR YOUNG: Yes. Thank you. Yes, we
13 sort of got going around and I think that's very
14 helpful sometimes to take things out of order and you
15 helped early on that. But, yes, please go ahead. At
16 any such license amendment proceeding, presumably the
17 petitioners would, anybody would, have an opportunity
18 to petition for a hearing in the proceeding. What
19 relevance would that have with regard to this
20 proceeding?

21 MR. O'NEILL: In Turkey Point, indeed, the
22 Commission mentioned, bears noting additionally, that
23 any change to a plant's licensing basis that requires
24 a license amendment that is a change in the technical
25 specifications will itself offer an opportunity for

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1 hearing in accordance with Section 189 of the Atomic
2 Energy Act. However, the relevance of that to this
3 proceeding is that there is no relevance for this
4 proceeding.

5 It goes perhaps to the question perhaps
6 that Judge Lam raises earlier. Is there other ways of
7 addressing a petitioner's concerns that are outline of
8 this proceeding given the narrowness of license
9 renewal? The Commission stated in McGuire, CLI 0214
10 an NRC proceeding, considers the application presented
11 to the agency for consideration and not potential
12 future amendments that are a matter of speculation at
13 the time of the ongoing proceeding. That's at 55 NRC
14 294. In McGuire, the Commission rejected the
15 expansive reading of the license renewal application
16 that would have invited inquiry to future inchoate
17 plans of the licensee.

18 CHAIR YOUNG: What about the -- Just if I
19 could interject here while you're on this.

20 MR. O'NEILL: Sure.

21 CHAIR YOUNG: What about the fact that the
22 rule talks about being exempted from the regular fire
23 protection regulations if you file a request for
24 amendment to change to the risk --

25 MR. O'NEILL: In PFA 805 performance based

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1 rule at 50.48.

2 CHAIR YOUNG: Right. And what I
3 understand is that your client has indicated an intent
4 to do that later. The Petitioners have raised an
5 issue about when there not being an endpoint to any of
6 this. Can you provide an elucidation on that?

7 MR. O'NEILL: Sure and I actually had that
8 ready to do.

9 CHAIR YOUNG: Okay. Good.

10 MR. O'NEILL: At Adams ML 051720404.

11 CHAIR YOUNG: ML 0517?

12 MR. O'NEILL: 20404.

13 CHAIR YOUNG: Okay.

14 MR. O'NEILL: Is the letter of intent of
15 Progress Energy to adopt an FPA 805 for its fleet of
16 nuclear plants, not just at Harris, its fleet of
17 nuclear plants. In that letter, it sets forth the
18 schedule for the license amendment request which will
19 be required for each of the plants to do that. There
20 is a time lag to prepare that license amendment
21 request because the process requires a PRA for each
22 plant.

23 And so consequently, set out in the letter
24 at page three shows that the Harris plant anticipates
25 the license amendment request in May of 2008. And

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1 while Mr. Runkle in his pleadings talked about an
2 endpoint of 2015 for Harris, it actually is an
3 endpoint of 2015 for the entire fleet to be
4 transitioned over to the 50.48 rule.

5 CHAIR YOUNG: And so some of the concerns
6 -- What you're saying also by implication is that some
7 of the concerns or possibly all of the concerns about
8 the fire protection might be raised in that license
9 amendment proceeding.

10 MR. O'NEILL: Well, it's certainly the
11 public would have the opportunity if there is a
12 significant hazard and there's an opportunity for
13 hearing to raise whatever issues that they might have.
14 Obviously, during this period the NRC is carefully
15 monitoring this voluntary pilot program that is
16 described in the Director's decision which Progress
17 Energy is in the lead to voluntarily transition to the
18 new rule which the Commission has encouraged because
19 it is moving more toward the probabilistic risk
20 assessment and performance based regulation.

21 So this is something that at great expense
22 the company has decided to do in order to be in the
23 Vanguard in order to address some of the issues, not
24 noncompliance, issues that have been raised with
25 respect to its current licensing basis which includes

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1 a barrier that was originally part of the licensing
2 basis which questions have been raised about using a
3 different test than was actually sanctioned by a
4 licensing board at the time operating license was
5 issued.

6 So this is a license amendment request
7 that the company has committed to submit, certainly
8 has every intent to do next year, and that the reason
9 the time lag is to perform the detailed and expensive
10 probabilistic risk assessment to make the
11 determinations as to what amendments must be made,
12 modifications to the plant or not.

13 CHAIR YOUNG: What if that amendment
14 request were denied? Would the plant then make
15 whatever changes are necessary to come in compliance
16 with the current rules? I see someone behind you
17 nodding. So you might want to --

18 MR. O'NEILL: Again --

19 PARTICIPANT: (Off the record comment.)

20 MR. O'NEILL: Sure. Of course, the issues
21 relate again to a set of differing views of what test
22 to use to qualify one hour and three hour barriers.
23 The current licensing basis has a test that was
24 referenced and litigated that is part of the current
25 licensing basis. Additional, if you will advancements

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1 in the art and what is considered more conservative as
2 a test have suggested that these materials may not be
3 appropriate in all cases.

4 There is a present set of compensatory
5 measures that assumes that they're not as appropriate
6 as the licensing basis and the deals with the safe
7 shutdown analysis today are currently operating
8 safely. That's what the Director's decision found, no
9 issue with respect to public health and safety today.
10 But because this is a complicated issue with respect
11 to these barriers, the company has elected to be the
12 first to move over to this new approach to fire
13 protection and to transition to it which will take
14 some time to do the PRA to determine do any of these
15 barriers have to be removed. Could there be other
16 ways of looking at it? How significant is it on the
17 PRA basis? That's what's happening today. That's why
18 we sit here and cringe when we heard constantly we're
19 not in compliance with our current licensing basis.
20 That's not technically a correct statement.

21 But the point is we have a safe shutdown
22 analysis. The NRC has looked at it many times. And
23 we're operating safely which is why I say there's no
24 basis for any contention here really.

25 CHAIR YOUNG: Okay.

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1 MR. O'NEILL: That's where we are in the
2 timing and I thought it important to put that on the
3 record because it's not seven or eight years off. It
4 is something that's occurring in near term and that we
5 are the first of all of the utilities and many are
6 likely to follow when the new plants that will be
7 constructed will be following this approach.

8 JUDGE LAM: And if I may add, I'm calling
9 to the Commission staff of the new rule that's
10 implemented according to the Commission staff to
11 enhance safety because not all vulnerabilities are
12 created equal. So in the risk performance basis, one
13 needs to address the most critical items first and in
14 that regard safety would be enhanced.

15 MR. O'NEILL: The one last point to sort
16 of wrap this up goes back to Turkey Point again
17 because of at least holding open the idea that maybe
18 this contention was all about meeting the licensing
19 basis in the years 2027 to 2047 and during the break,
20 my partner pointed out that actually Turkey Point
21 addresses that as well.

22 In the Turkey Point case which, of course,
23 is CLI 0117, I think I need to read the previous
24 paragraph to put it in context.

25 CHAIR YOUNG: Just a second. Let me see

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1 if I can put my hands on that.

2 MR. O'NEILL: I have the West Law version.
3 So it looks to be page five, the last paragraph of
4 page five, on the -- Excuse me. Or at 54 NRC at 5 is
5 where I'm reading from.

6 CHAIR YOUNG: All right.

7 MR. O'NEILL: And the paragraph before
8 which we focused on some is where the Commission
9 states "In establishing its license renewal process,
10 the Commission did not believe it necessary or
11 appropriate to throw open the full gambit of
12 provisions in a plant's current licensing basis to
13 reanalysis during the license renewal review. The
14 current licensing basis represents an evolving set of
15 requirements and commitments for a specific plant that
16 are modified as necessary over the life of a plant to
17 ensure a continuation of an adequate level of safety."
18 Citing the *Federal Register*.

19 CHAIR YOUNG: That's actually 54 NRC at 9.

20 MR. O'NEILL: I'm sorry.

21 CHAIR YOUNG: But anyway, go ahead.

22 MR. O'NEILL: "It is effectively addressed
23 and maintained by ongoing agency oversight review and
24 enforcement."

25 CHAIR YOUNG: Right.

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1 MR. O'NEILL: The next paragraph, however,
2 goes to the future. "Just as these oversight programs
3 help ensure compliance with the current licensing
4 basis during the original license term, they likewise
5 can reasonably be expected to fulfill this function
6 during the renewal term. In short, the regulatory
7 process commonly is the means by which the Commission
8 continually assesses the adequacy of and compliance
9 with the current licensing basis."

10 And at the end of the day with the
11 Petitioners having disavowed this being an aging
12 management contention, we then point to the language
13 that the Board mentioned in its order, but also the
14 couple sentences before and after as a summary. "The
15 Commission" --

16 CHAIR YOUNG: The language from Turkey
17 Point?

18 MR. O'NEILL: Turkey Point at --

19 CHAIR YOUNG: Ten.

20 MR. O'NEILL: Ten. But before the
21 language you cited is "In sum, our license renewal
22 safety review seeks to mitigate the detrimental
23 effects of aging resulting from operation beyond the
24 initial license term. To that effect, our rules focus
25 the renewal review on plant systems, structures and

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1 components for which current regulatory activities and
2 requirements may not be sufficient to manage the
3 effects of aging in the period of extended operation.
4 Adjudicatory hearings and individual license renewal
5 proceedings will share the same scope of issues as our
6 NRC staff review for our hearing process like our
7 staff's review necessarily examines only the questions
8 our safety rules make pertinent. Our rules
9 nonetheless recognize and provide the possibility of
10 exceptional situations on a case by case basis. If
11 warranted, by special circumstances, the Commission
12 may waive application of one or more of our license
13 renewal rules or otherwise make an exception for the
14 proceeding at issue."

15 CHAIR YOUNG: And that's the now the
16 2.3.3.5.

17 MR. O'NEILL: Right.

18 CHAIR YOUNG: Right. And that's what I
19 was trying to recall and I didn't. We have about ten
20 more minutes.

21 MR. O'NEILL: The last sentence is
22 important.

23 CHAIR YOUNG: Okay. Go ahead.

24 MR. O'NEILL: "Absent such a Commission
25 ruling under Section 2.75(A) which is now 2.3.3.5,

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1 however, the scope of the Commission review determines
2 the scope of admissible contentions at a renewal
3 hearing." So I think that the cart has to come before
4 the hearing.

5 CHAIR YOUNG: All right. Just very
6 briefly, do either of you have anything else to say
7 and then did you want to ask your question first or
8 after?

9 JUDGE MIGNEREY: That's all right. Well,
10 I had one very interesting. I say, suppose that it
11 was agreed that a plant was outside this current
12 licensing basis and did not have a path to it, not one
13 of these situations where "Temporarily this is
14 offline. We'll get it online." How in a licensing
15 renewal can you review aging of a system which is not
16 viable?

17 MR. RUNKLE: -- or not there.

18 MS. UTTAL: The system doesn't exist.

19 JUDGE MIGNEREY: The system that would be
20 in compliance does not exist in a license renewal.
21 I'm not saying this is necessarily your situation but
22 this is a hypothetical situation. They say that
23 "Okay, you need to do something else. You haven't
24 done it. You submit your license renewal. The
25 adequate system does not exist." How do you review

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1 that?

2 MS. UTTAL: You mean the system does not
3 exist in the reactor?

4 JUDGE MIGNEREY: That is --

5 MS. UTTAL: There are reactors that have -

6 -

7 JUDGE MIGNEREY: That is in compliance
8 with th current licensing basis.

9 MS. UTTAL: Well, either it's there and is
10 not in compliance or it's not there. So it can't be
11 in compliance. I don't know which one you're talking
12 about.

13 JUDGE MIGNEREY: Okay. The system that's
14 there is not in compliance which means that the
15 adequate system that is viewed by the Commission as
16 being in compliance is not there.

17 MS. UTTAL: I'm not understanding this.

18 CHAIR YOUNG: If it's not there, how do
19 you look at the aging of it? If the system doesn't
20 exist, then you wouldn't do aging management on it
21 because it doesn't exist for that particular reactor.

22 JUDGE MIGNEREY: Okay. Say that it was
23 unequivocally proven that a certain type of barrier is
24 not sufficient and doesn't work and this plant has
25 that kind of barrier and they submit an application

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1 for renewal.

2 MS. UTTAL: It would be under again the
3 current license basis.

4 JUDGE MIGNEREY: But how do you treat
5 aging of something that doesn't exist that isn't
6 inappropriate? It's not there. As I said, it's a
7 philosophical question.

8 MR. O'NEILL: I'm sure David will have
9 better answer, but I'm always happy to take a --

10 CHAIR YOUNG: If the -- options involved
11 X, Y or Z types of materials then how would an aging
12 review be conducted on those if they were not in
13 place? Does that make sense?

14 JUDGE MIGNEREY: Yes. If they were not in
15 place at the time of renewal.

16 MR. LEWIS: If there were literally no
17 structural component at all but if there was a
18 structural component, the issue is is it performing
19 its function. You can still do the aging review. You
20 do the aging review by looking at the materials and
21 the environments.

22 JUDGE MIGNEREY: But you've already
23 determined it's not performing its function.

24 MR. LEWIS: That's an issue.

25 JUDGE MIGNEREY: Right.

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1 MR. LEWIS: That's an issue that is
2 explored in the current licensing basis. For license
3 renewal, you can still look at aging effects and you
4 can look at the materials in an environment, determine
5 whether there's any age related degradation mechanism
6 in the place that prevents that age related
7 degradation from having an effect on the functioning
8 of the component. The separate issue then is whether
9 that function is sufficient. But that is entirely
10 separate from the aging issue and is a current
11 licensing term issue and if that's a safety issue, the
12 Commission should take proper action outside of
13 license renewal proceeding. You can address an aging
14 issue separately.

15 CHAIR YOUNG: Just as a matter of
16 interest, is there an aging review being done with
17 regard to these pieces of equipment that are at issue
18 in this contention even though you're nodding yes?

19 MR. O'NEILL: The answer is yes. Let's
20 focus on the hemic MT fire wrap. It is inspected
21 today and would be inspected throughout the license
22 life on a periodic basis. I believe it's 18 months.
23 Eighteen months an entire walkdown of every linear
24 foot of that material to ensure that it hasn't been
25 torn, that it's not degraded, that it's still there

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1 and still serving its function.

2 So now you might say "Well maybe there
3 won't be a wrap. Maybe it will be something else."
4 Yes, it could very well be a cable with a three hour
5 rating. They have replaced some cables that had a
6 fire wrap with a cable with a three hour rating. But
7 then the aging management would be in the inspection
8 of a cable as opposed to th inspection of the fire
9 wrap but still would be under the aging management
10 system for, in that case, cable as opposed to wrap.

11 MR. RUNKLE: Excuse me, Your Honor.

12 (Off the record discussion.)

13 CHAIR YOUNG: Anything further? Go ahead,
14 Mr. Runkle. Just in the last few minutes we'll let
15 you.

16 MR. RUNKLE: But that's not what happens.
17 In the part of the hearing on the 2206 petition, staff
18 said they knew that hemic wrap was out of compliance.
19 So they didn't inspect it. That's the way these
20 things are handled. If they aren't there or they're
21 out of compliance, they know they're out of
22 compliance, why inspect them? They're still out of
23 compliance.

24 So these major areas on the fire
25 protection haven't been addressed. There's no

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1 walkdown at 18 months. This is just not what happens
2 at the plant. The NRC staff inspectors say, "Yes,
3 we're not going to inspect that. We know it's out of
4 compliance."

5 The other point I'd just like to close on,
6 and I know time is getting late, based on Mr.
7 O'Neill's assertions that Progress is seeking
8 compliance with the NFPA 805 and that there is a
9 process going on, I would hereby move that we stay
10 these proceedings then until that is accepted. It
11 seems to me that I think that would answer a lot of
12 these questions about whether these things should be
13 addressed now. Let's just wait until that happens and
14 if they come into compliance in '08 or '15 or whatever
15 the time period is on that, that may cut out a lot of
16 this. We'd be glad to wait a couple years and push
17 them and see if they can come into compliance.

18 CHAIR YOUNG: I think the issues similar
19 to that have been raised in the license renewal
20 proceedings. I can't recall off the top of my head
21 what the authority is. But if you're going to be
22 filing something else with us on Friday which is the
23 authorizations, if any party could file with us also
24 by Friday any case law on the issue of staying
25 proceedings or any other authority on that, that would

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1 be helpful.

2 MR. RUNKLE: Well, then I'll make that
3 motion on Friday and will submit a short brief on it.
4 You have the power under Sections --

5 CHAIR YOUNG: Well, let's consider that
6 you're making the motion now and we'll just get
7 simultaneously any authority that any of you want to
8 provide to us on that issue.

9 MR. RUNKLE: If they come into compliance,
10 we don't have a contention. So if we wait until they
11 come into compliance, that answers a lot of those
12 questions. We've been waiting 18 years. So we could
13 go another two years.

14 CHAIR YOUNG: Before we close, two things.
15 One, do you want to address why -- Let's assume that
16 the license amendment request does come in on schedule
17 in May 2008 and you can petition for a hearing in that
18 proceeding. Are there any issues that you think could
19 not be satisfactorily addressed in that proceeding?
20 That proceeding would be I'm assuming 2206 or a
21 rulemaking obviously.

22 I'm trying to recall exactly what you said
23 on that issue and I'd like to know whether you have
24 anything else to say on it before we close now.

25 MR. RUNKLE: What I had said earlier, Your

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1 Honor, was when that happens we may or may not
2 intervene in that proceeding and raise issues. We're
3 right here now and I don't think it's going to happen
4 in May '08 and it certainly will be several years to
5 resolve on that. So we're looking at now, there's
6 still, I'm going to use the words again, reasonable
7 assurance that they will be in compliance.

8 So if they do, that would be great. We
9 don't have a contention if they can safely operate
10 this plant. Given their last 18 years, they haven't
11 been able to do that and given the foreseeable future,
12 that's what's going to affect. If we can stay the
13 proceeding until then, let's come back in a couple
14 years and then issue the license.

15 CHAIR YOUNG: I guess I should say I think
16 my recollection is that the Commission has said, I
17 think they have spoken to this issue, to the effect
18 that a stay would not be an appropriate thing to do,
19 but I'm just not recalling the cases.

20 Then I guess one last thing with you,
21 another last thing with you, since the GAO is going to
22 be doing the investigation, there is that avenue which
23 is not through the NRC. But there is that additional
24 path through which the issue is going to be addressed
25 apparently.

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1 MR. RUNKLE: Madam, I think of a half of
2 a dozen other avenues also. So that gives us a little
3 assurance that we're going to relicense this facility
4 to the year 2047 when it's been out of compliance and
5 it's going to stay out of compliance.

6 CHAIR YOUNG: All right. The staff, do
7 you have anything further to add?

8 MS. UTTAL: No.

9 CHAIR YOUNG: Thank you. This has been
10 helpful. You certainly raised a thorny issue and it's
11 been helpful to go through it with all of you and we
12 will once we receive everything from the parties be
13 issuing a ruling on the contentions and on the issue
14 of standing and anything else in the petition. We
15 appreciate your patience here and we will reconvene at
16 5:30 p.m. to hear limited appearance statements.

17 You're welcome to stay and listen and any
18 individuals are welcome to give statements. But
19 generally, counsel for parties sort of sit back and
20 listen. So we may move this table here so that people
21 can come up closer to us and have their say.

22 Anything else before we adjourn? All
23 right. Thank you all. Off the record.

24 (Whereupon, the proceedings went off the
25 record at 4:55 p.m.)

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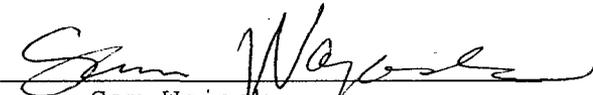
Name of Proceeding: Shearon Harris Nuclear

Oral Arguments

Docket Number: 50-400-LR, ASLBP No. 07-855-02-LR-BD01

Location: Raleigh, North Carolina

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