

# Official Transcript of Proceedings

## NUCLEAR REGULATORY COMMISSION

Title: Limerick Generating Station  
Oral Arguments

Docket Number: 50-352-LR, 50-353-LR

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UNITED STATES OF AMERICA

U.S. NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of: : Docket Nos.  
: 50-352-LR,  
EXELON GENERATION COMPANY, : 50-353-LR  
LLC :  
(Limerick Generating : ASLBP No.  
Station, Units 1 and 2) : 12-916-04-LR-BD01

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Tuesday,  
February 21, 2012  
Norristown, Pennsylvania

BEFORE:  
WILLIAM J. FROEHLICH, Chairman, Administrative Judge  
WILLIAM E. KASTENBERG, Administrative Judge  
MICHAEL F. KENNEDY, Administrative Judge

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On Behalf of the U.S. Nuclear Regulatory

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

9:00 a.m.

CHAIRMAN FROEHLICH: Good morning. Please  
be seated.

MS. LEACH: Good morning.

CHAIRMAN FROEHLICH: Good morning. It's  
Tuesday, February 12, 2012, just a little bit after  
9:00 a.m. Eastern Standard Time, in Courtroom A of the  
Montgomery County Courthouse, Norristown,  
Pennsylvania.

Today's proceeding concerns the  
application by Exelon Generation Company to renew the  
operating licenses for the Limerick Generation  
Station, Units 1 and 2, for an additional 20 years.

The operating licenses for Units 1 and 2  
are currently set to expire on October 26, 2024 and  
June 22, 2029, respectively.

For the record, the Docket Number for  
Exelon's applications are 50-352 LR and 50-353 LR.

On November 22, 2011 the Natural Resources  
Defense Council, and we'll refer to them today I guess  
as NRDC, filed a number of challenges to Exelon's  
license renewal application, and requested a hearing.

The Atomic Safety and Licensing Board was  
created on December 15, 2011 to adjudicate these

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1 challenges, which are the subject of today's oral  
2 argument.

3 My name is William Froehlich. I am an  
4 Administrative Judge and serve as Chairman of this  
5 Board. To my left is Judge Michael Kennedy. Judge  
6 Kennedy has been a full-time member of the Atomic  
7 Safety and Licensing Board Panel since 2008.

8 Judge Kennedy received his BS in Physics  
9 from Canisius College and his Master's and PhD in  
10 Nuclear Engineering from the University of Virginia.

11 Prior to joining the ASLBP, he spent over  
12 35 years performing and reviewing licensing and safety  
13 analysis of nuclear facilities.

14 To my right is Judge William Kastenbergl.  
15 Judge Kastenbergl has served as a part-time member of  
16 the Panel since 2007.

17 He received his BS and MS in Engineering  
18 from UCLA and a PhD in Nuclear Engineering from  
19 Berkeley.

20 Judge Kastenbergl was a Professor for over  
21 40 years, teaching courses such as risk assessment,  
22 management and nuclear reactor analysis and safety,  
23 first at UCLA, then at Berkeley, where he retired as  
24 the Daniel M. Tellep Distinguished Professor of  
25 Engineering.

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1           As I mentioned, my name is William  
2 Froehlich. I'm an attorney by training. I've had  
3 about 35 years of Federal Administrative and  
4 Regulatory Law experience. I joined the Panel in  
5 2008. I serve as a Legal Judge and as Chairman of this  
6 Board for procedural matters.

7           I'd also like to introduce our Law Clerk,  
8 Matthew Flyntz. Mr. Flyntz is an attorney and assists  
9 the Board with legal research, and last but not least,  
10 we have our Administrative Assistant here, Ms. Karen  
11 Valloch, all the way in the back.

12           At this point, I want to thank the Judges  
13 and the staff of the Montgomery County Courthouse for  
14 allowing us to use this beautiful Courtroom,  
15 especially the Honorable William J. Furber, Jr., the  
16 President Judge, and Judge Bernard Moore, whose  
17 Courtroom we are using now, along with Ms. Gina  
18 Eberhardt, Assistant to the Court Administrator, and  
19 Officers Austin and Sisca from the Montgomery County  
20 Sheriff's Department.

21           Our Court Reporter today is Tony Porreco.  
22 There will be an electronic transcript made of this  
23 entire proceeding, and copies will be available to the  
24 public. The transcript will be posted on the NRC  
25 website in about one week.

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1 I'd also like to mention that members of  
2 the media and the public are welcome to attend, to  
3 observe today's proceeding. Ms. Diane Screnci, in the  
4 back with her hand up, from the NRC Office of Public  
5 Affairs is present, and you can contact her if you  
6 have any questions about anything that you hear today.

7 At this point, I'd like to have the  
8 parties introduce themselves. I'd like for the lead  
9 representative to introduce yourself, state the name  
10 of your client and the name of any Counsel who may be  
11 participating with you in oral argument today.

12 Let's start with the Applicant.

13 MR. POLONSKY: Good morning, Your Honors.  
14 Alex Polonsky, Morgan, Lewis and Bockius for Exelon  
15 Generation Company.

16 To my right, arguing as well today, is  
17 Brooke Leach from Morgan, Lewis and Bockius, and to my  
18 left is a representative from our client, Exelon  
19 Generation, Jay Bradley Fewell.

20 CHAIRMAN FROEHLICH: Okay, thank you, and  
21 for the Petitioner.

22 MR. ROISMAN: Good morning. My name is  
23 Anthony Roisman. I represent the Natural Resources  
24 Defense Council, NRDC and with me today for the  
25 moment, is Chris Paine, who runs the nuclear program

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1 at the NRDC, and he's sitting back over there.

2 My other technical people will be coming,  
3 once they manage the traffic problems in this area,  
4 and one of them will sit here with me, depending on  
5 the questions that you're asking, just to give me  
6 advice.

7 CHAIRMAN FROEHLICH: Okay, thank you, and  
8 for the NRC staff?

9 MR. SMITH: Max Smith, arguing for the NRC  
10 staff, and I'm joined today by Ms. Catherine Kanatas  
11 and Ms. Lauren Woodall, who will -- Lauren Woodall,  
12 who will both be arguing with me today.

13 We also have several NRC staff members  
14 here. Leslie Perkins and Rob Kuntz are the  
15 Environmental and Safety Project Managers for this  
16 case, respectively, and Bruce Stuyvenburg and Jerry  
17 Dozier are also with us.

18 CHAIRMAN FROEHLICH: Thank you. Just a  
19 few pieces of housekeeping, before we begin.

20 As a reminder, it's the policy of the  
21 Montgomery County Courthouse that the photography is  
22 not permitted in the Courtroom.

23 In addition, the Courtroom doesn't permit  
24 cell phones, so that shouldn't be an issue, but if you  
25 were somehow able to get a cell phone in here, please

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1 make sure you've shut it off or set it to 'stun', so  
2 that we don't hear it.

3 I'd also like to explain a little bit  
4 about the rules of the Atomic Safety and Licensing  
5 Board, maybe a little background for this proceeding,  
6 just a little bit about the purpose of today's  
7 argument.

8 The Energy Reorganization Act of 1974, a  
9 law passed by Congress, created the NRC, which is  
10 tasked essentially with the regulation of civilian  
11 uses of nuclear materials.

12 The Commission itself is comprised of five  
13 Commissioners, who are appointed by the President and  
14 confirmed by the Senate. The Commission has a large  
15 regulatory staff of several thousand professionals and  
16 they are represented today by the attorneys of the  
17 NRC's Office of General Counsel.

18 We, as the Atomic Safety and Licensing  
19 Board, are a separate entity. Judges of the ASLBP are  
20 appointed to adjudicate these types of cases, and  
21 while we are employees of the NRC, we're not part of  
22 the Commission's regulatory staff. We don't talk with  
23 the staff or with the Commissioners regarding the  
24 proceedings before us.

25 The only communications we have with the

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1 staff, or with the other parties for that matter, are  
2 through the documents they have filed and public  
3 sessions like we are at today.

4 The Commission is an Appellate body and  
5 may overrule our decision. Likewise, the Commission's  
6 decisions are appealable to the Federal Courts.

7 As I mentioned, this proceeding arises  
8 from an application dated June 22, 2011, filed by  
9 Exelon to renew its operating licenses for the  
10 Limerick Generating Stations, Units 1 and 2.

11 That application was noticed in the  
12 Federal Register on August 24, 2011, and that Hearing  
13 Notice also stated that any person who has an interest  
14 that may be affected by that proceeding, who wishes to  
15 participate as a party, must file a petition for leave  
16 to intervene, in accordance with 10 CFR 2.309.

17 On November 22, 2011, the NRDC filed four  
18 contentions, challenging the adequacy of Exelon's  
19 license renewal application for the Limerick  
20 Generating Station.

21 The first three contentions challenge in  
22 various ways, whether or not Exelon's analysis of  
23 severe accident mitigation alternatives, which we'll  
24 refer to as SAMA's during today's proceeding, satisfy  
25 the Commission's regulations regarding license

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1 renewal.

2 The fourth contention challenges Exelon's  
3 analysis of so-called -- of the so-called no action  
4 alternative, to the proposed renewal of the licenses  
5 for the two units.

6 On December 28, 2011, Exelon filed an  
7 answer opposing NRDC's petition to intervene, and on  
8 the 21<sup>st</sup> of December, the NRC staff filed its answer,  
9 opposing the petition.

10 NRDC filed a combined reply to the Exelon  
11 and the NRC staff on January 6, 2012. Motions to  
12 Strike portions of the NRDC's combined reply were  
13 filed on January 17<sup>th</sup> by Exelon and the NRC staff.

14 The NRC -- NRDC filed a combined  
15 opposition to these Motions to Strike on January 27,  
16 2012.

17 To be granted a hearing in one of our  
18 proceedings, a Petitioner must demonstrate that it has  
19 standing and must submit at least one admissible  
20 contention. This Board will decide whether that  
21 request for a hearing should be granted.

22 We will decide whether the NRDC has  
23 standing, although we do note at the outset, that  
24 neither Exelon nor the NRC staff has challenged  
25 standing, and whether they have submitted at least one

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1 admissible contention.

2 A number of regulations in CFR govern the  
3 conduct of this Atomic Safety and Licensing Board and  
4 the parties before us. In particular, 10 CFR Section  
5 2.309(f) (1) governs the admissibility of contentions.

6 It provides that a Petitioner must provide  
7 a specific statement of the law or fact to be raised  
8 or controverted, must provide a brief explanation of  
9 the basis of their contention, must demonstrate that  
10 that contention is within the scope of the proceeding  
11 and that it is material to the conclusions or  
12 decisions that the agency must make.

13 Must provide a concise statement of the  
14 alleged facts or expert opinion which support their  
15 position, and on which they intend to rely at hearing,  
16 and must show that there is a genuine dispute with the  
17 Applicant on a material issue of law or fact.

18 As a reminder, the purpose of today's oral  
19 argument is to allow the Board to ask questions of the  
20 parties, to help us in our determination of whether  
21 the NRDC has met the burden under 10 CFR Section 2.309  
22 (f) (1) .

23 Specifically, the focus today is whether  
24 or not the four proffered contentions meet the  
25 criteria for admissibility.

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1 After oral argument, we'll return to  
2 Rockville, where we'll draft our initial decision and  
3 it will be issued within approximately 45 days.

4 At this point, I'd ask if Judge Kennedy or  
5 Judge Kastenberg has anything to add?

6 JUDGE KENNEDY: Nothing to add.

7 JUDGE KASTENBERG: Nothing to add.

8 CHAIRMAN FROEHLICH: As we stated in our  
9 notice, scheduling -- our notice of January 31, 2012,  
10 scheduling this oral argument, we'll begin with an  
11 opening statement of no more than 10 minutes from each  
12 party.

13 The Petitioners will go first, followed by  
14 the Applicant, and then the NRC staff. We'll then  
15 turn to our questions regarding the admissibility of  
16 the Petitioners four proposed contentions and then  
17 finish up the day with the Motions to Strike.

18 After we finished asking our questions,  
19 each party will be given five minutes at the end of  
20 the day, to make a closing statement.

21 We're now ready to hear the opening  
22 statement from Petitioners, Mr. Roisman.

23 MR. ROISMAN: Thank you, Mr. Chairman, Dr.  
24 Kastenberg, Dr. Kennedy.

25 This hearing is a strange item, if you

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1 consider that this plant still has years to go before  
2 its initial operating license will expire.

3 So, we're here about future events.  
4 Inherently, we're trying to predict the future, and  
5 the basis of the Natural Resources Defense Council's  
6 arguments here have to do with what we could now do,  
7 to anticipate what will happen 13 and 18 years from  
8 now, when these licenses will expire, if they are not  
9 extended.

10 The essence of the case depends upon  
11 whether the Applicant, Exelon, is able to meet its  
12 burden of proof. They must establish that they meet  
13 all of the requirements, environmental and safety  
14 requirements, related to the proposed extension of  
15 their license for an additional 20 years. Basically,  
16 a 50 percent extension of their operating license.

17 We here have the burden to demonstrate  
18 that we have raised valid challenges to that, but our  
19 burden is merely to demonstrate one that the Chairman  
20 has explained, that we have a specific contention,  
21 that it raises a legitimate legal and factual  
22 question, that we have provided bases which in normal  
23 parlance, really means have we given reasons why our  
24 legal arguments are provided, and finally, have we  
25 provided sufficient technical information to

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1 demonstrate not that we're wrong, but only that there  
2 is a dispute between what the Applicant has said and  
3 what we believe should be included in this proceeding.

4 In that regard, I think that the Supreme  
5 Court's decision in Robertson versus Methow Valley  
6 Citizen's Council, which we cited in our opening  
7 petition, perhaps lays out better than any other  
8 thing, the basic legal principle that we are pressing  
9 for in this case.

10 In that decision at pages 51 to 52, the  
11 Supreme Court said, "Omission of a reasonably complete  
12 discussion of possible mitigation measures would  
13 undermine the action forcing functions of NEPA."

14 "Without such a discussion, neither the  
15 agency nor other interested groups and individuals can  
16 properly evaluate the severity of the adverse effects  
17 and later," on the same page, "recognizing the  
18 importance of such a discussion in guaranteeing that  
19 the agency is taking a hard look at the environmental  
20 consequences of proposed Federal action."

21 "SBQ regulations require that the agency  
22 discuss possible mitigation measures when defining the  
23 scope of the environmental impact statement, in  
24 discussing alternatives to the proposed action and  
25 consequences of that action, and then explaining its

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1 ultimately decision."

2 Now, we are in this anomalous position  
3 created by the regulations, that basically we are  
4 asking this Board to allow us to challenge compliance  
5 with the National Environmental Policy Act.

6 However, as the Board is probably aware,  
7 the Applicant is not technically bound by that Act.  
8 It's an Act that applies to Federal agencies.

9 None the less, under the Commission's  
10 regulations, particularly 2.309(f)(1) and (f)(2), a  
11 party that wishes to challenge environmental matters  
12 must start by challenging the environmental report,  
13 and that is what we have done.

14 So, where we claim that the environmental  
15 report is deficient for not being in compliance with  
16 NEPA, we're basically saying that for the moment, you  
17 are to think of the environmental report as though it  
18 were an impact statement by the staff.

19 Any or all of those concerns that we have  
20 could, in theory, be eliminated when the staff  
21 produces its draft or final environmental impact  
22 statement. But the rules say we must raise the issue  
23 now, and so, that is what we are doing.

24 Our first three contentions, and I'll  
25 leave off the 'e', if that's all right, they're all

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1 environmental contentions.

2 One, two and three really deal with the  
3 question of severe accident mitigation alternatives,  
4 and as the Board is aware, the Applicant had such a  
5 study prepared by the NRC staff in 1989, and there is  
6 a legal question as to whether or not that document  
7 was itself, that required evaluation of mitigation  
8 alternatives, that NEPA, that the Methow case  
9 indicates is required, and that the Commission's  
10 regulations require.

11 Our view is, it is not, and there are  
12 three separate views. First, there is important new  
13 and significant information that was not part of that  
14 initial analysis, some 20+ years ago, and that needs  
15 to be considered, in order to fully evaluate the  
16 mitigation measure possibilities for this plant.

17 Secondly, that if that original analysis  
18 is to be deemed an analysis of mitigation  
19 alternatives, not of SAMA, you know, you could say  
20 that were SAMA, for the Commission's specific  
21 reference to SAMA in Part 51, but beyond its reference  
22 to SAMA in Part 51, the Commission has obligated the  
23 Applicant to do certain things, to evaluate  
24 alternatives. Mitigation measures are alternatives.

25 Instead of approving the application as

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1 the Applicant submits it, this Board could approve it,  
2 subject to various mitigation measures, being the  
3 document.

4 So; what we're talking about here in  
5 Contention 2, is that the general requirements for how  
6 alternatives are to be evaluated, have not been met by  
7 the Applicant.

8 In Contention 3, we directly take on  
9 Applicant's assertion in its environmental report,  
10 that the 1989 analysis meets an exception that the  
11 Commission created to the requirement that plants  
12 seeking license renewal must obtain and have a SAMA  
13 analysis conducted, and there, we take a look at what  
14 would be a legally sufficient SAMA analysis, compare  
15 it to the 1989 SAMDA analysis, as they used a slightly  
16 different name, and argued that it does meet it.

17 The second major contention that we  
18 raised, Contention 4, also deals with alternatives,  
19 and this is the so-called no-action alternative, and  
20 it's an alternative without alternatives, if you will.

21 In other words, it doesn't encompass some  
22 determination that some other thing ought to be done,  
23 instead of re-licensing the Limerick facility. It  
24 merely asks a very straight forward question, what  
25 would be the consequence if this Board were to

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1 determine that license renewal was not appropriate?

2 Now, obviously, that question has to start  
3 to be answered with looking at 2024, because between  
4 now and 2024, no matter what this Board decides on  
5 license renewal, nothing will be changed unless the  
6 Applicant itself chooses not to continue to operate,  
7 or for other reasons, the Commission orders the plant  
8 shut down.

9 So, we start with requiring that there be  
10 a look at the likely consequences of this event, and  
11 we claim that the Applicant has failed to look, or  
12 even consider, likely consequences.

13 Their analysis of alternatives to the  
14 plant, which is a different issue, that is, instead of  
15 allowing the plant to operate for 20 years, let's  
16 build a solar facility, or let's buy power from an  
17 outside utility or other alternatives.

18 Those options are not what we're  
19 discussing here. We're saying, what is likely to  
20 happen? Is it likely that they would take thousands  
21 of acres to put in a solar facility? Is it likely  
22 that they would put in a wind project, with again,  
23 thousands of acres?

24 Is it likely that they would see energy  
25 demand side management, that would reduce the

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1 generating need that this plant had been meeting up  
2 until 2024, and we believe the Applicant has not  
3 examined that question.

4 To the extent that they've looked at the  
5 no-action alternative at all, they have said  
6 explicitly in their environmental report, that what  
7 they are doing is comparing no action to the need for  
8 the generating capacity of this plant, its full power  
9 generation.

10 That is not what the no-action alternative  
11 is suppose to do. There is no assumption that the  
12 generating capacity of the plant needs to be met by  
13 the generating capacity of some other plant, and so,  
14 that failure is also a part of our contention.

15 Thirdly, that in looking at what the  
16 likely consequences would be of such an event, the  
17 Applicant has ignored a wide range of things that are  
18 likely to evolve over the next 13 to 18 years, in  
19 trying to figure out what would happen if this plant  
20 didn't get its license renewal.

21 In sum, we believe that we've presented  
22 the Board with the necessary elements for admissible  
23 contentions, and request that the Board grant our  
24 petition and allow us to proceed to the merits of  
25 these contentions over the next several months. Thank

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1 you.

2 CHAIRMAN FROEHLICH: Thank you, Mr.  
3 Roisman. I'd now like to hear opening statement from  
4 the Applicant, Mr. Polonsky.

5 MR. POLONSKY: Thank you. Good morning,  
6 Your Honor. Thank you for this opportunity to provide  
7 an opening statement on behalf of Exelon Generation,  
8 the company that has safely operated for decades, the  
9 two nuclear plants located at Limerick Generating  
10 Station, and the company that is seeking a 20-year  
11 extension on the current operating license for these  
12 two plants.

13 Limerick Station generates 2,340 watts --  
14 megawatts of electricity for the grid. The station is  
15 a safe and dependable source of base load electrical  
16 power. It's been operating for years on end, with  
17 only periodic breaks for maintenance and refueling.

18 Exelon submitted its license renewal  
19 application for Limerick Station last June, and the  
20 NRC will spend thousands of hours conducting a  
21 technical and environmental review of the application,  
22 regardless of whether there is a hearing on the  
23 application.

24 The NRDC has filed a petition to  
25 intervene, to challenge the application, but the NRDC

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1 does not allege a single safety issue with the  
2 operation of the plants during the renewed term of  
3 operations.

4           Rather, NRDC raises, as we have heard from  
5 Mr. Roisman, four environmental contentions, framed as  
6 legal deficiencies with the environmental report that  
7 Exelon submitted to the NRC in support of its license  
8 renewal application.

9           The first three contentions are framed  
10 around an allegation that the NRC granted Exelon a  
11 "inappropriate exemption", which allows Exelon to rely  
12 on a 1980's era severe accident mitigation study, and  
13 that there is new information, including the accident  
14 in Japan last March, that now should be considered.

15           That 1989 study was included in a  
16 supplement to the final environmental statement that  
17 the NRC staff issued in 1989, during the Limerick  
18 Station's construction and operating licensing phase.

19           These three contentions are not admissible  
20 in this licensing proceeding, because they are direct  
21 challenges to a rule in 10 CFR Section 51.53, that  
22 specifically accepts Limerick and two other nuclear  
23 stations, from submitting an analysis of SAMA's with  
24 a license renewal application.

25           The Commission created this exception

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1 because Limerick and these two other nuclear stations  
2 had already performed a SAMA or SAMDA analysis at  
3 their construction and operation phase.

4 The Commission regulations in 10 CFR 2.335  
5 are crystal clear, that an existing NRC regulation  
6 cannot be challenged in a license renewal proceeding,  
7 absent a waiver approved by the Commission itself.

8 The NRDC did not seek that approval.  
9 Accordingly, these contentions are simply not  
10 admissible here.

11 This is a perfectly fair outcome. If the  
12 NRDC thought that the 1989 final environmental  
13 statement for Limerick was not adequate, then it could  
14 have challenged the FES shortly after it was  
15 published. That was the first bite at the apple.

16 If the NRDC did not like the Commission's  
17 regulations, that accepted Limerick and these two  
18 other nuclear power stations from submitting an  
19 analysis of SAMA's with the license renewal  
20 application, then it could have submitted comments  
21 when that rule was finalized in 1996.

22 That rule was published in the Federal  
23 Register and was opened, and then reopened for receipt  
24 of public comments. That was the second bite at the  
25 apple, and there is no bar to the NRC today, filing a

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1 petition for rule making, seeking to have the rule  
2 changed.

3 But Section 2.335 soundly rejects any  
4 attempt by the NRDC to its third bite at the apple in  
5 this licensing proceeding.

6 The NRDC claims that the plain language of  
7 the regulation in Section 51.53 does not specify that  
8 it includes Limerick and that therefore, the NRDC is  
9 allowed to challenge whether Limerick falls under  
10 51.53's protective umbrella.

11 But the Commission's very intent in  
12 establishing the exception in Section 51.53 was to  
13 place Limerick and these two other nuclear stations  
14 under that umbrella. That language is indisputable.  
15 The NRDC's argument to the contrary is unsupported.

16 What these three contentions boil down to  
17 is the NRC's disagreement with a long standing NRC  
18 regulation, that the NRDC apparently only recently  
19 realized, applies to Limerick Station.

20 The NRDC cannot use this licensing  
21 proceeding as a forum to challenge their new found  
22 concern. It's as simple as that, and this is not an  
23 outcome that Exelon mandated. It's an outcome that  
24 the Commission itself has mandated, leaving no  
25 discretion to the Board to find otherwise.

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1           The first three contentions also include  
2 a claim that NRDC can challenge, in this license  
3 renewal proceeding, Exelon's evaluation of new and  
4 significant information that was included in the  
5 environmental report.

6           Exelon included NSI in its environmental  
7 report and the NRC staff will review the adequacy of  
8 that information, as part of its review of the license  
9 renewal application.

10           However, the Commission has already ruled,  
11 and a Court of Appeals has already affirmed, that a  
12 Petitioner like NRDC cannot litigate in a licensing  
13 proceeding, the adequacy of the discussion of new and  
14 significant information on matters that are resolved  
15 by regulation.

16           The fourth and last of NRDC's contentions  
17 argues that Exelon's evaluation of the environmental  
18 impacts of not issuing a renewed license for Limerick  
19 Station, called the no-action alternative, is  
20 deficient because it does not include certain  
21 renewable energy alternatives and reductions in the  
22 use of electricity called demand side management that  
23 could, hypothetically blossom in the shadow of the  
24 loss of 2,340 megawatts of power from Limerick  
25 Station.

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1                   Yet Exelon included, in its environmental  
2 report, the very renewable energy alternatives and  
3 demand side management possibilities that the NRC  
4 claims is missing -- NRDC claims is missing.

5                   Exelon included a discussion of renewable  
6 solar and wind resources with a supplemental nature  
7 gas fired plant for when the sun is not shining or the  
8 wind is not blowing.

9                   Exelon also included a discussion of  
10 renewable wind energy with a compressed air energy  
11 storage facility, and Exelon included a discussion of  
12 demand side management.

13                   Exelon not only included the discussion of  
14 these possibilities, but it presented a discussion of  
15 their environmental impacts.           Because the  
16 environmental report contains the very information  
17 that the NRDC alleges is missing, this fourth  
18 contention also is not admissible.

19                   Exelon and the NRC staff explained all of  
20 this in their answers to the petition to intervene.  
21 In response, the NRDC filed a reply that creates a  
22 moving target for the parties and for this Board.

23                   The NRDC crafted brand new arguments and  
24 submitted new interpretations about what their experts  
25 really meant to say in the petition to intervene, but

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1 a Petitioner cannot use a reply to support vague and  
2 unsupported arguments originally presented in the  
3 petition to intervene.

4 NRDC tries to shield its actions by saying  
5 that it was providing "supporting evidence", and that  
6 this is not the same as elaborating on the basis for  
7 a contention. This semantic gymnastics ignores the  
8 fact that the scope of a contention is defined by its  
9 legal citations and the breadth of its factual  
10 allegations.

11 Any new theories about why the  
12 environmental report is not adequate go beyond  
13 supporting evidence. They change the scope of the  
14 contention, and Commission regulations and precedent  
15 require that the scope of the contention be defined  
16 with specificity in the petition to intervene.

17 NRDC justifies its response in part, by  
18 claiming that Exelon sought to demonstrate that NRC  
19 was wrong "on the merits". That is not the case.

20 The Board has an obligation, at the  
21 admissibility stage, to evaluate whether the  
22 contention contains sufficient information to  
23 demonstrate that there is a genuine dispute. That is  
24 what the regulation in Section 2.309 (f) (1) requires,  
25 and Mr. Roisman, in his opening, stated that he has

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1 presented experts that demonstrate that there is a  
2 dispute. We would agree with that, but that is not  
3 the legal standard.

4 The standard is that it has to raise a  
5 genuine dispute, and Exelon has demonstrated in its  
6 answer, that the factual arguments raised by NRDC do  
7 not contain sufficient information to raise a genuine  
8 dispute. Exelon's arguments, therefore, don't go to  
9 the merits.

10 For example, NRDC's employees say that the  
11 wind patterns have changed over the past decades, such  
12 that disbursement of radiological impacts from an  
13 accident at Limerick might be different today than  
14 decades ago.

15 It's entirely appropriate for Exelon to  
16 point out that NRDC's employees, as they're experts,  
17 provide a objective data which actually shows the  
18 opposite.

19 The Board is not a robot, mindlessly  
20 accepting any arguments that are submitted simply  
21 because they're in a signed declaration. The Board is  
22 support to evaluate the arguments for what they do and  
23 do not say.

24 NRDC says it's not obligated to inform the  
25 Board and the parties, every time it identifies some

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1 new supporting evidence. That may be true, but there  
2 is a big difference between new documents that support  
3 an already well articulated argument and new  
4 arguments, supported by already identified documents.

5 For the Board to rule otherwise, would be  
6 giving an incentive for a Petitioner to hide the ball,  
7 regarding the bases for a contention, including to  
8 provide legal cites in its petition to intervene.

9 The Petitioner could always justify later,  
10 expanding the contention, by stating that it was  
11 merely providing supporting evidence. That is akin to  
12 notice pleading, which the Commission has soundly  
13 rejected, as not being the standard for admissibility  
14 of contentions in the license renewal proceeding.

15 For all these reasons, the Board should  
16 deny NRDC's petition to intervene in its entirety. We  
17 look forward to answering the Board's questions.  
18 Thank you.

19 CHAIRMAN FROEHLICH: Thank you, Mr.  
20 Polonsky. Mr. Smith?

21 MR. SMITH: Thank you, Judge Froehlich,  
22 Judge Kastenberg, Judge Kennedy.

23 The NRC staff opposes the Natural  
24 Resources Defense Council's petition to intervene.

25 As the parties have explained, and the

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1 Board has too, a petition to intervene must both  
2 establish standing, as well as proffer of one  
3 admissible contention.

4 Under the Commission's contention  
5 admissibility standards, an admissible contention must  
6 demonstrate that it is in the scope of the proceeding,  
7 material to the issues to be resolved and also,  
8 supported by an adequate factual basis.

9 The NRC staff believes that NRDC has  
10 established standing, but at that none of the four  
11 contentions meet the Commission's strict standards for  
12 contention admissibility, and because all four  
13 contentions focus on the environmental review, I'll  
14 take a minute to briefly explain the scope of the NRC  
15 staff's environmental review in license renewal  
16 proceedings.

17 The National Environmental Policy Act  
18 requires the NRC to consider the environmental impacts  
19 of renewing the operating license for an additional 20  
20 years.

21 When it promulgated its license renewal  
22 regulations, the Commission found that based on its  
23 experience with the existing reactors, and the  
24 misunderstanding of their impacts, it could draw some  
25 generic conclusions on the environmental impacts of

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1 renewing operating licenses. Prepared a generic  
2 environmental statement to support those conclusions  
3 and then the NRC and the Commission embodied those  
4 conclusions in its regulations.

5 However, the Commission also realized that  
6 some issues could not be determined generically and  
7 need to be resolved on a site specific basis.

8 For those issues, the NRC staff prepares  
9 a supplement to the generic environmental impact  
10 statement called a supplemental environmental impact  
11 statement, and in preparing that, the NRC staff relies  
12 on environmental reports submitted by the Applicant,  
13 that the NRC staff uses at the starting point for its  
14 own independent review.

15 Importantly, issues the Commission has  
16 resolved generically are outside the scope of  
17 adjudications and NRC's proceedings.

18 All three contentions -- the first three  
19 contentions, Contentions 1, 2 and 3, and I'll drop the  
20 'e' also, raise challenges to treatment of the -- the  
21 environmental report's treatment of severe accident  
22 mitigation alternatives.

23 The Commission's regulations clearly  
24 specify that if the staff has previously considered  
25 severe accident mitigation alternatives, in either an

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1 environmental impact statement or a supplement to an  
2 environmental impact statement, or in an environmental  
3 assessment, then license removal phase for that  
4 facility, severe accident mitigation alternatives need  
5 not be considered in the environmental report.

6 The staff considered severe accident  
7 mitigation design alternatives to the Limerick  
8 facility and a supplement to the environmental  
9 statement at the operating license phase -- licensing  
10 phase.

11 Therefore, under NRC regulations, all  
12 three of the first three contentions are outside the  
13 scope of this proceeding and immaterial because they  
14 challenge an analysis that the regulations do not  
15 require be in the environmental report.

16 Moreover, the Commission explained its  
17 intent when it promulgated this regulation in the  
18 accompanying statement of considerations, which was  
19 published in the Federal Register.

20 The Commission stated, "NRC staff  
21 considerations of severe accident mitigation  
22 alternatives have already been completed and included  
23 in an EIS or supplemental EIS for Limerick, Comanche  
24 Peak and Watts Bar."

25 Therefore, severe accident mitigation

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1 alternatives need not be reconsidered for these plants  
2 for license renewal.

3 Like all generic determinations, the NRC  
4 regulations provide avenues to challenge those, both  
5 in NRC adjudications and elsewhere, to the petitions  
6 for rule-making or petitions to waive the  
7 applicability of a rule in a given proceeding, but  
8 NRDC has not chosen to pursue either of those avenues.

9 Importantly, the NRC staff's consideration  
10 and the Commission's consideration of severe accidents  
11 and severe accident mitigation alternatives did not  
12 end when it promulgated the license renewal  
13 regulation.

14 Rather, the Commission and the staff  
15 continue to look at severe accidents and ways to  
16 mitigate those severe accidents, both through site  
17 specific studies and through generic studies across  
18 the entire industry, most recently, the response to  
19 the incidents of September 11, 2001, the Commission's  
20 planned proposed response to the incident of Fukushima  
21 and the state-of-the-art reactor consequence in this  
22 analysis and other studies, just to name a few, have  
23 continued to look at those issues in an evolving way.

24 The last, Contention 4e, has, as the other  
25 parties have noted, challenges the Applicant's

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1 treatment of the no-action alternative in the  
2 environmental report.

3 Now, a no-action alternative considers  
4 what would happen if the NRC were to deny the license  
5 renewal application, both the environmental impacts of  
6 decommissioning and as well, the environmental impacts  
7 of the likely sources of power to replace Limerick  
8 generating capacity.

9 NRDC alleges the no-action alternative  
10 should consider additional alternatives, but NRDC did  
11 not provide any evidence to show their technical  
12 feasibility or commercial viability in its petition to  
13 intervene.

14 NRDC's reply brief attempted to cure this  
15 deficiency by providing additional facts to support  
16 the contention, but Commission's precedent is very  
17 clear that Petitioners cannot use a reply brief as an  
18 opportunity to re-invigorate and thinly supported  
19 contention in the first instance, both for reasons of  
20 fairness and efficiency.

21 Moreover, in this case, the additional  
22 information in the reply brief is not supported by a  
23 citation to any expert declaration or other technical  
24 document, and therefore, it constitutes the types of  
25 assertion and speculation that the Commission has also

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1 found to be insufficient bases for admissible  
2 contentions.

3 Finally, I think it's worth noting that  
4 however the Board rules today, the NRC staff will  
5 conduct its own independent review of the Limerick  
6 license renewal application, both from a safety and  
7 from an environmental perspective.

8 The NRC staff's environmental review will  
9 consider the no-action alternative, as well as whether  
10 or not new and significant information impacts any of  
11 the generic determinations the Commission has  
12 previously made, including the determination to plants  
13 such as Limerick need not conduct a second SAMA  
14 analysis, if one was already completed.

15 The public has had an opportunity to  
16 participate in this process, by submitting the scoping  
17 comments for the staff's preparation of the  
18 supplemental EIS for this proceeding, and the public  
19 will have further opportunities to participate by  
20 submitting draft comments on the NRC's draft  
21 supplemental environmental impact statement.

22 Therefore, the NRC staff opposes NRDC's  
23 petition to intervene. We believe they have shown  
24 standing, but not submitted a contention that meets  
25 the Commission's strict admissibility standards.

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1                   None the less, the NRC staff will continue  
2                   to look at these issues in an ongoing fashion, as it  
3                   prepares its environmental impacts statements for  
4                   Limerick. Thank you.

5                   CHAIRMAN FROEHLICH: Thank you, Mr. Smith.  
6                   From the opening statements and from our review of the  
7                   pleadings that have been filed with the Board, much of  
8                   our discussion today, I think, will deal with SAMA's  
9                   and SAMDA's, and the relevance and the importance of  
10                  the SAMDA that was conducted in 1989, and what efforts  
11                  will be conducted to analyze severe accidents going  
12                  forward.

13                  I would like to start our questioning, I  
14                  guess, with reference to, I guess the Commission's  
15                  most recent statement on SAMA and SAMDA's in the  
16                  Pilgrim decision, the CLI 12-01.

17                  There; the Commission stated that a SAMA  
18                  analysis is part of the NRC's license renewal review  
19                  under NEPA. It's a NEPA mitigation alternative  
20                  analysis and to date, has been conducted as a  
21                  quantitative analysis to identify if there are  
22                  additional mitigation measures, procedures or hardware  
23                  that may be cost beneficial to implement a nuclear  
24                  power plant, to further reduce severe accident risk,  
25                  probability or consequences.

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1           The SAMA analysis is a probability weight  
2 of assessment of the benefits and costs of mitigation  
3 alternative that can be used to reduce the risks,  
4 again, probability or consequences or both, of  
5 potential severe accidents at nuclear power plants.

6           Various computer codes are used to  
7 calculate the accident sequence, probabilities and  
8 consequences, page two of CLI 12-01.

9           The Commission, in that Pilgrim decision,  
10 said that with respect to a SAMA analysis in  
11 particular, unless a contention submitted with actual  
12 -- with adequate factual documentary or expert support  
13 raises a potentially significant deficiency in a SAMA  
14 analysis, that is a deficiency that could credibly  
15 render the SAMA analysis all together unreasonable  
16 under NEPA standards, a SAMA related dispute will not  
17 be material to the licensing decision, and is not  
18 appropriate for litigation in an NRC proceeding, page  
19 25 of CLI 12-01.

20           The Commission in Pilgrim closed with the  
21 final observation that ultimately, the ER serves to  
22 inform the SAMA analysis in the first -- in the final  
23 supplemental environmental impact statement prepared  
24 in the Pilgrim license proceeding, while the Board's  
25 decision in that case focused on the adequacy of the

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1 ER, NEPA compliance is determined by the adequacy of  
2 the SEIS, not the Applicant's ER.

3 Therefore, the ultimate issue in  
4 determining NEPA compliance is the adequacy of the  
5 staff's environmental review, not the Applicant's ER,  
6 pages 29 to 30 of CLI 12-01.

7 As part of the notice scheduling today's  
8 oral argument, the Board sent out a preliminary list  
9 of topics to be addressed. I propose that we move  
10 through those questions in order, and the Board has a  
11 series of questions to follow up, the ones we gave  
12 you, as sort a sneak-peek of.

13 I guess I'd start with the broad first  
14 question in our notice of January 31<sup>st</sup>, where we said,  
15 "Considering the 10 CFR 51.53 (c) (3) (4) requires an  
16 environmental report to contain any new and  
17 significant information regarding the environmental  
18 impacts of license renewal of which the Applicant is  
19 aware, and that 10 CFR 51.53 (c) (3) (2) (L) requires an  
20 ER to consider alternatives to mitigate severe  
21 accidents if the staff has not previously conducted  
22 severe accident mitigation alternative for the  
23 Applicant's plant, please discuss how these two  
24 sections of the Commission's regulation should be  
25 applied in the Limerick license renewal proceeding."

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1 I think I'd like to hear first from the  
2 Applicant, and you touched on that in your opening.  
3 Mr. Polonsky?

4 MR. POLONSKY: Thank you, Your Honor.  
5 Looking at the overall structure of 10 CFR Section  
6 51.53 (c) (3), there are these four sub-sections, 1, 2  
7 and 3, or i or f, 1, 2 and 3 we'll call them -- 1, 2,  
8 3 and 4, sorry.

9 Four is the new and significant  
10 information section and two is the section that has  
11 certain requirements that must be met and creates  
12 exceptions. We don't call them exemptions, but  
13 exceptions to others.

14 There is not question in Exelon's mind,  
15 that there is an obligation to provide a discussion of  
16 new and significant information.

17 However, Section 2L specifically says that  
18 if the staff has not previously done a SAMA analysis,  
19 and here they have, there is no requirement to submit  
20 a SAMA analysis.

21 So, the 1989 SAMDA analysis that was part  
22 of the supplement to the final environmental statement  
23 for Limerick, as part of its construction and  
24 operating phase, was not incorporated by reference,  
25 was not brought in at all into the environmental

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1 report.

2           There simply was an analysis of new and  
3 significant information, or I should say new  
4 information to determine if it was significant, in the  
5 environmental report, and the specific rationale for  
6 doing that was to determine if there was going to be  
7 a change in the severe accident consequences, and on  
8 page 5-4 of the environmental report, if I can just  
9 quote to you.

10           "For purposes of this review," talking  
11 about new and significant information, "new  
12 information is defined as information indicating a  
13 potential change in consequences of severe accidents  
14 from those considered by the NRC in the GEIS, or  
15 generic environmental impact statement."

16           So, there is no discord between Sub-  
17 Section 2L and Sub-Section 4. Sub-Section 2L says we  
18 do not need to include a SAMA analysis. We did not.  
19 Section 4 says we do need to look at new information  
20 to determine whether it is significant, and we have  
21 done that, and the conclusion was that none of the  
22 information that we looked at, that was new, was in  
23 deed, significant.

24           CHAIRMAN FROEHLICH: It's your position  
25 that because the SAMDA was conducted by the staff, in

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1 August of 1989, you need not include that, make  
2 reference to that, as part of your application,  
3 relying on the exception or exemption in the regs, is  
4 that correct?

5 MR. POLONSKY: That is correct, Your  
6 Honor.

7 CHAIRMAN FROEHLICH: And that is the  
8 position that staff shares, is that correct, Mr.  
9 Smith?

10 MR. SMITH: That is correct, Your Honor.

11 CHAIRMAN FROEHLICH: Okay. Now, I guess  
12 I turn to the Petitioners.

13 JUDGE KASTENBERG: May I ask just a  
14 question?

15 CHAIRMAN FROEHLICH: Sure, go ahead. You  
16 know what my question will be.

17 MR. ROISMAN: I think I do.

18 CHAIRMAN FROEHLICH: All right.

19 JUDGE KASTENBERG: But you brought up this  
20 whole question about little 4, as new and significant  
21 information.

22 The fact that that is included, an  
23 analysis is included in the ER, is that challengeable?

24 MR. POLONSKY: Under normal circumstances,  
25 as the Board knows, yes, once information is

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1 presented, it is challengeable.

2           However, we have a line of case law that  
3 applies here, which says, for whatever curious result  
4 it is, it is not challengeable.

5           In the Pilgrim and Vermont Yankee  
6 proceedings for license renewal, the Judges of those  
7 Licensing Boards grappled with that very same  
8 question, Judge Kastenberg, and they came to the  
9 conclusion that -- and let me back up.

10           The sections that were relevant to that  
11 analysis was (c)(3)(i) and Section 4, for new and  
12 significant. Little i, or 1, covers Category 1  
13 information and says that if it's a Category 1 it does  
14 not need to be included, frankly, because it's covered  
15 by the generic environmental impact statement and  
16 therefore, has already been incorporated as part of a  
17 rule-making to Appendix B of 10 CFR Part 51.

18           So, with that background, the Boards then  
19 looked at Section 1 and 4 and said, does 4 trump 1,  
20 and the answer was no, even though you don't need to  
21 provide information about Category 1 issues, because  
22 they've already been included in the GEIS, you still  
23 need to look at new and significant information.

24           But any challenge of whether that  
25 information is there or whether that information, for

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1 our case which is most important, is adequate, is not  
2 challengeable in the license renewal proceeding.

3 Those decisions went to the Commission.  
4 They went to the Circuit Court and they were affirmed.  
5 That does not mean that there is no avenue for a  
6 Petitioner, like NRDC, to challenge.

7 They can file a petition for rule-making.  
8 They can, as the staff mentioned, comment on the draft  
9 and final SEIS, but that litigation of the adequacy of  
10 that new and significant information, the Commission  
11 has already said, cannot be done in a license -- in  
12 any license renewal proceeding.

13 JUDGE KENNEDY: Can you help us maybe  
14 expand on that a little bit more?

15 It seems to me, and there is a constant  
16 theme between the Applicant's filing and the staff's  
17 filings, does this rely on the fact that this is a  
18 Category 1 issue? I mean, are we to the point of  
19 saying that severe accident mitigation alternatives  
20 are a Category 1 issue?

21 I mean, I think we've got to be careful.  
22 I'm trying to look for the thread of when we're  
23 talking about severe accidents, which I would agree  
24 with you, is a Category 1 issue, and mitigation  
25 alternatives, which at least is not resolved

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1 generically, and then we -- we'll grapple with the  
2 exception/exemption issue.

3 But in my mind, when it comes to new and  
4 significant information, I think I'm looking for some  
5 clarification. The scope of that new information  
6 should go as broad as the mitigation alternative, and  
7 I guess I'm trying to understand how the case law  
8 takes that off the table.

9 I mean, the information is in there, and  
10 I understand what you're saying. If you put it in  
11 there, the adequacy could -- challenge could be  
12 raised. Now, whether it would be accepted or not, is  
13 pointed in the case law.

14 But I -- somehow, the bridge gets broken  
15 to me, somewhere between this Category 1 issue and  
16 where we are with mitigation alternatives, so -- and  
17 this is going to come up a few times. I mean, I think  
18 we've got some constant questions on Contentions 1, 2  
19 and 3, of how this all works.

20 We'll get to it, but I'm thinking, what if  
21 all the new and significant information led you to do  
22 -- what if it was significant? What is the outcome?  
23 Do you just say in the application that it's  
24 significant? Do you not have to deal with the SAMDA  
25 analysis, at that point? Is it the staff's issue to

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1 deal with? Does the Applicant have -- I'm sorry, this  
2 is too many questions, but let's start back with the  
3 Category 1.

4 We're going to get to all of these. I  
5 mean, I think this is going to come up time and again,  
6 and if we can nail down some of it earlier, it would  
7 be helpful. I've sort of got a broken bridge on my  
8 road to success here.

9 MR. POLONSKY: Well, let me work with that  
10 analogy and either make sure it doesn't break in the  
11 first place, or it fixes it for you.

12 Let me answer your question in two  
13 phrases. The first is that Exelon's approach was not  
14 to look at new and significant information for  
15 mitigation alternatives. The analysis has to start  
16 with severe accident consequences, and is there any  
17 new and significant information that would make a  
18 change in the -- make a significant change, because  
19 it's new and significant information, a significant  
20 change in the accident consequences?

21 And the NRC has -- well, I won't even go  
22 to the NRC. The 1989 supplement to the FES uses  
23 language in its conclusion that the consequences of  
24 severe accidents are -- let me get the exact language  
25 for you, reasonably low.

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1                   And so, the analysis that Exelon performed  
2 was to determine whether there was any information  
3 that was significant enough to change this conclusion.  
4 I'm on page VI of the supplement to NUREG-0974, which  
5 is that 1989 SAMDA document.

6                   I'm at the top, and the first full  
7 paragraph, just the first sentence, "In summary, the  
8 risks and environmental impacts of severe accidents at  
9 Limerick are acceptably low."

10                   Once the GEIS was issued, severe accidents  
11 had a Category 1 designation of 'small'. So, the  
12 review was to determine, was there any new and  
13 significant information that would change that  
14 category of 'small', to something more -- a greater  
15 impact, moderate or large?

16                   If the result of that was yes, the new  
17 information is significant, then there would have been  
18 a next step to look at mitigation alternatives, and  
19 that did not happen.

20                   But regardless, that wouldn't have been  
21 challengeable in this license renewal proceeding, and  
22 let me try and make the connection for you, between  
23 this Category 1 issue, and it not being challengeable.

24                   The ultimate take-home message, I hope  
25 you're looking for is, you don't need to find -- the

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1 Board does not need to find that the SAMDA or SAMA  
2 issue is a Category 1 issue for Limerick.

3 We think there is sufficient information  
4 in the record for you to conclude that SAMA's for  
5 Limerick are a Category 1 issue. That would clearly  
6 connect the Pilgrim and Vermont Yankee case law  
7 through to new and significant information.

8 However, even if the Board did not find  
9 that, we argued in our answer that that case law  
10 stands for the principle that any issue that is  
11 accepted by regulation, accepted by law, Category 1  
12 says you don't need to include it, 2L says you don't  
13 need to include a SAMA if you're Limerick. It's  
14 excluded -- accepted by law, then that is the new and  
15 significant information associated with that, and is  
16 not challengeable in the license renewal proceeding.

17 Otherwise, it eviscerates the whole -- the  
18 whole exception in the first place. Did that help?

19 JUDGE KENNEDY: So, when the bridge has  
20 been joined, there is the -- two sides of the river  
21 have been joined, in the world of severe accident  
22 mitigation alternatives, not just severe accidents.

23 I mean, so, whether we argue whether it's  
24 a Category 1 or Category 2, if you combine the  
25 exemption in this picture, then you view it as being

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1 at least by law, ruled out, even though you would go  
2 through -- again, in the hypothetical world where  
3 there was significant information, it ultimately led  
4 to a re-analysis of mitigation alternatives.

5 Would that all go into the ER, as new and  
6 significant information, and is not challengeable?

7 MR. POLONSKY: Again, it would not be  
8 challengeable, regardless of what the result is.

9 JUDGE KENNEDY: And that is because severe  
10 accident mitigation alternatives are ruled out by law?

11 MR. POLONSKY: For Limerick.

12 JUDGE KENNEDY: For Limerick?

13 MR. POLONSKY: Yes, Your Honor. The  
14 contention -- the result would be no different, if you  
15 had a Category 1 issue, we think, if you had new and  
16 significant information.

17 JUDGE KENNEDY: Right.

18 MR. POLONSKY: New information that turned  
19 out to be significant, you would have to do a further  
20 analysis of what that significance means for whatever  
21 Category 1 issue it was, and the NRC staff would  
22 review it, and the public could comment on it, but  
23 they could not litigate it.

24 JUDGE KENNEDY: Could not litigate it?  
25 That is -- that is the point you're making?

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1 MR. POLONSKY: Yes.

2 JUDGE KENNEDY: So, if I -- and again, I  
3 think to Mr. Smith, what I heard you say is that the  
4 staff will do its own analysis of mitigation  
5 alternatives and provide possibly, information within  
6 an environmental impact statement, supplemental  
7 environmental impact statement for Limerick.

8 I mean, assuming that it all -- I mean,  
9 again, it may support what is currently on record, but  
10 I thought I heard you say that the staff will also be  
11 doing work on its own, to look at kind of whether new  
12 and significant information is already -- or whether  
13 new information, possibly leading to changes or  
14 material within the supplemental environmental impact  
15 statement, and is it your position that that's not  
16 challengeable, you know, in a legal proceeding, in a  
17 hearing?

18 MR. SMITH: Thank you, Your Honor. You've  
19 raised several points, and I'll try to address them.

20 JUDGE KENNEDY: I have a tendency to do  
21 that. Please make me back up and repeat if, if you  
22 need it.

23 MR. SMITH: The NRC staff understands that  
24 it has to look for new and significant information to  
25 comply with NEPA, against all of the Commission's

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1 generic determinations, those in the GEIS, those that  
2 are labeled as Category 1 issues and also, this  
3 regulation that excuses facilities that have already  
4 completed one SAMA evaluation and are conducting  
5 another one.

6 The NRC looks at that information and  
7 under -- in the statement of considerations  
8 accompanying the Commission's environmental  
9 regulations, it was in 61 Federal Register 28467, if  
10 the NRC staff ultimately concludes that there is  
11 significant new information, then it, itself, has to  
12 go to the Commission to seek a waiver to consider that  
13 new information in the draft and final supplemental  
14 environmental impact statements.

15 And as the staff reviews this application  
16 and they look at it, we will look at the new  
17 information, evaluate its significance, and if we do  
18 find that it does rise to that level, then we'll ask  
19 the Commission to -- for the Commission to consider it  
20 in our environmental documents.

21 I think there was a part two to the  
22 question.

23 JUDGE KENNEDY: Well, maybe I'll re-ask,  
24 because if I understand where this is all going, let's  
25 say the information does show up in the draft

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1 supplemental environmental impact statement, that  
2 would not be available for new contentions to the  
3 Petitioner, and is not litigable?

4 MR. SMITH: Thank you. I think as a  
5 general matter, we might have a slight disagreement  
6 with the Applicant, we think, that all of the  
7 Commission's generic determinations could be litigated  
8 in an individual proceeding, on the condition that the  
9 Petitioner submitted a waiver petition, to seek  
10 Commission approval of the challenge of that  
11 determination, in the proceeding.

12 In that sense, the determination in 51.53  
13 (c)(ii)(L) is not different than any other one, and  
14 you can submit a petition on that and challenge  
15 whether or not there was new and significant  
16 information as related to the Commission's previous  
17 consideration about severe accident mitigation  
18 alternatives.

19 JUDGE KASTENBERG: I would like -- I want  
20 to come back to something over here, but we can take -  
21 - I can hold it.

22 CHAIRMAN FROEHLICH: Well, finish, but  
23 just let -- we want to hear from Mr. Roisman.

24 JUDGE KASTENBERG: Yes, just maybe a fine,  
25 yet important point, you quoted the NUREG, about that

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1 if new and significant information changed the risk,  
2 is the way I think you characterized it, then it might  
3 be -- that it might be challengeable.

4 ' My understanding, in reading what the  
5 Commission has said, that it's not that it's the risk,  
6 because they've already determined that the risk is  
7 small, but it is the balance between the cost and the  
8 benefit that might change, and I say that may be a  
9 subtle point, but it is a -- to me, at least, it is a  
10 significant point, that it's the change in risk,  
11 balanced against the cost of the mitigation, or some  
12 new mitigation device, or what have you, that would be  
13 permissible in a proceeding.

14 Again, you might argue, that well, because  
15 of this Sub-Part L, they're exempt even from that.  
16 I'm not so sure. That's what I would like to try to  
17 get a sense of, in that sense, that it's really the  
18 cost benefit that you have to look at.

19 MR. POLONSKY: Judge Kastenberg, you're  
20 right, for that Pilgrim decision, that CLI 12-01.

21 JUDGE KASTENBERG: Right.

22 MR. POLONSKY: But in that case, that was  
23 an admitted contention -- contentions, related to  
24 severe accident mitigation alternative analyses and  
25 the adequacy of those analyses, and once you get into

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1 the analysis itself, the ultimate arbitrator for  
2 whether or not a mitigation alternative is justifiable  
3 to add, is that cost benefit analysis.

4 We are three steps removed from getting  
5 all the way down into the details of that. We are  
6 looking at severe accident consequences, and we don't  
7 even get into the SAMA analysis, in our view, until we  
8 have determined that there is new and significant  
9 information that would change the outcome of that  
10 severe accident consequence analysis from "small", as  
11 defined under Part 51 and 52, to moderate or large,  
12 and if I could quickly clarify.

13 I tend to simply and say it's not  
14 litigable. It's not litigable. But clearly, 2.335  
15 exists to everything I am saying, and if there is a  
16 waiver that is submitted and granted by the  
17 Commission, then of course, it could be litigable, but  
18 we don't have those circumstances here.

19 CHAIRMAN FROEHLICH: Mr. Roisman, let's go  
20 back to two, and your view -- your view of the role of  
21 the 1989 SAMDA analysis played vis-a-vis raising  
22 Contentions 1, 2 and 3, at this point.

23 MR. ROISMAN: So, I must say you're a  
24 little bit, I think, Shakespearean, after we've been  
25 sitting here playing Hamlet without Hamlet, and I was

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1 glad to see that Mr. Polonsky decided to bring Hamlet  
2 on the stage, by quoting to you from the 1989 SAMA.

3 It is a myth to say that the SAMDA, the  
4 1989 SAMDA is not in this case. In fact, if it's not  
5 in this case, and Exelon fails to meet its burden of  
6 proof that it claims would give it an exemption under  
7 51.53 (L), because that requires proof that there has,  
8 in fact, been a prior SAMA analysis.

9 That is the condition for the exception to  
10 be applied.

11 CHAIRMAN FROEHLICH: That requires proof,  
12 that there was a SAMDA analysis in 1989? Can't we all  
13 agree that a SAMDA analysis was prepared by the staff  
14 in 1989?

15 MR. ROISMAN: They could offer that as a  
16 stipulation. We would not agree to it, because it's  
17 not a SAMDA analysis that 51.53(L) applies its  
18 exemption to.

19 It's a prior analysis of severe accident  
20 mitigation alternatives, and as we've argued in our  
21 Contention 3, we think that has some meaning, and the  
22 meaning is not actually in 51.53. It's in all the  
23 other regulations that the Commission has written  
24 about what has to be done with alternatives, and it's  
25 in the case that I cited in my opening statement.

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1           It is a requirement that you take a hard  
2 look at mitigation alternatives. I submit that any  
3 review of this document, the 1989 supplement, could  
4 not tell what was done by giving a hard look.

5           On at least two occasions, the staff  
6 explicitly says there are potentially cost beneficial  
7 SAMA mitigation measures.

8           But they say, Applicant has submitted some  
9 documents to us that suggest that the risk analysis is  
10 overly conservative, and the staff goes onto say, "We  
11 haven't evaluated that yet, but we're going to use the  
12 fact that they submitted it to us, to say therefore,  
13 these things that look like they might be cost  
14 beneficial aren't."

15           Now, any other definition of hard look,  
16 that's not a hard look, that's a duck, and that's what  
17 is happening here.

18           So, number one, and by the way, in a  
19 different Pilgrim decision, the Commission made the  
20 observation that we don't take the Applicant at its  
21 word.

22           The Applicant has told us that there is an  
23 adequate SAMDA -- excuse me, severe accident  
24 mitigation alternatives analysis that needs to come,  
25 but they have to prove it first. We don't take them

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1 at their word.

2 But let me step back from that for a  
3 moment, because in a way, that really only gets us to  
4 Contention 3, and now, for the moment, I want to focus  
5 where I think you started with Contention 1, new and  
6 significant information.

7 Let's identify what we know we agree  
8 about. Applicant, NRDC and staff agree that new and  
9 significant information exists, at least new  
10 information, excuse me, new information that bears on  
11 the 1989 SAMDA analysis, and that it's required to be  
12 included in the environmental report.

13 We disagree about whether it's  
14 significant. We also disagree about whether all the  
15 new information that bears on that report has been  
16 produced in the ER, but we don't disagree that if it  
17 is new, it belongs in an analysis and an environmental  
18 report, and the Applicant has provided one in its  
19 report.

20 We also agree that the test of whether  
21 it's significant or not depends upon the consequences  
22 test, and I think the Commission -- and we quoted this  
23 in our -- in our brief, in the petition at page 29,  
24 the Union Electric Callaway Plant case, in which the  
25 Commission said, this is their slip opinion at page

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1 31, the new information must present "a seriously  
2 different picture of the environmental impact of the  
3 proposed project, from what was previously  
4 envisioned".

5 Now, we submitted a declaration and by the  
6 way, Dr. McKinzie has joined me to help -- we  
7 submitted a declaration that describes in some detail,  
8 all of the ways in which new information would be  
9 significant here from looking at different accident  
10 scenarios, looking at a broader range of potential  
11 mitigation consequences, looking at the effect of  
12 population, looking at the effect of meteorology, a  
13 whole range of items that we claim, represent  
14 significant, not just new, but significant information  
15 because -- and the experts that prepared that  
16 technical declaration, take you through comparable  
17 plants, look at other plants and see what did those  
18 plants find were severe accident mitigation  
19 alternatives, and how are those different than what we  
20 now see, in looking at the 1989 SAMDA?

21 So, I think we've met a burden that is at  
22 least showing that there is a genuine dispute with the  
23 Applicant about how much information is new and what  
24 of the new information is significant, but we don't  
25 disagree with them, that it is a consequences test.

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1 It has -- can't just be an abstract, that is a very  
2 fine point, but it doesn't make any difference.

3 Where we disagree, and disagree  
4 substantially, is whether or not we're entitled to  
5 challenge the new and significant information that  
6 they have put into their report, the environmental  
7 report, and now, that the staff says might conceivably  
8 show up in the draft environmental impact statement,  
9 even arguably, a broader range of new information.

10 And they touched on it, in their own  
11 argument, that have -- that says that something that  
12 they assert in the environmental report is not  
13 challengeable here, is a line of Commission decisions  
14 that said when new and significant information is  
15 challenge in order to move a Category 1 generic  
16 finding to a Category 2 site specific finding, that  
17 has to be done by rule-making, by challenge under  
18 2.335, a variety of -- 2206 petition.

19 In other words, the generic findings are  
20 sacrosanct, because they were made in a GEIS, and if  
21 you want to change them for generic, you have to go  
22 through one of the generic processes. We don't  
23 disagree with that.

24 CHAIRMAN FROEHLICH: Your argument is that  
25 they are Category 2?

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1 MR. ROISMAN: They're Category 2, and the  
2 Commission has said they're Category 2, even when it  
3 gave the exemption that Exelon is relying on here,  
4 they call it a Category 2.

5 They don't say it's a Category 2, unless  
6 the exemption applies, and then if exemption applies,  
7 it's Category 1, nor could it be a Category 1, because  
8 the Commission again, in the regulation, not in the  
9 statement of consideration that went with the  
10 regulation alone, not in the GEIS, the body of that  
11 document, but in the regulation itself, tells us that  
12 in order to be a Category 1, it has to be generic.  
13 It's the whole -- that's why they call it generic  
14 environmental impact statement.

15 We are not talking about a generic  
16 problem. We are talking about a site specific issue  
17 related specifically to this plant. There is no way,  
18 short of the Applicant filing a 2.335 petition, which  
19 they have not yet done, to seek a waiver of the  
20 Commission's regulation on what constitutes a generic  
21 finding. There is no way for them to take the 1989  
22 SAMDA and turn it into a Category 1 issue. It's  
23 Category 2.

24 There is no Commission case law that  
25 suggests that new and significant information related

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1 to a Category 2 issue is beyond the scope of a  
2 hearing.

3 More importantly, when you read the  
4 Commission's decisions, the Commission's position that  
5 said, we can't challenge new and significant  
6 information in an individual licensing proceeding, was  
7 all based upon the fact that what you are challenging  
8 it about, had to do with moving something from generic  
9 to non-generic, from Category 1 to Category 2, and we  
10 aren't doing that.

11 We are talking about what is already a  
12 Category 2 issue. Therefore, we believe the new and  
13 significant information issue is more than legitimate  
14 in the proceeding. We've joined issue with the  
15 Applicant about it, depending upon what the staff does  
16 in the DSEIS, we're likely to join issue with them on  
17 it, as well.

18 Now, there is another aspect of this, that  
19 51.53(L) is not a prohibition. It doesn't say, "You  
20 may not do a SAMA analysis, if you've done one  
21 previously." It says you're not required to do one.  
22 Fair enough.

23 What does that mean in the context of what  
24 the Applicants did with its new and significant  
25 information analysis in the analysis that it has

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1 presented in the environmental report?

2 Well, if you look at that analysis, it  
3 reads like a SAMA analysis. They take a look at  
4 risks. They take a look at the consequences. They  
5 balance them. They calculate, this is how much more  
6 it would save in the way of, you know, some benefit to  
7 the public, and this is much it can cost, in terms of  
8 some damage to the public.

9 They've done, admittedly, a very  
10 inadequate SAMA analysis, as part of their  
11 environmental report, in order to explain to you, why  
12 this new information is not significant, as it's  
13 related to the 1989 SAMDA.

14 So, we aren't really in the territory in  
15 which the Applicant shows us, takes this document,  
16 hands it to the Board and says, "This meets the  
17 51.53(L) requirement," and sits down.

18 They said, "Well, there is some new  
19 information we've got to look at," and they pick  
20 through this document and they pick through the new  
21 information and they give you an analysis.

22 What other name would you call it, except  
23 an analysis of severe accident mitigation  
24 alternatives?

25 So, we're already here. The only question

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1 is whether or not we're going to get an opportunity to  
2 challenge what they said, or whether that is going to  
3 be shown here. I think that's it.

4 CHAIRMAN FROEHLICH: Staff or the  
5 Applicant care to respond to what you've just heard  
6 from the Petitioner?

7 MR. POLONSKY: Yes, Your Honor.

8 CHAIRMAN FROEHLICH: Okay.

9 MR. POLONSKY: Two points is I'd like to  
10 first point out that the argument that Mr. Roisman  
11 raised, I don't recall that being raised either in the  
12 petition or the reply.

13 So, that is a brand new argument we're  
14 hearing for the first time here, that our discussion  
15 of new and significant information was not something  
16 to meet the requirements of Section 4, but was  
17 actually at SAMA analysis, and I'd like the Board to  
18 note that.

19 The other is whether or not this a  
20 Category 1. I had answered Judge Kennedy's question  
21 by saying the Board did not need to find that it was  
22 a Category 1, but I would like to walk through what we  
23 think is the evidence that for Limerick, SAMA's are  
24 Category 1, and I'll start with the GEIS, the generic  
25 environmental impact statement NUREG-1437 on page 4-

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1 122.

2 There is a discussion about those plants  
3 that have -- with cooling ponds located in salt  
4 marshes, and there are specific plants called out,  
5 South Texas and Turkey Point, saying that ground water  
6 quality is not a significant concern there because  
7 ground water quality beneath salt marshes is too poor  
8 for human use.

9 This issue is raised in Section 2, as an  
10 exception, and these plants don't need to address  
11 ground water.

12 A few sentences below, it says,  
13 "Therefore, for plants with cooling ponds located in  
14 salt marshes, this is a Category 1 issue."

15 So, clearly, there is precedent that when  
16 something is accepted under Section 51.53(2), even  
17 thought it's not L, it's a different provision, but  
18 that is a Category 1 issue.

19 That is consistent with the page 5-116 of  
20 the GEIS, which talks specifically about SAMA's, that  
21 says, "Consequently, severe accidents are a Category  
22 2 issue for plants that have not performed a site  
23 specific consideration of severe accident mitigation,"  
24 and submitted that analysis for Commission review.

25 The inference is, if it's already been

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1 submitted, it's not a Category 2. Well, there are  
2 only two categories. So, it has to be Category 1.

3 Then in the June 1996 Federal Register  
4 notice, which issued these regulations, on page 28480,  
5 in the third column on the right, it says, "Because  
6 the third criterion required to make a Category 1  
7 designation for an issue requires a generic  
8 consideration of mitigation," as Mr. Roisman points  
9 out, "the issue of severe accidents must be re-  
10 classified as a Category 2 issue, that requires  
11 consideration of severe accident mitigation  
12 alternatives provided this consideration has not  
13 already been completed."

14 Again, it's Category 2 for those who  
15 haven't, because the Commission has made a generic  
16 determination that there are three plants out there  
17 that already have done it, and they don't need to  
18 address it again.

19 MR. SMITH: Judge?

20 CHAIRMAN FROEHLICH: Yes.

21 MR. SMITH: Is that for our response too?

22 CHAIRMAN FROEHLICH: Of course.

23 MR. SMITH: Thank you, very briefly. I  
24 think that in this case, the issue of whether or not  
25 SAMA's for Limerick are a Category 1 or Category 2

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1 issue is a distinction without a difference, and that,  
2 I think, goes to the nature of what a Category 1 issue  
3 really is.

4 In Category 1 issues, a generic  
5 determination is not challengeable in NRC proceedings,  
6 not because of the call Category 1, and that has some  
7 magical effect on the issue. It's Category 1 because  
8 it's embodied in the Commission's regulations,  
9 referring to the generic determination by the  
10 Commission on the environmental impacts of that issue,  
11 across all of the plants.

12 Likewise in this case, the SAMA regulation  
13 51.53 (c) (3) (2) (L) represents a generic determination  
14 by the Commission that if one SAMA analysis was done,  
15 then a subsequent one need not be done at the time of  
16 licensing renewal, and of course, the Commission  
17 singles out Limerick, Watts Bar and Comanche Peak in  
18 the statement of considerations, as examples of that.

19 But from the plain text of the regulation,  
20 they're also applied to three reactors of the license,  
21 such as Watts Bar Unit 2 or Vogtle, when they come  
22 into license renewal down the road, or even a  
23 subsequent license renewal.

24 So, it is a generic determination test and  
25 applicability across potentially, many plants and for

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1 that reason, the generic determination in the  
2 regulations does not put it challengeable at  
3 proceedings, not without its call to Category 1 or  
4 call to Category 2.

5 JUDGE KENNEDY: And I guess, and maybe  
6 this is more of a semantics questions, but I'd like to  
7 start with you, Mr. Smith.

8 The regulations really provide an  
9 exemption of does not need to be submitted, as opposed  
10 to does not need to be performed, and I think when I  
11 have in my mind, the word performed, I'm back to new  
12 and significant information and what goes into Section  
13 5 of the ER.

14 I mean, on one hand, if there is no new  
15 information, then probably 1989 is a technically very  
16 sound document. If there is lots of that information  
17 and it has a merit of -- a measure of significance, I  
18 start to wonder, I do point out, the staff at least,  
19 will take a hard look at it, and potentially refresh  
20 the mitigation alternatives analysis in the draft  
21 supplemental environmental impact statement.

22 I think, you know, I -- when the -- the  
23 bridge was built, and I can walk across the bridge.  
24 I'm okay with not submitting a SAMDA analysis on the  
25 Limerick document -- docket. I think that seems to

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1 me, to be clear, and when we get to Contention 2 and  
2 3, which really challenges the 1989 SAMDA, I think  
3 we'll have additional discussion.

4 But right now, the bridge is still in tact  
5 for me, on whether the Applicant had an obligation to  
6 submit a SAMDA analysis, and we'll talk more about,  
7 down the road, whether there is any criteria we can  
8 apply to whether that exemption is invalid for  
9 Limerick.

10 But I mean, at least on the plain reading  
11 of the regulation, it seems to me, they don't need to  
12 submit it, but I'm all hung up on this new and  
13 significant information, the scope of the new  
14 information.

15 How did we select -- how did the Applicant  
16 select the range of information, and I know I'm  
17 looking at you and asking you this question, but this  
18 is where the Board, I think, has got additional  
19 questions on Contention 1, that -- how do we get to  
20 what's in the application, and I'll turn to your right  
21 quickly, but I think that is the question that sticks  
22 foremost in my mind.

23 I mean, an honest attempt to assess new  
24 information was made by the Applicant and submitted as  
25 part of their ER. I think I'd like to entertain some

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1 discussion, as to how the scope of that was  
2 determined.

3 The basis of its significance on  
4 consequence, I think Mr. Roisman has already agreed  
5 that that is a good test. It seems like a good test,  
6 to me.

7 So, I have no issue with, you know, using  
8 that as a test for significance. But I do have some  
9 questions about the breadth of new information. How  
10 did we get to what is in the application today, and  
11 now that I'm looking at you, I think I'd like to turn  
12 possibly to Mr. Polonsky, and see if we can -- if I  
13 can rewind and try to summarize.

14 I'm really looking for some clarification  
15 on the breadth of the material that's in the ER  
16 Section 5. How did we get to those specific items?

17 I'm willing to agree that testing out  
18 significance through consequences is okay, but I think  
19 if I look across the petitions from NRDC, there looks  
20 to me, to be additional new information that they have  
21 raised questions on, that I don't see in the ER,  
22 things like additional mitigation alternatives, and I  
23 know you've been trying to help me understand why we  
24 never get to that phase, but if we open up the door a  
25 little wider, until we get to some things of

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1 significance and does the ball start rolling down hill  
2 a little bit.

3 MR. POLONSKY: Well, I am hoping to  
4 unburden you with this concern, but --

5 JUDGE KENNEDY: The bridge is still in  
6 tact.

7 MR. POLONSKY: -- by suggesting that there  
8 is no need to go here, and in fact, the Commission has  
9 said you're not allowed to go here, NRDC, that there  
10 is no litigation of these, or the adequacy.

11 They can certainly submit comments on the  
12 draft -- I mean, the final SEIS, but they cannot  
13 litigate it.

14 As to exactly how these particular ones  
15 were selected, you know, if I could -- if we're going  
16 to be taking a break, I can confer with my client, and  
17 get you a concise response on that.

18 JUDGE KENNEDY: I think in the vain of  
19 humoring the Board, it would be appreciative if you  
20 could at least give us a bit of a view into how the  
21 scope was -- the breadth or the range of what new  
22 information was assessed.

23 MR. POLONSKY: We'll do that.

24 JUDGE KENNEDY: And to give you a hint,  
25 you may want to focus a little bit on some of the

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1 material that's in Contentions 2 and 3, that start, to  
2 me, to look like new information that wasn't  
3 considered, or is not present in the ER, as it's  
4 written today, and then we'll decide some other time,  
5 whether we can litigate it.

6 But help us get through that part of that  
7 part of the discussion.

8 CHAIRMAN FROEHLICH: Perhaps, since it is  
9 about 10:30 a.m., we'll take a 10 minute break, and we  
10 can come back, and I think when we come back, the  
11 Board will like to focus on the concept of new and  
12 significant information, how the Applicant chose the  
13 four elements that they looked at.

14 Staff, I'd like to hear, when we get back,  
15 how the staff will look for or determine what our new  
16 -- putting aside significant at this point, what are  
17 new information, and also, from the Petitioner. I  
18 think that is where we'll pick up 10 minutes from now.  
19 Okay, thank you.

20 (Whereupon, the above-entitled matter went  
21 off the record at approximately 10:30 a.m. and resumed  
22 at approximately 10:40 a.m.)

23 CHAIRMAN FROEHLICH: Please be seated.  
24 The preparation of an environmental report requires  
25 that new and significant information regarding the

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1 environmental impacts of license renewal be discussed,  
2 any environmental impacts of which the Applicant is  
3 aware.

4 Mr. Polonsky, have you had a chance to  
5 meet with your folks, to determine how the company  
6 approaches the new information that may have arisen in  
7 the course of the preparation of the ER?

8 MR. POLONSKY: Yes, Your Honor.

9 CHAIRMAN FROEHLICH: Thank you.

10 MR. POLONSKY: In the environmental report  
11 in Section 5.3 page 5-4, specifically Section 5.3.1,  
12 there is a section entitled 'process to identify new  
13 information', and I did ask my client for some  
14 clarification about what exactly happened here behind  
15 the scenes, to give you a flavor for how this process  
16 to identify new information proceeded.

17 I was informed that experts in the field  
18 of risk management were asked to review the three  
19 documents that are cited here, on page 5-4, a review  
20 of the supplement to NUREG 09.74, a review of the June  
21 1989 PRA update, which is a -- lists here as PECO  
22 document, and review of the Limerick Generating  
23 Station probabilistic risk assessment PRA model and  
24 updates to that model since publication of the  
25 supplement in 1989.

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1                   So, a series of documents that exist since  
2 1989 in PRA space were reviewed.

3                   The review was not focused on every risk  
4 item, but those that would be low-threshold, and that  
5 is what then percolated into the items that were  
6 looked at for new information, to determine whether  
7 they were significant, and the thought was if they  
8 were low-threshold, then they didn't meet a  
9 significance determination, then all the others ones  
10 that were not low-threshold clearly, didn't need to be  
11 looked at, and that was the approach.

12                   Clearly, it relies on expert judgement,  
13 which is why they used these experts in risk  
14 management.

15                   JUDGE KENNEDY: So, the context of the  
16 environmental report, the way it's written, there is  
17 the process that was gone through, and that was  
18 described, which you pointed out.

19                   CHAIRMAN FROEHLICH: 5.3.1.

20                   JUDGE KENNEDY: And the stuff that  
21 percolated as new information was assessed and then  
22 discussed in the ER.

23                   I guess, there is no discussion of  
24 pleadings that weren't looked -- and I'm not quite  
25 sure how to ask this, but some of the things that NRDC

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1 has raised seem relatively logical to me, that would  
2 have been looked at as part of a review of new and  
3 significant information for the Limerick SAMA  
4 analysis.

5 I guess I'm really probing to see if there  
6 are things that were looked at, that were not viewed  
7 as important, but not documented as not important, and  
8 I mean, are we crossing in the night here? Has NRDC  
9 raised issues that Limerick has looked at and chose  
10 not to document, or is it a case of, it hasn't been  
11 looked at, and of course, part of the record, it's not  
12 in front of us, so, I can't --

13 I mean, I think we're looking for things  
14 like mitigation alternatives. Are there other  
15 mitigation alternatives, that would have had a  
16 different threshold, that could have been looked at?  
17 Why isn't that considered new information?

18 They've raised questions on methodology.  
19 The overall methodology is different today than it was  
20 in 1989. Why isn't that new information?

21 Was it looked at? I mean, it may have  
22 been looked at, and you know, Exelon shows to the  
23 staff, the approach that was taken in 1989.

24 So, those are the kinds of things that I'm  
25 thinking about.

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1 MR. POLONSKY: Judge Kennedy, the  
2 vocabulary, the nomenclature that you're using, I  
3 think is inconsistent with what Exelon did.

4 JUDGE KENNEDY: Okay.

5 MR. POLONSKY: We were not looking at  
6 severe accident mitigation alternatives.

7 As I mentioned before, the initial focus  
8 of new and significant information is on severe  
9 accident consequences, and whether there is new and  
10 significant information for that analysis.

11 If there was significant information to  
12 change the severe accident consequences, then  
13 hypothetically, the next step would have been to look  
14 at potential severe accident mitigation alternatives.

15 But that was not done here, because there  
16 is no -- the experts identified low-threshold items  
17 that they thought would change the -- could be  
18 possible -- could possibly change the outcome, and  
19 since those did not result in significant information,  
20 all the other ones that you're concerned about, that  
21 aren't documented here, were never laid out.

22 JUDGE KENNEDY: Yes, I guess and that --  
23 you're right, that the terminology I'm using, or the  
24 perspective I'm coming from is different than the way  
25 the environmental report is drafted.

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1 I'm taking a very broad view of what is  
2 new information. I mean, in some ways, it's a way to  
3 refresh something that had been done in the past with  
4 new information, since the time that it's performed,  
5 to in essence, make it current and make it, as I'm  
6 hearing it, in line with what the staff is going to  
7 attempt to do, in looking at new information.

8 So, I see a disconnect there. I mean,  
9 they're not focused on severe accidents. I hear them  
10 focused on severe accident mitigation alternatives.

11 MR. POLONSKY: That is correct, and we  
12 hear the Petitioner talking about that, but we don't  
13 believe that is the obligation of Exelon to perform.

14 In addition, all of this is -- should be  
15 viewed through the lens of NEPA, which is not a safety  
16 analysis, but an environmental analysis, that is  
17 subject to a rule of reason, and you know, we'll get  
18 to that more, when we talk about Contention 4, but  
19 even within this space of having experts in risk  
20 management, review probabilistic risk assessments that  
21 have been performed for the plant from, you know, day  
22 one until today.

23 The concept of them identifying low-  
24 threshold items to look at, to see whether there would  
25 be a change -- significant change in all consequences,

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1 that is perfectly within the rule of reason, and there  
2 is no requirement to identify with a 95 percent  
3 certainty or two orders of magnitude, none of that  
4 comes into play in NEPA.

5 That would be looking at worse case  
6 scenarios, which frankly, the Supreme Court has said,  
7 you are -- do not need to look at.

8 JUDGE KENNEDY: So, again, we're back to,  
9 the bridge is starting to develop a crack. We're back  
10 to severe accidents, is the way I'm hearing it.

11 Maybe I'm -- I don't want to put words in  
12 your mouth, but I am hearing severe accidents, and  
13 that the new information is only relevant to severe  
14 accidents, and so, we're focused back on the Category  
15 1 issue, yet, there is a Category 2 issue looming out  
16 there, which is severe accident mitigation  
17 alternatives, albeit you've been granted an exemption  
18 for submitting one as part of the application, but I'm  
19 struggling, the bridge is breaking in the obligation  
20 to look at new information relative to the SAMA  
21 analysis, as opposed to the severe accident analysis.

22 I guess I see it as two obligations, or a  
23 two-part obligation, and that is why I'm really  
24 curious about the breadth of the new information. I'm  
25 feeling it should be broader, but you're bringing it

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1 back to, it's okay the way it is, because it's severe  
2 accident.

3 MR. POLONSKY: It's looking at the severe  
4 accident consequences, because if the consequences are  
5 not -- are acceptable, as they are, you don't need to  
6 go into mitigation alternatives.

7 I mean, let's take an analogy of something  
8 completely unassigned to severe accident space. You  
9 know, let's look at Methow Valley and the facts of  
10 that case.

11 I think it was a downhill ski resort, that  
12 was looking to be expanded and some animal that was  
13 trying to be protected, and that you need to mitigate  
14 the way the runs would be designed, or whatever it  
15 was, to protect the animal.

16 Well, if the animal wasn't there, we  
17 wouldn't need to do a mitigation analysis. We would  
18 simply look at the runs and you would -- maybe it's a  
19 bad analogy.

20 JUDGE KENNEDY: Yes.

21 MR. POLONSKY: It is a bad analogy.

22 JUDGE KENNEDY: That doesn't convince us  
23 of anything.

24 MR. POLONSKY: Okay, the concept of  
25 mitigation only comes into play when you already have

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1 a identified problem, and the severe accident  
2 consequences are the analysis to say, do I have an  
3 issue or do I not have an issue? Do I have a problem  
4 or do I not have a problem?

5 If I have a problem, I have to look at  
6 mitigating that problem. But our analysis is  
7 suggesting, there isn't a problem. So, I don't need  
8 to go further. I don't have anything of significance.  
9 So, I don't need to go and look at mitigating that  
10 problem.

11 JUDGE KENNEDY: Let's take it a little  
12 step further. Let's -- severe accidents is yet only  
13 one of the Category 1 issues. What about all of the  
14 other stuff, all sprinkled through that table, is --  
15 how was -- where does that fit in this picture?

16 I mean, you -- we've gone quickly to the  
17 one element of that table.

18 MR. POLONSKY: Yes.

19 JUDGE KENNEDY: Where are the other  
20 guidance? Where is the rest of the stuff?

21 MR. POLONSKY: We could use an example of  
22 endangered species.

23 JUDGE KENNEDY: Yes.

24 MR. POLONSKY: If, at the time the plant  
25 was built, we had no endangered species and we

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1 concluded that the risks to endangered species were  
2 small, now, at the license renewal phase, someone has  
3 said, "Hey, there is some protected bird," that's new  
4 information. We hadn't considered it before, and we  
5 would evaluate for significance, even though that  
6 issue might be a Category 1 issue.

7 Then we would say, "Do we need to -- is it  
8 a significant issue," yes? Do we need to put in any  
9 mitigation to protect that species? We would be doing  
10 that at the license renewal phase, even though it  
11 might be a Category 1 issue.

12 JUDGE KENNEDY: Would that go on Section  
13 5 of the environmental report or is that somewhere  
14 else in the environmental report?

15 MR. POLONSKY: It would go in Section 5,  
16 which is assessment of new and significant  
17 information.

18 JUDGE KENNEDY: So, when we look at  
19 Section 5, we're seeing the final digestion of all of  
20 Exelon's review of information?

21 MR. POLONSKY: Yes, and we've -- and we  
22 quote the obligation in C34, at the very beginning,  
23 saying any information of which we are aware. It's  
24 not limited to SAMA's, or severe accident  
25 consequences.

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1 JUDGE KASTENBERG: Just coming back to  
2 your question, so, in Section 5, 5-2, one of the  
3 choices was to look at radiological ground water  
4 protection, okay.

5 Now, that is -- I don't believe that is  
6 covered by Section L, what we've been calling Capital  
7 L.

8 So, would 5.2 be challengeable, in your  
9 view?

10 MR. POLONSKY: If it were a Category -- I  
11 haven't studied this particular section, I can't -- if  
12 it were a Category 1 issue, it would not be  
13 challengeable in the license renewal proceeding,  
14 absent a waiver, because it's new and significant  
15 information on a Category 1 issue.

16 JUDGE KASTENBERG: So, is ground water  
17 protection Category 1 or Category 2?

18 MR. POLONSKY: I have to look at Part 51  
19 in Appendix B. I believe it's Category 2, but I will  
20 confirm that.

21 JUDGE KASTENBERG: So, it's Category 2.  
22 If NRDC would have challenged that, would that --

23 MR. POLONSKY: We would not have been able  
24 to use the defense of the Pilgrim and Vermont Yankee  
25 license renew cases.

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1 JUDGE KASTENBERG: You would find some  
2 other defense for it?

3 CHAIRMAN FROEHLICH: They would try very  
4 hard.

5 JUDGE KASTENBERG: Or you would at least  
6 attempt to find a defense for it?

7 MR. POLONSKY: I certainly would try, Your  
8 Honor.

9 JUDGE KASTENBERG: Yes.

10 CHAIRMAN FROEHLICH: And just to wrap up  
11 Judge Kastenberg's question.

12 The reason you'd have to look for a  
13 different defense is because it shows up in the Sub-  
14 Part A of Appendix B table as a Category 2 item, is  
15 that correct, Mr. Polonsky?

16 MR. POLONSKY: If it is in -- as a  
17 Category 2 item, then it would not be subject to the  
18 exception language in the case law that we've been  
19 discussing this morning.

20 CHAIRMAN FROEHLICH: Okay.

21 JUDGE KASTENBERG: And just one last  
22 thing, I just want to make sure I understand your  
23 argument regarding new and significant information and  
24 the exemption.

25 We went through this before, I realize,

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1 but just to kind of step through it again.

2 As I understand it, and you cited two  
3 other -- I think two other cases where there was a  
4 challenge to a Category 1 versus new and significant  
5 information, we went all the way up to District Court,  
6 and the Court ruled that it was not challengeable  
7 because it was Category 1, even though it was new and  
8 significant information, is that right?

9 MR. POLONSKY: Yes, Your Honor, it was the  
10 Court of Appeals, but yes, it was a Category 1 issue  
11 related to spent fuel pools.

12 JUDGE KASTENBERG: Right. So, it seems to  
13 me, at least at the moment, there is a leap between  
14 that and the Sub-Part L, which is the exemption.

15 So, how do I -- using Judge Kennedy's  
16 analogy, what is the bridge? What is -- what gets me  
17 that leap from a Category 1, when we know that -- and  
18 I think everyone agreed, that SAMDA analyses are  
19 Category 2 except for the exception. But how do I  
20 make that leap?

21 MR. POLONSKY: Okay, there are two ways  
22 you could make the leap.

23 JUDGE KASTENBERG: Could make it, yes.

24 MR. POLONSKY: The first is, you could  
25 conclude, as we've argued, that for Limerick, this

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1 issue is a Category 1 issue, and I've cited you  
2 provisions of the GEIS and the 1996 rule-making, which  
3 support that argument.

4           However, you don't need to find that it's  
5 a Category 1 issue. We argue in the alternative, in  
6 our answer, that the nomenclature is irrelevant, as  
7 the staff has also articulated, and that is that once  
8 the NRC has issued a rule, that the general principle  
9 is, you can't challenge that rule in a licensing  
10 proceeding, and this line of case law with Vermont  
11 Yankee and Pilgrim stand for the proposition that new  
12 and significant information submitted about an issue  
13 that is accepted by rule, whether Category 1 or in  
14 Section 2, is not challengeable in a license renewal  
15 proceeding, absent the waiver from the Commission  
16 under 2.335.

17           JUDGE KASTENBERG: And do you have a  
18 response to that, because to me, this is a pivotal  
19 point, in the question that we -- that is at stake  
20 here.

21           MR. ROISMAN: First, you can read this  
22 Section 51.53L all you want, and you will not find a  
23 statement in there that categorizes this as Category  
24 1, that's number one.

25           Number two, this provision that we're

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1 talking about is talking about an obligation that's  
2 imposed on the Applicant to perform something.

3 Ultimately, this issue, as you well know,  
4 is going to morph into an issue about what the staff  
5 does, and the staff does, traditionally, rely on the  
6 Applicant's SAMA analysis, but it's the staff and the  
7 staff's obligation to do it.

8 There is nothing that says, that if the  
9 staff has new and significant information that relates  
10 to severe accident mitigation alternatives, that it is  
11 not suppose to deal with that in the DSEIS, and I'm  
12 sure we reference that.

13 We approve -- if we disagree with what  
14 they do in challenging this, that is the nexus of it.

15 The third point is that what is new and  
16 significant information is not allowed to be  
17 challenged where there has been a prior generic  
18 finding for the -- in an individual licensing  
19 proceeding, because it would be inappropriate.

20 This is not 51.53L, is not a generic  
21 finding with regard to Limerick or Comanche Peak or  
22 any other nuclear plant.

23 So, there is no generic finding. So,  
24 let's step back for a minute and ask the question,  
25 what reason would the Commission have had for wanting

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1 to preclude someone from challenging new and  
2 significant information if it related to SAMA or SAMDA  
3 analysis, that could fit within the logic of the  
4 cases, and there isn't.

5           There is no reason why this issue, the  
6 very questions that Judge Kennedy raised, about  
7 alternative mitigation issues, shouldn't be subject to  
8 challenge, just as alternative ways of dealing with  
9 other issues at the plant, would be subject to  
10 challenge.

11           Their only policy reason would be, "Well,  
12 we've already looked at that question substantively,  
13 and we put it to bed," and if you want to question our  
14 putting it to bed, with new information, you have to  
15 go through our regulatory process, to ask us to change  
16 the regulation.

17           No one has put this to bed. The 1989  
18 SAMDA has never been mitigated as applied to licensing  
19 renewal. The Commission, in its statement of  
20 consideration that went along with the 1996 license  
21 renewal rules made reference to the Limerick 1989  
22 SAMA. There is no analysis. There is no record in  
23 front of the Commission. It was not part of any  
24 notice that was given to the public, that, "Oh by the  
25 way, along with all the other things we're doing in

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1 the rule-making, we're also going to rule on the  
2 adequacy of significant mitigation alternative  
3 analysis done for three plants."

4 So, nobody had a chance or was charged  
5 with, "Why didn't you show us then, and complain?"  
6 Well, there was no notice that that was going to be  
7 considered. No one said, "We're going to decide on  
8 the merits of the Limerick question."

9 Now, before we get to Contention 3, which  
10 is where this is more relevant, it bears on the new  
11 and significant information question in Contention 1,  
12 because it gets us, once again, to the question, if  
13 you don't challenge it here, where would you have your  
14 hearing, with regard to this question?

15 Why would the Commission have cut them  
16 out, if you will, and I want to add one note, that  
17 goes to Judge Kennedy's question about, well, how did  
18 we end up with only looking at this piece of new  
19 information and not these other ones, and I think that  
20 Counsel pointed it out, in the section of the ER,  
21 Section 5.3.1, the Applicant says, "For purposes of  
22 this review, new information is designed as  
23 information indicating a potential change in the  
24 consequences of severe accidents."

25 When we talk about consequences, and when

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1 I think the Commission talks about consequences of  
2 Callaway, they mean when it changed the outcome, not  
3 when it changed the outcome in just one respect.

4 So, the addition of these mitigation  
5 measures that our experts have identified, that now  
6 would apply to be looked at for BWR of this type, that  
7 were not looked at in 1989, is new information and we  
8 believe significant consequences, because if the  
9 accident consequences remain exactly the same, new  
10 ways to reduce those consequences.

11 I thought Mr. Polonsky's use of Methow and  
12 the analogy was a good one. The endangered species  
13 that we're talking about that was present in 1989 are  
14 the eight-million who live within 50 miles of the  
15 plant. It's going to be more like 10-million people.  
16 But the endangered species is still going to be there.

17 So, the mitigation alternatives analysis  
18 says, accept this level of consequences you do -- we  
19 challenge the level of the consequences, all of them,  
20 accept this level of consequences and then see if it's  
21 cost beneficial to mitigate those consequences, even  
22 further than the safety requirements that the  
23 Commission would say, by doing certain things, that  
24 end up costing you only this amount, and gaining that  
25 amount in economic effects.

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1           So, when we talk about consequences, we're  
2 talking about both aspects of those, and the new  
3 information that the Applicant looked at was, as this  
4 points out, and as we pointed out in our petition,  
5 narrowly limited, only to accident consequences, and  
6 we discussed those, and there are some of our points,  
7 which say the accident consequences could be greater  
8 than what the value is, and also, based on the issue.

9           But there is a separate piece that says,  
10 also that expanded alternatives that would mitigate  
11 those consequences shouldn't be assumed.

12           JUDGE KASTENBERG: Is there any -- as Mr.  
13 Polonsky did, is there any case law or regulations  
14 that would support the technical and the logical  
15 arguments that you give?

16           MR. ROISMAN: That support the view that  
17 new and significant information should be subject to  
18 the review?

19           JUDGE KASTENBERG: Yes.

20           MR. ROISMAN: Only in the sense that the  
21 case law that says it isn't is limited to a situation  
22 that doesn't fit here.

23           I don't think the Commission has  
24 explicitly addressed, to my knowledge, the question of  
25 whether new and significant information about a

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1 Category 2 issue would be litigatable in the licensing  
2 proceeding if someone disagreed with the Applicant's  
3 treatment of that item, in their environmental report.  
4 To my knowledge, that has not been litigated.

5           However, if you go back into the NEPA case  
6 law, then cases like Methow Valley, that say that you  
7 must do a thorough evaluation of severe accident  
8 mitigation -- I'm sorry, of mitigation alternatives,  
9 not severe accident, of mitigation alternatives, that  
10 case law would say that if the mitigation alternatives  
11 or consequences that weren't adequately looked at  
12 previously, then they have to be looked at now.

13           So, NEPA and case law under NEPA would  
14 say, you have to take a look at it. So, that would be  
15 the law, like the specific application of that to an  
16 NRC proceeding by the NRC, I'm not aware of.

17           CHAIRMAN FROEHLICH: Perhaps the NRC staff  
18 could address both the last comment and also, the  
19 approach taken by the NRC staff, in their review of  
20 new and significant information, and the preparation  
21 of the DSEIS, or the EIS process.

22           MR. SMITH: Thank you, Judge Froehlich.  
23 I think the NRC staff disagrees with both the  
24 Petitioner and the Applicant, in some respects.

25           First off, we view the Commission's

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1 regulation and determination of 51.53 (c)(2)(L) as  
2 being a generic determination, that applies to  
3 Limerick facility, as well as other facilities, and  
4 the reason for this goes back to the 3<sup>rd</sup> Circuit's  
5 holding in the Limerick case.

6 In that case, the 3<sup>rd</sup> Circuit, as we've  
7 discussed in our briefs, held that severe accident  
8 mitigation alternatives are a necessary component of  
9 NEPA consideration for reactor license application,  
10 such as this one, and NEPA applies to every major  
11 Federal action, including license renewals.

12 Therefore, when the Commission has  
13 permanently excused facilities from conducting a  
14 second SAMA analysis if one had already been  
15 completed, they were, in effect, making a generic  
16 determination that must meet the -- NEPA's hard look  
17 requirement.

18 Now, therefore, we view that encompassing  
19 a generic determination, which of course, I think goes  
20 into the second point.

21 The new and significant information in  
22 Federal case law, only really applies to prior  
23 environmental determinations and environmental impact  
24 statements, and that originated with the Marsh case,  
25 and what you're looking at in those cases is, whether

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1 or not new and significant prior to the supplement in  
2 existing environmental impact statement. It sort of  
3 gets thrown around a lot in NRC license renewal  
4 proceedings, because there is several environmental  
5 impact determinations in the GEIS that must be looked  
6 at, and if necessary, updated in the supplemental  
7 environmental impact statement for a given facility.

8 So, in that sense, it only really has  
9 meaning to talk about new and significant information  
10 if you're talking about a previous determination of an  
11 environmental impact.

12 Now, as the staff goes forward and looks  
13 for new and significant information with respect to  
14 Limerick, we disagree with the Applicant.

15 We don't think the relevant inquiry, and  
16 we explained this in our brief, is whether or not  
17 information applies to 1989 SAMDA analysis, but  
18 rather, we think the important inquiry is whether or  
19 not new information applies to the Commission's  
20 generic determination in the regulations, as explained  
21 in the accompanying statement of considerations.

22 In that sense, as we've explained, that  
23 determination rested not only on the prior 1989 SAMDA  
24 analysis, but also, a series of studies the Commission  
25 had undertaken, including the individual plant

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1 examination, including the individual plant  
2 examination for external events, and including the  
3 containment performance improvement program.

4 So, we'll be looking for new and  
5 significant information with respect to the  
6 understanding of severe accident mitigation contained  
7 in those studies. So, not just in 1989 SAMDA  
8 analysis, but also, those studies, as well as the  
9 Commission's understanding of severe accident  
10 mitigation, in general at the time, found in that  
11 regulation, both, I guess, on a slight Limerick basis,  
12 as well as an across the board basis, to see if the  
13 regulation is still valid.

14 As we're looking for new and significant  
15 information, we'll be guided by several sources of law  
16 and precedent to define and determine that -- in terms  
17 of that, and most importantly, as other Counsel has  
18 pointed out today, the Commission itself has defined  
19 the scope of that test in Callaway, saying that it  
20 presents a seriously different picture of the  
21 environmental impact of the proposed action from what  
22 was previously envisioned.

23 The Commission has provided a little more  
24 explanation for that, in the private fuel storage  
25 case, CLI-603 is the case number for that one, and

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1 said that information is new and significant, and I  
2 quote, "when it raises a previously unknown  
3 environmental concern, but not necessarily when it  
4 amounts to mere additional evidence supporting one  
5 side or the other of the disputed environmental  
6 impact".

7 I think significant for our purposes here  
8 the Board has recently struggled with a similar issue,  
9 in the Pilgrim cases, the Board has considered how the  
10 re-opening standard applies to a SAMA contention, and  
11 one element of the re-opening standard is that the  
12 issue must raise a significant issue, and the  
13 Commission has stated that on environmental  
14 contentions, the test for significance is akin to the  
15 test for supplementing the environmental impact  
16 statement, which is, it must present a seriously  
17 different picture of the environmental impacts of the  
18 proposed action.

19 The Board, in that case, did apply it to  
20 the SAMA analysis and I think the best take-away from  
21 those cases for the Board is, that the -- the Pilgrim  
22 Board, Judge Abramson, who was for the majority, and  
23 Judge Young, was that it can't just be speculation,  
24 that under the SAMA rules, somehow become cost  
25 effective.

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1           Of course, as Mr. Roisman pointed out,  
2           there has been considerable Federal case law, most  
3           notably the Marsh case, that further defines the scope  
4           of new and significant information and the staff has  
5           guidance, as well.

6           Reg Guide 4.2, which covers the  
7           preparation of SEIS for applications to renew the  
8           power plant operating licenses, explains that new and  
9           significant information is information that identifies  
10          a significant environmental issue that was not  
11          considered in the GEIS, and consequently, not codified  
12          in Appendix B, Sub-Part A of 10 CFR 51, or information  
13          that was not considered in the analysis summarized in  
14          NUREG 1437.

15          Therefore, as the staff goes forward and  
16          tries to -- I guess I should also point out too, that  
17          when it's looking for actual sources of information,  
18          that staff consider what's in the ER and will also  
19          consider what's in the petition to intervene, and as  
20          well as the scoping comments that I alluded to earlier  
21          today, would consider those, as well as any other  
22          information that comes to our attention, to determine  
23          if it meets what is, frankly, a very high standard of  
24          new and significant information, that presents a  
25          seriously different picture of the environmental

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1 impacts of the proposed action.

2 I'm not sure that the staff would go as  
3 far as the Applicant has, to say that only information  
4 that calls into question the Commission's  
5 determination, that a severe accident impact would be  
6 small, would qualify as new and significant  
7 information, as the SAMA analysis, but I think also,  
8 the Commission's precedent in EFS, as well as how the  
9 Board approached the issue in Pilgrim indicates that  
10 in the staff's view, it would be something that went  
11 beyond simply identifying the other cost beneficial  
12 SAMA, as to a more serious -- a more serious picture  
13 than the consequences than just demonstrating what is  
14 essentially materiality of the SAMA contention.

15 So, as to how the staff is going to  
16 approach it, we haven't published our DSEIS yet. So,  
17 we can't say. I think categorically, what information  
18 would be or would not, be that is the frame work we  
19 intend to use.

20 CHAIRMAN FROEHLICH: I think I hear you  
21 saying that you'll apply a rule of reason as you go  
22 through this, and I think you also imply that it's  
23 generally broader than just the consequence of that,  
24 is that fair?

25 MR. SMITH: Yes, Your Honor, we certainly

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1 will apply a rule of reason.

2 JUDGE KENNEDY: But your starting point is  
3 broader than the Applicant has communicated here. I  
4 don't want to put words in your mouth, but I thought  
5 that is what I heard you say.

6 You're going to start from the -- the  
7 current environmental impact statement, as your  
8 starting point, to consider new information.

9 MR. SMITH: Yes, Your Honor, sort of to  
10 borrow Mr. Roisman's analogy, in the staff's view, the  
11 1989 SAMA isn't -- might be Hamlet in the play, but  
12 Hamlet is not a one act -- a one person play.

13 There is many characters in the play and  
14 we're going to look at the other studies the  
15 Commission relied on in its statement of  
16 considerations that support the regulation, including  
17 the IPE, the IPEEE, and we think those apply.

18 JUDGE KENNEDY: Which is, sounds to me  
19 like more information than Limerick has considered, in  
20 their environmental report.

21 MR. SMITH: In the staff's view, it is  
22 more -- it's later information. The question is not  
23 1989 or 1996 for us, and we'll look at how the  
24 Commission's understanding of those studies, 1996, as  
25 described in the statement of considerations, would be

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1 impacted by new and significant information, and that  
2 is described in great deal in our brief.

3 MR. POLONSKY: Your Honor, if I could  
4 clarify. In Section 5.2.1, it's identifying new  
5 information.

6 What the experts looked at was more than  
7 just the 1989 document. There are three bullets here,  
8 three bulleted documents and the first is the 1989  
9 document, but the third, although it actually has a  
10 NUREG 0974 in 1989 language in it, it says, "Review of  
11 Limerick Generating Station PRA, probabilistic risk  
12 assessment model and updates to that model since  
13 publication of that document."

14 So, there are much more recent documents  
15 that were looked at, for purposes of new and  
16 significant information, for severe accident  
17 consequences.

18 JUDGE KENNEDY: Again, only through the  
19 lens of severe accident consequences.

20 MR. POLONSKY: That is because this  
21 Section 5.3 is severe accidents. The prior sections  
22 talk about new and significant information for other  
23 areas.

24 JUDGE KENNEDY: Okay, now, I am getting  
25 confused, because in the answer to Judge Kastenberg's

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1 question, about the ground water mitigation, that  
2 would go in Section 5.

3 MR. POLONSKY: Yes, five is four --

4 JUDGE KENNEDY: And it's actually in --

5 MR. POLONSKY: Oh, I'm sorry.

6 JUDGE KENNEDY: So, it's beyond severe  
7 accidents.

8 MR. POLONSKY: Yes.

9 JUDGE KENNEDY: Okay.

10 MR. POLONSKY: Section 5 is assessment of  
11 new and significant information, generically.

12 JUDGE KENNEDY: Okay.

13 MR. POLONSKY: Section 5.1 is a background  
14 discussion, 5.2 is radiological ground water  
15 protection, 5.3 is severe accidents.

16 JUDGE KENNEDY: No, I clearly mis-heard  
17 you.

18 MR. POLONSKY: Okay, I'm sorry, I am glad  
19 we cleared that up.

20 JUDGE KENNEDY: What goes in Section 4,  
21 then?

22 MR. POLONSKY: What was in?

23 JUDGE KENNEDY: Section 4?

24 MR. POLONSKY: I wasn't quoting to Section  
25 4. I was quoting to page 5-4.

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1 JUDGE KENNEDY: Oh, I see, okay. Maybe I  
2 should draw that. What I heard is that in response to  
3 my question, you said that would go in Section 4,  
4 because this section is new and significant, okay.

5 MR. POLONSKY: I'm sorry, but hopefully,  
6 we're on the same page now.

7 JUDGE KENNEDY: We're still focused on  
8 consequences, in Section 5, for severe accidents.

9 MR. POLONSKY: Yes.

10 JUDGE KENNEDY: So, in spite of, yes, you  
11 did the -- the Applicant did look at more information  
12 than just the 1989 SAMDA, it did not consider, for  
13 argument sakes, additional mitigation measures.

14 MR. POLONSKY: Correct, individual  
15 mitigation measures was not the focus of the analysis.

16 JUDGE KENNEDY: Because that is not new  
17 information?

18 MR. POLONSKY: No, because our view is,  
19 you don't get there unless you have identified a  
20 significant change.

21 JUDGE KENNEDY: But we're back to what is  
22 new information. Why isn't that new information?

23 MR. POLONSKY: Well, it is --

24 JUDGE KENNEDY: For argument sake, you  
25 could come up with an alternative that has a lower

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1 threshold, than the alternatives that were visited in  
2 the 1989 SAMDA analysis.

3 I think that is what is troubling you, is  
4 that by not looking at it, your threshold is where it  
5 was in 1989.

6 MR. POLONSKY: Okay.

7 JUDGE KENNEDY: I think that I what is  
8 bothering you. I don't see why that isn't new  
9 information.

10 MR. POLONSKY: There are -- the 1989 SAMDA  
11 document, which is a supplement to the FES, is  
12 Exhibit-A, but there is also Exhibit-B and Exhibit-C,  
13 and those are the other bullets in Section 5.3.1, and  
14 under Exhibit-C, which are all of the risk assessment  
15 model and updates since 1989, are a whole host of  
16 analyses, since 1989.

17 And so, the experts are looking not just  
18 at the 1989 document, but looking at these other PRA  
19 updates and they may already include mitigation  
20 alternatives.

21 I mean, we could look at what other things  
22 were implemented at the plants over time, but that  
23 doesn't necessarily mean that they need to be roped  
24 into or retro-fitted back to a 1989 SAMDA.

25 JUDGE KENNEDY: Yes, I guess that is what

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1 is troubling me. That is an example of information  
2 that may have been looked at and considered under  
3 those two bullets. It doesn't become visible at the  
4 ER level, and that goes back to a previous question.

5 There may be information that was looked  
6 at, that was -- that, through the process, is excluded  
7 from documentation in the ER, and again, if what  
8 you're telling me is one of those bullets has  
9 additional mitigation measures in it, I'm struggling  
10 to know how I would know that.

11 MR. POLONSKY: Well, it's -- it's a two-  
12 step process. The focus -- the first step is on  
13 whether there is a change in consequences.

14 If there is a change in consequences, then  
15 you move to, how do I mitigate that change in  
16 consequence?

17 JUDGE KENNEDY: As opposed to a change in  
18 threshold?

19 MR. POLONSKY: A change in threshold?

20 JUDGE KENNEDY: A different mitigation  
21 alternative?

22 MR. POLONSKY: Well, that would be  
23 starting at the end of the process and trying to work  
24 your way back, and the rule of reason, I mean, if I  
25 were a Petitioner, I could come up with 1,000

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1 mitigation alternatives that I say you should be  
2 looking at but --

3 JUDGE KENNEDY: Well, I think it suggested  
4 a few, under the GEIS of new information.

5 MR. POLONSKY: Right, but the rule of  
6 reason says that we don't even get to additional  
7 mitigation steps unless we have a change in the  
8 consequence of what was previously analyzed, and that  
9 that new and significant information is not  
10 challengeable in the license renewal proceeding.

11 JUDGE KENNEDY: But let's try it a  
12 different way. I mean, you've made a very convincing  
13 argument, that the SAMDA A) is not in the application,  
14 there is many reasons it's not challengeable.

15 So, we're kind of focusing in on the  
16 pathway through new information, and we'll deal later  
17 with whether something arises out of that new  
18 information, but ultimately, would be litigable.

19 But it just seems to me that the glue that  
20 pulls this together is what constitutes the scope of  
21 new information, and I'm not hearing a compelling  
22 argument, as to what limits that range of information.

23 You've certainly done -- there are  
24 certainly instances that you've pointed out, that I  
25 think are very clear to us, that yes, that is new

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1 information. The assessment appears to be adequately  
2 performed and there is no additional consequences.

3 It lead, begging the question of what  
4 wasn't looked at, and at least from our perspective,  
5 the Petitioners raised a few, that don't seem to see  
6 the light of day within the environmental report,  
7 under new and significant information.

8 That is how I -- I mean, again, I keep  
9 coming back to that.

10 MR. POLONSKY: The definition that the  
11 Commission has set forth for new and significant  
12 information is something that presents a "seriously  
13 different picture of the environmental impact, of the  
14 proposed project from what was previously envisioned".  
15 So, that is --

16 JUDGE KENNEDY: For significant, but what  
17 about for new?

18 I mean, new seems to me, to be time based.  
19 It's new, since something else. Again, I'm struggling  
20 with the way the staff is viewing new. I mean,  
21 they're looking at a range over time, of things that  
22 have occurred, and even the bullets in the ER, that is  
23 an evolution of analyses and refinement of analyses  
24 that was performed for Limerick. That clearly sounds  
25 new to me. That is new stuff.

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1 JUDGE KASTENBERG: Let me just see, if  
2 this helps, just a bit.

3 I think in your answer, and I think you  
4 spoke to it a few moments ago, the fact that the  
5 regulatory process is dynamic, there being IPE's and  
6 IPEEE's, and containment performance and all of these  
7 things that have taken place, and on the other side,  
8 as someone who is regulated, they do their due  
9 diligence and they follow what -- the course of  
10 events, as the regulatory process unfolds.

11 I think what Mike is getting at, at maybe  
12 another way is, why isn't all of that reflected, or  
13 should it have been reflected in the ER? In other  
14 words, it doesn't tell us, other than you guys are  
15 doing a good job of regulating perhaps, and you guys  
16 are doing a good job of following the regulator, but  
17 what does that have to do with the proceeding and the  
18 contentions that have been raised?

19 I think that is what Mike is getting at,  
20 it isn't -- what Judge Kennedy is getting at, he  
21 doesn't quite see how that brings it forward. Is that  
22 a better way of saying it, or another way of saying  
23 it? Does that make sense?

24 JUDGE KENNEDY: Yes, I'm struggling with  
25 the scope, and I keep hammering on the example of,

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1 could additional mitigation measures be new  
2 information, and I understand the process, at least as  
3 I understand you're explaining it to me, we don't get  
4 that far.

5 But I'm saying, why can't that be at the  
6 front end? Why wouldn't that even be considered as  
7 new information, of things that could have been looked  
8 at, even in 1989, and it's just that we didn't think  
9 about that, or they didn't present themselves.

10 It's just the newness of the information  
11 since 1989, assessed against the consequences that are  
12 in the current SAMDA analysis.

13 MR. POLONSKY: Your Honor, one of the  
14 concerns from a legal perspective is that the  
15 Commission created the exception, and that there not  
16 be some backdoor to a eviscerate the exception, and to  
17 on the one hand, say there is no need to submit a SAMA  
18 analysis, and then on the other hand, to say but  
19 anything I come up with that is new information, ought  
20 to be evaluated for its significance, such that we're  
21 now turning this new and significant information  
22 analysis into a SAMA analysis.

23 JUDGE KENNEDY: I guess, but I don't  
24 understand why five is there, then? Why is it focused  
25 on new information that could impact the severe

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1 accident consequences? Why is that even there, if you  
2 don't have to -- if that is in conflict with L? I  
3 mean, wh is it even there?

4 MR. POLONSKY: Because for Category --  
5 even a Category 1 issue, which doesn't have an  
6 exception, is, you know -- it's exempted, because it's  
7 -- you still need to look at new and significant  
8 information for a Category 1 issue.

9 JUDGE KASTENBERG: You need to look at it,  
10 but it's not challengeable.

11 MR. POLONSKY: It's not challengeable.

12 JUDGE KASTENBERG: And that is basically -  
13 -

14 MR. POLONSKY: And in the license renewal  
15 proceeding, and Your Honor, we'll spend all the time  
16 it needs and issue RAI's, if it seeks additional  
17 information, but it's just not litigable here.

18 CHAIRMAN FROEHLICH: Does the staff agree  
19 that the Petitioner has no right to challenge new  
20 information chosen by the Applicant in its ER?

21 MR. SMITH: I think, Your Honor, to point  
22 out earlier, is that the staff does not agree that is  
23 the case.

24 The Petitioner has an opportunity to  
25 challenge new and significant information, with

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1 respect to previous generic determinations, but it  
2 must do so in compliance with the Commission's  
3 regulations, which require the filing of a waiver  
4 petition, and NRDC is not likely to file a petition,  
5 in this case.

6 JUDGE KENNEDY: Going back to new  
7 information, again, Mr. Polonsky, I'll ask you, new  
8 information is relative only to Category 1? I mean,  
9 I'm sorry, that is what I heard.

10 MR. POLONSKY: Yes, new and significant  
11 information -- well, I was using that as an example.

12 JUDGE KENNEDY: Just as an example?

13 MR. POLONSKY: But new and significant  
14 information, I think the staff raised it, well, was if  
15 an analysis has already been performed, you are  
16 looking at new and significant information for what  
17 has previously been performed.

18 JUDGE KENNEDY: So, does that open the  
19 door to the SAMDA?

20 MR. POLONSKY: No, because the SAMDA is  
21 itself, just a spring-board. There were so many other  
22 analyses and updates since the SAMDA analysis, that  
23 have informed risk management and severe accident of  
24 the site.

25 For example, I mean, I think in the ER,

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1 and I'll have to locate it, there is a discussion of  
2 core damage frequency decreasing over time. Well, how  
3 is that possible?

4 Because they've gotten better at doing  
5 these analyses and have more information now, than  
6 they did before. But that doesn't mean that we look  
7 at core damage frequency from 1989 and say, "That is  
8 what we're comparing new and significant information  
9 to," because we have these more recent analyses to  
10 compare to.

11 JUDGE KENNEDY: Now, you compared it, as  
12 I understand it, to the consequences, and --

13 MR. POLONSKY: Right.

14 JUDGE KENNEDY: -- it would have lowered  
15 the consequences.

16 MR. POLONSKY: It would have lowered the  
17 consequences, that's right, which is why when the NRC  
18 -- when the Commission says new and significant  
19 information means it's in -- seriously different  
20 picture than the environmental impact, it's not just  
21 a slight increase. It's a seriously different  
22 picture. Those are significant words, for lack of a  
23 better term. This is a high threshold.

24 MR. ROISMAN: Mr. Chairman, could I  
25 respond?

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1 CHAIRMAN FROEHLICH: Sure.

2 MR. ROISMAN: Let me just say something.  
3 First of all, we've found in both types of new  
4 information, we offered information that suggested  
5 that the consequences could be worse, and we suggested  
6 that mitigation alternatives would be broader than  
7 what was done before, and some of these mitigation  
8 alternatives are outlined for you on page 7 and 8 of  
9 the declaration of our experts.

10 And contrary to Mr. Polonsky's statement,  
11 you don't start -- jump at the consequences, unless  
12 the consequences have gotten worse, you don't have any  
13 new information.

14 First of all, there is nothing in the  
15 regulation to suggest that that's the standard -- the  
16 standard for significant is, would it make a big  
17 environmental difference?

18 We agree, but we submit that these various  
19 mitigation measures that have been looked at in other  
20 plants, some of which are like Limerick, and that were  
21 not part of the 1989 analysis, have been shown to be  
22 potentially cost effective. Meaning that their  
23 implementation would make a substantial reduction in  
24 the offsite economic or human exposure risk and/or  
25 that their cost is relatively minor, compared to that.

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1           We gave you -- we cited to you, the Indian  
2 Point decision on SAMA, in which the Board provided a  
3 list taken from the Applicant's analysis, it's a PWR,  
4 and one of the examples that they list there involves  
5 a \$200,000 expenditure and a \$5 million mitigation.

6           Whatever other definition one might have  
7 of substantial or significant, that certainly would  
8 meet it.

9           So, we think that these all, whether  
10 they're changes in the consequence of the accident or  
11 changes in mitigation of the consequences of the  
12 accident, constitute new and significant, and we  
13 offer, are the basis for this.

14           The second -- and I think the heart of the  
15 question is, whether or not the Board is precluded  
16 from hearing and whether we are precluded from raising  
17 in this proceeding, a challenge to the new and  
18 significant information, as applied to this particular  
19 plant.

20           Counsel for staff pointed out that new and  
21 significant information applies to updating an  
22 environmental impact statement. That's what we have  
23 here. We have a 1989 supplement to the environmental  
24 impact statement, and that supplement is now out of  
25 date, and we've described ways in which we think it's

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1 out of date.

2 The Applicant has looked at it and said,  
3 "We don't think it's out of date." We've joined  
4 issues.

5 So, there, only with this very, tiny,  
6 little way, that the Applicant believes and the staff  
7 believes, they've found namely that the Commission has  
8 a line of cases where people are challenging Category  
9 1 and generic findings, and trying to argue those  
10 generic findings are wrong.

11 No one is arguing here that any generic  
12 finding is wrong. The 1989 analysis is a site  
13 specific analysis. No rule-making would have been  
14 needed to have challenged that. How did we file the  
15 rule, in which you said, we want you to change your  
16 licensing impact statement with regard to one  
17 particular plant?

18 It's inherently not generic. This is the  
19 place where one should be able to challenge, and it  
20 doesn't depend upon whether or not the Applicant is  
21 required to do a new SAMA analysis. We're not asking  
22 that. We're not even asking that in Contention 3.

23 It does turn on whether or not the  
24 analysis of mitigation alternatives is adequate and  
25 represents a hard look at this case law, as required.

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1 The Supreme Court's decision that I cited to you  
2 before, that Methow case, makes clear that looking at  
3 the mitigation alternatives is a key component of  
4 this.

5 In Marsh versus the Oregon Natural  
6 Resources Council they -- which is sort of a case that  
7 everyone goes to, when they're looking for new  
8 information, the Court said new and significant  
9 information is information showing that a proposed  
10 action would affect of the human environment in a  
11 significant manner or to a significant extent, not  
12 already considered.

13 We've offered you a number of things that  
14 were not already considered, the population issues,  
15 meteorological issues, evacuation time issues and  
16 mitigation measures, and for preconceived issues, as  
17 well.

18 So, we've -- and we've supported those  
19 with an expert conclusion. So, the bottom line is the  
20 mitigation part of the severe accident in play.

21 Mr. Polonsky kept referring to Section 5.3  
22 of the ER, as the severe accident discussion. With  
23 due respect, I'd like to quote the title of the  
24 section, "Severe accident mitigation". That is the  
25 title of the section.

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1           Applicant made no effort to explain how or  
2 why they would not look at changes in mitigation  
3 alternatives, under the whole consequences.

4           So, even their own document doesn't  
5 support the view of this sort of narrow salami slicing  
6 of the issue, and both are on the table, and both are  
7 challenged in Contention 1, and both are legitimate  
8 site specific concerns and frankly, if not here, they  
9 cannot be heard, and that means that the public's due  
10 process rights is protected the Atomic Energy Act and  
11 by NEPA, and would be violated.

12           CHAIRMAN FROEHLICH: That gets me back to  
13 staff. Could I ask, Mr. Smith, does the Petitioner  
14 have a right to raise any new information regarding  
15 environmental impacts of license renewal, which it  
16 believes are significant?

17           MR. SMITH: Thank you, Your Honor. Yes,  
18 I think the Petitioner's description of their claim,  
19 what it's revealing to me, about where the staff  
20 thinks their contention has gone wrong.

21           They describe their contention as raising  
22 the challenge to 1989 SAMDA analysis, and whether or  
23 not new information updates that analysis, but in the  
24 staff's view, that analysis isn't at issue in this  
25 proceeding.

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1           That was only an analysis for operating  
2           licensing. The issue in this proceeding is license  
3           renewal. The regulation provides the analysis for  
4           license renewal, and as the staff has pointed out,  
5           that regulation relies on more than just 1989 SAMDA  
6           analysis, but in NRDC has not shown how the totality  
7           of those studies provided an insufficient basis to the  
8           Commission's determination in the regulation.

9           Commission's regulations don't suggest  
10          that what we should do is just incorporate the old  
11          analysis and bring it into the proceeding and leave it  
12          at that.

13          The Commission's regulations, I think,  
14          reflect the study of severe accidents and severe  
15          accident mitigation and the study relies on a finding  
16          that if you've done one SAMDA analysis, you don't need  
17          to do another one, at the time of license renewal.

18          Of course, NEPA has a continuing  
19          obligation on the agency, before its final action, to  
20          always look at conclusions that have been codified in  
21          environmental impact statements or finalized in  
22          environmental impact statements, to see if any new and  
23          significant information impacts those findings, and of  
24          course, the Petitioners have a way to challenge that,  
25          and the Commission has been clear, the way to do that

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1 in NRC proceedings, for I think reasons of efficiency  
2 and fairness, that if they want to challenge the  
3 determinations and codify it in NRC regulation, is to  
4 file a labor petition and NRDC didn't do that in this  
5 case.

6 CHAIRMAN FROEHLICH: If a Petitioner had  
7 a concern that it became aware of, or it tied to an  
8 Applicant's ER, on a subject that will appear later in  
9 the DEIS or EIS, isn't that Petitioner under an  
10 obligation to raise it at the ER stage, to preserve it  
11 for when the DEIS is issued?

12 MR. SMITH: That is correct, Your Honor.

13 CHAIRMAN FROEHLICH: Can a Petitioner  
14 raise a contention that new information was overlooked  
15 in a license renewal application or in an Applicant's  
16 ER?

17 MR. SMITH: What do you mean by new  
18 information?

19 CHAIRMAN FROEHLICH: There is something,  
20 there is new information that would -- that would be  
21 significant, or perhaps, change the perspective of the  
22 Applicant in the first instance, in the ER or the  
23 staff, in its preparation of the EIS, that they  
24 believe is significant, would they be able to raise  
25 that, or aren't they obligated to raise that now, at

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1 the ER stage?

2 MR. SMITH: That is my understanding, Your  
3 Honor. The Petitioners must challenge the ER, that  
4 sort of stands in for the staff's draft SEIS.

5 But to the extent that the Petitioners are  
6 challenging an issue that the Commission has resolved  
7 generically, such as SAMA's for facilities that have  
8 already completed the SAMA analysis, then they would  
9 need to submit a waiver petition, because they are, in  
10 essence, challenging a regulation of the Commission.

11 Now, I think the Commission's quote from  
12 the Vermont Yankee and Pilgrim case, although it's  
13 tied to the Category 1 issue, is helpful to also, this  
14 case, because it's a generic determination.

15 The Commission ' said, "Adjudicating  
16 Category 1 issues site by site, based merely on a  
17 claim of new and significant information, ellipses,  
18 would defeat the purpose of resolving generic issues  
19 in the GEIS."

20 CHAIRMAN FROEHLICH: I think I would agree  
21 with you, as to Category 1 issues. Would your answer  
22 be exactly the same as to Category 2 issues?

23 MR. SMITH: Your Honor, a Category 2  
24 issue, as I alluded to earlier, it's sort of  
25 meaningless to talk about new and significant

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1 information with respect to a Category 2 issue,  
2 because under the Commission's regulations, a Category  
3 2 issue must be considered fresh for that licensing  
4 action.

5 Under NEPA, we have to take a hard look at  
6 the Category 2 issue, and that hard look goes beyond  
7 just looking for new and significant information,  
8 which as we talked about, is a higher standard which  
9 requires showing some kind of a seriously different  
10 picture of the environmental impacts.

11 Now, so, if there is no reason to apply  
12 new and significant information to Category 2 issues,  
13 which we're already looking at, as part of the  
14 licensing renewal process, which is why because the  
15 Commission has made a determination in their  
16 regulations, that we don't need to look at SAMA's  
17 here, that we are applying this higher new and  
18 significant information standard to the question of  
19 the SAMA's, and seeing about any of this information,  
20 which I think the -- to get back to the point Judge  
21 Kennedy was raising earlier.

22 When we look for new information, with  
23 respect to the prior determination, which in the  
24 staff's view, was 1996 rule-making, and then evaluate  
25 significance after that, and seeing if it meets that

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1 high standard. So, that is the approach that staff is  
2 taking.

3 CHAIRMAN FROEHLICH: I assume, Mr.  
4 Polonsky, you agree with staff's perspective on this  
5 issue? Did you want to take it further?

6 MR. POLONSKY: I would like to comment on  
7 the 1996 rule, if I could.

8 CHAIRMAN FROEHLICH: Sure.

9 MR. POLONSKY: And address a comment about  
10 some concern of lack of due process, which I assume  
11 the Board would take seriously, and hope to allay the  
12 Board that there is no violation of due process here.

13 NRDC has raised a concern that the first  
14 time that the Commission, in its statements of  
15 consideration, mentioned that Limerick would fall  
16 under this exception was in a final rule, and  
17 therefore, there was no opportunity or announcement to  
18 the public that they could challenge this, and that  
19 therefore, it was not somehow adjudicated, and  
20 therefore, we cannot rely on it for purposes of  
21 interpreting Section 51.53 and Section 2L.

22 The June 5, 1996 final rule is certainly  
23 listed as a final rule, and that is in 61FR28467, is  
24 the first page.

25 But the Commission acknowledged that it

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1 had changed things, or changed positions for the first  
2 time in the final rule and opened that up for a 30-day  
3 comment period, in that's explicit on this page.

4 Not only did they open it up for a 30-day  
5 comment period, but in the final final rule, if you  
6 will, issued in December 1996, they respond to  
7 comments that were submitted on the original final  
8 rule in June, and those comments include the fact that  
9 three industry commenters had disagreed with the  
10 designation of severe accidents as Category 2, in the  
11 final rule, and the requirement that SAMDA's must be  
12 addressed by the Applicant and the staff, etcetera,  
13 etcetera.

14 So, clearly, there were members of the  
15 public who not only were aware of the final rule in  
16 June, but commented on the changes to the SAMDA  
17 categorization, that had been raised in June, and that  
18 was embodied in December 1996.

19 So, there is no rationale for saying that  
20 this was not "adjudicated", whatever that means, and  
21 there is no due process violation, with respect to the  
22 1996 rule.

23 There is also no due process violation for  
24 the inability of a Petitioner to challenge new and  
25 significant information, for an issue that has been

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1 resolved by rule.

2 The way to get around that, it's not even  
3 to get around that, 2.335 allows the avenue to request  
4 a waiver petition, or you can file a petition for  
5 rule-making, if you don't agree with the rule itself.

6 Again, those are -- or you can comment on  
7 the draft SEIS. So, these are all ways that members  
8 of the public can participate, and so, there is no  
9 concern about a violation of due process.

10 CHAIRMAN FROEHLICH: Go ahead.

11 JUDGE KASTENBERG: Are you saying that  
12 public comment and adjudication are at the same level,  
13 an adjudication process, such as this, and public  
14 comment are equal, in terms of what the public can  
15 bring forward?

16 MR. POLONSKY: Well, a petition for a  
17 waiver is the way --

18 JUDGE KASTENBERG: No, first -- you  
19 started to talk about the fact that there were ample  
20 time for public comments and industry people commented  
21 and they iterated on then comments and so on, that you  
22 would equate that to an adjudication process, is that  
23 what you're saying?

24 MR. POLONSKY: In the rule-making context,  
25 yes, Your Honor, I think it has to, because the

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1 argument that NRDC has raised is that there was no  
2 opportunity for the public to comment on the change in  
3 the rule, which added Limerick and changed SAMA's from  
4 the draft rule of Category 1 to Category 2 in the  
5 final rule.

6 So, there was a public comment process,  
7 and that is what is called for under the  
8 administrative procedure act.

9 So, for this purpose, commenting on a  
10 rule-making is the way to satisfy public due process.

11 CHAIRMAN FROEHLICH: Was there anything in  
12 that statement of consideration, or in the final rule  
13 or final, final rule, or anywhere to the regulation  
14 that will tie or bring a Category 2 becoming a  
15 Category 1 event because of the exemption in the L?

16 MR. POLONSKY: Yes, Your Honor.

17 CHAIRMAN FROEHLICH: What is the cite into  
18 that, please?

19 MR. POLONSKY: On page -- this is 61  
20 Federal Register 28480, and it is the final rule, June  
21 5, 1996, and I believe I quoted this before, it's the  
22 right-hand column, towards the bottom.

23 It says, "Because the third criterion  
24 required to make a Category 1 designation for an issue  
25 requires a generic consideration of mitigation, the

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1 issue of severe accidents must be re-classified as a  
2 Category 2 issue, that requires a consideration of  
3 severe accident mitigation alternatives provided this  
4 consideration has not already been completed."

5 And so, the only natural inference from  
6 this is that Category 2 is applied to those plants  
7 who have not submitted a SAMA, and those plants that  
8 have, remain in Category 1, and I cited two other  
9 provisions, not in rule-making, but in the GEIS, which  
10 strongly suggest that an exception in 51.53(3)(c)(2),  
11 yes, is -- if it's an exception, essentially, a  
12 Category 1 issue, for those plants that have been  
13 accepted because of a generic determination that has  
14 been made.

15 CHAIRMAN FROEHLICH: Care to be heard, Mr.  
16 Roisman?

17 MR. ROISMAN: Yes, a couple of things.  
18 First of all, this is not a rule, identifying the  
19 Limerick SAMA and meeting the requirement of 51.53(f)  
20 does not appear in any rule.

21 The Commission is very careful in what it  
22 calls regulations and rules, and what are not, and  
23 that statement, that Applicant and staff are relying  
24 on, does not adhere to rule, if the intent of the rule  
25 had been to explicitly move that the -- the SAMA 1989

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1 analysis of Limerick and the one done for Comanche  
2 Peak and the one done for the third time, whose name  
3 I forget now, were intended to be within the scope of  
4 that, and remember, there were only three.

5 Why didn't they say so in the rule? Why  
6 didn't they say that?

7 What they did was, they said, if a SAMA --  
8 is a severe accident mitigation alternative analysis  
9 has been done, then the Applicant doesn't need to  
10 perform a new, without telling us that this particular  
11 plant's 1989 SAMDA meets that. That is the first  
12 point.

13 The second point is, Category 1 issues  
14 have to be generic. It's a -- it is a misuse of the  
15 English language to say that a site specific  
16 environmental impact statement, the 1989 supplement,  
17 is generic.

18 The example that was used of the salt  
19 water marsh, which I think is an excellent example,  
20 here is an exception of plants that are on the salt  
21 water marsh, and don't have to do an analysis of the  
22 ground water impacts of their cooling pond.

23 The basis for that is that salt water  
24 marsh impacts have been generically determined. There  
25 was already, a generic determination of what the

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1 impact would be of salt water marsh use as a cooling  
2 source of a power plant.

3 So, whether you had your salt water marsh  
4 on the ocean, or it was inland, you were exempt. This  
5 is perfectly okay, because it relates back to generic,  
6 and I would agree that we had an issue here of the  
7 salt water marsh pond, but I would not agree that just  
8 because an Applicant asserts that what they have is a  
9 salt water marsh cooling pond, and a reasonable  
10 intervener says, "No, that is not a salt water marsh  
11 cooling pond. That is something different," and  
12 presents sufficient evidence and bases and so forth,  
13 they would be able to challenge that, because the  
14 Applicant has to prove that they meet the regulatory  
15 exception standard.

16 This Applicant wants to say, "We don't  
17 have to prove that. We don't have to give you the  
18 1989 SAMDA, even though we quote from it, even though  
19 we analyze it, even though we rely on it, we don't  
20 have to give it to you," so, you don't get to see it.  
21 It's not part of this record, and number two, you  
22 don't get to challenge whether or not that document  
23 complies with whatever the Commission intended when it  
24 wrote 51.53(L), and we all agree that 51.53(L) gives  
25 us no definition of what is an analysis, a legal

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1 sufficiently analysis of severe accident mitigation  
2 alternatives.

3 We would have to go to the other sections  
4 that we cite, primarily in Contention 3, but also, in  
5 Contention 2, that tell us what would be an adequate  
6 analysis?

7 What the Applicant and staff are arguing  
8 is, is that the Commission is giving a license renewal  
9 to use any document that an Applicant called a severe  
10 accident mitigation alternative, done before license  
11 renewal, as an automatic free-ride on having to do one  
12 in a licensing proceeding, and of course, as an -- no  
13 opportunity for the kind of adjudicatory hearing that  
14 we're having here. There is no support for that.

15 CHAIRMAN FROEHLICH: Is the basis of your  
16 argument, that document was published in 1989, and  
17 titled 'staff's SAMDA analysis', is not a SAMDA?

18 MR. ROISMAN: In Contention 3, that is our  
19 argument. In Contention 1, our argument is, it  
20 doesn't even matter, because new and significant  
21 information related to non-generic findings that are  
22 part of the GEIS, even if we imported this into the  
23 GEIS, have to be considered as part of the  
24 environmental report, the DSEIS and FSEIS, and are  
25 subject to challenge by an intervener.

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1 CHAIRMAN FROEHLICH: So, you further would  
2 contend that when the Commission created the  
3 exception or exemption for the three plants, they  
4 weren't referring to Limerick or the 1989 staff SAMDA?

5 MR. ROISMAN: The Commission didn't create  
6 an exception for three plants. The Commission created  
7 an exception for any plant that met whatever that  
8 exception meant. It wasn't three. It might have been  
9 30.

10 There is nothing that would have stopped  
11 all the plants that are now presenting SAMDA's, as  
12 part of their license renewal, from trying to do one  
13 before license renewal ever came up.

14 Submitting it to the staff, getting it  
15 approved and then arguing, it's outside the licensing  
16 renewal.

17 But the Commission doesn't say three, in  
18 there, and I submit that there is nothing in the  
19 statement of consideration or in the GEIS that  
20 justifies the conclusion that what was done in 1989  
21 constitutes a legally adequate consideration of severe  
22 accident mitigation alternatives.

23 Most notably, forgetting about any of the  
24 other deficiencies, they never even look at the  
25 economic consequences of a severe accident. How could

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1 they possibly have determined which mitigation  
2 measures would be useful, if they left off, even by  
3 Applicant's declaration, 70 percent of the possible  
4 impacts?

5 Looking at only the consequences side, we  
6 think that number is way low for these plants, putting  
7 that aside.

8 So, it would be, it seems to me, that it's  
9 injustice to imply, much less define, that what  
10 happened in 1989 constituted sufficient information to  
11 meet NEPA's requirement for evaluating mitigation  
12 alternatives to severe accidents, the Commission's  
13 intent, when it said, if you have done that, we'll let  
14 you do it, without having to do the work, and by the  
15 way, we're not arguing that they should do the work.  
16 We're arguing they should update an old one.

17 And the staff points out that when the  
18 staff does these analyses, it's trying to deal with  
19 the updating of prior environmental impact statements.

20 This Applicant, when it applied for its  
21 license to operate the Limerick plants, did an  
22 environmental report. The staff did a draft and a  
23 final environmental impact statement. Many of the  
24 issues that are addressed in the new ER were the  
25 subject of the old FSEIS, DSEIS and ER. Why were they

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1 done all over again? Because context, Applicant  
2 didn't even try to cite, "Oh, that old one is done and  
3 we don't have to do it again."

4 Maybe the -- I think Mr. Polonsky  
5 acknowledged that new and significant information just  
6 gets automatically rolled into the updated analysis.

7 So, we have an old analysis. It needs to  
8 be updated. The Applicant has acknowledged that it  
9 needs to be updated. They haven't done it properly.  
10 We've challenged it. We should have a hearing.

11 CHAIRMAN FROEHLICH: I'm trying to get the  
12 chronology of when the Commission issued the L -- the  
13 change to the reg, to put in the L, and trying to  
14 gather from the timing of that, what they could have  
15 been referring to, when they carved out this  
16 exception, if not, the three plants that had done or  
17 the staff had done the SAMDA for.

18 MR. ROISMAN: Well, I think some of that,  
19 we've heard. The Commission had ongoing in 1996, and  
20 you'll see it in the statement of consideration. The  
21 IPE's, the IPEEE's, it was certainly possible that, as  
22 staff now argues with regard to this case, that that  
23 work would have completed the analysis of severe  
24 accident mitigation alternatives sufficiently, that  
25 the SAMA wouldn't have been required for any plant.

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1 I think all the Commission wrote in there  
2 was that if that has happened, then we're okay with  
3 it.

4 In 2001, the NEI filed a rule-making  
5 petition with the Commission, saying, just as staff  
6 has argued here, the IPE and the IPEEE are going to  
7 take care of this issue. We will know then, what the  
8 consequences are of severe accidents, we'll look at  
9 mitigation alternatives, we have back-fit rules. You  
10 don't need to keep this in there, and the Commission  
11 rejected that.

12 They turned down that rule-making request  
13 because they said, "This isn't done right. There's a  
14 lot more to be done," and the staff, by the way,  
15 supported the Commission and the rule-making was  
16 turned down.

17 So, all in all, there has been the  
18 possibility that you wouldn't have to do the SAMA  
19 because it would have already occurred. I don't think  
20 the three that are talked about -- I mean, where is  
21 the -- where is this support in this document, in the  
22 statement of considerations, that there was any look  
23 at these SAMA's, to see whether or not they were what  
24 the Commission had in mind, when it was considering  
25 what should be severe accident mitigation

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1 alternatives. It's not there.

2           There is a couple of lines in the GEIS,  
3 which is the staff's document, and the staff's  
4 document is merely saying, "Look what we did," I mean,  
5 it's self-serving. I don't mean to demean it by that,  
6 but it wasn't like an independent evaluation, and  
7 therefore, we don't have -- we don't even have a  
8 record in the statement of considerations, and again,  
9 I submit if it had been what you're asking for, Mr.  
10 Chairman, I think the Commission would have said  
11 something in L, that made reference to that, to the  
12 ones that are already done, or to something.

13           They didn't, and we are bound by the rule.  
14 The rule did not adopt the statement of consideration.  
15 It did not adopt the GEIS. It adopted only the  
16 portion of GEIS that put things in Category 1 and  
17 Category 2, and as we've discussed, the SAMA analysis  
18 into Category 2.

19           CHAIRMAN FROEHLICH: Staff Counsel?

20           MR. SMITH: Thank you, Judge Froehlich.  
21 I think one I wanted to respond to first is that staff  
22 has a different view of the NEI provision for rule-  
23 making in the denial that the Petitioners, and in the  
24 rule-making first and foremost, document any challenge  
25 to the -- the rule-making with any challenge, the

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1 Commission regulate that if you've done one SAMA  
2 analysis, a subsequent one need not be done for  
3 license renewal. That wasn't the issue.

4 Also, NEI petition for rule-making raised  
5 a limited challenge to Commission determination that  
6 basically brought forth two points.

7 First, it said that you're asking to be  
8 remote and speculative, and therefore, it need not be  
9 in the consideration of ways to mitigate this.

10 Second, NEI said that the scope of the  
11 NRC's environmental review should be limited to the  
12 scope of the safety review, which is managing the  
13 effects of aging, and the Commission soundly rejected  
14 to both of those principles. Nothing in the staff's  
15 argument is contrary today, first and foremost, that  
16 severe accidents are not remote and therefore, must be  
17 considered in the scope of license renewal, and  
18 second, the scope of our environmental review is much  
19 -- in a way, much larger than our scope of our limited  
20 safety review and it -- the environment review must  
21 consider the environmental impacts of operating from  
22 another 20 years, not just the impacts of aging --  
23 managing the defects of aging over that time period.

24 The Commission did briefly talk about  
25 categorizing severe accident mitigation alternatives

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1 as a Category 1 issue, at the end of that document,  
2 and talked about the IPE and IPEEE programs, but said  
3 at that time, didn't -- the Commission's view and the  
4 staff's view of those programs weren't sufficiently  
5 developed to the point where we would be certain that  
6 the result of that analysis would lead to the  
7 classification of SAMA as a Category 1 issue.

8 Therefore, it's been determined it wasn't  
9 worth the time at that point to consider the issue,  
10 but the Commission didn't consider itself, the  
11 question of whether or not SAMA's were properly  
12 categorized as Category 1 and Category 2, just the  
13 issue wasn't worth visiting at that time, in light of  
14 the staff's analysis.

15 Let's see, also I guess probably worth  
16 pointing out too, is the statement of considerations  
17 is not a regulation and it's not a rule, but it is  
18 helpful in explaining what the Commission meant when  
19 it promulgated the rule, and to the extent we're  
20 looking at the meaning of 10 CFR 51.53 (c) (3) (ii) (1)  
21 is, it's helpful in explaining that that language is  
22 meant to apply to the rule-making.

23 CHAIRMAN FROEHLICH: In your mind, it was  
24 intended to apply to Limerick?

25 MR. SMITH: Limerick specifically, but

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1 also as I pointed out earlier, the language was  
2 expansive enough to also encompass licensing  
3 applications for other facilities, like Watts Bar II  
4 or the new generation combined operating license  
5 reactors that will have had a SAMA analysis done in  
6 the initial operating phase, as well, or even if a  
7 facility were to come in for a second license renewal,  
8 who would have completed a SAMA analysis at the first  
9 license renewal stage.

10 So, the Reg Guides wouldn't apply to those  
11 facilities, as well. So, it could have a very large  
12 class of facilities, conceivably.

13 CHAIRMAN FROEHLICH: Mr. Polonsky,  
14 anything to add?

15 MR. POLONSKY: Yes, one, wasn't Limerick  
16 listed, is a question, and is Limerick mentioned in  
17 the June 1996 statement of considerations due any  
18 deference?

19 I think we did just hear why Limerick  
20 wasn't listed, because it would be a significant  
21 burden on the Commission to every time a new plant had  
22 performed a SAMA analysis, to then go in and revise  
23 the rule to add that plant.

24 So, to have added Limerick and Comanche  
25 Peak and Watts Bar at the time, that would then

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1 constrain the Commission to having to amend it every  
2 time a new plant was licensed, such that it did not  
3 have to submit a SAMA as part of its license renewal.

4 And then is Limerick mentioned in the June  
5 1996 due any deference? Well, the Commission, in the  
6 Pai'ina, Hawaii decision, we think is very on point.  
7 It's CLI-08-3. That was an underwater reactor -- I'm  
8 sorry, radiator proceeding, under Part 36, and there  
9 was an issue about citing and the limitations on  
10 citing requirements, and the rule is silent on citing,  
11 and the Commission goes into great length to discuss  
12 that the statements of consideration lay out why it is  
13 silent on citing, and provide those citing  
14 qualifications.

15 On page 163, as the Commission then delves  
16 into the statements of consideration analysis under  
17 Part 36, despite the fact that the concerned citizens  
18 group says that it's not proper to consider the  
19 statements of consideration, which is very similar to  
20 here, there is a footnote 46, which says, and it's  
21 quoting a prior Commission, Duke Energy Corp., CLI-  
22 0411, "The Commission often refers to the statement of  
23 considerations as an aide in interpreting our  
24 regulations."

25 It also says then, "See also," and cites

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1 to a decision from the D.C. Circuit, again, also in  
2 footnote 46, it says, "We regularly rely upon the  
3 preamble in interpreting agency rules, given that the  
4 purpose of the preamble, after all is to explain what  
5 follows."

6 CHAIRMAN FROEHLICH: And that page 163 and  
7 footnote 46 comes from the Pai'ina CLI-08-03?

8 MR. POLONSKY: Correct.

9 CHAIRMAN FROEHLICH: Okay.

10 MR. POLONSKY: And if we then go to the  
11 June 1996 statement of considerations, we think it is  
12 unambiguous on page -- this is 61 Fed Reg 28481, in  
13 the middle column, towards the bottom of the only full  
14 paragraph.

15 It says, "NRC staff considerations of  
16 severe accident mitigation alternatives have already  
17 been completed and included in an EIS or supplemental  
18 EIS for Limerick, Comanche Peak and Watts Bar."

19 "Therefore, severe accident mitigation  
20 alternatives need not be reconsidered for these plants  
21 for license renewal." That is essentially the  
22 language of the exception language in 51.53(f).

23 CHAIRMAN FROEHLICH: Last word, Mr.  
24 Roisman.

25 MR. ROISMAN: At most, at most it might

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1 get them over Contention 3, although I still think we  
2 have a dispute. It doesn't help them at all with  
3 regard to new and significant information in regards  
4 to Contention 1 or Contention 2, which says that  
5 forget about -- remember 51.53 has not standards for  
6 what is a severe accident mitigation alternative  
7 analysis.

8 So, in Contention 2, what we have said is,  
9 you are obligated by earlier regulation cited in -- by  
10 Supreme Court precedent which cited it, to do an  
11 adequate severe accident alternatives mitigation  
12 analysis. You haven't done it for this plant. You  
13 have to do it, based upon the information that is  
14 currently available.

15 So, both of those, Contentions 1 and  
16 Contention 2, don't really depend, even if this were  
17 correct, which I disagree with, and we can argue when  
18 we get to three, more about that, but even if that  
19 were correct, it wouldn't change the fact that the  
20 Commission can write all the exceptions it wants, but  
21 if at the end of the day, it doesn't have the legally  
22 required mitigation alternatives analysis, and  
23 admittedly, this is the staff, not the Applicant, it  
24 cannot sustain its decision on whether to re-license  
25 the plant.

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1 CHAIRMAN FROEHLICH: I note, we are  
2 approaching the noon hour. I would ask my colleagues  
3 of they have any further questions on Contention 1,  
4 and then suggest we take our luncheon break, and when  
5 we return, do Contentions 2, 3 and 4 and the Motion to  
6 Dismiss.

7 JUDGE KASTENBERG: Motion to Strike.

8 CHAIRMAN FROEHLICH: Motion to Strike, I'm  
9 sorry, Motion to Strike.

10 All right, then we'll stand in recess  
11 until 1:15 p.m. and take up Contention 2 when we  
12 return.

13 (Whereupon, the above-entitled matter went  
14 off the record at approximately 12:05 p.m. and resumed  
15 at approximately 1:00 p.m.)

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A F T E R N O O N     S E S S I O N

1:15 p.m.

1  
2  
3                   CHAIRMAN FROEHLICH: Please be seated. In  
4 this afternoon session, I'd like to go through  
5 Contentions 2, 3, and 4 and the Motion to Strike. But  
6 over lunch, as we talked through this, it might be  
7 helpful to as a general question and I'll start with  
8 Roisman, a question that we had propounded in regard  
9 to Contention 3. The question simply was what's the  
10 difference between Contention 2 and Contention 3?

11                   MR. ROISMAN: Contention 2 is based on  
12 requirements of NEPA and the Commission's  
13 environmental regulations. Those are conditions that  
14 are not waived by or replaced by anything in 51.53(1).  
15 But rather, inform as to what the words in that  
16 provision mean when the analysis of severe accident  
17 mitigation alternative. So a severe accident  
18 mitigation alternative has to be one that complies  
19 with the guidance of Methow Valley and complies with  
20 the requirements of 51.453 of the Commission's  
21 regulations, and 51.103(a)(4). Those two regulations  
22 imposed upon the Commission in the case of (d)(3) the  
23 discussion of alternatives should be sufficient to  
24 complete and aid the Commission in developing and  
25 exploring pursuant to Section 102(e) of NEPA,

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1 appropriate alternative to recommended courses of  
2 action in any proposal which involves unresolved  
3 conflicts concerning the alternative uses of available  
4 resources. And then 103(a)(4) says state whether --  
5 this is when the Commission is now doing its final  
6 decision on the license application, state whether the  
7 Commission has taken all practicable measures within  
8 its jurisdiction to avoid or minimize environmental  
9 harm from the alternative selective and if not to  
10 explain why those measures were not adopted.

11 So Contention 2 says the applicant does  
12 not meet those requirements. Admittedly, 103 applies  
13 to the commission, but we've already talked about that  
14 fiction. So Contention 2 says that Subpart L does not  
15 grant, nor could it legally grant, an exemption from  
16 the requirements of NEPA. The Commission cannot grant  
17 itself an exemption from the statute, and therefore  
18 the requirements of NEPA is still applicable.

19 So let's just look at what we have on the  
20 table. We have a 1989 SAMDA. We have the analysis of  
21 new and significant information in Part 5.3 of the ER.  
22 And (c), does the applicant provide the information  
23 that's required for a hard look at the mitigation  
24 alternatives for severe accident, yes or no?

25 So in that sense, it's not tied to whether

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1 you call it a SAMA, a SAMDA, or just an accident  
2 mitigation alternatives analysis, whatever you want to  
3 call it. That's what Contention 2 is about. And  
4 you'll see there are a couple of issues in 2 that  
5 don't appear in 1 because some of those issues are not  
6 new and significant information. They're old and  
7 significant information, but we still have to know  
8 whether or not these requirements are met. And that's  
9 a fundamental point that NRDC is pressing, that at the  
10 end of the day the Environmental Review for this plant  
11 must meet the requirements of NEPA and the  
12 Commission's regulations.

13 And you don't need to get to the question  
14 of whether a new SAMA has to be done and the old SAMDA  
15 analysis is equivalent of the new SAMA. All you have  
16 to do is evaluate the adequacy of that.

17 Nothing in the regulations excludes  
18 consideration of the adequacy of the analysis by the  
19 applicant of severe accident mitigation alternatives.  
20 So 2 just says they don't meet those statutory and  
21 regulatory requirements. It doesn't ask them to do a  
22 new SAMA. It just says you don't need it. They might  
23 choose to come in, if they thought we were right and  
24 they were wrong on that, and do a new SAMA. They  
25 might do something different. It might not look at

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1 all like a SAMA, but it might meet the statutory and  
2 regulatory requirements.

3 Contention 3 deals with the very narrow  
4 question and that is can an applicant assert  
5 compliance with the exception provision of 51.53(1)  
6 without proving something about the document that it  
7 claims meets the exception requirement. This  
8 applicant has said we don't have to bring it in.  
9 We're not bringing it in. It doesn't have to be made  
10 part of the application.

11 Our position is it's true, you don't have  
12 to do it, but if you choose to do, that is, if you  
13 choose to rely on the exception as they do here and if  
14 you choose to evaluate new and significant information  
15 against that whole document, you have to bring the  
16 document here. And we have an opportunity to evaluate  
17 whether or not that document is what the Commission  
18 had in mind.

19 The applicant and staff position is it  
20 does not matter what is in the document. If the  
21 applicant and staff call it a previous SAMA analysis,  
22 it automatically qualifies. There's no substantive  
23 evaluation of its merits.

24 Now they say well, the Commission has done  
25 that for us. They issued the regulation and they

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1 reference Limerick to Watts Bar and Comanche Peak and  
2 therefore they determined that those were adequate.  
3 What I submit is where is the record that would  
4 support such a determination? If the Board is to  
5 treat it as collateral estoppel or res judicata,  
6 however you want to treat it, there was to be some  
7 record. There has to be a process that has gone  
8 through in which the pros and cons, the merits and  
9 demerits of that were available to be evaluated. No  
10 such process is listed.

11 So in Contention 3, we ask you for the  
12 first time to take a look at the SAMDA of 1989 and make  
13 a judgment based upon any criteria that you can find  
14 and its only guidance criteria, I admit, in the  
15 Commission's guidance document, staff guidance  
16 document, as to what would be a proper SAMA, what kind  
17 of PRA analysis would you need, what kind of  
18 mitigation alternatives do you have to look at, how  
19 would you select what they were, how would you do the  
20 balance between the cost of the mitigation alternative  
21 with the cost of the accident and how much would you  
22 save by all of that.

23 We're not trying to lay down some rule as  
24 to what we say it has to be. All we're saying is that  
25 any fair evaluation of the 1989 SAMDA cannot meet the

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1 requirement the Commission had in mind. The  
2 Commission did not intend, no matter how you want to  
3 read the SOC, to say no matter how bad we've done it,  
4 an analysis is done, and regardless of the label  
5 that's put on it, it automatically qualifies for the  
6 exemption. So 3 challenges the applicant's assertion  
7 that it's entitled to the exemption.

8 Now you might decide that's a legal  
9 question. If it is, then we join the issue on a legal  
10 question and that contention should be stayed for a  
11 determination in a full-blown briefing that you would  
12 do. The applicant would file for summary disposition  
13 or we would file for summary disposition. At this  
14 stage, there is a dispute. The dispute is whether or  
15 not the applicant complies and meets the exception.  
16 That's the dispute.

17 JUDGE KASTENBERG: Could you elaborate on  
18 what you consider old, but significant in the  
19 declarations?

20 MR. ROISMAN: Oh yes, they are included in  
21 the declarations.

22 (Pause.)

23 So if you look at our petition on page 20  
24 where the bases of Contention 2 are mentioned, the  
25 number 3, the updated meteorological data, I believe

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1 that that is not one of the new and significant, but  
2 old and significant. It's an issue that could have  
3 been raised, but then 1989, there's not an event that  
4 happened, although we do note meteorological condition  
5 information is available since that time. But we  
6 think it was a bad choice.

7 Also, the consideration of the evacuation  
8 time which is number 5 on page 20 of the petitioner's  
9 grievance. It's another example of an issue which is  
10 not new in the way that we use the term new. It's  
11 potentially significant. I think those are the two  
12 principal ones, Judge.

13 JUDGE KASTENBERG: Thank you.

14 CHAIRMAN FROEHLICH: Mr. Smith --

15 JUDGE KASTENBERG: Before we do that, just  
16 one for the staff. Do you know what was the SAMDA of  
17 1989, was that peer reviewed?

18 MS. KANATAS: I'm not sure. I'm not sure,  
19 Your Honor. This is Catherine Kanatas. I can check  
20 with the staff and see what type of peer review, if  
21 any, it received.

22 CHAIRMAN FROEHLICH: Contention 2, as Mr.  
23 Roisman just explained, talks about an obligation of  
24 the applicant to meet the requirements of NEPA,  
25 separate and apart from the argument that revolves

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1 around the applicability of L, as I understood your  
2 answer.

3 From the staff's perspective, is there an  
4 obligation for the Agency staff to perform a SAMA  
5 analysis as part of this license renewal proceeding?

6 MS. KANATAS: Thank you, Your Honor. No,  
7 the staff does not believe that it is obligated to  
8 perform a SAMA analysis in this proceeding. As we've  
9 discussed, Exelon does not need to include a SAMA  
10 analysis in its Environmental Report and Table D-1  
11 which defines the scope of the staff's environmental  
12 review for license renewal states that alternatives to  
13 mitigate severe accidents must be considered for all  
14 plants that have not considered such alternatives.

15 Here, as we've discussed, the staff has  
16 considered alternatives to mitigate severe accidents  
17 in the NEPA document for Limerick and so SAMA need not  
18 be considered in the Limerick SEIS. A contrary  
19 reading of the regulation would render the statement  
20 that have not considered such alternatives meaningless  
21 which, as a result, courts try to avoid when reading  
22 regulations.

23 So I'd also like to point out that the  
24 staff explained in the 1989 final environmental  
25 statement that the severe accident program which

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1 includes the containment performance improvement  
2 program, the IPE, and the IPEEE, was the proper  
3 vehicle for further review of severe accidents at  
4 nuclear power plants including Limerick. That's on  
5 page 15 of the FES.

6 And the Commission cited to these same  
7 studies as well as the Limerick SAMDA in the 1996  
8 Statement of Considerations when it made its  
9 determination that another SAMA need not be done for  
10 Limerick at license renewal.

11 CHAIRMAN FROEHLICH: So even working in  
12 Mr. Roisman's argument that aside from L, NEPA would  
13 require some type of a SAMA analysis, you don't buy  
14 that?

15 MS. KANATAS: No, Your Honor. Part 51,  
16 including 51.53(c)(3)(2)(1) are the Commission's  
17 regulations implementing NEPA and NRDC has not shown  
18 has been following the Commission's regulations  
19 implementing NEPA do not meet NEPA. It's staff's  
20 position that in following Commission's regulation in  
21 not submitting a SAMA analysis in its ER, Exelon  
22 complied with our regulation.

23 JUDGE KENNEDY: So the strength of your  
24 argument is if the exemption and the fact that IPEs  
25 and IPEEEs have been performed is just supplementary

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1 to that? I'm not sure -- that's come up a couple of  
2 times today.

3 MS. KANATAS: Certainly, the Commission  
4 did determine that it could not make generic  
5 determinations for all plants based on IPE and IPEEE  
6 and that's not what we're arguing here. We recognize  
7 that SAMA is a Category 2 issue, but based on the  
8 consideration that was done in the SAMDA that was done  
9 in 1989, as well as the IPE, IPEEE that was done  
10 specifically for Limerick, and the other studies that  
11 have been done and continue to be done, the Commission  
12 made the generic determination that another SAMA did  
13 not need to be done for Limerick license renewal. So  
14 it's not trying to say that we're trying to apply  
15 Limerick's IPE generically to anyone else. As NRDC  
16 pointed out, the SAMDA that was done was site specific  
17 to Limerick as well as the IPE and IPEEE.

18 JUDGE KENNEDY: So the important  
19 consideration is that it is an Environmental Impact  
20 Statement?

21 MS. KANATAS: Correct, which the  
22 regulation 51.53(c)(3)(2)(1) does explicitly state,  
23 but the previous determination was in a Environmental  
24 Impact Statement, but yes, it may not be submitted for  
25 license renewal.

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1 JUDGE KENNEDY: Are there, just to keep  
2 going with that, are there other facilities outside of  
3 the three that have been mentioned that qualify for  
4 the exemption that have a SAMA analysis or SAMDA  
5 analysis within the Environmental Impact Statement  
6 outside of license renewal?

7 MS. KANATAS: I believe my co-counsel, Mr.  
8 Smith covered that there could be other potential  
9 cases that the rule would apply to, whether it be for  
10 COL applicant that had or other -- another license  
11 renewal, a second license renewal.

12 JUDGE KENNEDY: So that would be going  
13 forward?

14 MS. KANATAS: That would be going forward.

15 JUDGE KENNEDY: Line in the sand at the  
16 time Limerick submitted their application, the three  
17 that had been -- the three facilities that had been  
18 granted the exemption are they the only ones that have  
19 a SAMDA analysis or SAMA analysis within the  
20 Environmental Impact Statement?

21 That's not coming out right, because I can  
22 see Mr. Smith is thinking there's license renewal  
23 applications that have already been granted?

24 MS. KANATAS: Right, right.

25 JUDGE KENNEDY: I guess I'm trying to get

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1 at are those three that were granted the exemption the  
2 only ones that qualified for the exemption? I guess  
3 I'm trying to get at that point in time in '96 were  
4 they the only three that were granted an exemption  
5 based on having a SAMA analysis?

6 MS. KANATAS: I can confirm that with my  
7 staff. I believe that there might have been for  
8 systems 80, but I would need to -- I believe that at  
9 that time those were the only plants, but I can  
10 confirm that.

11 JUDGE KASTENBERG: And just to kind of  
12 round this out, is there anything in L, I'm just going  
13 to call it L, that precludes the staff when they're  
14 doing the review of the ER from raising questions  
15 regarding severe accident mitigation analysis?

16 MS. KANATAS: Thank you, Judge Kastenberg.  
17 No, there is nothing that precludes the staff from  
18 asking additional questions about the information  
19 provided in the ER related to any new and significant  
20 information. The staff is doing its own independent  
21 analysis of whether there is new and significant  
22 information related to the generic determination in L,  
23 as you say, and so we will be following up based on  
24 what's in the ER, what's in the petition, any other  
25 information that we have, the reviews that have

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1 already gone on, the SAMAs that have been done, other  
2 things to determine whether there's anything that  
3 needs to be followed up on, absolutely.

4 CHAIRMAN FROEHLICH: Mr. Roisman mentioned  
5 some new old items or old new items.

6 MS. KANATAS: Yes.

7 CHAIRMAN FROEHLICH: Will those items or  
8 those type of things, will they be looked at as part  
9 of the staff evaluation for the DEIS?

10 MS. KANATAS: Thank you, Judge Froehlich.  
11 The meteorology --

12 CHAIRMAN FROEHLICH: Right.

13 MS. KANATAS: And other concerns? The  
14 staff's review is ongoing and without binding the  
15 review and saying what exactly they will or won't be  
16 looking at, certainly any information that would paint  
17 a seriously different picture of the environmental  
18 consequences that were considered in the 1996  
19 rulemaking would be looked at by the staff. That may  
20 or may not include things like meteorology.

21 CHAIRMAN FROEHLICH: In that regard, how  
22 does that NEI 0501, how does that play into what you  
23 look at and the type of issues Mr. Roisman was saying  
24 that you must look at?

25 MS. KANATAS: Thank you, Judge Froehlich.

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1 A couple points on the NEI guidance. First, it  
2 relates to a SAMA which is not at issue in this  
3 proceeding. What is at issue is the regulation. So  
4 any guidance --

5 CHAIRMAN FROEHLICH: We're back to L.

6 MS. KANATAS: Back to L. Any guidance on  
7 the SAMA analysis really doesn't apply here because  
8 there is no SAMA analysis submitted in the LRA which  
9 NRDC notes on page two of their expert declarations.

10 In any event, the NEI guidance does not,  
11 like all guidance documents, does not have any  
12 requirements. And the Commission actually in the 1996  
13 Statement of Considerations specified that it did not  
14 intend to prescribe by rule the scope of an acceptable  
15 consideration of severe accident mitigation  
16 alternatives and that it would review each severe  
17 accident mitigation consideration provided by a  
18 license renewal applicant on its merits and determine  
19 whether it constituted a reasonable consideration of  
20 SAMA. That's at 61 Fed. Reg. 28482. There's an LPD  
21 55 NRC 49 at 127, citing that.

22 So frankly, not only is it not an issue in  
23 this proceeding because the SAMA is not at issue, it's  
24 guidance and not binding requirements and the  
25 Commission didn't intend to have any kind of bright

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1 line, this must be done for a legally adequate SAMA.

2 CHAIRMAN FROEHLICH: Is there somewhere --  
3 this sort of latches into Contention 3, is there any  
4 definition of severe accident mitigation alternatives  
5 in the Commission's regulations or somewhere that  
6 explained, perhaps, how it's intended to be used in L?

7 MS. KANATAS: Thank you, Judge Froehlich.  
8 The term is not defined in the regulations. In a 1980  
9 policy statement, the Commission indicated that SAMAs  
10 were additional features or other actions which would  
11 prevent or mitigate the consequences of severe  
12 accidents. The cite for that is 45 Fed. Reg. 40103.

13 The Commission's case law describes SAMAs  
14 as safety enhancements such as a new hardware item or  
15 procedure intended to reduce the risk of severe  
16 accidents. That's CLI 10-11, slip. op. at 3. And the  
17 Statements of Consideration for the '96 license  
18 renewal rules do not explicitly define SAMAs, but they  
19 do state that Limerick's SAMDA was a severe accident  
20 mitigation alternatives analysis for purposes of the  
21 rule.

22 (Pause.)

23 CHAIRMAN FROEHLICH: Mr. Polonsky, do you  
24 have a view on the difference, if any, your approach  
25 to Contention 2 vis-a-vis Contention 3, same question

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1 as I began with with the petitioner?

2 MR. POLONSKY: Yes, Your Honor. It's like  
3 a game show with two contestants who appear on the  
4 outside to be different contestants, but in effect,  
5 are the same contestant trying to get to the same  
6 prize. Contention 3 says the exception doesn't apply.  
7 Contention 2 says well, I may lose on that so I want  
8 another bite to see what's behind Curtain 3 as part of  
9 our game show, and so I'm trying to create a reason  
10 why I can get around the exception in 3. We think  
11 that's simply a camouflaged argument to do a runaround  
12 and go through the back door to challenge a Commission  
13 regulation which cannot be done absent a waiver in  
14 this proceeding.

15 There's another reason for that outcome  
16 and that is the citations that the petitioners have  
17 provided are general citations under NRC's  
18 interpretation of NEPA. And the general principles of  
19 regulatory history construction or regulatory  
20 construction period are that specific rules trump  
21 general rules and here we have a specific rule that  
22 says for those three plants that it already performed  
23 a SAMDA analysis and they do not need to submit one  
24 now. So to simply point to a general rule and say  
25 that trumps the specific rule goes against these

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1 general principles of regulatory construction.

2 And then finally, I think what the staff  
3 said about their obligation, also flows through  
4 equally from those general rules to this specific  
5 rule. And if I could map that out, I think it's very  
6 clear that the provisions that have been cited don't  
7 link back and the provisions that I'm going to cite do  
8 link back to the exception.

9 So in 10 CFR Section 51.95(c), that's the  
10 provision that governs the staff's obligation to issue  
11 a Final Environmental Impact Statement, to issue a  
12 Supplemental Environmental Impact Statement at the  
13 license renewal stage. And it says that you must  
14 address the issues that are required under 51.71. We  
15 then turn to 51 -- if I'm going too fast, let me know  
16 Judge Froehlich.

17 CHAIRMAN FROEHLICH: Okay.

18 MR. POLONSKY: So we're at 55.95(c) which  
19 is entitled the Operating License Renewal Stage. And  
20 it says that the Commission shall prepare an  
21 Environmental Impact Statement which is a supplement  
22 to the Generic Environmental Impact Statement. And  
23 then (c)(1) says the Supplemental Environmental Impact  
24 Statement for the operating license renewal stage  
25 shall address those issues as required by 51.71.

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1                   We then turn to 51.71 because we want to  
2 know what it is that they're supposed to address.  
3 51.71 entitled Draft Environmental Impact Statement  
4 Contents provides that the NRC staff must address the  
5 matters specified in several sections and then at the  
6 top of the page of the following page it says as  
7 appropriate and to the extent required by the scope,  
8 the draft statement will address the topics in  
9 paragraphs B, C, D, and E below and the matters  
10 specified in -- and they list a couple of sections  
11 including 51.53.

12                   So we then go to 51.53 and you know the  
13 answer to where this is going. The exception is  
14 written into 51.53(1) provision which says you don't  
15 need to include it here. So we think there's a very  
16 clear path that says no, this isn't included and it's  
17 not simply that the Commission forgot that this  
18 exception was there and that it somehow violates the  
19 requirement to do a hard look under NEPA. No, the  
20 entire construct of 51 sets out what the NRC staff is  
21 obligated to do and it clearly leads you down a path  
22 of not doing an analysis for SAMA for Limerick.

23                   CHAIRMAN FROEHLICH: It sounds very  
24 logical and direct.

25                   Mr. Roisman, care to comment?

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1 MR. ROISMAN: Yes, Your Honor. What the  
2 applicant and staff would argue is that -- they're  
3 saying that because the applicant is excused, their  
4 term, from doing a new SAMA analysis under 51.53, it  
5 therefore follows that staff which doesn't have to do  
6 anything more than the applicant did is also excused  
7 from doing it. And therefore, the NRC is excused from  
8 complying and that is inconsistent not only with the  
9 statute. It's inconsistent with the Statement of  
10 Considerations. The Commission, through the 1986  
11 Statement of Considerations, makes clear that its goal  
12 is to comply with NEPA. That's what it was trying to  
13 do. It's not setting up something separate and  
14 ignoring it, it's trying to comply with NEPA.

15 So the question on the table is whether  
16 looking at 2 and 3 is whether or not what has happened  
17 as of 1989 complies with NEPA. This language that Mr.  
18 Polonsky points to says that the staff's review needs  
19 to include what's in 51.53. It doesn't say it's  
20 limited to that and I believe staff counsel has  
21 conceded that the staff may go beyond what the  
22 applicant puts in the Environmental Report. This is  
23 the applicant's point of view. Staff can have a  
24 different point of view. They may find new  
25 information the applicant didn't look at. They may

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1 reject some of the applicant's analysis. They could  
2 even say to the applicant your 1989 SAMDA review  
3 reliance is unwarranted in light of everything that's  
4 happened in the last 23 years. Any of those things  
5 are possible.

6 So the staff, just like the applicant, is  
7 not prohibited from doing an analysis. It's told it  
8 doesn't have to. And what 2 raises is if you don't do  
9 it, can you still comply with NEPA and the most that  
10 they can say is if we don't do it, we'll still comply  
11 with A. But that isn't the question that's on the  
12 table, at least not in Contention 2.

13 Contention 2 just says is this an adequate  
14 analysis that will even show alternatives? So I think  
15 their framing the question by assuming the answer. I  
16 would agree. If L was a declaration by the Commission  
17 that they had made a generic determination that the  
18 impact of mitigation alternatives and analysis of  
19 severe accident mitigation alternatives at Limerick  
20 were substantively adequate. And there was a basis  
21 for that statement. In other words, it wasn't just a  
22 throwaway line in the SOC. We would be in a very  
23 different position, but we do not have that.

24 You can go through the SOC from top to  
25 bottom and you will not find, or the GEIS for that

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1 matter, any attempt to compare the 1989 SAMDA analysis  
2 for Limerick or any of the other plants against any  
3 criteria for what you would do to adequately consider  
4 severe mitigation alternatives, severe accident  
5 mitigation alternatives.

6 We suggest in Contention 2 and to some  
7 extent Contention 3 also things that you would have to  
8 look at if you wanted to know the answer to that  
9 question. That question is not answered in the 1989  
10 SAMDA analysis. It's not answered because a whole  
11 category of consequences, mainly economic consequences  
12 are totally ignored. It's not answered because a  
13 whole series of things that we've learned from 1989  
14 and now are not part of the analysis. It's not  
15 answered because there are specific things that were  
16 done in 1989 which are demonstrably wrong in our  
17 judgment. We presented expert opinion for it.

18 So we think that the fact that the  
19 applicant and the staff think that they can duck this  
20 responsibility at most, at the very most what you  
21 could say is the applicant in its ER didn't have to do  
22 more than the 1989 SAMDA.

23 Now we don't agree with that, but I don't  
24 think you can say more than that. When you get over  
25 to what the staff's obligations are, then we really

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1 are in NEPA territory and the language that I quoted  
2 at the beginning this morning from Methow Valley seems  
3 to me is sufficiently important.

4 And with your indulgence I'll read a part  
5 of it again. Omission of a reasonably complete  
6 discussion of possible mitigation measures would  
7 undermine the actual enforcing function of NEPA.  
8 Without such a discussion neither the Agency nor other  
9 interested groups of individuals can properly evaluate  
10 the severity of the adverse effects. Now that's not  
11 said in the SOC. It's not even said by the  
12 Commissioners. It's said by the United States Supreme  
13 Court. It is the law.

14 So Contention 2 is based upon the fact  
15 that a fair reading of the 1980 SAMDA analysis shows  
16 that it does not meet that requirement. It does not  
17 have a reasonably complete discussion of possible  
18 mitigation measures. And there has been no cure, no  
19 determination, no record, no opportunity for a record  
20 to be made with regard to the 1989 SAMDA's relevance  
21 to a 2012 license renewal application. Contention 2  
22 says this is on the shelf, this is on the shelf.

23 Now as to 3, the staff often quotes to you  
24 from the SOC to say that the Commission does not have  
25 any standards for what is a proper set up. I agree,

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1 they don't. It's not in the regs. It doesn't appear  
2 to meet it in the Statement of Considerations and in  
3 the Statement of Considerations they say we're not  
4 going to do that.

5           Contention 3 says we've got to know  
6 whether you've done an adequate job. We believe you  
7 offered, you say you, the applicant, that you're  
8 entitled to the exemption. We have a right to check  
9 on that assertion that you make in the ER. That's  
10 what Contention 3 does. It challenges that assertion.  
11 And we point to, because we can't point to regs. We  
12 point to staff guidance, primarily NEI 05-01 as at  
13 least illustrative of what we think would need to be  
14 done to do a proper SAMDA. But we go back to the  
15 declaration of our experts which say how could you  
16 possibly say that you've done a proper evaluation  
17 mitigation alternatives for Limerick when you have  
18 left out mitigation alternatives that are in other  
19 similar plants across the country as part of their  
20 SAMA analysis? You haven't even considered them under  
21 new and significant information much less as part of  
22 your analysis of mitigation alternatives.  
23 So that's where Contention 3 comes into play.

24           CHAIRMAN FROEHLICH: Staff counsel.

25           MS. KANATAS: Certainly. Sir, a few

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1 points that I want to raise regarding Mr. Roisman's  
2 argument. First, both Contention 2 and 3, as  
3 explained just now, challenge the 1989 SAMDA and claim  
4 deficiencies in that analysis and claim that the  
5 Environmental Report for license renewal incorporates  
6 or adopts that analysis as a SAMA analysis. And that  
7 is not accurate.

8 The Environmental Report references the  
9 1989 SAMDA as a citation to a previously done severe  
10 accident mitigation alternative and then says it is  
11 not -- the exact quote -- accordingly, no analysis  
12 SAMA's for Limerick Generating Station is provided in  
13 this license renewal Environmental Report as none is  
14 required as a matter of law, citing to L.

15 So the adequacy of the 1989 SAMDA analysis  
16 is not at issue. It's not part of the license renewal  
17 application. The relevant question is not whether new  
18 and significant information related to that analysis  
19 is related to that analysis. The new and significant  
20 information is related to the Commission's generic  
21 determination in the rule which is supported by  
22 several studies, the CPI, the IPE, the IPEEE, the  
23 previously done SAMDAs including Limerick. And NRDC  
24 does not indicate in its petition how its challenges  
25 undermine that finding and certainly have not sought

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1 a waiver to challenge the regulation. So that's my  
2 first point.

3 The second point that I wanted to make is  
4 in terms of these additional mitigation measures. I  
5 believe Judge Kennedy, you have some concern about how  
6 could that not be new information that needs to be  
7 addressed. And I just want to point out that the  
8 Commission's Statement of Considerations at 61 Fed.  
9 Reg. 28481 explicitly recognized the possibility that  
10 future SAMA analysis could identify cost beneficial  
11 SAMAs. But the Commission went on to conclude that  
12 future SAMAs were unlikely to identify major plant  
13 design changes or modifications that would be cost  
14 beneficial and that any identified cost beneficial  
15 SAMAs would tend to identify procedural and  
16 programmatic fixes with any hardware changes being  
17 only minor.

18 Given those conclusions, the Commission  
19 reasonably determined to exercise its discretion under  
20 NEPA to only consider one SAMA. The NRC, as I've  
21 said, has to determine whether there's any new and  
22 significant information which would paint a seriously  
23 different picture, the consequences of realizing same  
24 than what were considered by the Commission. But  
25 certainly they explicitly recognize that additional

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1 cost beneficial mitigation measures were a  
2 possibility. So I don't -- the staff position is that  
3 that is not new and significant in and of itself.

4 JUDGE KENNEDY: My head is rotating.

5 MS. KANATAS: Sorry.

6 JUDGE KENNEDY: Did you just agree with  
7 Mr. Roisman that there is no SAMA for Limerick?

8 MS. KANATAS: I agree that there's no SAMA  
9 submitted for license renewal in the license renewal  
10 Environmental Report because the 1989 FES contained a  
11 SAMDA for Limerick which is for the operating license  
12 and that that SAMDA was a severe accident mitigation  
13 alternatives analysis within the meaning of L and that  
14 because of that no SAMA was submitted for the license  
15 renewal.

16 JUDGE KENNEDY: Okay, so we're all in  
17 agreement that none was submitted.

18 MS. KANATAS: For the license renewal.

19 JUDGE KENNEDY: Are we in agreement there  
20 is one or there isn't one for Limerick?

21 MS. KANATAS: The staff's position is that  
22 there is a SAMA for Limerick that was done in support  
23 of the operating license and it's contained in the  
24 1989 final environmental statement.

25 JUDGE KENNEDY: Okay, that helps. Now

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1 let's go to new and significant information and  
2 mitigation alternatives. I think you went through a  
3 fair bit of discussion about whether any would be  
4 identified, whether -- that doesn't imply we're not  
5 going to look, does it?

6 MS. KANATAS: Absolutely not, Judge  
7 Kennedy. We certainly are going to look at all the  
8 information submitted by the petitioner, by any  
9 scoping comments which actually NRDC provided scoping  
10 comments that were very similar to the issues raised  
11 in the petition any other information that comes in  
12 that we --

13 JUDGE KENNEDY: We have from the petition  
14 from NRDC at least a suggestion that there are  
15 mitigation alternatives that have been explored since  
16 1989 that haven't been looked at as yet for Limerick  
17 and I guess I'm looking to see is that true? You say  
18 the scoping comments and other material -- is that in  
19 that mix of information?

20 If I understand the applicant, mitigation  
21 alternatives -- my recollection is that they don't  
22 need to be looked at because there's no significant  
23 consequence changes. I guess I'm struggling. To me,  
24 it just seems what's been maybe looked at over the  
25 last -- since '89, there could very well be some new

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1 information that could rise to significance and I'm  
2 just struggling with how that doesn't -- I guess I'm  
3 struggling first, doesn't raise it in the mix. And  
4 then we can discuss if it's not in the mix, why it  
5 would not be?

6 MS. KANATAS: I will try to answer your  
7 question and if I don't, please let me know.

8 Certainly we recognize that it's new  
9 information. Whether or not it's significant gets  
10 back to as my co-counsel, Mr. Smith, laid out, it  
11 would have to paint a seriously different picture of  
12 the environmental consequences that were not from  
13 1996.

14 Now whether or not that is the case, the  
15 staff is doing its evaluation now. But certainly my  
16 point was just to note that the Commission recognized  
17 back in 1996 that future SAMA analysis could identify  
18 other cost beneficial mitigation measures, but that  
19 they still made the determination. They drew the line  
20 and made the determination that if a SAMA had been  
21 done for a plant, another one need not be for license  
22 renewal given the other generic and site specific  
23 studies that had been done and would continue to be  
24 done for that plant.

25 JUDGE KENNEDY: Do you think it's the role

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1 of new and significant information to make that whole  
2 picture whole to connect all the dots and make  
3 something -- I mean if we keep going out in time when  
4 Limerick chooses to renew its license 20 years from  
5 now again, I mean we've now got a SAMA that goes back  
6 40 years. Something has to keep this to medium place  
7 other than just a regulatory exemption. There's  
8 something illogical about it.

9 I think Mr. Roisman makes a compelling  
10 logical argument. I'm not sure yet if he makes a  
11 compelling legal argument, but from a logic  
12 standpoint, there's something here that just doesn't  
13 seem to be gelling for me and that is we had this,  
14 yes, there's an exemption.

15 Yes, I agree that Exelon did not have to  
16 submit one as part of this application and we can come  
17 to the staff obligations and you've gone through some  
18 of that. How do we get -- how does this all work as  
19 we move out in time? As things are discovered,  
20 uncovered, revealed? We're still operating these  
21 plants. Stuff happens. Improvements get made. There  
22 are smart people out there. Things get suggested, get  
23 reviewed, get looked at.

24 How does that piece together? I'm hoping  
25 it pieces together. I'm just not sure how it gets

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1 pieced together.

2 If you don't have an obligation to do it.  
3 They don't have an obligation to do it.

4 CHAIRMAN FROEHLICH: And the petitioners  
5 are prevented from doing it.

6 JUDGE KENNEDY: I just don't know how it  
7 works. I think I'm hearing they don't have to submit  
8 it. You're not obligated to do it. They're concerned  
9 that it's not being done. It all sounds wrong.

10 MS. KANATAS: In terms of them not  
11 submitting a SAMA and NRDC's -- for license renewal --  
12 and NRDC's concerns with that, that is a challenge to  
13 the regulation. So while that could be something  
14 litigated, if a waiver was submitted and granted by  
15 the Commission, that is how that could be brought.

16 Certainly, too, as has been recognized a  
17 petition for rulemaking could be sought if NRDC did  
18 not believe that the current regulations implementing  
19 NEPA that are in part 51 do not meet NEPA's  
20 requirements. But it's not what was pled, does not  
21 undermine the Commission's determinations and does not  
22 constitute something that would meet the waiver  
23 standards in this case. So the NRC staff does  
24 recognize its independent duty to evaluate the  
25 information as well as identify any new and

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1 significant information in relation to all generic  
2 determinations in the regulation.

3 So I certainly understand your concern for  
4 the on-going nature of the review and the events and  
5 of things, and the staff is very aware and cognizant  
6 of their duties to evaluate our response to Fukushima,  
7 to September 11, to all the events that happened,  
8 unfortunately. We do recognize our duty to react and  
9 respond accordingly.

10 MR. ROISMAN: Mr. Chairman?

11 CHAIRMAN FROEHLICH: Sure.

12 MR. ROISMAN: Counsel seems to have  
13 touched on something that may help at least clarify  
14 what we're saying. If this were not Limerick, if this  
15 were any plant that had not previously done what was  
16 called SAMDA or something like that, the applicant, we  
17 all agree, under 51.53, submit a SAMA analysis.  
18 There's no question that we would be able to challenge  
19 the SAMA analysis. We could make the same kind of  
20 arguments that we've made here in terms of the  
21 substantive deficiency and their admissibility would  
22 not be in question assuming we agree, we would be  
23 stating the basis for the specificity and the  
24 supporting arguments.

25 So what is different about the applicant's

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1       submittal of a statement in its Environmental Report  
2       that says we don't have to do a SAMA analysis because  
3       we did one before, the 1989 SAMA. And they say this  
4       in 4.20. NRC has explained that severe accident  
5       mitigation alternatives for LGS do not need to be  
6       analyzed at the license renewal stage because the NRC  
7       previously completed such a site-specific analysis in  
8       its supplement to the FEIS, and they repeat the same  
9       concept in paragraph 5.3 of their Environmental  
10      Report.

11                   So the question is is there no place a  
12      member of the public could challenge the correctness  
13      of that assertion? Their position is that's right.  
14      You have no place that you can challenge the  
15      correctness of the assertion. We can't challenge  
16      whether or not we meet the exemption. We can't  
17      challenge whether or not that document itself was  
18      adequate to fulfill NEPA obligations this issue. You  
19      can't challenge whether that document needs to be  
20      updated with new and significant information. That is  
21      such a remarkably different result for something that  
22      was done 23 years ago would then occur if this very  
23      same plant had never done that 1989 analysis assuming  
24      they did a SAMA now.

25                   Why wouldn't the Commission have said any

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1 time an applicant completes a SAMA, any time they do  
2 a SAMA, you don't have the right to challenge it or to  
3 bring in new and significant information because the  
4 Commission knows that there is a public right of due  
5 process to challenge an assertion that's made by an  
6 applicant. This applicant asserts that the 1989 SAMDA  
7 meets the exemption, complied with NEPA, does all it's  
8 supposed to do. We believe we have an absolute right  
9 to challenge that assertion. It's in the  
10 Environmental Report. They rely on it. This really  
11 is happening without Hamlet. If the SAMDA is here, if  
12 you get a chance to see it, there it is without the  
13 table disaster.

14 If you get a chance to see it and look at  
15 it, you can draw your own judgment. You can make a  
16 conclusion about does this look like what the  
17 Commission meant when it said do an adequate  
18 evaluation of the severe accident mitigation  
19 alternative looked at through the 2012 lens that we  
20 were using. That's all we're asking to do in this  
21 matter.

22 CHAIRMAN FROEHLICH: Mr. Polonsky.

23 MR. POLONSKY: If I may, Your Honor, what  
24 Mr. Roisman has said is simply not true. There is a  
25 way that they can challenge the 1996 rule in Section

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1 L. There is a way that they can challenge all the  
2 other provisions that they suggest won't meet NEPA if  
3 L is implicated here and that is -- and it's already  
4 in the regs and it's been there for a long time,  
5 Section 2.335 which says if they want to in this kind  
6 of proceeding and like many other petitioners before  
7 them who have wanted to challenge new and significant  
8 information for a Category 1 issue or anything else  
9 accepted by rule, when there's a rule, you can't  
10 challenge it in the license renewal proceeding absent  
11 a waiver from the Commission. They simply haven't  
12 applied. So to sit over there and way due process has  
13 been violated, we've not had an opportunity, that's  
14 frankly the regulations allow them that opportunity.

15 In addition, to suggest that a 1989  
16 document of any kind is challengeable in a proceeding  
17 20 plus years later as a NEPA document would wreak  
18 havoc for license renewal applications across the  
19 board because those documents are challengeable at the  
20 time that they are issued. In fact, there have been  
21 many challenges in the courts where the Army Corps of  
22 Engineers or any other federal agency issues an  
23 environmental document and it's litigated at the time  
24 it's issue. You simply can't wait 20 plus years later  
25 and try and challenge it then.

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1                   CHAIRMAN FROEHLICH:     Can they raise  
2 challenges such as we've seen in the petition when the  
3 staff issues the Supplemental EIS?

4                   MR. POLONSKY:   No, Your Honor.   The issue  
5 of category, you must use the Category 1 issues.   New  
6 and significant information raised on Category 1  
7 issues are not challengeable.   It doesn't matter  
8 whether the applicant had that new and significant  
9 information or the staff in its independent review  
10 adds 150 other things that it thinks ought to be new  
11 and significant information.   Comments can be filed,  
12 but if you want to challenge a rule and in this case,  
13 the example we're using is a Category 1 issue,   you  
14 want to challenge a Category 1 issue which has already  
15 been decided in the Generic Environmental Impact  
16 Statement,   you need a waiver from the Commission.

17                  CHAIRMAN FROEHLICH:   How about Category 2  
18 issues that show up in the Supplemental EIS.

19                  MR. POLONSKY:   If it were a Category 2  
20 issue that was not accepted by rule, then yes, that is  
21 clearly challengeable.   But once it's accepted by rule  
22 and it's gone through a rulemaking process, we're now  
23 back into Section 2.335 and the only way to get out of  
24 that box -- and there is a way to get out of that box,  
25 is to request a waiver from the Commission.

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1 MR. ROISMAN: Mr. Chairman?

2 CHAIRMAN FROEHLICH: Yes.

3 MR. ROISMAN: Just one thing. Appendix B  
4 of --

5 CHAIRMAN FROEHLICH: I beg your pardon?

6 MR. ROISMAN: Appendix B of part 51, this  
7 contains a table for Category 1 and Category 2. It is  
8 a regulation. It's not a Statement of Consideration.  
9 It's not guidance. It defines Category 1, footnote 2  
10 at the very end of the document and it says -- the  
11 environmental impacts associated with issue to  
12 determine the quality of all plants if there's some  
13 issue with plants a specific type of cooling system,  
14 a single significance level has been assigned, and  
15 mitigation of adverse impacts associated with the  
16 issue has been considered in the analysis to determine  
17 additional plant's specific mitigation measures and  
18 not sufficiently beneficial to warrant implementation  
19 which a generic analysis of an issue may be adopted in  
20 each plant's specific review. There is no generic  
21 determination of a plant specific -- one plant, not  
22 even these three plants that we've been talking about.  
23 One, Limerick. So it's not -- they have another name.  
24 Whatever the name is, it's not Category 1. It might  
25 be Category 2A. It might be Category 3. It might be

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1 Category 0. But it's not Category 1 because the  
2 Commission defines what a Category 1 is and this  
3 report, SAMDA 1989 analysis.

4 So I don't think you can have a really bad  
5 issue, if we're going to follow the regs, we're going  
6 to stick to what the regs say. And they have other  
7 arguments and as Mr. Polonsky said it doesn't matter  
8 whether you call it Category 1 or Category 2, we think  
9 we're entitled to it for a different reason. And I'm  
10 only addressing just this one, this narrow reason, is  
11 it a Category 1? It's not.

12 CHAIRMAN FROEHLICH: Staff counsel.

13 MS. KANATAS: Thank you, Judge Froehlich.  
14 Yes, staff agrees with NRDC that SAMA is a Category 2  
15 issue. SAMA is a site-specific issue and the  
16 Commission has stated that it cannot expand generic  
17 conclusions resulting from plant-specific IPEs, IPEES,  
18 for example, to draw a generic conclusion.

19 And the staff -- I'm sorry, the Commission  
20 did recognize that NEPA's regulation and the Limerick  
21 decision required a consideration of mitigation  
22 alternatives in its EIS and supplements. So the  
23 Commission stated that a site-specific consideration  
24 of SAMA is required of license renewal for those  
25 plants for which the consideration has not been

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1 performed.

2 As we've said repeatedly here, the site  
3 specific Category 2 site specific consideration of  
4 SAMA has been done for Limerick in a NEPA document and  
5 as NRDC actually points out in their reply the SAMDA  
6 was a site-specific analysis applicable only to  
7 Limerick and is what NRDC calls a completed Category  
8 2 analysis. That's at page 12 of the reply. So we  
9 agree that SAMA is a Category 2 issue, but it's site  
10 specific and here there was a site specific  
11 consideration done.

12 CHAIRMAN FROEHLICH: Do you have any other  
13 questions on 2 or 3?

14 JUDGE KASTENBERG: Is it appropriate to  
15 just add on to what you said, however, there is an  
16 exemption in this case? That's basically the  
17 argument. I --

18 MS. KANATAS: That another one not be  
19 done, that another SAMA need not be done for license  
20 renewal because a SAMA has previously been done.

21 JUDGE KASTENBERG: And that's not  
22 challengeable?

23 MS. KANATAS: That is not challengeable  
24 absent a waiver because it's a generic determination  
25 in the Commission's regulations.

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1 CHAIRMAN FROEHLICH: I think it's safe to  
2 move on to Contention 4.

3 (Laughter.)

4 JUDGE KASTENBERG: When is it  
5 environmentally appropriate?

6 CHAIRMAN FROEHLICH: Our broad question to  
7 the parties on Contention 4 is does the ER address the  
8 impacts of denial of the proposed license renewal?  
9 And if so, where? I guess applicant we'll hear from  
10 first and then the petitioners.

11 MS. LEACH: Thank you, Your Honor. Brooke  
12 Leach on behalf of the applicant. I'm going to be  
13 answering questions on Contention 4.

14 CHAIRMAN FROEHLICH: Okay.

15 MS. LEACH: And to address your first  
16 question whether or not the EER addresses the impacts  
17 of denial of the license renewal. The ER does address  
18 the consequences of denial of license renewal.

19 Section 7.1 of the ER defines the no  
20 action alternative as denial of license renewal and  
21 then goes on to address two categories of impacts.  
22 The first category of impacts is decommissioning and  
23 those impacts are discussed in Section 7.1 on pages  
24 7-2 and 7-3.

25 The ER also addresses a second category of

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1 impacts and those are energy alternatives. Section  
2 7.21 of the ER starts out by identifying a  
3 comprehensive list of possible energy alternatives and  
4 this list includes new generation capacity, renewal  
5 energy alternatives, power purchases from the  
6 wholesale market, and energy savings through demand-  
7 side management.

8 This comprehensive list was then narrowed  
9 done under NEPA's rule of reason to a reasonable scope  
10 of alternatives. And Exelon generally defined  
11 reasonable, a reasonable alternative as one that's  
12 capable of generating base load power in the region of  
13 interest at the time that the first unit operating  
14 license would expire and that's in 2024. And the  
15 second unit then would expire in 2029.

16 In using that general standard, Exelon  
17 came up with a group of seven reasonable alternatives  
18 and if Your Honors will bear with me I'll go through  
19 the pages on the ER that identify and discuss these  
20 reasonable alternatives.

21 The first is fossil fuel fire generation  
22 capacity and that includes both natural gas and coal  
23 and that's discussed on page 7-10 and 7-11 of the ER.  
24 The next is purchase power from the wholesale market  
25 and that alternative is discussed on page 7-11. The

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1 third is new nuclear generation capacity and this  
2 alternative is discussed on page 7-11 to 7-12. And  
3 then we move into the renewable energy alternatives.  
4 The first is wind energy as a stand alone and that is  
5 discussed on page 7-12. Next is solar energy  
6 discussed on page 7-13. And then contrary to NRDC's  
7 argument in the petition the ER explicitly states that  
8 in crafting its reasonable alternatives, Exelon looked  
9 at more than just single generation resources and  
10 that's where we took a look at combinations of various  
11 resources.

12 The ER next goes into those combinations  
13 and the combinations are wind and solar energy  
14 combined with gas-fired generation and wind energy  
15 combined with compressed air energy.

16 The corresponding environmental impacts of  
17 these reasonable alternatives are considered in detail  
18 in Section 7.2.2. There's about a 25-page discussion  
19 about the environmental impacts of those alternatives  
20 that were deemed reasonable. These environmental  
21 impacts are then cross referenced into the no action  
22 alternative in accordance with Commission precedent  
23 that holds that the no action alternative discussion  
24 can be cross referenced with adverse impacts from  
25 other discussions.

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1           The reasonable alternative impacts are  
2 then depicted in the role of comparison table in  
3 Section 8.0. In addition, even though Exelon  
4 ultimately did not consider demand-side management as  
5 a reasonable alternative, Exelon took the extra step  
6 of evaluating environmental impacts of demand-side  
7 management and ultimately concluded that they were  
8 small and cross referenced those impacts into the no  
9 action alternatives as well.

10           In follow-up questions, I can break it  
11 down.

12           CHAIRMAN FROEHLICH: Mr. Roisman, could  
13 you address that same question, does the ER address  
14 the impacts of denial of proposed license renewal?

15           MR. ROISMAN: Yes, to an extent.

16           CHAIRMAN FROEHLICH: I guess we want to  
17 talk about that "to an extent."

18           MR. ROISMAN: Yes. I don't disagree with  
19 the page citations of counsel. That's where they  
20 purport to do it. It is what we criticized in our  
21 Contention 4 and forms the basis for the disagreement,  
22 the dispute that we have about the adequacy of their  
23 consideration action.

24           I can expand on that if you want, but I  
25 thought maybe you wanted to just know that answers it.

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1 CHAIRMAN FROEHLICH: We'll come back to  
2 you.

3 MR. ROISMAN: Good, okay.

4 CHAIRMAN FROEHLICH: Staff.

5 MS. WOODALL: The Staff agrees that the  
6 Environmental Report addresses the impacts of the  
7 denial of the proposed license in Section 7.2 in  
8 addition to the citations provided by the applicant  
9 just now. I could go through them as well, but I'll  
10 spare you.

11 The no action alternative is a little  
12 different from the consideration of the alternative,  
13 but in this case, it actually comes to be the no  
14 action alternative. The alternatives to generation  
15 are also part of the no action alternative. There are  
16 consequences of the no action alternative. So while  
17 separately addressed in the Commission's Statement of  
18 Considerations and the DEIS, there are necessarily  
19 also consequences of the no action alternative.  
20 Therefore the applicant correctly represents and as  
21 the GEIS states that the no action alternative or  
22 refers to the scenario in which the NRC has not  
23 remanded LGS operating licenses and as the DEIS  
24 recognizes that there are several ways that fulfill  
25 the generational alternatives that results in that.

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1 CHAIRMAN FROEHLICH: So are you saying  
2 that the no action alternative is the same as the  
3 denial of the license renewal?

4 MS. WOODALL: Yes. That's what the GEIS  
5 says and that's what the staff would use going  
6 forward.

7 JUDGE KENNEDY: Does the no action  
8 alternative then include the denial of the license  
9 plus the consequences of replacing the generation?

10 MS. WOODALL: The no action alternative  
11 considers the impacts of what happens, the NRC role is  
12 to consider the environmental impact of what happens  
13 if the license is denied. So we consider  
14 decommissioning which takes place at the plant and  
15 generally impacts have already been determined whether  
16 decommissioning happens in 20 years. The Commission  
17 generally believes that that's not necessarily  
18 discriminatory to the environmental impacts of that.  
19 But what happens now if we consider the environmental  
20 impacts to what happens if the license renewal is not  
21 denied.

22 JUDGE KENNEDY: Is denied

23 MS. WOODALL: Is denied. I apologize.

24 JUDGE KENNEDY: If I compare the  
25 environmental consequences of the proposed action

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1 against the decommissioning only option and if you  
2 look -- if I look at Table 80-1, they seem to have the  
3 same environmental impact. So decommissioning only  
4 and the proposed action seem to have the same  
5 environmental impact. And then the table goes on to  
6 look at the consequences of the decommissioning  
7 option. So the replacement power environmental  
8 consequences are added on to the decommissioning only.

9 It seems to me that there's some  
10 significance to comparing the proposed action and the  
11 base case decommissioning only option that should shed  
12 some light on this whole question of whether the right  
13 options are looked at, the wrong options are looked  
14 at, not enough of this, not enough of that. Maybe I'm  
15 misunderstanding Table 8-0 and we may have to go up  
16 and down the table here to help me understand 8-0.  
17 But if I compare the first two columns of Table 8-0 so  
18 the proposed action underneath the first column of the  
19 no action alternative, it seems to speak to a lot of  
20 information, at least to me it does.

21 Now I'm beginning to wonder, since every  
22 one of us have discussed the combination alternative,  
23 no action and the consequences of decommissioning as  
24 a combined action, it just seems to me that the base  
25 case plus the proposed action, if you compare those

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1 two, yes, I don't dispute going through the rest of  
2 it, but doesn't that speak a lot to whether the first  
3 two columns? They're identical, the environmental  
4 impacts, of whether you implement the proposed action  
5 or decommission the plant.

6 What you're suggesting is they can't just  
7 decommission a plant. The region needs the power, so  
8 you've got to add some other stuff. So all of those  
9 work in favor of the proposed action. And what we're  
10 debating is whether the proposed actions for  
11 generation have a different environmental benefit. I  
12 keep wondering why the base case compared to the  
13 proposed action just doesn't tell the whole story.  
14 Anything else is just a bunch of discussion.

15 No one talks about just the base case.  
16 You've explained why, but there's -- to me, there's a  
17 mountain of information in those first two columns,  
18 unless I don't understand this table.

19 MS. WOODALL: Correct me if I'm  
20 misunderstanding you --

21 JUDGE KENNEDY: I'm probably making it  
22 much more confusing than it is.

23 MS. WOODALL: The ER analyzes the proposed  
24 action in each of these determinations in the table  
25 from the small R, the result of other analyses in the

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1 ER resulting in that. And the base case  
2 decommissioning small -- the commission's  
3 determinations on decommissioning which generally have  
4 been determined to be small. And so those are the  
5 sources of both of those.

6 But in the GEIS, the staff recognizes and  
7 this is our guidance for determining how we analyzed  
8 the no action alternative under NEPA is that the  
9 decommissioning actions that take place at the plant  
10 are one part of what happens if we deny the license.  
11 If we deny the license, we continue obviously to have  
12 jurisdiction and will require them to decommission.  
13 Hence, the impact of decommissioning, but those  
14 impacts are generally, but not entirely, have been  
15 determined generically already. And so that's that  
16 part of that table.

17 But then at the same time if we deny the  
18 license, GEIS recognizes as part of 8.2 of the no  
19 action alternative, that there are other environmental  
20 impacts that result from that and those environmental  
21 impacts are resulting generally from the fact that you  
22 are removing power that is currently being used from  
23 the grid. And what are the impacts of replacing that  
24 power?

25 It's not the same as the purpose and need

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1 necessarily, but it happened that if you take off in  
2 this case, 23 megawatts, that there will be  
3 alternative impact from replacing that power. And so  
4 we're adding that.

5 JUDGE KENNEDY: I think we're in  
6 agreement. I guess we can sit here and we can debate  
7 the columns of this table. I guess in my mind  
8 anything you add to the base case works in favor of  
9 the proposed action. So I mean we may get argument  
10 from petitioners that say well, you didn't do enough  
11 of this and you didn't do enough of that. You picked  
12 the wrong combinations, but it appears that any  
13 combination on top of the base case is going to work  
14 in favor of the proposed action.

15 But yet no one -- it just seems to me  
16 that's the obvious answer to this question,  
17 alternatives to the proposal -- the base case is  
18 equivalent to the proposed action. And anything you  
19 do in addition to the base case is going to be a  
20 negative environmental impact or is not in favor of  
21 implementing anything but the proposed action.

22 So whether we debate whether there's a  
23 1,000 megawatts of DSM or 10 megawatts of DSM, it  
24 doesn't seem to me to be relevant because it's going  
25 to have an effect on the balancing that would push you

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1 to selecting the proposed action. That's the way I  
2 interpret the table. I'm looking for agreement.

3 I think when you communicated it back to  
4 me, I read the table the same way you do. You would  
5 have to take these in combination. But if you take a  
6 step back from that whole table, anything you pick in  
7 addition to decommissioning works in favor of the  
8 proposed action. It doesn't say you shouldn't go  
9 through the exercise, but I mean if we drop this,  
10 doesn't take this up to a high level, anything you do  
11 but decommissioning seems to weigh in favor of the  
12 proposed action.

13 I guess I'm looking to see if I'm reading  
14 this table right.

15 MS. WOODALL: I believe you're reading the  
16 table right. I'm a little confused on the chronology  
17 you're using and maybe I'm just not understanding.  
18 But essentially these are possible result of a no  
19 action alternative which if we do not verbalize them,  
20 these things could happen, these are the environmental  
21 impacts that we are evaluating of denying the license.  
22 Whatever those impacts, do they range all across the  
23 table depending on exactly what quantifier you're  
24 looking at, and they're analyzed. But I'm not sure  
25 if I can go further than that.

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1 JUDGE KENNEDY: You're exactly right. To  
2 me, I just cut to the quick, doing nothing else but  
3 decommissioning is equivalent to the proposed action.  
4 So anything you do in addition to decommissioning  
5 works in favor of the proposed action. That doesn't  
6 mean you don't go through the exercise, but I don't  
7 see anything here that it doesn't --

8 MS. WOODALL: No, I mean the no action  
9 alternative is simply it's required under NEPA. The  
10 Commission requires us to include it. There's no  
11 dispute that the staff will consider it and that the  
12 applicant has considered the no action alternative as  
13 part of the base line, but generally it is a brief  
14 discussion and it is there to provide a base line for  
15 information in this analysis that provides, you know,  
16 what would happen.

17 JUDGE KENNEDY: Mr. Polonsky -- I mean Ms.  
18 Leach.

19 MS. LEACH: Thank you, Judge Kennedy, I  
20 just wanted -- we agree with your assessment that  
21 comparing the two columns, we're only going to add on  
22 more impacts the more alternatives we add on. But we  
23 did want to note that the first column under proposed  
24 action that reads small, all of those impacts, those  
25 are not generic determinations and they could be

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1 different for other plants. It could be large for  
2 another plant and we believe that under NEPA's rule of  
3 reason we have provided sufficient information in this  
4 table and in the corresponding text in Section 7.1 and  
5 7.2 for the Commission to take a hard look at the  
6 environmental impacts of preserving the option of  
7 license renewal for energy planners.

8 JUDGE KENNEDY: Okay.

9 MR. ROISMAN: I can certainly understand  
10 why you reached that conclusion when you read this  
11 chart and I confess that if I had written the chart,  
12 you'd have reached the opposite conclusion. It's all  
13 in the writing of the chart, of course. One column,  
14 specifically is the DSM column. You'll remember that  
15 in the alternative discussion, which is incorporated  
16 by reference, is that it was disregarded as a  
17 reasonable alternative for this plant because it won't  
18 achieve what Exelon wants to choose to be able to  
19 sell, 2300 megawatts of power daily for 20 more years.

20 And I can understand that, but that's not  
21 what NEPA requires and it's not what the Commission's  
22 regulations require. And so the heart of our  
23 challenge is why, to answer the question that's in  
24 there, the kind of quote, tricky question, is this an  
25 omission or an inadequacy? It's an omission and it's

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1 an inadequacy. It omits a proper consideration of the  
2 likely consequences of the no action alternative.

3 Let me give you an example. First of all,  
4 there is no discussion of what the world might look  
5 like in this energy region thirteen years from now, or  
6 even ten years from now. These are the likely  
7 consequences. That might be true in terms of this  
8 afternoon.

9 So to begin with, we have to think about  
10 what the world would be like in 13 years. I admit  
11 there's a certain amount of, I'll use the term  
12 speculation. But as you probably know, utilities,  
13 Exelon included, have been engaged in speculating with  
14 20-year plans for decades. It's how you do planning  
15 in the industry because you don't instantly get a  
16 power plant on line the moment you have the power.  
17 You have to plan. So you're looking at what it would  
18 be like in five years, ten years, fifteen years.

19 So the first thing that's missing is that  
20 there's no look at what are the likely possibilities.  
21 The second thing that's missing is that in looking at  
22 what the consequences are, forgetting about for the  
23 moment whether these are the likely ones or not likely  
24 ones, the test was would it meet the 2300 megawatt  
25 generation the plant currently meets? The regulations

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1 say, and surely we both agree, that the need for power  
2 is not an issue in the licensing rules. That's a  
3 sword that cuts both ways. We don't argue that there  
4 is a reduced need for power. And they don't get to  
5 argue that there's an automatic need for power.

6 So we don't assume that there will be a  
7 2300 megawatt demand capacity. So all the columns to  
8 the right of decommissioning, with gas fire  
9 generation, coal fire, all of those, are all meeting  
10 a standard which Exelon wrote into its ER. We're only  
11 concerned about things that will happen that will  
12 replace all of this generating capacity. That's the  
13 second problem.

14 The third problem is that they have not  
15 done an evaluation of the costs and benefits of these  
16 various consequences that might ensue. So for  
17 example, they could have done an analysis in which and  
18 I think this would be supported on this issue, that if  
19 things just remain exactly as they are today and 13  
20 years from now you just turned off one of these  
21 plants, and in 18 years you turn it off the other,  
22 that there would be black outs and brown outs and  
23 people would suffer and there would be huge adverse  
24 consequences.

25 But there's another side. If you told

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1 everybody that 13 or 18 years from now these plants  
2 would not be operating, it's possible that what you  
3 would have is a completely changed way of dealing with  
4 energy. Instead of trying to deliver from large,  
5 central generating sources you might have dispersed or  
6 diversified energy sources. People might not look for  
7 solar energy in a 1,000 acre lot. You might look for  
8 solar energy on their roof. They might not worry that  
9 they need 2300 megawatts of electricity because they  
10 might have found more than 2300 megawatts of  
11 electricity that they can save by using more energy  
12 efficient items which would save them money, would be  
13 a benefit.

14 So a true analysis under the no action  
15 alternative is supposed to look at both the end of  
16 this plant's operation and the relevant time period.  
17 And what are reasonably likely things to happen if  
18 that were to occur? And our criticism is with their  
19 failure to do that. That's why it's a contention of  
20 omission. They don't look 13 to 18 years out, they  
21 look at essentially today. They don't put the  
22 alternative analysis into the context of what would be  
23 real consequence, but they assume that the consequence  
24 would be the need to provide 2300 megawatts of  
25 generating capacity which we reject. I think the

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1 Commission's regulation also says you should reject.

2 I submit to you that that is the flaw in  
3 the analysis which they have done. Did we then go on,  
4 to sort of touch a little bit, on what's coming next.  
5 Did we go on and lay out all of the different  
6 scenarios that we thought were likely consequences?  
7 No. We weren't required to do that. That's not the  
8 obligation of the intervener to write the  
9 Environmental Impact Statement. Our job is to point  
10 out the deficiencies, and the deficiencies of this  
11 analysis are well illustrated by Table 8.0-1 which  
12 summarizes all the wrong things. There are no  
13 benefits listed of many of the alternatives. It's  
14 only disadvantages. And there may be some benefits.

15 What would be the benefits of filling of  
16 the gap with purchased power? I don't know. It might  
17 mean that utilities in some other state would make  
18 more money and might end up being able to use that  
19 money in better ways to improve demand side management  
20 and their jurisdiction. They might be under a Public  
21 Service Commission that requires them to reduce their  
22 rates under certain circumstances. I mean, there are  
23 a lot of possible benefits.

24 So it doesn't automatically follow that if  
25 all is Column 1 and 2 proposed action in basic

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1 commission, anything after that is out. The GEIS  
2 recognizes that there could be benefits on demand side  
3 management that would actually be subtracted so that  
4 you could have in front of you a record that would  
5 enable you to say on balance it looks to us like it  
6 makes much more sense to not leave this option open,  
7 but to let these likely consequences which we think  
8 by saying no in 2012, if these consequences come into  
9 existence and end up better than it would be if you  
10 let this plant operate for another 20 years.

11 Finally, this idea that what is small or  
12 the proposed action was small decommissioning or what  
13 is small for gas-fire generation, that all those  
14 smalls mean the very same thing quantitatively, of  
15 course you know that's not true. The small  
16 designations don't provide a quantification that would  
17 allow you to make a real judgment if we had both  
18 pluses and minuses on the table, whether or not saying  
19 no would be better than saying yes. So because you  
20 don't have the pluses at this point there isn't any  
21 point in arguing the minuses.

22 As it stands, as the table stands, what  
23 Judge Kennedy said is absolutely right. Anything  
24 after you've looked at the decommissioning  
25 consequences is added, and therefore if it still works

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1 with just the decommissioning, everything else won't  
2 make any difference. But we contend the charge, the  
3 premise on which the chart is guilty, the nature of  
4 the analysis is wrong. Therefore, it doesn't include  
5 the proper analysis because it's omitted.

6 JUDGE KENNEDY: Can you help me understand  
7 the pluses? We'll be of the record.

8 (Whereupon, the above-entitled matter went  
9 off the record at 2:41 p.m., and resumed at 2:42 p.m.)

10 CHAIRMAN FROEHLICH: We'll be back on the  
11 record.

12 Judge Kennedy?

13 JUDGE KENNEDY: A couple of follow-up  
14 questions.

15 MR. ROISMAN: Sure.

16 JUDGE KENNEDY: I'll start with the harder  
17 one first, at least for me. You talk about pluses.  
18 Could you give me an example of what you're talking  
19 about in the world of pluses? Are these negatives?  
20 The environmental impacts, are they construed as  
21 negatives?

22 MR. ROISMAN: Yes. What is listed in  
23 Table 8.0-1 summarized there are all negatives. And  
24 what I mean by -- let's take) demand-side management  
25 as an example. If you at your home can reduce your

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1 energy consumption by 1,000 watts a month, and I don't  
2 even know if that's a reasonable number, unfortunately  
3 my utility charges me for the plant that got shut down  
4 because I said it wouldn't shut down eventually and  
5 now I'm paying for it. But if you could reduce your  
6 electric bill and still have all the amenities that  
7 you had before, you still had your air conditioning.  
8 You still had your TV and all that sort of stuff and  
9 you save \$50 a month that's a plus. We view that  
10 across all the customers of the region, that's a big  
11 plus.

12 JUDGE KENNEDY: So it's an economic plus.

13 MR. ROISMAN: It could be an economic  
14 plus. The second plus could be that if you use  
15 distributed generation, that is instead of large  
16 facilities with long power lines that crisscross  
17 through the country, you have generation much closer  
18 to the source. Walmart had its own energy source from  
19 its own solar panels on its roof. The parking lot had  
20 solar panels. In the old, old days, farmers used to  
21 have wind mills at their farms to generate electricity  
22 that they used at the farm before rural electricity  
23 came in.

24 You would then have eliminated all of the  
25 disadvantages of the power lines, large industrial

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1 sites, a site like Limerick could be returned to  
2 something that was more rural and pastoral instead of  
3 a central generating facility with large commercial,  
4 industrial development. So that's another plus that  
5 wouldn't necessarily translate into an economic --

6 JUDGE KENNEDY: I guess I can understand  
7 the plus in the environmental context. You reduce the  
8 need if you move away from base load generation into  
9 more distributed. How does the economic benefit get  
10 into this context here under NEPA?

11 MR. ROISMAN: Ultimately, NEPA has to a  
12 large extent tried to translate environmental values  
13 into economic factors, even to the point of what's the  
14 environmental value being able to go to the Grand  
15 Canyon and see that extraordinary thing. And so they  
16 started to look at well, how much do tourists pay to  
17 go and that sort of thing. But in a way, they are  
18 intangibles that they're making into economic.

19 So at the end of the day, you would take  
20 all these economic pluses, and all the economic  
21 disadvantages, and you would balance them up and you'd  
22 see where you came out and if it was an economic  
23 advantage to not relicense, there would then have to  
24 be a rational basis for choosing not to turn it down.  
25 I mean that's how the system works. For better or for

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1 worse, our system tends to put rational into economic  
2 terms.

3 JUDGE KENNEDY: In the context of the NRG  
4 regulatory process have you see this economic back and  
5 forth? Do you have an example you can --

6 MR. ROISMAN: Outside of the SAMA  
7 analysis, no. But it's very prevalent. In fact, it  
8 is the touchstone with the SAMDA analysis.

9 CHAIRMAN FROEHLICH: So Mr. Roisman, I  
10 understand your argument. You're saying that the  
11 applicant's environmental impact study is somehow  
12 deficient or lacking because it doesn't factor in  
13 economic benefits and other alternatives or  
14 combinations of alternatives beyond what they've done  
15 in Table 8, 8.0.1?

16 MR. ROISMAN: Yes and no. It says even  
17 more fundamentally than that that the way in which  
18 they chose how to do this analysis resulted in that  
19 consequence, but our attack is on the way they chose  
20 to do the analysis, ignoring the gap between now and  
21 13 and 18 years from now; failure to look at likely  
22 consequences; and the failure to look at anything that  
23 wasn't going to simply replace 2,300 megawatts of  
24 generated power.

25 CHAIRMAN FROEHLICH: Isn't the factor that

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1 when you're looking for alternatives as part of a NEPA  
2 analysis that you are to look at alternative ways of  
3 securing what is not being renewed?

4 MR. ROISMAN: Absolutely.

5 CHAIRMAN FROEHLICH: That's appropriate.

6 MR. ROISMAN: That's right. And that's  
7 really where the applicant's ER makes its most  
8 fundamental error. That's the discussion of  
9 alternatives in Section 7 of the ER is doing just  
10 that. It starts with the premise we are a generator.  
11 We make money selling electricity. Any alternative  
12 has to fulfill the same goal that we have here which  
13 is to continue selling electricity 2300 megawatts  
14 worth and in the context of alternatives that's what  
15 you do.

16 In the no action alternative, you do  
17 something very different. And that's where Exelon is  
18 falling down. When it decided to import some of the  
19 data from the analysis of alternatives into the no  
20 action alternative it neglected to look at whether the  
21 consequences of that transfer was likely or not. In  
22 other words would anybody really be likely to go with  
23 the coal-fired generation? Candidly, I don't think  
24 so.

25 Would anybody really think about building

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1 a massive solar unit that they are talking about? I  
2 don't think so, but what's missing is they don't tell  
3 us why that is a likely consequence. They just tell  
4 us it's possible. So the flaw is that when you get  
5 over to the no action alternative, that is the  
6 alternative.

7 There aren't alternatives. The  
8 alternative is turn it off, 13 and 18 years from now.  
9 Then look at what the consequence would be of that and  
10 decide whether those consequences are preferable, the  
11 same as going ahead with this action, or clearly less  
12 preferable. They haven't done that.

13 So we have a deficient analysis.

14 When they said to us in their answers, oh  
15 wait, we've done all of this over here in the  
16 alternatives. We then did -- maybe that's just sort  
17 of the lawyer in me -- someone who lays out the bait  
18 and you always go out and take a bite. We decided all  
19 right, we're going to take you on on your claim that  
20 your analysis of alternatives in Section 7 fulfilled  
21 the kind of analysis that you should have done in  
22 Section 8. And so we were more specific in our answer  
23 than we had been previously because that wasn't our  
24 contention. Our contention was you should have looked  
25 at these things in the first instance and you didn't.

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1 They tried to say they did. We showed why they  
2 hadn't.

3 CHAIRMAN FROEHLICH: Ms. Leach?

4 MS. LEACH: I will try to respond in turn  
5 to a few points that Mr. Roisman made. The first  
6 point that I want to make is that the no action  
7 alternative is governed by NEPA's rule of reason. And  
8 we're going to keep going back to that point in all of  
9 my points. The no action alternative, it's limited by  
10 the rule of reasons. The rule of reason does not  
11 require that the applicant look at economic costs and  
12 benefits of the no action alternative or the NEPA  
13 power.

14 Essentially, NRDC is arguing that DSM was  
15 considered in combination of other alternatives that  
16 the NEPA power would be less and the Commission's  
17 regulations are clear that an ER for license renewal  
18 application does not need to address the NEPA power.

19 MR. ROISMAN: I'm sorry, I didn't hear the  
20 last --

21 MS. LEACH: I'm sorry, does not need to  
22 address the NEPA power.

23 MR. ROISMAN: Thank you.

24 MS. LEACH: And with respect to NRDC's  
25 argument that Exelon did not take into account the

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1 planning time in between the potential denial of the  
2 license renewal application and the shutdown of the  
3 first unit in 2024, that assertion is plainly wrong.  
4 First of all, we're not required to look at that under  
5 NEPA's rule of reason.

6 NEPA's rule of reason requires that the ER  
7 provide sufficient information to the NRC so that it  
8 can take a hard look at the environmental impacts of  
9 alternatives including the no action alternative to  
10 the proposed action. It does require us to do an  
11 exercise in power planning and we did look at the  
12 current portfolio of energy in PJM in our discussion  
13 of the reasonable alternatives and in this discussion  
14 we even included a discussion of emerging  
15 technologies. For instance, wind energy in  
16 combination with compressed air energy storage, that's  
17 not a possibility today.

18 There's only two compressed air energy  
19 storage facilities in the world right now and there's  
20 one planned in Ohio some time in the future, but  
21 hypothetically, these could be possible. So we were  
22 over-inclusive in what we considered could be  
23 reasonable at the time of the first unit expires in  
24 2024. So we did consider the planning time in  
25 between.

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1                   And finally, NRDC's argument that DSM  
2                   should have been included in the table was not a  
3                   material dispute. We had a discussion of the  
4                   environmental impacts in Section 7 in the narrative  
5                   and it would be -- this Board would be flyspecking the  
6                   ER to determine that we needed to just roll over those  
7                   small conclusions into an extra column on the Table  
8                   8.0 and that wouldn't make -- that would still not  
9                   make any difference, but there's still adequate  
10                  information in the table to allow the NRC to take a  
11                  hard look at the environmental impacts of no action  
12                  and compare those to the environmental impacts of the  
13                  proposed action.

14                               CHAIRMAN FROEHLICH: Thank you. Ms.  
15                               Woodall.

16                               MS. WOODALL: I would like to make a few  
17                               points in response to Mr. Roisman and the applicant's  
18                               response.

19                               First, to the extent that we're talking  
20                               about future production or speculation, the point that  
21                               needs to be considered in this case is the 2024 date.  
22                               What can be implemented that's reasonable by 2024? I  
23                               mean we can think about a lot of things that can  
24                               happen in 2050 or 2400. Hopefully, we'll have an  
25                               energy solution, but that's the relevant date for

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1 considering what needs to be reasonable. And the  
2 applicant addressed that and projected to 2024 and  
3 alternatives and that's what we consider to be  
4 reasonable, even though we're taking major federal  
5 action now.

6 The other point I would like to make and  
7 we went through quite a bit on this is the cost and  
8 benefits, but the NRC has conclusively determined that  
9 51.53(c) that the cost and benefits are not to be  
10 analyzed in license renewal as part of the ER  
11 50.51(c). Basically, the ER for license renewal  
12 application is not required to include either the  
13 discussion of the NEPA power or the economic cost and  
14 benefits of the proposed action or alternatives unless  
15 we get to mitigation measures which is what we see  
16 discussed in mitigation measures, but it's not  
17 required to be included and we do not consider it as  
18 part of the ER unless it meets the next part of that  
19 sentence.

20 The other point I would like to make is  
21 that in terms of NEPA's rule of reason, the Commission  
22 has pointed out specifically and the point of no  
23 action alternative and hydro-resource, in fact, CLI-  
24 11, CLI-0104, that even where the intervenors may  
25 prefer -- intervenors in that case -- may prefer the

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1 no action alternative, and NEPA imposes no obligation  
2 to select the environmentally benign alternatives and  
3 it does not dictate Agency policy or determine the  
4 fate of the contemplated action.

5 And the final point I would like to make  
6 is that many of these arguments regarding CSP, whether  
7 based on solar power is an option, whether we can  
8 implement DSM, these are all factually-based arguments  
9 that were not included in the petition. The petition  
10 simply referenced distributable renewable energy,  
11 combined TM power, all forms of DSM and basically the  
12 only references to any basis that these could be  
13 viable alternatives by 2024 or that they should be  
14 analyzed. All of the information in the reply that  
15 substantively addressed things like battery storage  
16 and those things, those were not included as part of  
17 the petition.

18 And the staff opposes the admission of  
19 Contention 4 because it was not adequately supported.  
20 If the petitioner wishes to challenge the no action  
21 alternative, they need to point to something that  
22 shows that there is actually a predictable consequence  
23 and an actionable alternative other than what was  
24 already presented in the no action alternative. And  
25 the petitioner failed to do that.

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1           In the reply, neither the NRC staff nor  
2           the applicant, had the opportunity to respond to that.  
3           So that's the reason we opposed the contention as it  
4           is pled because in order to challenge the no action  
5           alternative analysis which is applied in the ER, you  
6           must actually point to some viable no action  
7           alternative, rather than just pointing to some various  
8           deficiency when that is provided.

9           CHAIRMAN FROEHLICH: Mr. Roisman, can you  
10          point to some minimal factual or legal foundation to  
11          support this fourth contention that was in the  
12          petition, putting aside the additional information  
13          that came in in the reply?

14          MR. ROISMAN: Sure. In the petition, in  
15          the declaration from Mr. Paine, in paragraph four  
16          which is on page two of his declaration, it says  
17          "Exelon submitted an environmental report in  
18          conjunction with its license renewal application, but  
19          did not adequately consider the environmental  
20          consequences of the no action alternatives.  
21          Specifically, the ER unreasonably misapplies NRC  
22          guidance from the 1996 GEIS that limits the set of  
23          reasonable alternatives for meeting a defined  
24          generating requirement to analysis of single, discrete  
25          electric generation sources. As a consequence of his

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1 misapplication, the ER arbitrarily limits and unfairly  
2 conflates consideration of the no action alternative  
3 with the same set of alternatives that it deems  
4 reasonable for analysis as single, discrete electric  
5 generation sources."

6 So one support is the applicant's ER  
7 itself. It specifically says we are looking at the no  
8 action alternative by only considering discrete  
9 generating sources, leaving DSM completely out of the  
10 analysis. So that's one factual statement.

11 CHAIRMAN FROEHLICH: We're on a roll.  
12 Show me some more of this argument in the petition.

13 MR. ROISMAN: All right, so in number  
14 seven, still in the Paine declaration at page three at  
15 the bottom, "Unlike consideration of reasonable  
16 alternatives to meet defined generating requirement  
17 represented by a particular base load nuclear power  
18 plant, mandatory consideration of the environmental  
19 impacts of the no action alternative defined as a  
20 decision to not be licensed LGS Units 1 and 2  
21 necessarily involves making an informed projection of  
22 the likely portfolio of PGM electricity system  
23 resources available in the region served by LGS  
24 beginning 13 years and 18 years hence that could  
25 reasonably be expected to supply the energy services

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1 currently supplied by LGS. These reasonably  
2 foreseeable system resources include all forms of DSM,  
3 waste heat co-generation, combined heat and power, and  
4 distributed renewable energy resources in addition to  
5 the 'single discrete electric generation sources'  
6 viewed by the applicant."

7 So there we've identified both the absence  
8 of consideration of certain kinds of consequences and  
9 a failure to include an analysis of what are the  
10 likely consequences. The ER does not have that  
11 analysis in it. So until we see that analysis, it's  
12 not our obligation to say well, if you did do that  
13 analysis this is what you should have found. That's  
14 not our obligation. Until the ER or if the ER  
15 doesn't, until the DSEIS comes up with some analysis  
16 that purports to meet that obligation.

17 So the contention stands or falls on  
18 whether the Board agrees that it's a mistake to look  
19 only at one large generating source and whether it's  
20 a mistake to not have an analysis of the likely  
21 consequences of the shutdown of this facility 13 and  
22 18 years hence.

23 CHAIRMAN FROEHLICH: Ms. Woodall, would  
24 you like to be heard on Mr. Roisman's response?

25 MS. WOODALL: Thank you, Your Honor. The

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1 no action alternative, the Commission has been clear,  
2 as well as other licensing boards that it cannot  
3 merely -- petitioner challenging an actionable  
4 alternative cannot merely say that any no action  
5 alternative would be acceptable. The GEIS recognizes  
6 that there are thousands of possible combinations that  
7 could be elected to replace a generating station.

8 And to step back just a second, I do want  
9 to point out that the GEIS at 8.2 does recognize that  
10 in terms of our discussion of base load power and  
11 whether 2300 megawatts would be appropriate. At 8.2,  
12 the GEIS recognizes that denial of renewed license of  
13 power generating capability may lead to a variety of  
14 potential outcomes.

15 In some cases, denial may lead to the  
16 selection of other electric generating sources to meet  
17 energy demands as determined by appropriate state and  
18 utility officials. In other cases, it may lead to  
19 conservation measures and/or decisions to import  
20 power. But in all of that, we're assuming that the  
21 environmental impacts resulting from denial require at  
22 least some consideration of replacement of that power.

23 The applicant acknowledges that the no  
24 action alternative in this case is denial of the  
25 renewed license. Therefore, what we're looking at in

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1 terms of what are the impacts of denial of the license  
2 are going to be at least in some form or fashion how  
3 that power is going to be replaced and the  
4 environmental impacts of replacing that power. That  
5 doesn't speak to the applicant's purpose and need as  
6 they might look in a COL or an ESP proceeding. It's  
7 a different theory. But at the same time, that's what  
8 we're looking at in this case.

9           Otherwise, as a petitioner inclusively is  
10 reading from the Paine declaration, the points that  
11 they make are not supportive. In the no action  
12 alternative, other boards have said that petitioner  
13 must show that the proposed alternative put forth are  
14 predictable consequences in no action alternatives and  
15 that's in USCC 62 NRC 585. In another case, in  
16 private fuel storage where the petitioner did not  
17 specify any environmental effects, the ER failed to  
18 consider or did not specify any advantages of the no  
19 action alternative at CLI 0404.

20           Those are examples of where the Commission  
21 has required a petitioner challenging the no action  
22 alternatives which could include many different things  
23 to point to something other than this mere list of  
24 possibilities to show that these are viable. And  
25 that's also supported in federal case law supporting

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1 the no action alternative specifically Association of  
2 Public Agency Customers BVPA, 9th Circuit 1997 which  
3 we've also cited in our brief where as part of the no  
4 action alternative they require them to point to what  
5 makes your no action alternative viable.

6 JUDGE KASTENBERG: Slightly different --

7 CHAIRMAN FROEHLICH: Hold it for a second.

8 Ms. Leach, did you want to respond?

9 MS. LEACH: Yes. If I could just add on  
10 to what staff counsel was just stating, arguing  
11 regarding the unsupported allegations in the petition  
12 and in the Paine declaration. The first section of  
13 the Paine declaration that Mr. Roisman cited for us  
14 this afternoon is the paragraph four that alleges that  
15 we only considered single and discrete resources in  
16 the no action alternative. In making that assertion,  
17 NRDC is misinterpreting our ER. We explicitly state  
18 in our ER that we are considering more than single  
19 discrete resources. We look at combinations and we  
20 also look at demand-side management.

21 With respect to paragraph seven, it has  
22 the one sentence that identifies certain system  
23 resources, waste heat co-generation, combined heat and  
24 power, distributed renewal energy resources and demand  
25 side management. None of these terms are defined.

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1 They're not supported and NRDC simply has not met its  
2 pleading obligations under the contention  
3 admissibility standards. This is not notice pleading  
4 and NRDC has given us no support or definition for any  
5 of these terms that are in the Paine declaration.

6 JUDGE KASTENBERG: Unless there was  
7 something, Mr. Roisman has something he wanted to  
8 respond to here.

9 MR. ROISMAN: Yes. I wanted to add one  
10 thing here. Both counsel seem to start from the  
11 premise that the ER addressed what we said they didn't  
12 address and then say well, once the ER addresses it  
13 you have a bigger obligation. I don't quarrel with  
14 that.

15 When the ER says that it's looking only at  
16 generating sources that will replace all the power, it  
17 makes a mistake. It makes a mistake under the no  
18 action alternative analysis that's required. You  
19 don't have to go beyond that. We don't have to say  
20 here are all the alternatives that you could have  
21 looked at, but you didn't look at any of the  
22 alternatives except this narrow group and the  
23 regulations and Commission's rules say you can't limit  
24 it to that. So that's number one.

25 Number two, when we talk about the absence

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1 of a consideration of likely consequences, we say ER  
2 does not attach to its analysis either in the  
3 alternatives portion or in the no action alternatives  
4 portion any analysis of the likelihood of these being  
5 real. So why would we have an obligation at that  
6 point to offer things that we think are likely until  
7 the applicant first meets its initial burden to take  
8 a shot at that question. Maybe we'll agree with them.  
9 Maybe they'll say oh, you know, when you really sit  
10 down and look at this, DSM looks like the most likely  
11 thing that will happen. Demand-side management is  
12 growing.

13 All we've heard from the applicant is  
14 well, it's true we didn't put it in the no action  
15 alternative, but we could have. Well, we're here  
16 about what you could have, but didn't do. That's why  
17 we're here.

18 The third thing we're hearing, rule of  
19 reason, rule of reason, rule of reason. It sounds  
20 like the perfect solvent. It dissolves everything,  
21 but actually the rule of reason means that you must be  
22 reasonable in what you do. Is it reasonable for an  
23 applicant to come up with the set of alternatives that  
24 they look at by assuming that all the power they  
25 currently generate will have to be generated later?

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1 No, I don't think that's reasonable. We're not asking  
2 them to get fanciful. We're asking them to get real.  
3 They have a planning program. This isn't a utility  
4 that makes it up every morning. They've got a plan.  
5 They know whether they want to build more capacity of  
6 the PJM system. They didn't share any of that in the  
7 licensing application, in the ER, because they didn't  
8 want to talk about likely consequences. They didn't  
9 want to tell you what they thought was going to happen  
10 13 and 18 years from now. So we said that's not  
11 appropriate.

12 So it's not reasonable for them to ignore  
13 and it's reasonable for us to ask them to do it  
14 without giving them our own version of what we think  
15 the world might look like 13 to 18 years from now if  
16 you turn down the plant. It's not our obligation to  
17 prove the ER. It's their obligation to produce a  
18 legally sufficient one. Our position is that they  
19 have not done that. We would note that in the GEIS,  
20 specifically, the GEIS says that DSM is a reasonable  
21 consequence of the no action alternative. Where is  
22 that in the applicant's discussion of no action  
23 alternative? Nowhere.

24 The GEIS talks about distributed solar  
25 capacity as a reasonable possibility if you didn't

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1 have a big nuclear generating facility operating.  
2 Where is that discussion here? It's not discussed.  
3 Those are in the GEIS which in other contexts today  
4 they pointed to and said here's the bible, here is  
5 what you have to go by. So yes, this is a contention  
6 of omission and we think they have omitted those  
7 considerations.

8 JUDGE KASTENBERG: That's what I wanted to  
9 get at. When I first read Contention 4, one of the  
10 first things that came to me well, is there guidance?  
11 Does the NRC have some guidance with regard to what  
12 actually should be in the no action alternative?

13 And Mr. Flyntz came up with NUREG 1555  
14 which is environmental standard review plan. This is  
15 the plan that the staff is supposed to use in  
16 evaluating the no action alternative. And my cursory  
17 reading of it is that in some ways they satisfy it  
18 because it specifically says you have to look at  
19 decommissioning and you have to look at some  
20 alternatives and so on.

21 What I'm gathering from what you said  
22 today is that you're questioning and see if I'm right,  
23 you're questioning the whole concept at a more  
24 conceptual stage of what would really in your view  
25 constitute a no action alternative, rather than at the

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1 content level which is what they're required to review  
2 and what apparently the applicant has given them to  
3 review in accordance with the Standard Review Plan.  
4 Would that be correct?

5 MR. ROISMAN: I think it's fair to say  
6 that our view of NRC internal guidance document that  
7 you referenced is a view that presumes from the idea  
8 that no one would ever say no to a nuclear power  
9 plant. And if you start with that premise, then you  
10 come to that guidance.

11 If you, however, are willing to have an  
12 objective evaluation of particularly here, I mean if  
13 we're talking about a plant that is going to end its  
14 40-year license in 2 years, we'd be in a much  
15 different situation, but here with this much lead time  
16 and to Exelon's credit they've provided that. There's  
17 a lot that could be done to look at this question and  
18 come up with a reasonable resolution. The ER doesn't  
19 do that in our judgment.

20 JUDGE KASTENBERG: Any comment on either  
21 side.

22 MS. WOODALL: Your Honor, I would just  
23 like to make a quick point regarding the DSM issue  
24 addressed earlier and the need for power. The NRC  
25 presently does not consider need for power in license

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1 renewal. When we consider DSM as part -- as the GEIS  
2 indicates that consideration of conservation measures  
3 is appropriate. We're considering the impact of such  
4 conservation measures. We're not considering the need  
5 for power whether DSM drops enough to remove a nuclear  
6 generating plant from the group.

7 I want to specify that when we're  
8 considering those under NEPA even under the no action  
9 alternative, we have produced a list of environmental  
10 impacts resulting from that no action alternative.  
11 And that's a distinction in the DSM. To the extent  
12 that the petitioner is challenging the need for power  
13 and whether Limerick needs to be on the grid,  
14 essentially, as I understand it here, they're not  
15 allowed to challenge that in this particular instance  
16 precluded in license renewal.

17 The other point that I would like to make  
18 is that the petitioner continues to emphasize that the  
19 ER does not feel that the likelihood of any -- the  
20 likely consequences of the renewal. Well, the  
21 alternatives presented in the ER and in the no action  
22 alternative are looking at things that are reasonable  
23 alternatives up to 2024 and the issue with this  
24 particular contention is the petitioner has not put  
25 forth any reasons why, what the ER chose are not

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1 likely. There's no supporting factual basis to show  
2 that what is presented is unreasonable and not a total  
3 reply.

4 CHAIRMAN FROEHLICH: Ms. Leach, do you  
5 have a comment?

6 MS. LEACH: If I could just add on to that  
7 comment. Each of the reasonable alternatives  
8 presented in the ER is a possible or likely  
9 consequence of no action. That is what we have said  
10 from the very beginning. The no action alternative  
11 has denied the license renewal and we look at two  
12 categories of impacts, number one, decommissioning;  
13 number two, energy alternatives. Therefore, Exelon's  
14 alternative analysis is reasonable under NEPA. NEPA  
15 doesn't require infinite study. We don't -- we could  
16 come up with infinite possibilities of what the power  
17 portfolio is going to look like in PJM in 12 years and  
18 how DSM can be combined with 15 other energy sources,  
19 but that's not what NEPA requires. NEPA only requires  
20 the ER to provide sufficient information so that the  
21 Commission can take a hard look at the environmental  
22 impacts of no action compared with the proposed  
23 action.

24 And as we've stated today, we have very  
25 over-exclusive set of alternatives and we've even

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1 looked at DSM and all of these impacts are  
2 incorporated in the no action alternative and  
3 therefore it's sufficient under NEPA.

4 JUDGE KASTENBERG: Just one last question.  
5 Suppose Exelon management came to the conclusion that  
6 for various reasons, economic, regulatory, other  
7 reasons, they wanted to shut the plant down. They  
8 decided not to go ahead with the license. Do you  
9 think that this review of no action quote unquote  
10 would be the same in that case in terms of their  
11 planning? I think that's what NRDC is asking is to  
12 put on the other hat and say what would we actually  
13 do? What's the most likely thing we as plant  
14 management would do once we've decided we're not  
15 seeking license extension?

16 MS. LEACH: We do believe that we've  
17 presented the possible impacts of denial of the  
18 license renewal which would ultimately result in the  
19 plant shutting down in 2024. Unit 1 will shut down in  
20 2024 and then 2029 would be Unit 2. We don't -- we  
21 are not energy planners and we're not required under  
22 NEPA to consider the need for power.

23 We have taken a reasonable analysis and  
24 looked at the possibilities and presented what we  
25 believe is reasonable and could occur in the next 12

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1 to 17 years in looking at emerging technologies and  
2 looking at the power market as it stands now and we  
3 believe that the analysis is reasonable under NEPA.  
4 And also Exelon is a merchant generator -- we generate  
5 electricity and sell it into the wholesale market.  
6 We're not energy planners, merchant generator.

7 MR. ROISMAN: That says a lot.

8 JUDGE KASTENBERG: Hm?

9 MR. ROISMAN: That tells you a lot right  
10 there. This regulation tells them that they have to  
11 think like energy planners. And if their excuse is  
12 well, we don't do that, it only confirms what we're  
13 saying. This ER is deficient. If they weren't  
14 agronomists and they were looking at farm issues,  
15 they'd go out and hire an agronomist. If they were  
16 looking at radiation effects issues and they're not  
17 radiation specialists, they'd go and get a nuclear  
18 physicist. So if they have to look at the likely  
19 consequences of shutting this plant down and I would  
20 say the ER approves, even if counsel hadn't conceded  
21 that they're not energy planners, then they go to an  
22 energy planner.

23 There's an independent system operator  
24 down here. There's an energy plan for PJM. This  
25 thing doesn't just manufacture itself. That's what

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1 we're asking for. That's what's missing. That's the  
2 dispute between us and them.

3 CHAIRMAN FROEHLICH: And the basis for  
4 that is you believe such an analysis is required under  
5 our regulations or under NEPA?

6 MR. ROISMAN: Yes, the likely consequences  
7 analysis it requires, yes.

8 CHAIRMAN FROEHLICH: What I'd like to do  
9 is take just a ten-minute break. We've finished up  
10 with all the questions that we have come with for the  
11 four contentions and after our break, I'd like to  
12 address the motion to strike and the answer. Take ten  
13 minutes.

14 (Whereupon, the above-entitled matter went  
15 off the record at 3:17 p.m., and resumed at 3:30 p.m.)

16 CHAIRMAN FROEHLICH: Please be seated.  
17 The applicant and the staff contend that a reply can't  
18 raise new arguments, new contention bases, or new  
19 issues. And I'm asking of the staff and applicant,  
20 are you arguing that the NRDC has raised a new  
21 contention? Is there a new contention that showed up  
22 in the reply that you didn't see or had no notice of  
23 in the original contention? Does it rise to that  
24 degree of over reaching or misuse of a reply?

25 Staff?

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1 MS. WOODALL: Thank you, Your Honor. The  
2 staff heavily considered whether to file this Motion  
3 to Strike when it received the reply. And based on  
4 the information presented in the NRDC's petition and  
5 in addition to the declaration of Mr. Paine provided  
6 in support of Contention 4, the staff believes that  
7 the 11 points that it put forth in its Motion to  
8 Strike for new issues, new factual bases, that  
9 completely change the character of the contention and  
10 that we were not provided an opportunity to reply to  
11 or set forth essentially could be viewed as  
12 constituting an entirely new contention based on the  
13 four passing references to possibility and then end of  
14 reply it receives substantive factual bases for  
15 challenging the CSP analysis, for example, battery  
16 storage which absolutely never appeared in any form or  
17 fashion in the petition or in the declaration. And  
18 that all these factual bases were also not supported  
19 by any expert support and mostly did not reference  
20 even back to Mr. Paine, much less any other factual  
21 support.

22 So whether I actually think it's a new  
23 contention or not, I'm not sure, but these are all  
24 completely new factual bases.

25 CHAIRMAN FROEHLICH: So the thrust of the

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1 staff's objection is that we have at the reply stage  
2 new bases that change the character of the initial  
3 contention as you read it and understood it.

4 MS. WOODALL: I actually do think it could  
5 rise to the level of a new contention because it's  
6 much more than what the initial contention alleged.  
7 And some of these are not even linked to what the  
8 initial contention was. And to the extent that that  
9 is true, then it is a new contention. For example,  
10 battery storage.

11 CHAIRMAN FROEHLICH: How about a quick  
12 list of those things that aren't even linked to the  
13 initial contention?

14 MS. WOODALL: I would have to -- battery  
15 storage plan, the refit work, and number 11 to start  
16 with.

17 CHAIRMAN FROEHLICH: Okay.

18 MS. WOODALL: Is not linked. That's  
19 impossible because there was nothing there. The fact  
20 that we're challenging hypotheticals, whether these  
21 are hypothetical or rather they're impractical,  
22 uneconomic. None of that was referred to in the  
23 initial petition. That was not part of the challenge  
24 as to whether what the applicant put forth in the ER,  
25 whether any of those things -- the initial petition

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1 nor the declaration, neither of them challenge whether  
2 what the applicant put forth was actually unreasonable  
3 or uneconomic. They simply said that more things  
4 needed to be included.

5 So any of these challenges, as put forth  
6 in ten, those were not included in either the petition  
7 or the declaration.

8 I have to go through this slowly --

9 CHAIRMAN FROEHLICH: That's okay. I want  
10 to focus on that. And then I'm going to ask the  
11 petitioner if there was something in the reply that  
12 justifies or is a grounds for them to add these new  
13 surprising new bases. So that's where we're going  
14 with this.

15 MS. WOODALL: Okay, my point, too, is that  
16 the staff -- to the extent that the petitioner's reply  
17 to our Motion to Strike said that the staff cited the  
18 GEIS and that petitioner can respond to that. That is  
19 true. The staff extensively cited the GEIS. It's  
20 also called the document. It also referred to the ER.

21 The difference and the point that I want  
22 to make is that when we cite the standards of the  
23 GEIS, it's a guidance, but it's what we use to guide  
24 us and how we're going to evaluate it. We pointed out  
25 that what the petition put forth was inadequate to

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1 show a material dispute with no standards. But what  
2 the petitioner cannot -- the petitioner can say that  
3 we put forth in the petition is adequate to meet those  
4 standards. That's an acceptable response to our  
5 answer. But what the petitioner cannot do is add  
6 support to make those things adequate when they were  
7 not initially adequate.

8 And what we're arguing is that's what the  
9 petition is doing. That is, it's adding factual bases  
10 to the staff and the applicant pointing out that what  
11 you initially pled was inadequate.

12 CHAIRMAN FROEHLICH: Understood.

13 MS. WOODALL: And as to nine, the NRDC  
14 notes that they're technically feasible, commercially  
15 viable and reasonable for the region. There was no  
16 indication in either the petition or the declaration  
17 that there was any of the four things that they put  
18 forth were technically feasible, commercially viable.  
19 They said that they noted that before which they have  
20 not noted that before. So we raised that in nine.

21 Then eight, the NRDC says that they  
22 challenge essentially the DSM energy savings  
23 scenarios, but before all they said is the applicant  
24 needs to analyze all forms of DSM. They did not  
25 substantively challenge the DSM analysis provided at

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1 7.2 of the ER and here for the first time they're  
2 providing a substantive challenge to that adequacy.  
3 That's different than alleging all forms of DSM should  
4 be analyzed nor did they put forth what those all  
5 forms should be.

6 And seven, NRDC alleges that they have  
7 various combinations that could plausibly evolve.  
8 This claim was never put forth because the  
9 combinations of resources was never previously  
10 challenged. So they said that you should put forth,  
11 you should analyze renewable. You should analyze  
12 combined heat and power. You should analyze all forms  
13 of DSM, but they never challenged the application  
14 alternatives nor that they were unreasonable. That's  
15 a first time challenge.

16 And six we're seeing new factual  
17 information challenging technical feasibility and  
18 commercial viability of the solar plan. That was  
19 never challenged before. The four things that they've  
20 requested to be put into the application, those things  
21 -- this is now a substantive challenge and providing  
22 practical information that is unsupported, I might  
23 by anyone as to whether this is technically feasible  
24 or commercially viable.

25 On five, we are pointing out that their

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1 CSP challenge to the infusibility. We also did not  
2 see any challenge to the substantive analysis of CSP  
3 or anything else of that nature in the ER. Also,  
4 whether anyone would propose the CSP. That was not  
5 put forth for the PJM, whether that was a reason that  
6 that was insufficient.

7 Number four, the PV generation challenge  
8 that the analysis is a sham. This highly implausible  
9 rendition. Once again, this is a substantive  
10 challenge to the analysis in the application. It did  
11 not appear before. This is different than the four  
12 claims put forth by Mr. Paine in his declaration of  
13 things that should be added.

14 And three, we're also looking at new  
15 challenges to the reasonable alternatives in the ER,  
16 basically that they're unreasonable and that another  
17 substantive challenge essentially.

18 And two, the NRDC reply contained three  
19 brand new issues pointing out substantive challenges  
20 for why the no action alternative is wrong.  
21 Basically, three is about why these issues are  
22 basically unreasonable but none of these three factors  
23 were provided in the petitioner's reply and I think  
24 you'll not find any cross reference to Mr. Paine or  
25 anyone else for that.

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1                   And also number one, as I go backwards, I  
2 apologize --

3                   CHAIRMAN FROEHLICH: It's okay.

4                   MS. WOODALL: Is that they are basically  
5 adding support to the idea that before we identified  
6 the decision was inadequate because they did not  
7 provide support for any of these possibilities being  
8 a viable alternative, and so now they're backing --  
9 they're trying to add support for that, pointing out  
10 the inadequacy.

11                   The entire point of this reply, as I  
12 iterated before, the entire point of us filing the  
13 Motion to Strike which we did not take lightly, was to  
14 point out that these are entirely new bases, that we  
15 did not have an opportunity to reply to and that we  
16 could not consider as part of Contention 4 in our  
17 reply because this is all new and substantive  
18 challenges to the application and very different than  
19 what was presented in Contention 4E.

20                   CHAIRMAN FROEHLICH: Okay, Mr. Roisman,  
21 the Palisades decision says that the parties must  
22 focus narrowly on the argument first presented in the  
23 original petition or raised in answers to it. The  
24 staff has just gone through those items, those issues  
25 which it says it saw for the first time in your reply.

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1                   Would you care to go back and now tie in  
2 for me each of these elements to the initial  
3 contention or the declaration of Mr. Paine that  
4 accompanied your petition?

5                   MR. ROISMAN: Yes.

6                   CHAIRMAN FROEHLICH: Thank you.

7                   MR. ROISMAN: I think in a reduced time  
8 line we've really done this in the attachment to our  
9 opposition to the Motion to Strike. That's Attachment  
10 1 to the Motion to Strike.

11                  CHAIRMAN FROEHLICH: I have that.

12                  MR. ROISMAN: I'm not going to prolong the  
13 discussion by reading all the sections of it, but let  
14 me put it into context.

15                  As we explained when we were discussing a  
16 few moments ago what the essence of the contentions,  
17 our contention was one of omission. You didn't look  
18 at likely consequences. You didn't think about 13 to  
19 18 years out in the future. And you compared the  
20 viability of alternatives against their capacity to  
21 generate as much electricity as Limerick generates.  
22 Those were three failings.

23                  In the responses, both from the applicant  
24 and from the staff, we were cited portions of the ER.  
25 Portions we do not believe fulfill those criteria. We

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1 didn't have the duty to go through them. There are  
2 huge sections of the ER that don't even address  
3 alternatives and we didn't have any duty to point out  
4 all the sections that didn't address what we said and  
5 proper answer from them that would not entitled us to  
6 say anything more would have been an answer that said  
7 you have not adequately demonstrated that we failed to  
8 do what you say we failed to do. That's not what they  
9 did.

10 They went through and they discussed why,  
11 in effect, our disagreement with what they did was  
12 wrong. We came back and said your disagreement with  
13 what we did is a basis for hearing. It's a dispute  
14 and here's the basis for the dispute. You said that  
15 when you talk about DSM and the alternatives analysis  
16 without ever mentioning it in the no action  
17 alternative, that you have addressed it. Well, what  
18 should we do? If they just said that we would have  
19 ended it. But they went on and talked about all the  
20 things they said about DSM, to try to explain why the  
21 way they discussed it in the alternatives analysis was  
22 adequate to fulfill their obligation to discuss it  
23 under the no action alternative.

24 So we responded on the merits to that. If  
25 the Board wants to keep what we set out, take what

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1 they set out, and let's just go on the basis of what  
2 we filed in our petition and the narrow answers that  
3 they give. The rule is not that we have to stick to  
4 narrow petitions and they get to have broad answers  
5 and we do not get to have broad replies. That's not  
6 the rule.

7 CHAIRMAN FROEHLICH: I'm not suggesting  
8 that it is. I'm merely suggesting that if you are  
9 going to have the broad reply, that you have to tie  
10 that to something that was opened up in the answer.

11 MR. ROISMAN: Right, and so if you go to  
12 the table -- well, let's take the references to the  
13 GEIS. First of all, this is on page 23 of our  
14 combined reply to the Motion to Strike.

15 CHAIRMAN FROEHLICH: Page 23, okay. Are  
16 the pages numbered?

17 MR. ROISMAN: Probably not. It's the  
18 third page from the end. It's a total of 25 pages.  
19 It's when you're in the chart format.

20 CHAIRMAN FROEHLICH: I'm in the chart.

21 MR. ROISMAN: It's the one -- the item on  
22 the left location, new information and NRC's combined  
23 replies to Contention 4E.

24 CHAIRMAN FROEHLICH: 4E, okay.

25 MR. POLONSKY: Tony, just a question for

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1 you. There are three pages that start with that.  
2 Could you be more specific, please?

3 MR. ROISMAN: Okay, just a second. It's  
4 the first one.

5 CHAIRMAN FROEHLICH: Okay, the first of  
6 the 4Es.

7 MR. ROISMAN: Of the 4Es. So the charge  
8 is well, we shouldn't have been able to reference any  
9 specific sections of the GEIS. Now the first thing  
10 that we said was well, we did reference the GEIS. We  
11 did it on page seven in Mr. Paine's declaration and he  
12 lists it as a reference. So it's not as though the  
13 GEIS was unheard of.

14 The second thing we pointed out was that  
15 the Exelon answer referred to Section 8.2 of the GEIS  
16 and quoted some language that it believed that the  
17 Board in the Indian Point case had looked at in the  
18 context of the no action alternative. And the staff  
19 quoted extensively from the GEIS. I think it's fair  
20 for us to point out all the things that the staff  
21 failed to quote from what they were trying to draw out  
22 of the GEIS in support of the arguments that they were  
23 making. And that's what we did.

24 CHAIRMAN FROEHLICH: So it's the middle  
25 column on your attachment that will provide the Board

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1 with the --

2 MR. ROISMAN: View of the rationale.

3 CHAIRMAN FROEHLICH: The rationale.

4 MR. ROISMAN: And the last two columns,  
5 columns four and five describe where either in the  
6 applicant's answer or the staff's answer, or both  
7 depending on the case, of something that was said that  
8 required us to reply or authorized to reply. In a few  
9 instances, but not related to Contention 4, we didn't  
10 have to look at their answer because we had explicitly  
11 raised the issue in our petition to intervene. But  
12 those relate to Contentions 1 and 3. And we're  
13 talking about 4 here.

14 CHAIRMAN FROEHLICH: Now I would ask the  
15 staff and the applicant, did you mention a case or a  
16 particular regulation in your answer, does that  
17 provide an avenue for petitioner to cite to us  
18 contrary case holdings or other regulations?

19 MS. WOODALL: Yes. What I alluded to  
20 before, the staff extensively cited the GEIS and I  
21 also want to point out that in some places that the  
22 table in this reply conflates the staff's Motion to  
23 Strike the applicant's Motion to Strike.

24 So in some places, the applicant  
25 challenged parts of the reply that we did not. And

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1 specifically, we did not challenge the GEIS, the  
2 portions that I just went through with you. We did  
3 not challenge and very implicitly did not lay out  
4 anything that said you cannot cite the GEIS. You  
5 didn't challenge any of this in the reply. You cited  
6 them. And it's absolutely appropriate. They're a  
7 logical outgrowth of the answer. What the staff says  
8 is inappropriate is the new substantive challenges,  
9 new bases, and new reasons that did not appear in the  
10 initial petition.

11 And so I just do want to make clear that  
12 there is some distinction and it's not entirely clear  
13 in this reply. But we did try to make it clear  
14 there's the distinction that I want to make sure that  
15 is not missed going back and forth with this.

16 CHAIRMAN FROEHLICH: Okay.

17 MR. ROISMAN: Do you want me to go on?  
18 That was just the first sort of major tack.

19 CHAIRMAN FROEHLICH: Okay.

20 MR. ROISMAN: The second one was the  
21 discussion of combinations of alternatives.

22 CHAIRMAN FROEHLICH: Right.

23 MR. ROISMAN: And we point out this is on  
24 the very next page. We point out in the middle column  
25 that it's really semantic. Mr. Paine referred to it

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1 as an informed projection of the likely portfolio PGM  
2 electricity system resources available in the region  
3 served by.

4 Now is that the functional equivalent of  
5 saying you need to look at the combination? I think  
6 it does. And there's no difference between referring  
7 to the portfolio system resources and the combination  
8 of alternatives given that we're not really talking  
9 about alternatives, we're talking about consequences.  
10 We're not talking about alternatives. We're talking  
11 about consequences.

12 But in its answer, Exelon, the next  
13 column, in its answer Exelon evaluated the -- it says  
14 that it evaluated the environmental impacts of  
15 combination of generation sources including  
16 combinations of new energy sources as reasonable  
17 alternatives by 2024. So now they are asserting  
18 contrary to our contention that they really have  
19 looked at this issue substantively. I think we're  
20 entitled to substantively say no. We say you didn't  
21 do it. We think it's obvious on its face that you  
22 didn't do it. You think you've got an argument that  
23 says you did do it, okay, we'll respond to that  
24 argument.

25 With that, we're already into the merits.

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1 We're not talking about whether we have a  
2 disagreement. In fact, this motion points out the  
3 magnitude of the disagreement that exists on  
4 Contention 4 between the applicant, the staff, and  
5 NRDC.

6 And then NRC staff, in its answer, says  
7 because denial of the license renewal as a power  
8 generating capability may lead to a variety of  
9 potential outcomes, the GEIS states that the no action  
10 alternative should include selection of other electric  
11 generating sources to meet energy demands of  
12 conservation. And it goes on from there. So they  
13 seem to be using the GEIS to argue that it doesn't  
14 matter what the combination is.

15 As long as there's more than one that it's  
16 put together, that's enough. We had said no, that's  
17 not enough. You need to look at a likely portfolio of  
18 what is available in the PGM system within the  
19 relevant time frame.

20 So again, they wanted to argue about the  
21 merits. We responded about the merits.

22 The next piece of this that is challenged deals still  
23 on that same page.

24 MR. POLONSKY: Your Honor, if I may -- I  
25 think it's going to be very difficult for us to then

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1 go back and recreate each of these responses. Is  
2 there any way we could do sort of tit for tat for each  
3 of these so we don't lose the thread?

4 CHAIRMAN FROEHLICH: I was going to go  
5 through yours separately, but I don't mind if you  
6 respond now on this item. And we'll keep it all in  
7 the same place in the transcript.

8 MR. POLONSKY: Okay, thank you. On this  
9 particular issue, Exelon was pointing out that this  
10 was a contention of omission. It was alleged as a  
11 contention of omission and even in the reply they've  
12 asserted very strongly that it's a contention of  
13 omission. On page 50, they say however, on page 28 --  
14 in the 28 pages of briefing, Exelon and the NRC staff  
15 failed to refute any part of the essential argument  
16 advanced by NRG which is simply and clearly stated as  
17 a contention of omission with respect to the no action  
18 alternative.

19 So when we saw this originally in the  
20 petition we said well, that's incorrect. Because a  
21 contention of omission is not admissible if the  
22 information that is alleged to be missing is in the  
23 ER. So we responded that this information is here and  
24 that there are these combinations and why do we  
25 address combinations because the Paine declaration

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1 says renewable energy, vaguely refers to renewable  
2 energy sources. So we provided combinations of  
3 renewable energy resources in the ER.

4 And we're simply pointing out that those  
5 combinations are there. I don't see how that opens  
6 the door then to all of this other discussion that  
7 wasn't properly pled and was vague and unsupported in  
8 the petition to intervene.

9 CHAIRMAN FROEHLICH: Mr. Roisman?

10 MR. ROISMAN: Yes, the word that keeps  
11 getting missed because it doesn't appear in the ER is  
12 the word "likely." Yes, they had some combination of  
13 resources there that in our judgment were completely  
14 fanciful. What we were criticizing them for, what the  
15 contention criticizes them for is not providing an  
16 analysis that shows therefore omitting an analysis  
17 that the combinations that they are relying on are  
18 likely.

19 So they come back in their reply and they  
20 say we did know to do that. Here it is, here it is,  
21 here it is. And then that calls for us to then  
22 respond to say you didn't demonstrate that any of  
23 those are likely and here's why they're not likely.  
24 But we start with the fact that they never tried to  
25 show that they're likely. They just show that they're

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1 out there. And that's not enough.

2 So again, if you want to take out of their  
3 answer the allegation that they do show a combination  
4 of alternatives, we'll take out of our reply that  
5 you've not shown that they're likely because we're  
6 willing to stand on our initial argument that what's  
7 missing in the ER and what's still missing in the  
8 answer is any analysis that something was a likely  
9 combination. That's the crux of the contention.  
10 That's why we're not changing the contention or the  
11 basis. We're still talking about the same contentions  
12 and the bases.

13 CHAIRMAN FROEHLICH: Mr. Polonsky.

14 MR. POLONSKY: We'd be happy with that  
15 settlement if the original contention is limited as  
16 such as pled.

17 CHAIRMAN FROEHLICH: Okay.

18 MR. POLONSKY: In the petition to  
19 intervene.

20 CHAIRMAN FROEHLICH: Do you want to  
21 address the next item, please?

22 MR. ROISMAN: Yes, okay. The next one  
23 talks about -- bear with me.

24 (Pause.)

25 Okay, this again, it's really a variation

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1 on the likely argument. In other words, the  
2 contention starts by saying you've not demonstrated in  
3 the ER what are the likely scenarios and they've come  
4 back again this time in their argument in opposition,  
5 attempting to say that they did look at the likely  
6 alternatives, but we specifically identified what  
7 they've violated, which sections of the CQ regulations  
8 they violated in 10 CFR Part 51 they violated.

9 And we pointed out on page four of the  
10 Paine declaration the ER's analysis of the no action  
11 alternative fails to consider the environmental  
12 impacts of the reasonably foreseeable portfolio PGM  
13 system resources and thus fails to make the required  
14 comparison between the environmental impacts and no  
15 action and the continued operation of LGS for an  
16 additional 20 years. So we're sort of back again to  
17 the same point.

18 Don't misunderstand me. I'm not saying  
19 that the applicant doesn't have an argument. They do.  
20 That's why we're going to have a hearing, we hope, to  
21 resolve this disagreement. But for the moment, we  
22 have an ER that doesn't defend or justify the choices  
23 that were made of the alternatives that -- or of the  
24 consequences that would flow from the no action  
25 alternative.

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1           And as I suggested back when we were  
2 talking about Contention 4, the problem was that when  
3 the applicant transferred their alternatives analysis  
4 in Section 7 which does not require looking at a  
5 likely question specifically, over to the no action  
6 alternative, they neglected to include an analysis of  
7 the likely consequences. Their counsel has told us  
8 why, because this utility is not an energy planner.  
9 Okay, I can understand why they didn't do it, but that  
10 doesn't mean that they're allowed to not have it in  
11 there. It just means that they needed to get a  
12 consultant. They didn't. So that's what we pointed  
13 out.

14           So every time they came back and tried to  
15 say we did it, we had to respond on the merits, but  
16 our basis contention is still the same, you didn't  
17 ever do it in the first instance. And therefore, we  
18 have a valid contention.

19           MR. POLONSKY: Paragraph four of the  
20 declaration of Mr. Paine says that the ER is deficient  
21 and says specifically it unreasonably misapplies NRC  
22 guidance from the 1996 GEIS. It limits the set of  
23 reasonable alternatives for meeting the defined  
24 generating requirement to analysis of single and  
25 discrete electric generating storage and sources.

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1 That's the allegation of the deficiency and this  
2 argument.

3 And I think we're talking about the one  
4 about hypothetical scenarios and whether or not what  
5 we did looking out to 2024 was adequate, was nowhere  
6 to be found is our position in the petition to  
7 intervene and only was somehow articulated as a basis  
8 in the reply.

9 Again, it was a contention of omission and  
10 it never said you didn't look at hypotheticals if you  
11 focused on single discrete resources. And we pointed  
12 out that we did not.

13 CHAIRMAN FROEHLICH: I understand. Mr.  
14 Roisman, back to you.

15 MR. ROISMAN: Well, this particular  
16 response to that response.

17 CHAIRMAN FROEHLICH: Oh, okay.

18 MR. ROISMAN: I think we ought to have a  
19 racquet in our hands since this is the way we're doing  
20 this.

21 CHAIRMAN FROEHLICH: That's how it is  
22 often done when you're ruling on Motions to Strike.

23 MR. ROISMAN: Right. Petition intervene,  
24 the initial petition on page 24, the last paragraph of  
25 the bases for Contention 4E says the ER violates

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1 51.53(c) by failing to thoroughly consider the  
2 environmental impact and likely consequences under the  
3 no action alternative of denying relicensing now 13  
4 years before the existing license for Limerick 1 will  
5 expire, and 18 years before the existing license for  
6 Limerick 2 will expire, including expected growth in  
7 demand-side management and renewal energy resources  
8 and fails to quantify and balance the environmental  
9 costs of those consequences against the environmental  
10 cost of relicensing the Limerick reactors including  
11 the properly analyzed cost of a severe accident.

12 So the basis is there. The applicant  
13 disagrees with the basis and then goes on to say and  
14 here's the substantive information that's contained in  
15 the ER that we think disagrees with it. So we point  
16 out to you then after they challenge that they have  
17 put in a discussion of the likely consequences for the  
18 13 to 18 year lead time, if you will, we put in our  
19 response to that. It's just a continuation of the  
20 basis that we made in a response to their challenge to  
21 what we said.

22 CHAIRMAN FROEHLICH: Counselor.

23 MR. POLONSKY: The contention  
24 admissibility criteria which I hope we won't argue  
25 over is in 2.309(f)(1) and even before you get to the

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1 little Roman numerals you are told that you need to  
2 set forth whatever it is that follows with  
3 particularity.

4 And then when you get down to Roman  
5 numeral V, to provide a concise statement of the  
6 alleged fact or expert opinions, you're told you need  
7 to do this -- it's on which the petitioner intends to  
8 rely adhering together with references to the specific  
9 sources and documents on which the request or  
10 petitioner intends to rely to support its position on  
11 the issue.

12 We don't think this requirement was met  
13 here simply by saying likely consequences, and that  
14 the Paine declaration is sufficiently vague and  
15 unsupported and that it does not support an admissible  
16 contention. So to raise these issues now is to -- Mr.  
17 Roisman would say it's supporting evidence. We would  
18 say it clarifies the contention beyond what the  
19 contention was stated in the petition to intervene  
20 making it a new contention subpart or a new contention  
21 in its entirety and in addition to factual issues,  
22 they have done the same with legal citations which  
23 each arguably could be their own contention.

24 CHAIRMAN FROEHLICH: Safe to move on?

25 MR. ROISMAN: Yes, I would just remind the

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1 Board that in Mr. Paine's declaration he goes to great  
2 pains, no pun intended, to identify the paragraphs of  
3 the ER and quote from them with which we disagree. So  
4 I think we did the particularity thing just fine.

5 So then we have at the top of the next  
6 page that begins with Contention 4E --

7 CHAIRMAN FROEHLICH: And is that the last  
8 page of 4E?

9 MR. ROISMAN: Yes.

10 CHAIRMAN FROEHLICH: Okay.

11 MR. ROISMAN: A challenge to the whole  
12 idea of the decentralized power sources as opposed to  
13 central generating facility power sources and the  
14 applicant objects that these are all things that we  
15 didn't talk about in the original petition.

16 First of all, we recognized and  
17 acknowledged that the ER contained an analysis of  
18 discrete replacement sources for Limerick, but does so  
19 without providing an analysis that demonstrates those  
20 resources of combinations are reasonably likely,  
21 talked about that. At page three of his declaration,  
22 Mr. Paine says "unlike the applicant's section of  
23 individual utility-scale power plant alternatives."  
24 Keep in mind that's another one of the fundamental  
25 bases of the contention that they look at the no

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1 action alternative in terms of utility, scale, power  
2 plant alternatives, that it subjectively deems  
3 reasonable and appropriate to its own business purpose  
4 of generating and selling electricity to replace LGS.  
5 They say that in the ER. They say explicitly that's  
6 what they're looking at and they say it in the no  
7 action and they say it in the alternative analysis.  
8 We say that's wrong.

9 The GEIS says you're not to do that.  
10 Common sense says you should not do that. NEPA says  
11 you cannot do that and we said that is a mistaken way  
12 of looking at the issue.

13 So when they start to join issue with us  
14 on the merits of that question of whether or not all  
15 the individual sources were the proper combinations  
16 and whether they looked at the things that we thought  
17 they should look at, we answered. We responded to  
18 that.

19 Then at page four of his declaration, Mr.  
20 Paine says "in addition to the single discrete  
21 electricity generation sources reviewed by the  
22 applicant as reasonable alternatives to extended  
23 operation of Limerick's base load capacity," pointing  
24 out there was more you had to look at, not just those.  
25 And then his declaration highlights the omission in

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1 the ER, the failure to demonstrate that the scenarios  
2 discussed are reasonable and only consideration of  
3 alternatives that will meet Limerick's current  
4 generating capacity.

5 So we put the issue in play. We said it's  
6 missing. They come back and say it's not missing.  
7 What are we to do, but to say to them your  
8 interpretation of your own document fails to  
9 demonstrate what you claim is wrong with our  
10 contention. So we have a dispute. They say it's in.  
11 We say it's not in. When they cite to what they  
12 believe supports that, we challenge it.

13 CHAIRMAN FROEHLICH: Mr. Polonsky.

14 MR. POLONSKY: This is at the very heart  
15 of how this contention was submitted as a contention  
16 of omission. In the very language that Mr. Roisman  
17 has just cited, suggests that we did not look at  
18 something other than the output from Limerick  
19 Generating Station. Well, there's a section on the  
20 demand-side management and that section on the demand-  
21 side management includes a discussion of DSM. Looks  
22 at a study from I think New Jersey about human  
23 behavior on demand-side management and then makes an  
24 environmental impact conclusion about demand-side  
25 management and concludes that it's small. That is

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1 then cross referenced into the no action alternative.

2 It was certainly reasonable for us in our  
3 answer to assume they perhaps had missed the cross  
4 reference and didn't realize that it was in the no  
5 action alternative because they say it can't be  
6 equated with replacing the generating capacity. Well,  
7 we didn't entirely replace the generating capacity.  
8 We looked at conservation measures, consistent with  
9 the GEIS in demand-side management.

10 So our answer is simply saying you have  
11 articulated this unambiguously as a contention of  
12 omission. Here is where that information is that you  
13 have said it's not. To then attack the adequacy of  
14 that creates a new contention about the adequacy of  
15 that information and converts this contention of  
16 omission into something that was not originally pled  
17 in the petition to intervene and that is  
18 impermissible.

19 CHAIRMAN FROEHLICH: Mr. Roisman?

20 MR. ROISMAN: First of all, as we pointed  
21 out before whether by reference or otherwise, the  
22 summary table produced in the ER that compares the no  
23 action alternative and its consequences does not have  
24 a column for DSM. But what are we to do with that?  
25 We said it didn't include DSM in the no action

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1 alternative. They want to come back and say well, we  
2 talked about it in this other place. We incorporated  
3 by reference. We've just been excoriated for not  
4 being precise, for not being specific.

5 Can we not at least use the same logic to  
6 look at what they have done. If they wanted to say  
7 the DSM has a role to play in the no action  
8 alternative, it should have been included in the  
9 discussion. When they deal with it on the merits  
10 which they then raise and say ah, see, we did look at  
11 it. We then point out that first they dismiss the DSM  
12 because they say it won't replace all the generating  
13 capacity which we say that's the wrong test. That's  
14 not the test you're supposed to use. And then we  
15 point out all of the problems with the way they  
16 examine the DSM including the failure to look at what  
17 it might look like 13 or 18 years into the future.  
18 So we're responding to what they're saying.

19 CHAIRMAN FROEHLICH: The next one, if we  
20 could?

21 MR. ROISMAN: And the last one -- okay.  
22 This is the one that said we never specifically  
23 referenced 51.103(a)(4) as a legal standard for the  
24 analysis of the no action alternative. It's true we  
25 didn't use the section, but we used the words. We

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1 used the concept, the ER violates because of  
2 unreasonably and arbitrary 51.45(c) and unreasonably  
3 and arbitrarily limits its analysis of the no action  
4 alternative in a manner that fails "to the fullest  
5 extent practicable to quantify the various factors  
6 considered and neglects discussion of important  
7 qualitative considerations or factors that cannot be  
8 quantified." And that was in our petition at page 23  
9 and part of Mr. Paine's declaration.

10 If that's not specific enough, if that's  
11 how it's out -- take it out, but I tell you that's  
12 flyspecking. Anybody who has ever read Part 51 and  
13 remember, that section 51.103 applies to the staff.  
14 The language that we quote which we took from that  
15 without putting that reference in is in the context of  
16 51.45(c) which basically says the applicant is  
17 supposed to produce an environmental report that will  
18 provide the staff with what it needs to write its  
19 DSEIS and FSEIS.

20 So I don't think that we've really caught  
21 them by surprise. If the Board thinks we have, take  
22 reference.

23 CHAIRMAN FROEHLICH: Mr. Polonsky?

24 MR. POLONSKY: We see this as the same as  
25 the first issue that is raised that only Exelon raises

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1 which is there's an allegation in a footnote in the  
2 petition to intervene that says that the statements of  
3 consideration haven't been adjudicated. Well, there's  
4 no citation. It's not defined. And then we make our  
5 arguments in our answer and they come back and they  
6 reply and provide a two-page legal discussion with  
7 citations and quotations from various sections of the  
8 Administrative Procedure Act telling us where that  
9 argument can be found for the very first time in the  
10 reply.

11 And again, we think it's just crystal  
12 clear that if you are citing to any legal authority in  
13 a petition to intervene, the same way you're citing to  
14 a document in a petition to intervene, that you need  
15 to tell the other parties and the Board what it is  
16 you're citing to and provide that citation with  
17 specificity. I mean we've had boards where you just  
18 cite to the application or cite to a regulatory  
19 document and they say this thing is 340 pages long.  
20 We're not going to go through -- it's not our  
21 obligation to go through and find where that is.

22 It's not my job to hunt down and find out  
23 where the citation is to why the Statements of  
24 Consideration were not adjudicated. And so it is  
25 perfectly fair game for us to say and it's not

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1 flyspecking. It's part of the pleading requirements  
2 for admissibility that you provide the legal citations  
3 to what you are doing. And that simply wasn't done  
4 here and it wasn't done on the first argument and it  
5 wasn't done on the second.

6 MR. ROISMAN: Okay, let me -- since that's  
7 the first one that goes away for 4, let me just talk  
8 about that very briefly. If you read the ER, you will  
9 see that the applicant has no pinpoint citation to  
10 anything that identifies either the Statement of  
11 Considerations in support of the 1996 regulations or  
12 the GEIS language that in its answer relied upon as  
13 the basis for the statement that the subpart L issue  
14 that had been dealt in.

15 What we said in the footnote in the  
16 petition to intervene frankly was gratuitous. We  
17 didn't even need to have said that because there was  
18 nothing using Mr. Polonsky's own standard. There was  
19 no guidance. We were -- if you take a look at  
20 reference in the ER is to NRC 1996A. That reference  
21 is you go back to it simply references the GEIS, all  
22 500 or 600 pages of it. So sauce for the goose is  
23 sauce for the gander.

24 But on top of that we said it hadn't been  
25 adjudicated. They didn't come back and say oh yeah,

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1 it's been adjudicated. They came back and said it's  
2 been adopted. It's a regulation because the SOC said  
3 that it was okay and the GEIS said it was okay, now  
4 giving the specific references. That was the first  
5 chance that we would have had if we were going to do  
6 proper pleading to respond to an assertion that does  
7 not appear anywhere in the ER.

8 So we responded by pointing out that you  
9 cannot have an adjudication of an issue if there's no  
10 notice that you're getting ready to adjudicate it  
11 either in a rulemaking or in a more formal proceeding  
12 in an adjudicatory context. And of course, that's a  
13 major point that we've made about Contentions 1, 2,  
14 and 3. And that's all discussed on the first page of  
15 this attachment, the very first block of documents  
16 there.

17 CHAIRMAN FROEHLICH: Did you want to  
18 respond to that last comment, Mr. Polonsky?

19 MR. POLONSKY: Yes, Your Honor.

20 CHAIRMAN FROEHLICH: Just to notify the  
21 public.

22 MR. POLONSKY: Mr. Roisman knew full well  
23 how Exelon got from the L exception to applying that  
24 to Limerick even though Limerick wasn't mentioned.  
25 And that's why he put it in the footnote just so to

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1 somehow feign that he didn't need to raise that  
2 because that is why it was relied upon in the ER to us  
3 is just incredible and to any extent if he wanted to  
4 raise that as an issue when he specifically cited to  
5 it in his footnote, the issue that we had was the term  
6 adjudicated.

7 We're in a licensing board proceeding.  
8 We're scratching our head trying to figure out what it  
9 is that he needs. And we don't say it wasn't  
10 adjudicated. We basically say there's no requirement  
11 that it be adjudicated. What is he talking about and  
12 we point to 2.309(f)(1) and say that's vague and  
13 unsupported. And he comes back and says oh, let me  
14 provide the support. That to us is ripe for a Motion  
15 to Strike.

16 CHAIRMAN FROEHLICH: Okay. Any questions?  
17 Okay. All right. It has been a long day. I think  
18 that's all the questions at least I have on the Motion  
19 to Strike.

20 We will take the charts and the individual  
21 elements, go through them one by one, if need be, in  
22 our decision.

23 At this point I think we can move to a  
24 closing argument where you're free to address the  
25 contention admissibility issues as well as the Motion

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1 to Strike if you wish to. And if you could limit  
2 yourselves to five minutes each we may get out of here  
3 today.

4 We'll start with the applicant.

5 MR. POLONSKY: Thank you, Your Honor.  
6 Exelon ZER for the Limerick Station does not include  
7 a new SAMA analysis because the Commission has excused  
8 Exelon from including one. The language in Section L  
9 specifies this outcome. And if there's any question  
10 that that regulation applies to Limerick, the Board  
11 need only look to the June 1996 Statements of  
12 Consideration which unambiguously answer that  
13 question.

14 So we know that Exelon need not submit a  
15 second SAMA analysis. This disposes of Contention 3  
16 which alleges to the contrary. But it also disposes  
17 of Contention 2. Just before the lunch break, Mr.  
18 Roisman characterized Contention 2 as follows: that  
19 NEPA obligates Exelon and ultimately the NRC staff to  
20 perform an adequate SAMA analysis regardless of what  
21 Section L says. This is nothing more than a  
22 camouflaged attack on the text of Section L which does  
23 not require Exelon to submit a second SAMA analysis as  
24 part of license renewal.

25 And general rules of regulatory

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1 construction would tell you that a general rule is  
2 trumped by a specific rule. The general rules  
3 regarding the Commission's NEPA obligations that the  
4 NRDC cites do not trump the specific regulation that  
5 exempts Exelon from submitting a second SAMA analysis  
6 as part of license renewal.

7 As for Contention 1, yes, there is  
8 consideration of new and significant information  
9 required by 51.53(c)(3)(4). And Exelon included a  
10 discussion of new and significant information in the  
11 Limerick ER. However, the adequacy of that  
12 information cannot be litigated in this proceeding  
13 because either SAMAs for Limerick are a Contention 1  
14 issue or alternatively SAMAs for Limerick, Comanche  
15 Peak and Watts Bar and any other plant that may in the  
16 future perform a SAMA analysis at the construction and  
17 operating phase are a generic finding that is accepted  
18 by rule. As such, the Pilgrim and Vermont Yankee  
19 decisions are binding.

20 In any event, Exelon's consideration of  
21 new and significant information is consistent with  
22 NEPA's rule of reason. NEPA requirements tell you to  
23 evaluate environmental impacts. That's in NEPA  
24 Section 102. If the impacts are significant, then  
25 NEPA requires you to evaluate mitigation alternatives.

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1 New and significant information looks for new  
2 information that could result in a seriously different  
3 picture of the environmental impacts from what was  
4 previously envisioned.

5 In this case, the impacts were  
6 consequences of severe accidents are defined as small.  
7 Therefore, only that information that would change the  
8 consequences to moderate or large, the other  
9 definitions are provided in the rules, would be new  
10 and significant. NRDC doesn't like the 1989 SAMDA.  
11 Well, it's too late, 20 plus years too late to  
12 challenge that analysis. And the chaos in license  
13 renewal proceedings and prior NEPA documents from the  
14 construction and operating stage to be litigated in  
15 this proceeding would be significant. And the Board  
16 should not allow it.

17 NRDC also does not like the exception in  
18 NRC regulations in 51.53(c)(3)(2)(L) or the  
19 regulations in 51.95 or 51.71 that flow the NRC  
20 staff's requirements down into that exception. It can  
21 bring its grievance in a waiver under 2.335 or through  
22 a petition for rulemaking. But what it cannot do  
23 absent a waiver is bring that challenge here in this  
24 license renewal proceeding.

25 As for Contention 4, it appears that the

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1 NRDC is challenging the need for power after all.  
2 They've argued today that under the no action  
3 alternative, there is no need for the power from  
4 Limerick. Thus, the no action alternative can look at  
5 something other than replacing 2,340 megawatts the  
6 Limerick station will provide. That is a veiled  
7 challenge of the need for power. That's outside the  
8 scope of this proceeding.

9 NRDC has a number of concerns about how  
10 the no action alternative will be defined and handled  
11 by the NRC. This is best handled as a policy concern  
12 and comments, for example, on the draft revision to  
13 the GEIS or through a petition for rulemaking. NRDC's  
14 concern is apparently also with the staff's Standard  
15 Review Plan in NUREG 1555 and how it applies to all  
16 plants. This licensing proceeding is not the place to  
17 litigate NRDC's policy concern applicable to all  
18 plants.

19 NRDC does not specify the combinations of  
20 alternatives that would make the ER adequate. Rather,  
21 they rely on a single sentence talking vaguely about  
22 "waste heat co-generation, combined heat and power,  
23 and distributed renewable energy resources" as if we  
24 know what that meant. Would 10 percent waste heat, 70  
25 percent combined heat and 20 percent distributed

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1 renewable energy be adequate? Or how about 20, 50, 30  
2 percent or 33 percent for each?

3 The combinations are innumerable. And how  
4 much solar panels on rooftops should we incorporate or  
5 windmills in farmers' backyards? It's a nice academic  
6 exercise and more appropriately it's speculation.  
7 NEPA doesn't require either and it also doesn't  
8 require worst case scenarios. It requires a rule of  
9 reason which Exelon met. And even before you get to  
10 NEPA, the admissibility standards require specificity  
11 which is not present here.

12 Finally, this is clearly and unambiguously  
13 and repeatedly stated as a contention of omission.  
14 NRDC's statements today that it is a combination of  
15 both is belied by its pleadings. NRDC fails to  
16 recognize even today that the ER does contain energy  
17 alternatives and combinations of alternatives, solar,  
18 wind and natural gas combinations were included in the  
19 ER. Wind, compressed air energy storage as a  
20 combination were included in the ER, and all of those  
21 impacts were flowed through to Table 8-0.

22 To the extent that the conclusion of  
23 environmental impacts on demand-side management which  
24 were identified in the ER as small were not lifted and  
25 carried into a summary table which frankly is merely

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1 a roll up of what is in Section 7 is itself flyspeck.  
2 For all of these reasons we urge the Board to deny the  
3 petition in its entirety and on behalf of Exelon, we  
4 thank you for the opportunity to have this candid  
5 discussion with you. Thank you.

6 CHAIRMAN FROEHLICH: Thank you, Mr.  
7 Polonsky, for the Commission staff.

8 MR. SMITH: Thank you, Judge Froehlich.  
9 Before I get started we do have a couple items of  
10 homework I would make in terms of Judge Kastenberg's  
11 questions on the 1989 Limerick SAMDA.

12 First, it was not peer reviewed, but the  
13 NRC staff reviewed it and also contractors reviewed  
14 it, too. We submitted the SAMDA analysis to  
15 contractor labs and they looked at it as well. So  
16 different sets of eyes did review the 1989 SAMDA  
17 beyond just the NRC staff. But it was not a formal  
18 peer review.

19 Second, we're not aware of any other SAMDA  
20 or SAMA analyses that have been completed beyond the  
21 ones we stated earlier at the time of 1996 when the  
22 Commission promulgated its license renewal rule. I  
23 hope that's responsive.

24 CHAIRMAN FROEHLICH: Thank you.

25 MR. SMITH: Second, the NRC staff noticed

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1 a concern that the 1989 SAMDA analysis by itself  
2 doesn't adequately consider severe accident mitigation  
3 alternatives at least for this license renewal  
4 proceeding conducted over 20 years later. But the NRC  
5 staff and since, there could be some kind of a gap or  
6 a hole in the Commission's regulations if you read  
7 Section L to say what it says it does.

8 The NRC staff's position is that Section  
9 L doesn't just rest on the 1989 SAMDA analysis.  
10 Rather, a careful reading of the 1996 Statement of  
11 Considerations indicates that the Commission was  
12 considering not just the prior SAMDA analyses of the  
13 facilities in question, but also considered the  
14 extensive study of the NRC staff and the applicants in  
15 licensing were taking to consider severe accidents and  
16 ways to mitigate those risks of severe accidents.

17 In fact, as we point out in our brief, the  
18 Commission thought that that analysis was so thorough  
19 that it would be unlikely that any more future SAMA  
20 analysis would uncover cost beneficial SAMAs beyond  
21 the procedural and programmatic changes, for minor  
22 plant modifications.

23 In that sense, the Commission reasonably  
24 used its discretion in the 1996 rulemaking to not  
25 require applicants to consider severe accident

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1 mitigation alternatives beyond the ones reviewed at  
2 either the operating license phase or if necessary,  
3 the license renewal phase. But unless there would be  
4 a thought there was a gap there, that determination  
5 like all determinations in 1996 Statement of  
6 Considerations, regulations, and GEIS is a subject of  
7 NEPA's new and significant information obligation and  
8 the NRC staff as well as the applicant has to consider  
9 whether or not the new and significant information  
10 impact submissions of determination in 1996 SOC  
11 codified in the regulations that essentially one SAMA  
12 is enough.

13           And turning to Contention 4, the staff's  
14 final thoughts on that and since they could be argued  
15 that NRDC's petition to intervene is based on a new  
16 philosophy or new way of looking at a no action  
17 alternative and in that sense, the NRC staff agrees  
18 that it might be. The NRDC is asking you to look at  
19 no action in a way that we haven't considered  
20 previously and nonetheless, if they were to do that,  
21 the petitioner would still need to provide adequate  
22 basis or factual demonstration for why their way of  
23 looking at it was a reasonable way under NEPA.

24           And as the Board held in Monticello  
25 license renewal proceeding, a simple allegation of

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1 different renewable alternatives should be considered  
2 isn't enough to meet the admissibility standards. And  
3 in this case, the NRC staff read the Paine declaration  
4 as well as the initial petition to intervene, the  
5 facts stated in there don't provide any indication for  
6 why the things they are saying should be looked at in  
7 a no action alternative are commercially viable,  
8 technically feasible, more appropriate for  
9 consideration otherwise.

10 In any event, if the Board were to  
11 consider in the statements we argued about recently in  
12 the reply, the NRC staff knows that the Board would  
13 consider all of them and even the bases for the  
14 contention, none of the statements at least the staff  
15 would move to strike are provided by citation to  
16 either a technical document or a expert declaration.  
17 In that sense, they constitute the types of  
18 allegations or speculation the Commission has  
19 previously found and cannot support in this  
20 contention.

21 For those reasons, the NRC staff opposes  
22 the position that NRDC requests. Thank you, Your  
23 Honors.

24 CHAIRMAN FROEHLICH: Thank you. Mr.  
25 Roisman?

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1           MR. ROISMAN: Thank you, Mr. Chairman.  
2 Well, one message is clear. The applicant and staff  
3 agree that there's anywhere that we can challenge what  
4 we want to challenge, but not here. We can challenge  
5 it in 2.335 which we might do should the Board agree  
6 with their view of these regulations which we don't  
7 agree with. We could do it by rulemaking. We could  
8 have done it before anybody thought to apply for  
9 license renewal. We could do it before the applicant  
10 used it as a basis for its Environmental Report here.

11           Our position is we're in the right place.  
12 We're in front of the right Board. This is the right  
13 time. And we have the right issues. Let me go over  
14 them briefly.

15           We are not claiming that an applicant  
16 needs to do a new SAMA analysis. That is not one of  
17 our claims. Our claim is that they need to do an  
18 adequate analysis of mitigation alternatives, whether  
19 it's called a SAMA, a SAMDA, or something else  
20 altogether. They say that the 1989 SAMDA is that  
21 adequate analysis either because the Commission  
22 blessed it without really thinking about or because it  
23 is a generic finding or because it is in some way or  
24 another represents a good starting point and the staff  
25 says then you have to look at the IPE and the IPEE,

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1 incidentally, also not offered in evidence in this  
2 proceeding, but referenced only.

3 We believe that NEPA requires an adequate  
4 consideration of mitigation alternatives in order to  
5 answer that question. You have to take a look at the  
6 SAMDA, the 1989 SAMDA. How can you tell whether the  
7 new information is new or whether the new information  
8 is significant if you don't look at the 1989 SAMDA  
9 that the applicant says is considering new and  
10 possibly significant information for it. So Hamlet is  
11 here. Hamlet is in the play. The applicant keeps  
12 taking him offstage every time we try to have a  
13 conversation with him, but he's here. We're going to  
14 play his play.

15 Secondly, the new and significant  
16 information is not a Category 1 issue problem because  
17 whatever the 51.53(1) is, it didn't convert a site-  
18 specific issue to a Category 1 issue. The Commission  
19 defined Category 1. It doesn't fit that category.  
20 It's also not a generic finding. By definition a  
21 generic finding would be a finding that applies to  
22 lots of other plants. This they claim is a finding  
23 that applies to Limerick. So it can't be a generic  
24 finding and they're certainly not trying to assert  
25 that they did exactly the same analysis that was done

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1 for Watts Bar and Comanche Peak and therefore we have  
2 a three party generic finding. It's site specific.  
3 It's specific to this case.

4 It's significant, those new information  
5 are significant just because of the consequences of  
6 the accident, but also because of the mitigation  
7 alternatives that could come into play if we used the  
8 new and significant information that NRDC has pointed  
9 out in its report. Those consequences are the heart  
10 of an evaluation under NEPA under the Commission's own  
11 regulations.

12 And Subpart L does not purport to decision  
13 the question of whether or not any particular document  
14 offered by an applicant is or is not an adequate  
15 mitigation alternative analysis. It simply says that  
16 if there is one, the applicant is excused from doing  
17 a new SAMA analysis. We don't want them to do a new  
18 SAMA analysis. We want them to do a mitigation  
19 analysis that's adequate. When they give us one,  
20 we'll tell you whether we think it's adequate or not,  
21 but it doesn't get into this question of a new SAMA  
22 analysis.

23 Finally, with regard to Contention 4 we're  
24 told that this is a challenge for the need for power.  
25 This is a strange contention. On the one hand we have

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1 the applicant asserting that if you don't have these  
2 plants running, you will need to meet 2300 megawatts  
3 of generating capacity. In my simple world they are  
4 asserting that there's a need for the power from the  
5 plant. We're not challenging whether there is a need  
6 for the power. We're asking them to evaluate what the  
7 consequences would be if 13 or 18 years from now you  
8 shut it off, you turn off the plant, what happens?  
9 They don't give us that analysis. They keep referring  
10 to it in summary fashion. We've given you a  
11 reasonable analysis. We said it's not a reasonable  
12 analysis because it assumes you have to supply all the  
13 generating capacity that would be gone which is an  
14 assumption which is wrong. And it doesn't look at  
15 likely consequences. It just looks at some possible  
16 consequences.

17 Are we asking for worst case? Are we  
18 asking for the edges of speculation? No. We're  
19 asking for some discussion in the ER of why a set of  
20 consequences that the applicant wants to say will  
21 occur are likely. That conversation does not occur  
22 anywhere in the ER.

23 We are not arguing that specific  
24 alternatives should have been considered. We're  
25 arguing that the way of looking at whatever

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1 alternatives the applicant wants to look at are wrong.  
2 They look at it from a wrong perspective. That's the  
3 error. That's the omission in the analysis. When  
4 they look at it in the right way, they might expand  
5 the alternatives. They might get consequences. They  
6 might narrow. I don't know. It's their job to do it  
7 right. It's our job to point it out to them.

8 Finally, what we're doing in this petition  
9 to intervene is attempting to have our day in court  
10 for our members and for our organization to raise with  
11 the Board what we think are significant deficiencies  
12 in the applicant's Environmental Report. All of these  
13 will come back again if the staff decides to simply  
14 repeat what the applicant has done. If they change,  
15 if they improve, we may tell you we're dropping the  
16 contention. They've dealt with our problem. If they  
17 address the problem head on, but do it in a wrong way,  
18 we may file a new contention based on that. But for  
19 now what we have is a deficient Environmental Report.  
20 We ask the Board to give us the opportunity to make  
21 our case with regard to that. Thank you for the time  
22 you've given us today.

23 CHAIRMAN FROEHLICH: On behalf of the  
24 entire Board I want to thank all the participants,  
25 counsel, for your time and thoughtful arguments. I

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1 assure you the arguments will be helpful to the Board  
2 in coming up with a decision and as I mentioned in my  
3 opening, we'll try to have that decision published  
4 within 45 days. I know the rules say 45 days from the  
5 reply, but I read them to be 45 days from the end of  
6 this oral argument. Again, I want to thank the  
7 officers of the Montgomery County Court for their  
8 perseverance and for their attendance all day and the  
9 parties for their helpful arguments. We stand  
10 adjourned. Thank you.

11 (Whereupon, at 4:35 p.m., the oral  
12 arguments were concluded.)

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CERTIFICATE

This is to certify that the attached proceedings  
before the United States Nuclear Regulatory  
Commission

Proceeding: Limerick Generating Station  
Oral Arguments

Docket Number: 50-352-LR and 50-353-LR

Location: Norristown, Pennsylvania

were held as herein appears, and that this is the  
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