

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE COMMISSION**

In the Matter of  
Entergy Corporation  
Pilgrim Nuclear Power Station  
License Renewal Application

Docket # 50-293-LR

September 6, 2011

**PILGRIM WATCH OPPOSITION TO APPLICANTS MOTION FOR ISSUANCE  
OF RENEWED LICENSE (August 23, 2011)**

**I. INTRODUCTION**

Pursuant to 10 C.F.R. § 2.323(c) Pilgrim Watch respectfully requests that it be allowed to Reply to Entergy's Motion for Issuance of Renewed License filed August 23, 2011. Pilgrim Watch opposes Entergy's Motion.

Entergy asks the Commission to immediately direct the NRC Staff to issue the renewed license for the Pilgrim Nuclear Power Station ("Pilgrim") in accordance with Entergy's incorrect reading of 10 CFR 2.340 and 2.1210(D) (collectively the "immediate effectiveness rule), or in the alternative, to authorize the NRC Staff to issue the renewed licenses. (Motion at 1) Entergy's request asks the Commission to abdicate its responsibilities and ignore its rules and policies.

Entergy's request should be denied for a host of reasons.

**A Immediate Effectiveness Rule**

Entergy incorrectly argues (i) that the "immediate effectiveness" rule applies and (ii) that the Commission should change the policy that the Commission adopted in SECY-02-008 and has applied ever since. The predicate to 10 C.F.R 2.340 is that the Board has issued its "initial

decision" in this proceeding. Entergy ignores the important fact that it has not. The Board has issued two "partial initial decisions," but these resolved only the specific issues that they addressed. There are numerous undecided contested issues still before the Board and Commission. The Board has not issued, and cannot issue the "initial decision" required by 2.340 until these have been resolved

Additionally, the policy of SECY-02-0088 only allows the Director of NRR to issue renewed operating licenses without Commission approval in uncontested proceedings. SECY-02-0088 and the implementing SRM of June 5, 2002 quite correctly recognize that such a "without approval" procedure is limited to uncontested cases and does not apply in cases, such as Pilgrim's, where the grant of the renewal license is contested. The Commission has a responsibility to see that contested issues raised by an Intervenor are resolved to provide reasonable assurance that public health and safety will be protected going forward.

Entergy argues that the 2007 amendments to the immediate effectiveness rule invalidates SECY-02-0088. However, Entergy recognizes that the NRC staff does not agree; and that "the Commission, as a matter of policy, has not allowed the Director of NRR to make the appropriate findings and renew operating licenses in contested proceedings without Commission authorization." (Entergy at 10) The 2007 Amendments did not invalidate the SECY policy, and the Commission should not abrogate that policy here.

B. NEPA:

Entergy apparently believes that the National Environmental Policy Act (NEPA) permits the NRC to make a final decision now, and without any hearing or consideration of Pilgrim Watch's and the Commonwealth's new and significant information on the lessons learned from

Fukushima and their significance for Pilgrim. Pending Pilgrim Watch and Commonwealth requests resulted from the disaster in Pilgrim's sister-reactors in Fukushima. To comply with NEPA, NRC must consider Pilgrim Watch's and the Commonwealth's new and significant information arising from the accident at Fukushima before relicensing Pilgrim.

C. Reopening:

Entergy argues that the Commission should put an end to what it calls "further delay" because Entergy does not believe that Pilgrim Watch or the Commonwealth will succeed on any of the important matters now before the Board and Commission and that the Commission should put an end to these and simply ignore Pilgrim Watch's pending requests for review. According to Entergy, Pilgrim Watch's pending requests for hearing on new contentions cannot succeed because PW did not move to reopen; Entergy ignored that the record before the Board is not closed and that the Board admits that PW's new contentions raise entirely new issues. As for the Commonwealth, Entergy incorrectly says that the Commonwealth's requests have not made the affirmative showing required to reopen the record or support a waiver allowing litigation of the impacts of spent fuel fires. (Entergy at 15)

In its rush to avoid any Commission involvement, Entergy also forgets that whether, in the context of this proceeding, a formal motion to reopen is required for the Board to consider any of PW's new contentions is now before the Commission, and has not been decided.<sup>1</sup> Indeed, in a Commission Order dated September 1, 2011, "the time within which the Commission may rule on [Pilgrim Watch's] petitions for review [was] extended until further notice."

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<sup>1</sup> Pilgrim Watch's Petition for Review of Memorandum and Order (Denying Pilgrim Watch's Requests for Hearing on Certain New Contentions, August 26, 2011

D. Delay:

The heart of Entergy's request is its view that Pilgrim's renewal proceeding has taken too long; and that this justifies asking the Commission to avoid its regulations and responsibilities, and to ignore NEPA and NRC regulations/policies. Entergy (at 2) complains that length of the proceeding is causing harm to the company. Much of this is Entergy's own-doing. Entergy's steadfast refusal to consider Pilgrim Watch's long standing offer of settlement and Judge Young's offer to appoint a settlement judge. Further Entergy forgets that it is not unusual for contested adjudications to take a long time.

## II. ARGUMENT

### A. The Immediate Effectiveness Rule Does Not Apply

10 C.F.R. 2.1210(a) says "the presiding officer shall render an initial decision after completion of an informal hearing under this subpart." (emphasis added)

The pertinent portions of 10 C.F.R 2.340 provide:

(a) *Initial decision—production or utilization facility operating license.* In any initial decision in a contested proceeding on an application for an operating license (including an amendment to or renewal of an operating license) for a production or utilization facility, the presiding officer shall make findings of fact and conclusions of law on the matters put into controversy by the parties to the proceeding....

(f) *Immediate effectiveness of certain decisions.* An initial decision directing the issuance or amendment of ... an operating license under part 50 of this chapter ...is immediately effective upon issuance unless the presiding officer finds that good cause has been shown by a party why the initial decision should not become immediately effective.

Together and separately, these NRC Regulations could hardly be clearer that the "initial decision" referred to in 2.340 is (i) a decision issued "after completion of an informal hearing,"

(ii) a decision that addresses all of "the matters put into controversy by the parties to the proceedings," and (iii) a decision "directing the issuance or amendment ... of an operating license."

Here, the plain fact of the matter is that the Board has not issued any such "initial decision." The two "partial initial decisions" that Entergy incorrectly says brings 2.340 into play were just that.

A Licensing Board's partial initial decision in an operating license proceeding [] resolves a number of safety contentions, but does not authorize the issuance of an operating license or resolve all pending safety issues..... Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), LBP-85-28, 22 NRC 232, 298 n.21 (1985) citing Boston Edison Co. (Pilgrim Nuclear Power Station, Unit 2), ALAB-632, 13NRC 91, 93 n.2 (1981)." NRC Practice Manual, APPEALS 14

These "partial initial decisions" were not, were not intended to be, and did not amount to, an "initial decision" issued after the proceeding before the Board had been completed, that addressed all controverted issues, and that directed issue of the renewed license that Entergy seeks. Entergy's motion fails on this fact alone.

Entergy's statement that "the Licensing Board has issued an initial decision resolving all matters placed in controversy" (Entergy at 12) is simply wrong; and the Board certainly has not issued any decision directing issue of a renewed license. There are at least three unresolved matters pending before the Board, and at least four others pending before the Commission.<sup>2</sup> Although Entergy would like to short-circuit the process and avoid having the issues now before Board and Commission decided, it seems plain that the Board cannot properly issue its "initial (not "partial") decision" until all outstanding contested issues have been resolved.

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<sup>2</sup> The requests for review and motions, not only of Pilgrim Watch but also of the Commonwealth of Massachusetts now pending before the Commission and the Board are discussed below. (See below pgs., 9-12)

Indeed, this is what the policy stated in SECY-02-0088 is all about, and that policy was not abolished by what Entergy calls the 2007 amendments.

**B. SECY-02-0088 Does Not Apply to Contested Proceedings**

SECY-02-0088 and its implementing Staff Requirements Memorandum (SRM) established that Commission policy allows the Director of NRR to issue renewed operating licenses in uncontested proceedings without Commission approval.

In the context of an uncontested renewal proceeding, this procedure may well make sense in many cases. In an uncontested proceeding, the only participants are the NRC Staff and the applicant. Once the NRC Staff has completed the final SER and SEIS and reached agreement with the applicant, an uncontested license renewal proceeding is effectively over, and the Commission usually has no further substantive role to play.

However, SECY-02-0088, the implementing SRM of June 5, 2002 and the NRC Staff quite correctly recognize that the “issue a license without Commission approval” procedure is limited to uncontested cases.

SECY-02-0088, Commissioner McGaffigan: “[T]he time has come for the Commission to “authorize the Director of NRR to issue subsequent uncontested operating license renewals without prior Commission authorization.” (Emphasis added)

SRM of June 5, 2002: “The Commission authorizes the Director of NRR to issue all future uncontested operating license renewals without prior Commission authorization once the Director of NRR has made the appropriate findings.” (Emphasis added)

Entergy, 9-10: “[T]he NRC Staff has taken the position that the Commission, as a matter of policy, has not allowed the Director of NRR to make the appropriate findings and renew operating licenses in contested proceedings without Commission authorization.

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), Docket No. 50-219-LR, NRC Staff's Response to Opposition of Citizen's Motion for Clarification at 2 (Mar. 4, 2008).

... The Commission too has referred to this policy. AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CL1-09-07, 69 N.R.C 235, 285 (2009) ("when a proceeding is contested, the Staff, as a matter of policy, seeks Commission approval to issue the license, even though the issuance of the license is not stayed by the petition for review.").

In short, the SECY "no approval required" policy simply does not apply in cases, such as Pilgrim's, where the grant of the renewal license is contested. In contested cases, the Commission review and approval is required, and essential.

Even Entergy admits (see Entergy, 9-11) that the long-standing SECY policy that the Commission and NRC Staff have followed for years does not allow the Director of NRR to issue renewed operating licenses in contested proceedings without Commission approval. Once again, the reasoning is clear. Even though the applicant and the Staff may be in agreement, an intervenor well may not agree with them. Both common sense and a sense of justice preclude cutting off the Intervenor's rights before the Commission has considered the disputed issues.

### **C. The SECY Policy Was Not Changed by the 2007 Amendments**

Entergy's argument that the 2007 amendments to the immediate effectiveness rule invalidated SECY-02-0088 is wrong. Entergy is comparing apples to oranges. The "immediate effectiveness rule" says that the Board's initial decision is normally effective immediately. It does not say that such an initial decision itself authorizes NRR or NRO immediately to issue any license.

When, and whether, to order a license actually to be issued is left to the Commission. The rule, 2.340(a), says:

Depending on the resolution of those matters, the Commission, Director, Office of Nuclear Reactor Regulation or Director, Office of New Reactors, as appropriate, after making the requisite findings, will issue, deny or appropriately condition the license: (underlining added): and 2.340(i): "The Commission, the Director of New Reactors, or the Director of Nuclear Reactor Regulation, as appropriate ... shall issue ... an operating license ... within 10 days from the date of issue of the initial decision." (Underlining added)

The important words here are "as appropriate, after making the requisite findings," and "as appropriate." Under SECY 02-0088, one critical "requisite finding" is whether the licensing proceeding was contested or uncontested. If uncontested, SECY and Commission policy say that it is appropriate" for the Director of NRR to issue an operating license. If the proceeding is contested, SECY and Commission policy are equally clear: it is not "appropriate" to issue a license until after the Commission has reviewed the initial decision.

The 2007 amendments did nothing to invalidate the Commission's authority to decide whether issue of a license is or is not "appropriate."

Entergy simply ignores "as appropriate, after making the requisite findings," and "as appropriate." In saying that 2.340(i) requires that the "Staff or Commission 'shall issue an operating license within 10 days of the initial decision'" (Entergy 11) forgets that 2.340(i) says "as appropriate, shall issue ....;" and it is "appropriate" only if the proceeding was uncontested.

The NRC Staff's long-standing position that it is 'not allowed' to issue the renewed license without Commission authorization" (Entergy, 11) is not "contrary to the immediate effectiveness rule." (Id) The Staff's position is consistent with the immediate effectiveness rule, and it is also consistent with the SECY policy that the Commission and the Staff have properly followed since 1988.



Entergy's request that "the Commission either clarify that Commission approval is no longer required, or expeditiously grant approval" (Entergy at 10-11) is once again another effort to cut Pilgrim Watch and the Commonwealth of Massachusetts out of the relicensing proceeding before the issues they raise have been determined. In contested cases, such as Pilgrim's, where contested issues remain, the Commission has a responsibility to follow its rules, wait for the Board to issue the initial decision required by 2.340 and 2.1210, and itself first review the matter.

Pilgrim Watch recognizes that Commission rules permit a licensee to continue to operate during the pendency of a federal court appeal. But Entergy seeks far more than being able to operate, under either its original or an extended license. Entergy asks the Commission to ignore the plain requirements in Rule 2.340 and Rule 2.1210 requiring that the Board first have issued its final and complete "initial decision; and to direct the issuance a renewed license in a way that is not allowed by the pertinent rules, is contrary to NRC policy. If Entergy's improper procedure were to happen, unresolved issues raised by PW and Commonwealth will remain unresolved.

#### Pending Contested Issues

Entergy readily admits that there are three pending requests for hearing - contested issues now before the Board. Entergy says that, "The three requests to litigate new contentions that remain pending before the Board (two from Pilgrim Watch<sup>3</sup> and one from the Commonwealth<sup>4</sup>) seek to have issues stemming from the Fukushima Daiichi accident considered in this license renewal proceeding. The Board has indicated that it will address those three pending requests in

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<sup>3</sup> Pilgrim Watch's Request for Hearing on Post Fukushima SAMA Contention (May 12, 2011); Pilgrim Watch Request For Hearing on A New Contention Regarding Inadequacy [sic] of Environmental Report, Post-Fukushima (June 1, 2011)

<sup>4</sup> Commonwealth of Massachusetts' Contention Regarding New and Significant Information Revealed by the Fukushima Radiological Accident (June 2, 2011)

a forthcoming ruling (LBP-11-20 at 2-3), but has provided no timetable for doing so." (Energy, 7) Entergy wants to insure that the Board does not decide any of the three.

Although Entergy acknowledges that there are currently three pending requests - contested issues now before the Commission. There are actually five; and Entergy does not want the Commission to decide them either.

One is Pilgrim Watch's appeal<sup>5</sup> on the Board's July 19, 2011 decision regarding the remanded portion of Pilgrim Watch Contention 3, LBP-11-18. A second is Pilgrim Watch's appeal of the Board's August 11, 2011 ruling (LBP-11-20) on three contentions that includes Pilgrim Watch's Request for a Hearing on a New Contention (Nov. 29, 2010) and Pilgrim Watch's two Requests for Hearing on the Inadequacy of Entergy's Aging Management of Non-Environmentally Qualified (EQ) Inaccessible Cables at Pilgrim Station (Dec. 13, 2010 and January 20, 2011. Entergy's list ignored a Joint filing where Pilgrim Watch joined other Petitioners in a filing, *Emergency Petition To Suspend All Pending Reactor Licensing Decisions And Related Rulemaking Decisions Pending Investigation Of Lessons Learned From Fukushima Daiichi Nuclear Power Station Accident* (April 14-19, 2011).

Again, Entergy wants its license to be issued before any of these are decided, a fact that is particularly important here since that at least two, if decided in Pilgrim Watch's favor, would result in additional accepted contentions that the Board would have to address.

In addition, the Commonwealth of Massachusetts' Conditional Motion to Suspend Pilgrim Nuclear Power Plant License Renewal Proceeding Pending Resolution of Petition for

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<sup>5</sup> Pilgrim Watch Motion For Reconsideration Of CLI-10-1 1 (04.05.10); Pilgrim Watch's Petition For Review Of Memorandum And Order (Denying Pilgrim Watch's Requests For Hearing On Certain New Contentions) ASLBP No. 06-848-02-LR, August 11, 2011(August 26, 2011)

Rulemaking to Rescind Spent Fuel Pool Exclusion Regulations (June 2, 2011) (“Conditional Motion”) is now before the Commission.

Administrative Judge Ann Marshall Young, Chairman of the ASLB, made it crystal clear that “this licensing board will be addressing certain post-Fukushima contentions filed in May and June.”

In the Board’s Partial Initial Decision (July 19, 2011) Judge Young said,

Additionally, there have been matters raised, relating to how new information arising out of the Fukushima accident in Japan (which occurred only days after the March oral argument in this proceeding) should affect the environmental analysis (including the SAMA analysis) on the application under NEPA, as well as matters relating to the sought license renewal in certain other particulars. And it has been argued in various post-Fukushima filings that any final licensing decision on the renewal application should be postponed until significant further analysis is done concerning the ability of the Pilgrim plant to perform safely in the renewal period, taking into account information arising out of the Fukushima situation and the fact that the Pilgrim plant is of the same type as the Fukushima reactors.

Preliminarily, I would tend to find that some of these arguments do warrant greater scrutiny of the plant and application in light of Fukushima-related information prior to any decision whether to renew the license for another 20 years. However, because the Board Majority’s Initial Decision does not terminate this proceeding or constitute a final licensing decision, I will address the preceding matters in greater detail, as appropriate, in the context of later Board rulings on several pending new contentions and other filings submitted by Pilgrim Watch and the Commonwealth of Massachusetts.<sup>6</sup>

Again on August 11, 2011 Judge Young made a consistent statement, saying that,

Finally, although this licensing board will be addressing certain post-Fukushima contentions filed in May and June of this year in a later issuance, I would add a comment noting again Pilgrim Watch’s request that we take judicial notice of the accident at the Fukushima nuclear power plant in the wake of the earthquake and tsunami there, as well as, among other things, loss of power being a contributing factor in the accident, and the fact that both the Fukushima reactors and the Pilgrim reactor are General Electric Mark I models. Particularly given these circumstances, I find the lack of clarity about which electrical cables might be subject to any salt-water environment, however high or low the concentration, and about the effects of

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<sup>6</sup> LBP-11-18, 73 N.R.C. (July 19, 2011), Separate Statement, pg., 2-3

and efforts to address this, to be of a level of concern sufficient to “tip the balance” in this close case, and to warrant further inquiry and exploration in this proceeding prior to issuing a renewed license.<sup>7</sup>

#### **D. Reopening Dispute Is Before the Commission**

Entergy argues that the Commission should put an end to what it calls "further delay" because Entergy does not believe that Pilgrim Watch or the Commonwealth will succeed on any of important matters before the Commission and the Board.

According to Entergy, Pilgrim Watch's pending requests for hearing on new contentions cannot succeed because PW did not move to reopen; and the Commonwealth's requests have not made the affirmative showing required reopening the record or supporting a waiver allowing litigation of the impacts of spent fuel fires. (Entergy at 15)

In its rush to avoid any Commission involvement, Entergy forgets that both Pilgrim Watch and the Commonwealth agree that reopening is not required. The record is not closed. The Board said that it “... will address Pilgrim Watch’s fourth and fifth contentions, which both concern information derived from the events at the Fukushima reactors, in a separate ruling.”<sup>8</sup> These new contentions have nothing to do with Pilgrim Watch’s originally accepted Contentions 1 or 3. Pilgrim Watch has appealed the issue whether a formal motion to reopen is required. The question is now before the Commission and has not been decided.<sup>9</sup> (*Commission Order, September, 1, 2011*)

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<sup>7</sup> Separate Statement to the Memorandum and Order (Denying Pilgrim Watch’s Requests for Hearing on Certain New Contentions), LBP 11-20, pages 32-33

<sup>8</sup> LBP-11-20, 73 N.R.C., slip op. at 2-3 (August 11, 2011)

<sup>9</sup> Pilgrim Watch's Petition for Review of Memorandum and Order (Denying Pilgrim Watch's Requests for Hearing on Certain New Contentions, August 26, 2011

It is presumptuous of Entergy to assume that they can second guess the Commission. It is hardly an open and shut case in Entergy's favor. Further, there is no basis for Entergy to presume that the Commission will decide that the Commonwealth's requests must be denied.

The Commission hardly would want to "call it quits" now, as Entergy wishes, and not allow the ASLB to perform its responsibility to issue its Orders that sufficiently inform parties of the disposition of these pending contentions so that parties and appeal boards can understand the foundation of the ruling.

#### **E. NEPA Requires Consideration New, Significant, And Material Information**

Entergy denies that Fukushima must be addressed in license renewal. (Entergy at 1-2, 15-16) They are wrong. The pending requests resulted from the disaster in Pilgrim's sister-reactors in Fukushima; and the NRC "ha[s] a duty to take a hard look at the proffered evidence." *Marsh v Oregon Natural Resources Council*, 490 U.S. 360, 385 (1989) before relicensing Pilgrim. The NRC must ensure that "important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson v Methow Valley Citizens Council*, 490 U.S. 332,349 (1989)

##### **1. NEPA Requirements**

The NRC must consider new and significant information arising from the accident at Fukushima before relicensing Pilgrim NPS, whether or not that information ultimately leads to modification of licensing requirements. "Regardless of its eventual assessment of the significance of the information, the [agency] ha[s] a duty to take a hard look at the proffered evidence." *Marsh v Oregon Natural Resources Council*, 490 U.S. 360, 385 (1989)

The fundamental purpose of the National Environmental Policy Act, NEPA, 42 USC § 4332, is to “help public officials make decisions that are based on understanding of environmental consequences, and take decisions that protect, restore and enhance the environment.” 40 CFR § 1500.1(c) (Emphasis added).

In its application for license renewal of Pilgrim, Entergy was required under 10 CFR § 51 to provide an analysis of the impacts on the environment that could result if it is allowed to continue beyond its initial license. The environmental impacts that must be considered in Entergy’s EIS include those which are “reasonably foreseeable” and have “catastrophic consequences, even if their probability of occurrence is low.” 40 CFR §1502.22(b)(1). The fact that the likelihood of an impact may not be easily quantifiable is not an excuse for failing to address it in an EIS. NRC regulations require that “to the extent that there are important qualitative considerations or factors that cannot be quantified, these considerations or factors will be discussed in qualitative terms.” 10 CFR§51.71.

The Commission must assure Pilgrim's adjudication process considers issues raised by Fukushima prior to relicensing Pilgrim; the Fukushima events plainly show that, even if they are not yet all conclusively understood, the environmental impacts of the NRC relicensing Pilgrim may “affect the quality of the human environment in a significant manner or to a significant extent not already considered.” *Marsh* at 374; see also *Marsh* at 372-373

The Commission properly cannot rely upon Entergy’s 2006 SAMA analysis and ignore new and significant information. NEPA requires an agency to consider the environmental impacts before decisions are made. *Robertson v Methow Valley Citizens Council*, 490 U.S. 332,349 (1989)

Pilgrim Watch's new contentions seek compliance with NEPA and they are based on the Applicant's Environmental Report (ER). 10 CFR§2.309(f)(2).

## **2. Entergy's Incorrect Arguments**

### (a) Lessons Learned Will Be Applied Generically To All Reactors:

Entergy argues that Pilgrim Watch and the Commonwealth are wrong to try to inject lessons learned from Fukushima into this proceeding because "The Commission has made clear that the application of any lessons-learned in its review of the Fukushima Daiichi accident will occur as part of the Commissions ongoing regulatory process, irrespective of and wholly apart from the license renewal process...any lessons learned...will be applied generically to all reactors." (Entergy at 2)

Entergy forgets that Pilgrim Watch and the Commonwealth have a right to a hearing under the AEA on their Fukushima-related contentions, whether or not the Commission chooses to address the concerns through a rulemaking process when the issues are generic or as in this proceeding when the issues are site specific. Whichever option the Commission chooses, the NRC must provide Pilgrim Watch and the Commonwealth with a process that satisfies our right to a hearing under the AEA. (*Kelly v. Selin*, 42 F. 3d 1501, 1511 (6th Cir. 1995) Further, even if the Commission wants to address the contested issues brought forward by Petitioners generically, it must address them before Pilgrim can be re-licensed. That duty is not discretionary.<sup>10</sup>

Also, Entergy's argument that the Commission will address lessons learned from Fukushima generically, and that they do not belong in license renewal adjudications, incorrectly

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<sup>10</sup> *Silva v. Romney*, 473 F.2d 287, 292 (1st Cir. 1973).

assumes that issues must be unique to a site in order to require consideration under NEPA.

However NEPA contains no requirement that environmental impacts must be particular to a facility in order to be worthy of consideration in an EIS. The only relevant question is whether Fukushima shows that the potential, consequences and duration for a severe accident at Pilgrim is substantially greater than previously considered in Pilgrim's environmental analysis. Both Pilgrim Watch and the Commonwealth have established that standard of proof in their pending contentions.

(b) Task Force Found No "Imminent Risk to Public Health & Safety"

Entergy also incorrectly argues that the Commission can bypass NEPA because "The Task Force has concluded that 'continued operation and continued licensing activities do not pose an imminent risk to public health and safety' (so that) there is no safety reason why the immediate effectiveness rule should not be applied." (Entergy at 16) Again, Entergy is wrong.

(1) NEPA requires that NRC must take a hard look at the lessons of Fukushima "Regardless of its eventual assessment of the significance of the information, the [agency] ha[s] a duty to take a hard look at the preferred evidence." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 385 (1989) (emphasis added). See also *United States v. Coalition for Buzzards Bay*, -- F.3d --, 2011 WL 1844221 (May 17, 2011)(1st Cir. 2011) at \*10-11, (NEPA framework is designed to stimulate public participation in agency decision making; failure to take hard look at environmental consequences raised in public comment prior to decision making is reversible error).

(2) The NRC must consider the lessons of Fukushima prior to relicensing Pilgrim because these events reasonably suggest - even if they do not conclusively yet establish - that the



environmental impacts of the NRC's relicensing decision for Pilgrim may "affect the quality of the human environment in a significant manner or to a significant extent not already considered." *Marsh* at 374; see also *Marsh* at 372 -373 (NEPA is subject to a rule of reason; EIS must be supplemented if there "are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.").

(3) NEPA does not permit the NRC to disregard these intervening events and to place "blinders on the adverse environmental effects" of its relicensing decision. *Marsh* at 371 – 372; see also *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (NEPA requires an agency to consider the environmental impacts *before* decisions are made to ensure that "important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast."

(4) Based on Entergy's 2006 SAMA analysis, it is not possible at this stage of the proceeding for the NRC to reach the conclusion that "continued operation and continued licensing activities do not pose an imminent risk to public health and safety." Entergy's SAMA analysis was submitted six years before Fukushima. NRC, itself, admits that although all information regarding lessons-to-be-learned are not available today, that enough information is available on some issues that is conclusive. Pilgrim Watch and the Commonwealth put forward substantial factual evidence showing that conclusive lessons learned from Fukushima, pertinent to Pilgrim, were not properly considered in Pilgrim's SAMA. The net result is that the costs of offsite consequences were not properly modeled; risk-reduction mitigations not justified that will impact public health and safety going forward from 2012-2032.

(5) Since the NRC is still evaluating the lessons learned from Fukushima, including environmental risk raised by Pilgrim Watch and the Commonwealth, it is premature and inconsistent with NEPA to make any final decision now. Entergy's Motion must be denied.

**F. Prompt Resolution of Disputes - A Matter Of Policy and Equity**

Pilgrim Watch finds itself somewhat bemused by Entergy's statement (Entergy, 12, fn 37) that "[a]n agency must follow its own rules until it changes them explicitly." Perhaps Entergy only means rules that favor it. Entergy certainly is not asking the Commission to follow Rules 2.340 and 2.1210; and it also is asking the Commission to forget about, for example, 2.309 that gives an intervenor the right to present what the rule calls "nontimely requests" contentions if it meets the rule's (not Entergy's) requirements.

Entergy asks the Commission to ignore important facts. The Board has issued only a partial decision; and there are contested issues before the Board and Commission not yet resolved put forward by both Pilgrim Watch and the Commonwealth. Entergy also asks the Commission to ignore NEPA requirements that the NRC is legally required obligated to comply. In other words, Entergy says ignore the rules and make a decision based on simply the calendar. Entergy's complaint about a delay in the licensing schedule must be rejected.

Entergy arguments that the Pilgrim license renewal proceeding is now in its sixth year largely due to Pilgrim Watch's repeated filings, a period of time that they claim is contrary to NRC policy committing to "prompt resolution of disputes" and the "expeditious completion of adjudicatory proceedings." They say that the time delay is contrary to other licensing decisions; and the delay is causing harm to the company. "Prompt issuance of the renewed license is...in order as a matter of policy and equity." (Entergy at 2) Entergy is wrong.

The length of this hearing to date is not Pilgrim Watch's fault. The Commission, as a result of case load and budget/staff cuts, took nearly two years to make a decision on Pilgrim Watch's Petition for Review, filed November 12, 2008; and over two months to rule on Pilgrim Watch's Response to Judge Paul Abramson's Decision on the Recusal Motion filed June 16, 2010. Nor is it any party's fault that the Commission failed to make clear the scope of the SAMA remand. Also, neither Pilgrim Watch nor the Massachusetts Attorney General caused the disasters at Pilgrim's sister plants in Fukushima that provided new, significant and material information requiring the NRC to take a hard look through "careful scientific analysis." (*Marsh v. Oregon Natural Resources Council*, 490 US. 360, 385 (1989))

Entergy argues further that "the Commission has authorized issuance of multiple license renewals since the Fukushima Daiichi accident, and ...submits that the Pilgrim license renewal should be treated no differently." (Motion at 2) Entergy cites Hope Creek, Salem, Prairie Island, Palo Verde, and Vermont Yankee. None of the reactors cited are listed in the Electronic Hearing Docket as having adjudicatory proceedings, excepting Vermont Yankee and in its proceeding all pending issues had been closed prior to the Decision.

Contrary to the picture that Entergy seeks to paint, an extended process is not unusual if applications are contested. For example: Entergy filed its license renewal application (LRA) for Indian Point April 30, 2007; and, a hearing on the multiple disputed contentions there is yet to be scheduled, expected late 2011 or early 2012. Entergy filed its LRA for Vermont Yankee January, 27, 2006, the same date as Pilgrim, and the decision was issued November 8, 2011, and only after all issues pending were completed.

Pilgrim Watch, unlike Entergy, was willing to expedite the proceeding. Pilgrim Watch outlined modest and reasonable terms of settlement to Entergy in early 2007; and Pilgrim Watch

repeated its commitment to settle for those same terms on numerous subsequent occasions. Pilgrim Watch simply asked Entergy to install onsite a sufficient number of appropriately placed and sampled monitoring wells to test for groundwater leaks of radioactive liquids; to install offsite a sufficient number of appropriately placed radiation monitors to test for radioactive air emissions; and provide all data through a computer link to the Massachusetts Department of Public Health and Massachusetts Emergency Management Agency for emergency planning purposes. Monies that Entergy has paid its lawyers and experts far exceed the cost of the monitors requested. Entergy's refusal to settle leaves the public and local authorities with an obvious and disconcerting conclusion that Entergy fears what the requested monitors might disclose. In 2010, Pilgrim Watch supported the Board's recommendation to appoint a Settlement Judge. Entergy refused.

If there is an ounce of truth in Entergy's claim that delay has caused harm, why did Entergy refuse to settle over five years ago; and refuse in late 2010 to have a Settlement Judge appointed?

Further NRC rules allow a company to continue to operate on its original license if the adjudication process is not completed by the end of its original license. Therefore if pending issues remain when Pilgrim's license expires June 8, 2012, the sun will come up the next morning and they will continue to operate.

### **III. CONCLUSION**

It is important to step back and consider that the Commission's stated Mission and Strategic Outcomes. Its mission is "to ensure adequate protection of public health and safety...and protect the environment." Its Strategic Outcomes are to "Prevent occurrence of...any

nuclear accidents...any inadvertent criticality events...any acute radiation exposures resulting in fatalities... (and) any releases of radioactive materials that cause significant adverse environmental impacts."

Presumably a license renewal proceeding is intended to ensure that all this is done on a site specific basis before granting an additional 20 year license to a 40-year old plant designed like those in Fukushima. Pilgrim Watch does not believe that NRC should relinquish its responsibility to protect public health, safety and the environment because Entergy has decided to play referee and "call the game."

Last it is worthwhile to take a minute to consider the benefits derived from citizen/public interest group's participation. We respectfully direct the Commission's attention to what Atomic Safety and Licensing Board Judge Michael Farrar said in his concurring opinion in the Matter of Shaw Areva Mox Services (Mixed Oxide Fuel Fabrication Facility) June 27, 2008.

... intervenors' right to a hearing, which is an empty promise unless there is an opportunity to be heard "at a meaningful time and in a meaningful manner." It is in that spirit that this concurrence respectfully suggests a need for Commission directives or policies that would enable agency adjudications to proceed differently when circumstances call for it. Specifically, those adjudications should be conducted in a way that more nearly assures that the agency's hearing process - one of the means by which nuclear safety is promoted and the natural environment protected makes the hearings mandated by the Atomic Energy Act "meaningful."

The Petitioners were instrumental in focusing the Board's attention on the troubling matters... That they did so is a testament to the contribution that they, and others like them, can make to a proceeding. Moreover, in doing so they often labor under a number of disadvantages.

... once the initial petition is filed, facility proponents routinely press within the adjudicatory process to ensure that any attempt thereafter to cure any deficiencies - as in a response to the proponents' answers-is rejected as untimely.

... crucial adjudicatory pleading deadlines have practical exclusionary impact on only one of the parties - the petitioners.

Judge Farrar concluded by saying that, "The adjudicatory system--and its impact on public safety and environmental protection - benefits both from robust Staff performance and from meaningful intervenor participation." Petitioners trust the Commission sees it the same way.

Respectfully submitted,

(Electronically signed)

Mary Lampert  
Pilgrim Watch, pro se  
148 Washington Street  
Duxbury, Massachusetts 02332  
Tel 781-934-0389  
Email: mary.lampert@comcast.net  
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