

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
ENTERGY NUCLEAR GENERATION)	Docket No. 50-293-LR
COMPANY AND ENTERGY NUCLEAR)	
OPERATIONS, INC.)	
)	
(Pilgrim Nuclear Generating Station))	

NRC STAFF'S ANSWER TO PILGRIM WATCH'S PETITION FOR REVIEW
OF MEMORANDUM AND ORDER (DENYING PILGRIM WATCH'S
REQUESTS FOR HEARING ON CERTAIN NEW CONTENTIONS)

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September 6, 2011

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.341(b)(3), the staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby answers Pilgrim Watch's ("PW") Petition for Review of Memorandum and Order (Denying Pilgrim Watch's Request for Hearing on Certain New Contentions), ASLBP No. 68-8484-02-LR, August 11, 2011 ("Petition for Review"). After over five and a half years of litigation in this license renewal proceeding, an evidentiary hearing, several prehearing conferences and oral arguments, and the closing of the record, which was followed by Commission review and remand, PW filed two contentions asserting that the aging management program for submerged cables was inadequate and a contention claiming that the cost-benefit analysis in the severe accident mitigation analysis was flawed. In its Petition for Review, PW asserts that the Atomic Safety and Licensing Board ("Board") erred when it applied the reopening standard to these contentions and when it found PW's contentions inadmissible for failure to satisfy that standard. As demonstrated herein, the Board did not err when it applied the reopening standard to the contentions. The Board's legal determination

that PW did not meet the requirements for reopening is supported by precedent and is not in conflict with existing case law. Accordingly, PW's petition for review should be denied.

PROCEDURAL BACKGROUND

Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.'s ("Entergy" or "Applicant") submitted a license renewal application for the Pilgrim Nuclear Generating Station ("Pilgrim") on January 25, 2006.¹ In response to a Federal Register notice of opportunity for hearing,² Pilgrim Watch filed a petition to intervene in this matter on May 25, 2006, submitting five contentions for consideration.³

The Board admitted two of Pilgrim Watch's proposed contentions-- Contention 1, challenging Entergy's aging management program for buried piping and Contention 3, challenging Entergy's Severe Accident Mitigation Alternatives ("SAMA") analysis.⁴ On October 30, 2007, a Board majority granted the motion for summary disposition of Contention 3.⁵ On April 10, 2008, an evidentiary hearing was held on Contention 1, and shortly thereafter, on June 4, 2008, the Board formally closed the evidentiary record.⁶

The Board issued an initial decision disposing of Contention 1 in favor of the Applicant

¹ Entergy Nuclear Operations, Inc., License Renewal Application – Pilgrim Nuclear Power Station (January 25, 2006) (Agencywide Documents and Access Management System ("ADAMS") Accession No. ML060300028).

² Entergy Nuclear Operations, Inc., Pilgrim Nuclear Power Station; Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License No. DPR-35 for an Additional 20-Year Period, 71 Fed. Reg. 15,222 (Mar. 27, 2006).

³ Request for Hearing and Petition to Intervene by Pilgrim Watch (May 25, 2006) (ADAMS Accession No. ML061630125).

⁴ *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 348-49 (2006).

⁵ *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-07-13, 66 NRC 131 (2007).

⁶ Memorandum and Order (Ruling on Pilgrim Watch Motions Regarding Testimony and Proposed Additional Evidence Relating to Pilgrim Watch Contention 1) (June 4, 2008) at 3 (ADAMS Accession No. ML081560375).

and terminated the proceeding on October 30, 2008.⁷ Pilgrim Watch filed a petition for review of the Board's initial decision and other interlocutory decisions,⁸ which the Commission denied on June 17, 2010 in CLI-10-14.⁹

The Commission reversed the summary disposition of Contention 3 and remanded it to the Board for further proceedings as limited by the Commission's Order.¹⁰ On July 29, 2011, the Board issued a partial initial decision finding in favor of the Applicant on remanded Contention 3.¹¹ The Board's decision on remanded Contention 3 is currently pending before the Commission on a petition for review filed by PW.¹²

A few months after it filed its petition for review, PW filed a request for a hearing on the first new contention asserting (hereinafter the "Cleanup Contention"):

Until and unless some third party assumes responsibility for cleanup after a severe nuclear reactor accident to pre-accident conditions, sets a cleanup standard, and identifies a funding source, Entergy should be required to take all of the mitigation steps that would be required by a SAMA (severe accident mitigation alternative) analysis (i) based on a conservative source term using release fractions no lower than those specified in NUREG-1465 or used by the NRC in studies such as NUREG-1450, cleanup to a dose rate of not more than 15 millirem a year, and at least the 95th percentile of the total consequences determined by

⁷ *Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-08-22, 68 NRC 590, 593 (2008).

⁸ Pilgrim Watch's Petition for Review of LBP-08-22, LBP-07-13, LBP-06-23 and the Interlocutory Decisions in the Pilgrim Nuclear Power Station Proceeding at 11 (Nov. 12, 2008)(ADAMS Accession No. ML083240599).

⁹ *Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-14, 71 NRC ____ (June 17, 2010) (slip op. at 39).

¹⁰ *Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 281, 317 (2010).

¹¹ *See generally Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-11-18, 74 NRC ____ (July 19, 2011)(slip op.).

¹² Pilgrim Watch Request for Review of the Partial Initial Decision (Rejecting Upon Remand Pilgrim Watch's Challenge To Meteorological Modeling In SAMA analysis in Entergy's License Renewal Application (July 19, 2011) (ADAMS Accession No. ML11215A133)

the EARLY and CHRON modules of the MACCS2 Code, and (ii) does not reduce any costs by use of a discount factor or probabilistic analysis.¹³

Shortly thereafter, PW filed the second new contention ("Cable Contention 1") asserting:

Entergy's Aging Management Plan for non-environmentally qualified (EQ) inaccessible cables and cable splices at Pilgrim Station is insufficient to provide reasonable assurance that these cables will be in compliance with NRC Regulations and public health and safety shall be protected during license renewal.¹⁴

A few weeks later, PW filed a third contention, similar to the second contention ("Cable Contention 2"), asserting:

Entergy's Aging Management Plan (*as amended by Entergy on January 7, 2011*) for non-environmentally qualified (EQ) inaccessible cables and cable splices at Pilgrim Station is insufficient to provide reasonable assurance that these cables will be in compliance with NRC Regulations and public health and safety shall be protected during license renewal.¹⁵

The Board denied PW's requests for hearing on the Cleanup Contention and Cable Contentions 1 and 2¹⁶ and on August 26, 2011, pursuant to 10 C.F.R. § 2.341(b)(1), PW filed a petition for review of the Board's decision denying the Cleanup Contention and Cable Contention 2.¹⁷

¹³ Pilgrim Watch Request for Hearing on a New Contention (November 29, 2010)(ADAMS Accession No. ML103420305).

¹⁴ Pilgrim Watch Request for Hearing on a New Contention: Inadequacy of Entergy's Aging Management of Non-Environmentally Qualified Inaccessible Cables (Splices) at Pilgrim Station (December 13, 2010) (ADAMS Accession No. ML103500400).

¹⁵ Pilgrim Watch Request for Hearing on a New Contention: Inadequacy of Entergy's Aging Management of Non-Environmentally Qualified Inaccessible Cables (Splices) at Pilgrim Station (January 20, 2010)(ADAMS Accession No. ML110200267).

¹⁶ Memorandum and Order (Denying Pilgrim Watch's Requests for Hearing on Certain New Contentions), LBP-11-20, 74 NRC ____ (Aug. 11, 2011) (slip op at 3.).

¹⁷ Petition for Review.

ARGUMENT

I. Standard for Review of a Board Decision

The procedural regulations at 10 C.F.R. § 2.341(a)(1) govern PW's petition for review. Subsection (b)(4) provides that the Commission may grant a petition for review "giving due weight to the existence of a substantial question" with respect to one or more of the following considerations:

- (1) a clearly erroneous finding of fact;
- (2) a necessary legal conclusion is without precedent or conflicts with existing law;
- (3) the appeal raises a substantial and important question of law or policy;
- (4) the proceeding involved a prejudicial procedural error; or
- (5) any other consideration the Commission determines to be in the public interest.

10 C.F.R. § 2.341(b)(4).

In this instance, the Board determined that the reopening standard applied and that PW had failed to meet that standard and, therefore, denied admission of the proffered contentions. The question the Board determined was thus a question of law. There were no findings of fact; the appeal raises no substantial or important questions of law or policy; and PW has not claimed prejudicial procedural error. With respect to a board's conclusions of law, a petitioner must show an "error of law or abuse of discretion" by the board.¹⁸ The Commission will reverse a board's legal conclusions only "if they are a departure from or contrary to established law."¹⁹

¹⁸ *USEC, Inc. (American Centrifuge Plant)*, CLI-06-0, 63 NRC 433, 439 n.32 (2006).

¹⁹ *Tennessee Valley Authority (Watts Bar Nuclear Plant, Unit 1; Sequoyah Plants, Units 1 & 2; Browns Ferry Nuclear Plant, Units 1,2 &3)*, CLI-04-24, 60 NRC 160, 190 (2004).

II. The Standard for Reopening the Record

Once the record is closed, it will not be reopened except upon a strong, well-supported showing of singular circumstances. Accordingly, the regulations provide that a motion to reopen the record will not be granted unless it satisfies the following three criteria:

- (1) The motion must be timely, except that an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented;
- (2) The motion must address a significant safety issue; and
- (3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

10 C.F.R. § 2.326(a). *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 688 (2008). The motion must be accompanied by an affidavit that provides the factual and/or technical bases for the movant's claim that the three criteria in section 2.326(a) are satisfied. 10 C.F.R. § 2.326(b). The evidence supporting the motion must satisfy the Commission's admissibility standards in 10 C.F.R. § 2.337(a); it must be "relevant, material, and reliable." *Id.* at 672. Moreover, "the moving papers must be strong enough, in the light of any opposing filings, to avoid summary disposition." *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 (2005).

The standard for admissibility of a contention associated with a motion to reopen is also high. *See Private Fuel Storage*, CLI-05-12, 61 NRC at 350. The contention must, of course, meet the general admissibility requirements at 10 C.F.R. § 2.309(f). But in addition, 10 C.F.R. § 2.326(d) expressly states that where the contention raises an issue not previously in controversy, the contention must satisfy the requirements for admission of nontimely contentions at 10 C.F.R. § 2.309(c). A nontimely contention will only be admitted upon a balancing of eight factors, the most important of which is good cause for the failure to file on

time.²⁰ Finally, the contention must meet the standard for late-filed contentions, or contentions filed after the initial filing period has passed. Such contentions are allowed “only ‘upon a showing that – (i) [t]he information upon which the amended or new contention is based was not previously available; (ii) [t]he information upon which the amended or new contention is based is materially different than information previously available; and (iii) [t]he amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.’” *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 636 (2004) (quoting 10 C.F.R. § 2.309(f)(2)(i)-(iii) (alterations in original)).

III. The Board’s Decision Is Supported by Precedent and Does Not Conflict with Existing Law

A. The Board Did Not Err in Applying the Reopening Standard

Having closed the evidentiary record in 2008, the Board properly viewed PW’s Cleanup Contention and Cable Contentions 1 and 2 as attempts to reopen the record. PW argues that because this proceeding is still ongoing and a result has not yet been reached, the reopening standard does not apply.²¹ PW conflates the termination of the proceeding with the closing of the evidentiary record. These are two separate events, which may occur simultaneously or not. Judge Young explained the difference between the close of the proceeding and the close of the record in her statement concurring with the majority that the reopening standard must be applied:

[i]n the *Vermont Yankee* proceeding, in which the Commission on appeal of board initial decisions remanded the case for a limited purpose, it observed that, although the *proceeding* would remain open, Intervenor therein had to submit a motion to reopen to

²⁰ *Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit 3), CLI-09-05, 69 NRC 115, 125-26 (2009).

²¹ Petition for Review at 4.

address ‘any *genuinely new* issues related to the license renewal application that previously could not have been raised.’

August 11 Memorandum and Order, J. Young Concurring in Part and Dissenting in Part, at 3.

The Board’s application of the reopening standard was thus consistent with prior case law and the petition for review challenging this part of the Board’s decision should, therefore, be denied.

B. Pilgrim Watch’s Cable Contention 2 Does Not Meet the Reopening Standard and Was Not Timely

The Board observed that throughout the proceeding, PW maintained that Cable Contention 2 was not subject to the reopening standard and thus steadfastly refused to address the criteria for reopening.²² The Board stated that PW’s refusal to address the reopening criteria deprived the Board of the very information it would need in order to rule in favor of PW on reopening, particularly, a demonstration that a materially different result would have been likely had the proffered contention been admitted.²³ In light of the Commission’s stated position that it is the “petitioner (not the board)”²⁴ who must supply the information required to show admissibility, the Board’s determination that PW must establish that it met the reopening standard was correct.

Even if PW had addressed the reopening standard, the Board stated that it would have rejected Cable Contention 2 because PW failed to show that it had raised the issue in a timely manner, a showing required for reopening pursuant to 10 C.F.R. § 2.326(a)(1) and Commission precedent.²⁵ In Cable Contention 2, PW argued that the Applicant’s aging management

²² August 11 Memorandum and Order at 12.

²³ *Id.* at 23-24.

²⁴ *Id.* at 15-16, quoting *AmerGen Energy Co. LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 260 (2009).

²⁵ *Id.* at 24-25.

program for submerged cables was inadequate and pointed to the Applicant's recent amendment of the program in an attempt to justify its filing of the contention over five and half years after the initial period for filing contentions expired.²⁶ But the Board noted that the Applicant's amendment of its aging management program for cables expanded the scope of the program and the frequency of testing and inspection and thus constituted an enhancement to the program.²⁷ The Board noted that if the enhanced program is inadequate, then the original, unenhanced program must also have been inadequate and PW should have challenged the original, unenhanced program when it filed its initial contentions, citing *Oyster Creek*, CLI-09-7, 69 NRC at 273-74.²⁸ In a similar situation in which it approved the application of the reopening standard and the rejection of a similar contention as untimely, the Commission stated that the complaint, "if true today, was equally true when [the applicant] filed its Application" and that the intervenor could have and should have been aware of this when it first filed its contentions in the proceeding.²⁹

In its Petition for Review, PW asserts that the Board misread the regulation governing reopening and that the reopening standards should only be applied to contentions that seek to raise issues that have been litigated and should not be applied to new contentions which have "nothing to do with the closed portion of the record, and in fact [present] new questions that were not, and could not have been earlier litigated."³⁰ This interpretation of the regulation at 10

²⁶ Pilgrim Watch Request for Hearing on a New Contention: Inadequacy of Entergy's Aging Management of Non-Environmentally Qualified Inaccessible Cables (Splices) at Pilgrim Station (January 20, 2010) at 24-25.

²⁷ *Id.* at 27.

²⁸ *Id.* at 28.

²⁹ *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-11-02, 73 NRC ____ (Mar. 10, 2011) (slip op. at 9).

³⁰ Petition for Review at 5.

C.F.R. § 2.326 is incorrect. As the Third Circuit held, such a reading of the regulation would render it a nullity.

Pursuant to 10 C.F.R. § 2.326(d), "[a] motion to reopen *which relates to a contention not previously in controversy* among the parties must also satisfy the requirements for nontimely contentions in § 2.309(c)." (emphasis added). Thus, the regulations explicitly allow for contentions alleging previously nonlitigated issues to be raised through a motion to reopen. To accept Citizens' argument that the motion to reopen standard may never be applied in situations where a petitioner seeks to add previously unlitigated material would effectively render the regulation meaningless.

New Jersey Environmental Federation v. NRC, No. 09-2567, 2011 WL 1878642, at *9-10 (3rd Cir. May 18, 2011).

PW further argues that Cable Contention 2 was timely filed and that the Board misread the case law on the issue of timeliness. PW asserts that *Vermont Yankee* does not mandate denial of a contention merely because the contention is based on an amendment to an aging management program.³¹ While there may indeed be instances where an amendment to an aging management program may support a contention filed out of time, the main thrust of the decision, which the Board relied on, is that "timeliness turns here on the threshold question of when [the petitioner] first had access to information sufficient to enable it to proffer [the contention]"³² and that if a contention is raised late in the proceeding and was "equally true" when the proceeding was initiated, the contention is untimely.³³

PW also disagrees with the Board's characterization of the Commission's holding in *Oyster Creek*; instead of an endorsement of the Board's approach, PW views the Commission's decision as merely affirming the Board's determination that, under the circumstances presented

³¹ Petition for Review at 8.

³² *Vermont Yankee*, CLI-11-02, 73 NRC ___, slip op. at 6.

³³ *Id.* at 9-14.

in the proceeding before it, enhancement to a program did not constitute new information sufficient to support a new contention. The Staff, however, submits that the Commission ultimately affirmed the approach taken by the *Oyster Creek* Board and, indeed by the Board in this proceeding: that where a petitioner relies on an enhancement to an aging management program for admissibility of a contention years after the initial filing date has passed, and the petitioner could have -- but did not -- challenge the original program, the contention will be rejected as untimely.³⁴

The Board's rejection of PW's Cable Contention 2 is thus consistent with precedent and should, therefore, be affirmed.

C. Pilgrim Watch's Cleanup Contention Raises Issues that Are Beyond the Scope of this Proceeding, Requests Remedies that Were Rejected by the Commission, and Does Not Meet the Reopening Standard

The Board correctly held that PW's Cleanup Contention was inadmissible. It raises issues regarding policy matters that lie solely with the Commission and those issues are beyond the scope of this proceeding. It requests remedies that the Commission has already rejected. And the contention was not supported by an affidavit and thus failed to meet this requirement under the reopening standards.

Fundamentally, PW's Cleanup Contention faults the NRC for failing to arrive at an agreement with the Environmental Protection Agency and the Federal Emergency Management Agency regarding radioactive cleanup. The Board recognized that Pilgrim Watch's dissatisfaction with NRC policy and interaction with other agencies regarding the clean-up of a severe accident raised policy issues that cannot be addressed by the Board but can only be

³⁴ *Oyster Creek*, CLI-09-7, 69 NRC at 273-74, *aff'd*, *New Jersey Environmental Federation v. NRC*, No. 09-2567, 2011 WL 1878642, at *9.

addressed by the Commission.³⁵ Accordingly, the Board ruled that the contention raised issues that are beyond the scope of this proceeding and was, therefore, inadmissible.³⁶

The Board also held that the contention was inadmissible because it challenged Commission rulings in this matter: rulings that had rejected the remedies PW was raising yet again in the contention.³⁷ In its Cleanup Contention, PW sought a more conservative SAMA analysis, but, as the Board noted, that kind of analysis was specifically rejected by the Commission in *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 281, 316 (2010).

Finally, the Board stated that the Cleanup Contention was inadmissible because PW refused to address the reopening standards when it submitted the contention and, in particular, refused to submit an affidavit in support of the contention.³⁸ The reopening standard requires the petitioner to demonstrate that a materially different result would have been likely had the new material been considered in the first instance. 10 C.F.R. § 2.326(a)(3). Because PW did not submit an affidavit in support of the contention, PW did not demonstrate that a materially different result was likely and did not satisfy this requirement for reopening. For this additional reason, the Board denied the contention.

The Board's rejection of PW's Cleanup Contention is consistent with the regulations, case law generally, and the law of the case here. The petition for review should, therefore, be denied.

³⁵ August 11 Memorandum and Order at 19.

³⁶ 10 C.F.R. § 2.309(f)(1)(iii). *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-08-17, 68 NRC 213, 242 (2008); *Duke Energy Carolinas, LLC* (William States Lee III Nuclear Station, Units 1 and 2), LBP-08-17, 68 NRC 451, 452 (2008) (contentions that constitute generalized grievances with respect to NRC policy raise issues beyond the scope of adjudicatory proceedings and are not admissible).

³⁷ August 11 Memorandum and Order at 19.

³⁸ *Id.* at 20.

CONCLUSION

As shown above, the Atomic Safety and Licensing Board correctly applied the reopening standards to the contentions Pilgrim Watch filed after the record closed. The contentions did not meet the reopening standards because they were unsupported by the affidavits setting forth the factual bases supporting the contentions and demonstrating that a materially different result would have been likely had the contentions been admitted. Moreover, the contentions were not timely, raised issues beyond the scope of the proceeding, and requested remedies the Commission rejected earlier in the proceeding. The Board's legal determination that Pilgrim Watch did not meet the requirements for reopening is supported by precedent and is not in conflict with existing case law. Accordingly, Pilgrim Watch's petition for review should be denied.

Respectfully submitted,

/Electronically signed/

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Dated at Rockville, Maryland
This 6th day of September, 2011

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S ANSWER TO PILGRIM WATCH'S PETITION FOR REVIEW OF MEMORANDUM AND ORDER (DENYING PILGRIM WATCH'S REQUESTS FOR HEARING ON CERTAIN NEW CONTENTIONS)" have been served upon the following by the Electronic Information Exchange this 6th day of September, 2011:

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