UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
Entergy Nuclear Generation Co. and	)	
Entergy Nuclear Operations, Inc.	)	Docket No. 50-293-LR
	)	
	)	ASLBP No. 06-848-02-LR
(Pilgrim Nuclear Power Station)		

September 12, 2011

PILGRIM WATCH REPLY TO ENTERGY'S ANSWER OPPOSING PILGRIM WATCH'S PETITION FOR REVIEW

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In accordance with § 2.323(c) Pilgrim Watch ("PW") seeks leave to reply to Entergy's September 6, 2011 Answer Opposing Pilgrim Watch's Petition for Review. PW could not anticipate that Entergy would try to muddle rather than address the issues.

The primary issue before the Commission is whether PW was required to file a motion to reopen any record to present new contentions that (i) meet the requirements of 10.C.F.R 2.309 and (ii) have absolutely nothing to do with anything that the Board has decided. The answer is that PW was not. Entergy spends pages discussing "a Grave nor a Significant Safety Issue" and "a Materially Different Result," but since no record is being reopened, they are irrelevant.[1]

1. **PW Was Not Required to File a Motion to Reopen.** The basic question here is whether PW is seeking to reopen any "closed record." Energy, both here and in its recently filed Motion asking the Commission immediately to issue a renewal license, seems contend that, no matter how many issues may remain outstanding, the entire record of a Board licensing proceeding is closed if the record with respect to any contention has been closed, and that it is entitled to its renewal license once any partial initial decision has been issued. PW does not believe that the Commission, or a reviewing court, could rationally read the Commission rules this way.

PW believes that the only sensible, or proper, reading of 10 C.F.R 2.236 is that the term "record" refers to the record regarding a matter that has been decided (or, to deal with the gap between the end of a hearing or proceeding and when the Board issues a decision, a matter that

[1] In the 5 pages allowed here, PW does not have room to deal all of the inaccuracies in Entergy's response, both in its "Statement of the Case" and its characterizations of PW's positions. We trust the Commission's legal staff will do the necessary review.

the Board has taken under advisement;[2] and that a "record" is "closed" only if and to the extent that the Board says so.

A Board often closes the record with regard to a particular contention when all the evidence as to that contention has been heard; and the Board here did so with respect to record regarding Contention 1. See Board Order of June 4, 2008. If PW had sought to reopen with respect to Contention 1, PW agrees that a motion to reopen the closed record of that contention would be required.[3]

But the Board has not closed the record in this proceeding, or with respect to any of the issues raised by PW's new contentions. Entergy seems to recognize the Board may not properly do so until "all timely raised issues have been resolved" (Entergy at 8), and to admit that there are pending requests before the Board and Commission.[4] (Entergy Motion for Issuance, pp 1, 7)

The Administrative Safety Licensing Board knows the difference between closing the record as to a particular contention and closing the record of a proceeding. After the hearing on Contention 1 had been completed, the Board here issued its June 4, 2008 Order closing" the record with regard to Contention 1." But the Board has never issued an order like those in for example, *Southern Nuclear Operating Co*., LBP 10-21 ("Once the record of a proceeding is closed" and *Areva Enrichment Services, LLC*, Feb. 18, 2011 ("The Board hereby closes the record of this proceeding…"). Judge Young's statement that the open issues here "warrant further inquiry and exploration in this proceeding prior to issuing a renewed license" (Separate

[2] PW agrees that there is necessarily "gap between the time the record is closed and the time the administrative decision is promulgated" (Entergy at 9), and that a new contention filed in that "gap," i.e., "after the record is closed but before an Initial Decision is issued" (Entergy at 9), would require a motion to reopen.

[3] PW does not seek to reopen anything with respect to either Contention 1 or Contention; the contentions PW raises are entirely new, as the Board has recognized. (August 11, 2011 Majority Decision, p.14)

[4] Under the applicable rules, a Board cannot close the record of a proceeding until it has completed this informal hearing (10 C.F.R 2.1210), and has received and heard everything necessary to permit it to issue the initial decision required by 10 C.F.F. 2.340 that addresses "all matters put into controversy by the parties." (10 C.F.R. 2.340(a))

Statement, August 11, 2011, p. 32) could hardly make clearer that the record in this proceeding as to those issues is not closed.

The requirement in 2.236(a)(3) that a motion to reopen "must demonstrate that a materially different result would be or would have been likely" emphasizes that "closed record" in 2.236(a) must mean a record directed to a matter that has actually been decided and as to which there is some "result." [5] It makes no sense to apply 2.326(a) to a "record" that may not even exist, and that certainly has not been closed. Until the Board has decided a matter, there is no "materially different result [that] would be or might or might have been likely had the newly proffered evidence been considered initially."

2. **"Even If:"** PW's consistent position is that no motion to reopen is required. The Board majority said that PW did not "attempt to argue in the alternative." PW explicitly said "even if it [a motion to reopen] were required," PW met the reopening standard. There is no meaningful substance difference between "in the alternative" and "even if." Even Entergy does not say that there is.

Entergy's Reply ignores this, and instead tries to say that PW asked the Board to rewrite PW's contentions (Entergy at 12). PW did not

3. PW's Alleged Failure to Meet the Reopening Standards. As a starting point, this entire portion of Entergy's reply (pp 10-23) is irrelevant because "the Reopening Standards" (Rule 2.236) simply do not apply here. The only standard that applies is that of Rule 2.309.[6]

Even if it were otherwise, Entergy's statement that PW failed to present affidavits in support of Cable Contention 2 (Entergy at 11) is simply wrong. Entergy may not like what Mr.

[5] Since administrative necessity requires dealing with the "gap" between the time a record is closed and a decision is promulgated, PW agrees with Entergy that a motion to reopen would be required with respect to a matter under advisement.

[6] PW recognizes that "timeliness" is an aspect of Rule 2.309. PW's contentions were timely, as discussed in its Request for Hearing, Jan 20, 2011(pp. 53-54); below at 4; and PW's Reply to the NRC Staff, (pp.3-4)

Blanch said, indeed Entergy's reply (see pp 17-23) clearly shows the vast number of material facts that Entergy and PW dispute. Judge Young correctly recognized that PW's contentions would survive a motion for summary disposition. (Statement, pp 17-32)

a. **Timeliness -** *Both* Entergy and Staff say that the Cable Contentions were not timely because they are based on an enhancement to the original AMP. Beyond that this is doubly wrong – as a matter of law[7] and also as a matter of fact since Cable Contention 2 was also based on new information from the Fukushima disaster and the subsequent NRC Task Force finding (provided to the Board in Memoranda on March 12, 2011, June 23, 2011 August 8, 2011) and new information regarding "proven tests" to detect cable insulation degradation that showed Entergy provided false sworn testimony (provided to the Board in Memoranda on April 11 & April 12, 2011; also see discussion in PW Petition 19-20). Further, PW will not here repeat what it said on timeliness in PW's Jan. 20, 2011 Request for Hearing and in its Sept 12, 2011 reply to the Staff.

b. **Significance –** Does Entergy really believe that its failure to properly manage aging of non-environmentally-qualified (Non-EQ) inaccessible cables does not raise a grave or significant safety issue? The NRC's own papers make it abundantly clear that they do. NRC IN-2012-06 warns that wet or submerged environment will increase the <u>probability</u> that multiple cables will fail on demand, and that the potential for a common-mode failure will increase. Mr. Blanch's affidavit also showed that "that this is a grave safety issue that may result in common mode failures increasing the probability and possibly challenging the integrity of the reactor coolant pressure boundary, the capability to shut down the reactor and maintain it in a safe shutdown

[7] Entergy attempts to rewrite the Commission's decision in *Yankee Atomic* (Entergy at 14), and ignores that *Oyster Creek* supports PW's position (PW Petition at 8).

condition; or the capability to prevent or mitigate the consequences of accidents. Blanch Decl., ¶ 50. Judge Young agreed (Statement, 13-16)

c. **Materially Different Result:** Entergy does not even try to tie PW's new and significant information to any record of any matter that has been decided or that the Board has taken under advisement – thus belying its argument that 2.236 has any application to PW's new contentions.

Rather, it simply says that none of PW's or Mr. Blanch's allegations "would likely produce a materially different result in the outcome of the proceeding." In doing so, Entergy in effect asks the Commission to decide PW's new contentions in advance of any hearing to determine who – Entergy or PW – is right. PW is quite clear, if these new contentions were accepted and heard by the Board the outcome should be that Entergy would not be granted a renewal license – at least not until it had (i) addressed the "grave and serious safety" issues that its widespread use of Non-EQ cables that as the NRC has found and Entergy has admitted, are frequently submerged[8] and (ii) conducted a proper SAMA analysis under a clear clean-up standard. (See PW Sept 12, 2011 Response Staff, pp.4-5) Entergy naturally disagrees, but there can be no disagreement if PW's alleged facts are found to be correct, the "result" will be a final outcome that is "materially different" from what Entergy wants.

Respectfully submitted,

(Signed electronically)

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[8] NRC Integrated Inspection Report 05000293/2010003,1RO6 flood Protection Measures, pp. 7-8, July 29, 2010: where inspectors looked in three cable vaults and observed partially or fully submerged medium voltage cables in all three; Entergy admitted that two of the three were "always found submerged;"(Jan 20,2011 Request Hearing, p. 22-23; emphasis added)