

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 NRC STAFF'S ANSWER TO
PILGRIM WATCH'S REQUEST FOR REVIEW**

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In accordance with § 2.323(c) Pilgrim Watch (“PW”) seeks leave to reply to NRC Staff’s September 6, 2011 Answer to Pilgrim Watch’s Petition for Review of Memorandum and Order.

1. No Motion To Reopen Is Required For Either The Cables or Cleanup New Contentions: The Staff supports its argument that a motion to reopen was required by saying that “on June 4, 2008, the Board formally closed the evidentiary record.” There are at least two fundamental flaws in the Staff’s assertion. First, and completely ignored by the Staff, is that the June 4, 2008 Board order could not have more clearly said that the only closed record was that with regard to Contention 1, AMP for Buried Pipes and Tanks (Order, pp; 2-3, 3-4):

We note in taking this approach that we have not prior to this date formally closed the record with regard to Contention 1
[W]e consider that the record with regard to Contention 1 is effectively closed, and to the extent necessary we here and now formally so close it.

The implication that the Staff seeks to create, that the entire record was then “formally closed,” is simply not so.

Second, 10 CFR 2.236 says “record.” It does not say “evidentiary record,” and there is an important distinction (that the Staff again overlooks) between the two. A hearing before the Board on a contention creates an “evidentiary” record of that contention; the hearing on Contention 1 created an evidentiary record of that hearing. But the “record” of a proceeding is, as even Entergy seems to admit (see Entergy Reply at 4) a record that includes all timely raised issues. PW timely raised subsequent contentions that remain before the Board and Commission.

As for the Staff’s statement that “PW conflates the termination of the proceeding with the closing of the evidentiary record” (Staff at 7), to the extent that PW confused the Staff and might

better have said “closing the record of the proceeding,” we apologize. PW recognizes, as Entergy points out in its reply, that “Administrative consideration of evidence always creates a gap between the time the record is closed and the administrative decision is promulgated.” (Entergy at 9, emphasis Entergy’s) PW’s point, that the Staff obfuscates, is that the record of this proceeding was not closed when PW filed its new contentions, and it still has not been.

Regarding *Vermont Yankee*,¹ the Staff’s quotation of Judge Young conveniently ignores the important facts in *Vermont Yankee*: See PW Petition for Review, p.6

(3) *Vermont Yankee* – Unlike here, the “new contention” was essentially the same as other contentions previously decided and as to which the record was closed. “We agree with the Board that NEC has simply rehashed old arguments in Contention 2C.” CLI-10-7, 67 (Emphasis in original)

On the facts actually present in *Vermont Yankee*, what Judge Young said in the Staff’s extracted quotation is correct – the *Vermont Yankee* “*proceeding would remain open*”, and “*genuinely new issues* related to [matters that had already been decided in] the license renewal application” would require a motion to reopen.” (emphasis the Staff’s)

In its Petition for Review, PW said (p., 5) it “agrees with Judge Young that “rule [2.236(d)] is not intended to be limited to motions seeking only to submit additional evidence relating to a previously admitted contention” (Separate Statement, p. 2). As PW also said, “the test is whether the new contention seeks to reopen a closed record.” (Id.) PW’s new contentions do not. Both the Staff’s and Entergy’s replies completely ignore the Board majority’s specific finding that “Each of Pilgrim Watch’s new contentions raises new matters not heretofore raised in this proceeding” (Memorandum and Order, August 11, 2011, p.14, emphasis added)

¹ The Staff’s reliance on *New Jersey Environmental* (Staff at 10) is also misplaced. *New Jersey Environmental* has nothing to do with the issue here – whether PW was required to file a motion to reopen. In *New Jersey Environmental*, Citizens filed a motion to reopen after the administrative record had been closed, the Board’s Initial Decision had been issued, Citizens had a petition for review with the Commission. *New Jersey Environmental*, Slip opinion, pp. 13, 27 Here, none of these circumstances are the case.

PW's new contentions are unrelated to either the closed Contention 1 evidentiary record, or to the then-still-open Contention 3 record, and have nothing to do with any matter that has already been decided or taken under advisement.

Here, the proceeding and its record are indisputably open. The record in this proceeding was not closed when PW's requests for hearing were filed, and is not closed even today.

2. PW's New Contentions are Timely: Staff (at 8) echoes the Decision's incorrect majority position that the Contention was not timely because the Gall revision and Entergy's supplement merely enhanced the original AMP. According to them, if the enhanced AMP is inadequate, so too was the original and the filing should have been made in 2006. The Staff cites the Board majority statement that "the Commission is plain in its view that an enhancement to a program does not constitute new information sufficient to support a new contention." (Decision at 27, citing Oyster Creek, CLI-09-7, 69 NRC 273-74) However the Staff, like the Board majority, ignores that "what the Commission actually did in Oyster Creek with respect to the 'enhancement' ruling of that Board was to find it to be reasonable and to state that it saw 'no error in [its] reasoning.'" (Statement at 11, citing Oyster Creek, CLI-09-7, 69 NRC at 274) The Commission did not say a petitioner could not file a contention based on a supplement to an application; neither did the Third Circuit Court of Appeals.

Further, let us not ignore reality - later filed contentions are often based in part upon new information and in part upon information that was known at the time of the initial deadline. The NRC's Staff Practice and Procedure Digest- March 2010 correctly recognizes that

The answer to the "good cause" factor may involve more than looking at the dates on the various documents submitted by the petitioners. Instead, the inquiry turns on a more complex determination about when, as a cumulative matter, the separate pieces of the new information "puzzle" were sufficiently in place to make the particular concerns espoused reasonably apparent. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 26 (1996) (Emphasis added)

Until December 2, 2010 when Cables Contention 1 was filed, PW did not know that, despite the flurry of paper that the NRC has produced over the years recognizing that there is a serious problem with Inaccessible Non-EQ electric cables,² the NRC had decided to not require the industry to do anything of substance to address those problems in the Gall Revision. Indeed, all of the papers that NRC Staff and Entergy cite to show why everyone should have known of this problem led PW to assume that the NRC would seriously address the issue. They failed to do so. After Fukushima, where loss of electric power was the key factor in the disasters, and climate change predictions on Massachusetts' coast predicting increased storms, wetness and flooding require that now is the time for a "hard look" at the sufficiency of Pilgrim's AMP for submerged Non-EQ cables.

3. Significance, Materiality, Affidavit: Significantly, the Staff nowhere says that PW's Cable contentions failed to raise significant safety issues or failed to demonstrate that a materially different result would be or would have been likely or failed to provide a proper Affidavit. Here the Staff is in agreement with Pilgrim Watch (Petition for Review 10-14) and Judge Young (Memorandum and Order, August 11, 2011, Separate Statement, pp.13-32)

4. NEPA: NRC Staff completely avoided the Board majority's failure to even consider that PW's subsequent Memoranda provided new, significant and material information and that, under NEPA, the Board was required to take a "hard look." (Petition at 18) Only by totally avoiding NEPA's clear requirement was the Staff, like Entergy, able to conclude that PW's Petition should be denied.

² NRC Information Notice 2010-26: Submerged Electrical Cables, Background (p., 6-7) reviews NRC Information Notices and Generic Letters 2002-2010, Attached to PW Request New Hearing, December 13, 2010

5. PW's Cleanup Contention Raised Issues within the scope of this proceeding:

The Staff (at 11) says that PW's Cleanup Contention raised issues beyond the scope of this proceeding and requests remedies rejected by the Commission. They are wrong. (Petition 23-25)

The Staff, like the Board majority, still do not understand the contention. First, the contention addressed a defect in the SAMA analysis, a Category 2 issue that is within scope. Entergy's cost-benefit analysis is not valid because there is no established cleanup standard, and offsite economic costs are heavily dependent on whether the standard is, for example, 15 mrem/yr or perhaps 5 rem/yr. Absent a federal agency in charge of cleanup, it will be less efficient and more costly; and there is no source of funding. Staff also insists incorrectly that the contention asked for remedies that the Commission previously rejected. It did not. PW merely suggested two options- either deny the license or choose some middle-ground such as a requirement to prepare a more conservative SAMA that inevitably would add more SAMAs to mitigate the potential need for significant cleanup for which there is no standard for cleanup, responsible agency in charge, or monies set aside. The Cleanup contention was not required to satisfy the reopening standards, discussed here at page 1. An affidavit was not required, contrary to NRC; PW's contention met requirements. PW provided 149 pages of emails between EPA, FEMA and NRC obtained by Inside EPA under the Freedom of Information Act, and a study prepared by Pacific Northwest Laboratory.

Respectfully submitted,

(Signed electronically)

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