UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
Entergy Nuclear Generation Co.	)	Docket No. 50-293-LR
And Entergy Nuclear Operations, Inc.	)	
(Pilgrim Nuclear Power Station)	)	September 13, 2011

COMMONWEALTH OF MASSACHUSETTS REPLY TO NRC STAFF AND ENTERGY OPPOSITIONS TO COMMONWEALTH MOTION TO SUPPLEMENT BASES TO CONTENTION ON NRC TASK FORCE REPORT ON LESSONS LEARNED FROM FUKUSHIMA

I. Introduction

On August 11, 2011, the Commonwealth of Massachusetts (Commonwealth) filed a motion to supplement the bases for its contention previously filed with the Atomic Safety and Licensing Board (ASLB) on June 2, 2011, which focuses on the lessons learned from the accident at the Fukushima Daiichi Nuclear Power Plant and their relevance for the Pilgrim Nuclear Power Plant relicensing proceeding.[1] The Commonwealth's supplemental bases provided additional new and significant information in support of its contention which was not available at the time of the Commonwealth's initial contention filing: 1) the July 12, 2011 report of the Near Term Task Force established by the Nuclear Regulatory Commission (NRC) to evaluate the Fukushima accident and determine, in light of those lessons, whether the NRC's policies

[1] Commonwealth of Massachusetts Motion to Supplement Bases to Commonwealth Contention to Address NRC Task Force Report on Lessons Learned from the Radiological Accident at Fukushima (August 11, 2011)(Commonwealth Motion).

and regulatory practices should be changed for U.S. nuclear power plants[2]; and 2) the supplemental declaration of Dr. Gordon Thompson,[3] in which Dr. Thompson comments on the Task Force Report as consistent with, and as providing additional support for, his earlier opinion submitted in this proceeding.[4] The Commonwealth supplemented its bases to ensure that the ASLB, consistent with the National Environmental Policy Act (NEPA) and the Atomic Energy Act (AEA), has the opportunity to take a hard look at this additional new and significant information, before deciding whether to relicense the Pilgrim Nuclear Power Plant for an additional twenty years.

On September 6, 2011, the NRC Staff[5] and Entergy[6] filed oppositions to the Commonwealth's Motion. Primarily, the Staff and Entergy claim that the Commonwealth's Motion should be denied because the NRC's Task Force Report – the first report by the NRC on the "new information" from the lessons learned from Fukushima – does not present new and significant information for the Pilgrim relicensing

[2] Recommendations for Enhancing Reactor Safety in the 21st Century, The Near Term Task Force Review of the Insights from the Fukushima Dai-ichi Accident (July 12, 2011), ADAMS No. ML111861807 (Task Force Report).
[3] Declaration of Gordon R. Thompson Addressing New and Significant Information Provided by the NRC's Near-Term Task Force Report on the Fukushima Accident (August 11, 2011) (Thompson Supplemental Declaration).
[4] New and Significant Information from the Fukushima Daiichi Accident in the Context of Future Operation of the Pilgrim Nuclear Power Plant (June 1, 2011) (Thompson 2011 Report).
[5] NRC Staff's Response to Commonwealth of Massachusetts' Motion to Supplement Bases to Proposed Contention to Address NRC Task Force Report on Lessons Learned from Fukushima (September 6, 2011)(Staff Opposition).
[6] Entergy's Answer Opposing Commonwealth Motion to Supplement Bases to Commonwealth Contention to Address NRC Task Force Report on Lessons Learned from Fukushima (September 6, 2011) (Entergy Opposition).

proceeding.[7] The Staff and Entergy also assert that Task Force recommendations to improve safety at U.S. nuclear plants, by enhancing mitigation measures, are not relevant to the Severe Accident Mitigation Measures (SAMA) analysis for the Pilgrim plant.[8]

Finally, the Staff and Entergy misinterpret and misapply the NRC's late-filed contention standards to oppose admission of the Commonwealth's contention, and thereby would allow the NRC to avoid its legal responsibility to take a hard look at the new and significant information from Fukushima, and ensure compliance with NEPA, before relicensing the Pilgrim plant. Through this misapplication of NRC regulations, the Staff and Entergy also unreasonably seek to deny the Commonwealth its right to a hearing under the AEA on material (Fukushima-related) issues regarding the environmental impacts of relicensing Pilgrim, when the Commonwealth previously could not have raised these issues in this proceeding.[9]

II. The NRC Task Force findings under the AEA that the level of safety should be improved, and additional mitigation measures implemented, for U.S. Nuclear plants also provides new and significant information that the current Pilgrim SAMA Analysis and Pilgrim Supplement to the GEIS do not comply with NEPA and should be redone.

The Staff and Entergy claim, in substance, that the Task Force's AEA safety findings -- that the safety at U.S. nuclear plants should be improved and additional

[7] *See* Task Force Report at 18 ("As new information and new analytical techniques are developed, safety standards need to be reviewed, evaluated, and changed, as necessary… [T]he time has come for such change.").
[8] *Id.* at 69 (Enhancing Mitigation) and *infra*..
[9] The Commonwealth will not repeat how it has complied with the NRC's "late-filed" contention standards, but, while reserving its right to challenge the application of these standards to this case, instead will address a few of the primary arguments that provide the foundation for the Staff and Entergy Oppositions to the Commonwealth's Motion.

mitigation measures implemented[10] -- do not provide new and significant information on the Pilgrim SAMA analysis prepared under NEPA.[11] In short, the Staff and Entergy seek to avoid the NRC's NEPA obligations – to take a hard look at the lessons learned from Fukushima based upon the Task Force Report – by denying there is any relationship between the Task Force's AEA safety findings and Pilgrim's NEPA compliance.[12] This is manifestly false.

NEPA requires the preparation of an environmental impact statement when a major federal action may have a significant effect on the human environment. *See* 42 U.S.C. §4321 *et seq*. The term "human environment" "shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment." 40 C.F.R. §1508.14. Moreover, the "effects" and "impacts" are synonymous and include the ecological effects (such as effects on natural resources and on the components, structures, and functioning of affected ecosystems) as well as the aesthetic, historic, cultural, economic, social, and health impacts of a proposed action. 40 C.F.R. §1508.8. The degree to which a project may affect public health or safety is a major consideration under the statute. *See* 40 C.F.R. §1508.27.

Consistent with NRC regulations, the Commonwealth has presented NEPA claims on the inadequacy of the Pilgrim SAMA analysis, the need to consider additional mitigation measures, and the failure of the Pilgrim SAMA analysis and Supplement 29 to

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[10] *See e.g.* Task Force Report at 18 (safety standards need to be reviewed and changed); at 21 (strengthen mitigation of accidents as severe as Fukushima).
[11] *See e.g.* Staff Opposition at 9 (Task Force Report represents a review under the AEA, "not [under NEPA], the act that controls the NRC's environmental reviews and SAMA analyses"; *see also* Entergy Opposition at 14.
[12] In various guises, the Staff and Entergy repeatedly make this assertion in addressing the NRC's "late-filed" contention standards.

the Generic Environmental Impact Statement to comply with NEPA because they do not address the new and significant information arising from Fukushima. The Commonwealth's NEPA concerns are consistent with, overlap, and in part rely upon the same impacts of concern for the Pilgrim plant as do AEA safety concerns identified by the NRC's own Task Force and addressed in NRC regulations.

> The accident at Fukushima happened, and it happened at reactors of the same model as the Pilgrim reactor. In this light, not to consider information concerning the *severe accident* at the Fukushima plant as "new" information that is relevant to the Pilgrim SAMA analysis – the *severe accident* mitigation alternatives analysis – including those aspects of it that concern containment failure, offsite consequences, and the functioning and use of the DTV, would seem to be short- sighted, if not indeed absurd.[13]

The link between AEA safety findings and NEPA compliance also is well established in the law. *See Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 730 (3rd Cir. 1989) (noting the overlap in AEA and NEPA considerations and indicating that both statutes must be satisfied to support licensing). Similarly, the environmental considerations under NEPA also may be applied to health and safety considerations under the AEA. *Id*. at 730 *quoting Citizens for Safe Power, Inc. v. NRC*, 524 F.2d 1291, 1299 (D.C. Cir. 1975).

Thus notwithstanding the protests of the Staff and Entergy, to deny the interplay between AEA and NEPA on the impacts of relicensing would otherwise result in a "stultifying formalism" of regulatory interpretation. *Id*. The Task Force's report – and the Commonwealth's Amended Contention based upon that Report – provide critical new

[13] *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), Memorandum and Order (Denying Pilgrim Watch's Requests for Hearing on New Contentions Relating to Fukushima Accident), LBP-11-23, 73 N.R.C. __, (slip op. of Marshall, J. concurring in part and dissenting in part) at 3 (September 8, 2011) (Concurrence).

information on the environmental impacts of relicensing the Pilgrim plant that must be considered under NEPA in the Pilgrim SAMA analysis.

III. The NRC Staff and Entergy have misinterpreted and misapplied the NRC's "late-filed" contention standards to avoid the NRC's obligation to consider new and significant information under NEPA for the Pilgrim plant and to deny the Commonwealth its AEA hearing right on issues material to relicensing.

A. The NRC Staff and Entergy seek to impose an incorrect and unduly burdensome legal standard upon the Commonwealth before its new and significant information would be considered by the NRC.

The NRC cites *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-07, 69 N.R.C. 235, 290 (2009) for the proposition that the Commonwealth's amended contention must be rejected because the Commonwealth has not established "that it is more probable than not that [the movant] would have prevailed on the merits of the proposed new contention." *See* Staff Opposition at 8, *citing Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-10-19, 72 NRC __ (Oct. 28, 2010) (slip op. at 26) (ADAMS Accession No. ML103010136). In substance the Staff argues that the NRC need not comply with NEPA to consider new and significant information arising from Fukushima unless the Commonwealth – at the contention admission stage of this proceeding – can prove a likelihood of success on the merits. While the Commonwealth meets this standard, *see* sections II and III B, it is not obligated to do so. The *Oyster Creek* case, however, is inapposite here because it concerned a safety contention brought under the NRC's regulations for implementing the AEA, not a NEPA contention like the Commonwealth's contention. Whatever the appropriate standard may be for considering new safety information late in a licensing proceeding, the Supreme Court has made it clear that an agency's NEPA obligation to consider new and significant environmental

information continues until the time the action is taken. *See Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 372 (1989). Thus, it would violate NEPA for the NRC to interpret its regulations to impose any burden on the Commonwealth for admission of a contention which would be inconsistent with the NRC's obligation to consider new and significant information under NEPA. The First Circuit affirmed this legal principle in this same proceeding.[14] The NRC may not use procedural hurdles as "blinders to adverse environmental effects." *Id.* at 371. The NRC must take a hard look at this new and significant information before decisions are made and before actions are taken 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." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989); *accord Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc*., 462 U.S. 87, 96 (1983).

Through expert testimony and the NRC's own Task Force Report, the Commonwealth has met its burden to present new and significant information under *Marsh*, which also is consistent with NRC regulations that provide that the new information at issue be "significant," "relevant to environmental concerns," and "bearing on the proposed action." 40 C.F.R. § 1502.9. The NRC's "late-filed" contention standards should be interpreted consistent with the NRC's NEPA obligations and its regulations.[15]

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[14] *See Commonwealth of Massachusetts v. NRC*, 522 F.3d 115, 127 (1st Cir. 2008) ("NEPA does impose a requirement that the NRC consider any new and significant information regarding environmental impacts before renewing a nuclear power plant's operating license."); *see also* Commonwealth Waiver Petition at 23, *cited* at fn.20.

[15] While NEPA's mandate applies "regardless of [the agency's] eventual assessment of the significance of this information," *Marsh*, 490 U.S. at 385, nevertheless the Commonwealth clearly has established the significance of the information that triggers

B. The Commonwealth has met its burden, as a matter of fact and expert opinion, that the Pilgrim SAMA analysis and Supplement to the GEIS are erroneous and should be redone in light of new and significant information.

The NRC Staff and Entergy claim that the Commonwealth has failed to demonstrate that "any additional SAMA should have been identified as potentially cost-beneficial," Staff Opposition at 8 *citing* CLI-09-11, and thus the Commonwealth's contention lacks an adequate basis for admission. The record on the Commonwealth's contention filings and the NRC's own Task Force Report refute that position and instead establish a material dispute of fact and expert opinion on whether SAMAs and other mitigation measures at Pilgrim should be changed.

1. The Staff asserts that it would require at least a doubling of benefits before the next SAMA on the candidate list could become potentially cost-beneficial and that therefore at least a doubling of benefits is required to change the results of the SAMA analysis. Staff Opposition at 11. According to the Staff, "Nothing in the TFR, the Amended Contention, or the attached Thompson Declaration indicate (sic) that the benefit of any existing SAMA could double or that any new SAMA would prove cost-beneficial." *Id.* Similarly, Entergy argues that Dr. Thompson has failed to provide any information showing that the SAMA analysis of filtered containment venting is incorrect. *See* Entergy Opposition at 30.

In making these arguments, the Staff and Entergy ignore Dr. Thompson's Conclusion (C. IV) of his June 1, 2011 report (p. 16) that Entergy has under-estimated the

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NEPA review. *See* Concurrence at 7: "I would further find that information regarding the Fukushima accident is clearly 'significant,' as required at 10 C.F.R. § 2.326(a)(2), both as a matter of obvious fact, and with specific reference to the Pilgrim SAMA analysis, including those aspects of it that concern containment failure, offsite consequences, and the functioning and use of the DTV."

baseline CDF by an order of magnitude (a factor of ten). Moreover, as he explains, the benefit of a SAMA will scale (approximately) linearly with baseline CDF. *Id.* Thus, the Staff's requirement of at least a doubling of benefits is comfortably met, since the Commonwealth's expert suggests a ten-fold increase of benefits.[16] A factor of ten also encompasses the SAMA analysis for filtered containment venting, which found that the costs outweighed the benefits by a factor of three. *See* Declaration of Joseph R. Lynch, Lori Ann Potts, and Dr. Kevin R. O'Kula in Support of Entergy Answer Opposing Commonwealth Claims of New And Significant Information Based On Fukushima, at 53, ¶ 98 (June 27, 2011).[17]

2. In its Opposition, the Staff also states (page 6): "In addition, nothing in the Amended Petition or TFR suggests that the Fukushima accident raised any spent fuel pool issues with site specific applicability to Pilgrim."

However, in para. III-5 of the Commonwealth's August 11, 2011 expert declaration, Dr. Thompson opines that the pre-installed water spray system recommended in the TFR would be "substantially more robust and reliable than the jury-rigged spray arrangement now envisioned in the Pilgrim EDMGs, as discussed in Section VI.2 of the Thompson 2011 report." The jury-rigged spray arrangement must be Pilgrim-specific, although its details have not been disclosed. Thus, the benefit from replacing the jury-

[16] The Staff and Entergy responses of June 27, 2011 challenged the Commonwealth's expert conclusion that Entergy under-estimated CDF by a factor of 10. The Commonwealth, in turn, in its expert declaration of July 5, 2011 rebutted those challenges, and para. III-3 of the declaration of August 11, 2011 further supported the Commonwealth's expert on this issue. Thus the parties have a material dispute of fact and law on these material relicensing issues.

[17] Thus, based upon the Commonwealth's expert-supported contention, the benefit of filtered venting will rise from $872,000 to $8,720,000 (approximately), which is substantially larger than the cost of $3,000,000.

rigged spray arrangement with a pre-installed spray system (per TFR recommendation #7) would be Pilgrim-specific.

C. The burden to demonstrate NEPA compliance rests with the NRC, not the Commonwealth.

Because the Commonwealth has met its burden to present new and significant information, the burden now rests with the NRC under NEPA to take a hard look at this information before deciding whether to relicense the Pilgrim plant. *Marsh*, *supra*. Moreover, having met its initial burden, the Commonwealth is not obligated to perform a complete and new SAMA analysis or conduct a comprehensive review of potential mitigation measures before the NRC is obligated to take a hard look at the lessons learned from Fukushima: "[it]is the agency, not an environmental plaintiff, that has a 'continuing duty to gather and evaluate new information relevant to the environmental impacts of its actions,' even after release of an [EA or EIS]." *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 559 (9th Cir. 2000) (*quoting Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1023 (9th Cir. 1980)); *see also Te-Moak Tribe v. U.S. Dept of the Interior*, 608 F.3d 592, 605-06 (9th Cir. 2010); *Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975) ("compliance with NEPA is a primary duty of every federal agency; fulfillment of this vital responsibility should not depend on the vigilance and limited resources of environmental plaintiffs.").

As the First Circuit remarked in *Dubois v. U.S. Dept. of Agric.*, 102 F.3d 1273, 1291 (1st Cir. 1996), discussing the public's role under NEPA:

> 'Specifics' are not required…[T]he purpose of public participation regulations is simply to 'provide notice' to the agency, not to 'present technical or precise scientific or legal challenges to specific provisions' of the document in question…Moreover, NEPA requires the agency to try on its own to develop alternatives that will "mitigate

> the adverse environmental consequences" of a proposed project. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989).

Here, the Commonwealth has more than met its burden to provide new and significant information to the NRC on the lessons learned from Fukushima that demonstrates that the Pilgrim SAMA analysis and Supplement to the GEIS are flawed and should be redone. Thus it is now the NRC's duty, not that of the Commonwealth, to take a hard look at this information in a manner that rationally connects the facts found to the choices made. *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1972) (the agency must consider relevant factors and articulate "a rational connection between the facts found and the choice made"). [18]

D. The Staff's and Entergy's interpretation of the NRC's "late-filed" contention standards, as applied to the new and significant information arising from the Task Force Report on the lessons learned from Fukushima, would represent a misapplication of NRC rules and deny the Commonwealth its AEA hearing right on these issues.

Finally, the Staff and Entergy claim that, of the approximately nineteen separate "late-filed" contention factors which the Commonwealth addressed based upon the Task Force Report, the Commonwealth purportedly did not satisfy a single factor – although the Commission itself has recognized the work of the Task Force as the most important before the agency.[19] This is the best evidence that the Staff's and Entergy's cramped

[18] Entergy argues that the Commonwealth's NEPA claims are outside the scope of the relicensing process because they do not address the effects of aging. Entergy Opposition at 8 – 9. To the contrary, in the relicensing process, the NRC must additionally consider new and significant information on all Category 1 and Category 2 issues, including spent fuel pools and SAMAs. *See* 73 Fed. Reg. at 46206 (NRC denial of Massachusetts petition for rulemaking)(August 8, 2008).

[19] *See* Briefing on the Task Force Review of NRC Processes and Regulations Following the Events in Japan (July 19, 2011): (Chairman Jaczko: "I believe today's meeting on the task force's report will be among the most important at the NRC in recent years. These

interpretation of the NRC "late-filed" regulations – at the contention admission stage and on an issue (Fukushima) which could not have been raised previously in this proceeding – represents a misapplication of NRC rules and is patently unreasonable and inconsistent with the Commonwealth's AEA hearing right on its Fukushima-related contention. *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 56 (D.C. Cir. 1990)(NRC rules cannot be misapplied to prevent parties from raising a material licensing issue which could not have been raised previously); *see also Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1443-44 (D.C. Cir. 1984)(Commission discretion to deny a hearing under the reopen the record standard may be inconsistent with AEA hearing right on a material licensing issue); *New Jersey Environmental Federation v. NRC*, 645 F.3d 220, 233 (3rd Cir. May 18, 2011)(reopen the record standard may be applied "so long as it is reasonable").

The Commonwealth recognizes that it is up to the NRC whether to address the concerns raised by the Commonwealth in the site specific Pilgrim proceeding or in a generic rulemaking, but in either case the NRC, as required by NEPA and the AEA, must take a hard look at this new and significant information from Fukushima before making a final decision on relicensing the Pilgrim plant. [20]

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safety issues are simply that important."); Commissioner Magwood: "This work should be our highest priority…"); Commissioner Ostendorff: "The NRC's next steps following this task force report issuance are…the most important thing before the Commission, before the agency.").

[20] Commonwealth of Massachusetts Petition for Waiver of 10 C.F.R. Part 51 Subpart A, Appendix B of, in the Alternative, Petition for Rulemaking to Rescind Regulations Excluding Consideration of Spent Fuel Storage Impacts from License Renewal Environmental review (June 2, 2011) at 29 citing *Baltimore Gas & Electric Co*. 462 US at 100.

IV. Conclusion

The Commonwealth respectfully requests the ASLB to reject the oppositions, to grant the Commonwealth's Motion to supplement its contention, and to admit it for either adjudicatory hearing or rulemaking as the ASLB deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMONWEALTH OF MASSACHUSETTS REPLY TO NRC STAFF AND ENTERGY OPPOSITIONS TO COMMONWEALTH MOTION TO SUPPLEMENT BASES TO CONTENTION ON NRC TASK FORCE REPORT ON LESSONS LEARNED FROM FUKUSHIMA**, dated September 13, 2011, were provided to the Electronic Information Exchange (EIE) for service on the individuals below and by electronic mail as indicated by an asterisk*:

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