UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Gregory B. Jaczko, Chairman
Kristine L. Svinicki
George Apostolakis
William D. Magwood, IV
William C. Ostendorff

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

CLI-12-06

MEMORANDUM AND ORDER

The Commonwealth of Massachusetts and Pilgrim Watch seek review of LBP-11-35, in which the Licensing Board denied Massachusetts' motion to admit a new contention relating to the recent nuclear events in Japan, as well as other, related requests.[1] For the reasons set forth below, we deny the petitions for review. We also rule on a related suspension request.[2]

[1] *Commonwealth of Massachusetts' Notice of Appeal of LBP-11-35* (Dec. 8, 2011); *Commonwealth of Massachusetts' Brief in Support of Appeal from LBP-11-35* (Dec. 8, 2011) (Massachusetts Petition for Review); *Pilgrim Watch's Petition for Review of Memorandum and Order (Denying Commonwealth of Massachusetts' Request for Stay, Motion for Waiver, and Request for Hearing on a New Contention Relating to the Fukushima Accident) Nov. 28, 2011* (Dec. 8, 2011) (Pilgrim Watch Petition for Review).

[2] *See Commonwealth of Massachusetts' Conditional Motion to Suspend Pilgrim Nuclear Power Plant License Renewal Proceeding Pending Resolution of Petition for Rulemaking to Rescind Spent Fuel Pool Exclusion Regulations* (June 2, 2011) (Conditional Motion to Suspend).

I. BACKGROUND

This adjudicatory proceeding commenced in 2006 with the publication in the *Federal Register* of a notice of opportunity for hearing.[3] Massachusetts and Pilgrim Watch each submitted hearing requests challenging Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.'s (together, Entergy) license renewal application for the Pilgrim Nuclear Power Station.[4] In addition to its hearing request, Massachusetts filed a petition for rulemaking to rescind the 10 C.F.R. Part 51 regulations that set forth the NRC's generic findings for certain environmental impacts during the license renewal term, namely, the regulations pertaining to the environmental impacts of spent fuel storage.[5] Massachusetts claimed that "new and significant information" invalidated the findings with respect to spent fuel pool environmental impacts.[6] The

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[3] 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).

[4] *See generally Request for Hearing and Petition to Intervene by Pilgrim Watch* (May 25, 2006); *Massachusetts Attorney General's Request for a Hearing and Petition for Leave to Intervene with Respect to Entergy Nuclear Operations Inc.'s Application for Renewal of the Pilgrim Nuclear Power Plant Operating License and Petition for Backfit Order Requiring New Design Features to Protect Against Spent Fuel Pool Accidents* (May 30, 2006).

[5] *See* Massachusetts Attorney General; Receipt of Petition for Rulemaking, 71 Fed. Reg. 64,169 (Nov. 1, 2006).

[6] *Id.* at 64,170.

Board granted Pilgrim Watch's hearing request and admitted two of its proposed contentions—Contentions 1 and 3.[7] The Board denied Massachusetts' hearing request.[8]

Massachusetts appealed the Board's ruling; we affirmed.[9] In doing so, we found that the Board properly rejected Massachusetts' contention—which raised concerns similar to those in its rulemaking petition—as an impermissible challenge to our regulations.[10] We explained that Massachusetts' generically-applicable concerns were not appropriate for resolution in an adjudicatory proceeding, and acknowledged Massachusetts' rulemaking petition as the appropriate mechanism for raising those concerns.[11] We also denied, as premature, Massachusetts' request to suspend the adjudicatory proceeding pending the disposition of its rulemaking petition because at that time Massachusetts was not a party or an "interested governmental entity," and thus had no right under our rules to request such a stay.[12]

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[7] LBP-06-23, 64 NRC 257, 348-49 (2006). Contentions 1 and 3 challenged Entergy's aging management program for buried piping, and certain aspects of the severe accident mitigation alternatives (SAMA) analysis in Entergy's Environmental Report, respectively. *See id.* at 349.

[8] *Id.* at 349.

[9] *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-07-3, 65 NRC 13, 23 (2007). *See also Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-07-13, 65 NRC 211, 215 (2007) (denying motion for reconsideration of CLI-07-3). CLI-07-3 and CLI-07-13 addressed essentially identical appeals in both the *Vermont Yankee* and *Pilgrim* proceedings.

[10] *Vermont Yankee*, CLI-07-3, 65 NRC at 20-21.

[11] *Id.* at 20.

[12] *Id.* at 22 n.37; *Vermont Yankee*, CLI-07-13, 65 NRC at 214-15. *See generally* 10 C.F.R. § 2.802(d) (permitting a rulemaking petitioner to request that we "suspend all or any part of any licensing proceeding to which the petitioner is a party pending disposition of the petition for rulemaking").

Massachusetts challenged these rulings in the U.S. Court of Appeals for the First Circuit. The court upheld our ruling on Massachusetts' hearing request.[13] With regard to the suspension request, the court ordered a brief stay of the close of this proceeding to allow Massachusetts an opportunity to request status as an interested governmental entity.[14] Shortly thereafter, Massachusetts filed a notice of intent to participate as an interested state.[15]

We later denied Massachusetts' rulemaking petition, which was consolidated with a similar petition filed by the State of California, finding that the information raised in the petitions was neither new nor significant.[16] We "further determined that [the] findings related to the [environmental impacts of] storage of spent nuclear fuel in pools . . . remain valid."[17] The U.S. Court of Appeals for the Second Circuit upheld our decision.[18]

Separate from the pendency and resolution of Massachusetts' appeals, litigation proceeded on Pilgrim Watch's admitted contentions. The Board granted summary disposition of Contention 3 in favor of Entergy.[19] And after holding an evidentiary hearing on Contention 1, the

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[13] *Massachusetts v. United States*, 522 F.3d 115, 129-30 (1st Cir. 2008).

[14] *Id.* at 130.

[15] *Commonwealth of Massachusetts' Notice of Intent to Participate as an Interested State* (May 6, 2008). *See also* CLI-08-9, 67 NRC 353, 355-56 (2008) (addressing the effect of the court-ordered stay on the *Pilgrim* proceeding). *See generally* 10 C.F.R. § 2.315(c).

[16] The Attorney General of Commonwealth of Massachusetts, The Attorney General of California; Denial of Petitions for Rulemaking, 73 Fed. Reg. 46,204, 46,208 (Aug. 8, 2008) (2008 Rulemaking Denial). Chairman Jaczko dissented. *Id.* at 46,212.

[17] *Id.* at 46,212.

[18] *See New York v. NRC*, 589 F.3d 551, 555 (2d Cir. 2009).

[19] LBP-07-13, 66 NRC 131, 154 (2007).

Board formally closed the record on June 4, 2008.[20] The Board then resolved Contention 1 in Entergy's favor and terminated the proceeding.[21]

Pilgrim Watch petitioned for review of the Board's rulings on Contentions 1 and 3, as well as earlier Board rulings.[22] We granted Pilgrim Watch's petition for review as to Contention 3, and reversed and remanded a portion of that contention to the Board for hearing.[23] We expressly stated that the remand was "limited by [that] ruling."[24] Later, we denied the balance of Pilgrim Watch's petition for review, including Pilgrim Watch's challenge to the Board's merits ruling on Contention 1.[25] The Board has since issued an initial decision on the remanded portion of Contention 3, resolving it in favor of Entergy.[26] We recently denied Pilgrim Watch's petition for review of that decision.[27]

At issue today is the Board's ruling on a new Massachusetts contention challenging the severe accident mitigation alternatives (SAMA) analysis in the Pilgrim final supplemental

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[20] Memorandum and Order (Ruling on Pilgrim Watch Motions Regarding Testimony and Proposed Additional Evidence Relating to Pilgrim Watch Contention 1) (June 4, 2008), at 3-4 (unpublished). The Board closed the record on Contention 1 in accordance with our direction in CLI-08-9. *See* CLI-08-9, 67 NRC at 356.

[21] LBP-08-22, 68 NRC 590, 610 (2008).

[22] *Pilgrim Watch's Petition for Review of LBP-06-848, LBP-07-13, LBP-06-23 and the Interlocutory Decisions in the Pilgrim Nuclear Power Station Proceeding* (Nov. 12, 2008).

[23] CLI-10-11, 71 NRC 287, 290 (2010).

[24] *Id.*

[25] CLI-10-14, 71 NRC 449, 477 (2010).

[26] LBP-11-18, 74 NRC __ (July 19, 2011) (slip op. at 34).

[27] CLI-12-1, 75 NRC __ (Feb. 9, 2012) (slip op.).

environmental impact statement (FSEIS) based on the recent nuclear events in Japan.[28] On March 11, 2011, Japan suffered a 9.0 magnitude earthquake, followed by a devastating tsunami that severely damaged the Fukushima Dai-ichi Nuclear Power Station. Massachusetts argues that these events present "new and significant information" that must be considered in the Pilgrim FSEIS before a decision is made on Entergy's license renewal application.[29] Massachusetts included with its new contention a petition for waiver of 10 C.F.R. § 51.71(d) and 10 C.F.R. Part 51, Subpart A, Appendix B, which preclude the consideration of the environmental impacts of spent fuel pool storage in individual license renewal adjudications.[30] As an alternative, in the event the Board were to deny Massachusetts' waiver petition,

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[28] *See* LBP-11-35, 74 NRC __ (Nov. 28, 2011) (slip op.).

[29] *See Commonwealth of Massachusetts' Motion to Admit Contention and, if Necessary, to Re-open Record Regarding New and Significant Information Revealed by Fukushima Accident* (June 2, 2011) (Motion to Reopen); *Commonwealth of Massachusetts' Contention Regarding New and Significant Information Revealed by the Fukushima Radiological Accident* (June 2, 2011) (New Contention); *Declaration of Dr. Gordon R. Thompson in Support of Commonwealth of Massachusetts' Contention and Related Petitions and Motions* (June 1, 2011); *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 Report). Two months later, Massachusetts filed a motion to supplement the basis for its contention, and attached a supplemental declaration for Dr. Thompson. *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* (Aug. 11, 2011) (Motion to Supplement Contention); *Declaration of Gordon R. Thompson Addressing New and Significant Information Provided by the NRC's Near-Term Task Force Report on the Fukushima Accident* (Aug. 11, 2011) (Supplemental Thompson Declaration). The Board granted Massachusetts' motion and considered Dr. Thompson's supplemental declaration. LBP-11-35, 74 NRC at __ (slip op. at 70).

[30] *See Commonwealth of Massachusetts' Petition for Waiver of 10 C.F.R. Part 51 Subpart A, Appendix B or, in the Alternative, Petition for Rulemaking to Rescind Regulations Excluding Consideration of Spent Fuel Storage Impacts from License Renewal Environmental Review* (June 2, 2011) (Waiver/Rulemaking Petition).

Massachusetts contemporaneously requested that we consider its filing as a petition for rulemaking to rescind those regulations, similar to its earlier petition for rulemaking.[31] Massachusetts also included a "conditional motion" to suspend the proceeding pending resolution of its standby rulemaking petition, in the event of the rulemaking petition's activation.[32]

In LBP-11-35, the Board rejected Massachusetts' new contention and denied its waiver petition.[33] The Board found that Massachusetts' new contention failed to satisfy the criteria for reopening a closed record, and failed to satisfy the timeliness and general contention admissibility standards.[34] With regard to the waiver petition, the Board determined that a rule waiver was not warranted because Massachusetts had not shown that the spent fuel pool

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[31] *Id.* at 30.

[32] Conditional Motion to Suspend at 1-2.

[33] LBP-11-35, 74 NRC at __ (slip op. at 70-71). Judge Young concurred only in the result. *Id.* at __ (slip op. at 72-77). She would have rejected the contention as premature, and would not have addressed the reopening or contention admissibility standards, or the waiver petition. *See id.* at __ (slip op. at 72-73) (citing *Union Electric Co. d/b/a Ameren Missouri* (Callaway Plant, Unit 2), CLI-11-5, 74 NRC __ (Sept. 9, 2011) (slip op. at 29-30)).

The Board also denied a request that Massachusetts filed in May 2011, seeking to stay the Board's decision on the license renewal application pending our review of a separate Massachusetts request to suspend the proceeding to consider lessons learned from the Fukushima events. LBP-11-35, 74 NRC at __ (slip op. at 70); *Commonwealth of Massachusetts Motion to Hold Licensing Decision in Abeyance Pending Commission Decision Whether to Suspend the Pilgrim Proceeding to Review the Lessons of the Fukushima Accident* (May 2, 2011) (citing *Commonwealth of Massachusetts Response to Commission Order Regarding Lessons Learned from the Fukushima Daiichi Nuclear Power Station Accident, Joinder in Petition to Suspend License Renewal Proceeding for the Pilgrim Nuclear Plant, and Request for Additional Relief* (May 2, 2011)). Massachusetts' stay request became moot when we issued our decision in CLI-11-5, which, among other things, denied its request to suspend this license renewal proceeding. *See Callaway*, CLI-11-5, 74 NRC at __ (slip op. at 36).

[34] LBP-11-35, 74 NRC at __ (slip op. at 70).

issues underlying its waiver request uniquely applied to Pilgrim, rather than generically to a class of nuclear power plants.[35]

Massachusetts then filed the instant appeal. As noted above, Pilgrim Watch also seeks review of the Board's ruling. Entergy and the Staff oppose both requests for review.[36] The Board's ruling also places before us Massachusetts' "conditional" request to suspend the proceeding. We consider each of these matters below.

II. DISCUSSION

Pilgrim Watch and Massachusetts seek review under separate provisions of our rules. Massachusetts filed its appeal under section 2.311, which governs appeals of board rulings on

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[35] *Id.* at __ (slip op. at 15-16).

[36] *See Entergy's Answer Opposing the Commonwealth's Appeal of LBP-11-35* (Dec. 19, 2011), at 1-2; *Entergy's Answer Opposing Pilgrim Watch's Petition for Review of LBP-11-35* (Dec. 19, 2011), at 3 (Entergy Answer to Pilgrim Watch); *NRC Staff's Answer to the Commonwealth of Massachusetts' Brief in Support of Appeal from LBP-11-35* (Dec. 19, 2011), at 2; *NRC Staff's Answer in Opposition to Pilgrim Watch's Petition for Review of LBP-11-35* (Dec. 19, 2011), at 2 (Staff Answer to Pilgrim Watch). Pilgrim Watch replied. *Pilgrim Watch Reply to Entergy's and NRC Staff's Answers to Pilgrim Watch's Petition for Review of Memorandum and Order (Denying Commonwealth of Massachusetts' Request for Stay, Motion for Waiver, and Request for Hearing on a New Contention Relating to the Fukushima Accident) Nov. 28, 2011* (Dec. 23, 2011) (Pilgrim Watch Reply).

Massachusetts filed a motion to reply. *Commonwealth of Massachusetts' Motion to Reply to NRC Staff and Entergy Oppositions to Commonwealth Appeal of LBP-11-35* (Dec. 23, 2011); *Commonwealth of Massachusetts' Brief in Reply to NRC Staff and Entergy Oppositions to the Commonwealth's Appeal of LBP-11-35* (Dec. 23, 2011). Entergy and the Staff oppose Massachusetts' motion. *Entergy's Answer Opposing Commonwealth of Massachusetts' Motion to File a Reply to Entergy's and NRC Staff's Answers* (Jan. 3, 2012); *NRC Staff's Answer in Opposition to Commonwealth of Massachusetts' Motion to Reply to NRC Staff and Entergy Oppositions to Commonwealth Appeal of LBP-11-35* (Jan. 3, 2012). Massachusetts has filed its appeal pursuant to 10 C.F.R. § 2.311, which does not permit the filing of a reply. *See* 10 C.F.R. § 2.311(b). As discussed below, however, Massachusetts' appeal is properly considered a petition for review subject to the requirements of 10 C.F.R. § 2.341, which affords the petitioner a right to reply. We therefore consider Massachusetts' reply.

hearing requests, petitions to intervene, and access to certain non-public information.[37] Section 2.341, on the other hand, governs review of the majority of presiding officer decisions.[38] Pilgrim Watch filed its request under section 2.341(b). Because the decision that Massachusetts challenges here is not a board ruling on a hearing request, petition to intervene, or access to non-public information, its appeal does not lie under section 2.311. Accordingly, we consider both requests under the same provision—section 2.341(b)—as petitions for review.

We will grant a petition for review at our discretion, giving due weight to the existence of a substantial question with respect to one or more of the following considerations:

> (i) a finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
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> (ii) a necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
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> (iii) a substantial and important question of law, policy, or discretion has been raised;
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> (iv) the conduct of the proceeding involved a prejudicial procedural error; or
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> (v) any other consideration which we may deem to be in the public interest.[39]

For threshold issues like contention admissibility, we give substantial deference to a

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[37] *See* 10 C.F.R. § 2.311(a).

[38] *See id.* § 2.341(a)(1). *Cf. South Texas Project Nuclear Operating Co.* (South Texas Project, Units 3 and 4), CLI-09-18, 70 NRC 859, 862 (2009) ("As a general matter, contentions filed after the initial petition are not subject to appeal pursuant to section 2.311.").

[39] 10 C.F.R. § 2.341(b)(4)(i)-(v).

board's determinations.[40] We will affirm decisions on the admissibility of contentions where we find no error of law or abuse of discretion.[41] As discussed below, neither Pilgrim Watch nor Massachusetts has presented a substantial question warranting review.

A. Pilgrim Watch's Petition for Review

Pilgrim Watch argues that although the Board's decision "is largely directed to requests and motions filed by . . . Massachusetts," portions of it "directly affect Pilgrim Watch."[42] According to Pilgrim Watch, the Board's statement that the record closed in June 2008, the statement that the record remains closed, the Board's application of the criteria for reopening a closed record, and the Board's passing reference to Pilgrim Watch's new contentions being "previously resolved or . . . resolved by this Order," directly affect its interests.[43] Pilgrim Watch asserts that the Board improperly uses its decision on Massachusetts' contention to "bolster" the Board's "previous incorrect" decisions on various new Pilgrim Watch contentions.[44] Repeating

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[40] *See Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 119 (2009).

[41] *See Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-8, 74 NRC __ (Sept. 27, 2011) (slip op. at 5-6); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 260 (2009).

[42] Pilgrim Watch Petition for Review at 1.

[43] *Id.* at 1-2 (citing LBP-11-35, 74 NRC at __ (slip op. at 3, 64, 71)); Pilgrim Watch Reply at 2-3.

[44] Pilgrim Watch Petition for Review at 3. Pilgrim Watch has sought review of those decisions. *See generally 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* (Aug. 26, 2011) (Pilgrim Watch August 26 Petition); *Pilgrim Watch's Petition for Review of Memorandum and Order (Denying Pilgrim Watch's Requests for Hearing on New Contentions Relating to Fukushima Accident) Sept. 8, 2011* (Sept. 23, 2011) (Pilgrim Watch September 23 Petition). We denied the Pilgrim Watch September 23 Petition; the Pilgrim Watch August 26 Petition is pending. *See* CLI-12-3, 75 NRC __ (Feb. 22, 2012) (slip op.).

the same arguments that it has raised in its own petitions for review, Pilgrim Watch argues that the Board incorrectly applied the reopening standards because the proceeding has not closed, and because Massachusetts, like Pilgrim Watch, filed a contention that raises new issues.[45]

Entergy argues that we should reject Pilgrim Watch's petition because Pilgrim Watch has suffered no cognizable injury from the Board's rejection of Massachusetts' contention, and thus it has no standing to appeal.[46] The Staff asserts that we should deny the petition because Pilgrim Watch does not address issues of fact or law that are central to the Board's decision, but rather Pilgrim Watch "seeks only to bolster its arguments in . . . appeals now pending before the Commission."[47] Therefore, according to the Staff, Pilgrim Watch's petition is "outside the scope of the appealable issues contemplated by the regulations."[48]

We agree with Entergy's and the Staff's arguments. Although Pilgrim Watch insists that the Board's decision directly affects its interests, the portions of the Board's decision that Pilgrim Watch references are focused on the Board's resolution of Massachusetts' contention and do not concretely affect the admissibility of Pilgrim Watch's new contentions.[49] At bottom, Pilgrim

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[45] Pilgrim Watch Petition for Review at 4-8; Pilgrim Watch August 26 Petition at 3-6; Pilgrim Watch September 23 Petition at 7-9.

[46] Entergy Answer to Pilgrim Watch at 1-2.

[47] Staff Answer to Pilgrim Watch at 4.

[48] *Id.* at 3.

[49] *See Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-631, 13 NRC 87, 89 (1981) (explaining that a litigant is not entitled to challenge a board ruling "unless and until that ruling has worked a concrete injury to his personal interests"). The Board's statement that it resolved five of Pilgrim Watch's new contentions in earlier decisions *or in LBP-11-35* is imprecise. *See* LBP-11-35, 74 NRC at __ (slip op. at 64 n.232). LBP-11-35 (continued. . .)

Watch reiterates its claim that the Board erred in applying the reopening standards to a contention raising new issues—an argument that we rejected in a recent decision in this proceeding.[50] As we stated then, "[c]ontrary to Pilgrim Watch's assertions, the reopening standards . . . expressly contemplate contentions that raise issues not previously litigated."[51] To the extent Pilgrim Watch seeks review of the Board's decision on Massachusetts' behalf, its petition fails for lack of standing. Pilgrim Watch "may act to vindicate its own rights," but "it has no standing . . . to assert the rights of others."[52] Accordingly, we deny its petition for review.

B. Massachusetts' Petition for Review

Massachusetts argues that the Board "ignored" its obligation to consider the "new and significant information" presented in its new contention and waiver petition, contrary to the

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(. . .continued)
contains no legal analysis or conclusions directed to any Pilgrim Watch contention; we view the Board's statement here as a catch-all phrase with no independent legal significance.

[50] CLI-12-3, 75 NRC at __ (slip op. at 9-12). There, we reiterated our position that raising new issues related to the Fukushima events did not warrant new procedures or a separate timetable. *Id.* at __ (slip op. at 11) (citing *Callaway*, CLI-11-5, 74 NRC at __ (slip op. at 35)). We noted the ongoing review of the Fukushima events and our confidence that the existing procedural rules can be applied effectively to address proposed new or amended contentions. *Id.* Our analyses, as well as the analyses of NRC's expert staff, have uncovered no new information that causes us to change our view.

[51] *Id.* at __ (slip op. at 9). Therefore, even were we to consider Pilgrim Watch's filing as an answer supporting Massachusetts' petition for review, we reject its argument that the reopening standards do not apply here. *See id.* at __ (slip op. at 9-12). *Cf. Tennessee Valley Authority* (Clinch River Breeder Reactor Plant), ALAB-345, 4 NRC 212, 213 (1976) (noting that even though a party who is not injured by a board's ruling has no right to appeal that ruling, it may file a supporting brief at the appropriate time).

[52] *Clinch River*, ALAB-345, 4 NRC at 213. *See also Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 542-43 n.58 (1986).

requirements of the National Environmental Policy Act (NEPA).[53] Further, Massachusetts asserts that the Board improperly applied a "heightened standard"—what Massachusetts characterizes as essentially a merits review—in rejecting the new contention.[54] Massachusetts maintains that it has "met its initial burden to present new and significant information,"[55] and argues that the requirements of NEPA supersede our procedural rules when new and significant information is presented.[56] We disagree. We find that the Board correctly applied our procedural rules for reopening the record and for the admission of contentions, and appropriately determined that Massachusetts failed to show that its new contention and the issues underlying its waiver petition should be considered in this adjudication.[57]

1. Massachusetts' Waiver Petition

Massachusetts' petition for review offers little in the way of argument against the Board's denial of its waiver petition. At most, Massachusetts references the Board's finding that

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[53] *See* Massachusetts Petition for Review at 14. Massachusetts also states that the Board rejected its alternative request for rulemaking. *See id.* at 1, 13. But the Board did not rule on Massachusetts' rulemaking petition, nor could it have, because that petition is now pending before us. We address the rulemaking petition and the related request to suspend the proceeding, below. (Massachusetts captioned its Waiver/Rulemaking Petition as before the Board *or* the Commission.)

[54] *See id.* at 12, 23.

[55] *Id.* at 16.

[56] *See id.* at 24-27.

[57] Contrary to Massachusetts' assertion, NEPA does not supersede our procedural rules. Federal courts leave to an agency's discretion the manner in which the agency determines whether information is new or significant to warrant supplementation of an environmental impact statement, including the application of its procedural rules. *See Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 373-77 (1989); *Massachusetts*, 522 F.3d at 130; *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 55-56 (D.C. Cir. 1990).

Massachusetts had not demonstrated "uniqueness" of the spent fuel pool storage issues raised in the waiver request, and reiterates the spent-fuel-pool-related arguments in support of its contention.[58] Thus, it is unclear whether Massachusetts challenges the Board's ruling on the waiver petition. Nevertheless, we briefly address the Board's ruling.

As a general matter, our regulations are not subject to challenge in adjudicatory proceedings.[59] Section 2.335(b), however, provides an exception to this general rule. That provision permits a party to an adjudication to petition for a waiver of a rule or regulation upon a showing that "special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which [it] was adopted."[60] In order to meet this standard, the party seeking a waiver must attach an affidavit that, among other things, "state[s] with particularity the special circumstances [claimed] to justify the waiver or exception requested."[61]

In the *Millstone* license renewal proceeding, we established a four-factor test based on NRC case law interpreting section 2.335(b).[62] The waiver petitioner must meet all four factors, demonstrating that: (i) the rule's strict application would not serve the purpose for which it was adopted; (ii) there are "special circumstances" that were "not considered, either explicitly, or by

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[58] *See* Massachusetts Petition for Review at 6-7, 11, 13, 29.

[59] 10 C.F.R. § 2.335(a).

[60] *Id.* § 2.335(b).

[61] *Id.*

[62] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 559-60 (2005).

necessary implication, in the rulemaking proceeding leading to the rule sought to be waived"; (iii) those circumstances are unique to the facility, rather than "common to a large class of facilities"; and (iv) a waiver of the rule is necessary to reach a "significant safety problem."[63]

The Board found that Massachusetts "plainly" had not met the third factor—a showing that the spent fuel pool issues raised in Massachusetts' waiver petition are "unique" to Pilgrim rather than "common to a large class of facilities."[64] The Board agreed with Entergy and the Staff that the spent fuel pool accident risks asserted in the waiver petition and supporting attachments are applicable to other plants.[65] The Board pointed out that onsite storage of spent fuel is being addressed as part of our comprehensive review of lessons learned from the Fukushima Dai-ichi events, indicating that Massachusetts' spent fuel pool concerns are more appropriately addressed "through more generic regulatory reform."[66]

We find the Board's reasoning sound, and we decline to disturb it here. Because the concerns that Massachusetts raises apply generically to "*all* spent fuel pools at all reactors,"

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[63] *Id.* at 559-60. *See also Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC __ (Oct. 12, 2011) (slip op. at 30).

[64] LBP-11-35, 74 NRC at __ (slip op. at 14-15).

[65] *See id.*

[66] *Id.* at __ (slip op. at 16). *See generally* "Recommendations for Enhancing Reactor Safety in the 21st Century, The Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident" (July 12, 2011), at 43-46 (transmitted to the Commission via "Near-Term Report and Recommendations for Agency Actions Following the Events in Japan," Commission Paper SECY-11-0093 (July 12, 2011) (ML11186A950 (package)) (Near-Term Report) (discussing recommendations regarding spent fuel pool safety).

they are more appropriately addressed via rulemaking or other appropriate generic activity.[67] "It makes more sense for the NRC to study whether, as a technical matter, the agency should modify its requirements relating to spent fuel storage for all plants . . . than to litigate [the issue] in particular adjudications."[68] As discussed below, we now consider Massachusetts' waiver petition as an active rulemaking petition and we refer it to the Staff for further consideration.[69]

2. Massachusetts' New Contention

In its new contention, Massachusetts argued that the Staff must revise the FSEIS to account for new and significant information from the events at Fukushima Dai-ichi.[70] In support, Massachusetts attached a declaration and report from Dr. Gordon R. Thompson. Dr. Thompson outlined six main areas in which, he argued, the events at Fukushima Dai-ichi provide new and significant information.[71] According to Massachusetts, if these issues are considered in a revised Pilgrim SAMA analysis, "previously rejected or ignored" mitigation

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[67] *Vermont Yankee*, CLI-07-3, 65 NRC at 20-21. *See also AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 133-34 (2007).

[68] *Vermont Yankee*, CLI-07-3, 65 NRC at 20. *See also Massachusetts*, 522 F.3d at 129-30.

[69] *See* Waiver/Rulemaking Petition at 30.

[70] New Contention at 1. The contentions reads: "The Commonwealth contends that the environmental impact analysis and the SAMA analysis in [the FSEIS] are inadequate to satisfy NEPA because they fail to address new and significant information revealed by the Fukushima accident that is likely to affect the outcome of those analyses. The new and significant information shows that both core-melt accidents and spent fuel pool accidents are significantly more likely than estimated or assumed in [the FSEIS]. As a result, the environmental impacts of re-licensing the Pilgrim [Nuclear Power Station] have been underestimated. In addition, the SAMA analysis is deficient because it ignores or rejects mitigative measures that may now prove to be cost-effective in light of this new understanding of the risks of re-licensing Pilgrim." New Contention at 5-6.

[71] Thompson Report at 3.

alternatives "may prove to be cost-effective."[72] In a supplemental filing, Massachusetts asserted that the July 2011 Near-Term Task Force Report presents new and significant information that further supports its new contention.[73] Massachusetts claimed that the Task Force proposed a number of safety improvements and regulatory changes that align with the issues identified in the Thompson Report.[74] Massachusetts also attached a supplemental declaration by Dr. Thompson further describing the areas where the Task Force's findings support his views.[75]

Although Massachusetts argued that the reopening standards do not apply, it nonetheless addressed them.[76] Massachusetts was right to have done so. The Board closed the evidentiary record in June 2008. Even after our later remand of a portion of Pilgrim Watch's Contention 3, the record remained closed on all issues except that single, remanded issue. Because Massachusetts filed its new contention after the Board already had closed the evidentiary record, it was obliged to address the reopening standards.[77] We therefore find that the Board appropriately applied the reopening standards here. Furthermore, as discussed below, we find no Board error or abuse of discretion in the manner in which the Board applied

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[72] *See* New Contention at 9.

[73] *See* Motion to Supplement Contention at 1-2.

[74] *See id.* at 6-7.

[75] *See* Supplemental Thompson Declaration at 1-7.

[76] *See* Motion to Reopen at 2.

[77] *See* CLI-12-3, 75 NRC at __ (slip op. at 9-12); *Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 NRC 1, 10 n.37 (2010).

these standards to the issues identified in Massachusetts' new contention, the supplement to its new contention, and the supporting declarations and Thompson Report.

Motions to reopen a closed record are governed by 10 C.F.R. § 2.326. The movant must show that: (1) the motion is timely; (2) the motion addresses a "significant safety or environmental issue"; and (3) "a materially different result would be or would have been likely had the newly proffered evidence been considered initially."[78] "Each of the criteria must be separately addressed, with a specific explanation of why it has been met."[79]

The level of support required to sustain a motion to reopen is greater than that required for a contention under the general admissibility requirements of 10 C.F.R. § 2.309(f)(1).[80] The motion to reopen "must be accompanied by affidavits that set forth the factual and/or technical bases for the movant's claim that the . . . [three criteria for reopening] have been satisfied."[81] "Evidence contained in [the] affidavits must meet the admissibility standards [in 10 C.F.R. § 2.337]."[82] That is, it must be "relevant, material, and reliable."[83] Further, the "[a]ffidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised."[84] A litigant seeking to reopen a closed record

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[78] 10 C.F.R. § 2.326(a)(1)-(3).

[79] *Id.* § 2.326(b).

[80] *Compare id.*, *with id.* § 2.309(f)(1)(v).

[81] *Id.* § 2.326(b).

[82] *Id.*

[83] *Id.* § 2.337(a).

[84] *Id.* § 2.326(b).

necessarily faces a "heavy" burden.[85] After a record has closed, finality attaches to the hearing process, and after that point, only timely, significant issues will be considered.[86] At bottom, Massachusetts has not shown that its contention should be litigated in this proceeding because it has failed to demonstrate a sufficiently supported link between the Fukushima Dai-ichi events and the Pilgrim environmental analysis.

Massachusetts now argues that the Board "ignored the [Near-Term Report] and [Massachusetts'] expert supported new and significant information."[87] We address each of these areas of purported new and significant information, which are discussed in detail in the supporting material provided by Dr. Thompson, in turn.[88]

In its new contention, Massachusetts first argued that the SAMA analysis underestimates core damage frequency by an order of magnitude.[89] Rather than use the probabilistic risk assessment (PRA) techniques that are used in the Pilgrim SAMA analysis to estimate core damage frequency, Dr. Thompson employed what he termed a "direct

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[85] *Oyster Creek*, CLI-09-7, 69 NRC at 287.

[86] *See* Final Rule, Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,539 (May 30, 1986) ("The purpose of this rule is not to foreclose the raising of important . . . issues, but to ensure that, once a record has been closed and all timely-raised issues have been resolved, finality will attach to the hearing process.").

[87] Massachusetts Petition for Review at 17.

[88] Massachusetts' Motion to Supplement discusses the ways in which the Near-Term Report supports Dr. Thompson's views. *See* Motion to Supplement Contention at 1-2. The Supplemental Thompson Declaration discusses in further detail the purported supporting information in the Near-Term Report. *See* Supplemental Thompson Declaration at 1-7.

[89] *See* New Contention at 6; Thompson Report at 17.

experience" methodology.[90] Even though Dr. Thompson observed that the data set for his methodology "is comparatively sparse and therefore does not provide a statistical basis for a high-confidence estimate of [core damage frequency]," he nonetheless concluded that it provides a "reality check" for the Pilgrim SAMA analysis.[91]

The Board reasoned that Massachusetts did not show how Dr. Thompson's "direct experience" methodology called into question the scenario-specific core damage frequencies that were developed in the Pilgrim application for "the entire spectrum of core damaging events, ranging from those that do minimal damage to those that involve massive core melting," nor did it show how Dr. Thompson's methodology (with its limited data set) would be used to develop a separate spectrum of core damage frequencies.[92] The Board also determined that Massachusetts failed to explain the effect of Dr. Thompson's core damage frequency estimate on potential containment failure and subsequent offsite release.[93]

We find no error or abuse of discretion in the Board's ruling on this point. Although the Board made its observations while analyzing the timeliness of Massachusetts' motion to reopen

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[90] *See* Thompson Report at 15-16. Where the PRA methodology takes into account a variety of accident scenarios and the probability of their occurrence, Dr. Thompson's "direct experience" methodology focuses on five actual core damage accidents at commercial nuclear power plants, divided by approximately 14,500 reactor years of operating experience at commercial nuclear power plants worldwide (as of May 16, 2011), yielding a core damage frequency that is ten times higher than the baseline estimate in the Pilgrim SAMA analysis. *See id.* at 15-17.

[91] *Id.* at 16. *See also* Supplemental Thompson Declaration at 4 (arguing that the Task Force showed a "clear preference for direct experience as the primary basis for its recommendations").

[92] LBP-11-35, 74 NRC at __ (slip op. at 51 & n.203).

[93] *Id.*

under subsection 2.326(a)(1),[94] we find them more pertinent to subsection 2.326(a)(2). Massachusetts has not demonstrated the existence of a "significant environmental issue."[95] Although Massachusetts suggested a different methodology for performing the SAMA analysis, it ultimately failed to show how the PRA methodology that is currently used is inadequate to satisfy NEPA's "hard look" requirement.[96] As we have stated, our adjudicatory proceedings are not "EIS editing sessions."[97] The burden is on the proponent of a contention to show that the Staff's analysis or methodology is unreasonable or insufficient.[98] Other than the sweeping assertion that the "direct experience" methodology provides a "reality check" for the Pilgrim SAMA analysis, Massachusetts' contention and the Thompson Report do not challenge the Pilgrim site-specific spectrum of events making up the PRA core damage frequency in the FSEIS.[99]

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[94] *See id.* at __ (slip op. at 49-55).

[95] *See* 10 C.F.R. § 2.326(a)(2).

[96] *See* CLI-10-11, 71 NRC at 315-16 ("In short, NEPA allows agencies 'to select their own methodology as long as that methodology is reasonable.'" (quoting *Town of Winthrop v. FAA*, 535 F.3d 1, 13 (1st Cir. 2008))).

[97] *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 431 (2003).

[98] *See id.*

[99] We also question the timeliness of Massachusetts' "direct experience" claim. *See* 10 C.F.R. § 2.326(a)(1). As the Board observed, in addition to the accident at Fukushima Dai-ichi, Dr. Thompson's "direct experience" methodology is based on the Three Mile Island and Chernobyl accidents—both of which occurred decades ago. *See* LBP-11-35, 74 NRC at __ (slip op. at 27, 52-53). The Board observed that a direct experience calculation using information from Three Mile Island and Chernobyl alone would have yielded a core damage frequency five times higher than that provided in the Pilgrim SAMA analysis. *Id.* at __ (slip op. at 52 & n.206). The information arising out of the Fukushima accident, when used in the direct experience (continued. . .)

Second, Massachusetts asserted that operators at Fukushima Dai-ichi were unable to perform mitigative actions to lessen or prevent an offsite radiation release due to the severity of damage at the site.[100] According to Massachusetts, the possibility of similar conditions limiting operator ability to effectively mitigate an accident should be considered in the Pilgrim SAMA analysis.[101] Relating to spent fuel storage, Dr. Thompson argued that the inability of operators to mitigate an accident "could affect the conditional probability of a spent-fuel-pool fire" if operators are unable to add water to the pools.[102] Based on reports of attempts to add water to the spent fuel pools at Fukushima Dai-ichi, Dr. Thompson questioned the efficacy of the measures in place at Pilgrim to mitigate or prevent a spent fuel pool fire.[103]

For Massachusetts' claims relating to operator actions and mitigation procedures not involving the spent fuel pool, the Board found them inadequate for failure to address the "actual consideration of those matters in the [license renewal application], and failure to "indicate how [they] would be affected by consideration of the proposed new information."[104] Based on this reasoning, we find no error in the Board's analysis. The Board appropriately found that Massachusetts had not demonstrated sufficiently that a materially different result would have

(. . .continued)
analysis, provided a different value for the core damage frequency, but it did not change Massachusetts' underlying challenge to the method for calculating core damage frequency itself. The Board did not err in finding that Massachusetts' direct experience claim was late, since it could have been raised at the outset of this proceeding. *See id.* at __ (slip op. at 52-53).

[100] New Contention at 6; Thompson Report at 18; Supplemental Thompson Declaration at 4-5.

[101] New Contention at 6-7; Thompson Report at 20.

[102] Thompson Report at 18-19.

[103] *Id.* at 19-20; Supplemental Thompson Declaration at 4-5.

[104] LBP-11-35, 74 NRC at __ (slip op. at 59).

been likely had this information been considered initially.[105] As for Massachusetts' remaining spent-fuel-pool-related claims, the Board found them to be outside the scope of the proceeding and did not consider them further.[106] We agree.

Massachusetts' third argument is closely tied with the second. Massachusetts asserted that "the NRC's excessive secrecy regarding accident mitigation measures and the phenomena associated with spent-fuel-pool fires degrades the licensee's capability to mitigate an accident."[107] Dr. Thompson elaborated that because certain measures to mitigate severe accidents were only recently disclosed to the public, there is a risk of their inadequacy due to their not having received the benefit of public input, as well as a risk that the entities involved in implementing the measures may not understand fully the details of the tasks they are expected to perform.[108]

The Board found Massachusetts' "secrecy" claims to be outside the scope of the proceeding.[109] The Board did not err in holding that these claims are out-of-scope. Massachusetts' concerns appear to be directed more generally at policy issues governing access and categorization of non-public information,[110] and it is not apparent how the claimed "excessive secrecy" could affect, or even be factored into, the SAMA analysis.

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[105] See *id.* at __ (slip op. at 59).

[106] *See id.* at __ (slip op. at 46, 50).

[107] New Contention at 7.

[108] *See* Thompson Report at 21-23. *See also* Supplemental Thompson Declaration at 5.

[109] LBP-11-35, 74 NRC at __ (slip op. at 65).

[110] *See* Thompson Report at 21-23.

Massachusetts' fourth argument pertains to the prevention of hydrogen explosions during a reactor accident.[111] Massachusetts claimed that "[b]ased on the occurrence of hydrogen explosions at Fukushima [Dai-ichi] . . . it appears likely that hydrogen explosions similar to those experienced at Fukushima could occur at . . . Pilgrim."[112] In support, Dr. Thompson asserted that "containment venting and other hydrogen control systems at the Pilgrim plant should be upgraded, and should use passive mechanisms as much as possible."[113] In his view, hydrogen control measures—both hardware and operating procedures—should be incorporated into Pilgrim's design basis.[114]

In rejecting Massachusetts' hydrogen control claims, the Board found that Massachusetts had failed to confront the existing SAMA analysis' extensive consideration of the potential for hydrogen explosions and measures to mitigate the buildup of hydrogen.[115] The Board thus concluded that Massachusetts had not shown the likelihood of a materially different result had Dr. Thompson's hydrogen control information been considered initially.[116] We decline to disturb the Board's sound reasoning on this issue. As Entergy asserted, Dr. Thompson "nowhere references or addresses the Pilgrim SAMA analysis's extensive consideration of

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[111] New Contention at 7; Thompson Report at 24.

[112] New Contention at 7.

[113] Thompson Report at 25. *See also* Supplemental Thompson Declaration at 5.

[114] Thompson Report at 26.

[115] LBP-11-35, 74 NRC at __ (slip op. at 59, 61-62). *See also id.* at 36-38 (citing *Entergy's Answer Opposing Commonwealth Contention and Petition for Waiver Regarding New and Significant Information Based on Fukushima* (June 27, 2011), at 41-43 (Entergy Answer to New Contention)).

[116] LBP-11-35, 74 NRC at __ (slip op. at 59).

hydrogen explosions, let alone provide[s] any explanation of how any of it is inadequate."[117] Failure to challenge the existing SAMA analysis would be insufficient to establish a material dispute for the purposes of satisfying the general contention admissibility standards, let alone the reopening standards.[118]

Fifth, Massachusetts focuses on the probability of a spent fuel pool fire and a resulting radioactive release.[119] Acknowledging that the state of knowledge about the Fukushima Dai-ichi accident continues to evolve, and "much of the relevant information is not available at this time," Dr. Thompson hypothesized that there is evidence of fuel damage in at least one of the Fukushima Dai-ichi spent fuel pools.[120] He argued that this supports his view of a "substantial conditional probability of a pool fire during a reactor accident at . . . Pilgrim."[121] In addition, he referenced reports that he prepared in support of Massachusetts' 2006 rulemaking petition, and asserted that "no evidence has emerged from Fukushima" to contradict the conclusions in those reports.[122] He further argued that the "Pilgrim pool should be re-equipped with low-density,

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[117] Entergy Answer to New Contention at 41.

[118] *See* 10 C.F.R. §§ 2.309(f)(1)(vi), 2.326(a)(3). The Board also found the hydrogen control claims to be outside the scope of the proceeding. *See* LBP-11-35, 74 NRC at __ (slip op. at 65). The Board's reasoning on this point is thin, but to the extent the Board excludes hydrogen control related to spent fuel pools, we agree that this would be outside the scope of this adjudication, in light of the Board's denial of the waiver petition.

[119] *See* New Contention at 7 (arguing that after Fukushima, "the NRC's previous rejection [(presumably in the 2008 Rulemaking Denial)] of [Massachusetts'] concerns regarding the environmental impacts of high-density pool storage of spent fuel has been refuted").

[120] Thompson Report at 26.

[121] *Id.* at 27. *See also* Supplemental Thompson Declaration at 5-6.

[122] Thompson Report at 27.

open-frame racks."[123] Because the Board denied Massachusetts' waiver petition, it found this issue to be outside the scope of the proceeding.[124] We find no error in the Board's ruling on this point.

The final issue raised in Massachusetts' new contention pertains to filtered venting of reactor containment.[125] Dr. Thompson speculated that some of the radioactive material released at Fukushima might have traveled through vents designed to relieve containment pressure. To reduce the radiological impact of a severe accident, Dr. Thompson argued that filters should be added to the vents to remove radioactive material.[126] He asserted that the Pilgrim SAMA analysis should be revised to consider filtered vents, and that a filtered vent system that uses passive mechanisms should be installed at Pilgrim.[127]

The Board rejected the claims concerning filtered vents, finding that Massachusetts failed to demonstrate the likelihood of a materially different result because Massachusetts had not discussed the relative costs and benefits of adding filters.[128] Additionally, the Board found the issue to be outside the scope of the proceeding to the extent Massachusetts would require installation of the filters.[129] We find no error in the Board's analysis here. We also note that

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[123] *Id.* at 28.

[124] *See* LBP-11-35, 74 NRC at __ (slip op. at 46, 50).

[125] New Contention at 7; Thompson Report at 28.

[126] Thompson Report at 28-29.

[127] *See id.* at 29; Supplemental Thompson Declaration at 6.

[128] LBP-11-35, 74 NRC at __ (slip op. at 58-59).

[129] *See id.* at __ (slip op. at 65).

Massachusetts' filtered vent claims fail to satisfy the "materially different result" prong for an independent reason. As Entergy pointed out, filtered vents already were considered as a SAMA candidate in the Pilgrim FSEIS, and Massachusetts' contention and its supporting material do not acknowledge, let alone challenge, the existing analysis.[130] Therefore, the Board did not err in holding that Massachusetts failed to show the likelihood of a materially different result, given that the SAMA analysis already considered filtered vents.[131]

3. Massachusetts' Rulemaking Petition and Suspension Request

As discussed above, Massachusetts included with its waiver petition a "standby" petition for rulemaking and conditional motion to suspend the proceeding pending the disposition of the rulemaking request. With the Board's denial of its waiver petition, the question arises whether the rulemaking petition is now active. In pleadings submitted to the Board, the Staff and Massachusetts requested that the Board refer the rulemaking petition to the Staff for consideration upon the Board's denial of the waiver petition.[132] The Board did not refer the

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[130] *See* Entergy Answer to New Contention at 43-44.

[131] *See* 10 C.F.R. § 2.326(a)(3); CLI-12-3, 75 NRC at __ (slip op. at 23-24).

[132] *See NRC Staff's Response to the Commonwealth of Massachusetts' Petition for Waiver of 10 C.F.R. Part 51 Subpart A, Appendix B or, in the Alternative, Petition for Rulemaking* (June 27, 2011), at 2 ("Because Massachusetts filed the request with the Board, it is not yet before the portion of the agency tasked with processing petitions for rulemaking . . . . Consequently, should the Board dismiss the Waiver Petition, the Staff asks that the Board forward the request to the NRC Staff for consideration as a formal petition for rulemaking under 10 C.F.R. §§ 2.802 [and] 2.803."); *Commonwealth of Massachusetts Reply to the Responses of the NRC Staff and Entergy to Commonwealth Waiver Petition and Motion to Admit Contention or in the Alternative for Rulemaking* (July 5, 2011), at 3 & n.7.

rulemaking petition expressly; therefore, we will today. We refer Massachusetts' rulemaking petition to the Staff for appropriate resolution in accordance with 10 C.F.R. Part 2, Subpart H.[133]

However, we decline to suspend the proceeding pending the disposition of the rulemaking petition. We consider suspension of licensing proceedings a "drastic" action that is not warranted absent compelling circumstances.[134] In the *Private Fuel Storage* dry cask proceeding, we articulated three criteria for determining whether to suspend an adjudication.[135] We balance whether moving forward with the adjudication will: (1) "jeopardize the public health and safety"; (2) "prove an obstacle to fair and efficient decision[-]making"; and (3) "prevent appropriate implementation of any pertinent rule or policy changes that might emerge from our . . . ongoing [lessons-learned] evaluation."[136] Massachusetts argues that "it is necessary to suspend the . . . proceeding to allow sufficient time for the Commission to consider [the rulemaking petition] . . . to rescind the spent fuel pool . . . regulations on a generic basis, and ensure that the concerns raised [in its] . . . contention will be considered before the [Board] makes a final decision" on Entergy's license renewal application.[137] In other words,

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[133] *See generally* Waiver/Rulemaking Petition; Thompson Declaration; Thompson Report; *Commonwealth of Massachusetts Supplemental Attachment to the Declaration of Dr. Gordon R. Thompson* (June 13, 2011); Motion to Supplement Contention; Supplemental Thompson Declaration.

[134] *E.g.*, *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 484 (2008).

[135] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 380 (2001). *See also Callaway*, CLI-11-5, 74 NRC at __ (slip op. at 19-20).

[136] *Private Fuel Storage*, CLI-01-26, 54 NRC at 380.

[137] Conditional Motion to Suspend at 2 (emphasis omitted).

Massachusetts asserts that we must suspend the proceeding to "protect its position," which eventually will enable it to litigate, in this adjudicatory proceeding, its challenges to the Pilgrim FSEIS.[138]

With regard to the first factor, Massachusetts has not shown that continuing with the *Pilgrim* adjudication presents an immediate threat to public health and safety. Massachusetts' desire to protect its litigating position does not invoke a public health and safety threat. Moreover, the issues it raises in its contention and rulemaking petition concern a number of generic issues that may be addressed as part of our ongoing regulatory processes. When addressing similar suspension petitions that were submitted in response to the events at Fukushima Dai-ichi, we observed, particularly with respect to license renewal, that our current regulatory and oversight processes provide reasonable assurance that each plant continues to

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[138] *Id.* at 2, 4, 7-8. Entergy and the Staff oppose Massachusetts' suspension motion. *Entergy Answer Opposing Commonwealth of Massachusetts Conditional Motion to Suspend License Renewal Proceeding* (June 13, 2011) (Entergy Answer to Conditional Motion to Suspend); *NRC Staff's Answer in Opposition to Commonwealth of Massachusetts' Conditional Motion to Suspend Pilgrim Nuclear Power Plant License Renewal Proceeding Pending Resolution of Petition for Rulemaking to Rescind Spent Fuel Pool Exclusion Regulations* (June 13, 2011). Massachusetts seeks leave to reply to Entergy and the NRC Staff, arguing that it could not have anticipated the arguments in Entergy's and the Staff's answers. *Commonwealth of Massachusetts Motion to Reply to NRC Staff and Entergy Oppositions to the Commonwealth of Massachusetts Motion to Suspend the License Renewal Proceeding for the Pilgrim Nuclear Power Plant* (June 16, 2011), at 1. Entergy opposes Massachusetts' motion to reply. *Entergy Answer Opposing Commonwealth of Massachusetts Motion to Permit Unauthorized Reply to Entergy and NRC Staff Answers Opposing Conditional Motion for Suspension* (June 24, 2011). We deny the motion to reply, finding no compelling circumstances presented here. *See* 10 C.F.R. § 2.323(c). We find that Massachusetts should have anticipated the arguments in the Staff's and Entergy's answers, which, in our view, were logical responses to Massachusetts' suspension motion. *Cf. Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-11-14, 74 NRC __ (Dec. 22, 2011) (slip op. at 7-9).

comply with its "'current licensing basis,' which can be adjusted by future Commission order or by modification to the facility's operating license outside the renewal proceeding."[139]

Massachusetts' arguments in support of its rulemaking petition are more relevant to the second and third factors, in that they focus on the potential unfairness of continuing the adjudicatory proceeding while Massachusetts awaits the outcome of its rulemaking petition, and the ability of the NRC to consider Massachusetts' claims before a decision is made on Entergy's license renewal application. But any unfairness to Massachusetts equally applies to Entergy in this case, as Entergy argues that "*suspension* of this proceeding . . . would undermine fair and efficient decision[-]making."[140] Moreover, we already have considered and rejected the notion that our Fukushima lessons-learned review needs to be completed prior to a decision on any pending license renewal application. Any rule or policy changes we may make as a result of our post-Fukushima review may be made irrespective of whether a license renewal application is pending, or whether final action on an application has been taken.[141] Therefore, on balance, we

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[139] *Callaway*, CLI-11-5, 74 NRC at __ (slip op. at 26) (citing Final Rule, Nuclear Power Plant License Renewal, 56 Fed. Reg. 64,943, 64,949, 64,953-54 (Dec. 13, 1991)). *See also* Near-Term Report at vii (concluding that "continued operation and continued licensing activities do not pose an imminent risk to public health and safety").

[140] Entergy Answer to Conditional Motion to Suspend at 3 (emphasis in original). *See generally* 5 U.S.C. § 558(c) (requiring that an agency set and complete proceedings on license applications "with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time"). *See also Vermont Yankee*, CLI-07-3, 65 NRC at 22 ("[W]hatever the ultimate fate of [Massachusetts'] 'new information' claim, admitting [Massachusetts'] contention for an adjudicatory hearing is not necessary to ensure that the claim receives a full and fair airing.").

[141] *See Callaway*, CLI-11-5, 74 NRC at __ (slip op. at 26).

do not find that suspension of this adjudicatory proceeding pending the disposition of Massachusetts' rulemaking petition is warranted in the circumstances presented here.

Our denial of Massachusetts' suspension petition should not be interpreted to mean that we take its claims lightly. Our review of the events at Fukushima Dai-ichi is ongoing. We have directed the Staff to strive to complete and implement lessons learned within five years—by 2016.[142] The NRC continues to analyze the Fukushima events, to engage stakeholders, and to develop further recommendations.[143] We have in place well-established regulatory processes by which to impose any new requirements or other enhancements that may be needed following completion of regulatory actions associated with the Fukushima events.[144] All affected nuclear

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[142] Staff Requirements—SECY-11-0124—Recommended Actions to Be Taken Without Delay from the Near-Term Task Force Report (Oct. 18, 2011), at 1 (ML112911571). *See generally* "Recommended Actions to Be Taken Without Delay from the Near-Term Task Force Report," Commission Paper SECY-11-0124 (Sept. 9, 2011) (ML11245A127, ML11245A144) (paper and attachment); Staff Requirements—SECY-11-0137—Prioritization of Recommended Actions to Be Taken in Response to Fukushima Lessons Learned (Dec. 15, 2011) (ML113490055) (Prioritization of Recommended Actions, SRM); "Prioritization of Recommended Actions to Be Taken in Response to Fukushima Lessons Learned," Commission Paper SECY-11-0137 (Oct. 3, 2011) (ML11272A111) (package) (Prioritization of Recommended Actions, SECY-11-0137).

[143] These efforts include the engagement of internal and external stakeholders. *See* Staff Requirements—COMWDM-11-0001/COMWCO-11-0001—Engagement of Stakeholders Regarding the Events in Japan (Aug. 22, 2011) (ML112340693). For example, the Staff's prioritization of Near-Term Task Force recommended actions included a discussion of additional recommendations for "further consideration and potential prioritization" that stakeholders, as well as the Staff, have identified. *See* Prioritization of Recommended Actions, SECY-11-0137, at 4-5. *See also* Prioritization of Recommended Actions, SRM, at 2. (Although the Staff included "[f]iltration of containment vents"—an issue raised in Massachusetts' contention—as an item for further consideration and potential prioritization, the Staff noted that its "assessment of these issues is incomplete at this time." Prioritization of Recommended Actions, SECY-11-0137, at 5. We acted on the Staff's recommendation and provided direction regarding "the analysis and interaction with stakeholders needed to inform a decision" on the filtered vents issue. Prioritization of Recommended Actions, SRM, at 2.)

[144] *See Callaway*, CLI-11-5, 74 NRC at __ (slip op. at 24-25, 29).

plants ultimately will be required to comply with NRC direction resulting from lessons learned from the Fukushima accident, regardless of the timing of issuance of the affected licenses.[145] Although our Fukushima lessons-learned review continues, we do not have sufficient information at this time to make a significant difference in the *Pilgrim* environmental review. NEPA requires that we conduct our environmental review with the best information available now.[146] It does not, however, require that we wait until inchoate information matures into something that later might affect our review.[147]

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[145] Most recently, the Staff transmitted to us recommendations to issue proposed orders in response to lessons learned from the events in Japan. *See generally* "Proposed Orders and Requests for Information in Response to Lessons Learned from Japan's March 11, 2011, Great Tohoku Earthquake and Tsunami," Commission Paper SECY-12-0025 (Feb. 17, 2012) (ML12039A103) (package).

[146] *See Village of Bensenville v. FAA*, 457 F.3d 52, 71-72 (D.C. Cir. 2006) (reasoning that the review method chosen by the agency in "creating its models with the best information available when it began its analysis and then checking the assumptions of those models as new information became available, was a reasonable means of balancing . . . competing considerations, particularly given the many months required to conduct full modeling with new data"); *Town of Winthrop*, 535 F.3d at 9-13 (upholding agency decision not to supplement an EIS with information in an area of research that was "still developing"). *Accord Marsh*, 490 U.S. at 373 ("[A]n agency need not supplement an EIS every time new information comes to light after the EIS is finalized. To require otherwise would render agency decision[-]making intractable, always awaiting updated information only to find the new information outdated by the time a decision is made.").

[147] *See Marsh*, 490 U.S. at 373-74. Our rules enable us to supplement an FSEIS if, before a proposed action is taken, new and significant information comes to light that bears on the proposed action or its impacts, consistent with the Supreme Court's decision in *Marsh v. Oregon Natural Resources Council*. *See* 10 C.F.R. § 51.92(a); *Marsh*, 490 U.S. at 373-74. *See also* LBP-11-35, 74 NRC at __ (slip op. at 65 n.234) (noting that "[i]f and when Fukushima-derived information sheds new light on the Pilgrim SAMA analysis, the NRC has adequate mechanisms for addressing its regulatory impact").

III. CONCLUSION

For the reasons set forth above, we *deny* Massachusetts' and Pilgrim Watch's petitions for review. We *refer* Massachusetts' rulemaking petition to the Staff for appropriate resolution. We *deny* Massachusetts' request to suspend the adjudicatory proceeding pending the disposition of its rulemaking petition.

IT IS SO ORDERED.[148]

For the Commission

[NRC Seal]

/RA/

_____
Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 8th day of March, 2012.

[148] Commissioner Apostolakis did not participate in this matter.

Chairman Gregory B. Jaczko, Concurring in Part, and Dissenting in Part

I concur with the majority decision to the extent it denies Massachusetts' waiver petition and request for suspension of the proceeding in the event that its rulemaking petition is activated. I dissent from the decision to the extent that it applies the standard reserved for reopening a closed hearing record, in 10 C.F.R. § 2.326(a), to Massachusetts' new Fukushima contention. Fundamentally, I believe that the reopening standard is not appropriate for Fukushima-related contentions. Therefore, I believe the admissibility of this contention should have been considered solely under the criteria applicable to nontimely filings in 10 C.F.R. § 2.309(c).

The higher threshold for contention admissibility imposed for reopening a record places a heavy burden on a litigant seeking the admission of new contentions. In my view, this more stringent contention admissibility standard is not appropriate for contentions arising from the unprecedented and catastrophic accident at Fukushima. We are in the process of conducting a comprehensive review of the Fukushima events from which we have, and will continue to, learn new information and gain new insights on the safety of our nuclear fleet. Given the significance of that accident and the potential implications for the safety of our nuclear reactors, we should allow members of the public to obtain hearings on new contentions on emerging information if they satisfy our ordinary contention standards. Applying more stringent admissibility standards to Fukushima contentions because a Board has taken the administrative action of closing the record on an unrelated hearing will lead to inconsistent outcomes and, more importantly, unfairly limit public participation in these important safety matters. When we considered whether our modifications to our adjudicatory processes should be modified for Fukushima-related contentions, we said we would monitor our proceedings and issue additional guidance as

appropriate.[1] I believe that we should do so now and direct that the reopening criteria should not be applied.

[1] *Callaway*, CLI-11-5, 74 NRC at __ (slip op. at 36).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-12-06) have been served upon the following persons by Electronic Information Exchange (EIE) and by electronic mail as indicated by an asterisk*.

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Dated at Rockville, Maryland
this 8th day of March 2012