LBP-11-20

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ann Marshall Young, Chair
Dr. Paul B. Abramson
Dr. Richard F. Cole

In the Matter of:	Docket No. 50-293-LR
ENTERGY NUCLEAR GENERATION COMPANY AND ENTERGY NUCLEAR OPERATIONS, INC.	ASLBP No. 06-848-02-LR
(Pilgrim Nuclear Power Station)	August 11, 2011

MEMORANDUM AND ORDER
(Denying Pilgrim Watch's Requests for Hearing on Certain New Contentions)

On March 26, 2010, the Commission remanded to this Board a narrow portion of Contention 3 for reconsideration in accordance with specific instructions.[1] Subsequently, the parties agreed that the remanded portion of Contention 3 could be resolved on the evidentiary record – as supplemented by their written evidentiary submissions – without an oral evidentiary hearing.[2] The Board heard oral argument on Contention 3,[3] and the Board denied the remanded portion for failure to raise a material issue.[4] During the interval between the remand and the ruling on Contention 3, Intervenor Pilgrim Watch filed requests for hearing on five new

[1] See CLI-10-11, 71 NRC __, __ (slip op. at 3) (Mar. 26, 2010).

[2] Joint Motion Requesting Resolution of Contention 3 Meteorological Issues on Written Submissions (Feb. 16, 2011) at 1.

[3] Tr. at 784-1018.

[4] LBP-11-18, 74 NRC __, __ (slip op. at 32-33) (July 19, 2011).

contentions, the first two in November and December 2010,[5] a follow-up to the December contention filed in January 2011,[6] a fourth in May 2011,[7] and a fifth in June 2011.[8]

This ruling of a majority of the Board pertains only to Pilgrim Watch's first three proposed new contentions. The first concerns which agency regulates costs of, and which bears responsibility for, the cleanup of any accident at the Pilgrim Nuclear Power Station (Pilgrim).[9] The second and third challenge the aging management plan (AMP) for non-environmentally qualified (EQ) inaccessible cables of Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (collectively Entergy) for Pilgrim.[10]

The Board will address Pilgrim Watch's fourth and fifth contentions, which both concern information derived from the events at the Fukushima reactors, in a separate ruling. Pilgrim Watch's fourth contention asserts that Entergy's severe accident mitigation alternatives (SAMA) analysis fails to incorporate lessons learned from Fukushima,[11] and the fifth asserts that

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[5] Pilgrim Watch Request for Hearing on a New Contention (Nov. 29, 2010) at 1 [hereinafter Cleanup Contention]; Pilgrim Watch Request for Hearing on a New Contention: Inadequacy of Entergy's Aging Management of Non-Environmentally Qualified (EQ) Inaccessible Cables (Splices) at Pilgrim Station (Dec. 13, 2010) at 1 [hereinafter Cables Contention 1].

[6] See Pilgrim Watch Request for Hearing on a New Contention: Inadequacy of Entergy's Aging Management of Non-Environmentally Qualified (EQ) Inaccessible Cables (Splices) at Pilgrim Station (Jan. 20, 2011) [hereinafter Cables Contention 2].

[7] Pilgrim Watch Request for Hearing on Post[-]Fukushima Contention (May 12, 2011) [hereinafter Post-Fukushima Contention 1].

[8] Pilgrim Watch Request for Hearing on a New Contention Regarding Inadequacy of Environmental Report, Post Fukushima (June 1, 2011) [hereinafter Post-Fukushima Contention 2].

[9] Cleanup Contention at 2.

[10] Cables Contention 1 at 1; Cables Contention 2 at 1.

[11] Post-Fukushima Contention 1 at 1.

Entergy's SAMA analysis fails to properly consider the probability of both containment failure and subsequent larger off-site consequences due to failed operation of the direct torus vent.[12]

In addition, that separate ruling will address filings by the Commonwealth of Massachusetts that also concern information from the Fukushima events. The Commonwealth filed a motion before us on May 2, 2011 that amounts to a request for a stay of this proceeding,[13] and submitted on June 2 both (a) a hearing request for a new contention challenging the Entergy SAMA analysis because of asserted new information regarding both Spent Fuel Pool (SFP) accidents and severe accident probabilities based upon the events at Fukushima[14] and (b) a request to waive our regulation that SFP issues are outside the scope of a license renewal proceeding such as this.[15]

Given the status of this case, for any of the three contentions we consider today to be admitted, the Commission's demanding regulatory requirements for reopening the record regarding such contention must be satisfied.[16] For the reasons set out below, we DENY Pilgrim Watch's requests.

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[12] Post-Fukushima Contention 2 at 1.

[13] See 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) at 1.

[14] Commonwealth of Massachusetts' Contention Regarding New and Significant Information Revealed by the Fukushima Radiological Accident (June 2, 2011) at 5-8; see also 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) at 1.

[15] 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) at 1-2.

[16] See 10 C.F.R. § 2.326.

I. BACKGROUND

In late January 2006, Entergy submitted its license renewal application (LRA) for Pilgrim, requesting a 20-year extension of its current operating license.[17] Pilgrim Watch petitioned to intervene, challenging the application,[18] and this Board admitted two contentions—Contention 1, challenging Entergy's aging management program for buried piping and Contention 3, challenging Entergy's SAMA analysis.[19] On October 30, 2007, the majority of this Board granted summary disposition of Contention 3 in Entergy's favor.[20] On April 10, 2008, the Board held an evidentiary hearing on Contention 1[21] and closed the evidentiary record shortly thereafter.[22]

On October 30, 2008, this Board issued an initial decision resolving Contention 1 in Entergy's favor and terminated the proceeding.[23] Pilgrim Watch petitioned for review of that initial decision and numerous other Board decisions, including our order dismissing Contention 3 on summary disposition.[24] On March 26, 2010, the Commission, in CLI-10-11, reversed the summary disposition of Contention 3 and remanded it to the Board "as limited by [the Commission's remand] ruling" for further proceedings.[25] More particularly, the Commission

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[17] See 71 Fed. Reg. 15,222, 15,222 (Mar. 27, 2006).

[18] Request for Hearing and Petition to Intervene by Pilgrim Watch (May 25, 2006) at 1.

[19] LBP-06-23, 64 NRC 257, 348-49 (2006).

[20] LBP-07-13, 66 NRC 131, 137 (2007).

[21] Tr. at 557-874.

[22] Board 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) [hereinafter Order Regarding Testimony and Evidence].

[23] LBP-08-22, 68 NRC 590, 610 (Oct. 30, 2008).

[24] See Pilgrim Watch's Petition for Review of LBP-06-848 [sic], LBP-07-13, LBP-06-23 and the Interlocutory Decision in the Pilgrim Nuclear Power Station Proceeding (Nov. 12, 2008) at 1.

[25] CLI-10-11, 71 NRC __, __ (slip op. at 3) (Mar. 26, 2010).

explicitly limited the remanded proceeding to the narrow topic of whether asserted shortcomings in the meteorological modeling are so large as to alter the results of the SAMA cost-benefit analysis.[26]

On November 29, 2010, Pilgrim Watch filed the first new contention (the Cleanup Contention), asserting:

> Until and unless some third party assumes responsibility for cleanup after a severe nuclear reactor accident to pre-accident conditions, sets a cleanup standard, and identifies a funding source, Entergy should be required to take all of the mitigation steps that would be required by a SAMA analysis (i) based on a conservative source term using release fractions no lower than those specified in NUREG-1465 or used by the NRC in studies such as NUREG 1450, cleanup to a dose rate of not more than 15 millirem a year, and at least the 95th percentile of the total consequences determined by the EARLY and CHRONC modules of the MACCS2 Code, and (ii) does not reduce any costs by use of a discount factor or probabilistic analysis.[27]

Pilgrim Watch filed the second new contention on December 13, 2010 (Cables Contention 1)[28] and the third on January 20, 2011 (Cables Contention 2).[29] In Cables Contention 1 Pilgrim Watch asserts:

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[26] Id. at __ (slip op. at 26-27). The Board framed the remanded question to be "whether the meteorological modeling in the Pilgrim SAMA analysis is adequate and reasonable to satisfy NEPA, and whether accounting for the meteorological patterns/issues of concern to Pilgrim Watch could, on its own, credibly alter the Pilgrim SAMA analysis conclusions on which SAMAs are cost[]beneficial to implement." Board Order (Confirming Matters Addressed at September 15, 2010, Telephone Conference) (Sept. 23, 2010) (unpublished) (emphasis omitted). The Commission also directed that if the Board determines that the asserted deficiency in the meteorological pattern modeling could cause additional SAMAs to become cost effective, the Board also reexamine offsite economic costs and evacuation time inputs linked to the adequacy of the meteorological modeling. CLI-10-11, 71 NRC at __ (slip op. at 26-27).

Faced with Pilgrim Watch's argument that it should be allowed to present evidence on matters not subject to the remand, the Commission explicitly held that Pilgrim Watch "cannot now insist that it is free to 'present evidence' on remand . . . to the extent that such evidence is not within the scope of the remanded meteorological patterns issue, as explained in CLI-10-11." CLI-10-15, 71 NRC __, __ (slip op. at 8) (June 17, 2010).

[27] Cleanup Contention at 1.

[28] Cables Contention 1 at 1.

[29] Cables Contention 2 at 1.

> Entergy's Aging Management Plan for non-environmentally qualified (EQ) inaccessible cables and cable splices at Pilgrim Station is insufficient to provide reasonable assurance that these cables will be in compliance with NRC Regulations and public health and safety shall be protected during license renewal.[30]

Cables Contention 2 is identical to Cables Contention 1 except that Pilgrim Watch has modified the noun "Plan" by inserting after it the parenthetical "(as amended by Entergy on January 7, 2011)."[31] The two cables contentions are based upon assertedly new information. Pilgrim Watch asserts that Cables Contention 1 is based upon new information contained in the NRC's Information Notice 2010-26 (Submerged Electrical Cables), issued on December 2, 2010.[32] Pilgrim Watch asserts that Cables Contention 2 is based upon new information contained in the NRC's December 2010 revision of the Generic Aging Lessons Learn (GALL) Report[33] and Entergy's January 7, 2011 LRA supplement[34] which, among other things, amended the AMP for

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[30] Cables Contention 1 at 1.

[31] Cables Contention 2 at 1 (emphasis omitted). Cables Contention 2 reads in full:

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

<u>Id.</u>

[32] Cables Contention 1 at 2 (citing <u>id.</u>, Att. A).

[33] Office of Nuclear Reactor Regulation, Generic Aging Lessons Learned (GALL) Report, NUREG-1801, Rev. 2 (Dec. 2010) (ADAMS Accession No. ML103490041) [hereinafter GALL Rev. 2].

[34] Cables Contention 2 at 24-25. Entergy thoroughly discusses the GALL revision and LRA supplement in Section II.B of its answer to Cables Contention 1, Entergy Answer Opposing Pilgrim Watch Request for Hearing on a New Contention (Jan. 7, 2011) at 5-10 [hereinafter Entergy Answer to Cables Contention 1], and discusses them with similar thoroughness in its answer to Cables Contention 2. <u>E.g.</u>, Entergy Answer Opposing Pilgrim Watch Request for Hearing on a New Contention (Feb. 14, 2011) at 10-11, 17 [hereinafter Entergy Answer to Cables Contention 2].

non-EQ inaccessible cables.[35] Pilgrim Watch filed its requests for a hearing on contentions challenging Entergy's AMP even though Pilgrim Watch's intervention petition did not challenge the original LRA's program for managing inaccessible cables.[36]

Pilgrim Watch contends that these three proposed new contentions: (1) need not satisfy the standards for reopening the record in 10 C.F.R. § 2.326;[37] (2) satisfy the contention admissibility standards in 10 C.F.R. § 2.309(f)(1);[38] and (3) satisfy the standards for nontimely new contentions in 10 C.F.R. § 2.309(c).[39]

In late December of 2010, Entergy and the NRC Staff filed their respective answers to Pilgrim Watch's Cleanup Contention.[40] Entergy and the NRC Staff filed their answers to Cables

[35] Letter from Stephen J. Bethay, Entergy Nuclear Operations, Inc. to U.S. Nuclear Regulatory Commission, Att. 1, License Renewal Application – Supplemental Information at 8 (Jan. 7, 2011) (ADAMS Accession No. ML110200058) [hereinafter LRA Supplement].

[36] Pilgrim Nuclear Power Station License Renewal Application (Jan. 2006) (ADAMS Accession No. ML060300028) [hereinafter License Renewal Application].

[37] Pilgrim Watch Reply to Entergy's and NRC Staff's Answers Opposing Pilgrim Watch Request for Hearing on a New Contention (Jan. 7, 2011) at 5-6 [hereinafter Reply for Cleanup Contention]; Pilgrim Watch Reply to Entergy's and NRC Staff's Answers Opposing Pilgrim Watch Request for Hearing on New Contention (Jan. 14, 2011) at 8-9 [hereinafter Reply for Cables Contention 1]; Cables Contention 2 at 58-59.

[38] Cables Contention 2 at 1; see, e.g., Cleanup Contention at 4 (asserting the 10 C.F.R. § 2.309(f)(iv) materiality standard is met); Cables Contention 1 at 4 (asserting the 10 C.F.R. § 2.309(f)(iv) materiality standard is met).

[39] Cleanup Contention at 9-15; Cables Contention 1 at 34-39; Cables Contention 2 at 53-58.

[40] Entergy Answer Opposing Pilgrim Watch Request for Hearing on a New Contention (Dec. 27, 2010) [hereinafter Entergy Answer to Cleanup Contention]; NRC Staff's Answer in Opposition to Pilgrim Watch's Request for Hearing on New Contention (Dec. 23, 2010) [hereinafter Staff Answer to Cleanup Contention].

Contention 1 on January 7, 2011.[41] On February 14, 2011, Entergy and the Staff filed answers opposing Cables Contention 2.[42]

Entergy and the NRC Staff assert that the requests for admission of the three subject contentions should be denied because the evidentiary record has been closed since the Board's decision terminating the proceeding in LBP-08-22, and therefore 10 C.F.R. § 2.326's requirements for reopening a closed record apply, but Pilgrim Watch neither filed a motion to reopen nor addressed or met the 10 C.F.R. § 2.326 criteria.[43] Entergy argues also that the three subject requests for admission are untimely under 10 C.F.R. § 2.309(f)(2)[44] and do not meet the 10 C.F.R. § 2.309(c) standards for nontimely contentions.[45] The NRC Staff also argues the Cleanup Contention and Cables Contention 2 are untimely[46] and fail to meet the standards for nontimely contentions.[47]

In addition, Entergy and the NRC Staff oppose the subject contentions' admission under 10 C.F.R. § 2.309(f)(1). Entergy argues Cables Contention 1 and Cables Contention 2 are

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[41] Entergy Answer to Cables Contention 1; NRC Staff's Answer in Opposition to Pilgrim Watch Request for Hearing on New Contention (Jan. 7, 2011) [hereinafter Staff Answer to Cables Contention 1].

[42] Entergy Answer to Cables Contention 2; NRC Staff's Answer in Opposition to Pilgrim Watch's January 20, 2011 Amended Contention (Feb. 14, 2011) [hereinafter Staff Answer to Cables Contention 2].

[43] See, e.g., Entergy Answer to Cleanup Contention at 3-5; Staff Answer to Cleanup Contention at 1; Entergy Answer to Cables Contention 1 at 3, 10-14; Staff Answer to Cables Contention 1 at 4; Entergy Answer to Cables Contention 2 at 4, 12, 15-16; Staff Answer to Cables Contention 2 at 7.

[44] Entergy Answer to Cleanup Contention at 1, 5-12; Entergy Answer to Cables Contention 1 at 1, 14-20; Entergy Answer to Cables Contention 2 at 17-20.

[45] Entergy Answer to Cleanup Contention at 1, 12-15; Entergy Answer to Cables Contention 1 at 20-23; Entergy Answer to Cables Contention 2 at 26-30.

[46] Staff Answer to Cleanup Contention at 11-12; Staff Answer to Cables Contention 2 at 11-13.

[47] Staff Answer to Cleanup Contention at 7-11; Staff Answer to Cables Contention 2 at 10.

inadmissible because they are too vaguely stated to satisfy 10 C.F.R. § 2.309(f)(1)(i),[48] raise issues that are immaterial to and outside the scope of the proceeding in contravention of 10 C.F.R. § 2.309(f)(1)(iii) and (iv),[49] and fail to demonstrate a genuine dispute with the application pursuant to 10 C.F.R. § 2.309(f)(1)(vi).[50] Entergy argues in addition that Cables Contention 1 lacks the support of alleged facts or expert opinion required by 10 C.F.R. § 2.309(f)(1)(v)[51] and that Cables Contention 2 lacks a brief explanation of its basis in violation of 10 C.F.R. § 2.309(f)(1)(ii).[52] The NRC Staff also argues that Cables Contention 2 raises issues outside the scope of this proceeding.[53] Finally, both Entergy and the NRC Staff argue that the Cleanup Contention fails to provide a brief explanation of its basis,[54] raises issues beyond the scope of this proceeding and not material to this proceeding,[55] lacks the support of facts or expert

[48] Entergy Answer to Cables Contention 1 at 24-25; Entergy Answer to Cables Contention 2 at 35.

[49] Entergy Answer to Cables Contention 1 at 35-37; Entergy Answer to Cables Contention 2 at 32-35.

[50] Entergy Answer to Cables Contention 1 at 26-35; Entergy Answer to Cables Contention 2 at 36-49.

[51] Entergy Answer to Cables Contention 1 at 25.

[52] Entergy Answer to Cables Contention 2 at 35.

[53] Staff Answer to Cables Contention 2 at 13-15.

[54] Entergy Answer to Cleanup Contention at 16-18; Staff Answer to Cleanup Contention at 16-17.

[55] Entergy Answer to Cleanup Contention at 18-19; see Staff Answer to Cleanup Contention at 15-16, 18-19.

opinion,[56] and fails to raise a genuine dispute with the application on a material issue of law or fact.[57]

On January 7, 2011, Pilgrim Watch replied to Entergy and the NRC Staff's answers concerning admission of the Cleanup Contention.[58] Pilgrim Watch replied to Entergy and the NRC Staff's answers concerning Cables Contention 1 on January 14, 2011[59] and Cables Contention 2 on February 24, 2011.[60]

On March 9, 2011, in conjunction with hearing oral argument on the remanded issue, the Board heard argument on admissibility of these three proposed new contentions.[61]

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[56] Entergy Answer to Cleanup Contention at 20, see Staff Answer to Cleanup Contention at 17-18.

[57] Entergy Answer to Cleanup Contention at 20-23, Staff Answer to Cleanup Contention at 15-16.

[58] Reply for Cleanup Contention.

[59] Reply for Cables Contention 1.

[60] Pilgrim Watch Reply to Entergy's and the NRC Staff's Oppositions to Pilgrim Watch's Request for Hearing on a New Contention (Feb. 24, 2011) at 1 [hereinafter Reply for Cables Contention 2].

[61] Tr. at 784-1018. After the oral argument, Pilgrim Watch filed five memoranda relating to the three proposed new contentions addressed in today's ruling. On March 12 and 28, 2011, Pilgrim Watch submitted two filings related to the recent events at the Fukushima Nuclear Power Plant in Japan, in which it argues that we should consider concerns related to these events in connection with the matters currently pending before us. Pilgrim Watch Memorandum Regarding Fukushima (Mar. 12, 2011) at 1 [hereinafter PW Fukushima Memo 1]; Pilgrim Watch Post-Hearing Memorandum (Mar. 28, 2011) at 1 [hereinafter PW Fukushima Memo 2]. In the second of these Pilgrim Watch argues that the events in question constitute relevant new information of which we should take judicial notice, PW Fukushima Memo 2 at 1, and that we should, on the same basis, accept the proposed new contentions, require further analysis of the Pilgrim SAMA analysis, and delay any decision on the LRA "until NRC has evaluated the lessons learned from Fukushima to be assured that the Aging Management Programs for Pilgrim are appropriate." Id. at 3. Attached to this latter filing was an editorial from the Boston Globe newspaper, urging among other things that "a badly needed reappraisal of nuclear energy safety in the United States" should "start with [the] Pilgrim nuclear station in Plymouth," including revisiting "concerns about the aging cables at Pilgrim and the plant's security. Id., Att. 1, At Pilgrim, NRC must address fuel rods, cables, safety plan, Boston Globe, Mar. 27, 2011 (emphasis omitted).

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II. ANALYSIS

A. General Legal Standard Governing Motion to Reopen the Record

Under 10 C.F.R. § 2.326(a), a motion to reopen a closed record must (1) be timely,[62] (2) address a significant safety or environmental issue; and (3) demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been

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Pilgrim Watch's next two post-hearing memoranda concern alleged statements by Entergy about the availability of commercially proven tests to detect cable insulation degradation. Pilgrim Watch Memorandum—Entergy's Incorrect and Misleading Information Regarding Proven Tests to Detect Cable Insulation Degradation (Apr. 11, 2011) at 1; Pilgrim Watch Memorandum—Entergy's Incorrect and Misleading Information Regarding Proven Tests to Detect Cable Insulation Degradation—Video Supplement (Apr. 12, 2011) at 1.

Pilgrim Watch's fifth post-hearing memorandum presents excerpts from an NRC task force report on Fukushima. Pilgrim Watch Request for Leave to Supplement Pilgrim Watch Request for Hearing on the Inadequacy of Entergy's Aging Management Program of Non-Environmentally Qualified (EQ) Inaccessible Cables (Splices) at Pilgrim Station, filed on December 10, 2010 and January 20, 2011 (Aug. 8, 2011) at 1 (citing Dr. Charles Miller, et al., 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)).

NRC Staff and Entergy have not filed answers to Pilgrim Watch's fifth post-hearing memorandum yet, but they oppose the requests made by Pilgrim Watch in the first four. Entergy's Reply to Pilgrim Watch Post-Hearing Memorandum (Apr. 7, 2011) at 1; NRC Staff's Response to Pilgrim Watch Post-Hearing Memorandum (Apr. 7, 2011) at 1; Entergy's Objection to Pilgrim Watch's Post-Hearing Memoranda and Other Unauthorized Filings (Apr. 22, 2011) at 1 [hereinafter Entergy's Objection to Unauthorized Filings]. Entergy argues the first four post-argument memoranda are unauthorized and contain inaccurate allegations. Entergy's Objection to Unauthorized Filings at 1-2.

Despite not having the opportunity to consider answers and a reply regarding Pilgrim Watch's fifth post-hearing memorandum, we conclude that the excerpts of the task force report, as with the other four post-hearing memoranda, have no bearing on today's ruling. Therefore, we do not rule herein on those filings. Accordingly we need not address Entergy's and Staff's objections and Pilgrim's response to those objections. Pilgrim Watch Answer to Entergy's and NRC Staffs Reply to Pilgrim Watch Post-Hearing Memorandum Filed April 7, 2011 (Apr. 11, 2011); Pilgrim Watch Response to Entergy's April 22, 2011 Filing Regarding Proven Tests to Detect Cable Insulation Degradation (Apr. 24, 2011).

[62] 10 C.F.R. § 2.326(a)(1) gives the presiding officer discretion to consider "an exceptionally grave issue . . . even if untimely presented." Id.

considered initially.[63] In addition, the motion must be accompanied by affidavits that set forth the factual and/or technical bases for the claim that the above criteria have been met.[64] In such affidavits, "[e]ach of the criteria must be separately addressed, with a specific explanation of why it has been met."[65]

B. Application of Motion to Reopen Standards to Pilgrim Watch's Three New Contentions

Pilgrim Watch explicitly elected not to file a motion to reopen with regard to any of these three proposed new contentions, asserting, instead, that there was no need to reopen.[66] Pilgrim Watch, having taken this approach without making any attempt to argue in the alternative, nowhere in its arguments attempts to make the case that a materially different result would be likely if any of its proposed new contentions were considered, as required by 10 C.F.R. §

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[63] 10 C.F.R. § 2.326(a).

[64] Id. § 2.326(b).

[65] Id.

[66] As it regards Cables Contentions 2, Pilgrim Watch made their position unequivocally clear, stating:

> Pilgrim Watch [(PW)] does not seek to "reopen" anything. It does not ask to reopen Contention 1; neither does it seek to add anything to still pending Contention 3. Rather, PW's new contention is directed to an issue – submerged unqualified inaccessible cables – that was not part of, and that was not and could not have been litigated in connection with, either Contention 1 or Contention 3. . . .
>
> In short, this is not "a motion to reopen a closed record." Neither is it an attempt to show that "a materially different result would be or would have been likely had the newly proffered evidence been considered initially.". . . The "results" in Contention 1 and Contention 2 would not be affected for the simply [sic] reason that nothing in PW's new contention relates to either of those contentions, and PW does not ask that the record in either be reopened.
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> What Pilgrim Watch does seek is a hearing on a new contention that raises an issue that was not been litigated, [sic] and could not have been litigated, as part of either Contention 1 or Contention 3.

Reply for Cables Contention 2 at 3 (internal citation omitted).

2.326(a)(3). Moreover, it fails to present affidavits required by Section 2.326(b) setting forth the factual and technical bases for the claim that the criteria of Section 2.326(a) have been met, thus depriving the Board of any foundation for finding, for example, that a materially different result could be likely. Although Pilgrim Watch did deliver affidavits in support of its two new cable contentions,[67] neither addresses, as is required by our regulations, the reopening standards of Section 2.326. The Commission has emphasized, in this docket, the need for affidavits to support any motion to reopen and has held that intervenors' speculation that further review of certain issues "might" change some conclusions in the final safety evaluation report does not justify restarting the hearing process.[68]

This failure of Pilgrim Watch to address the reopening standards in accord with Section 2.326 creates a yawning deficiency in its submissions since the evidentiary record in this Board hearing has been closed[69] and the Board's jurisdiction in this remanded proceeding does not extend to, nor does the remand reopen, any other aspect of this hearing or other issues regarding the requested license renewal.[70] The scope of the remand does not even encompass

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[67] Cables Contention 1, Att. B, Declaration of Paul M. Blanch [hereinafter Blanch Declaration]; Affidavit of Paul M. Blanch ¶18 (Jan. 19, 2011) [hereinafter Blanch Affidavit].

[68] AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 486 (2008). The CLI-08-23 order involved four NRC proceedings, including the Pilgrim proceeding.

[69] Order Regarding Testimony and Evidence at 3-4.

[70] See Entergy Nuclear Vermont Yankee, L.L.C. (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 NRC __, __ (slip op. at 10 n.37) (July 8, 2010) [hereinafter Vermont Yankee I] (noting that during pendency of remand intervenors "are free to submit a motion to reopen the record pursuant to 10 C.F.R. § 2.326, should they seek to address any genuinely new issues related to the license renewal application that previously could not have been raised" (emphasis omitted)). The record of the hearing before the Board consists of all evidence presented to the Board, all correspondence between the Board and the parties (including teleconferences), and all Board rulings and other orders. That record was finalized when the Board closed the record. The remand of the Commission directed that the Board consider a very narrow topic and that all evidence and correspondence and Board issuances that occur during the course of carrying out the Commission's remand directive will be added to the Board's previously closed record. However, the remand did nothing more vis-à-vis the record, and had the Commission intended

(continued . . .)

all of Contention 3; it is limited to the narrow issue respecting whether addressing the asserted shortcomings in the meteorological modeling could cause other SAMAs to become cost effective.[71]

Each of Pilgrim Watch's proposed new contentions raises new matters not heretofore raised in this proceeding, and, notwithstanding Pilgrim Watch's assertions to the contrary, Section 2.326(d) of agency regulations explicitly sets out criteria for reopening a closed record when the motion "relates to a contention not previously in controversy."[72] Thus Pilgrim Watch's view that no motion to reopen is required in this circumstance[73] is in error.[74] And, if there were any doubt whatsoever regarding the intent of Section 2.326, Commission precedent makes clear that Pilgrim Watch's request for hearing regarding a newly proffered contention cannot be admitted unless it satisfies the stringent standards for reopening the record.[75]

(. . . continued)
that the record of the Board be reopened, it is quite capable of so directing. In the absence of any such directive, we cannot, and, in fact, must not, find the record otherwise reopened or ordered to be expanded beyond that narrow scope.

[71] Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-526, 9 NRC 122, 123-24, 124 n.3 (1979) (holding that, after board authorized issuance of applicant's permits and Commission remanded specific question to board, board's jurisdiction was limited to what was remanded to it, and board lacked jurisdiction over newly-filed intervention petition).

[72] 10 C.F.R. § 2.326(d).

[73] Reply for Cleanup Contention at 5-6; Reply for Cables Contention 1 at 8-9; Cables Contention 2 at 58-59.

[74] Indeed, the only circumstance which would enable Pilgrim Watch to avoid satisfaction of the reopening requirements would be if the record here were not closed, or if the remand had the effect of keeping it open regarding the new contention material. But, as we discussed above, not only does the subject matter of Pilgrim Watch's new contentions fall well outside the scope of the remanded matter, but the remand had no effect which can reasonably be said to reopen the record – rather it creates a circumstance wherein the record will be supplemented in the narrow remanded subject area.

[75] See Entergy Nuclear Vermont Yankee, L.L.C. (Vermont Yankee Nuclear Power Station), CLI-11-02, 73 NRC __, __ (slip op. at 5) (Mar. 10, 2011) [hereinafter Vermont Yankee II] (citing 10 C.F.R. § 2.326(a) and § 2.309(c) as the burden to be met when an intervenor "seeks both to reopen the record and to submit a late contention" after the record "has been closed, even with
(continued . . .)

The rationale for the Commission's policy of "generally disfavor[ing] the filing of new contentions at the eleventh hour of an adjudication"[76] is based on the doctrine of finality, "which states that at some point, an adjudicatory proceeding must come to an end."[77] Where, as here, the record has been closed, the Commission is equally plain that its rules impose a "deliberately heavy" burden on an intervenor seeking to reopen the record to consider additional evidence, including evidence on a new contention.[78]

Moreover, a Board may not provide analysis that an intervenor has failed to provide. Rather, the Commission has held that "[w]hile a board may view a petitioner's supporting information in a light favorable to the petitioner, it cannot do so by ignoring our contention admissibility rules, which require the petitioner (not the board) to supply all of the required

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(. . . continued)
respect to an existing contention"); Vermont Yankee I, CLI-10-17, 72 NRC at __ (slip op. at 10 n.37); AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 668 (2008) [hereinafter Oyster Creek I] ("'Commission practice holds that the standard for admitting a new contention after the record is closed is higher than for an ordinary late-filed contention.'" (quoting Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 (2005))); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132, 1135, 1138 (1983) (holding standards for reopening the record "clearly do" apply to proposed new contention after all issues, excepting matters unrelated to the proposed new contention, have been litigated and the record has been closed); cf. Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,538-39 (May 30, 1986) [hereinafter Criteria for Reopening] ("A motion to reopen must be filed whenever a proponent seeks to add new information to a closed record, whether the information concerns a new contention or one which has already been heard.").

[76] Vermont Yankee II, CLI-11-02, 73 NRC at __ (slip op. at 4).

[77] Id. (citing Private Fuel Storage, CLI-05-12, 61 NRC at 350 n.18); see also Criteria for Reopening, 51 Fed. Reg. at 19,539 ("Administrative consideration of evidence always creates a gap between the time the record is closed and the time the administrative decision is promulgated. This is especially true if the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful. If upon the coming down of the order litigant might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed; or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening. It has been almost a rule of necessity that rehearings were not matters of right, but were pleas to discretion." (quoting ICC v. Jersey City, 322 U.S. 503, 514-15 (1944))).

[78] Oyster Creek I, CLI-08-28, 68 N.R.C. at 674.

elements for a valid intervention petition."[79] Although we agree with our colleague's general approach that we should not endorse form over substance, we may not, as our colleague would,[80] reconstruct Pilgrim Watch's pleadings to find that Pilgrim Watch's pleadings might be interpreted to satisfy these requirements where Pilgrim Watch itself has explicitly argued it need not, and explicitly elected not to attempt to do so, and its arguments fail to supply the necessary substance.[81]

Additionally, where a motion to reopen relates to a contention not previously in controversy, Section 2.326(d) requires that the motion demonstrate that the balance of the nontimely filing factors in 10 C.F.R. § 2.309(c) favors granting the motion to reopen. Finally, the new contention must also meet the standards for contention admissibility under 10 C.F.R. § 2.309(f)(1).

With these precepts in mind, we turn to an analysis of the admissibility of each of Pilgrim Watch's three new contentions under consideration here.

C. Rulings on Admissibility of Proposed New Contentions

1. Cleanup Contention (filed November 29, 2010)

In its proposed new Cleanup Contention Pilgrim Watch asserts:

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

[79] AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 260 (2009) [hereinafter Oyster Creek II] (emphasis added).

[80] See Administrative Judge Ann Marshall Young, Concurring in Part and Dissenting in Part (Aug. 11, 2011) at 7 [hereinafter Concurrence and Dissent].

[81] In this aspect, we disagree with our colleague's interpretation of the substance of Pilgrim Watch's pleadings.

> MACCS2 Code, and (ii) does not reduce any costs by use of a discount factor or probabilistic analysis.[82]

As we indicated above, Pilgrim Watch has filed no affidavit to establish that this contention meets the requirements of 10 C.F.R. § 2.326(a)(1)-(3).

While arguing it need not satisfy the requirements for reopening the record, Pilgrim Watch nonetheless presents arguments regarding timeliness,[83] which is a requirement under 10 C.F.R. § 2.326(a)(1). Pilgrim Watch asserts the Cleanup Contention is timely because of information it found in an article published on November 10, 2010, in Inside EPA.[84] According to this article,

> EPA, the Nuclear Regulatory Commission (NRC) and the Federal Emergency Management Agency (FEMA) are struggling to determine which agency – and with what money and legal authority – would oversee cleanup in the event of a large-scale accident at a nuclear power plant that disperses radiation off the reactor site and into the surrounding area.
>
> The effort, which the agencies have not acknowledged publicly, was sparked when NRC recently informed the other agencies that it does not plan to take the lead in overseeing such a cleanup and that money in an industry-funded insurance account for nuclear accidents would likely not be available, according to documents obtained by Inside EPA . . . under the Freedom of Information Act (FOIA).[85]

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[82] Cleanup Contention at 1.

[83] Id. at 9-10.

[84] Id. at 5, 10.

[85] Id., Att. 1, Douglas P. Guarino, Agencies Struggle to Craft Offsite Cleanup Plan for Nuclear Power Accidents, Inside EPA, Nov. 22, 2010 (emphasis omitted), quoted in part in Cleanup Contention at 5-6. The documents to which the article refers – a series of emails among employees of various federal agencies discussing issues relating to the subject of the article – are attached to the Cleanup Contention. The article also notes that

> [a] spokesman for the Nuclear Energy Institute (NEI), which represents the nuclear power industry, says officials believe such cleanups would be handled by the insurance fund despite assertions in the documents to the contrary. The NEI spokesman also downplays the likelihood of such a cleanup being necessary, saying accidents are "highly unlikely to occur."

Guarino, supra this note.

At oral argument, Pilgrim Watch argued that it should be excused from the affidavit requirement of § 2.326(b) because the issue in the contention "is a non[-]technical issue and . . . very straightforward on its face" and because the contention is supported by a large number of emails of government employees.[86]

The NRC Staff opposes admission because, among other things, issues relating to NRC policy and its interactions with other agencies "are not issues that are susceptible to resolution in this proceeding."[87] Entergy and the NRC Staff further assert that the referenced article does not support the technical modeling changes that Pilgrim Watch seeks.[88]

To begin with, and paramount to our decision regarding admissibility of this proposed new contention, we note that the Cleanup Contention has a singular subject matter: Pilgrim Watch's purported "new" information regarding cleanup after a severe accident, particularly implying a lack of certainty regarding which agency has responsibility for cleanup after a severe accident, the standard for cleanup and the source of funding for such cleanup. In fact, in its reply, Pilgrim Watch asserts that this contention is "based on new information indicating that no third party has assumed responsibility for cleanup after a severe nuclear reactor accident, no cleanup standard had been set, and no source is identified to pay for the cleanup."[89] Based upon that information, Pilgrim Watch argues that:

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[86] Tr. at 795-96; Pilgrim Watch further indicates in the Cleanup Contention that at a hearing it "intends principally to rely upon government documents and testimony from David I. Chanin and Dr. Edwin Lyman." Cleanup Contention at 15. Pilgrim Watch argues that "[i]t would be unreasonable . . . to expect a totally unfunded group to provide testimony from these experts" when filing a contention. Id. According to Pilgrim Watch, such a requirement would render "most members of the public, non-profit public interest groups, and local governments . . . unable to file due to lack of resources." Id. Pilgrim Watch advises that "[r]esources for these groups necessarily must be preserved for expert witnesses required at the summary disposition and hearing stage of these proceedings." Id.

[87] Staff Answer to Cleanup Contention at 19.

[88] Entergy Answer to Cleanup Contention at 7; Staff Answer to Cleanup Contention at 6, 17-18.

[89] Reply for Cleanup Contention at 1.

> . . . Entergy should be required to take all of the mitigation steps that would be required by a SAMA analysis (i) based on a conservative source term using release fractions no lower than those specified in NUREG-1465 or used by the NRC in studies such as NUREG 1450, cleanup to a dose rate of not more than 15 millirem a year, and at least the 95th percentile of the total consequences determined by the EARLY and CHRONC modules of the MACCS2 Code, and (ii) does not reduce any costs by use of a discount factor or probabilistic analysis.[90]

But these challenges regard policy matters that are solely within the jurisdiction of the Commission. They also represent challenges to binding Commission rulings regarding what is required in a SAMA analysis; arguments along the lines of the need to perform more conservative analysis, to use 95th percentile computations, as well as the challenge of using a discount factor to evaluate the time-effects of clean-up costs, were all previously advanced by Pilgrim Watch in this proceeding and explicitly rejected by the Commission.[91]

As to Pilgrim Watch's implication that there may be forthcoming, from studies of the events at the Fukushima reactors, new information as to potential consequences of a severe accident at Pilgrim,[92] the consequences of those events are simply irrelevant to any uncertainty that might exist regarding which agency has authority over clean-up after a severe accident in the United States. And, of course, to the extent that such information might become a future basis for modifications of SAMA analysis standards in the United States, speculation regarding any such unknown modifications is outside the scope of this proceeding.

Thus, this proposed contention must be rejected as being outside the scope of this proceeding and requesting remedies previously rejected in this proceeding by the Commission itself.

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[90] Cleanup Contention at 1.

[91] CLI-10-11, 71 NRC at __ (slip op. at 39); see, also, this Board's discussions of these matters in LBP-11-18, 74 NRC at __ (slip op. at 12-13).

[92] PW Fukushima Memo 2 at 3.

Further, although the contention is inadmissible for the aforesaid reasons, it is also inadmissible for its failure to satisfy the explicit and intentionally stringent requirements for reopening a record. Although we recognize that participating in an NRC adjudication proceeding obviously involves some cost, and that intervenors are not always situated to have the resources, including experts, needed to support contentions, when a motion to reopen is required, as we have concluded it is here, Section 2.326(b) specifically requires an affidavit because that affidavit supplies the factual and legal foundation for assertions that the reopening criteria are satisfied. As Entergy has pointed out, the Commission is plain that the "burden of satisfying the reopening requirements is a heavy one," and that "proponents of a reopening motion bear the burden of meeting all of [these] requirements."[93]

Pilgrim Watch has failed, both in the pleadings associated with the Cleanup Contention itself and its subsequent pleadings, to meet the requirement of Section 2.326, including those of Section 2.326(b) for an affidavit. The absence of expert-supported information causes Pilgrim Watch to fail to satisfy the requirements of Section 2.326(a)(3); the absence of such information directly causes a failure to demonstrate (as is required) (and therefore deprives us of the ability – even the opportunity – to substantively consider whether), a materially different result would be obtained (as is required by our reopening standards).[94] Therefore, even if we had not found

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[93] Oyster Creek II, CLI-09-7, 69 NRC at 287 (quoting Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5 (1986) and Pub. Serv. Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-10, 32 NRC 218, 221 (1990)) quoted in Entergy Answer to Cleanup Contention at 5.

Further, Entergy and Staff also point out that Pilgrim Watch's technical concerns could have been raised earlier. See, e.g., Entergy Answer to Cleanup Contention at 7-11; Staff Answer to Cleanup Contention at 11.

[94] This standard is measured using the Commission's test of whether it has been shown that a motion for summary disposition could be defeated. See Vermont Yankee II, CLI-11-02, 73 NRC at __ (slip op. at 15).

(as we did) that the contention was inadmissible for the reasons set out above, it is inadmissible for failure to satisfy the reopening standards of 10 C.F.R. § 2.326.

2. Cables Contention 1 (filed December 13, 2010)

In the second of its proposed new contentions, filed December 13, 2010, Pilgrim Watch alleges

> Entergy's Aging Management Plan for non-environmentally qualified (EQ) inaccessible cables and cable splices at Pilgrim Station is insufficient to provide reasonable assurance that these cables will be in compliance with NRC Regulations and public health and safety shall be protected during license renewal.[95]

But Pilgrim Watch plainly concedes that the subject matter of inaccessible cables was addressed in Entergy's original LRA (submitted on January 17, 2006),[96] and thus for this contention to be admissible the "new" information must, in-and-of itself, be sufficient to support its admissibility.[97] Pilgrim Watch identifies NRC Information Notice 2010-26, which concerned submerged electrical cables and was issued on December 2, 2010, as the new information upon which this proposed new contention is based.[98]

This same issuance was presented as new information to support admissibility by an intervenor in the Vermont Yankee proceeding.[99] Similar to Cables Contention 1, the proposed new contention in Vermont Yankee alleged that an aging management program for "buried, below grade, underground, or hard-to-access" cables did not "comply with NRC regulation" and

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[95] Cables Contention 1 at 1.

[96] See, e.g., Cables Contention 1 ¶ 31. Both the NRC Staff and Entergy thoroughly discuss the depth to which inaccessible cables were addressed in the original LRA. Entergy Answer to Cables Contention 1 at 7; Staff Answer to Cables Contention 1 at 13.

[97] 10 C.F.R. § 2.309(f)(2).

[98] Cables Contention 1 at 2.

[99] Vermont Yankee II, CLI-11-02, 73 NRC at __ (slip op. at 12).

did not assure "protection of public health and safety."[100] The Commission determined that NRC Information Notice 2010-26 merely summarized information that was previously available, and explicitly held that such a summary is not new information upon which a new contention can be based.[101] In addition, the Commission held that the Vermont Yankee intervenor did not "come close to demonstrating a likelihood that it would have prevailed on the merits of [the new contention] and that its success would have materially altered the outcome of [that] proceeding."[102] Thus the notice relied upon by Pilgrim Watch is not new information sufficient to provide the basis for reopening the presently closed record in this proceeding; i.e. it causes the contention to fail to satisfy the requirements of Section 2.326(a)(1) and therefore to be inadmissible.

Moreover, Pilgrim Watch failed to make any motion to reopen the record, which is, in-and-of-itself, fatal to admissibility of this contention.[103] Further, Pilgrim Watch has, here again in connection with its refusal to address the reopening requirements, failed to deliver the required expert affidavit and caused, by absence of such information, the contention to fail to satisfy the requirements of Section 2.326(a)(3). Thus, Cables Contention 1 cannot be admitted because it fails to satisfy the requirements for reopening the record.

Finally, Pilgrim Watch asserts that this Board should consider concerns arising out of the problems at the Fukushima nuclear power plants in the wake of the earthquake and tsunami

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[100] Id. at __ (slip op. at 2-3). Another reason we find Vermont Yankee II instructive is that the proposed new contention there was supported by the affidavit of the same expert who provided the affidavit in support of Cables Contention 1. Compare New England Coalition's Motion to Reopen the Hearing and for the Admission of New Contentions (Aug. 23, 2010), Att. Declaration and Affidavit of Paul Blanch (ADAMS Accession No. ML102420042) with Blanch Declaration.

[101] Vermont Yankee II, CLI-11-02, 73 NRC at __ (slip op. at 13).

[102] Id. at __ (slip op. at 18).

[103] In this regard, we find thorough and persuasive, and hereby adopt, the arguments advanced by the Staff in page 7 through 19 of its answer. Staff Answer to Cables Contention 1 at 7-19.

there, because "[t]he inability to provide electric power to critical safety components appears to be a major contributing factor."[104] But Pilgrim Watch fails to provide any connection or logic explaining how those factors (if they exist) are related to this proposed contention, or to explain how those factors could affect the fact that the information upon which this contention is based is not new within the requirements of the NRC. Nor do the assertions regarding the problems at the Fukushima reactors in any way affect the other failures of Pilgrim Watch regarding this contention. These concerns simply provide no basis upon which we might rule otherwise than in accordance with the NRC rules at 10 C.F.R. § 2.326.

3. Cables Contention 2 (filed January 20, 2011)

In Cables Contention 2, the second of Pilgrim Watch's proposed new contentions challenging Entergy's aging management plan for inaccessible cables, Pilgrim Watch alleges:

> Entergy's Aging Management Plan (as amended by Entergy on January 7, 2011) for non-environmentally qualified (EQ) inaccessible cables and cable splices at Pilgrim Station is insufficient to provide reasonable assurance that these cables will be in compliance with NRC Regulations and public health and safety shall be protected during license renewal.[105]

As with its November and December 2010 contentions, Pilgrim Watch elected not to file a motion to reopen the record with its January 2011 new contention.[106] Rather Pilgrim Watch repeatedly claimed it need not satisfy the reopening standard in order for the contention to be admissible.[107] Thus, nowhere in its pleading does Pilgrim Watch argue or otherwise

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[104] PW Fukushima Memo 1 at 1.

[105] Cables Contention 2 at 1 (emphasis omitted).

[106] We cannot, as Pilgrim Watch would have it, wholly disregard the Commission's reopening standards. Indeed, the burden (and here, the deliberately heavy burden) falls upon an intervenor, not a licensing board, to assure that the Commission's substantive standards have been met. See, supra note 79 and accompanying text.

[107] As we stated, this position is patently incorrect. See, supra note 75 and accompanying text. This Board's jurisdiction on remand is limited to the narrow meteorological SAMA issue of remanded Contention 3. And for Pilgrim Watch's new contention to be admitted, it must satisfy the Commission's stringent standards for reopening the record.

demonstrate that its request satisfies the requirements of 10 C.F.R. § 2.326(a)(3) or (b). By so refusing, not only has Pilgrim Watch simply not addressed the relevant criteria, but it has failed to submit the required information which might enable us to make a favorable determination on its request, failing to deliver any affidavit setting forth the factual bases for a claim that it satisfies each of the criteria in 10 C.F.R. § 2.326(a), and thereby failing to submit the requisite information to demonstrate that a materially different result would be likely if we were to admit this proposed new contention. This failure requires that we reject the request for hearing on the new cable contention.[108]

Furthermore, even if Pilgrim Watch had addressed the other requirements for reopening the record, Pilgrim Watch fails to demonstrate that Cable Contention 2 is timely under 10 C.F.R. § 2.326(a)(1) which is fatal under both our regulations and under plain and unequivocal

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[108] See Vermont Yankee II, CLI-11-02, 73 NRC at __ (slip op. at 18) (affirming denial of motion to reopen because intervenor did not show likelihood that it would have prevailed on the merits of proposed new contention and that its success would have materially altered the proceeding's outcome); Oyster Creek II, CLI-09-7, 69 NRC at 287 (stating that "proponents of a reopening motion bear the burden of meeting all of [these] requirements" (quoting Seabrook Station, CLI-90-10, 32 NRC at 221 (1990))); Independent Spent Fuel Storage Installation, CLI-05-12, 61 NRC at 350 ("[A] party seeking to reopen a closed record to raise a new matter faces an elevated burden to lay a proper foundation for its claim."); see also Pacific Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1365-66 (1984) (stating reopening motion must show that a different result would have been reached initially if the material had been considered (quoting ALAB-756, 18 NRC 1340, 1344 (1983))).

And, we disagree with our colleague that looking at the "reality" of what is shown by Pilgrim Watch's pleadings (which she apparently does based upon her review of Pilgrim Watch's statement repeated in her Concurrence and Dissent that "its request for hearing on its January 2011 new contention 'is not a motion to reopen, and even it if were Pilgrim Watch's request meets the standards for reopening – it is timely and addresses a significant safety issue,'" Concurrence and Dissent at text accompanying note 2 (quoting Reply for Cables Contention 2 at 2) (emphasis omitted)) can reasonably lead to the conclusion that the stringent and explicit requirements that each of the reopening criteria be explicitly addressed in an expert affidavit as well as set out clearly in the contention pleading are satisfied. Id. at 7. Pilgrim Watch's pleadings and expert affidavit simply do not address the criteria to the requisite degree, and the results we express in this Order regarding our examination of these requirements cannot reasonably be construed to elevate form over substance.

Commission precedent on this topic.[109] To be timely, Pilgrim Watch must demonstrate that the issues sought to be raised by the new cable contention could not have been raised earlier.[110]

Cable Contention 2 alleges that Entergy's AMP for non-environmentally qualified (EQ) inaccessible cables and cables splices at Pilgrim remains insufficient to satisfy 10 C.F.R. §§ 54.21(a) and 54.9.[111] Pilgrim Watch asserts that Entergy's January 7, 2011 commitment in its AMP to include monitoring of low-voltage cables (400V to 2kV) and to increase the frequency of cable testing and manhole inspections "remains" inadequate because, inter alia, the AMP: (1) does not commit to replacing non-EQ cables exposed to submergence; (2) fails to monitor cables carrying less than 400V; (3) does not commit to adequate frequency of inspections; (4) does not assume the correct probability of corrosion (and thus the risk management in the

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[109] As the Commission has repeatedly stated:

> There simply would be no end to NRC licensing proceedings if petitioners could ignore our timeliness requirements and add new contentions at their convenience based on information that could have formed the basis for a timely contention at the outset of the proceeding. Our expanding adjudicatory docket makes it critically important that parties comply with our pleading requirements and that the Board enforce those requirements.

Vermont Yankee II, CLI-11-02, 73 NRC at __ (slip op. at 6) (quoting Oyster Creek II, CLI-09-7, 69 NRC at 271-72).

[110] See Criteria for Reopening Records, 51 Fed. Reg. at 19,536 (explaining that "timely" has been defined in NRC case law as "whether the issues sought to be presented could have been raised at an earlier time"); see, e.g., Diablo Canyon, ALAB-775, 19 NRC at 1366 ("[F]or a reopening motion to be timely presented, the movant must show that the issue sought to be raised could not have been raised earlier." (citing Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973))); 10 C.F.R. § 2.309(f)(2).

[111] See Cables Contention 2 at 2 (alleging the AMP is "like" the original AMP in failing to satisfy 10 C.F.R. §§ 54.21(a) and 54.29). It cannot go unnoticed that Pilgrim Watch's assertion is not that the improvements to the AMPs made through Entergy's January 2011 supplement to its LRA themselves present an insufficiency in the subject programs, but that Pilgrim Watch asserts that those programs "remain" insufficient – i.e., that Pilgrim Watch now seeks to raise a matter it believed was problematic ab initio.

AMP is misguided); (5) does not perform a baseline inspection of groundwater flow as it relates to inaccessible cables; and (6) does not provide sampling methodology.[112]

Pilgrim Watch asserts that the contention is timely because it is based on the NRC Staff's recent revisions to the GALL report and Entergy's license renewal supplement filed in response thereto.[113]

Entergy and the NRC Staff argue, inter alia, that Cables Contention 2 is not based on new information because the GALL report revision and Entergy's LRA supplement merely enhance the AMP identified in the original LRA.[114] For the reasons set out below, we agree with Entergy and the NRC Staff that the contention is not timely under 10 C.F.R. § 2.326(a)(1).[115]

As noted, on January 17, 2006, Entergy submitted its LRA which identified the AMP that it planned to use for inaccessible cables at Pilgrim.[116] On its face, Entergy's original AMP committed to implement a program for "Non-EQ Inaccessible Medium-Voltage Cable" consistent with Section XI.E3 of Revision 1 of NUREG-1801, Generic Aging Lessons Learned (GALL) Report (GALL Report Rev. 1).[117] In turn, the GALL Report Rev. 1 provided, at the time Entergy submitted its original LRA, for a program for managing "Inaccessible Medium-Voltage Cables Not Subject to 10 CFR 50.49 Environmental Qualification Requirements," which requires periodic testing of cable insulation and inspection of manholes inspection for water

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[112] Id. at 28-35.

[113] Id. at 53-54.

[114] Entergy Answer to Cables Contention 2 at 17; Staff Answer to Cables Contention 2 at 8.

[115] In addition, we find that Cables Contention 2 is not timely under 10 C.F.R. § 2.309(f)(2).

[116] See License Renewal Application, App. B § B.1.19, App. A § A.2.1.21 (ADAMS Accession No. ML060300029) [hereinafter LRA Appendices]; see also Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Safety Evaluation Report: Related to the License Renewal of Pilgrim Nuclear Power Station (July 2007) at 3-18 to 3-21.

[117] LRA Appendices, App. B § B.1.19.

accumulation.[118] Thus, Entergy's original LRA identified an AMP that provided a program for periodic inspection and testing of non-EQ inaccessible cables. Although such a program was included in the original LRA (and therefore could have been challenged), Pilgrim Watch did not proffer a contention that challenged that AMP in its original intervention petition when the issue could have been first raised.

Since the original LRA was submitted, more than five years ago, no material portion of Entergy's AMP regarding the subject cables has been changed. In response to the recommendations of revision 2 to the GALL Report, Entergy elected to enhance its existing AMP for non-EQ inaccessible medium-voltage cables to include monitoring of low-voltage cable (400V to 2kV), and to increase the minimum frequency of non-EQ inaccessible cable testing and inspections, thus continuing its efforts to be in compliance with the requirements of 10 C.F.R. §§ 54.21(a) and 54.9.[119] Entergy's enhancements to its AMP for these cables include commitments to test cables for degradation once every six years, to inspect the manholes yearly, and to increase the frequency of testing and inspection based on its evaluation of test results.[120]

For Pilgrim Watch's position to be correct, the modifications must, in and of themselves, and despite the fact that the general topic of inspection and maintenance of the subject cables was addressed, and a related AMP provided, in the original LRA and not challenged by Pilgrim Watch, constitute new information sufficient to permit admissibility of an entirely new contention. But the Commission is plain in its view that an enhancement to a program does not constitute

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[118] Office of Nuclear Reactor Regulation, Generic Aging Lessons Learned (GALL) Report, NUREG-1801, Rev. 1, § XI.E3 (Sept. 2005) (ADAMS Accession No. ML052780376) [hereinafter GALL Rev. 1].

[119] LRA Supplement at 8; Compare GALL Rev. 2 at XI E3-2 with GALL Rev. 1 at XI E-7 to E-8.

[120] LRA Supplement at 8.

new information sufficient to support a new contention.[121] The Commission could not have been more clear on this point when it explicitly endorsed as reasonable the view of the licensing board in Oyster Creek that "as a matter of law and logic if—as [Intervenors] allege—[Applicant's] enhanced monitoring program is inadequate, then [Applicant's] unenhanced monitoring program . . . was a fortiori inadequate, and [Intervenor] had a regulatory obligation to challenge it in their original Petition to Intervene."[122] Thus, if Entergy's enhanced AMP for the Pilgrim plant is inadequate as alleged by Pilgrim Watch, then its original AMP for the plant was also inadequate and Pilgrim Watch was obligated to challenge it in its intervention petition.[123] Moreover, close scrutiny of the Affidavit of Paul M. Blanch submitted in support of Pilgrim Watch's challenge raised by this contention makes clear that every single objection raised by Mr. Blanch, even where he made specific reference to the amendment to the LRA, regarded

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[121] Oyster Creek II, CLI-09-7, 69 NRC at 273-74.

[122] Id. at 274 (quoting LBP-06-22, 64 NRC 229, 246 (2006)). The Commission also stated that the Oyster Creek Board's reasoning was "equally sound when the Board later applied it to reject a proposed new contention concerning a new program for monitoring [the imbedded liner portion at issue there]." Id.

> We note our colleague disagrees with this view, and her approach is not without merit. However, her analysis fails to recognize that the circumstances that would need to be present for her interpretation of precedent to be appropriately applicable to the present situation are simply not present here. See, e.g., our discussion supra at text accompanying note 121 and infra text accompanying note 124.

[123] Indeed, by its own statements, Pilgrim Watch makes clear that it could have filed the new contention earlier. For example, Pilgrim Watch asserts that

> > [t]he license renewal application for Pilgrim Station was amended by Entergy January 7, 2011. Like its original Aging Management Program (AMP), in its 2006 License Renewal Application, it fails to comply with the requirements of 10 C.F.R. §§ 54.21(a) and 54.29 because the applicant has not proposed an adequate or sufficiently specific plan for aging management of non-environmentally qualified inaccessible electrical cables . . . .
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> Cables Contention 2 at 2. Likewise, Pilgrim Watch contends that "Entergy's AMP for Non-EQ inaccessible cables at Pilgrim, as amended, remains woefully insufficient." Id. at 28 (emphasis added).

subject matter that could (and therefore should) have been raised at the outset of this proceeding as an objection to the AMPs set out in the original LRA.[124] In short, the issue raised

[124] In this regard, we disagree with our colleague's view that the mere statement by Mr. Blanch that he "fully support[s] all technical and regulatory aspects of this contention" might fulfill the requirements of Section 2.326(b), Concurrence and Dissent at notes 21-22 and accompanying text (quoting Blanch Declaration and citing 10 C.F.R. § 2.326), that the expert affidavit "set forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) . . . have been satisfied . . . [and that] [e]ach of the criteria must be separately addressed, with a specific explanation of why it has been met." 10 C.F.R. § 2.326(b). In fact, as we discussed, this affidavit plainly fails these requirements.

We do not disagree with our colleague's interpretation of governing cases to the effect that there are circumstances wherein an amendment to an AMP will present new information that is indeed new when compared to the then-existing AMP and which is, therefore, suitable fuel for a contention, even one requiring reopening a then-closed record. However, this is not such a situation as Pilgrim Watch's challenge raises matters that were the subject of the original AMP and that have merely been expanded or supplemented by Entergy's amendment. Put simply, the subject of inaccessible cable inspection and maintenance was covered by AMPs in Entergy's original LRA and any shortcomings of those plans was appropriate for contention at the time. While Entergy's amendment indeed enhances and supplements the original AMP for inaccessible cables, all of the shortcomings addressed in the amendment were obviously present in the original LRA AMP, and therefore those shortcomings are not new today. Thus the issues Pilgrim Watch raised through its expert, Mr. Blanch, are nothing more than issues that were present in the original AMP submitted with the original LRA. For example, Mr. Blanch raised the following issues: (a) assertions of the absence from the AMP of a "requirement to perform a thorough subsurface hydrological-geological survey over the entire site to determine groundwater flow today as it relates to inaccessible Non-EQ cables within scope," Blanch Affidavit ¶18; (b) assertions that there are "very high corrosive salt concentrations in the groundwater which will likely accelerate the degradation of cables in contrast to those nuclear plants located away from coastal areas" and that "[t]he risk of common mode failure of submerged cables at Pilgrim is significantly greater than [at] most US nuclear plants," Id. ¶23; (c) concerns about the effectiveness of GALL, Revision 2, Id. ¶¶25, 26; (d) assertions that by its amendment, Entergy

> has arbitrarily redefined the scope of its cables monitoring programs thereby eliminating the majority of vital cables within the scope of 10 CFR 54.4 and 10 CFR 54.21. There are miles of cables operating at voltages of less than 400 volts that meet the requirements defined in 10 CFR 54, yet Entergy and the NRC has [sic] failed to address any requirements for aging management for these cables and wires. Entergy and the NRC have now defined low voltages cables to eliminate all cables designed to operate at less than 400 volts.

Id. ¶28; (e) an assertion that in the amendment "Entergy infers they have a 'proven method' for detecting cable deterioration," and the assertion that "[t]here is no 'proven, commercially available test' that will assure cables that have experienced submergence for any voltage rating from 0 to 345 KV," Id. ¶29; (f) an assertion that "Entergy claims it has a program (EN-DC-346, Cable Monitoring Program, which it issued on December 31, 2009) with the inference it will

(continued . . .)

in Cables Contention 2 is not new and the contention thus not timely under 10 C.F.R. § 2.326(a)(1).[125]

(. . . continued)
provide reasonable assurance that will detect degraded cable failures," Id. ¶34; (g) an assertion that Section B.1.19 of the LRA Supplement (which he recites in part in paragraph 36)

> fails to meet the requirements of 10 CFR 54 as there is no technical justification for periodicity of inspections and it is not possible to inspect the condition of cable splices that may exist within submerged conduits. Cables that have been exposed to any submergence must be replaced with cables designed and qualified for underwater operation.

Id. ¶37; and (h) after assertions that "Entergy has failed to provide any commitment to establishing any baseline inspections for safety related inaccessible cables," Id. ¶42, and that "[t]he NRC does not have the expertise to totally understand cable manufacturing, installation and operation," Id. ¶43, concludes with the assertion that, in his professional opinion

> this is a grave safety issue that may result in common mode failures increasing the probability and possibly challenging:
> The integrity of the reactor coolant pressure boundary;
> The capability to shut down the reactor and maintain it in a safe shutdown condition; or
> The capability to prevent or mitigate the consequences of accidents

Id. ¶50. Every single one of these challenges regards elements of the AMPs for inaccessible electrical cables, and, because the subject matter was treated in the original LRA, these could have been raised as objections to the initial AMP, which were surely suffering from these same shortcomings now addressed in part by Entergy's amendment. We disagree with our colleague's basis for finding that this contention presents an admissible challenge.

[125] Regarding the issue of timeliness, we note that the provisions of 10 C.F.R § 2.326(a)(1) would permit a finding of timeliness if the issue raised is "exceptionally grave." We do not find persuasive or compliant with our regulations Mr. Blanch's bare speculative statement, that he believes this is a grave safety issue, Blanch Affidavit ¶ 50; his statements are simply conclusory remarks provided with no explanation as to how the asserted shortcomings he finds in Entergy's AMP for inaccessible cables logically lead to the sort of safety issues he asserts are present. Those statements are also speculative ("may result" in common mode failures leading to the several outcomes he suggests are possible), and speculation by an expert cannot form the basis for admission of a contention on the basis of the matter being exceptionally grave. See Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 125 (2009) (affirming finding of untimeliness where expert did not explain how the issue presented an exceptionally grave safety or environmental issue). Thus we do not find any basis for Pilgrim Watch's (or Mr. Blanch's) assertion that an exceptionally grave issue is presented by the matters subject of this proposed contention. Moreover, we see nothing to suggest, and nothing has been presented by Pilgrim Watch that could enable us to conclude, that Entergy's January 2011 improvements to its AMP submitted might present some exceptionally grave

(continued . . .)

III. ORDER

For the foregoing reasons, we DENY admission of each of Pilgrim Watch's first three proposed new contentions.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD[126]

/RA/

_____
Dr. Paul B. Abramson
ADMINISTRATIVE JUDGE

/RA/

_____
Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 11, 2011

(. . . continued)
issue – and certainly if there were such a serious matter, it would plainly have been presented by the provisions of Entergy's original LRA regarding the subject cables.

[126] Judge Young's concurring and dissenting views are set forth on the following pages.

Administrative Judge Ann Marshall Young, Concurring in Part and Dissenting in Part

I agree that Pilgrim Watch's new contentions are required to meet the standards of 10 C.F.R. § 2.326, and that its November 2010 new contention does not meet these requirements. For the reasons stated herein, however, although Intervenor's January 2011 new contention presents a close case, I find it meets the rule's standards.[1]

Reopening standards of 10 C.F.R. § 2.326

Intervenor argues that the reopening requirements of § 2.326 do not apply to its new contentions, stating among other things, for example, that its request for hearing on its January 2011 new contention "is not a motion to reopen, and even it if were Pilgrim Watch's request meets the standards for reopening – it is timely and addresses a significant safety issue."[2] Pilgrim Watch urges that the reopening requirements apply only to "new evidence about an issue that has already been heard," and "may not be properly applied to the new material contentions that deal with u[n]litigated issues."[3]

It is true that 10 C.F.R. § 2.326 begins, at subsection (a), by referring to a "motion to reopen a closed record *to consider additional evidence*," stating that such a motion "will not be

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[1] As indicated *infra*, I find no need to rule on Intervenor's December 2010 new contention.

[2] Pilgrim Watch Reply to Entergy's and the NRC Staff's Oppositions to Pilgrim Watch's Request for Hearing on a New Contention (Feb. 24, 2011) at 2 (emphasis in original) [hereinafter Pilgrim Watch 2/24/11 Reply].

[3] *Id.* at 4. Intervenor cites various cases in support of its arguments, including *Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1443-44 & n.11 (D.C. Cir. 1984); *Commonwealth of Mass. v. NRC*, 924 F.2d 311, 334 (D.C. Cir. 1991); *Union of Concerned Scientists v. NRC*, 920 F.2d 50 (D.C. Cir. 1990); *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1316-17 (D.C. Cir. 1984), *vacated in part*, 760 F.2d 1320 (D.C. Cir. 1985) (en banc), *and aff'd* 789 F.2d 26 (D.C. Cir. 1985) (en banc), *cert. denied*, 479 U.S. 923 (1986). These cases, however, all involve situations in which parties were not permitted to raise issues initially and/or there was no opportunity for hearing on a particular issue, *see Union of Concerned Scientists*, 735 F.2d at 1444-45; *Mass. v. NRC*, 924 F.2d at 333-36; *Mothers for Peace*, 751 F.2d at 1316-17, which is not the situation herein. Intervenor has at all times in this proceeding been permitted at least to raise issues, as argued by Entergy and the NRC Staff. *See* Tr. at 808-09, 812.

granted" unless certain criteria are satisfied.[4] But subsection (d) of the rule refers to "[a] motion to reopen *which relates to a contention not previously in controversy among the parties*,"[5] indicating that the rule is not intended to be limited to motions seeking only to submit additional evidence relating to a previously-admitted contention.

The reopening criteria that must be satisfied under § 2.326 are, first, under subsection (a), that any such motion (1) must be timely (except that "an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented"); (2) must "address a significant safety or environmental issue"; and (3) must "demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially."[6] In addition, the rule at subsection (b) requires that:

> The motion must be accompanied by affidavits that set forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) of this section have been satisfied. Affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. Evidence contained in affidavits must meet the admissibility standards of this subpart. Each of the criteria must be separately addressed, with a specific explanation of why it has been met. When multiple allegations are involved, the movant must identify with particularity each issue it seeks to litigate and specify the factual and/or technical bases which it believes support the claim that this issue meets the criteria in paragraph (a) of this section.[7]

Finally, subsection (d) requires that a motion relating to a new contention also "satisfy the requirements for nontimely contentions in § 2.309(c)."[8] All of these criteria must be met in order to satisfy the requirements of § 2.326. And, of course, any contention must meet the requirements of 10 C.F.R. § 2.309(f)(1)(i)-(vi).

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[4] 10 C.F.R. § 2.326(a) (emphasis added).

[5] *Id.* § 2.326(d) (emphasis added).

[6] *Id.* § 2.326(a)(1)-(3).

[7] *Id.* § 2.326(b). Subsection (c) of the rule concerns motions predicated on allegations of confidential informants and is not relevant to the matters at issue.

[8] *Id.* § 2.326(d).

The Commission has endorsed the principle that "a motion to file new or amended contentions must address the motion to reopen standards" after an intervention petition has been denied.[9] And in the *Vermont Yankee* proceeding, in which the Commission on appeal of board initial decisions remanded the case for a limited purpose,[10] it observed that, although the *proceeding* would remain open, Intervenors therein had to submit a motion to reopen to address "any *genuinely new* issues related to the license renewal application that previously could not have been raised."[11] Although the Commission has not made such a statement in this proceeding,[12] the same logic would seem to apply. I therefore agree that under NRC rule and case law, Pilgrim Watch must meet the reopening criteria of § 2.326 with respect to any new contentions filed after the Commission's remand, in CLI-10-11, for the limited purposes set forth therein.

November 2010 "Cleanup Contention"

In its November 2010 contention Pilgrim Watch asserts:

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

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[9] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 120 (2009).

[10] *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 NRC __, __ (July 8, 2010) (slip op. at 2) [hereinafter *Vermont Yankee* I*]*.

[11] *Id.* at __ (slip op at 10 n.37) (emphasis in original). *See also N.J. Envtl. Fed'n v. NRC*, No. 09-2567, 2011 WL 1878642, at *9-10) (3rd Cir. May 18, 2011).

[12] I do note that, in an Order issued August 5, 2010, the Commission through its Secretary denied Pilgrim Watch's request for further consideration and remand of certain matters, stating that Intervenor "neither addresses nor meets the Commission's standards for seeking reconsideration, *or for reopening a closed record*, and therefore merits no further adjudicatory action by the Commission." Commission Order (Aug. 5, 2010) (unpublished) (emphasis added). This indicates some level of presumption that the reopening requirements would apply to any new filings in the proceeding, at least from and after August 5, 2010.

> millirem a year, and at least the 95th percentile of the total consequences determined by the EARLY and CHRONC modules of the MACCS2 Code, and (ii) does not reduce any costs by use of a discount factor or probabilistic analysis.[13]

Although there are certain arguments that might be said to support the timeliness and significance aspects of this contention,[14] Pilgrim Watch has not met the requirement of 10 C.F.R. § 2.326(b) for an affidavit,[15] which also brings into question whether it has met the "materially different result" requirement of § 2.326(a)(3), using the Commission's test of whether it has been shown that a motion for summary disposition could be defeated.[16] Therefore, while not agreeing with all of my colleagues' analysis on this contention, I must agree that it is inadmissible, because it does not meet all of the reopening standards of 10 C.F.R. § 2.326. Whatever their ultimate merits, however, I do not discount the subjects about which Pilgrim

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[13] Pilgrim Watch Request for Hearing on New Contention (Nov. 29, 2010) at 1 [hereinafter Nov. 2010 Cleanup Contention].

[14] Pilgrim Watch bases this contention largely on a November 10, 2010, article in the online publication Inside EPA, entitled *Agencies Struggle to Craft Offsite Cleanup Plan for Nuclear Power Accidents*, in which it is stated that there exist disagreements and confusion among the NRC, the Environmental Protection Agency (EPA), and the Federal Emergency Management Agency (FEMA) over "which agency – and with what money and legal authority – would oversee cleanup in the event of a large-scale accident at a nuclear power plant that disperses radiation off the reactor site and into the surrounding area." *Id.*, Att. 1, Douglas P. Guarino, Agencies Struggle to Craft Offsite Cleanup Plan for Nuclear Power Accidents, Inside EPA, Nov. 22, 2010. Although Entergy and the NRC Staff dispute the preceding assertions, assuming *arguendo* them to be true (and avoiding going into the merits of the contention at this stage of the proceeding, as is proper) they would seem on their face to be both timely and serious so as to support some of the suggestions made in the contention itself, even if they do not meet the affidavit and "materially different result" requirements of § 2.326.

[15] I note Pilgrim Watch's statement that it "intends principally to rely upon government documents and testimony from David I. Chanin and Dr. Edwin Lyman. It would be unreasonable at this date to expect a totally unfunded group to provide testimony from these experts . . . ." Nov. 2010 Cleanup Contention at 15. However, § 2.326(b) and relevant case law appear not to permit such circumstances to be taken into account. *See*, *e.g.*, *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 672-73 (2008).

[16] *See Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-11-02, 73 NRC __, __ (slip op. at 15) (Mar. 10, 2011) [hereinafter *Vermont Yankee* II]; 10 C.F.R. § 2.1205.

Watch is concerned,[17] particularly in view of the recent events at the Fukushima Plant in Japan, and would therefore recommend to the Commission that it consider having the NRC Staff address the subjects of this contention and the matters on which it is based, in light of ongoing Fukushima-related efforts,[18] prior to considering the issuance of the sought license renewal.

December 2010 Cables Contention

In December 2010 Pilgrim Watch filed a contention relating to inaccessible cables.[19] Attached to it is a December 13, 2010, Declaration signed by Paul M. Blanch, stating his experience, among other things as a Navy nuclear reactor operator and electric plant operator on *Polaris* submarines; a California registered professional engineer with a B.S. in electrical engineering; an active participant in "industry standards writing activities" with the American Nuclear Society, the Instrumentation Society of America, and the Institute of Electrical and Electronics Engineers, for use by the nuclear industry; a contractor for the Electric Power Research Institute and the Nuclear Energy Institute; and more than 40 years of "engineering, design, operations, maintenance, engineering management, and project coordination"; as well as noting that he was named 1993 "Engineer of the Year" by Westinghouse Electric and Control magazine for his "efforts in identifying the subtle failures of active electrical devices such as pressure, level, and flow transmitters and indicators [including] generic design deficiencies of

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[17] *See supra* note 14; *see also* Tr. at 814-59.

[18] For example, an NRC task force recently issued a report that is currently under consideration by the Commission. *See* Dr. Charles Miller *et al.*, 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) (ADAMS Accession No. ML111861807) [hereinafter Near-Term Task Force Report].

[19] Pilgrim Watch Request for Hearing on a New Contention: Inadequacy of Entergy's Aging Management of Non-Environmentally Qualified (EQ) Inaccessible Cables (Splices) at Pilgrim Station (Dec. 13, 2010) [hereinafter Dec. 2010 Cables Contention].

piping and mechanical systems in reactor level monitoring systems."[20] Mr. Blanch states in his Declaration that he has "read and reviewed the enclosed proposed contention from Pilgrim Watch and fully support[s] all technical and regulatory aspects of this contention on Inaccessible cables."[21] Based on the last preceding statement, one might consider that Mr. Blanch has effectively incorporated by reference the entire December 2010 Cables Contention and its accompanying basis, and address the reopening standards of 10 C.F.R. § 2.326, among others, based on such a reading.[22] Because, however, the allegations in the December 2010 Cables Contention have in effect been superseded by those in Pilgrim Watch's January 2011 contention, which challenges Entergy's aging management plan for the cables as amended in January 2011, I consider that the latter has effectively replaced the former, and address only the latter, in the following section.

January 2011 Cables Contention

Pilgrim Watch in the contention asserts:

> Entergy's Aging Management Plan *(as amended by Entergy on January 7, 2011)* for non-environmentally qualified (EQ) inaccessible cables and cable splices at Pilgrim Station is insufficient to provide reasonable assurance that these cables will be in compliance with NRC Regulations and public health and safety shall be protected during license renewal."[23]

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[20] Dec. 2010 Cables Contention, Att. B, Declaration of Paul M. Blanch (Dec. 13, 2010), Dec. 2010 Cables Contention at 48-49.

[21] *Id.* at 50.

[22] The contention is in any event likely inadmissible based on the Commission's ruling in *Vermont Yankee* II, CLI-11-02, 73 NRC __, discussed *infra* in my consideration of Pilgrim Watch's January 2011 Cables Contention.

[23] Pilgrim Watch Request for Hearing on a New Contention: Inadequacy of Entergy's Aging Management of Non-Environmentally Qualified (EQ) Inaccessible Cables (Splices) at Pilgrim Station (Jan. 20, 2011) at 1 (emphasis in original) [hereinafter January 2011 Cables Contention or Cables Contention 2].

Although Pilgrim Watch has argued that this contention "is timely and addresses a significant safety issue,"[24] it did not in the contention seek to reopen the record, and does not explicitly address the reopening standards of 10 C.F.R. § 2.326.[25] If, however, the contention *does in fact* meet all the substantive criteria of 10 C.F.R. § 2.326, I would find denying it solely on the basis that Intervenor did not file a formal motion to reopen to be elevating form over substance. In my view, looking instead at the *reality* of what is actually shown in the filings is the appropriate course to take, particularly given Pilgrim Watch's *pro se* status.[26] To do this does not violate any regulatory provisions or reasonable standards of fair play, nor does it constitute supplying for the intervenor any required elements, as suggested by the board majority. It involves looking to whether Intervenor itself has supplied the necessary elements, even if not designating them as such. I look, therefore, to whether Cables Contention 2 and its support, as filed, does in fact meet the requirements of 10 C.F.R. § 2.326.

Timeliness Under 10 C.F.R. §§ 2.326(a)(1), (d), and 2.309(c)

On the requirements of timeliness found at §§ 2.326(a)(1) and (d), and 2.309(d), I would take the following circumstances into account:

First, the Commission in its recent decision in the *Vermont Yankee* proceeding upheld that Licensing Board's denial of a motion to reopen regarding a contention similar to both Pilgrim Watch's December 2010 new contention as well as this one in some

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[24] Pilgrim Watch 2/24/11 Reply; *see also supra* note 2 and accompanying text.

[25] *See* Cables Contention 2 at 58-59.

[26] In NRC proceedings, *pro se* litigants are generally not held to the same high standards of pleading and practice as parties with counsel. *See*, *e.g.*, *Vermont Yankee* I, CLI-10-17, 72 NRC at __ (slip op. at 56 n.246); *U.S. Enrichment Corp*. (Paducah, Kentucky Gaseous Diffusion Plant), CLI-01-23, 54 NRC 267, 272 (2001); *Consolidated Edison Co. of N.Y.* (Indian Point, Unit 2) *and Power Authority of N.Y.* (Indian Point, Unit No. 3), LBP-83-5, 17 NRC 134, 136 (1983).

respects, supported by the affidavit of the same expert.[27] The Commission in CLI-11-02 noted that "the first and most significant difficulty" with the cables contention in *Vermont Yankee* was that it was "based on the premise that the cable AMP in Entergy's Application is incomplete – an assertion that, if true today, was equally true when Entergy filed its Application in 2006."[28] The contention, the Commission said, "raises the question of whether the AMP in the Application adequately addresses the issue of submerged electric cables during the twenty-year period of extended operation – an issue of which [Intervenor New England Coalition (NEC)] should have been aware since the filing of the 2006 Application."[29]

The Commission then, after finding that the information on which NEC based its contention was not truly new,[30] went on to address NEC's complaint that the *Vermont Yankee* Board should not in ruling on its contention have considered a supplement to its application that Entergy had filed, addressing certain cable-related criteria and arguing that it rendered NEC's contention moot.[31] The Commission noted NEC's argument that

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[27] *Vermont Yankee* II, CLI-11-02, 73 NRC __. The contention at issue in that case stated as follows:

> Applicant has not demonstrated adequate aging management review and/or time-limited aging analysis nor does the applicant have in place an adequate aging management program to address the effects of moist or wet environments on buried, below grade, underground, or hard-to-access safety-related electrical cables[. T]hus the applicant does not comply with NRC regulation (10 CFR §54.21(a)[)] and guidance and/or provide adequate assurance of protection of public health and safety (54.21(a)[)].

Id. at __ (slip op. at 2-3). *See* New England Coalition's Motion to Reopen the Hearing and for the Admission of New Contentions (Aug. 23, 2010), Attached Declaration and Affidavit of Paul Blanch (ADAMS Accession No. ML1024200420).

[28] *Vermont Yankee* II, CLI-11-02, 73 NRC at __ (slip op. at 9).

[29] *Id.* at __ (slip op. at 9-10).

[30] *Id.* at __ (slip op. at 10-13).

[31] *Id.* at __ (slip op. at 13-14).

the Board should not have "accepted" the document, but found that Entergy appropriately filed the supplement, stating in addition:

> NEC has not shown that it has been harmed or prejudiced by the agency's consideration of the Supplement. NEC has had ample time to review, and adequate means by which to address, the Supplement. Specifically, NEC could either have filed a second motion to reopen the proceeding on the basis of the Supplement, or requested leave to amend its August 20 Motion to Reopen, and (either way) to file a revised Contention 7. NEC has taken none of these steps.[32]

The Commission follows this statement immediately with its conclusion that "[i]n sum, the [*Vermont Yankee*] Board did not err in determining that NEC offered no 'new' information supporting Contention 7 and that the information therefore did not support NEC's Motion to Reopen."[33]

In contrast to the intervenor in *Vermont Yankee*, Pilgrim Watch in this proceeding did file a revised contention – its January 20, 2011, contention quoted above – citing as "new information" Entergy's January 7, 2011, amendment of its aging management plan, or "AMP."[34] Thus Cables Contention 2 is distinguishable from the contention addressed in CLI-11-02 (which Pilgrim Watch's December 2010 Cables Contention may be said to more closely resemble). The new AMP amendment is comparable to the "supplement" in *Vermont Yankee* that the Commission discusses in the above-quoted language. Based on this, I would find that the January 2011 Cables Contention 2 may be timely

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[32] *Id.* at __ (slip op. at 14) (citing 10 C.F.R. §§ 2.326, 2.309(f)(2)). I also note that the Commission's ruling in CLI-11-02 was limited to finding that the provisions of 10 C.F.R. § 2.326(a)(1) and (3) were not met. An affidavit had been provided, and the Commission did not rule on the significance issue of subsection (a)(2) because the Licensing Board had not ruled on it and therefore, the Commission found, it was not properly before it on appeal. *Id.* at __ (slip op. at 4 n.13).

[33] *Id.* at __ (slip op. at 14).

[34] Cables Contention 2 at 24-25. Pilgrim Watch also cited the NRC Staff's December 23, 2010, Revision 2 of the GALL Report, *id.*, which the Commission in CLI-11-02 found did not constitute new information, given that it merely summarized previously-available information, *Vermont Yankee* II, CLI-11-02, 73 NRC at __ (slip op. at 13).

and admissible to the extent it is based on the AMP amendment, assuming all other relevant criteria are met.

Regarding my colleagues' conclusion that the contention fails because based on a mere enhancement of what existed before, the same could have been said with respect to the supplement in *Vermont Yankee*,[35] and yet the Commission in CLI-11-02 does not suggest this, notwithstanding its earlier comment about the "incompleteness" of the original cables AMP.[36] I note the authority that my colleagues and Entergy cite for the contrary proposition – namely, the Commission's earlier *Oyster Creek* ruling upholding that Licensing Board's finding that a contention challenging an "enhanced monitoring program" adopted by that Applicant was inadmissible because that intervenor had not challenged the original "unenhanced monitoring program."[37] However, while the Commission in *Vermont Yankee* cited its earlier *Oyster Creek* ruling for various other propositions,[38] it does not make any reference to the concept of holding inadmissible challenges to "enhanced" programs when an original "unenhanced" program has not been challenged, nowhere even using the word "enhance," "enhanced," or "unenhanced." If it intended to adopt this reasoning, it surely would have done so explicitly.

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[35] *See Id.* at __ (slip op. at 13 n.55).

[36] It might also be observed that Intervenor herein challenges more the correctness than the completeness of the AMP amendment in question. In addition, the exact definition of what constitutes an "enhancement" may not be so clear as the majority sees it.

[37] *See* Entergy Answer Opposing [Cables Contention 2] at 2 and n.6 (citing *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 274 (2009)) [hereinafter Entergy Answer to Cables Contention 2]; *accord* Majority Ruling at notes 121-123 and accompanying text.

[38] *See Vermont Yankee* II, CLI-11-02, 73 NRC at __ (slip op. at 4 n.14, 5 n.17, 6 n.22, 15 nn.63-64, 16 n.69).

Furthermore, what the Commission actually did in *Oyster Creek* with respect to the "enhancement" ruling of that Board was to find it to be reasonable and to state that it saw "no error in [its] reasoning."[39] The Commission in *Oyster Creek* did not say that this was the only possible result in circumstances in which an intervenor files a new contention based on a supplement to an application, such as, for example, Entergy's *new* amendment to its AMP herein. Nor does the Third Circuit Court of Appeals in its ruling on an appeal of the Commission's *Oyster Creek* decision say anything to the contrary, instead (similarly to the Commission) merely finding the ruling to have been reasonable and not an abuse of discretion.[40]

Moreover, the Commission's statement in *Vermont Yankee* that NEC had not moved to reopen based on the supplement or filed a "revised [c]ontention"[41] must be presumed to have meaning, to be more than mere *dictum*, and to have played into its timeliness ruling – particularly in the absence of any reference to its observation in *Oyster Creek* on a contention challenging an "enhancement" to an existing program. Again, notwithstanding the Commission's earlier reference in CLI-11-02 to the asserted "incompleteness" of that cables AMP, to construe that reference to mean that any contention that might have been based on the *Vermont Yankee* supplement (or, as in this case, the amendment to the AMP[42]) would actually and necessarily be *inadmissible*, because the original "unenhanced" AMP was not challenged, would effectively be to

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[39] *Oyster Creek*, CLI-09-7, 69 NRC at 274.

[40] *N.J. Envtl Fed'n*, 2011 WL 1878642 at 7.

[41] *See supra* note 32 and accompanying text.

[42] I note that the supplement at issue in *Vermont Yankee* appears to be very similar to the AMP amendment in this proceeding. *See Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-10-19, 72 NRC __, __ (slip op. at 18, 26) (Oct. 19, 2010) (the supplement extended the AMP for medium-voltage cables to also cover low-voltage cables).

accuse the Commission of a sort of sleight of hand in the above-quoted statement, offering but an empty theory. For just as in this case, NEC in *Vermont Yankee* had not challenged the original AMP,[43] and under the "enhancement" theory could never have successfully challenged the AMP supplement through a motion to reopen or a revised contention, which would render the Commission's above-quoted language from CLI-11-02[44] meaningless. I will presume, to the contrary, that the Commission's analysis was meaningful and genuine.

In sum, Pilgrim Watch in its January 20, 2011, contention did, unlike the Intervenor in *Vermont Yankee*, challenge Entergy's January 7, 2011, amendment to its AMP, and on this basis I would find it to be timely under 10 C.F.R. § 2.326(a)(1) as well as under §§ 2.326(d) and 2.309(c). (Insofar as Pilgrim Watch's January 20, 2011, filing is based on Entergy's January 7, 2011, amendment of its AMP, it might indeed also be considered timely under § 2.309(f)(2).)

Under § 2.309(c), I would consider that Entergy's January AMP amendment constituted good cause for failure to file on time under § 2.309(c)(1)(i), and find in Pilgrim Watch's favor on the remaining subparts of § 2.309(c)(1), with the exception of subpart (vii) and possibly subpart (viii). It has already been determined that Pilgrim Watch has an interest and right as a party to this proceeding,[45] which carries with it the reality that whatever order is ultimately issued in this proceeding will affect such interest, and there appears to be no other party raising the concerns stated in Cables Contention 2.

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[43] *See id.* at __ (slip op. at 12, 23-24).

[44] *See supra* text accompanying note 32.

[45] LBP-06-23, 64 NRC 257, 271, 348 (2006).

Obviously, admitting the contention would delay the proceeding somewhat,[46] but I would not find this consideration to outweigh the good cause provision of subpart (i), the factor given the greatest weight in a § 2.309(c) analysis.[47] And on subpart (viii), it is clear that Pilgrim Watch is limited in its resources, but I would also note that it has an expert who can address the issues in its January 2011 Cables Contention.

Significance under 10 C.F.R. § 2.326(a)(2)

With respect to the requirement under 10 C.F.R. § 2.326(a)(2) for a "significant safety or environmental issue," I note Affiant Paul Blanch's January 19, 2011, Affidavit, including, among others, statements therein that Entergy's AMP amendment for inaccessible cables inappropriately limits the scope of its monitoring program, omitting "miles of cables operating at voltages of less than 400 volts that meet the requirements defined in 10 CFR 54";[48] that Entergy's commitment to use a "proven, commercially available test" is incorrect because there is no such test;[49] that the cables should be replaced "with cables designed and qualified for underwater operation" because of the salt water environment;[50] that NUREG/CR-7000 supports his opinion;[51] and that it is his expert opinion that the aging cables at issue in the contention and the lack of any "recognized testing that can provide reasonable assurance that [they] can perform 'their intended functions'" present a:

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[46] Of course, the fact that the Applicant may continue to operate pending a final decision on its license renewal application, *see* 10 C.F.R. § 2.109, minimizes the negative impact of any delay.

[47] *See*, *e.g.*, *Vermont Yankee* I, CLI-10-17, 72 NRC at __ (slip op. at 67 n.304).

[48] Affidavit of Paul M. Blanch (Jan. 19, 2011) at 9 [hereinafter Blanch Affidavit].

[49] *Id.* at 9-10.

[50] *Id.* at 11-12.

[51] *Id.* at 13-14.

> grave safety issue that may result in common mode failures increasing the probability and possibly challenging:
>
> > The integrity of the reactor coolant pressure boundary;
> >
> > The capability to shut down the reactor and maintain it in a safe shutdown condition; or
> >
> > The capability to prevent or mitigate the consequences of accidents.[52]

As to Mr. Blanch's expertise, in addition to the experience noted *supra* in my discussion of Pilgrim Watch's December 2010 Cables Contention, he has "more than 45 years of engineering, design, operations, maintenance, engineering management, and project coordination experience for the construction[,] maintenance and operation of nuclear power plants," among other things.[53] I find his overall experience establishes his competence, knowledge, and expertise for purposes of subsections 2.326(b) and (a)(2).

I further find Expert Blanch's statements support a finding of both safety and environmental significance. I note that Applicant and the NRC Staff disagree with Mr. Blanch's statements, which I discuss in greater detail below in the context of the § 2.326(a)(3) and (b) requirements for a "materially different" demonstration. However, such disagreements go to the merits of the issues, and while Intervenor might not (were the contention admitted) ultimately prevail on all issues, Applicant's and Staff's arguments do not negate the serious issues themselves that Mr. Blanch raises and addresses in his Affidavit.

I note also, on the issue of significance, Pilgrim Watch's March filing of two documents asking the Board to consider certain concerns arising out of, and take judicial notice of, the accident at the Fukushima nuclear power plant in the wake of the earthquake and tsunami there as well as, among other things, loss of power being a

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[52] *Id.* at 18.

[53] *Id.* at 3; *see also supra* text accompanying note 20.

contributing factor in the accident, and the fact that both the Fukushima reactors and the Pilgrim reactor are General Electric Mark I models.[54] Although both Entergy and the NRC Staff object to these filings,[55] and much of the information in them goes into a level of alleged detail inappropriate for judicial notice, the three facts of the accident (1) occurring, (2) being related to loss of power, and (3) involving reactors of the same model as at the Pilgrim plant, appear to be pretty clearly undisputed and beyond reasonable controversy or dispute.[56] I would therefore consider these bare facts in making the significance determination required by § 2.326(a)(2) – if only to provide some reasonable context and emphasis on the matter.

Although the extent to which the exact cables at issue in Cables Contention 2 are connected to or otherwise related to critical safety components is not altogether clear, I find it reasonable to presume that they have some safety and environmental significance. If they did not, there would presumably have been no need for either the

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[54] Pilgrim Watch Memorandum Regarding Fukushima (Mar. 12, 2011); Pilgrim Watch Post-Hearing Memorandum (Mar. 28, 2011).

[55] Entergy's Reply to Pilgrim Watch Post-Hearing Memorandum (April 7, 2011) [hereinafter Entergy 4/7/11 Reply]; NRC Staff's Response to Pilgrim Watch Post-Hearing Memorandum (April 7, 2011).

[56] As Entergy has pointed out, *see* Entergy 4/7/11 Reply at 2, 10 C.F.R. § 2.337(f)(1) permits a board to take official notice "[1] of any fact of which a court of the United States may take judicial notice or [2] of any technical or scientific fact within the knowledge of the Commission as an expert body." Rule 201 of the Federal Rules of Evidence permits judicial notice of any fact "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201. Even assuming the three facts I list in the text were not generally known, the NRC's Near-Term Task Force is one example of a body that has clearly recognized these facts, in a manner indicating they are beyond reasonable dispute. *See* Near-Term Task Force Report at 8-9. *See also* Pilgrim Nuclear Power Station License Renewal Application (Jan. 2006) at 2.4-1 (ADAMS Accession No. ML060300028).

amended AMP or the revised evaluation that prompted it.[57] Also, although it is possible that any similar such cables would not be related to the occurrences in Japan, the accident at the Fukushima Dai-ichi plant has at a minimum highlighted the seriousness of power-related issues, with regard to which electrical cables would seem clearly to be relevant. Not to take the situation into account as, at least, context would seem to be the equivalent of wearing blinders to a matter that is obviously of serious concern and significance to the world, the country, and the NRC.[58]

Affidavit and "Materially Different Result" Requirements of 10 C.F.R. § 2.326(a)(3), (b)

As indicated above, Pilgrim Watch filed in support of its Cables Contention 2 the Affidavit of Paul M. Blanch.[59] This Affidavit consists of 19 pages of information challenging various aspects of Entergy's amended cables AMP for the Pilgrim plant.[60] Entergy, however, in addition to arguing that Pilgrim Watch has not met the standards for reopening,[61] shown the existence of a significant safety issue (providing instead "bare assertions and speculation"[62]), or met the late-filing or contention admissibility standards of 10 C.F.R. § 2.309,[63] contends that Intervenor has also failed to show that a materially

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[57] *See infra* text accompanying notes 73-75.

[58] *See*, *e.g.*, Near-Term Task Force Report.

[59] *See* Blanch Affidavit. I note that in some respects this Affidavit bears some similarities to the one provided in support of a somewhat similar contention in another license renewal proceeding, in which that contention was found to be admissible. *See NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), LBP-11-02, 73 NRC __, __ (slip op. at 27-32) (Feb. 15, 2011).

[60] *See supra* text accompanying notes 48-52. *See also supra* text accompanying notes 20, 53, on Mr. Blanch's experience, competence, knowledge, and expertise.

[61] Entergy Answer to Cables Contention 2 at 1, 15-20.

[62] *Id.* at 20-21.

[63] *Id.* at 26-49.

different result would be likely.[64] NRC Staff agrees with Entergy on all points,[65] does not provide any affidavit in support of its opposition to the January 2011 new contention, but does cite certain of its earlier filings related to Cables Contention 1, including its response to Pilgrim Watch's December 2010 cables contention.[66]

In support of its arguments, Entergy provides the 18-page Declaration of Vincent Fallacara and Roger B. Rucker, who are, respectively, the Director of Engineering at the Pilgrim plant, and an electrical engineering consultant on license renewal for Entergy who is responsible for "developing and implementing aging management programs for electrical components, responding to NRC requests for additional information and other license renewal related reviews, and assisting with audits and inspections."[67] Like Mr. Blanch, Mr. Rucker holds a professional engineering license; he is also a licensed master electrician.[68] Entergy argues that their Declaration "demonstrates that there is no genuine issue of material fact in dispute,"[69] and provides a summary of the points made in the Declaration.[70]

Given that the standard for determining whether a party has met the "materially different result" requirements of 10 C.F.R. § 2.326(a)(3) and (b) is whether the party can

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[64] *Id.* at 21-26.

[65] NRC Staff's Answer in Opposition to Pilgrim Watch's January 20, 2011 Amended Contention (Feb. 14, 2011) at 1-2, 7-15 [hereinafter Staff 2/14/2011 Answer].

[66] Staff 2/14/2011 Answer at 4.

[67] Entergy Answer to Cables Contention 2, Attached Declaration of Vincent Fallacara and Roger B. Rucker in Support of [Entergy Cables 2 Answer] (Feb. 14, 2011) at 1 [hereinafter Entergy Declaration].

[68] *Id.*

[69] Entergy Answer to Cables Contention 2 at 22.

[70] *Id.* at 22-26.

defeat a motion for summary disposition,[71] I examine Pilgrim Watch's January 2011 Cables Contention in this light. More specifically, I look to whether Mr. Blanch's Affidavit demonstrates a genuine dispute on a material issue of fact.[72] Of course, the situation

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[71] *See supra* note 16 and accompanying text.

[72] In this 10 C.F.R. Part 2, Subpart L proceeding, NRC regulations require, at 10 C.F.R. § 2.1205(c), that in ruling on a motion for summary disposition the standards of Subpart G apply. Subpart G at § 2.710(d)(2) provides that summary disposition should be granted:

> if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.

If it is found that a moving party has provided a sufficient showing of the right to summary disposition, the next inquiry is whether the opposing party has overcome the movant's case by showing a genuine dispute on a material issue of fact. The Commission has stated in this regard the following:

> When a motion for summary disposition is made and supported as described in our regulations, "a party opposing the motion may not rest upon [ ] mere allegations or denials," but must state "specific facts showing that there is a genuine issue of fact" for hearing. It is not sufficient, however, for there merely to be the existence of "*some* alleged factual dispute between the parties,["] for "the requirement is that there be no *genuine* issue of *material* fact." "Only disputes over facts that might affect the outcome" of a proceeding would preclude summary disposition. "Factual disputes that are . . . unnecessary will not be counted."
>
> The correct inquiry is whether there are material factual issues that "properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." At issue is not whether evidence "unmistakably favors one side or the other," but whether "there is sufficient evidence favoring the non-moving party" for a reasonable trier of fact to find in favor of that party. If the evidence in favor of the non-moving party is "merely colorable" or "not significantly probative," summary disposition may be granted.
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> In ruling on a motion for summary disposition a licensing board (or presiding officer) should not, however, conduct a "trial on affidavits." At this stage, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for [hearing]." "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." If "reasonable minds could differ as to the import of the evidence," summary disposition is not appropriate.

CLI-10-11, 71 NRC __, __ (slip op. at 12-13) (quoting 10 C.F.R. § 2.710(b); *Anderson v. Liberty Lobby*, 477 U.S. 242, 247-52, 255 (1986) (emphasis in original)).

herein is reversed from that in a normal summary disposition context, in that Entergy is actually responding to Pilgrim Watch's presentation in Mr. Blanch's Affidavit, rather than the other way around. I will, however, proceed with considering Entergy's submission first, along with excerpts from an earlier Staff filing, and then look to whether Pilgrim Watch has shown a genuine dispute on any material issue(s) of fact with respect to Entergy's and NRC Staff's position, so as to be able to defeat a summary disposition motion on the matters the parties address. To simplify the inquiry, I will use Entergy's summary of its witnesses' Declaration, refer to the Staff's earlier affidavit of an NRC expert, and then consider whether Pilgrim Watch through Mr. Blanch's Affidavit has demonstrated any genuine dispute on a material issue of fact.

In its summary of the Declaration of its experts, Entergy states at the outset that, while its original Application "committed to an AMP for Non-EQ Inaccessible Medium-Voltage Cable that is consistent with Rev. 1 of the GALL Report,"[73] in response to GALL Rev. 2[74] it "enhanced this AMP so that it now includes low-voltage (400 V to 2 kV) power cable, and has increased the minimum frequency of manhole inspections and cable insulation testing."[75] It continues its summary as follows:

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[73] Entergy Answer to Cables Contention 2 at 22 (citing Entergy Declaration at ¶¶ 6-7). The GALL Report is an NRC "technical basis" document relating to license renewal. Generic Aging Lessons Learned (GALL) Report, NUREG-1801, Rev. 1, Abstract (Sept. 2005) (ADAMS Accession No. ML052780376). Of course, as the Commission observed in the *Vermont Yankee* case, "a commitment to implement an AMP that the NRC finds is consistent with the GALL Report constitutes one acceptable method for compliance with 10 C.F.R. § 54.21(c)(1)(iii)," *Vermont Yankee* I, CLI-10-17, 72 NRC at __ (slip op. at 44), but this does not insulate such an approach from challenge by an intervenor, and is not binding on a licensing board in an adjudication, as, for example, a regulation would be. *Id.* at 47.

[74] Office of Nuclear Reactor Regulation, Generic Aging Lessons Learned (GALL) Report, NUREG-1801, Rev. 2 (Dec. 2010) (ADAMS Accession No. ML103490041).

[75] Entergy Answer to Cables Contention 2 at 22 (citing Entergy Declaration ¶ 10).

> • The purpose of this AMP for non-EQ inaccessible cable is to minimize cable exposure to significant moisture that might cause failure of low- and medium-voltage cable not subject to the environmental qualification requirements of 10 C.F.R. § 50.49 (which Entergy refers to as "non-EQ" cable), and to test the cable insulation for cables potentially exposed to significant moisture.[76]

Entergy indicates that it does not include cables with voltages below 400 V, "because the operating experience across all operating units has not indicated any significant frequency of water-induced failure," which is said to reflect "the fact that degradation of cable insulation is generally a function of both the voltage and the presence of water (i.e., the voltage level contributes to the degradation)."[77] Nor are high-voltage cables and connections included, because of unique characteristics that require they be "evaluated on an application specific basis."[78] In addition, Entergy states that "[t]here are no inaccessible cable splices at Pilgrim," and the splices that exist are managed according to a different AMP in the Application.[79]

Entergy summarizes the Declaration on monitoring and testing of cables under the amended cables AMP as follows:

> • The AMP for non-EQ inaccessible cable requires periodic actions to minimize exposure of cable [to] significant moisture, such as inspecting for water collection in cable manholes containing in-scope cables, and draining water as needed. These inspections will occur at least once every year, with more frequent inspections performed if necessary based on trending and evaluation of inspection results. For example, with respect to the only two manholes that are near the water table, Entergy conducts these inspections bi-weekly.
>
> • The AMP for non-EQ inaccessible cable requires testing at least every six years to provide an indication of the condition of the cable insulation, and the results will be evaluated to determine the need for increasing the test frequency.

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[76] *Id.* at 23 (citing Entergy Declaration ¶ 5).

[77] *Id.* (citing Entergy Declaration ¶ 26).

[78] *Id.* (citing Entergy Declaration ¶ 27).

[79] *Id.*; Entergy Declaration ¶ 13.

> • Multiple proven tests exist for determining the degradation of cable insulation from different aging mechanisms. The types of tests specified in Section XI.E3 of the GALL Report and in the revised Pilgrim AMP for non-EQ inaccessible cable are all identified in NUREG/CR-7000 as tests that have the ability to indicate the condition of cable insulation.
>
> • The tests identified in the AMP for detecting cable insulation degradation include: dielectric loss (dissipation factor/power factor); insulation resistance and polarization index; AC voltage withstand; partial discharge; step voltage; time domain reflectometry; and line resonance analysis.
>
> • The manhole inspections and cable insulation tests required under Pilgrim's AMP are consistent with recommendations for such inspections and tests developed by the Electric Power Research Institute ("EPRI").[80]

Entergy asserts that "there is no regulatory requirement for baseline inspections," but that "initial testing of the non-EQ medium- and low-voltage inaccessible cable will provide baseline results," that "[a]ll in-scope medium-voltage cable will be tested before the period of extended operation, and [that] all in-scope, inaccessible low-voltage cable will be tested within the first six years of extended operation."[81] It states that "[c]orrosion is not an aging effect applicable to cable insulation because cable insulation is non-metallic and therefore not subject to corrosion."[82]

According to Entergy's experts, there is also "no regulatory requirement to perform a hydrological survey of the Pilgrim site for license renewal purposes," but it has nevertheless "performed such a survey in 2007 as part of the industry's groundwater protection initiative," which "confirm[ed] that Pilgrim cables are installed above the groundwater table."[83] Entergy states that the "Pilgrim site grade elevation is 23 feet above mean sea level and above the 100 year flood level," and that there has been no

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[80] Entergy Answer to Cables Contention 2 at 23-24 (citing Entergy Declaration ¶¶ 10-11, 13, 15, 17, 23, 27).

[81] *Id.* at 24 (citing Entergy Declaration ¶¶ 28-29).

[82] *Id.* at 25 (citing Entergy Declaration ¶ 31).

[83] *Id.* (citing Entergy Declaration ¶¶ 35-36).

flooding at Pilgrim, because "[g]roundwater flows into Cape Cod Bay; sea water does not flow in the reverse direction," and because "[g]roundwater at Pilgrim does not have high corrosive salt concentrations," nor does rainwater.[84] According to Entergy's experts, the "average pH results from tests on water collected from storm drains and manholes is essentially neutral and does not indicate the presence of any contaminants that might adversely impact cable insulation."[85]

According to Entergy and its experts, "Pilgrim's inaccessible cables are located in a 'mild environment' as defined in the NRC rules and, therefore, the environmental qualification requirements of 10 C.F.R. § 50.49 do not apply to them."[86] Thus, "compliance with the provisions of [General Design Criterion] 4 are generally achieved and demonstrated by proper incorporation of all relevant environmental conditions into the design process, including the equipment specification."[87] Moreover, Pilgrim's inaccessible cables "were procured for installation in wet locations," and "[t]est results of samples taken from underground, 4 kV Pilgrim medium-voltage cable over 30 years old showed no evidence of premature aging or degradation."[88]

Entergy states that Pilgrim does not use "inside wiring not intended to get wet"; there is "no NM-B cable in use" underground; and the commercial industry standards of the National Electrical Manufacturers Association (NEMA), National Electric Code (NEC), "do not apply to underground power cables installed at Pilgrim."[89] Finally, any

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[84] *Id.* (citing Entergy Declaration ¶ 50).

[85] *Id.*

[86] *Id.*; Entergy Declaration ¶ 39.

[87] Entergy Answer to Cables Contention 2 at 25 (citing Entergy Declaration ¶ 42).

[88] *Id.* (citing Entergy Declaration ¶¶ 43, 29).

[89] *Id.* at 26 (citing Entergy Declaration ¶¶ 44-49).

cable failures at Pilgrim "will not result in common mode failures because the likelihood of simultaneous cable insulation failure is extremely low in light of the long time period required to make a cable susceptible to voltage surges that can lead to cable failure, and the fact that voltage surges are random."[90] Entergy asserts that any allegations not addressed in the previous summary are "immaterial or otherwise beyond the scope of this proceeding."[91]

Because the NRC Staff has referred to its response to Pilgrim Watch's December 2010 cables contention,[92] I note as well its attachment to that response of the Affidavit of NRC employee Roy K. Mathew, addressing the cables issue. In his Affidavit, he states among other things that, while "allowing medium voltage cables to remain submerged for extended periods of time [at the Pilgrim plant in 2010] was a performance deficiency [because t]hese cables are not designed for submergence," this finding was "determined to be of very low safety significance . . . because the condition did not contribute to both the likelihood of a reactor trip and the unavailability of mitigating systems equipment."[93] I also note Mr. Mathew's discussion of the NRC's "ongoing and continuous oversight of nuclear reactor operations"; his statement that "cables do not fail immediately, even when they are subjected to a wet or submerged environment," and should be "monitored

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[90] *Id.* (citing Entergy Declaration ¶¶ 44-49, 59-60).

[91] *Id.*

[92] *See supra* text accompanying note 66.

[93] NRC Staff's Answer in Opposition to Pilgrim Watch Request for Hearing on New Contention (Jan. 7, 2011), Attached Affidavit of Roy K. Mathew at 3.

for degradation"; as well as his statement that NUREG/CR-7000 does not contain any provisions with which licensees are required to comply.[94]

Mr. Blanch disputes Entergy's reliance on the GALL Report, stating that it offers only "vague guidance" and "provides no assurance that the proposed program is in compliance with NRC regulations and industry standards." He also disputes Entergy's position that the cables in question are in a "mild environment" as provided at 10 C.F.R. § 50.49.[95] He challenges Entergy's limiting of "the scope of its cables monitoring programs" that "eliminate[e] the majority of vital cables within the scope of 10 CFR 54.4 and 10 CFR 54.21." According to Mr. Blanch, there are "miles of cables operating at voltages of less than 400 volts that meet the requirements defined in 10 CFR 54, yet Entergy . . . has failed to address any requirements for aging management for these cables and wires," which Blanch contends must meet the requirements of § 50.49.[96]

Mr. Blanch disputes Entergy's monitoring and testing system, contending that "[t]here is no 'proven, commercially available test' that will assure cables that have experienced submergence for any voltage rating from 0 to 345 KV," stating that "neither the NRC, EPRI, Sandia nor Brookhaven have concluded there is any 'proven' technology to detect degradation."[97] Mr. Blanch quotes the following from NUREG/CR-7000 in support of this statement:

> *In-service testing of safety-related systems and components can demonstrate the integrity and function of associated electric cables under test conditions. However, in-service tests do not provide assurance that cables will continue to*

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[94] *Id.* at 5-6. *See infra* note 98 for a complete cite for NUREG/CR-7000. Mr. Mathew is of course correct that NUREG/CR-7000, like the GALL report, does not carry the binding authority of a properly promulgated regulation. *See supra* note 73.

[95] Blanch Affidavit ¶ 26.

[96] *Id.* ¶ 28.

[97] *Id.* ¶ 29.

> *perform successfully when they are* ***called upon to operate fully loaded for extended periods as they would under normal service operating conditions or under design basis conditions****. In-service testing of systems and components does not provide specific information on the status of cable aging degradation processes and the physical integrity and dielectric strength of its insulation and jacket materials.*[98]

According to Mr. Blanch, the preceding statement is consistent with his own experience.[99]

Mr. Blanch disputes Entergy's statements on the need for a survey, stating that there should be a "thorough subsurface hydrologicalgeological survey over the entire site to determine groundwater flow today as it relates to inaccessible Non-EQ cables within scope," in order to "compare those results to the original Dames and Moore 1967 hydro study to see if locally adverse conditions are more severe than were anticipated when the plant was originally designed." In addition, he contends, this should be followed up "with regular subsequent scheduled subsurface surveys to track changes in groundwater flow and tides expected from, for example, onsite construction or impacts from global warming changes" in the license renewal period.[100]

Also disputed by Mr. Blanch are Entergy's statements regarding the absence of salt water and cable insulation. According to Mr. Blanch, the National Electrical Manufacturers Association (NEMA) does have relevant information relating to the cables in question. He states that "it would be logical to have Nuclear Power plants" comply with certain minimum standards of NEMA relating to residential, industrial and

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[98] *Id.* ¶¶ 30, 32 (citing NUREG/CR-7000, BNL-NUREG-90318-200 – Essential Elements of an Electric Cable Condition Monitoring Program (Jan. 2010)) (emphasis provided by Affiant Blanch). The quotation provided by Mr. Blanch is found in the Conclusions and Recommendations part of NUREG/CR-7000, at 5-1.

[99] *Id.* ¶ 31.

[100] *Id.* ¶ 18.

commercial facilities, and advocates replacement of certain wires and cables.[101] Noting that the Pilgrim plant "is located adjacent to Cape Cod Bay," he states that "therefore the groundwater has very high corrosive salt concentrations . . . which will likely accelerate the degradation of cables in contrast to those nuclear plants located away from coastal areas," and the cables are "not located in a mild environment." He cites various NEMA requirements regarding water-damaged cables, as well as descriptions of the dangers of using cables that have been water-damaged, "whether through floodwaters or other means," including risks of future equipment failure.[102]

Mr. Blanch challenges Entergy's inspection program for inaccessible medium-voltage cables that is to be **"**based on and consistent with the program described in NUREG-1801, Revision 2, Section XI.E3, 'Inaccessible Medium- Voltage Cables Not Subject to 10 CFR 50.49 Environmental Qualification Requirements,'" and that will include at least annual inspections for water accumulation in manholes, trending to determine possible need for a different inspection frequency, and "[a]dditional operational inspections . . . to verify drainage systems are functional prior to predicted heavy rains or flooding events such as hurricanes."[103] Mr. Blanch disputes the efficacy of these measures, stating that it is his "professional opinion that this proposed program fails to meet the requirements of 10 CFR 54 as there is no technical justification for periodicity of inspections." It is his professional opinion that relevant cables are within the scope of 10 C.F.R. § 50.49, and that the baseline inspections addressed in NUREG/CR-7000 (which he quotes in some detail) are required as well, but that Entergy

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[101] *Id.* ¶¶ 20-21.

[102] *Id.* ¶¶ 22-24.

[103] *Id.* ¶ 36 (quoting from Entergy's amended Cables AMP).

has not complied with these.[104] He points out that, "[w]hile a single event of a submerged cable failure may be ***of low safety significance*** this is a problem that may result in common mode failures of multiple redundant safety systems," citing Information Notice 2010-26 and cable failures discussed therein, and the relationship of aging to cable failures.[105]

Finally, in his January Affidavit Mr. Blanch states that he has reviewed Pilgrim Watch's January 2011 contention and fully supports all "technical and regulatory aspects" of it. He also challenges the NRC in various ways, which are not material to this proceeding, the scope of which is limited to Entergy's license renewal Application for the Pilgrim plant.

I note in addition that Intervenor, in its reply to Entergy and Staff responses to the January 2011 contention, quotes from a August 2010 presentation by NRC Staff Affiant Mathew and others, in which one of the slides states (1) that "[e]lectric cables are one of the most important components in a nuclear plant to provide the various plant systems function to mitigate the effects of an accident and preserve the safety of the plant during the normal, abnormal, and anticipated operational occurrences," (2) that, "[i]f cable degration from aging or other mechanisms remain undetected, it can lead to deterioration of cable performance or result in cable failure when it is relied on to mitigate design bases accidents and transients," and (3) that in response to a 2007 letter licensees had "provided data showing that the number of cable failures is increasing with plant age, and that cable failures are occurring with the plants' 40-year licensing periods," which "failures have resulted in plant transients and shutdowns, loss of safety

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[104] *Id.* ¶¶ 37-43.

[105] *Id.* ¶ 45 (emphasis in original).

redundancy, entry into limiting conditions for operation, and undue challenges to plant operations."[106]

From the preceding, I would conclude that Intervenor Pilgrim Watch has demonstrated a genuine dispute on material issues of combined fact and law. It is clear that, while some of Mr. Blanch's statements come close to being "mere allegations," Pilgrim Watch through his Affidavit has raised significant, genuine, and material issues, regarding whether the Pilgrim cables addressed in Entergy's AMP amendment in question are within the scope of and meet the requirements of 10 C.F.R. §§ 50.49, 54.4, and 54.21; whether the amendment includes all the cables that it should include under these rules; and whether the surveying, monitoring, and inspection programs for inaccessible cables at Pilgrim are sufficient to meet the requirements of the rules and to protect public health and safety.

10 C.F.R. § 54.4 addresses the scope of license renewal. Subsection (a) of the rule concerns "[p]lant systems, structures, and components" including "(1) [s]afety-related systems, structures, and components which are those relied upon to remain functional during and following design-basis events (as defined in 10 CFR 50.49(b)(1)) to ensure the following functions:"

(i) The integrity of the reactor coolant pressure boundary;

(ii) The capability to shut down the reactor and maintain it in a safe shutdown condition; or

(iii) The capability to prevent or mitigate the consequences of accidents which could result in potential offsite exposures comparable to those referred to

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[106] Pilgrim Watch 2/24/11 Reply at 15 (quoting from NRC Public Meeting "Inaccessible or Underground Cable Performance Issues at Nuclear Power Plants," Aug. 10, 2010, chaired by Mr. Roy Mathew, NRC/NRR, Slide 10 (ADAMS Accession No. ML092460425)). The slides are actually dated August 19, 2009.

> in § 50.34(a)(1), § 50.67(b)(2), or § 100.11 of this chapter, as applicable.[107]

Section 54.21 concerns the contents of a license renewal application.

Section 50.49 concerns "[e]nvironmental qualification of electric equipment important to safety for nuclear power plants." It requires licensees to "establish a program for qualifying [certain defined] electric equipment,"[108] and, at subsection (b), states (similarly to § 54.4(a)(1)):

> Electric equipment important to safety covered by this section is:
>
> (1) Safety-related electric equipment.
>
> > (i) This equipment is that relied upon to remain functional during and following design basis events to ensure--
> >
> > > (A) The integrity of the reactor coolant pressure boundary;
> >
> > > (B) The capability to shut down the reactor and maintain it in a safe shutdown condition; or
> >
> > > (C) The capability to prevent or mitigate the consequences of accidents that could result in potential offsite exposures

---

[107] The remainder of § 54.4(a) places the following additional systems, structures, and components within the scope of license renewal:

> (2) All nonsafety-related systems, structures, and components whose failure could prevent satisfactory accomplishment of any of the functions identified in paragraphs (a)(1)(i), (ii), or (iii) of this section.
>
> (3) All systems, structures, and components relied on in safety analyses or plant evaluations to perform a function that demonstrates compliance with the Commission's regulations for fire protection (10 CFR 50.48), environmental qualification (10 CFR 50.49), pressurized thermal shock (10 CFR 50.61), anticipated transients without scram (10 CFR 50.62), and station blackout (10 CFR 50.63).

In addition, under § 54.4(b):

> The intended functions that these systems, structures, and components must be shown to fulfill in § 54.21 are those functions that are the bases for including them within the scope of license renewal as specified in paragraphs (a)(1) - (3) of this section.

[108] C.F.R. § 50.49(a).

> comparable to the guidelines in § 50.34(a)(1), § 50.67(b)(2), or § 100.11 of this chapter, as applicable.
>
> (ii) Design basis events are defined as conditions of normal operation, including anticipated operational occurrences, design basis accidents, external events, and natural phenomena for which the plant must be designed to ensure functions (b)(1)(i) (A) through (C) of this section.

Section 50.49 also states, at subsection (c), the following:

> Requirements for (1) dynamic and seismic qualification of electric equipment important to safety, (2) protection of electric equipment important to safety against other natural phenomena and external events, and (3) environmental qualification of electric equipment important to safety located in a mild environment are not included within the scope of this section. *A mild environment is an environment that would at no time be significantly more severe than the environment that would occur during normal plant operation, including anticipated operational occurrences.* (Emphasis added).

As indicated above, Entergy maintains that "Pilgrim's inaccessible cables are located in a 'mild environment'" and therefore § 50.49 does not apply to them. Pilgrim Watch disputes this, through Mr. Blanch's Affidavit.

I note at this point that, while the question of the rule's definition of a "mild environment" is not as precise as it might be,[109] it seems, according to its plain language, to be tied to whether the environment in question could *ever for any reason* be subject to variation (apart from "anticipated operational occurrences") that could include significantly more severe conditions than those existing during "normal plant operation." Entergy in effect claims that there are no inaccessible cables of the sort described in its amended cables AMP in any location that could ever be subject to a salt water environment with "high corrosive salt concentrations," because the elevation of the plant is so high above sea level, and because the cables are above the groundwater level.

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[109] I understand that there may be a common understanding of the meaning of the definition in the nuclear industry, but regulations must first be interpreted according to their plain language, which in this instance is not clear.

Pilgrim Watch submits that being next to Cape Cod Bay implicitly means that the cables will be subject to a salt water environment that will "accelerate the degradation of cables in contrast to those nuclear plants located away from coastal areas." There would seem to be an issue both of *how high* salt concentrations might reach in the environment of the cables, and of whether these could ever *at any time* rise significantly above normal levels.

This is a close case in several respects. However, while there are obviously differing opinions between Mr. Blanch, on the one hand, and Entergy and Staff and their experts, on the other, it is not appropriate to weigh the evidence presented in competing expert affidavits in a summary disposition context.[110] Intervenor must in such a context demonstrate a genuine dispute on a material issue of fact, and I would find that Pilgrim Watch has done this, and therefore shown that it could defeat a motion for summary disposition, if not with respect to every individual issue addressed by the parties' experts, at least with respect to those issues I describe above.

Based on the preceding, I would find that Pilgrim Watch has met the requirements of 10 C.F.R. §2.326(a)(3) and (b).

Admissibility Under 10 C.F.R. § 309(f)(1)(i)-(vi)

Very briefly, Pilgrim Watch has clearly provided a specific statement of the issue it raises in its January 2011 Cables Contention, as required under 10 C.F.R. § 309(f)(1)(i), as well as a brief explanation of the basis for the contention as required at § 309(f)(1)(ii). The contention raises questions about the safety of equipment it argues must comply with 10 C.F.R. §§ 50.49, 54.4, and 54.21, which bring it within the scope of this proceeding, and thereby satisfies the requirement to this effect at 10 C.F.R.

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[110] *See supra* note 72.

§ 309(f)(1)(iii), and also meets the materiality requirement of § 309(f)(1)(iv). And Mr. Blanch's Affidavit satisfies the requirement at § 309(f)(1)(v) for a "concise statement of the alleged facts or expert opinions" supporting the contention, and that at § 309(f)(1)(vi) for "sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact," as discussed above.

Conclusion

I would, based on the preceding analysis, reopen the proceeding and admit Pilgrim Watch's January 20, 2011, (Cables 2) Contention.

Finally, although this licensing board will be addressing certain post-Fukushima contentions filed in May and June of this year in a later issuance, I would add a comment noting again Pilgrim Watch's request that we take judicial notice of the accident at the Fukushima nuclear power plant in the wake of the earthquake and tsunami there, as well as, among other things, loss of power being a contributing factor in the accident, and the fact that both the Fukushima reactors and the Pilgrim reactor are General Electric Mark I models.[111] Particularly given these circumstances, I find the lack of clarity about which electrical cables might be subject to any salt-water environment, however high or low the concentration, and about the effects of and efforts to address this, to be of a level of concern sufficient to "tip the balance" in this close case, and to

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[111] *See supra* notes 54, 56. I note also Pilgrim Watch's most recent filing of August 8, 2011, in which it in effect requests that the Board consider certain findings of the Near Term Task Force Report on flooding and mitigation measures related to loss of power. Pilgrim Watch Request for Leave to Supplement Pilgrim Watch Request for Hearing on the Inadequacy of Entergy's Aging Management Program of Non-Environmentally Qualified (EQ) Inacessible Cables (Splices) at Pilgrim Station, filed on December 10, 2010 and January 20, 2011 (Aug. 8, 2011).

warrant further inquiry and exploration[112] in this proceeding prior to issuing a renewed license.

[112] *See Yankee Atomic Elec. Co*. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 249 (1996) (citing Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989); *Costle v. Pacific Legal Found.*, 445 U.S. 198, 204 (1980)); *Vt. Yankee Nuclear Power Corp. v. NRC*, 435 U.S. 519, 554 (1978)); *see also Gulf States Util. Co*. (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 51 (1994); *Pub. Serv. Co. of N.H*. (Seabrook Station, Units 1 and 2), ALAB-942, 32 NRC 395, 428 (1990).

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 **MEMORANDUM AND ORDER (Denying Pilgrim Watch's Requests for Hearing on Certain New Contentions) (LBP-11-20)** 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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Docket No. 50-293-LR
MEMORANDUM AND ORDER (Denying Pilgrim Watch's Requests for Hearing on Certain New Contentions) (LBP-11-20)

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[Original signed by Nancy Greathead]

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Dated at Rockville, Maryland
this 11th day of August 2011