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NUCLEAR REGULATORY COMMISSION

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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Before the Atomic Safety and Licensing Board

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

# ENTERGY'S ANSWER TO THE MASSACHUSETTS ATTORNEY GENERAL'S REQUEST FOR A HEARING, PETITION FOR LEAVE TO INTERVENE, AND PETITION FOR BACKFIT ORDER

## I. INTRODUCTION

Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (hereinafter collectively referred to as "Entergy") hereby answer and oppose the "Massachusetts Attorney General's Request for a Hearing and Petition for Leave to Intervene With Respect to Entergy Nuclear Operations, Inc.'s Application for Renewal of the Pilgrim Nuclear Power Plant Operating License and Petition for Backfit Order Requiring New Design Features to Protect Against Spent Fuel Pool Accidents" dated May 26, 2006 (the "Petition" or "Pet."). The Petition should be denied because the Attorney General has not proffered an admissible contention. With respect to the Petitioner's request for a backfit order, that request is simply beyond the scope of this proceeding.

## II. PROCEDURAL BACKGROUND

Entergy submitted its application, dated January 25, 2006, requesting renewal of Operating License DPR-35 for the Pilgrim Nuclear Power Station (the "Application"). On March 27, 2006, the Nuclear Regulatory Commission ("NRC" or "Commission") published a

TEMPLATE = SECY-037

SECY-02

Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing ("Notice") regarding Entergy's application. 71 Fed. Reg. 15,222 (Mar. 27, 2006)). The Notice permitted any person whose interest may be affected to file a request for hearing and petition for leave to intervene within 60 days of the notice. Id.

The Notice directs that any petition shall set forth with particularity the interest of the petitioner and how that interest may be affected, and must also set forth the specific contentions sought to be litigated. Id. at 15,222-23. The Notice states:

> Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the requestor/petitioner shall provide a brief explanation of the bases of each contention and a concise statement of the alleged facts or the expert opinion that supports the contention on which the requestor/petitioner intends to rely in proving the contention at the hearing. The requestor/petitioner must also provide references to those specific sources and documents of which the requestor/petitioner is aware and on which the requestor/petitioner intends to rely to establish those facts or expert opinion. The requestor/petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the action under consideration. The contention must be one that, if proven, would entitle the requestor/petitioner to relief. A requestor/petitioner who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Id. at 15,233 (footnote omitted).

## III. STANDING

Entergy does not challenge the Massachusetts Attorney General's standing in this proceeding (see 10 C.F.R. § 2.309(d)(2)) or the Attorney General's right to participate in this proceeding as a representative of an interested State in accordance with 10 C.F.R. § 2.315(c) if a hearing is held. However, to be admitted as a party, the Attorney General must meet the other requirements applicable to a hearing request, including the requirement to propose at least one admissible contention meeting the NRC's pleading standards. 10 C.F.R. § 2.309(d)(2). As

discussed later in this Answer, the sole contention submitted by the Attorney General is not admissible.

## IV. STANDARDS FOR ADMISSIBILITY OF CONTENTIONS

### A. Contentions Must Be Within the Scope of the Proceeding and May Not Challenge NRC's Rules

As a fundamental requirement, a contention is only admissible if it addresses matters within the scope of the proceeding and does not seek to attack the NRC's regulations governing the proceeding. This fundamental limitation is particularly important in a license renewal proceeding, because the Commission has conducted extensive rulemaking to define and limit the technical and environmental showing that an applicant must make. As discussed later in this Answer, the Attorney General's contention falls beyond the scope of this proceeding.

10 C.F.R. Part 54 governs the health and safety matters that must be considered in a license renewal proceeding. The Commission has specifically limited this safety review to the matters specified in 10 C.F.R. §§ 54.21 and 54.29(a),[1] which focus on the management of aging of certain systems, structures and components, and the review of time-limited aging evaluations. See Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 N.R.C. 3, 7-8 (2004); Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2), CLI-02-26, 56 N.R.C. 358, 363 (2002). Thus, the potential effect of aging is the issue that essentially defines the scope of license renewal proceedings. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 N.R.C. 631, 637 (2004).

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[1] The Commission has stated that the scope of review under its rules determines the scope of admissible issues in a renewal hearing. 60 Fed. Reg. 22,461, 22,482 n.2 (May 8, 1995). "Adjudicatory hearings in individual license renewal proceedings will share the same scope of issues as our NRC Staff review, for our hearing process (like our Staff's review) necessarily examines only the questions our safety rules make pertinent." Turkey Point, CLI-01-17, 54 N.R.C. at 10.

The rules in 10 C.F.R. Part 54 are intended to make license renewal a stable and predictable process. 60 Fed. Reg. at 22,461, 22,462, 22,463, 22,485. As the Commission has explained, "We sought to develop a process that would be both efficient, avoiding duplicative assessments where possible, and effective, allowing the NRC Staff to focus its resources on the most significant safety concerns at issue during the renewal term." Turkey Point, CLI-01-17, 54 N.R.C. at 7 (2001). "License renewal reviews are not intended to 'duplicate the Commission's ongoing reviews of operating reactors.'" Id. (citation omitted). To this end, the Commission has confined 10 C.F.R. Part 54 to those issues uniquely determined to be relevant to the public health and safety during the period of extended operation, leaving all other issues to be addressed by the existing regulatory processes. 60 Fed. Reg. at 22,463. This scope is based on the principle, established in the rulemaking proceedings, that with the exception of the detrimental effects of aging and a few other issues related to safety only during the period of extended operation, the existing regulatory processes are adequate to ensure that the licensing bases of currently-operating plants provide and maintain an adequate level of safety. 60 Fed. Reg. at 22,464, 22,481-82. Consequently, license renewal does not focus on operational issues, because these issues "are effectively addressed and maintained by ongoing agency oversight, review, and enforcement." Millstone, CLI-04-36, 60 N.R.C. at 638 (footnote omitted).

The NRC rules governing environmental matters – which are contained in 10 C.F.R. §§ 51.53(c), 51.95(c), and Appendix B to Part 51 – are similarly intended to produce a more focused and, therefore, more effective review. 61 Fed. Reg. 28,467 (June 5, 1996); Turkey Point, CLI-01-17, 54 N.R.C. at 11. To accomplish this objective, the NRC prepared a comprehensive Generic Environmental Impact Statement ("GEIS") for License Renewal of Nuclear Plants (NUREG-1437) and made generic findings reflected in the GEIS and in

Appendix B to 10 C.F.R. Part 51. Those issues that could be resolved generically for all plants are designated as Category 1 issues and are not evaluated further in a license renewal proceeding (absent waiver or suspension of the rule by the Commission based on new and significant information). 61 Fed. Reg. at 28,468, 28,470, 28,474; Turkey Point, CLI-01-17, 54 N.R.C. at 12. The remaining (i.e., Category 2) issues that must be addressed in an applicant's environmental report are defined specifically in 10 C.F.R. § 51.53(c). See generally, Turkey Point, CLI-01-17, 54 N.R.C. at 11-12.

10 C.F.R. § 2.309(f)(1)(iii)-(iv) requires a petitioner to demonstrate that the issue raised by each of its contentions is within the scope of the proceeding and material to the findings that the NRC must make. Licensing boards "are delegates of the Commission" and, as such, they may "exercise only those powers which the Commission has given [them]." Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 N.R.C. 167, 170 (1976) (footnote omitted); accord Portland General Electric Co. (Trojan Nuclear Plant), ALAB-534, 9 N.R.C. 287, 289-90 n.6 (1979). Accordingly, it is well established that a contention is not cognizable unless it is material to a matter that falls within the scope of the proceeding for which the licensing board has been delegated jurisdiction. Id.; see also Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-616, 12 N.R.C. 419, 426-27 (1980); Commonwealth Edison Co. (Carroll County Site), ALAB-601, 12 N.R.C. 18, 24 (1980).

It is also well established that a petitioner may not demand an adjudicatory hearing to attack generic NRC requirements or regulations. Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 N.R.C. 328, 334 (1999). "[A] licensing proceeding . . . is plainly not the proper forum for an attack on applicable statutory requirements or for challenges to the basic structure of the Commission's regulatory process." Philadelphia Electric Co. (Peach

Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 A.E.C. 13, 20, aff'd in part on other grounds, CLI-74-32, 8 A.E.C. 217 (1974) (footnote omitted). Thus, a contention which collaterally attacks a Commission rule or regulation is not appropriate for litigation and must be rejected. 10 C.F.R. § 2.335; Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 A.E.C. 79, 89 (1974). A contention which "advocate[s] stricter requirements than those imposed by the regulations" is "an impermissible collateral attack on the Commission's rules" and must be rejected. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 N.R.C. 1649, 1656 (1982); see also Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-19, 33 N.R.C. 397, 410, aff'd in part and rev'd in part on other grounds, CLI-91-12, 34 N.R.C. 149 (1991). Likewise, a contention that seeks to litigate a generic determination established by Commission rulemaking is "barred as a matter of law." Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 N.R.C. 5, 30 (1993).

These limitations are very germane to this proceeding in that the scope of admissible environmental contentions is constrained by 10 C.F.R. §§ 51.53(c), 51.95(c), and Appendix B to Part 51; and the scope of technical contentions is constrained by 10 C.F.R. Part 54. See Turkey Point, CLI-01-17, 54 N.R.C. at 5-13. See also Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 N.R.C. 327, 329 (2000); Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-14, 48 N.R.C. 39, 41 (1998), motion to vacate denied, CLI-98-15, 48 N.R.C. 45, 56 (1998); Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2 and 3), CLI-98-17, 48 N.R.C. 123, 125 (1998).

B. Contentions Must Be Specific and Supported By a Basis Demonstrating a Genuine, Material Dispute

In addition to the requirement to address issues within the scope of the proceeding, a contention is admissible only if it provides:

- a "specific statement of the issue of law or fact to be raised or controverted;"
- a "brief explanation of the basis for the contention;"
- a "concise statement of the alleged facts or expert opinions" supporting the contention together with references to "specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;" and
- "[s]ufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact," which showing must include "references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief."

10 C.F.R. § 2.309(f)(1)(i), (ii), (v) and (vi). The failure of a contention to comply with any one of these requirements is grounds for dismissing the contention. Palo Verde, CLI-91-12, 34 N.R.C. at 155-56. As discussed later in this Answer, the Massachusetts Attorney General's sole contention does not comply with these requirements.

These pleading standards governing the admissibility of contentions are the result of a 1989 amendment to 10 C.F.R. § 2.714, now § 2.309, which was intended "to raise the threshold for the admission of contentions." 54 Fed. Reg. 33,168 (Aug. 11, 1989); see also Oconee, CLI-99-11, 49 N.R.C. at 334; Palo Verde, CLI-91-12, 34 N.R.C. at 155-56. The Commission has stated that the "contention rule is strict by design," having been "toughened . . . in 1989 because in prior years 'licensing boards had admitted and litigated numerous contentions that appeared to

be based on little more than speculation.'" Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 N.R.C. 349, 358 (2001) (citation omitted). The pleading standards are to be enforced rigorously. "If any one . . . is not met, a contention must be rejected." Palo Verde, CLI-91-12, 34 N.R.C. at 155 (citation omitted). A licensing board is not to overlook a deficiency in a contention or assume the existence of missing information. Id.

The Commission has explained that this "strict contention rule" serves multiple purposes, which include putting other parties on notice of the specific grievances and assuring that full adjudicatory hearings are triggered only by those able to proffer at least some minimal factual and legal foundation in support of their contentions. Oconee, CLI-99-11, 49 N.R.C. at 334. By raising the threshold for admission of contentions, the NRC intended to obviate lengthy hearing delays caused in the past by poorly defined or supported contentions. Id. As the Commission reiterated in incorporating these same standards into the new Part 2 rules, "[t]he threshold standard is necessary to ensure that hearings cover only genuine and pertinent issues of concern and that issues are framed and supported concisely enough at the outset to ensure that the proceedings are effective and focused on real, concrete issues." 69 Fed. Reg. at 2,189-90.

Under these standards, a petitioner is obligated "to provide the [technical] analyses and expert opinion" or other information "showing why its bases support its contention." Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 N.R.C. 281, 305, vacated in part and remanded on other grounds, CLI-95-10, 42 N.R.C. 1, aff'd in part, CLI-95-12, 42 N.R.C. 111 (1995). Where a petitioner has failed to do so, "the [Licensing] Board may not make factual inferences on [the] petitioner's behalf." Id., citing Palo Verde, CLI-91-12, 34 N.R.C. 149. See also Private Fuel Storage, L.L.C. (Independent Spent

Fuel Storage Installation), LBP-98-7, 47 N.R.C. 142, 180 (1998) (a "bald assertion that a matter ought to be considered or that a factual dispute exists . . . is not sufficient"; rather "a petitioner must provide documents or other factual information or expert opinion" to support a contention's "proffered bases") (citations omitted).

Further, admissible contentions "must explain, with specificity, particular safety or legal reasons requiring rejection of the contested [application]." Millstone, CLI-01-24, 54 N.R.C. at 359-60. In particular, this explanation must demonstrate that the contention is "material" to the NRC's findings and that a genuine dispute on a material issue of law or fact exists. 10 C.F.R. § 2.309(f)(1)(iv), (vi) (emphasis added). The Commission has defined a "material" issue as meaning one where "resolution of the dispute would make a difference in the outcome of the licensing proceeding." 54 Fed. Reg. at 33,172 (emphasis added).

As observed by the Commission, this threshold requirement is consistent with judicial decisions, such as Conn. Bankers Ass'n v. Bd. of Governors, 627 F.2d 245, 251 (D.C. Cir. 1980), which held that:

> [A] protestant does not become entitled to an evidentiary hearing merely on request, or on a bald or conclusory allegation that . . . a dispute exists. The protestant must make a minimal showing that material facts are in dispute, thereby demonstrating that an "inquiry in depth" is appropriate.

Id. (footnote omitted); see also Calvert Cliffs, CLI-98-14, 48 N.R.C. at 41 ("It is the responsibility of the Petitioner to provide the necessary information to satisfy the basis requirement for the admission of its contentions . . . ."). A contention, therefore, is not to be admitted "where an intervenor has no facts to support its position and where the intervenor contemplates using discovery or cross-examination as a fishing expedition which might produce

relevant supporting facts." 54 Fed. Reg. at 33,171.[2] As the Commission has emphasized, the contention rule bars contentions where petitioners have what amounts only to generalized suspicions, hoping to substantiate them later, or simply a desire for more time and more information in order to identify a genuine material dispute for litigation. Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2), CLI-03-17, 58 N.R.C. 419, 424 (2003).

Therefore, under the Rules of Practice, a statement "that simply alleges that some matter ought to be considered" does not provide a sufficient basis for a contention. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 N.R.C. 200, 246 (1993), review declined, CLI-94-2, 39 N.R.C. 91 (1994). Similarly, a mere reference to documents does not provide an adequate basis for a contention. Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 N.R.C. 325, 348 (1998).

Rather, NRC's pleading standards require a petitioner to read the pertinent portions of the license application, including the safety analysis report and the environmental report, state the applicant's position and the petitioner's opposing view, and explain why it has a disagreement with the applicant. 54 Fed. Reg. at 33,170; Millstone, CLI-01-24, 54 N.R.C. at 358. If the petitioner does not believe these materials address a relevant issue, the petitioner is "to explain why the application is deficient." 54 Fed. Reg. at 33,170; Palo Verde, CLI-91-12, 34 N.R.C. at 156. A contention that does not directly controvert a position taken by the applicant in the license application is subject to dismissal. See Texas Utilities Electric Co. (Comanche Peak

[2] See also Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 N.R.C. 460, 468 (1982), vacated in part on other grounds, CLI-83-19, 17 N.R.C. 1041 (1983) ("[A]n intervention petitioner has an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable [the petitioner] to uncover any information that could serve as the foundation for a specific contention. Stated otherwise, neither Section 189a. of the Act nor Section 2.714 [now 2.309] of the Rules of Practice permits the filing of a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery against the applicant or staff.").

Steam Electric Station, Unit 2), LBP-92-37, 36 N.R.C. 370, 384 (1992). Furthermore, an allegation that some aspect of a license application is "inadequate" or "unacceptable" does not give rise to a genuine dispute unless it is supported by facts and a reasoned statement of why the application is unacceptable in some material respect. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-16, 31 N.R.C. 509, 521 & n.12 (1990).

## V. THE ATTORNEY GENERAL'S CONTENTION DOES NOT MEET THE STANDARDS FOR ADMISSION

The Attorney General's sole contention ("Contention"), which alleges that the Environmental Report is inadequate because it "does not address the environmental impacts of severe spent fuel pool accidents" (Pet. at 21), is inadmissible because issues associated with the environmental impacts of spent fuel storage, including accident risk and mitigation, are Category 1 issues beyond the scope of this proceeding. The Contention is also inadmissible because it provides no basis demonstrating that the generic findings relating to spent fuel are inapplicable in this proceeding and because it seeks to raise issues concerning the current licensing basis for spent fuel pool storage at Pilgrim that are beyond the scope of this proceeding.

Management of on-site spent fuel is a Category 1 environmental issue, based on the generic finding that "the expected increase in the volume of spent fuel from an additional 20 years of operation can be safely accommodated on site with small environmental effects through dry or pool storage at all plants if a permanent repository or monitored retrievable storage is not available." 10 C.F.R. Part 51, App. B, Table B-1. As the Commission has held,

> The GEIS's finding encompasses spent fuel accident risks and their mitigation. See GEIS at xlviii, 6-72 to 6-76, 6-86, and 6-92. The NRC has spent years studying in great detail the risks and consequences of potential spent fuel pool accidents, and the GEIS analysis is rooted in these earlier studies. NRC studies and the agency's operational experience support the conclusion that onsite reactor spent fuel storage, which has continued for decades, presents no undue risk to

> public health and safety. Because the GEIS analysis of onsite fuel storage encompasses the risk of accidents, [a contention seeking to raise spent fuel accidents in a license renewal proceeding] falls beyond the scope of individual license renewal proceedings.

Turkey Point, CLI-01-17, 54 N.R.C. at 21.[3]

The analysis in the GEIS includes a finding that "even under the worst probable cause of a loss of spent-fuel pool coolant (a severe seismic-generated accident causing a catastrophic failure of the pool), the likelihood of a fuel-cladding fire is highly remote." GEIS at 6-72 – 6-75 (citation omitted).[4] It is well established that under NEPA's rule of reason, agencies are not required to probe remote or speculative consequences or discuss every conceivable alternative to a proposed action. See, e.g., NRDC v. Morton, 458 F.2d 827, 837 (D.C. Cir. 1972). In particular, NEPA does not require consideration of accidents that are remote and speculative. San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287, 1300-01 (D.C. Cir. 1984), aff'd on

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[3] The Commission went on to emphasize that the GEIS covered mitigation of accidents as well as their environmental impacts:

> [T]he GEIS deals with spent fuel storage risks (including accidents) generically, and concludes that "regulatory requirements already in place provide adequate mitigation."

Id. at 21-22 (citations omitted).

[4] The GEIS's determination that the occurrence of a zirconium spent fuel pool fire is "highly remote" (GEIS at 6-72 – 6-75) references the Commission's 1990 Review and Revision of the Waste Confidence Decision (55 Fed. Reg. 38,474 (Sept. 18 1990)). In its Waste Confidence Decision, the Commission determined that "even if the timing of a spent fuel pool failure were conducive to fire," the likelihood of such a fire would be "extremely rare." 55 Fed. Reg. 38,481 (emphasis added). The Commission reasoned as follows:

> [E]ven if the timing of a spent fuel pool failure were conducive to fire, a fire could occur only with a relatively sudden and substantial loss of coolant – a loss great enough to uncover all or most of the fuel, damaging enough to admit enough air to keep a large fire going, and sudden enough to deny operators the time to restore the pool to a safe condition. Such a severe loss of cooling water is likely to result only from an earthquake well beyond the conservatively estimated earthquake for which reactors are designed. Earthquakes of that magnitude are extremely rare.
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> The plant specific studies . . . found that, because of the large safety margins inherent in the design and construction of their spent fuel pools, even the more vulnerable older reactors could safely withstand earthquakes several times more severe than their design basis earthquake. Factoring in the annual probability of such beyond-design-basis earthquakes, . . . the average annual probability of a major spent fuel pool fuel pool failure at an operating reactor . . . was calculated at two chances in a million per year of reactor operation.

Id. (emphasis added) (citations omitted).

rehearing en banc, 789 F.2d 26 (D.C. Cir.), cert. denied, 479 U.S. 923 (1986); Carolina Envtl. Study Group v. U.S., 510 F.2d 796, 798-800 (D.C. Cir. 1975).

Consequently, the Contention's assertion that the Environmental Report is inadequate because it fails to address the environmental impacts of severe spent fuel accidents (Pet. at 21) is a direct challenge to the generic finding that is codified in Table B-1 of Part 51, as well as to 10 C.F.R. §§ 51.53(c) and 51.95(c), which do not require analysis of Category 1 issues. Because the NRC's rules may not be challenged in individual licensing proceedings (10 C.F.R. § 2.335(a)), this claim is inadmissible.

Furthermore, the Contention's claim that consideration of the environmental impacts of severe spent fuel pool accidents is necessary because of new information (see, e.g., Pet. at 22) does not bring this Category 1 issue within the scope of the proceeding. As an NRC rule, the Category 1 findings in 10 C.F.R. Part 51, Appendix B, Table B-1 are not subject to attack by any means in this proceeding. 10 C.F.R. § 2.335(a). Therefore, if a person believes that there is new and significant information that would alter a Category 1 finding, it should a petition for waiver or rulemaking. As the Commission has stated:

> The Commission recognizes that even generic findings sometimes need revisiting in particular contexts. Our rules thus provide a number of opportunities for individuals to alert the Commission to new and significant information that might render a generic finding invalid either with respect to all nuclear power plants or for one plant in particular. In the hearing process, petitioners with new information showing that a generic rule would not serve its purpose at a particular plant may seek a waiver of the rule. See 10 C.F.R. § [2.335] . . . Petitioners with evidence that a generic finding is incorrect for all plants may petition the Commission to initiate a fresh rulemaking.

Turkey Point, supra, CLI-01-17, 54 N.R.C. at 12 (emphasis added). As explained when this requirement was first proposed,

> Litigation of environmental issues in a hearing will be limited to unbounded category 2 and category 3 issues unless the rule is suspended or waived.

SECY-93-032, 10 C.F.R. Part 51 Rulemaking on Environmental Review for Renewal of Nuclear Power Plant Operating Licenses (Feb. 9, 1993) at 4. The final rule subsequently combined Category 2 and 3 issues (61 Fed. Reg. at 28,474), but made no changes that would alter the treatment of Category 1 issues. Thus, a petitioner who wishes to litigate a Category 1 issue must submit a petition for waiver, pursuant to 10 C.F.R. § 2.335.

Further, the information to which the Contention refers is not new and significant, and therefore would not serve as a basis to waive the Category 1 findings even if the Massachusetts Attorney General had properly submitted a waiver petition. The Contention refers to NUREG-1738,[5] a report by the National Academy of Sciences concerning spent nuclear fuel storage,[6] and the reports of Drs. Gordon Thompson[7] and Jan Beyea[8] supporting the Contention. Pet. at 22, 24, 30. None of these sources contain new and significant information that mandate the NRC to reconsider its GEIS findings regarding spent fuel storage, nor provides the basis for an admissible contention.

NUREG-1738 considered the potential of spent fuel pool fires in the context of plants undergoing decommissioning (which lack many of the functioning safety systems of an operating nuclear power plant). While NUREG-1738 provided additional information on the

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[5] NUREG-1738, "Technical Study of Spent Fuel Pool Accident Risk and Decommissioning Nuclear Power Plants" (Jan. 2001) ("NUREG-1738").

[6] National Academy of Sciences Committee on the Safety and Security of Commercial Spent Nuclear Fuel Storage, "Safety and Security of Commercial Spent Nuclear Fuel Storage" (The National Academies Press: 2006) ("NAS Rept.").

[7] Gordon R. Thompson, "Risks and Risk-Reducing Options Associated with Pool Storage of Spent Nuclear Fuel at the Pilgrim and Vermont Yankee Nuclear Power Plants" (May 25, 2006) ("Thompson Rept.").

[8] Jan Beyea, "Report to the Massachusetts Attorney General on the Potential Consequences of a Spent-Fuel-Pool Fire at the Pilgrim or Vermont Yankee Nuclear Power Plant" (May 25, 2006) ("Beyea Rept.").

potential for spent fuel pool fires, the Attorney General's claim that NUREG-1738 undercuts the rationale of the license renewal GEIS (e.g., Pet. at 30-31) is not supported by that document. None of the information presented in NUREG-1738 controverts the conclusion in the GEIS that the occurrence of a zirconium spent fuel pool fire is "highly remote." See GEIS at 6-72 – 6-75. To the contrary, even after considering the partial drainage and obstructed air flow scenario cited by Dr. Thompson (e.g., NUREG-1738 at A1A-4), NUREG 1738 ultimately concludes that there is a "very low likelihood" of a zirconium pool fire (NUREG-1738 at vii, x, 5-1 and 5-3; emphasis added) – a conclusion that parallels and reconfirms the conclusion of the GEIS that the likelihood of a fuel cladding fire is "highly remote" (GEIS at 6-72 – 6-75).[9]

Likewise the Contention's claim that the 1990 Waste Confidence Decision rulemaking "ignored the risk of pool fires" (Pet. at 27-28) (emphasis added) is patently wrong. Plainly, the Commission considered the risk of pool fires in its Waste Confidence Decision as is evident from the quotation in note 4 supra.[10] Such mischaracterization of a document provides no basis

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[9] The Attorney General's claim that in NUREG 1738 the Staff concluded that "regardless of the age of the fuel in a pool, the fuel will burn shortly after the tops of the fuel assemblies are uncovered" (Pet. at 31 (emphasis added)), misstates the NUREG's conclusion. Rather, the NUREG's conclusion was that, because of the different variables involved, the possibility of a " a zirconium fire cannot be precluded" based solely on the decay time of the fuel. NUREG 1738 at 2-1 – 2-2 (emphasis added). Moreover, the claim that NUREG-1738 presented new and significant information concerning the likelihood that uncovered fuel would ignite and burn (Pet. at 31) ignores the Commission's determination in the Waste Confidence Decision (quoted in note 4, supra) that the likelihood of a spent fuel pool fire is highly remote even assuming the timing of pool failure were conducive to fire initiation. In this respect, the average annual probability of a major spent fuel pool fuel pool failure at an operating reactor referred to by the Commission (in the quotation in note 4, supra) assumed a conditional probability of a Zircaloy cladding fire of "1.0 for PWRs and 0.25 for BWRs" for "high density configurations" of spent fuel storage. NUREG-1353, Regulatory Analysis for the Resolution of Generic Issue) 82, "Beyond Design Basis Accidents in Spent Fuel Pools" (April 1989) ("NUREG-1353") at ES-2 and 4-10. The difference between the conditional probabilities for PWRs and BWRs was based on studies that determined significantly lower probabilities for zirconium oxidation for BWR spent fuel than for PWR spent fuel because of the significantly lower decay power for BWR spent fuels and differences in PWR and BWR spent fuel storage configurations. See NUREG-1353 at 4-8 – 4-11.

[10] The Contention (Pet. at 28 n.10) and the Thompson Report (at 16-17) also claim that the technical studies relied upon by the Commission in the Waste Confidence Decision considered only an "instantaneous loss of water from the pool" rather than a partial loss of cooling water. That is not the case (see NUREG-1353 at 4-13 – 4-36), but in any event, as discussed above, NUREG-1738 explicitly considered partial drainage of the pool (as

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for an admissible contention. See, e.g., Philadelphia Electric Co (Limerick Generating Station, Units 1 and2), ALAB-804, 21 N.R.C. 587, 593 (because cited document "does not support the point for which it is urged," the contention lacks a "cognizable basis"); Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 N.R.C. 253, 265 (2004) (documents provided in support of a contention "will be carefully examined by the Board" to determine whether they "supply an adequate basis for the contention").

Similarly, the NAS Report does not provides significant new information mandating the Commission to reconsider its license renewal GEIS.[11] The NAS Report focused on terrorist attacks potentially causing a severe spent fuel accident. As discussed below, the Commission has ruled that NEPA imposes no legal duty on the NRC to consider intentional malevolent acts, and thus the subject of the NAS Report is beyond the scope of this license renewal proceeding. Moreover, the NRC has carefully evaluated the NAS Report, and has acted on the Report's Findings and Recommendations as it deemed appropriate. Most relevant to the issue here, the NRC has concluded, after reviewing the information in the NAS Report, that it continues to generally consider "the likelihood of a zirconium fire capable of causing large releases of radiation into the environment to be extremely low."[12] Thus, the NRC has fully considered the

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acknowledged by the Contention, e.g., Thompson Rept. at 12) and still reached a conclusion identical to that reached in the Waste Confidence Decision, that a zirconium cladding fire is highly remote.

[11] The Contention (Pet. at 31-32) quotes the NAS Report's summary of the results of various analyses reviewed by the NAS. However, as stated in the NAS Report, the series of studies that it reviewed, dating back to 1979 (and including the technical studies underlying the Commission's Waste Confidence Decision), "[a]ll . . . suggest that a loss-of-pool-coolant event could trigger a zirconium cladding fire in the exposed spent fuel." NAS Rept. at 44. Thus, the fact that a loss-of-pool-coolant event could trigger a zirconium cladding fire in the exposed fuel is plainly not new information, and as noted above, was fully considered in the NRC's Waste Confidence Decision which underlies the license renewal GEIS.

[12] "U.S. Nuclear Regulatory Commission Report to Congress on the National Academy of Sciences Study on the Safety and Security of Commercial Spent Nuclear Fuel Storage" ( (Mar. 2005), at 21. ("NRC Rept. on NAS Study") The NRC noted that the NRC had in a "February 2002 Order "required licensees to develop specific

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NAS report and found no basis, even in the context of a terrorist attack, to change its conclusion regarding the risks of spent fuel pool fires stated in the GEIS.

The Thompson and Beyea reports repeat arguments that were made in a 2003 paper by Alvarez, et al. (referenced in Thompson Report at 12 and Beyea Report at 3). This article has, however, already been reviewed by the NRC and found to suffer from excessive conservatisms, with the result that its recommendations do not have a sound technical basis. COMSECY-03-0019, Review of the Paper "Reducing the Hazards from Stored Spent Power-Reactor Fuel in the United States," Robert Alvarez et. al., January 31, 2003 (To Be Published in Science and Global Security), Aug. 7, 2003, Adams Accession No. ML052340740. No new substantive information responding to the deficiencies identified by the NRC in the Alvarez paper is provided in the Contention or its supporting papers.

For example, the NRC concluded that the Alvarez paper provided "no justification for the postulated probabilities of worst case spent fuel pool damage." The paper offered no "probabilistic analysis of the likelihood" of a terrorist attack, or any other event, leading to severe damage of a spent fuel pool and its fuel, but rather merely postulated such probabilities

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guidance and strategies to maintain or restore [spent fuel pool] cooling capabilities" in "circumstances associated with the loss of large areas of the plant due to large fires and explosions" and that in a July 2004 letter the NRC directed licensees "to implement additional 'spent fuel mitigative measures,' as appropriate," including "reconfiguration" of the fuel as recommended by the NAS Study. Id. at 6, 17, 21. The cover letter from Nils J. Diaz, Chairman of the NRC, to Senator Domenici, Chairman, Subcommittee on Energy and Water Development, Committee on Appropriations, United States Senate (Mar. 14, 2005) ("Diaz Letter"), forwarding the NAS Report, similarly describes, at page 2 of the letter, the "numerous actions" taken "to enhance the security of spent nuclear fuel."

The cover letter from Chairman Diaz to Senator Domenici also noted that, while agreeing with many points raised by the NAS, the NRC believes that, "based on information developed in NRC vulnerability assessments," "some scenarios" identified by the NAS report "are unreasonable." Diaz Letter at 1. Chairman Diaz further stated that the NRC "disagreed with some NAS recommendations" because "they lacked a sound technical basis," including in particular the "NAS finding that earlier movement of spent fuel from pools into dry storage would be prudent." Id.

which were claimed to justify moving the spent fuel to dry cask storage. COMSECY-03-0019, Attachment at 2-4. Dr. Thompson's Report provides no new substantive information regarding the probability of a worst case spent fuel damage scenario involving a terrorist attack. Indeed, the report states that the "record of experience does not allow a statistically valid estimate of this probability." Thompson Rept. at 26. Rather, it claims, without any factual support or explication, that "prudent judgment indicates that a probability of at least one per century is a reasonable assumption for policy purposes." Id. This is the same sophistry that NRC rejected as meaningless in COMSECY-03-0019. See COMSECY-03-0019, Attachment at 2-4. Such speculation provides neither new and significant information requiring the NRC to reconsider its GEIS findings regarding spent fuel storage, nor supports an admissible contention.

Similarly, the Thompson Report provides no new or significant information regarding non-terrorist events. The report alleges that "non-malicious events that could lead to pool fire" at Pilgrim include "(i) an accidental aircraft impact, with or without an accompanying fuel-air explosion or fire; (ii) an earthquake; (iii) dropping of a fuel transfer cask or shipping cask; (iv) a fire inside or outside the plant building; and (v) a severe accident at the adjacent reactor" (Thompson Rept. at 18), but provides no basis indicating that any of these scenarios is sufficiently probable to warrant consideration under NEPA.

With respect to the first four scenarios, the Thompson Report provides no estimated probability of occurrence nor any factual basis whatsoever from which even a probability of occurrence could be inferred. The necessary sequence of events by which such scenarios might lead to spent fuel pool fires is not identified, nor is there any discussion of the probability of their occurrence.

Such broad, unsupported claims do not provide the necessary requisite factual basis for an admissible contention, much less provide new information necessary to trigger the NRC's reconsideration of the GEIS conclusions regarding spent fuel storage. See Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 N.R.C. 370, 390 (2001) ("vague references to potential spent fuel catastrophes" do not constitute an admissible contention), affirming Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-00-19, 52 N.R.C. 85 (2000). For example, neither the sequence of events by which the dropping of a fuel transfer cask or shipping cask might lead to a spent fuel pool fire nor the likelihood of occurrence of such an accident scenario is discussed in the Contention and its supporting documents. Nor is mention made of the precautions taken at Pilgrim to minimize the possibility of a dropped cask, nor of the energy absorbing system included in the cask handling area of the spent fuel pool which ensures that damage to the spent fuel pool from a dropped cask "will not result in a leakage rate greater than the pool makeup capability." PNPS Updated Safety Analysis Report ("UFSAR") at 10.3-7.

Likewise, with respect to earthquakes, the report simply suggests – without any factual explication of a sequence or probability – that a severe earthquake that damages the reactor and its supporting systems and causes a core-melt accident "could cause leakage of water from the pool" (Thompson Rept. at 19). The Thompson Report provides no basis to assume that the probability of a seismic event causing a catastrophic failure and drainage of the steel-lined, seismic category 1 spent fuel pool (Application at 2.4-3 – 2.4-4; UFSAR at § 10.3) is the same as the probability of a seismic event causing core damage. The Thompson Report totally ignores the wholly different nature of the structures (e.g., the thick spent fuel pool walls and floor) and

systems involved.[13] Similarly, no factual explication is provided of a sequence or likelihood of a potential accident scenario involving accidental aircraft crash impacts or fires inside or outside the plant.[14] Such vague, unsupported assertions provide no basis for an admissible contention, much less a basis for the NRC to reconsider its GEIS findings regarding spent fuel storage. See, e.g., Shearon Harris, supra, CLI-01-11, 53 N.R.C. at 390 ("vague references to potential spent fuel catastrophes" do not constitute an admissible contention); Georgia Tech, supra, LBP-95-6, 41 N.R.C. at 305 (a petitioner is obligated "to provide the [technical] analyses and expert opinion" or other information "showing why its bases support its contention").

With respect to the allegation that "a severe accident at the adjacent reactor" would cause a spent fuel pool fire, the Thompson Report again fails to provide any meaningful information indicating that this scenario is sufficiently probable to warrant further analysis under NEPA, or that it would change the GEIS conclusions regarding spent fuel storage. The Thompson Report merely "assumes that the conditional probability of a spent-fuel-pool fire, given an early release from the adjacent reactor, is 50 percent" and provides no real basis for this speculation Thompson Rept. at 20 (emphasis added). The Thompson Report asserts that "[s]upport for this assumption is provided by technical studies and opinions submitted to the Atomic Safety and Licensing Board (ASLB) in a license-amendment proceeding in regard to the expansion of spent-

[13] The Commission in the Waste Confidence Decision found that "because of the large safety margins in the design and construction of their spent fuel pools," spent fuel pools could safely withstand earthquakes "several times more severe" than the plant's design basis earthquake. See note 4, supra.

[14] With respect to aircraft crashes, in plant licensing the likelihood of an aircraft impacting the site would have been determined to be less than 1 E-7. See NUREG-0800, Standard Review Plan for the Review of Safety Analysis Reports for Nuclear Power Plants, §§ 2.2.3 & 3.5.1.6. Thus, even without considering the likelihood of occurrence of subsequent events that would be necessary for an aircraft crash to cause a spent fuel pool fire, the likelihood of a spent fuel fire caused by aircraft crashes would be considered remote and speculative for purposes of NEPA. See Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-01-9, 53 N.R.C. 239, 268 (2001) (an event with probability of occurrence of 2.0E-07 determined to be remote and speculative); CLI-01-11, 53 N.R.C. at 388 n. 8 (although "Commission has never determined a threshold accident probability figure for imposing the requirement of preparing an EIS," 2.0E-07 is below any such threshold).

fuel-pool capacity at the Harris nuclear power plant," and alleges that "[a]ll three parties to the proceeding – the NRC Staff, Carolina Power & Light, and Orange County – reached the same conclusion on an issue" relevant to the appropriateness of a conditional probability of 50 percent for Pilgrim. Id. (emphasis added). However, the Thompson Report provides no citation to any such support. Moreover, it is clear from the published decisions in the Shearon Harris spent fuel proceeding that Thompson's characterization of the parties' positions and the related findings of the Harris licensing board is inaccurate. No support for such a 50% conditional probability is found in either the Harris licensing board's decision or the technical position of the parties described in that decision.

As reflected in Harris, the accident scenario alleged in the Thompson Report of a reactor severe accident causing spent fuel pool fire involves consideration of the probability of a sequence of seven events:[15]

- (1) a degraded core accident;
- (2) containment failure or bypass;
- (3) loss of all spent fuel cooling and makeup systems;
- (4) extreme radiation doses precluding personnel access;
- (5) inability to restart any pool cooling or makeup systems due to extreme radiation doses;
- (6) loss of most or all pool water; and
- (7) initiation of exothermic oxidation reaction in the spent fuel pool.

Shearon Harris, supra, LBP-01-09, 53 N.R.C. at 244-45. The Thompson Report does not address the probability of each of these events at Pilgrim, but instead simply assumes a conditional

[15] Four plants had originally been planned for the Harris site, and accordingly, the fuel handling building had been constructed with four spent fuel pools. Initially, only two of the spent fuel pools were utilized to support the single unit at Harris, but in December 1998, CP&L filed an application for a license amendment to increase the spent fuel storage capacity at the plant by adding spent fuel racks and utilizing the two previously inactive spent fuel pools, which triggered the licensing proceeding discussed above. Shearon Harris, supra, LBP-01-09, 53 N.R.C. at 242.

probability of 50% for steps 3 through 7 for Pilgrim. As reflected in the licensing board's decision in the Harris proceeding, nowhere did the NRC Staff, CP&L, nor the licensing board itself, conclude that the conditional probability of a spent fuel pool fire was 50% given a severe accident causing the release of radioactivity from the reactor.

Performing a probabilistic risk analysis ("PRA"), CP&L calculated a probability of 7.7 E-06 through step 2 (release of radioactivity into the environment) and an overall probability for a spent fuel fire of 2.78 E-08. LBP-01-9, 53 N.R.C. at 267. This is a factor of more than 35 lower than the release of radioactivity, or in other words, a conditional probability of less than 3% that a severe reactor accident releasing radioactivity would trigger a spent fuel pool fire. The Staff calculated the probability of a significant release (through step 2) to be 1.2 E-05 and an overall probability of a spent fuel fire to be 2.0 E-07. Id. at 254, 256-57, 267. This is a factor of more than 166 lower than the release of radioactivity, or in other words a conditional probability of less than 1% that a severe reactor accident releasing radioactivity would trigger a spent fuel pool fire.[16] The Harris licensing board found the Staff's estimates to be reasonable and supported by the more detailed PRA analysis performed by CP&L and found that the probability of the postulated sequence of events resulting in a spent fuel pool fire was "conservatively in the range described by the Staff: 2.0 E-07 per reactor year. . . , or less." Id. at 267 (emphasis added).

Based on this testimony, the licensing board in Harris held that the accident scenario alleged by Dr. Thompson was properly characterized as "remote and speculative" and therefore did not have to be considered in an environmental impact statement. Id. at 271. Thus, the Harris

[16] In contrast, the intervenor – based on analysis and report provided by the same Dr. Thompson – calculated the probability of a significant release of probability (through step 2) to be 1.6 E-05 and an overall probability of a spent fuel fire to be the same, 1.6 E-05, for a conditional probability of 1.0. LBP-01-9, 53 N.R.C. at 267.

proceeding does not support the Attorney General's assertion that the probability of this accident falls within the range that the NRC considers reasonably foreseeable (see Pet. at 3).

Moreover, several factors underlying the probabilities calculated by the Staff and CP&L, and affirmed by the Harris licensing board, directly contradict unsupported assertions in the Thompson Report. First, contrary to Dr. Thompson's bald claim of 100% certainty that spent fuel cooling would be lost as a result of a degraded core accident and containment failure, the Harris licensing board found, based on persuasive analysis by the Staff, that loss of spent fuel cooling was dominated by a loss of offsite power and "that there are only limited circumstances after containment failure in which cooling would be lost." Id. at 257-58 (emphasis added). Second, analysis by both the Staff and CP&L showed that it would take in the range of at least 10 days without spent fuel cooling before the water in any of the pools would boil off "so as to lower the water level to the top of the fuel storage racks such that makeup" water would be required, and that within this period of time there was a "high" likelihood of success in providing the necessary makeup water to the spent fuel pools. Id. at 262, 264 (emphasis added).[17]

In short, the claim that support for a conditional probability of 50% for a spent fuel pool fire given an accident causing a radiological release from the Pilgrim reactor is found in the Harris proceeding is a mischaracterization of that proceeding. On their face, the findings and conclusions of the Harris licensing board belie this claim. It is well established that mischaracterization of the findings or conclusions of a document cannot support the admission of a contention. See, e.g., Limerick, supra, ALAB-804, 21 N.R.C. at 593-94 (because the cited

[17] CP&L determined that at least one makeup water lineup was possible with 4 days for all accident-initiating sequences of postulated core damage accident and the Staff conservatively assigned a "conservative probability of 0.1 (10%)" that restoring spent fuel cooling would not be successful. Id.

document "does not support the point for which it is urged," the contention lacks a "cognizable basis") Thus, at bottom, the claim of a conditional probability of 50% for a spent fuel pool fire given an accident causing a radiological release from the Pilgrim reactor is based on the mere speculation of Dr. Thompson, a person with "little experience in the actual operation of a nuclear power plant or in PRA[s]." Shearon Harris, supra, LBP-01-9, 53 N.R.C. at 251. Such speculation does not provide the basis for an admissible contention, much less new information for the NRC to reconsider its GEIS findings regarding spent fuel storage.

Likewise, the Contention and the supporting documents provide no new information to ameliorate what COMSECY-03-0019 considered to be the unrealistic and excessive conservatisms regarding the overestimation of radiation release and overestimation of societal costs associated with a severe spent fuel accident. See COMSECY-03-0019, Attachment at 4-5. The report by Dr. Beyea supplied on these topics uses the same "methodologies outlined" in the Alvarez Report and the 2004 addendum to that Report. Beyea Rept. at 3. The Beyea Report continues to assume releases of 10% and 100% of the spent fuel pool cesium inventory (id. at 9-10) even though such releases, particularly anything approaching 100%, is wholly unrealistic. COMSECY-03-0019, Attachment at 4. Also, an example of the excess conservatisms employed in the calculation of societal damages is the Beyea Report's assumption of a 5% loss in property value for properties extending out 1000 miles from the plant. Beyea Rept. at 9-10. As would be expected, this unsupported and unrealistic assumption, which in essence posits property damage to nearly one-third of the nation, results in estimates of hundreds of billions of dollars of damage. Id. Similarly, the Beyea Report's projection of thousands of cancer deaths appears to be based on contamination affecting a population within a 1000-mile radius (see Beyea Rept. at 30-33), and relies on the remarkable assumption that resuspended radioactivity would cause more

cancers than the remediated plume (see id. at 24). Further, Dr. Beyea advocates a supra-linear dose-response curve – a position that is not supported by any recognized advisory authority (e.g., BEIR, NCRP, ICRP, UNSCEAR, NRC, or EPA). In short, the Beyea Report does not provide a reliable, credible assessment of consequences and thus provides no basis to support a re-examination of the risk of spent fuel pool fires. It is well established that NEPA does not require "worst-case analyses" such as those presented in the Beyea Report,[18] and no new information is provided therein that would mandate the NRC's reconsideration of its GEIS findings regarding spent fuel storage.

In summary, the Attorney General's Contention is not supported by any credible basis establishing the probability of a spent fuel pool fire or demonstrating that it is sufficiently foreseeable to warrant consideration under NEPA. Further, the Attorney General's Contention is not supported by any credible discussion of the consequences of such an accident. As a result, the Contention provides no basis to suggest that there is a risk warranting further consideration or mitigation.

Further, while the Contention and it supporting materials give passing reference to non-malicious events that allegedly could lead to spent pool fires, the Contention's focus is clearly on loss of cooling water caused by terrorist acts. See Pet. at 33-47. The Commission has ruled, however, that "NEPA imposes no legal duty on the NRC to consider intentional malevolent acts, such as [the September 11, 2001 attacks] on a case-by-case basis in conjunction with commercial

[18] Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 354-56 (1989). In that case, the Supreme Court clearly enunciated that NEPA does not require a "worst case analysis" because, among other reasons, worst case analyses would "distort[] the [NEPA] decisionmaking process by overemphasizing highly speculative harms." Id. at 356 (emphasis added). The legal precedent of the Supreme Court's decision in Robertson has been subsequently and repeatedly followed. See, e.g., Edwardsen v. U.S. Dep't of Interior, 268 F.3d 781, 785 (9th Cir. 2001) ("an EIS need not include a worst-case scenario").

power reactor license renewal applications." McGuire, supra, CLI-02-26, 56 N.R.C. at 365 (footnote omitted).

The Attorney General argues that the NRC rationale in excluding consideration of terrorism is not supported, and advances a number of arguments that were recently briefed before the U.S. Court of Appeals for the Ninth Circuit in a proceeding involving the licensing of an independent spent fuel storage installation at the Diablo Canyon Power Station. See Pet. at 42-47. On reply, the Attorney General will no doubt point out that the Ninth Circuit has now held that the NRC should have considered the effects of terrorism in its environmental assessment in that proceeding. San Luis Obispo Mothers for Peace v. NRC, No. 03-74628, slip op. (9th Cir. June 2, 2006). The Court, however, has not yet issued its mandate,[19] so this decision currently has no effect. Even if this decision becomes effective, it would not affect license renewal proceedings, because the Commission has held:

> Even if we were required by law to consider terrorism under NEPA, the NRC has already issued a Generic Environmental Impact Statement ("GEIS") that considers sabotage in connection with license renewal. . . . The GEIS concluded that, if such an event were to occur, the resultant core damage and radiological release would be no worse than those expected from internally initiated events.

McGuire, CLI-02-26, 56 N.R.C. at 365 n.24 (citations omitted).

Moreover, the Ninth Circuit's decision is inconsistent with Limerick Ecology Action v. NRC, 869 F.2d 719, 741-44 (3d Cir. 1989), which upheld the NRC's determination that the risk of sabotage could not be assessed meaningfully and therefore was unlitigable. Therefore, even if the Ninth Circuit's decision were to become effective, there would be a split in the circuits. Because the Ninth Circuit decision is not controlling, and because the Commission held in

[19] Nor has the time expired within which the NRC or the utility involved may seek rehearing, rehearing *en banc*, or Supreme Court review.

McGuire that sabotage is already addressed in the GEIS, Entergy respectfully submits that until the Commission directs otherwise, the Board should continue to follow the NRC's license renewal precedent. In any event, because spent fuel storage is governed by the Waste Confidence Rule and is a Category 1 issue in license renewal, it can be admitted as a contention only if the Commission waives these rules.

Finally, the Contention's request that the Commission issue a backfit order requiring Pilgrim to change its spent fuel pool design to the original low-density storage configuration using dry storage for any excess fuel must be rejected as beyond the scope of this license renewal proceeding, as it does not concern aging management of plant systems and components. As discussed above, in promulgating the license renewal rule the Commission determined that, with the exception of the detrimental effects of aging and a few other issues related to safety only during the period of extended operation, the existing regulatory processes are adequate to ensure that the licensing bases of currently-operating plants provide and maintain an adequate level of safety. 60 Fed. Reg. at 22,464, 22,481-82. Thus, issues concerning the adequacy of the current licensing basis are beyond the scope of license renewal proceedings. Turkey Point, supra, CLI-01-17, 54 N.R.C. at 8-9. For this reason, the Commission has held that on-site storage of spent fuel raises no safety question for license renewal. Id. at 23. Accordingly, the Contention's request for a backfit order to change the plant's spent fuel pool licensing basis must be rejected.

Further, to the extent that the Attorney General is advocating a need to protect against terrorist acts that exceed the design basis threat, its contention is barred by 10 C.F.R. § 50.13.[20]

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[20] 10 C.F.R. § 50.13 provides as follows::

> An applicant for a license to construct or operate a production or utilization facility, or for an amendment to such license, is not required to provide for design features or other measures for the specific purpose

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Moreover, to the extent that the Attorney General may be advocating a need to revise the design basis threat, that matter is being addressed by an ongoing rulemaking proceeding in which the Commission has invited public comment on the potential for air-based threats in accordance with section 651(a) of the Energy Policy Act of 2005. 70 Fed. Reg. 67,380-382 (Nov. 7 2005). The Massachusetts Attorney General has in fact commented, urging the NRC to adopt an attribute for air-based threats,[21] and other comments have raised specific proposals similar to those advanced in the Petition.[22] As has been long held, licensing boards should not accept contentions which are or are about to become the subject of rulemaking. Oconee, supra, CLI-99-11, 49 N.R.C. at 345.[23]

In summary, the Massachusetts Attorney General's Contention seeks to raise an issue that has been resolved generically and is beyond the scope of this proceeding. Because the Massachusetts Attorney General has not petitioned the Commission for a waiver, its contentions may not be entertained. Further, even if this contention were within the scope of the proceeding, it would be inadmissible because it fails to show that the Commission's generic determinations are inapplicable to Pilgrim or would not serve their intended purpose, and fails to establish any genuine dispute with a material issue. Finally, the Attorney General's request for a backfit order

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of protection against the effects of (a) attacks and destructive acts, including sabotage, directed against the facility by an enemy of the United States, whether a foreign government, or person, or (b) use or deployment of weapons incident to U.S. defense activities.

[21] Letter from J. Milkey, Mass. Office of the Attorney General, to Secretary, U.S. NRC, Re: Docket No. RIN 3150-AH60 (Jan. 23, 2006), available at http://ruleforum.llnl.gov/cgi-bin/library?source=*&library=dbt_prule_public&file=*&st=prule.

[22] See, e.g., Letter from D. Lochbaum and E. Lyman, USC, to A. Vietti-Cook, USNRC (Jan.23, 2006), available at http://ruleforum.llnl.gov/cgi-bin/library?source=*&library=dbt_prule_public&file=*&st=prule.

[23] In UCS v. AEC, 499 F.2d. 1069 (D.C. Cir. 1974), the D.C. Circuit upheld the Commission's discretion to exclude issues from consideration in a licensing proceeding when those issues are being considered in a rulemaking proceeding. As a general matter, the NRC clearly has the discretion to define the scope of its proceedings. Bellotti v. NRC, 725 F.2d 1380, 1381 (D.C. Cir. 1983).

to modify the current licensing basis for the Pilgrim spent fuel pool must be rejected as beyond the scope of this license renewal proceeding.

## VI. SELECTION OF HEARING PROCEDURES

Commission rules require the Atomic Safety and Licensing Board designated to rule on the Petition to "determine and identify the specific procedures to be used for the proceeding" pursuant to 10 C.F.R. §§ 2.310 (a)-(h). 10 C.F.R. § 2.310. The regulations are explicit that "proceedings for the . . . renewal . . . of licenses subject to [10 C.F.R. Part 50] may be conducted under the procedures of subpart L." Id. § 2.310(a). The regulations permit the presiding officer to use the procedures in 10 C.F.R. Part 2, Subpart G ("Subpart G") in certain circumstances. Id. § 2.310(d). It is the proponent of the contentions, however, who has the burden of demonstrating "by reference to the contention and bases provided and the specific procedures in subpart G of this part, that resolution of the contention necessitates resolution of material issues of fact which may be best determined through the use of the identified procedures." Id. § 2.309(g). The Attorney General did not address the selection of hearing procedures in the Petition and therefore did not satisfy its burden to demonstrate why Subpart G procedures should be used in this proceeding. Accordingly, any hearing should be governed by the procedures of Subpart L.

## VII. CONCLUSION

For the reasons stated above, the Massachusetts Attorney General has not proffered an admissible contention in this proceeding. Therefore, its request for hearing should be denied. The Attorney General's petition for a backfit order is beyond the scope of this proceeding and should likewise be denied.

Respectfully Submitted,

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Dated: June 22, 2006

**UNITED STATES OF AMERICA**
**NUCLEAR REGULATORY COMMISSION**
Before the Atomic Safety and Licensing Board

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "Entergy's Answer to the Massachusetts Attorney General's Request for a Hearing, Petition for Leave to Intervene, and Petition for Backfit Order," dated June 22, 2006, were served on the persons listed below by deposit in the U.S. Mail, first class, postage prepaid, and where indicated by an asterisk by electronic mail, this 22nd day of June, 2006.

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