

June 29, 2007

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
ENERGY NUCLEAR GENERATION CO.	)	Docket No. 50-293-LR
ENERGY NUCLEAR OPERATIONS, INC.	)	
	)	
(Pilgrim Nuclear Power Station)	)	ASLBP No. 05-848-02-LR
	)	
	)	
	)	

NRC STAFF RESPONSE TO  
ENERGY'S MOTION FOR SUMMARY  
DISPOSITION OF PILGRIM WATCH CONTENTION 3

INTRODUCTION

On May 17, 2007, Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc., (collectively, Entergy), filed a motion for summary disposition of Pilgrim Watch's Contention 3.<sup>1</sup> Pursuant to 10 C.F.R. § 2.1205(b), the staff of the NRC (Staff) hereby files its response in support of Entergy's summary disposition motion. For the reasons stated below, the motion for summary disposition should be granted.

BACKGROUND

This matter arises from an application for license renewal, filed pursuant to 10 C.F.R. Part 54, on January 25, 2006 by Entergy to renew the operating license for the Pilgrim Nuclear Power Station (Pilgrim) for an additional twenty-year period.<sup>2</sup> On May 25, 2006, Pilgrim Watch

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<sup>1</sup> See Entergy's Motion for Summary Disposition of Pilgrim Watch Contention 3 (May 17, 2007) (Entergy's Motion).

<sup>2</sup> See Letter from Michael Balduzzi, Entergy Nuclear Operations, to U.S. NRC, Re: License Renewal Application, (January 25, 2006) (Agencywide Documents and Access Management System (ADAMS) Accession No. ML060300028).

filed a petition to intervene in this matter.<sup>3</sup> Two of Pilgrim Watch's contentions were admitted by the Atomic Safety and Licensing Board (Board) on October 16, 2006.<sup>4</sup> Pilgrim Watch

Contention 3, which was narrowed and amended by the Board, reads:

Applicant's SAMA analysis for the Pilgrim plant is deficient in that the input data concerning (1) evacuation times, (2) economic consequences, and (3) meteorological patterns are incorrect, resulting in incorrect conclusions about the costs versus benefits of possible mitigation alternatives, such that further analysis is called for.

LBP-06-23, 64 NRC at 341.

Entergy filed its summary disposition motion asserting that, as to the issues raised in Contention 3, there are no material facts in issue and, thus, Entergy is entitled to a decision as a matter of law. Entergy bases its motion on three declarations and a report prepared by Washington Safety Management Solutions (WSMS).<sup>5</sup> The Staff files this response and attached affidavit<sup>6</sup> in support of Entergy's motion.

#### DISCUSSION

##### 1. Legal Standards Governing Motions for Summary Disposition

Pursuant to 10 C.F.R. § 2.1205(a), motions for summary disposition must be in writing, must include a written explanation of the basis for the motion, and must include affidavits to support statements of fact. In ruling on a motion for summary disposition, the presiding officer applies the standards for summary disposition set forth in 10 C.F.R. § 2.710(d)(2). See

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<sup>3</sup> See Request for Hearing and Petition to Intervene by Pilgrim Watch (May 25, 2006) (Pilgrim Watch's Petition).

<sup>4</sup> See Memorandum and Order (Ruling on Standing and Contentions of Petitioners Massachusetts Attorney General and Pilgrim Watch), LBP-06-23, 64 NRC 257 (2006).

<sup>5</sup> See Entergy's Motion at 1-2.

<sup>6</sup> Affidavit of Joseph A. Jones and Dr. Nathan Bixler Concerning Entergy's Motion for Summary Disposition of Pilgrim Watch Contention 3 (Staff Affidavit).

10 C.F.R. § 2.1205(c). A moving party is entitled to summary disposition of a contention as a matter of law if the filings in the proceeding, together with the statements of the parties and the affidavits, demonstrate that there is no genuine issue as to any material fact. See 10 C.F.R. §§ 2.1205 and 2.710(d)(2); see also *Advanced Medical Sys., Inc.* (One Factory Row, Geneva, Ohio), CLI-93-22, 38 NRC 98, 102-03 (1993); *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 179-80 (2005).

A party seeking summary disposition bears the burden of demonstrating that lack of a genuine issue of material fact. See *Sequoyah Fuels Corp. & General Atomics Corp.* (Gore, Okla. Site Decontamination and Decommissioning Funding), LBP-94-17, 39 NRC 359, 361, *aff'd*, CLI-94-11, 49 NRC 55 (1994). The evidence submitted must be construed in favor of the non-moving party. *Id.* Affidavits submitted in support of summary disposition must be executed by individuals qualified by “knowledge, skill, experience, training, or education,” and must be sufficiently grounded in facts. *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-04, 61 NRC 71, 80-81 (*citing* Fed. Rule of Evid. 702); *Bragdon v. Abbott*, 524 U.S. 624, 653 (1998) (stating that expert testimony must have a traceable, analytical basis in objective fact before it may be considered on summary judgment).

A party opposing a motion for summary disposition cannot rely on mere allegations or denials of the moving party's facts; rather, the non-moving party must set forth specific facts demonstrating a genuine issue of material fact. See 10 C.F.R. § 2.710(b); *Advanced Medical Sys.*, CLI-93-33, 38 NRC at 102. Bare assertions and general denials, even by an expert, are insufficient to oppose a properly supported motion for summary disposition. *Duke Cogema*, LBP-05-04, 61 NRC at 81 (*citing* *Advanced Medical Sys.*, CLI-93-33, 38 NRC at 102); *Houston Lighting & Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-629, 13 NRC 75, 78 (1981). Although the burden is on the moving party to show there is no genuine issue of

material fact, the non-moving party must controvert any material fact proffered by the moving party or that fact will be deemed admitted. *Advanced Medical Sys.*, CLI-93-33, 38 NRC at 102-03.

Admission of a party in a proceeding based on one acceptable contention neither precludes summary disposition nor guarantees a party a hearing on its contentions. *Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1258 n.15 (1982) (citing *Houston Lighting & Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 550 (1980)). For a board to find the existence of a genuine issue of material fact, “the factual record, considered in its entirety, must be enough in doubt so that there is a reason to hold a hearing to resolve the issue.” *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 & 2), LBP-83-46, 18 NRC 218, 223 (1983).

2. Contention 3 is, in Essence, a Contention of Omission

Although not written precisely as a contention of omission in that it speaks of “incorrect” conclusions, Contention 3 is, at bottom, a contention of omission. Contentions of omission allege that certain information has been omitted from documents. *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 382-3 (2002). “There is . . . a difference between contentions that merely allege an ‘omission’ of information and those that challenge substantively and specifically how particular information has been discussed in a license application.” *Id.* Licensing boards have made distinctions between contentions of omission, contentions alleging deficient analysis of subsequently supplied information, and combinations of both. *See, e.g., Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-23. 54 NRC 163, 170-72 (2001). In that case, the board, in determining the category in which to place the State of Utah’s contention, said:

[I]t is apparent that in determining which of these three forms is involved in any contention, we look first to the language of the contention. Yet, if that proves unavailing, the language of the bases provided to support the contention may be examined to discern the sponsor's intent relative to the contention's scope and meaning.

*Id.* at 171, citing *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93,97 (1988). In looking at the State's contention, the *PFS* board noted that the contention alleged that the *PFS* Environmental Report (ER) did not "adequately discuss" the no-action alternative. *Id.* The basis statement supporting the contention stated that the *PFS* ER did not "meaningfully" discuss the no action alternative, focusing only on the disadvantages of not building the facility. *Id.* The State then gave three examples of factors not considered in the ER. *Id.* See also *id.* at 166. The board found that the contention was one of omission, because it was based on an alleged failure "to include a discussion of certain information." *Id.*

In the instant case, Pilgrim Watch alleges that Entergy's SAMA analysis in its ER is incorrect because it did not consider certain factors (*e.g.*, sea breeze effect, loss of tourist dollars, shadow evacuation) in its input data for the MACCS2 code, thus rendering its conclusions incorrect and mandating further analysis including those factors. See Pilgrim Watch's Petition at 34-44.<sup>7</sup> Pilgrim Watch would like Entergy to consider information not previously considered in their analysis. *Id.* Pilgrim Watch then concludes that if such information is considered, the SAMA analysis conclusions may change, rendering additional SAMAs cost beneficial. *Id.* at 49. Contention 3 is very similar to the contention that was under consideration in the *PFS* case; thus, the same analysis is applicable.

Contention 3 has essentially two parts: First, that certain information was omitted from the SAMA analysis, and as a result, the conclusions of the SAMA analysis are incorrect; and, second, that if the information is considered, the results will change. "Where a contention

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<sup>7</sup> Pilgrim Watch's original Contention 3, as submitted, was considerably broader, but it was narrowed to its present form, cited above, by the Board. See LBP-06-23, 64 NRC at 341.

alleges the omission of particular information or an issue from an application, and the information is later supplied by the applicant . . . , the contention is moot.” *McGuire*, CLI-02-28, 56 NRC at 383. The Staff submits that the information Pilgrim Watch sought to have considered in Entergy’s SAMA analysis has now been considered, as demonstrated by the additional information supplied by Entergy, thus rendering the first part of the contention moot. Further, Entergy has demonstrated that the additional factors considered do not change the conclusions of the SAMA analysis. See Staff Affidavit at 3, 8. Thus, if Pilgrim Watch cannot demonstrate, pursuant to 10 C.F.R. § 2.710(b), that the conclusions reached using the information are incorrect, then the motion for summary disposition should be granted.

3. The Motion for Summary Disposition Should be Granted Because There are no Material Facts in Issue

The Staff has carefully reviewed the reports, declarations and list of material facts that form the basis of Entergy’s Motion, and agrees with Entergy that it is entitled to a decision as a matter of law on Pilgrim Watch Contention 3 because there are no genuine issues of material fact that require litigation. Entergy has listed 59<sup>8</sup> facts that it considers material and that it alleges are not in dispute. The Staff has determined that the statements contained in Entergy’s Statement of Material Facts are correct, with certain minor clarifications and corrections noted by the Staff’s affiants. The Staff is in full agreement with 45 of the 59 stated facts. As to the remaining 14 facts, the Staff has some minor disagreements with these facts, but, as indicated in the attached Staff Affidavit, none of these disagreements would change the results of the SAMA analysis. See Staff Affidavit at 8. Therefore, the Staff has concluded that no genuine dispute of material fact exists with respect to Contention 3 and Entergy’s motion for summary disposition should be granted.

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<sup>8</sup> Although the Statement of Material Facts submitted by Entergy lists facts from 1 to 58, the number 7 appears twice. Therefore, there are actually 59 separate material facts listed. See Entergy’s Motion, Statement of Material Facts.

CONCLUSION

For the reasons discussed above, the Staff supports Entergy's motion for summary disposition on Contention 3 and submits that it should be granted.

Respectfully submitted,

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Susan L. Uttal  
Counsel for NRC staff

Dated at Rockville, Maryland  
This 29th day of June, 2007