

November 6, 2007 (1:40pm)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the matter of
Entergy Corporation
Pilgrim Nuclear Power Station
License Renewal Application

Docket # 50-293

November 6, 2007

**PILGRIM WATCH'S REPLY TO ENTERGY'S MOTION FOR
RECONSIDERATION OF LPB-07-12**

1. Introduction

On October 29, 2007, Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. ("Entergy") filed a Motion for Reconsideration of the Board's October 17, 2007 Memorandum and Order, LBP-07-12 ("Ruling on Entergy's Motion for Summary Disposition of Pilgrim Watch Contention 1, Regarding Adequacy of Aging Management Program for Buried Pipes and Tanks and Potential Need for Monitoring Wells to Supplement Program"). Entergy requested leave to file the motion for reconsideration pursuant to 10 C.F.R. § 2.323(e) that states,

(e) Motions for reconsideration may not be filed except upon leave of the presiding officer or the Commission, upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid.

As Pilgrim Watch will explain below, Entergy's Motion for Reconsideration makes only the most perfunctory effort to show that it complies with the Commission's standards for reconsideration. Far from demonstrating the existence of a "clear and material error in a decision, which could not reasonably have been anticipated" (10 CFR 2.323(e)), it amounts to an attack on the Licensing Board for having found -- quite properly, in view

of the dispute among the experts who testified and references cited -- that there were material issues in dispute, such that a motion for summary judgment did not lie. The Commission has made plain that motions for reconsideration are disfavored, and are not to be used to reargue points already made and considered. Here, Entergy offers as one of its grounds for reconsideration the claim that "a hearing requires a considerable devotion of attention and resources for all parties, including the applicant and the NRC staff." To imply that the Licensing Board is unaware that hearings require attention and resources, and needs to have this novel fact brought to its attention, is little short of insulting. Even more to the point, Entergy is directing its complaints to the wrong target, for it was Congress, in the Atomic Energy Act, that mandated hearings when certain preconditions are met, and Congress was certainly well aware that hearings consume time and resources. Due process of law cannot be discarded simply because one of the parties is impatient to reach a particular result, and does not wish to be burdened with the procedures established by Congress and the NRC.

II. Entergy's Motion For Reconsideration Fails To Comply With The Regulatory Standard Governing Motions For Reconsideration

10 C.F.R. § 2.323(e)

Previously the standard for granting a motion for reconsideration was defined under NRC case law, which allowed the Board to "reexamine existing evidence that may have been misunderstood or overlooked, or to clarify a ruling on a matter (69 Fed.Reg.at 2207). In adopting 10 C.F.R. § 2.323(e), the Commission admonished that – pursuant to the "compelling circumstances" standard embodied in the regulation – reconsideration is "an extraordinary action and should not be used as an opportunity to reargue facts and rationales which were (or should have been) discussed earlier."¹ Section 2.323(e) thus creates a "higher standard than the existing case law [and] is intended to permit reconsideration only where manifest injustice would occur...and the claim could not have been raised earlier (Ibid). Accord, e.g., Pacific Gas & Electr. Co. (Diablo Canyon Power

¹ Amergen's Answer in Opposition to Citizens' October 20, 2006 Motion for Reconsideration (October 30, 2006); NRC Staff Response to Citizens' Motion for Reconsideration (Oct. 31, 2006);

Plant Independent Fuel Storage Installation), CL1-06-27, 64 NRC __, __ (slip op. at 2) (Nov 9,2006) (Commission reiterates that the “compelling circumstances” standard is to be applied strictly”).

Entergy Has Not Satisfied The Requirements For Seeking Reconsideration

Pilgrim Watch asserts that (1) Entergy presents no compelling circumstances. Contrary to the legal standard for reconsideration that it should not be used as an opportunity to reargue facts and rationales which were (or should have been) discussed earlier, the Motion simply restates what Entergy had heretofore stated in Entergy’s Motion for Summary Disposition of Pilgrim Watch Contention 1, June 8, 2007; and what was stated in The NRC Staff Response in Support of Entergy’s Motion To Entergy’s Motion For Summary Disposition of Pilgrim Watch Contention 1, June 28, 2007 – all of which, along with Pilgrim Watch’s replies, were reviewed by the Board to prepare the Order. (2) Further, there was no clear and material error in the decision; instead Entergy misreads the controlling law.

Entergy Presents No Compelling Circumstances Which Could Not Have Reasonably Been Anticipated, That Renders The Decision Invalid – Entergy Simply Restates What Was Said Previously Adding Nothing New.

Gall Report/Operating Experience- facts and rationales already argued: Entergy, at 4, supports their motion for reconsideration, in part, by claiming that LBP-07-12 constitutes a clear and material error of law by not accepting the conclusions presented in a Declaration by Alan Cox. The declaration, “described the aging management programs applicable to buried tanks and piping within the scope of the license renewal rule at Pilgrim, and demonstrated the effectiveness of these programs to ensure that the buried tanks and piping would perform their intended function. This demonstration included explaining the conformance of the programs with the GALL Report, discussing the operating experience supporting the adequacy of the programs, and providing his professional expert opinion on their effectiveness.” And later Entergy refers to an affidavit from Dr. James A. Davis, NRC Staff in which Dr. Davis presented the results of

the NRC Staff's Safety Evaluation Report concluding that the aging management programs for buried tanks and piping at Pilgrim are consistent with the GALL Report.

This is neither new nor compelling; Pilgrim Watch disputed this point, with pointed reference to NRC and industry documents. For example the NRC Groundwater Contamination at Nuclear Power Plants-Final Report, September 1, 2006, Executive Summary, at ii, stated²,

“The Task Force did identify that under the existing regulatory requirements the potential exists for unplanned and unmonitored releases of radioactive liquids to migrate offsite into the public domain undetected.”

Pilgrim Watch noted that this document was published *after* the GALL report was written in response to the numerous reports of leaks at reactors around the country. Pilgrim Watch backed up our dispute not by mere allegations or denials but by reference to NRC documents in both Pilgrim Watch's Answer Opposing Entergy's Motion, June 27, 2007 and Pilgrim Watch's Answer to NRC Staff Response to Entergy's Motion, July 6, 2007. We feel that is safe to assume that the authors of the NRC Groundwater Contamination at Nuclear Power Plants-Final Report are regarded by the ASLB as qualified experts.

What is new is avoided by Entergy; perhaps because new documents support Pilgrim Watch's dispute with Entergy's material facts and conclusions drawn in Entergy's motion. Two examples:

Office of Inspector General's Audit of NRC's License Renewal Program:³ In the OIG Report, Section (C), Consistent Evaluation of Operating Experience Would Improve NRC Reviews, the OIG concluded that,

² Groundwater Contamination (Tritium) at Nuclear Plants-Task Force – Final Report, Sept 1, 2006

³ Office of Inspector General's Audit of NRC's License Renewal Program, OIG-07-A-15, September 6, 2007.

“Operating experience plays an important role in license renewal and the license renewal staff is expected to review plant-specific operating experience, including corrective actions. Yet, audit team members do not review operating experience consistently. Furthermore, most audit team members do not conduct independent verification of operating experience, instead relying on license-supplied information. This is because program managers have not established requirements and controls to standardize the conduct and depth of such reviews. In the absence of conducting independent verification of plant-specific operating experience, license renewal auditors may not have adequate assurances that relevant operating experience was captured in the licensee’s renewal application of NRC’s consideration.” [OIG-07-A-15, at 18]

Although Pilgrim was not among the sites sampled by the OIG, the report raises a “red flag” and supports that a hearing must be held to flush questions raised by the audit. The fact that Dr. Davis, Entergy’s expert, presented the results of the NRC Staff’s Safety Evaluation Report concluding that the aging management programs for buried tanks and piping at Pilgrim are consistent with the GALL Report does not in itself provide reason to regard the AMPs as adequate or reason not to go forward with a hearing.

Another document Entergy failed to mention as new and compelling evidence is NEI 07-07 Final Industry Groundwater Protection Initiative- Final Guidance Document, August 2007: In this document, published after the Motions and Response for Summary Disposition were filed, NEI advocated that ground water monitoring programs be established, not eschewed and Entergy helped develop the document. Geoff Schwartz, Entergy & Don Mayer, Entergy are listed as part of industry team that developed the document. The purpose of the document is to help licensees to 1) improve management situations involving inadvertent releases; and 2) improve communication with external stakeholders to enhance trust and confidence on the part of local communities, States and NRC, and the public [at 1]. They state that, “...leaks and spills occasionally occur and equipment can fail” [at 1]. Page 3 of this NEI document defines Action 1 to be “Improve management of situations involving inadvertent radiological releases that get into ground

water." This is "Action 1", not Action 308 or Action 1,256. Page 4 of this NEI document helps workers implement Action 1. Objective 1.2.2 involves identifying components "for which there is a credible mechanism for the licensed material to reach ground water." The examples explicitly listed include "buried piping." The acceptance criterion (b) on page 4 has workers identifying "existing leak detection methods for each SSC" which may "include ground water monitoring..." Page 5 of this NEI document provides Objective 1.3 - "Establish an on-site ground water monitoring program to ensure timely detection of inadvertent radiological releases to ground water." Acceptance criterion (a) suggests that owners "consider placement of ground water monitoring wells down-gradient from the plant but within the boundary defined by the site license." Now, NEI is typically not characterized as a radical, left-wing organization seeking to end nuclear power by running up the unnecessary cost of nuclear power generation. And here NEI is advocating that ground water monitoring programs be established, not eschewed, and Entergy helped develop the document.

We conclude that if there is any new and compelling evidence to introduce, it is documents supporting the Intervenor, not the applicant.

Dr. David Ahlfeld, Pilgrim Watch's Expert: Entergy attempts to buttress their Motion for Reconsideration, Motion at 5-6, by misrepresenting the comments made by Pilgrim Watch's expert, Dr. Ahlfeld and implying that his experience is not relevant, "...Dr. Ahlfeld's declaration does not demonstrate any experience with aging management programs at nuclear power plants." [Motion at 6] Entergy seems to forget what Pilgrim Watch's contention is all about - that leak detection via a system of monitoring wells is a necessary supplement to the aging management program to ensure that relevant components perform their functions, to keep liquids in not let them leak out, irrespective of the specific nature of the liquids. Therefore it is only appropriate to hear from a qualified expert in the area of groundwater flow and contaminant transport in the

subsurface and from an expert with extensive experience in monitoring programs. Further Entergy's comment, at 6, that, "...Dr. Ahlfeld's declaration does not demonstrate any experience with aging management programs at nuclear power plants" could be meant to suggest that their experts are more qualified than ours. The Order correctly stated that, "it is inappropriate at the summary disposition stage for a Board to attempt "to untangle the expert affidavits and decide 'which experts are more correct.'""⁴ This is consistent with Federal Court rulings that, while "wholly conclusory statements for which no supporting evidence is offered' need not be taken as true for summary judgment purposes," a court, "may not make credible determinations or weigh the evidence" at the summary judgment stage."⁵ As noted in the Oyster Creek license renewal proceeding, "summary judgment is not appropriate if it would require a judge to assess the correctness of facts and conclusions that are embodied in the competing, well-founded opinions of the parties experts."⁶

Efficiency: Entergy further argues for reconsideration, at 2-3, on the grounds that a hearing is inefficient, requires the expenditure of time and monies, and would delay the issuance of the renewed license by months. Clearly a delay of a few months in the first half of 2008 is hardly a hardship for a license extension set to begin mid 2012 – four years later. Efficiency and effectiveness are required; Congress assured that "effectiveness" would trump "efficiency." Further if there was any merit to the "efficiency" argument, public participation and the adjudicatory process would be done

⁴ Id. At 80 (citing Private Fuel Storage, LBP-01-39, 54 NRC at 7 510); Vermont Yankee, LBP-06-5, 63 NRC at 122.

⁵ Banks v. District of Columbia, 377 F. Supp. 2d 85, 89 (D.D.C. 2007); Mobley v. Continental Casualty, 405 F. Supp. 2d 42 47 (D.D.C. 2005); San Carlos Apache Tribe v. United States, 272 F. Supp. 2d 860, 880 (D.Ariz. 2003).

⁶ Amergen Energy Company, LLC (License Renewal for Oyster Creek Nuclear Generating Station), Memorandum and Order (Denying Amergen's Motion for Summary Disposition) at 4 (June 19, 2007) (unpublished), Adams Accession No. ML 071700768 (citing United States v. Alcan Aluminum Corp., 990 F.2d 711, 722-23 (2d Cir. 1993); Norfolk S. Corp. v. Oberly, 632 F. Supp. 1225, 1243 (D. Del. 1986), aff'd, 822 F.2d 388 (3d Cir. 1987); Private Fuel Storage, LBP-01-39, 54 NRC at 509-10).

away with entirely; however NRC wisely chose instead not to make the process simply a “rubber stamp.” It benefits the NRC and industry for the public to have some degree of trust in the fairness of the NRC adjudication process.

Entergy argues, at 8-9, that replies presented regarding “Pilgrim Watch’s allegations concerning operating experience were irrelevant”- for failing in essence to offer proof: Pilgrim Watch explained in their dispute of Material Fact 43, for example, that Pilgrim Station does not currently have a groundwater-monitoring program to show with any degree of confidence that there have not been leaks; are not leaks now; or will not be leaks tomorrow; and that leaks reported to have occurred at Pilgrim in the past demonstrated just that – components there can and do leak. Entergy’s comment that the Dresden reference was irrelevant because Dresden’s HPCI piping was made of aluminum, unlike Pilgrim’s that is made of stainless steel is hardly “compelling” – stainless steel can fail, too. Entergy continues to repeat and reargue material already discussed in the previous Motion for Summary Disposition; however, reconsideration is “an extraordinary action and should not be used as an opportunity to reargue facts and rationales which were (or should have been) discussed earlier.” (See FN 1).

Entergy argues, at 3, that a party opposing a motion for summary disposition may not rest upon mere allegations or denials of his answer. The Order explained that, “A licensing board ruling on a motion for summary disposition “must view the record in the light most favorable to the party opposing such a motion.”⁷ Although it is true that the opponent of the motion must “set forth specific facts showing that there is a genuine issue,” and may not rely on “mere allegations and denials.”⁸ The opposing party does *not*, however, have to show that it would prevail on the issues, but rather must “demonstrate

⁷ Advanced Med. Sys. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102(1993).

⁸ Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-06-5, 63 NRC 116, 122 (2006) (citing 10 CFR 2.710 (b); Advanced Med Sys., CLI-93-22, 38 NRC at 102)

that there is a genuine factual issue to be tried.”⁹ Pilgrim Watch met this standard by the declaration of a well-qualified expert and references to NRC and industry documents. Entergy’s Motion for Reconsideration has added no new and compelling evidence that contradicts what has heretofore been introduced.

III. Conclusion

As Pilgrim Watch has shown above, the Licensing Board was entirely correct in finding, upon consideration of the testimony and filings before it, that the existence of material issues in dispute precluded the grant of Entergy’s motion for summary disposition. Disregarding the Commission’s clearly articulated standards for motions for reconsideration, Entergy stubbornly reiterates the very points that the Board considered and rejected previously. Entergy will have ample opportunity, later in the process, to argue to the Commission that the Board erred; what it cannot do is short-circuit that process through a motion for reconsideration now. Hearings may sometimes be time-consuming, as Entergy argues; they do entail the expenditure of resources; but they are part of the legal process that Congress established for resolving disputed issues, and the fact that Entergy would prefer not to spend time and money on a hearing is entitled to no legal weight in ruling on its motion for reconsideration.

For the foregoing reasons we ask that Entergy’s Motion for Reconsideration be denied.

Respectfully submitted,



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⁹ Advanced Med Sys., CLI-93-22, 38 NRC at 102; see also American Mfrs. Mut. Ins. Co. v American Broadcasting-Paramount Theaters, Inc., 388 F. 2d 272, 280 (2d Cir. 1967).

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Pilgrim Watch Reply To Entergy's Motion For Reconsideration of LPB-07-12 has been served this 6th day of November, 2007 by electronic mail and by U.S. Mail, first class to each of the following:

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FOURTH DISCLOSURE STATEMENT BY PILGRIM WATCH

Pilgrim Watch hereby submits our fourth disclosure listing of documents pursuant to 10 C.F.R. § 2.336 in anticipation of the hearing mandated by Order LBP-06-23 issued by the Atomic Safety and Licensing Board on November 5, 2007.

FOURTH DISCLOSURE STATEMENT BY PILGRIM WATCH

Assessing Risks of Potential Malicious Actions at Commercial Nuclear Facilities: The Case of a Proposed Independent Spent Fuel Storage Installation at the Diablo Canyon Site, Gordon R. Thompson, June 27, 2007, Adams Accession No. "ML 071910169."

NUREG/CR-6876, Risk-Informed Assessment of Degraded Buried Piping Systems in Nuclear Power Plants, June 2005, NRC ADAMS Collection

Office of Inspector General's Audit of NRC's License Renewal Program, OIG-07-A-15, September 6, 2007, NRC ADAMS Collection

NEI 07-07 Final Industry Groundwater Protection Initiative- Final Guidance Document, August 2007.


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I hereby certify that the foregoing Pilgrim Watch Notice Fourth Disclosure has been served this 5th day of November, 2007 by electronic mail and by U.S. Mail, first class to each of the following:

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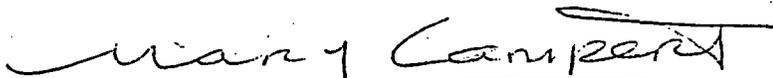
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