UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 01/11/08

ATOMIC SAFETY AND LICENSING BOARD PANEL

SERVED 01/11/08

Before Administrative Judges:

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

In the Matter of:	Docket No. 50-293-LR
ENTERGY NUCLEAR GENERATION COMPANY AND ENTERGY NUCLEAR OPERATIONS, INC. (Pilgrim Nuclear Power Station)	ASLBP No. 06-848-02-LR January 11, 2008

Order
(Denying Pilgrim Watch's Motion for Reconsideration)

I. INTRODUCTION

In LBP-06-23, issued October 16, 2006, this Licensing Board granted the Petition to Intervene of, and admitted two contentions submitted by, the non-profit citizens' organization, Pilgrim Watch opposing an application by Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. ("Entergy") to renew its operating license for the Pilgrim Nuclear Power Station ("PNPS").[1] On October 30, 2007, this Board granted the Applicant's Motion for Summary Disposition of Pilgrim Watch's Contention 3.[2] On December 19th 2007, this Board issued a scheduling order for the evidentiary hearing for Pilgrim Watch's sole remaining contention, Contention 1.[3]

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[1] Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257 (2006). The Town of Plymouth, Massachusetts, where the Pilgrim plant is located, is also participating in this proceeding as an interested local governmental body, pursuant to 10 C.F.R. § 2.315(c). See id. at 266.

[2] Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), LBP-07-13, 66 NRC __, __ (slip op.) (Oct. 30, 2007).

[3] See Licensing Board Order (Revising Schedule for Evidentiary Hearing and Responding to Pilgrim Watch's December 14 and 15 Motions) (Dec. 19, 2007) (unpublished)

On December 28, 2007, Pilgrim Watch filed a motion asking that we reconsider our December 19th decision.[4] For the reasons discussed below, we deny Pilgrim Watch's Motion for Reconsideration.

II. ANALYSIS

A. Regulatory Standard Governing Motions For Reconsideration

Motions for reconsideration are evaluated under 10 C.F.R. § 2.323(e), which provides that such motions "may not be filed except upon leave of the [licensing board] . . . 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." The Nuclear Regulatory Commission (NRC) adopted this standard as part of its 2004 amendments to its adjudicatory Rules of Practice.[5] Whereas the previous standard for granting a motion for reconsideration had been defined under NRC case law, to allow a Board to "reexamine existing evidence that may have been misunderstood or overlooked, or to clarify a ruling on a matter,"[6] 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."[7] 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

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[hereinafter "December 19th Order"].

[4] See Pilgrim Watch Motion for Reconsideration ASLBP No. 06-848-02 (Dec. 28, 2007) [hereinafter "PW Motion for Reconsideration"].

[5] See Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2207 (Jan. 14, 2004).

[6] 69 Fed. Reg. at 2207.

[7] Id.

been raised earlier."[8]

B. Pilgrim Watch Has Failed to Satisfy the Requirements for Reconsideration

The December 19th Order sets out clearly and unequivocally our ruling and its underlying legal, factual and technical foundations. We discussed these matters at length with Judge Young prior to its issuance and, while we understand her view of the law and our regulations as expressed in her dissent, and note that Pilgrim Watch has, in large part, adopted her views, we believe those views to be both legally and factually incorrect. Our December 19th ruling thoroughly deals with all matters which Pilgrim Watch would have us reconsider, and also thoroughly addresses all other factual and legal matters that are otherwise relevant to the decision embodied in that ruling. Thus we find that Pilgrim Watch has failed to satisfy the criteria for reconsideration – a fact that in and of itself is sufficient to cause this majority of the Board to deny Pilgrim Watch's Motion.

C. Pilgrim Watch Misapprehends the Substance of our Order and the Admitted Contention

Notwithstanding Pilgrim Watch's failure to satisfy the conditions for reconsideration, we are compelled to explain, once again and perhaps in greater detail, the scope of the admitted contention, as false premises clearly underlie Pilgrim Watch's misapprehension that our December 19th ruling is somehow inconsistent – a view apparently shared in part by the Staff.[9]

Pilgrim Watch's first, and fundamental, error (endorsed by the Staff) is the view that the admitted contention of omission is the contention that that monitoring wells are omitted from the

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[8] Id. Accord, e.g., Pacific Gas & Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-06-27, 64 NRC __, __ (slip op. at 2) (Nov. 9, 2006) (Commission reiterates that the "compelling circumstances" standard is to be applied "strictly").

[9] Apparently Pilgrim Watch and Staff have failed to adhere to John Galt's cardinal rule before reaching their erroneous conclusions: "If you believe you have found a contradiction, check your premises." AYN RAND, ATLAS SHRUGGED.

Aging Management Program (AMP).[10] While it is apparent on its face that the Application and the AMPs indeed fail to address monitoring wells to assist in making the determination whether buried pipes and tanks containing radioactive fluids are leaking at rates so great as to render them incapable of satisfying their intended safety functions (this latter statement being, in fact, the full statement of the actually admitted contention), that fact does not cause that particular omission to rise to the level of an admissible contention. In this instance, the Applicant readily concurred with the observation that it had not addressed monitoring wells. It argued that it had not discussed monitoring wells in its application (and therefore in its AMPs) for two fundamental reasons: first, its ongoing monitoring programs are not within the scope of license extension hearings; and second, as it noted in its Motion for Summary Disposition, it has no need for data from monitoring wells in its aging management programs.[11] In admitting the original contention, the Board admitted the reformulated contention that, in substance, is that one of two omissions occurred: either (a) the application omits to describe the programs and procedures by which it will determine whether or not buried pipes and tanks containing radioactive fluids are leaking at such great rates that they cannot satisfy their respective designated safety functions, or (b) the Applicant has no such programs. This is the foundation for the specific orders set out in the December 19th Order. Formulated this way, which fully comports with the contention as reformulated and admitted by the entire Board, it is clear that what is at issue is NOT whether or not the AMPs (or the Application) address monitoring wells. Thus this particular premise is in error.

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[10] PW Motion for Reconsideration at 4; NRC Staff Response to Pilgrim Watch's Motion for Reconsideration at 7-8 (Jan. 7, 2008) [hereinafter "Staff Response"].

[11] Entergy's Answer to the Request for Hearing and Petition to Intervene by Pilgrim Watch and Notice of Adoption of Contention at 18-20 (June 26, 2006); Entergy's Motion for Summary Disposition of Pilgrim Watch Contention 1 at 18-21 (June 8, 2007).

Furthermore, this reformulation, and the clarity of what has indeed been admitted, serves as part of the foundation for our December 19th holding that information regarding the performance of, or need for, monitoring wells is not relevant unless and until the Applicant advises that it intends to rely upon such wells to make the aforesaid determinations. As we have said on numerous occasions, monitoring is not proper subject matter for license extension contentions.[12] Thus, where Pilgrim Watch's original formulation of its contention focused upon the potential for surface and groundwater contamination from radioactivity contained by certain of the Applicant's buried pipes and tanks,[13] that subject is a matter managed by the Applicant's ongoing monitoring programs, and is therefore outside the scope of matters properly considered in license extension hearings. Therefore, we denied admitting a contention directed at that particular subject.[14]

Nonetheless, imbedded in Pilgrim Watch's original contention was the concept that the application and the Applicant's AMPs appear to fail to set out programs which enable the Applicant to determine whether those buried pipes and tanks containing radioactive fluids are leaking at such great rates that they would fail to satisfy their respective safety functions - and that inquiry is proper subject matter for a challenge to a license extension application. Thus we reformulated the contention when we admitted it to focus upon this latter inquiry.[15] That inquiry

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[12] See Pilgrim, LBP-06-23, 64 NRC at 274-277 (The Board presented a thorough analysis of the "Scope of Subjects Admissible in License Renewal Proceeding" looking at Commission regulations and case law, specifically the Commission's decision in the 2001 Turkey Point proceeding. "[T]he NRC's license renewal review focuses upon those potential detrimental effects of aging that are not routinely addressed by ongoing regulatory oversight programs." Florida Power & Light Co. (Turkey Point Nuclear Generation Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 7 (2001)). See also 60 Fed. Reg. 22,461, 22,481-82 (May 8, 1995); Nuclear Management Company, LLC. (Monticello Nuclear Generating Plant), LBP-05-31, 62 NRC 735, 754 (2005).

[13] Request for Hearing and Petition to Intervene by Pilgrim Watch at 4 (May 25, 2006).

[14] Pilgrim, LBP-06-23, 64 NRC at 315.

[15] Id.

does not, as we said in our December 19th Order, involve monitoring wells, which by their nature and design are focused upon "monitoring", unless the application or the Applicant's AMPs specifically state that they intend to rely upon monitoring wells to make the aforesaid safety-function-capability determination.[16] To date, the Applicant has denied such an intent.

The second erroneous premise is the assertion by Pilgrim Watch and the Staff, apparently motivated in part by a similar assertion in Judge Young's dissent, that monitoring wells MAY become relevant if the Applicant's AMP's are ultimately found to be deficient with regard to this inquiry.[17] That the premise underlying this comment, that simply because something MAY become relevant it is indeed relevant to the present content of an application, is erroneous is obvious from the fundamental nature of the Agency's processes - that it is the Applicant's burden to demonstrate that its programs are sufficient to avoid aging related degradation. Thus the mere fact that the application does not address monitoring wells (or, for that matter any other widget) does not create an admissible contention; a contention must be relevant to the determination the Agency must make – in this instance whether or not the Applicant has programs and procedures in place which enable it to determine whether buried pipes and tanks containing radioactive fluids are able to satisfy their intended safety functions despite leaks - i.e. to determine that there are not leaks at such great rates so as to cause those pipes or tanks to fail to satisfy those safety functions. The programs and procedures of the Applicant which enable it to make that determination are within the sole discretion of the Applicant, although they must ultimately satisfy the Agency's requirements. Thus it is erroneous to assert that information regarding monitoring wells, or any other particular widget, is relevant to this hearing unless the Applicant expressly determines it intends to utilize such wells or

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[16] December 19th Order at 1-2.

[17] PW Motion for Reconsideration at 6; Staff Response at 7-8.

widgets to make the subject determination. To be sure, any device MAY become relevant; however, were such a fact to become relevant to the scope of admissible contentions, every single contention would become admissible – and our Agency clearly and plainly rejects pure speculation as a foundation for admissible contentions.

Since the Applicant bears the burden of making the determination to the satisfaction of the Staff and this Board, it has the sole responsibility to specify how it will do so. While the Staff and Judge Young are correct that if existing programs ultimately are found to be inadequate, implementation of other measures will become necessary in order for this Agency to grant the requested license extension, the development and selection of those measures will remain the Applicant's obligation - not that of either the Staff or any third party - and the Staff, Judge Young and Pilgrim Watch are entirely incorrect when they imply that monitoring wells will therefore become relevant. The mere fact that Pilgrim Watch proposed that monitoring wells are necessary to make this determination does not somehow elevate information regarding monitoring wells to relevance as to how the Applicant will satisfy its burden. Pilgrim Watch and Staff are incorrect if they intend to assert that monitoring wells WILL be relevant if the existing AMPs are ultimately determined to be insufficient, and the speculation that monitoring wells MAY become relevant in those circumstances is insufficient to make monitoring wells relevant NOW without a determination by the Applicant that it will rely upon them for the subject determination.

Finally, any reasonably knowledgeable observer of the issue which is being considered cannot avoid being aware that the programs and procedures the Applicant ultimately relies upon to make its safety-function determination may or may not be part of its AMPs, or spelled out in its Application for the subject license extension. Thus, seeing this as a distinct possibility, this majority of the Board set out specific questions for the Applicant intended to recognize that the procedures and processes which Applicant relies upon to make the relevant determination may,

rather than being part of its AMPs required to be set out in its license renewal application, instead, be part of some other ordinary process - such as an ongoing operational testing program or ongoing maintenance and testing.

For the foregoing reasons, this majority of the Board provided explicit direction in its December 19th Order requiring sufficient information so that all parties and this Board can comprehend how the Applicant indeed intends to make this determination. While it may ultimately become apparent that some or all of those procedures and programs are part of the Applicant's ongoing maintenance programs and therefore not properly within the scope of this proceeding, we required this information be submitted so that all parties and this Board can thoroughly understand how the relevant determinations are made. We repeat here that all parties are directed to focus their testimony and filings accordingly.

As our earlier Orders have made consummately clear, currently before the Board is the contention that either the application omits to describe the programs and procedures by which it will determine whether or not buried pipes and tanks containing radioactive fluids are leaking at such great rates that they cannot satisfy their respective designated safety functions, or that there are no such programs.

Our December 19th ruling was explicit on this point, and set out thoroughly the legal and factual foundation for our holdings. We decline to revise that ruling.

III. CONCLUSION

For the foregoing reasons, we deny Pilgrim Watch's Motion for Reconsideration.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD[18]

/RA/

_____
Dr. Paul B. Abramson
ADMINISTRATIVE JUDGE

/RA/

_____
Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

Rockville, Maryland
January 11, 2008

[18] Copies of this Order were sent this date by Internet electronic mail transmission to counsel for (1) the Licensee, (2) the NRC Staff, and (3) Intervenor.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB ORDER (DENYING PILGRIM WATCH'S MOTION FOR RECONSIDERATION) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 11th day of January 2008