

March 27, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF RESPONSE IN OPPOSITION TO PILGRIM WATCH
MOTION TO PERMIT LATE FILLED (SP) EXHIBITS

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the NRC Staff (“Staff”) hereby files its response to Pilgrim Watch Motion to Permit Late Filled (sp) Exhibits (“Motion”), filed on March 24, 2008. For the reasons set forth herein, the Staff submits that regardless of its *pro se* status, Pilgrim Watch was aware of the filing requirements and that other important considerations dictate that the late-filed exhibits should not be accepted.

For the reasons set forth below, the Staff opposes the Motion.

BACKGROUND

On December 19, 2007, the Atomic Safety and Licensing Board (“Board”) issued an order revising the schedule for the evidentiary hearing on Contention 1¹ from the original order issued on Dec. 20, 2006.² Pursuant to the Scheduling Order, Pilgrim Watch filed their initial

¹ Order (Revising Schedule for Evidentiary Hearing and Responding to Pilgrim Watch’s December 14 and 15 Motions) (Dec. 19, 2007) (“Scheduling Order”).

² Order (Establishing Schedule for Proceeding and Addressing Related Matters) (Dec. 20, 2006) (continued. . .)

statement of position, prefiled direct testimony and exhibits on January 29, 2008.³ On February 21, 2008, the Board issued an order and notice, wherein, among other issues, it directed Pilgrim Watch to “provide specific citations to testimony of its (or any other party’s) experts and to exhibits, as relevant, for each of the statements made in its Statement of Position of January 29, 2008, and in any additional statements.”⁴ Pilgrim Watch filed its response on March 3, 2008.⁵ On March 6, 2008, again pursuant to the Scheduling Order, Pilgrim Watch filed its rebuttal statement of position, testimony, and exhibits.⁶ On March 24, 2008, Pilgrim Watch, by its representative Mary Lampert, filed their Motion requesting the Board to allow the introduction of late-filed exhibits into the record.⁷

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(“Initial Scheduling Order”).

³ Pilgrim Watch Presents Statements of Position, Direct Testimony and Exhibits Under 10 CFR 2.1207 (Jan. 29, 2008).

⁴ Order and Notice (Regarding Hearing, Limited Appearance Session, and Additional Questions for Parties) (Jan. 29, 2008) at 2.

⁵ Pilgrim Watch Presents Statements of Position, Direct Testimony and Exhibits Under 10 CFR 2.1207 [Modified Per Request ASLB Order of February 21, 2008, section c, page 2] (Mar. 3, 2008).

⁶ Pilgrim Watch’s Rebuttal Directed to Entergy’s Initial Statement of Position on Pilgrim Watch Contention 1, January 8, 2008 and NRC Staff Initial Statement of Position – Contention 1, January 29, 2008 (Mar. 6, 2008).

⁷ The Staff notes that Ms. Lampert left a voicemail message regarding her intent to file this motion on Staff Attorney Susan Uttal’s telephone on Friday March 21, 2008. However, Pilgrim Watch did not certify that it tried to contact the participants in the proceeding, namely the Staff or the Licensee, as required by 10 C.F.R. § 2.323(b). A motion is to be rejected if it does not include a certification that the movant’s attorney or representative made a sincere effort to contact the other parties in the proceeding to resolve issues raised in the motion, and that those efforts were unsuccessful. 10 C.F.R. § 2.323(b).

DISCUSSION

I. Pilgrim Watch's Awareness of the Filing Requirements

Pilgrim Watch states in its Motion that due to its *pro se* intervenor status, it is confused about the 10 C.F.R. Part 2 rules, specifically those regarding Subpart L proceedings, and that therefore the Board should allow the late-filing of twenty-eight additional exhibits as evidence two and one half weeks before for the April 10, 2008 evidentiary hearing. However, even accepting Pilgrim Watch's explanation regarding its interpretations of 10 C.F.R. §§ 1207(a)(1) and (b)(2), two other points demonstrate that this type of late-filing is inappropriate: (1) The Board's discussions of the process in the Initial Scheduling Order and the Scheduling Order and (2) Board and Commission precedent regarding the bounds of latitude given to *pro se* intervenors.

By virtue of the issuance of the Initial Scheduling Order and the Scheduling Order, Pilgrim Watch has been on notice about what was expected of it in its filings leading up to the evidentiary hearing. These orders were more than clear that the Board expected all testimony and exhibits to be submitted prior to the trial with full explanations of their purpose. The Initial Scheduling Order outlined what was expected with regard to the statements of position and direct testimony:

In filing statements of position, testimony and exhibits, the parties (and other participants, as applicable), should bear in mind the following considerations: A statement of position should be in the nature of a trial brief, or summary of a participant's position on matters at issue, that provides a *precise "road map" of the party/participant's case, setting out affirmative arguments and any applicable legal standards, identifying witnesses and evidence, and specifying the purpose of witnesses and evidence (stating with particularity how the witness, exhibit, or other evidence supports a factual or legal position)*. The written testimony shall be under oath or supported by an affidavit. The exhibits shall include

all documents that the party or its witnesses refer to, use, or rely upon for their statements of position.⁸

In the Scheduling Order, the Board clarified the purpose of the rebuttal testimony:

The opportunity to submit rebuttal is NOT an opportunity to present material unrelated to the explicit prefiled direct testimony being rebutted, *nor is it an opportunity to raise additional matters or testimony to supplement its initial prefiled direct testimony*. The Board will direct, upon receipt of appropriate motions to strike, that any filings not conforming to this guidance be appropriately modified.⁹

With this information it was clear to all parties, whether *pro se* or represented by experienced counsel, that all exhibits parties wished the Board to consider in its deliberation should be submitted with either the prefiled direct testimony or the rebuttal testimony. No Board order or section of 10 C.F.R. Part 2 permits, or even suggests, that the filing of new written testimony and exhibits at the evidentiary hearing will be permitted.¹⁰

Further, while the Commission and Boards will generally give latitude to *pro se* intervenors for mistakes like procedural defects and inartfully drafted pleadings because of “lack of familiarity with the NRC Rules of Practice and Procedure,” specifically with respect to petitions to intervene, Boards have refused to extend that same latitude to untimely or delayed action.¹¹ While Pilgrim Watch frames this as a “lack of familiarity” issue, by this point in the

⁸ Initial Scheduling Order at 8 (emphasis added).

⁹ Scheduling Order at 3, fn.3 (emphasis added).

¹⁰ Although 10 C.F.R. § 2.1207(b)(5) states that “The presiding officer may accept written testimony from a person unable to appear at the hearing, and may request that person to respond in writing to questions” that provision is inapplicable to this situation.

¹¹ See e.g., *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-05-22, 62 NRC 585, 593, fn.8 (2005); *Public Service Electric and Gas Co.* (Salem Nuclear Generating Station, Units 1 and 2), ALAB-136, 6 AEC 487, 489 (1973); *PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 21 (2007); *Shieldalloy Metallurgical Corp.* (Licensing Amendment Request for Decommissioning of the Newfield, New Jersey Facility), LBP-07-5, 65 NRC 341, (continued. . .)

proceeding, having been involved for almost two years, they should be more than familiar with the requirements of Part 2. Also, this is not a case of procedural defects or inartful pleadings; instead it is about an avoidable delay in submitting exhibits that should not be accorded any latitude due to *pro se* status.

II. Other Considerations

Although precedent and notice clearly demonstrate the need to deny the Motion, there are other important factors for the Board to consider. Allowing the introduction of such a large number of new exhibits, twenty-eight at almost 100 pages, so close to the hearing would create an undue burden on the Staff and Entergy, amount to unfair surprise, and prejudice the other parties. Thus, the Board should not grant Pilgrim Watch's motion.

First, while it may be true that these documents were provided by Entergy as disclosures, the Staff has only concentrated on key documents. The Staff has not necessarily reviewed all proposed exhibits since their initial disclosure, which may have been as long ago as December 2006, because they were not attached as exhibits to Pilgrim Watch's prefiled or rebuttal testimony. Therefore, in addition to the already planned preparation for hearing, Staff would have to perform a rushed review of all additional exhibits and prepare for a host of potential questions that may arise at hearing, which may or may not fall within their area of expertise. Second, without the aid of expert testimony concerning the exhibits, parties are left to guess the exact purpose of each document. Although Pilgrim Watch cannot sponsor the exhibits because they are Entergy documents, there is still a need for testimony to demonstrate

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352 (2007); *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 581 (2006).

the purpose of new exhibits.¹² Third, Pilgrim Watch has been aware of these documents for months and in some cases years. Therefore, Pilgrim Watch should not have excluded these documents from their prefiled testimony, since they were on notice that the Board expected parties to place their “precise ‘road map’ of the [] case . . . identifying . . . evidence, and specifying the purpose of . . . evidence (stating with particularity how the [] exhibit or other evidence supports a factual or legal position).”¹³ Pilgrim Watch’s decision to wait until the hearing to present these exhibits was unreasonable in the face of the long-standing availability of the documents, the numerous opportunities to disclose their intended use, and the Board’s clear instructions to prefile all evidence in accordance with the schedule. Finally, this new batch of exhibits amounts to a form of sur-rebuttal by Pilgrim Watch. As such, if the exhibits are admitted, fairness would dictate the need for written, pre-hearing responses by both parties.

CONCLUSION

For the reasons discussed above, the Board should deny Pilgrim Watch’s motion.

Respectfully submitted,

/RA/

Kimberly A. Sexton
Counsel for NRC Staff

Dated at Rockville, Maryland
this 27th day of March, 2008

¹² See Initial Scheduling Order at 8.

¹³ *Id.*

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE IN OPPOSITION TO PILGRIM WATCH MOTION TO PERMIT LATE FILLED (SP) EXHIBITS" in the above-captioned proceeding have been served on the following by electronic mail and by deposit in the U.S. Nuclear Regulatory Commission's internal mail system, or, as indicated by an asterisk (*), by electronic mail and by deposit in the U.S. Mail system this 27th day of March, 2008.

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