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March 24, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

Before the Atomic Safety and Licensing Board Panel

March 24, 2008 (3:28 pm)

In the Matter of)
)
Entergy Nuclear Generation Company and)
Entergy Nuclear Operations, Inc.)
)
(Pilgrim Nuclear Power Station))

Docket No. 50-293-LR
ASLBP No. 06-848-02-LR

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

**ENTERGY'S OPPOSITION TO PILGRIM WATCH'S REQUEST TO
CONDUCT CROSS-EXAMINATION IN ACCORDANCE WITH 10 CFR 2.1204(b)**

Pursuant to the Atomic Safety and Licensing Board's ("Board") December 19, 2007 Order (Revising Schedule for Evidentiary Hearing and Responding to Pilgrim Watch's December 14 and 15 Motions) ("Dec. 19 Order"), Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (collectively, "Entergy") hereby file their opposition to Pilgrim Watch's ("PW") motion to conduct cross-examination.¹ The Motion should be denied because PW has not demonstrated the rare circumstances required for a party to conduct cross-examination in a Subpart L proceeding. PW makes no showing that its cross examination is necessary to ensure the development of an adequate record for decision – indeed, PW makes no showing that it has any capability to conduct meaningful cross examination. Similarly, PW makes no showing that questioning by the Board will be insufficient to develop the record. Finally, the Board must reject the Motion because PW failed to consult with counsel for Entergy as required under 10 C.F.R. § 2.323(b) prior to filing its motion for cross-examination.

¹ Pilgrim Watch Request to Conduct Cross-Examination in Accordance With 10 CFR 2.104(b) (March 17, 2008) ("Motion"). PW's Motion throughout mistakenly refers to 10 C.F.R. § 2.104(b) and not 10 C.F.R. § 2.1204(b).

TEMPLATE = SECY-021

SECY-02

I. BACKGROUND

The Board's December 19, 2007 Order revising the hearing schedule provided that any party wishing to conduct cross-examination was to file on or before March 17, 2008 "a motion seeking permission to do so along with a cross-examination plan." Dec. 19 Order at 3. The Board went on to state that:

Such motions shall comply with 10 C.F.R. § 2.1204(b). . . . The Board will grant such motions 'only if [it] determines that cross-examination by the parties is necessary to ensure the development of an adequate record for decision.'"

Dec. 19 Order at 3-4 (citing 10 C.F.R. § 2.1204(b)(3)) (emphasis added). In issuing the Order, the Board further made clear to the parties that "under recent revisions to the regulations set out in 10 C.F.R. Part 2, Subpart L, the responsibility to perform the bulk of the inquiry at evidentiary hearings rests with the Board." Id. at 2.

On March 17, 2008, PW filed its Motion to conduct cross-examination. The Motion notes that "10 CFR 2.1[2]04(b) authorizes the Board to allow any party to cross-examine a witness when 'it is necessary for the development of an adequate record for a sound decision or is required for a full and true disclosure of facts.'" Motion at 1 (citing Entergy Nuclear Vermont Yankee LLC (Vermont Yankee Nuclear Power Station), LBP-04-31, 60 N.R.C. 686, 689 (2004)). While the Motion goes on to quote from the Vermont Yankee decision that cross-examination "may well [be] helpful in drawing out 'expert opinions, technical and scientific facts' (id.), the Motion provides no statement why cross-examination is helpful or necessary here to develop an adequate record for a sound decision. Rather, the Motion suggests that cross-examination by PW is necessary for the Board to hear a "balanced presentation" and, on that basis, PW requests cross examination "to assure that the experts are asked all pertinent questions or follow up questions during the hearing." Motion at 2 (emphasis added).

II. ARGUMENT

A. Pilgrim Watch Has Failed to Demonstrate the Rare Circumstances Required for a Party to Conduct Cross-Examination in Subpart L Proceedings

1. Cross Examination is Permitted Only in Rare Circumstances where Necessary to Produce an Adequate Record for Decision

Under the Commission's rules of practice, licensing boards may allow cross-examination in a Subpart L proceeding only if the board "determines that cross-examination by the parties is necessary to ensure the development of an adequate record for decision." 10 C.F.R. § 2.1204(b)(3). As reflected in its 2004 amendments to 10 C.F.R. Part 2 promulgating this provision, "the Commission expects that the use of cross-examination in Subpart L . . . proceedings will be rare." 69 Fed. Reg. 2,182, 2,188 (Jan. 14, 2004) (emphasis added).

In sum, the Commission expects that in hearings under Subpart Lprocedures, the presiding officer will conduct the examination of witnesses and that the presiding officer will permit cross-examination only in the rare circumstances where the presiding officer finds in the course of the hearing that his or her questioning of witnesses will not produce an adequate record for decision, and that cross-examination by the parties is the only reasonable action to ensure the development of an adequate record.

Id. at 2,196 (emphasis added).

Further, in promulgating these provisions, the Commission indicated that cross-examination appropriate only when the credibility of eyewitnesses is an issue with respect to either the occurrence of a material past event, or the motive or intent of a party. As the Commission explained,

Nor does the Commission believe that there are a large number of hearings where the credibility of eyewitnesses is an issue with respect to either the occurrence of a material past event, or the motive or intent of a party, such that cross-examination is an appropriate tool for issue resolution. On the

other hand, the Commission believes that if the presiding officer has the opportunity to examine witnesses, the presiding officer will be able to gain a better understanding of the testimony, and efficiently oversee the development of evidence relevant to the resolution of the contested matter in the hearing.

Id. at 2,213. “For these reasons, the Commission concludes that an oral hearing should be provided for in Subpart L proceedings, but that cross-examination should ordinarily not be permitted.” Id. (emphasis added).

2. Pilgrim Watch Makes No Showing of Rare Circumstances that the Board Is Unable, Through Its Own Questioning, to Ensure the Development of an Adequate Record for Decision

PW’s Motion should be denied because it makes no showing that its cross examination is necessary to ensure the development of an adequate record for decision. PW’s three paragraph motion makes no showing that questioning by the Board will be insufficient to develop an adequate record. In the absence of any explanation why questioning by the Board would be inadequate, PW’s motion should be denied.

Rather than demonstrating any rare or unusual circumstances that would necessitate cross-examination. PW simply asserts that it should be allowed to conduct cross-examination in order to “to assure that the experts are asked all pertinent questions or follow up questions during the hearing.” Motion at 2. Such an argument could always be made and therefore its acceptance would swallow the rule and render it meaningless. Moreover, PW was allowed to ask any questions it saw fit of its own experts and the Board has permitted PW to submit proposed questions in accordance with 10 C.F.R. § 2.1207(a)(3) for the Board to ask Entergy’s and the NRC Staff’s expert witnesses. Dec. 19 Order at 3. As discussed above, the opportunity to submit proposed questions is intended to ensure the parties that the Board will have an adequate record for deci-

sion. PW provides no showing why these informal hearing procedures established by the Commission are – in this case – inadequate so as to require cross-examination to develop the record.

The only suggested basis offered by PW -- that cross-examination is necessary to provide “a balanced presentation” because of the asserted capability of Entergy and the NRC Staff “to support their position by an overwhelming volume of expert testimony that may serve to make a greater impression simply because of its magnitude” (Motion at 2) -- lacks merit. The informal hearing procedures of Subpart L call for the active involvement of the Board to develop a full and balanced record in order to ensure an adequate basis for decision. As explained by the licensing board in the Vermont Yankee uprate proceeding in rejecting a similar argument:

“[W]e believe that at least some elements of the Subpart L procedures, may serve to assist, not hinder, petitioners. The three administrative judges on each Board, usually including two scientific experts in fields relevant to the proceeding, bring substantial experience and expertise to each contested matter. Given that the Board has the primary responsibility to examine witnesses in Subpart L proceedings, its three judges must be active inquisitors of the factual, technical, and scientific evidence relevant to resolving contested issues. 69 Fed. Reg. at 2188. This active and inquisitorial role of the Boards in Subpart L proceedings may serve to reduce the burdens that ordinary citizens with limited resources might otherwise face in a full adversarial Subpart G proceeding and help to ‘level the playing field’ in a way that may enhance public confidence in the proceeding.”

Vermont Yankee , *supra*, LBP-04-31, 60 N.R.C. at 697 (emphasis added). Thus, the Subpart L procedures effectively “level the playing field” and PW’s claim that cross-examination is required to ensure “a balanced presentation” is contrary to both the intended purpose and effect of the rule. PW provides no explanation why Board examination based on questions developed and provided PW will not provide for a full and balanced presentation and record adequate for decision. Therefore, the Board should deny PW’s Motion to conduct cross-examination.

3. Allowing Pilgrim Watch to Cross-Examine Will Not Conserve the Board and The Parties' Time and Resources, Nor Will Cross-Examination Make the Hearing Process More Effective and Efficient

PW's Motion should also be denied because allowing PW to cross-examine expert witnesses will not be an effective or efficient use of the time or resources of the Board and of the parties. An underlying purpose of permitting only the Board to question witnesses is to conserve the Board and the parties' "time and resources," 69 Fed. Reg. at 2,196, and to ensure that the hearing process is "effective and efficient." 69 Fed. Reg. at 2,182. In issuing its final rule for 10 C.F.R. Part 2, the Commission stated that it "continues to believe that cross-examination conducted by the parties often is not the most effective means for ensuring that all relevant and material information with respect to a contested issue is efficiently developed for the record of proceeding." 69 Fed. Reg. at 2,195.

Allowing PW to conduct cross-examination here would be extremely inefficient. In the first place, PW's representative has no legal training or experience in conducting cross-examination. She also has no technical expertise in the subject matter of the contention. Thus, there is no indication that PW has any capability to conduct cross-examination.

Moreover, PW has repeatedly attempted to expand Contention 1 beyond the scope permitted by the NRC rules and Board's rulings. Indeed, as set forth in Entergy's and the NRC Staff's motions in limine, PW's prefiled testimony continues to focus on groundwater monitoring and continues to argue that groundwater protection is a function that must be demonstrated in this proceeding. Thus, there is substantial likelihood that any cross-examination by PW would delve into impermissible and irrelevant areas. This would generate numerous, multiple objections and argument that would waste the time and resources of both the Board and the parties.

Thus, permitting PW to cross-examine the experts would not be an efficient or effective use of the Board's or parties' time and resources. Given PW's propensity to broaden the scope of the contention, seek duplicative and irrelevant information, and ignore the Board's orders, the Board should deny PW's Motion to conduct cross-examination. Any cross-examination would only allow another forum for PW to raise irrelevant, out of scope issues that would result in numerous and multiple objections and, overall, in an inefficient and ineffective hearing process.

B. A Motion to Conduct Cross Examination Must Be Accompanied by a Cross-Examination Plan

Under 10 C.F.R. § 2.1204(b), a motion to conduct cross-examination must be accompanied by a cross-examination plan that provides: "(i) [a] brief description of the issue or issues on which cross-examination will be conducted; (ii) the objective to be achieved by cross-examination; and (iii) the proposed line of questions that may logically lead to achieving the objective of the cross-examination." PW's Motion makes no mention of the required cross-examination plan. If PW has not provided a cross-examination plan supporting its Motion, then its Motion must be denied for this reason as well.

C. Pilgrim Watch Failed to Consult with Entergy Prior to Filing Its Motion

Under 10 C.F.R. § 2.323(b), "[a] motion must be rejected if it does not include a certification by the attorney or representative of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant's efforts to resolve the issue(s) have been unsuccessful." (Emphasis added)). PW did not consult with Entergy and provides no certification in its motion. This failure too warrants denial of the Motion.

III. CONCLUSION

For the foregoing reasons, PW's Motion to conduct cross-examination should be denied.

Respectfully Submitted,



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Dated: March 24, 2008

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NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Entergy's Opposition to Pilgrim Watch's Request to Conduct Cross-Examination in Accordance with 10 CFR 2.1204(b)," dated March 24, 2008, 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 24th day of March, 2008.

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