

May 19, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board Panel

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

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

**ENERGY'S ANSWER TO PILGRIM WATCH'S MOTION
REGARDING THE CUMULATIVE USAGE FACTOR**

Pursuant to 10 C.F.R. § 2.323(c) and the May 12, 2008 Order of the Atomic Safety and Licensing Board Panel ("Board"),¹ Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (collectively, "Entergy") hereby file their opposition to "Pilgrim Watch Motion Regarding the Cumulative Usage Factor (CUF)", filed on May 5, 2008 ("Motion"). The Board has multiple reasons to deny the Motion. First, the Motion is in essence an impermissible, additional reply to Entergy's and the NRC Staff's responses to Pilgrim Watch's April 9, 2008 Motion² on CUFs. Second, even if the Motion were viewed as a new motion to raise a late-filed contention, it must be denied because the Motion fails to address any of the criteria for admitting late-filed contentions in 10 C.F.R. § 2.309(c)(1)(i)-(viii) and § 2.309(f)(2)(i)-(iii), and those criteria weigh heavily against admission of any purported new late-filed contention. Lastly, even putting aside Pilgrim Watch's total failure to address the criteria for admitting late-filed contentions, the Motion still fails because Pilgrim Watch has failed to proffer an admissible

¹ Order (Setting Deadlines for Provisional Proposed Findings and Conclusions on Contention 1, and for Pleadings Related to Pilgrim Watch's Recent Motion Regarding CUFs) (May 12, 2008), slip op. at 3 ("May 12 Order").
² "Pilgrim Watch Motion Requesting the Record be Held Open So that the Board May Address a New and Significant Issue [Method to Calculate Cumulative Usage Factors (CUF)] Sua Sponte and Provide Pilgrim Watch an Opportunity for Hearing" (Apr. 9, 2008).

contention under the Commission's admissibility standards of 10 C.F.R. § 2.309(f)(1). Each of the reasons alone warrants denial of the Motion.

I. PILGRIM WATCH'S IMPERMISSIBLE SECOND REPLY SHOULD BE REJECTED OUT OF HAND

Pilgrim Watch has no right to reply to any answer to its own motion absent permission from the Board, and then only in "compelling circumstances." 10 C.F.R. § 2.323(c). Pilgrim Watch previously ignored this prohibition when it filed a reply to Entergy's and the NRC Staff's answers to Pilgrim Watch's April 9 Motion concerning CUFs.³ Pilgrim Watch now seeks to file what is in essence another impermissible reply on this same matter, simply repackaging its previous arguments in a different form. Pilgrim Watch's thinly veiled attempt at yet another bite at the apple should not be countenanced. Consequently, the Board should reject the Motion out of hand.

II. PILGRIM WATCH FAILED TO ADDRESS THE LATE-FILED CONTENTION ADMISSIBILITY CRITERIA

Pilgrim Watch's April 9, 2008 Motion asked the Board to consider the CUF issue, sua sponte, and the current Motion gives no clear indication that Pilgrim Watch is now seeking anything different. Nowhere in the current Motion does Pilgrim Watch state that it is seeking leave for admission of a late-filed contention. Consequently, Pilgrim Watch's Motion should be denied for the same reasons stated in Entergy's April 21, 2008 Response⁴ and the NRC Staff's April 21, 2008 Response⁵ to Pilgrim Watch's April 9, 2008 Motion. However, even if the

³ "Pilgrim Watch Replies to Entergy's and NRC's Responses Opposing Pilgrim Watch's Motion Requesting that the Record be Held Open for Sua Sponte Consideration of Cumulative Usage Factors" (Apr. 30, 2008).

⁴ "Entergy's Response in Opposition to Pilgrim Watch Motion Requesting the Record be Held Open for Sua Sponte Consideration of Cumulative Usage Factors" (Apr. 21, 2008) ("Entergy's April 21, 2008 Response").

⁵ "NRC Staff Response in Opposition to Pilgrim Watch Motion Requesting Record Be Held Open (Apr. 21, 2008) ("NRC Staff April 21, 2008 Response").

Motion were construed as requesting admission of a late-filed contention, it should still be denied because the Motion fails to address any of the Commission's criteria for admitting late-filed contentions.

A party seeking admission of a late-filed contention has the burden to demonstrate that it has met the criteria contained in 10 C.F.R. § 2.309(c)(1)(i)-(viii) and § 2.309(f)(2)(i)-(iii). Shieldalloy Metallurgical Corp. (License Amendment Request for Decommissioning of the Newfield, New Jersey Facility), CLI-07-20, 65 N.R.C. 499, 504-05 (2007) (holding that petitioner failed its burden to address the criteria contained in 10 C.F.R. § 2.309(f)(2)(i)-(iii)); Florida Power & Light Co., et al (Calvert Cliffs Nuclear Power Plant, Units 1 & 2, *et al.*) CLI-06-21, 64 N.R.C. 30, 33-34 (2006) (holding that petitioner failed to meet its burden to address the criteria contained in 10 C.F.R. § 2.309(f)(2)(i)-(iii) and two of the eight criteria contained in 10 C.F.R. § 2.309(c)(1)(i)-(viii)); Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 N.R.C. 325, 347 & n.9 (1998) (“longstanding NRC practice obliges petitioner to show that its contentions satisfy [the 10 C.F.R. § 2.309(c)(1)(i)-(viii)] requirements”) (emphasis in original). See also 10 C.F.R. § 2.309(c)(2) (“[t]he requestor/petitioner shall address the factors in paragraphs (c)(1)(i) through (c)(1)(viii) of this section in its nontimely filing” (emphasis added).

The failure to address any of the late-filed criteria contained in 10 C.F.R. §§ 2.309(c)(1)(i)-(viii) & 2.309(f)(2)(i)-(iii) “alone warrants rejection of” any late filed contention. Calvert Cliffs, CLI-98-25, 48 N.R.C. at 347 (failure to address the late-filed criteria in 2.714(1)(a)); Calvert Cliffs, CLI-06-21, 64 N.R.C. at 33-34 (failure to address the criteria in 10 C.F.R. § 2.309(f)(2) and all eight of the criteria contained in 10 C.F.R. § 2.309(c)(1) “constitutes sufficient grounds for rejecting” petitioner’s intervention and hearing requests). Indeed, because

the Motion's "deficiency is so apparent," there should be "no need to call for applicant and staff responses" to the Motion. Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), LBP-98-26, 48 N.R.C. 232, 241 n.6 (1998), aff'd, CLI-98-25, 48 N.R.C. 325 (1988).

Furthermore, a balancing of the late-filed criteria clearly weighs against the admission of any purported new contention. For example, Pilgrim Watch cannot demonstrate that the information upon which the amended or new contention is based was not previously available. 10 C.F.R. § 2.309(f)(2)(i). As explained in Entergy's Response to Pilgrim Watch's April 9 Motion concerning CUFs,⁶ the issue Pilgrim Watch seeks to raise here has been the subject of a contention initially raised in the Vermont Yankee proceeding in May 2006 which was admitted on September 22, 2006. See Entergy Nuclear Vermont Yankee, LLC & Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 N.R.C. 131, 183-87 (2006). Further, the commitments in the Pilgrim license renewal application about which Pilgrim Watch complains have been part of the license renewal application for some time. Commitment 31 has been part of the license renewal application since its initial filing in January 2006, and Commitment 35 has been part of the license renewal application since July 2006.⁷ Both commitments are part of the SER, which was issued in June 2007.⁸ Moreover, the proposed Regulatory Issue Summary ("RIS") which Pilgrim Watch claims is "new and significant" is irrelevant to Pilgrim because, as noted in Entergy's Response to Pilgrim Watch's April 9 Motion concerning CUFs (at page 4), Pilgrim has not used the simplified approach that is the subject of the RIS.

⁶ Entergy's April 21, 2008 Response at 2.

⁷ Commitment 35 was also revised in July 2006 to address the feedwater nozzle.

⁸ A supplement was added to the SER in September 2007, and the final SER was issued as NUREG-1891 in November 2007.

For these same reasons, Pilgrim Watch can assert no good cause for its failure to file on time. 10 C.F.R. § 2.309(c)(1)(i). As stated by the Commission,

The test for “good cause” is not simply when the Petitioners became aware of the material they seek to introduce into evidence. Instead, the test is when the information became available and when Petitioners reasonably should have become aware of that information. In essence, not only must the petitioner have acted promptly after learning of the new information, but the information itself must be new information, not information already in the public domain.

Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 N.R.C. 62, 70 (1992). “Good Cause” for a petitioner’s late filing is the “first and principal test” for a late filing. Westinghouse Electric Corp. (Nuclear Fuel Export License for Czech Republic-Temelin Nuclear Power Plants), CLI-94-7, 39 N.R.C. 322, 329 (1994). As stated above, both commitments in the Pilgrim license renewal application about which Pilgrim Watch now complains for the first time have been part of the license renewal application since July 2006 – almost two years ago. Additionally, the RIS provides no good cause for Pilgrim Watch’s late complaints because the RIS raises an issue regarding a methodology that has not been proposed or used for Pilgrim. Thus, Pilgrim Watch cannot demonstrate good cause for its failure to raise its contention before now.

Where a petitioner fails to demonstrate good cause, the petitioner is “bound to make a compelling showing that the remaining factors nevertheless weigh in favor of granting the late intervention and hearing request.” Id. (emphasis added). Here, the other factors also weigh heavily against admitting the new contention. For example, admitting the new contention would greatly expand the hearing by adding a totally new issue at the end of the hearing process, which would undoubtedly delay the proceeding. 10 C.F.R. § 2.309(c)(1)(vii). Likewise with respect to 10 C.F.R. § 2.309(c)(1)(viii), Pilgrim Watch has offered no basis for the Board to conclude that

Pilgrim Watch's participation on this issue might reasonably be expected to assist in developing a sound record because Pilgrim Watch has neither identified any witnesses on this issue nor summarized their proposed testimony. Comanche Peak, CLI-92-12, 36 N.R.C. at 74-75. Indeed, it is the petitioner's "ability to contribute sound evidence" that determines whether it would contribute to the development of a sound record. Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit No.1), LBP-84-17, 19 N.R.C. 878, 888 (1984), citing Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-671, 15 N.R.C. 508, 513 n.14 (1982).

In short, the Motion must be denied because (1) Pilgrim Watch totally failed to address the late-filed criteria in 10 C.F.R. § 2.309(c)(1) and § 2.309(f)(2), and (2) those criteria weigh heavily against admitting Pilgrim Watch's purported new contention.

III. PILGRIM WATCH HAS NOT SUBMITTED AN ADMISSIBLE CONTENTION

The Board has requested that Entergy and the NRC Staff evaluate the admissibility of Pilgrim Watch's purported new contention against the criteria contained in 10 C.F.R. 2.309(f)(1).⁹ While Pilgrim Watch's failure to address the late-filed contention admission criteria alone warrants rejection of any new contention, the Board may also reject Pilgrim Watch's claims because they impermissibly challenge the Commission's regulations and fail to meet the admissibility criteria contained in 10 C.F.R. § 2.309(f)(1).

A. Pilgrim Watch Impermissibly Challenges the Commission's Regulations

The issue that Pilgrim Watch asks the Board to review is in essence an impermissible challenge to the NRC rules. 10 C.F.R. §2.335(a) & (b). The gravamen of Pilgrim Watch's

⁹ May 12 Order at 3.

complaints appears to be that Entergy must calculate environmentally adjusted cumulative usage factors (“CUF”) and demonstrate now that those factors will remain below 1 throughout the period of extended operation. The Commission’s license renewal regulations, however, provide that a time-limited aging analysis (such as a fatigue analysis) may be addressed by demonstrating any of the following:

- (i) The analyses remain valid for the period of extended operation;
- (ii) The analyses have been projected to the end of the period of extended operation; or
- (iii) The effects of aging on the intended function(s) will be adequately managed for the period of extended operation.

10 C.F.R. § 54.21(c)(1)(i)-(iii). Thus, the NRC rules allow an applicant to propose a program for managing the effects of aging, and Entergy has selected this option.

Pilgrim Watch claims that these commitments are yet other examples¹⁰ of where “the license renewal safety reviews . . . have failed to identify and fully resolve safety issues associated with” operating a nuclear plant for an additional twenty years, and that the commitments do not amount to “specific and meaningful steps to provide real assurance.” Motion at 11. This assertion is simply an attack on the sufficiency of the NRC Staff’s review, which is not permitted in this proceeding.¹¹

¹⁰ Contrary to Pilgrim Watch’s assertions, Entergy does not own the Oyster Creek Nuclear Generating Station.

¹¹ See 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989).

Apart from NEPA issues, . . . a contention will not be admitted if the allegation is that the NRC staff has not performed an adequate analysis. With the exception of the NEPA issues, the sole focus of the hearing is on whether the application satisfies NRC regulatory requirements, rather than the adequacy of the NRC Staff performance. See, e.g. *Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2)*, ALAB-728, 17 NRC 777, 807, review declined, CLI-83-32, 18 NRC 1309 (1983).

Id. (footnote omitted). This principal is reflected in the NRC’s rules of practice, at 10 C.F.R. § 2.309(f)(2).

B. Pilgrim Watch's Purported New Contention Fails the Contention Admissibility Criteria

Apart from challenging Commission regulations, Pilgrim Watch has failed to offer sufficient basis as required by the admissibility criteria contained in 10 C.F.R. § 2.309(f)(1)(ii). Pilgrim Watch provides no basis as to why the elements in Entergy's program for managing environmentally assisted fatigue are insufficient, other than Pilgrim Watch's unsupported speculation that the activities may be performed improperly. Among other things, Entergy's program commits (1) to refine the fatigue analyses in accordance with one of four methods, one of which is to employ an "analysis using an NRC-approved version of the ASME code or NRC-approved alternative (e.g., NRC-approved code case)"; and (2) if during the period of extended operation ongoing monitoring indicates a potential for a condition outside a bounded analysis, to manage fatigue by one of three methods, including "an inspection program that has been reviewed and approved by the NRC (e.g., periodic non-destructive examination of the affected locations at inspection intervals to be determined by a method acceptable to the NRC)," or "[r]epair or replace" components before a CUF of one is exceeded.¹²

Thus, Entergy has committed to enforceable standards. Pilgrim Watch's suspicion that Entergy will violate these standards provides no basis for an admissible contention. See USEC Inc. (American Centrifuge Plant), CLI-06-10, 63 N.R.C. 451, 465 (2006) (rejecting a proposed contention that "present[ed] mere assertions and speculation that [the licensee] would encourage or condone violations of NRC regulations"); Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 N.R.C. 349, 366 (2001) ("We cannot

¹² "Safety Evaluation Report Related to the License Renewal Application of Pilgrim Nuclear Power Station" (NUREG-1891) (Nov. 2007), Appendix A at A-10 – A-12 (emphases added) (describing Commitment 31); see also id. at A-13 (describing Commitment 35).

allow admission of contentions premised on a general fear that a licensee cannot be trusted to follow regulations of any kind”).

Moreover, Pilgrim Watch has offered no statement of alleged facts or expert opinion, or any references to specific sources and documents, on which it intends to rely in support of its position on this issue and thus fails to meet the requirement in 10 C.F.R. § 2.309(f)(1)(v). Pilgrim Watch supplies no expert affidavit or declaration supporting the various assertions made by it, and provides no reference to any document or other source indicating a deficiency in Entergy’s application.¹³ Rather, Pilgrim Watch provides nothing more than unsupported rhetoric.

IV. CONCLUSION

For the foregoing reasons, the Board should deny Pilgrim Watch’s Motion.

Respectfully Submitted,



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¹³ To the extent that Pilgrim Watch suggests that the CUF for certain components exceed 1.0 today, Motion at 10, Pilgrim Watch is incorrect. Table 4.3-3 of the license renewal application presents very conservative estimates of environmentally adjusted CUFs at the end of the period of extended operation. In several instances, these values are based on generic CUF values rather than plant specific data. The purpose of this Table was not to provide current or realistically expected CUF values, but rather simply to provide a conservative screening to determine whether a program pursuant to 10 C.F.R. § 54.21(c)(1)(iii) would be necessary.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Entergy's Answer to Pilgrim Watch's Motion Regarding the Cumulative Usage Factor," dated May 19, 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 19th day of May 2008.

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