

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

June 2, 2008

DOCKETED
USNRC

Before the Atomic Safety and Licensing Board Panel

June 3, 2008 8:00 am

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

**ENTERGY'S ANSWER OPPOSING PILGRIM WATCH'S MOTION
TO INCLUDE CERTAIN EXHIBITS IN THE RECORD**

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c) and the Atomic Safety and Licensing Board's ("Board") Order of May 28, 2008,¹ Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (collectively, "Entergy") hereby answer and oppose "Pilgrim Watch Motion to Include as Part of the Record Exhibits Attached to Pilgrim Watch Motion to Strike Incorrect and Misleading Testimony from the Record of May 15, 2008," filed on May 27, 2008 ("Motion").² The Motion is meritless. Contrary to Pilgrim Watch's claims, the hearing record is closed, and Pilgrim Watch has provided no basis to reopen the record in order to admit new evidence, as Entergy has demonstrated.³ Furthermore, the documents that Pilgrim Watch seeks to include in the record are not admissible evidence. Consequently, the Motion must be denied.

¹ Order (Setting Relevant Deadlines) (May 28, 2008).

² Pilgrim Watch seeks to include in the record multiple documents: (1) *Pilgrim Nuclear Power Station: Salt Water Discharge Piping Trenchless Rehabilitation Challenges*, Jonathan Raymer, Miller Pipeline Corporation, Indianapolis, IN March 22-24, 2004, North American Society for Trenchless Technology (NASTT) No-Dig 2004 ("Miller Pipeline paper"); (2) letter from John H. Fitzgerald III, P.E., *Retrofitting Cathodic Protection at Pilgrim Station* and Mr. Fitzgerald's curriculum vitae (collectively, "Fitzgerald letter"); and (3) emails from multiple sources regarding cathodic protection (collectively, "Cathodic Protection e-mails"). Motion at 1.

³ Entergy's Answer Opposing Pilgrim Watch's Motion to Strike and Request to Reopen the Hearing (May 27, 2008). ("Entergy's May 27 Answer").

II. THE HEARING RECORD ON PILGRIM WATCH CONTENTION 1 IS CLOSED AND PILGRIM WATCH HAS PROVIDED NO BASIS FOR THE REOPENING OF THE RECORD

The hearing record on Pilgrim Watch Contention 1 is effectively closed, and Pilgrim Watch cannot, therefore, add evidence to the record absent reopening of the record. For the reasons set forth in Entergy's May 27 Answer, which will not be repeated here, Pilgrim Watch has provided no basis to reopen the hearing record on Pilgrim Watch Contention 1 to admit new evidence.

Pilgrim Watch's claim that the "hearing has not been closed" (Motion at 1) is meritless. The hearing on Pilgrim Watch Contention 1, during which all parties presented their evidence, was held and concluded on April 10, 2008. In advance of the hearing, the deadline for Pilgrim Watch to submit pre-filed written testimony was clearly announced by the Board as January 29, 2008, and its deadline to submit rebuttal testimony was clearly announced as March 3, 2008.⁴ Furthermore, after the conclusion of the hearing, on May 12, 2008, the Board directed that all parties should file findings of fact and conclusions of law, and reply findings and conclusions, on June 9 and June 23, respectively.⁵ Additionally, on May 16, 2008, the Commission "direct[ed] the Board to close the evidentiary record on Pilgrim Watch Contention 1" and proceed with its stated schedule for the filing of findings of fact and conclusions of law.⁶

Pilgrim Watch's claim that the Board's May 12 Order allows it to add testimony or other documents to the record (Motion at 1-2) is mistaken. It does not. The Board was clear in stating that its May 12 Order should be construed as not closing the hearing in this matter only to the

⁴ Order (Revising Schedule for Evidentiary Hearing and Responding to Pilgrim Watch's December 14 and 15 Motions) (Dec. 19, 2007) at 3.

⁵ 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) ("May 12 Order") at 3.

⁶ CLI-08-09, 67 N.R.C. ___, slip op. at 5 (2008)

extent that “the need for further findings” may arise “based on the current stay or related activities.” May 12 Order at 3. The referenced stay is that imposed by the First Circuit to permit the Commonwealth of Massachusetts to seek to participate in the license renewal proceeding as an interested state. May 12 Order at 1-2 & n.3 (citing Mass. v. United States, 522 F.3d 115 (1st Cir. 2008)). Nothing in the Board’s May 12 Order suggests that it was meant as an opportunity for Pilgrim Watch to supplement the evidentiary record on Pilgrim Watch Contention 1.

The effective closure of the evidentiary record except for matters related to the First Circuit’s temporary stay is further confirmed by the statements of the Board at the close of the April 10 evidentiary hearing. The Board made clear that the sole purpose for not formally closing the record on Pilgrim Watch Contention 1 at that time was the First Circuit’s temporary stay. Tr. at 870 (the Board is “not willing to close the record in this hearing which is part of this proceeding in the face of the court’s order”) (Judge Young). That the record was not immediately closed in no way suggested that the record remained open for the parties to submit new evidence on Pilgrim Watch Contention 1. As Judge Abramson made clear: “So while the record isn’t formally closed, there should be no further testimony from any party on this particular contention.” Tr. at 871 (Judge Abramson) (emphasis added).

Any doubt that the evidentiary record on Contention 1 is in fact now closed is laid to rest by the Commission’s May 16 Order. There, the Commission has interpreted the First Circuit’s stay as having no relation to “any concerns about the evidentiary hearing on Pilgrim Watch’s contention,” and concluded that the stay is meant only to provide the Commonwealth of Massachusetts the opportunity to seek participant status as an interested state, which it has done. CLI-08-09, 67 N.R.C. ___, slip op. at 3. In other words,

It is not necessary for the parties or the Board to suspend their work on findings of fact and conclusions of law for Pilgrim Watch Contention 1 to protect the right of Massachusetts to participate as ordered by the Court.

Id., slip op. at 4. In the same vein and at the same time, the Commission expressly ordered “the Board to close the evidentiary record on Pilgrim Watch Contention 1.” Id., slip op. at 5.

In short, the record is closed, and Pilgrim Watch is foreclosed from supplementing the hearing record on Contention 1 absent a showing that it has met the criteria for reopening a closed record (which it has utterly failed to do, as demonstrated by Entergy’s May 27 Answer).

III. THE DOCUMENTS PILGRIM WATCH SEEKS TO ADD TO THE HEARING RECORD ARE NOT ADMISSIBLE EVIDENCE

In addition to failing to demonstrate that the hearing record should be reopened, the Motion must also be rejected because the documents that Pilgrim Watch seeks to add to the record are not admissible evidence.

In a Subpart L Hearing, statements of position and written testimony must be filed with supporting affidavits. 10 C.F.R. § 2.1207. The same affidavit requirement applies to motions whose support consists of witness statements. 10 C.F.R. § 2.323(b). Contrary to the express wording of these regulations, however, Pilgrim Watch has submitted no affidavit supporting the testimony and documents it seeks to add to the record. Consequently, the Motion is contrary to the Commission’s requirements and must be rejected.

More importantly, the Commission’s regulations permit that “[o]nly relevant, material, and reliable evidence which is not unduly repetitious will be admitted” to the hearing record. 10 C.F.R. § 2.337(a). According to longstanding Commission precedent, evidence is not reliable, and is therefore inadmissible, if a competent witness has not been provided at hearing to defend the evidence. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2

and 3), ALAB-717, 17 N.R.C. 346, 367 (1983). Unsponsored technical analyses will be excluded from the record because

that kind of material “manifestly is the type of evidence that calls for sponsorship by an expert who can be examined on the reliability of the factual assertions and soundness of the scientific opinions found in the documents.”

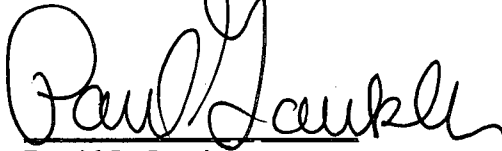
Id., quoting Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 N.R.C. 453, 477 (1982). See also Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 N.R.C. 479, 494 n.22 (1986) (excluding exhibits offered without sponsoring or testifying witnesses); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 N.R.C. 1076, 1088 n.13 (1983) (refusing to accept pre-filed written testimony from a witness who did not appear at the hearing and could therefore not be cross-examined on that testimony).

Here, Pilgrim Watch seeks to add to the record witness testimony on technical issues regarding the cured in place liners on the SSW system discharge piping and an alleged need to apply cathodic protection to the buried pipes at issue in Contention 1. However, the other parties have not been provided an opportunity to rebut the assertions made therein with witness testimony of their own. Furthermore, Pilgrim Watch did not provide at the April 10 hearing the sponsors of this new evidence and testimony, thus denying the Board an opportunity to examine the witnesses. In short, Pilgrim Watch seeks to add untested evidence to the record. Commission regulations and longstanding precedent deem such evidence unreliable, and as such the proffered evidence must be excluded from the evidentiary record.

IV. CONCLUSION

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

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Paul Gaukler". The signature is written in a cursive, flowing style with a large initial "P".

David R. Lewis

Paul A. Gaukler

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Dated: June 2, 2008

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Entergy's Answer Opposing Pilgrim Watch's Motion to Include Certain Exhibits in the Record," dated June 2, 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 2nd day of June 2008.

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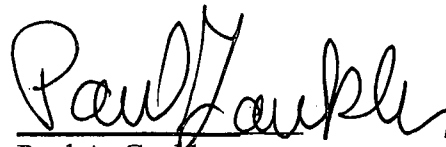
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