

June 23, 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
)	
(Pilgrim Nuclear Power Station))	ASLBP No. 06-848-02-LR

NRC STAFF'S RESPONSE TO ENTERGY'S
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

On May 12, 2008, the Atomic Safety and Licensing Board ("Board") issued an order setting forth the schedule for filing proposed findings of fact and conclusions of law regarding Pilgrim Watch Contention 1 as well as responses to the proposed findings of fact and conclusions of law filed by other parties in this license renewal matter.¹ Pursuant to that order, the NRC Staff ("Staff") herein provides its response to the proposed findings of fact and conclusions of law filed by Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. ("Entergy").²

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Conclusions on Contention 1, and for Pleadings Related to Pilgrim Watch's Recent Motion Regarding CUFs) (May 12, 2008) (unpublished) ("May 12 Order").

² Pilgrim Watch Post-Hearing Findings of Fact, Conclusions of Law (June 9, 2008) ("PW Proposed Findings").

DISCUSSION

The NRC Staff (“Staff”) generally considers the proposed findings of fact and conclusions of law³ submitted by Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (“Entergy”) regarding Pilgrim Watch’s Contention 1 to be consistent with, and supported by, the evidentiary record. Nonetheless, the Staff believes that a few aspects of Entergy’s Proposed Findings do merit a response.

I. Scope of License Renewal Reviews

First, part of Entergy’s discussion of the scope of license renewal reviews is overly broad. As the Staff explained in its proposed findings, 10 C.F.R. Part 54 addresses “systems, structures, and components” in the initial scoping phase under § 54.4, but then requires aging management review of only “structures and components” under § 54.21.⁴ Entergy’s approach to license renewal scoping seems to have glossed over this distinction, which may have helped create some earlier confusion in this case about whether the condensate storage system’s buried pipes were legitimately within the scope of license renewal.⁵ In Entergy’s Proposed Findings, Entergy repeats this error by stating, incorrectly, that “10 C.F.R. § 54.21(a)(1) defines the systems, structures, and components that are subject to aging management review” and that “10 C.F.R. § 54.21(a)(3) requires that the applicant demonstrate that, for each system, structure, and component identified under § 54.21(a)(1), the effects of aging will be adequately

³ Entergy’s Proposed Findings of Fact and Conclusions of Law on Pilgrim Watch Contention 1 (June 9, 2008) (“Entergy’s Proposed Findings”).

⁴ See NRC Staff Proposed Findings of Fact and Conclusions of Law, and Order in the Form of an Initial Decision (June 9, 2008) (“Staff Proposed Findings”) at ¶ 23.

⁵ See Staff Proposed Findings at 17 n.51.

managed.”⁶ Under the terms of § 54.21(a)(1) and (a)(3), each of these references to “systems, structures, and components” should instead read “structures and components.”

The Staff further notes that this distinction in Part 54 between “systems, structures, and components” and “structures and components” was deliberate, and it was specifically addressed in the Statement of Considerations accompanying the 1995 revisions to Part 54.⁷ In that Statement of Considerations, the Commission explained that “aging management review . . . should be a component and structure level review rather than a more general system level review,” in contrast to time-limited aging analyses (“TLAA”) conducted under § 54.21(c), which apply to “systems” as well as to “structures and components.”⁸ Accordingly, the Board should adhere to the text of § 54.21 rather than to Entergy’s incorrect paraphrasing of that text.

II. Proposed Findings With Respect to Out-of-Scope Components

A second point, also related to the proper scope of license renewal proceedings, involves Entergy’s proposed findings regarding the condensate storage (CS) system. Entergy, like the Staff, recognizes that the CS system’s buried piping does not perform any intended safety functions within the scope of license renewal.⁹ However, Entergy goes on to propose that the Board find that Entergy’s aging management programs for buried piping and tanks provide reasonable assurance with respect to the CS system. The Staff recognizes that Entergy may simply be proposing this finding out of an abundance of caution. Yet, because the Staff, in light of the evidence presented in this case, sees no possible basis under the

⁶ Entergy’s Proposed Findings at 8.

⁷ Final Rule, “Nuclear Power Plant License Renewal: Revisions,” 60 Fed. Reg. 22,461 (May 8, 1995).

⁸ *Id.* at 22,462 n.1.

⁹ See Entergy Proposed Findings at ¶14; Staff Proposed Findings at ¶ 31.

Commission's license renewal regulations for including the CS system's buried piping within the scope of the admitted contention,¹⁰ the Staff does not consider it appropriate for the Board, in the context of this license renewal adjudication, to make these reasonable assurance findings regarding the CS system.

III. "Reasonable Assurance" and "Preponderance of the Evidence"

Lastly, Entergy provides a potentially misleading definition of the burden it must meet to obtain a renewed license. The regulatory standard that Entergy must satisfy to obtain a renewed license is one of "reasonable assurance." The evidentiary burden that Entergy must satisfy in this adjudication is that of "preponderance of the evidence." Whether intentionally or not, Entergy appears to equate these two terms, stating that "[r]easonable assurance' requires here that Entergy must prove its case by a preponderance of the evidence." These two standards, however, are not one and the same; rather, they represent, respectively, a substantive regulatory burden and an evidentiary burden. In tandem, they signify the following: in this license renewal adjudicatory proceeding, Entergy must convince the Board, by a preponderance of the evidence, that the relevant aging management programs satisfy the NRC's reasonable assurance standard. Thus, the two standards serve distinct functions.

The Staff further notes that the cases cited by Entergy in support of their characterization of their evidentiary burden do not actually support interpreting the evidentiary burden in the manner that Entergy explains it; in fact, the *Oyster Creek* decision that Entergy references states that, "[i]n this proceeding, [the applicant] must demonstrate that it satisfied the 'reasonable assurance' standard by a preponderance of the evidence."¹¹ Again, this shows that

¹⁰ See Staff Proposed Findings at ¶¶ 30-34.

¹¹ *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-07-17, 66 NRC (continued. . .)

the “reasonable assurance” standard is a substantive regulatory standard that is distinct from the “preponderance of the evidence” evidentiary standard.

Accordingly, the Staff submits that the Board should not adopt Entergy’s mistaken conflation of the Commission’s reasonable assurance standard with the preponderance of the evidence standard.

CONCLUSION

The Staff considers Entergy’s proposed findings of fact and conclusions of law to be consistent with the evidentiary record, except as discussed above.

Respectfully submitted,

/RA/

James E. Adler
Counsel for NRC Staff

Dated at Rockville, Maryland
this 23rd day of June, 2008

(. . .continued)

327, 340 (2007) (citing *Commonwealth Edison Co.* (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 421 (1980)). In the *Advanced Medical Systems* footnote to which Entergy also cites, the Commission indicates that the preponderance of the evidence standard is applied following a hearing in NRC administrative proceedings. See *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 302 n.22 (1994). This case is therefore also consistent with the notion that the preponderance standard is an evidentiary burden in an adjudicatory hearing context, and so is not equivalent to “reasonable assurance,” which is the ultimate regulatory standard that applicants for renewed licenses must meet in order to obtain those licenses.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO ENTERGY'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW" 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 23rd day of June, 2008.

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