

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ann Marshall Young, Chair  
Dr. Paul B. Abramson  
Dr. Richard F. Cole

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

July 1, 2008

MEMORANDUM and ORDER  
(Ruling on Pilgrim Watch Motions Regarding Cumulative Usage Factors)

We rule herein on a May 5, 2008, motion<sup>1</sup> of Intervenor Pilgrim Watch, in this proceeding involving the Application of Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc., for renewal of the operating license for its Pilgrim Nuclear Power Station.<sup>2</sup> Intervenor's motion concerns certain issues involving methods for analyzing metal fatigue and "cumulative usage factors," or "CUFs," and follows a prior motion<sup>3</sup> in which Intervenor asked the

<sup>1</sup> Pilgrim Watch Motion Regarding the Cumulative Usage Factor (CUF) (May 5, 2008) [hereinafter PW May 5 Motion]. See also NRC Staff Motion to Strike Pilgrim Watch Motion Regarding the Cumulative Usage Factor (May 8, 2008) [hereinafter Staff May 8 Motion to Strike]; NRC Staff in Response to Pilgrim Watch Motion to Add New Contention Regarding the Cumulative Usage Factor (May 19, 2008) [hereinafter Staff May 19 Response]; Entergy's Answer to Pilgrim Watch's Motion Regarding the Cumulative Usage Factor (May 19, 2008) [hereinafter Entergy May 19 Response]; Pilgrim Watch Reply to Entergy's & NRC's Responses to Pilgrim Watch Motion to Add New Contention Regarding the Cumulative Usage Factor (CUF) (May 27, 2008) [hereinafter PW May 27 Reply].

<sup>2</sup> Pilgrim Nuclear Power Station License Renewal Application, ADAMS Accession No. ML060300024, ML060300028; see also <http://www.nrc.gov/reactors/operating/licensing/renewal/applications/pilgrim.html> (last visited July 1, 2008).

<sup>3</sup> 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 (April 9, 2008) [hereinafter PW April 9 Motion]. See also NRC Staff Response in Opposition to Pilgrim Watch Motion Requesting Record Be Held Open (April 21, 2008) [hereinafter Staff April 21 Response]; Entergy's

Licensing Board to hold the record open in the proceeding so that we might address *sua sponte* essentially the same issues. Based on portions of the May 5 Motion that are in the nature of arguments to admit a contention,<sup>4</sup> on May 12 the Licensing Board issued an Order, among other things “treating Pilgrim Watch’s most recent motion regarding CUFs as being in effect the submission of a new contention” and directing the NRC Staff and Entergy to file responses including argument regarding the admissibility of such contention.<sup>5</sup> We consider herein whether Pilgrim Watch’s May 5 submission would be admissible as a contention and, for reasons stated below, find it inadmissible in this proceeding. We also find that Pilgrim Watch has failed to demonstrate grounds for the Board to consider any related matters *sua sponte*.

In its May 5 Motion, Pilgrim Watch relies on a May 1, 2008, NRC News Release, referring to the NRC’s seeking public comment on a proposed “regulatory issue summary (RIS) to notify power plant licensees that a methodology used by some license renewal applicants to demonstrate the ability of plant components to withstand the stress of an additional 20 years of operation may not be sufficiently conservative if not correctly applied.”<sup>6</sup> We note that

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Response in Opposition to Pilgrim Watch Motion Requesting the Record Be Held Open for Sua Sponte Consideration of Cumulative Usage Factors (April 21, 2008) [hereinafter Entergy April 21 Response]; 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 (April 30, 2008) [hereinafter PW April 30 Reply]; Entergy’s Motion to Strike Pilgrim Watch’s Reply 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 (May 1, 2008) [hereinafter Entergy May 1 Motion to Strike]; NRC Staff Motion to Strike Pilgrim Watch Reply to NRC Staff Response to Pilgrim Watch’s Motion to Hold the Record Open (May 2, 2008) [hereinafter Staff May 2 Motion to Strike].

<sup>4</sup> See PW May 5 Motion at 3-5.

<sup>5</sup> 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) at 3. Pursuant to this Order, the NRC Staff and Entergy filed responses to the motion, NRC Staff Response in Opposition to Pilgrim Watch Motion to Add New Contention Regarding the Cumulative Usage Factor (May 19, 2008) [hereinafter Staff May19 Response]; Entergy’s Answer to Pilgrim Watch’s Motion Regarding the Cumulative Usage Factor (May 19, 2008) [hereinafter Entergy May 19 Answer]; and Pilgrim Watch filed a reply, Pilgrim Watch Reply to Entergy’s and NRC’s Responses to Pilgrim Watch Motion to Add New Contention Regarding the Cumulative Usage Factor (CUF) (May 27, 2008) [hereinafter PW May 27 Reply].

<sup>6</sup> NRC News Release No. 08-88, NRC Seeks Public Comment on Fatigue Analysis of Nuclear Power Plant Components (May 1, 2008) (<http://www.nrc.gov/reading-rm/doc->

Intervenor's earlier motion was based on a newspaper article addressing the fact that metal fatigue issues raised by an intervenor in the Vermont Yankee license renewal proceeding had led the NRC to review those same issues at another plant (the Oyster Creek nuclear generating station in Ocean County, New Jersey) whose license renewal application has also been the subject of an NRC adjudicatory proceeding.<sup>7</sup> In the article an NRC spokesman is quoted as stating that, "[a]fter Vermont Yankee, we are using an abundance of caution to let some of the other plants know they might be affected by this."<sup>8</sup> The article attached to Pilgrim Watch's April 9 Motion also quotes a "'significant new information' notice issued by the NRC" as stating that the "staff is reviewing the use of a simplified method to calculate cumulative usage factors that may not be conservative."<sup>9</sup> This review appears to have led to the May 1 news release and proposed RIS.

The May 1 news release on the RIS states that the NRC had "requested recent license renewal applicants who used the simplified calculation to perform confirmatory analyses."<sup>10</sup>

Pilgrim Watch in its May 5 motion states that "to the best of [its] knowledge, a confirmatory

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collections/news/2008/08-088.html) [hereinafter News Release 08-88]. See Nuclear Regulatory Commission, Proposed Generic Communication; Fatigue Analysis of Nuclear Power Plant Components, 73 Fed. Reg. 24,094 (May 1, 2008).

<sup>7</sup> PW April 9 Motion at 1-2 (citing Brattleboro Reformer, "VY metal fatigue issues raise concerns elsewhere" (April 5, 2008)).

<sup>8</sup> *Id.* at 3 (Attachment).

<sup>9</sup> *Id.* at 4. Pilgrim Watch in its April 9 Motion refers to the information provided in the article as "new and relevant information regarding serious flaws in the License Renewal Applications of nuclear plants that are in all critical respects identical [to the] Pilgrim [plant] and serious flaws in the review process," *id.* at 1, and states further that "Pilgrim Watch now questions whether NRC staffers looked at conditions at Pilgrim because of the metal fatigue issues raised; if so, what were their findings; and did Pilgrim use a method that was too simplified that would impact public safety?" *Id.* at 2. Entergy and the NRC Staff in their responses to Pilgrim Watch's April 9 motion argue among other things that the motion "fails to meet the criteria for either a stay . . . or admission of a new contention, and . . . is also an improper discovery request," Staff April 21 Response at 1; and that, in addition to being "inexcusably late," presents no grounds for the Board to examine the issues under 10 C.F.R. § 2.340(a), Entergy April 21 Response at 1. Pilgrim Watch replied to the Entergy and Staff Responses with many of the same arguments subsequently made in its May 5 Motion. See PW May 5 Motion.

<sup>10</sup> News Release 08-88.

analysis of components not meeting the acceptable CUF has yet to be determined at Pilgrim.”<sup>11</sup>

Further, Pilgrim Watch raises the following “Issue of Law,” which we treat herein as a contention:

The LRA does not include an adequate plan to monitor and manage the effects of aging due to metal fatigue on key reactor components that are subject to an aging management review, pursuant to 10 C.F.R. § 54.21(a), and an evaluation of time limited aging analysis, pursuant to 10 C.F.R. § 54.21(c).<sup>12</sup>

Pilgrim Watch asserts as basis for this contention that, among other things, “[t]he data that Entergy provided in the [Application] and reviewed in [the Staff’s Safety Evaluation Report<sup>13</sup> or SER] indicates that key components have a CUF value of greater than 1.0”; that this means that these components “will have a greater potential to crack and/or fail during the proposed license renewal term”; that “[t]his could potentially result in catastrophic failure”; and that certain commitments of Entergy relating to CUFs “do not provide reasonable assurance to the public that the issue is resolved.”<sup>14</sup>

The NRC Staff and Entergy object to the preceding contention primarily on the basis that it is not timely.<sup>15</sup> Staff and Entergy also argue that Pilgrim Watch has not satisfied the contention admissibility criteria at 10 C.F.R. § 2.309(f)(1).<sup>16</sup>

Regarding the Staff’s May 1 RIS, Pilgrim Watch suggests that Pilgrim “may” be affected by the methodology for analyzing metal fatigue and CUFs that is discussed in the RIS,<sup>17</sup> but provides no support for this suggestion, and does not rebut the statements by both Entergy and

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<sup>11</sup> PW May 5 Motion at 3.

<sup>12</sup> *Id.*

<sup>13</sup> NUREG-1891, *Safety Evaluation Report Related to the License Renewal of Pilgrim Nuclear Power Station* (Nov. 2007).

<sup>14</sup> PW May 5 Motion at 4.

<sup>15</sup> See Staff May 19 Response at 1, 4-8; Entergy May 19 Response at 1-6.

<sup>16</sup> See Staff May 19 Response at 8-15; Entergy May 19 Response at 6-9.

<sup>17</sup> PW May 5 Motion at 3.

Staff<sup>18</sup> that in fact the methodology at issue was not used for the Pilgrim plant.<sup>19</sup> Instead,

Pilgrim Watch asserts the following:

(1) That “new and significant information affecting public health and safety came forward in press reports, April 2008,” resulting from “new and significant developments in New England Coalition’s (NEC) intervention at Entergy’s Vermont Yankee ( . . . VY) LRA on CUF,” from which it “learned, among other things, that NRC had made note that the issues at Vermont Yankee could apply to other reactor sites”,<sup>20</sup>

(2) That “VY’s latest experience alerted Pilgrim Watch to the serious shortcomings in Pilgrim’s commitments[ ] mainly because . . . Pilgrim would not recalculate the CUFs prior to the close of the hearing,” and “[i]f the commitments are allowed to stand, the Board and public will have no opportunity to verify Entergy’s recalculations and check/verify their assumptions”,<sup>21</sup>

(3) That “[t]herefore, the new and significant information from NEC’s experience at Vermont Yankee is that Pilgrim’s CUF commitments do not provide reasonable assurance”; and

(4) That, “[i]rrespective of whether or not Entergy plans to use the same or different methodology [than that used at Vermont Yankee] at Pilgrim is not relevant. What is relevant is that we do not have specific information about what they do intend to use. It is obvious from [Vermont Yankee]’s experience that merely agreeing to vague commitments, and to do recalculations after the hearing is closed, does not allow any party, including the Board, an opportunity [to] make an assessment that the calculations/formula is appropriate, is based on the right assumptions, or that it is applied correctly.”<sup>22</sup>

Pilgrim Watch states that the “essence” of its motion is “a challenge to the manner in which Entergy intends to deal with the issue of metal fatigue at Pilgrim,” asserting that the commitments it questions “lack the detail necessary so that the public and ASLB can determine precisely what will be done and how it will be done.”<sup>23</sup> More specifically, Pilgrim Watch acknowledges that Entergy has committed to use an NRC-approved version of the relevant ASME code or an NRC-approved alternative in the calculations it commits to doing, but

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<sup>18</sup> Entergy May 19 Response at 4; Staff May 19 Response at 8 n.28; see also Entergy April 21 Response at 4; Staff April 21 Response at 13 n.44.

<sup>19</sup> See generally PW May 5 Motion; PW May 27 Reply.

<sup>20</sup> PW May 27 Reply at 10.

<sup>21</sup> *Id.* at 10-11.

<sup>22</sup> *Id.* at 12.

<sup>23</sup> *Id.* at 11.

challenges the lack of disclosure of underlying assumptions or implementation methodology.<sup>24</sup> Intervenor also summarizes part of the declaration of NEC's expert in the Vermont Yankee proceeding, but does not indicate that it has or will have its own expert to address the technical issues it raises,<sup>25</sup> stating that "until Entergy is required to produce a recalculation and its methodology, there is nothing for an expert to analyze."<sup>26</sup>

Whether or not Pilgrim Watch has raised a genuine, properly-supported issue with its questioning of the lack of specific information about Entergy's plans regarding CUFs, we find we are compelled to agree with the NRC Staff and Entergy in their arguments that Intervenor is not timely in raising the concerns it actually addresses in its various filings. Had Pilgrim Watch shown that the May 1 RIS was the essential and relevant basis for its new contention and arguments, this conclusion might be different. But it did not do this, nor has it shown that the RIS has any impact whatsoever in this proceeding. Instead the Intervenor raises concerns that it in fact had the opportunity to raise much earlier, in part based on the Application at the time it filed its original contentions, and later at the time of the Staff's issuance of the SER. And it has provided no arguments regarding its satisfaction of the timeliness factors of either 10 C.F.R. § 2.309(f)(2) or § 2.309(c),<sup>27</sup> which we in any event find Pilgrim Watch has not met.

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<sup>24</sup> *Id.*; see also *id.* at 12-13; Entergy May 19 Response at 8.

<sup>25</sup> PW May 27 Reply at 11-12.

<sup>26</sup> *Id.* at 13.

<sup>27</sup> In a prior Order in this proceeding, we discussed some of the ramifications of a party proceeding without counsel in an adjudicatory proceeding. Memorandum and Order (Ruling on Pilgrim Watch Motions Regarding Testimony and Proposed Additional Evidence Relating to Pilgrim Watch Contention 1) (June 4, 2008) at 4 n.12 [hereinafter June 4 Memorandum and Order]. We noted that, while this "puts a party at a distinct disadvantage, the best way to overcome this, as much as possible under the circumstances, is to read all rules, orders, and relevant documents carefully, and comply with all relevant requirements as fully as possible, in a timely manner." *Id.*

This Memorandum is not the place to provide a complete or detailed exposition on the subject of legal proceedings in all its nuanced particulars. Briefly, however, adjudication is a formalized process for resolving disputes between parties that are unable to resolve their differences in any other way. The procedures involved in adjudication generally have been developed over the course of centuries, based on a general approach of trying to balance all relevant factors so as best to assure fairness to all parties, including providing reasonable opportunity for challenges to be made to given matters while at the same time permitting the

Under the preceding circumstances, we find no valid reason to admit Pilgrim Watch's May 5 motion in the nature of a contention. Nor do we find grounds to seek Commission approval of our consideration of the matters at issue on a *sua sponte* basis, under 10 C.F.R. § 2.340(a), and we thus deny Pilgrim Watch's April 9 motion as well. Although there may be legal questions associated with leaving for later calculation the time-limited aging analyses required under 10 C.F.R. § 54.21(c), Pilgrim Watch has failed to demonstrate the sort of "serious safety, environmental, or common defense and security matters" required under

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challenged to move forward after a reasonable, defined period of time for allowing such challenges has lapsed. While the NRC rules contain some procedures that are different than those found in adjudication more generally, and while these are in some instances more stringent than in other jurisdictions, the broad principle that duly-adopted rules must be complied with in any adjudication, absent a legitimate cause for exemption or waiver, exists at least in part to assure that decisions are based not on personal preference or arbitrary and capricious whim, but on the law, which includes such duly-adopted rules. This is part of what the term "rule of law" encompasses. And so this Licensing Board is bound, as a panel of judges, to comply with, and apply fairly, any rules that relate to a matter before us. See American Bar Association Model Code of Judicial Conduct (Feb. 2007), Rule 2.2, and comments thereto. Thus, while unrepresented parties have the right to expect fairness and reasonable accommodation, as has been provided in this proceeding, see June 4 Memorandum and Order at 4 n.12, this does not include exempting such parties from complying with fundamental procedural rules, absent good cause shown, which has not been shown by Pilgrim Watch in this instance. Disagreements with rules themselves are generally best addressed in other ways, including, for example, through a petition for rule-making under 10 C.F.R. § 2.802.

As to Pilgrim Watch's references to the Vermont Yankee proceeding, we note that it was in fact in 2006 that NEC submitted a contention in that case stating essentially the same as Pilgrim Watch's "Issue of Law" quoted above and treated as a contention herein, making many of the same arguments now made by Pilgrim Watch. See *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 182-87 (2006). Thereafter, NEC submitted a series of amendments to this contention. See *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-07-15, 66 NRC 261 (Nov. 7, 2007); Order (Granting Motion to Amend NEC Contention 2A) (April 24, 2008).

In contrast to the situation in Vermont Yankee, although Pilgrim Watch could have raised questions regarding Entergy's commitments based initially on the Pilgrim Application and later on the Staff's SER in this proceeding, it did not do so. Moreover, it should have been aware of circumstances in the Vermont Yankee case based on its apparently being in contact with NEC and other petitioners in the Vermont Yankee proceeding through the filing of various joint motions to the Commission. See, e.g., Petition by Nuclear Information and Resource Service; Jersey Shore Nuclear Watch, Inc.; Grandmothers, Mothers, and More for Energy Safety; New Jersey Public Interest Research Group; New Jersey Sierra Club; New Jersey Environmental Federation; Riverkeeper, Inc.; Pilgrim Watch and New England Coalition to Suspend License Renewal Reviews for Oyster Creek, Indian Point, Pilgrim, and Vermont Yankee Nuclear Power Plants Pending Investigation of NRC Staff Review Process and Correction of Deficiencies (Jan. 3, 2008). See *also* Staff April 21 Response at 9-10.

§ 54.21(c); it challenges the lack of notice to and ability of the public to participate in resolution of the safety matters of concern, but fails to show serious safety consequences of this, or that the NRC staff's oversight would not prevent any such serious safety consequences.<sup>28</sup>

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<sup>28</sup> We do note that recently in the Vermont Yankee license renewal proceeding the licensing board asked the parties to brief the legal issue of whether commitments to complete evaluations regarding time-limited aging analyses (TLAA) prior to entering the period of extended operations, but after the renewed license has been granted, satisfy the requirements of 10 C.F.R. § 54.21(c)(1)(i)-(iii), given that the NRC Staff's previous position on this issue was that such commitments do not satisfy 10 C.F.R. § 54.21(c)(1), even though it currently believes that such commitments are appropriate under § 54.21(c)(1)(iii). See *Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), Order (Regarding the Briefing of Certain Legal Issues) (June 27, 2008) (unpublished). This was done, however, in a context of timely-filed contentions already having put forward the issues in question. Moreover, Pilgrim Watch has not in any event (despite its *pro se* representative's impressive performance in general in the proceeding) shown the ability to address this *legal* issue.

On the other hand, if in the *Vermont Yankee* proceeding this issue is ultimately resolved in favor of the Staff's original position, it would seem that the same approach should be taken in the Pilgrim proceeding. We are not authorized to direct the NRC Staff in the performance of its duties, but the Commission may wish to direct the Staff in this regard to assure that the legal issues in question are handled appropriately in this proceeding.

It is therefore ORDERED that Pilgrim Watch's April 9, 2008, and May 5, 2008, Motions be DENIED.

THE ATOMIC SAFETY  
AND LICENSING BOARD

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*/RA/*  
Ann Marshall Young, Chair  
ADMINISTRATIVE JUDGE

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*/RA/*  
Dr. Paul B. Abramson  
ADMINISTRATIVE JUDGE

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*/RA/*  
Dr. Richard F. Cole  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
July 1, 2008<sup>29</sup>

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<sup>29</sup> Copies of this Order were sent this date by Internet electronic mail transmission to all counsel and representatives for the parties.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
 )  
ENTERGY NUCLEAR GENERATION CO. )  
AND )  
ENTERGY NUCLEAR OPERATIONS, INC. ) Docket No. 50-293-LR  
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 )  
(Pilgrim Nuclear Power Station) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON PILGRIM WATCH MOTIONS REGARDING CUMULATIVE USAGE FACTORS) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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[Original signed by Evangeline S. Ngbea]

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Office of the Secretary of the Commission

Dated at Rockville, Maryland  
this 1<sup>st</sup> day of July 2008