

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S RESPONSE IN OPPOSITION TO PILGRIM WATCH'S
MOTION FOR RECONSIDERATION OF CLI-10-11

INTRODUCTION

On March 26, 2010, the Commission issued a "Memorandum and Order,"¹ (Commission's Order"), which reversed in part, affirmed in part, and remanded, consistent with the Commission's Order, the Atomic Safety and Licensing Board's ("Board") summary disposition of Pilgrim Watch's Contention 3.² On April 5, 2010, Pilgrim Watch ("PW") filed "Pilgrim Watch Motion for Reconsideration of CLI-10-11" ("PW's Motion"). Pursuant to 10 C.F.R. § 2.323(c), the Staff of the Nuclear Regulatory Commission ("Staff") hereby files its response in opposition to PW's Motion. Because PW's Motion does not meet the standards for reconsideration, PW's Motion should be denied.

PROCEDURAL BACKGROUND

This proceeding concerns the application by Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (collectively "Entergy") to renew the operating license for the Pilgrim Nuclear Power Station ("Pilgrim"). On May 25, 2006, PW filed a petition to intervene in

¹ *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), Memorandum and Order, CLI-10-11, slip op. at 39 (Mar. 26, 2010) (hereinafter "Commission's Order").

² *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-07-13, 66 NRC 131 (2007).

this matter, submitting five contentions for consideration by the Board.³ The Board granted the petition, admitting PW's Contentions 1 and 3.⁴ However, Contention 3 was limited by the Board, and was admitted in the following form:

Applicant's SAMA analysis for the Pilgrim plant is deficient in that the input data concerning (1) evacuation times, (2) economic consequences, and (3) meteorological patterns are incorrect, resulting in incorrect conclusions about the costs versus benefits of possible mitigation alternatives, such that further analysis is called for.⁵

On October 30, 2007, the Board granted Entergy's motion for summary disposition of Contention 3; thus, dismissing Contention 3 from further consideration by the Board.⁶ On October 30, 2008, a majority of the Board issued its Initial Decision, LBP-08-22, on Contention 1, and on October 31, 2008, Judge Young issued a Concurring Opinion. The Board found that Entergy has "proven by a preponderance of the evidence that its aging management program at issue here provides reasonable assurance that aging effects to certain underground pipes at the Pilgrim plant will be adequately managed so that the components in question will perform their intended functions throughout the proposed license renewal period."⁷

On November 12, 2008, PW filed its petition for review of LBP-08-22, LBP-07-13, LBP-06-23, and other interlocutory decisions.⁸ In its request for review of LBP-06-23, PW

³ Request for Hearing and Petition to Intervene by Pilgrim Watch ("PW's Petition") (May 25, 2006).

⁴ *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 341 (2006).

⁵ *Pilgrim*, LBP-06-23, 64 NRC at 341.

⁶ *Pilgrim*, LBP-07-13, 66 NRC 131. Judge Young dissented from the Board's Order. *Id.* at 156.

⁷ *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-08-22, 68 NRC 590, 593 (2008).

⁸ Pilgrim Watch's Petition for Review of LBP-08-22, LBP-07-13, LBP-06-23 and the Interlocutory Decisions in the Pilgrim Nuclear Power Station Proceeding ("PW's Petition for Review") (Nov. 12, 2008) at 11.

limited its appeal to the Board's denial of admission of its proposed Contention 4⁹ and did not appeal the Board's revision of Contention 3.¹⁰

On March 26, 2010, the Commission issued its Memorandum and Order reversing in part, affirming in part, and remanding Contention 3, as limited by the Commission's Order, to the Board for further proceedings. On April 5, 2010, PW filed its Motion for Reconsideration of the Commission's Order that is the subject of this opposition.

PW's Motion now argues that the Commission should reconsider because the Order was, in part, erroneous.¹¹ It asserts that the Commission erred by (1) improperly limiting Contention 3¹² and (2) improperly limiting both the scope and evidence for hearing.¹³ PW also raises a new argument, not previously raised to the Commission that it should now be allowed to challenge the Generic Environmental Impact Statement for License Renewal of Nuclear Plants ("GEIS")¹⁴ and PRA.¹⁵ Finally, PW argues that the GEIS prejudices the SAMA analysis and that the NRC's use of PRA techniques in order to evaluate SAMAs effectively reduces the dose risk and economic risk so substantially that Pilgrim "will never be required" to implement

⁹ Contention 4 primarily asserted that a SAMA analysis was required to assess mitigation measures for spent fuel pool accidents related to fires, loss of water, and acts of sabotage or terrorism. PW's Petition at 50, 64-67.

¹⁰ See *id.* at 12-13 (challenging the Board's interpretation of its decision but not the decision itself or the language of Contention 3, as admitted).

¹¹ PW's Motion at 2.

¹² *Id.* at 3.

¹³ *Id.* at 7.

¹⁴ NUREG 1437, *Generic Environmental Impact Statement for License Renewal of Nuclear Plants* ("GEIS"), (May 1996).

¹⁵ This position is contrary to PW's explanation in its Petition for Review that the use of PRA was not the subject of Contention 3. Pilgrim Watch Reply to Entergy Answer to Request For Hearing and Petition to Intervene by Pilgrim Watch ("PW's Reply") (July 3, 2006) at 14.

any SAMAs that would prevent or reduce the impact of a severe accident.¹⁶

DISCUSSION

I. Legal Standards Governing Motions for Reconsideration

Motions for reconsideration must demonstrate “compelling circumstances, such as a clear and material error in a decision, which could not have been reasonably anticipated and, that renders the decision invalid.”¹⁷ “Reconsideration petitions must establish an error in a ... decision, based upon an elaboration or refinement of an argument already made, an overlooked controlling decision or principle of law, or a factual clarification.”¹⁸ Reconsideration is not appropriate to simply reargue matters already decided or advance new arguments that could have been made previously.¹⁹ PW has failed to demonstrate a “clear and material error” in the Commission’s Order and, thus, failed to meet the requirements for reconsideration.²⁰

II. PW Has Failed to Identify Clear and Material Errors of Law or Fact Warranting Reconsideration

PW’s Motion does not identify clear errors of law or fact that require the Commission to reconsider its decision. PW’s Motion identifies no legal support for the view that the Commission decision contained an error of law.²¹ The factual errors alleged by PW are not material errors. Nor do they contradict any material facts in the decision. In fact, PW simply takes exception to the effects of the Commission’s Order that resulted from PW’s failure to

¹⁶ PW’s Motion at 9.

¹⁷ 10 C.F.R. § 2.323(e); *see also Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622 (2004).

¹⁸ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-1, 55 NRC 1, 2 (2002).

¹⁹ *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Station Unit 2), CLI-09-8, 69 NRC 317, 328 (2009).

²⁰ *See, e.g., Entergy Nuclear Vermont Yankee, L.L.C.*, (Vermont Yankee Nuclear Power station and Pilgrim Nuclear Power station), CLI-07-13, 65 NRC 211, 214 (2007).

²¹ *Id.*

dispute the material facts related to Entergy's analysis of evacuation times and economic consequences that are unrelated to the meteorological data.

A. The Commission's Order Properly Limited PW's Contention 3

PW argues that the Commission selectively quoted its legal authority but PW does not identify any errors in this legal authority.²² PW does not identify any legal authority for its positions.

PW also alleges, in succession, that the Commission failed to include the consequences of a spent fuel pool accident, failed to include health costs in the off-site economic costs, failed to understand Contention 3 as originally proffered, failed to identify the bases in support of Contention 3,²³ failed to recognize that the Board included decontamination and other economic infrastructure costs in Contention 3, and failed to include the full scope of the loss of economic infrastructure.²⁴

Spent fuel pool accidents were properly part of Contention 4, which asserted that a SAMA analysis was required to assess mitigation for spent fuel pool water losses and fires.²⁵ Contention 4 was dismissed by the Board and review is pending before the Commission.²⁶ In

²² PW complains that it was incorrect to require them to comply with the regulations and existing case law by insisting on some minimal factual and legal support for PW's Contentions. *See Amergen Energy Company, LLC* (Oyster Creek Nuclear Generating Station), LBP-06-22, 64 NRC 229, 234-35 (2006); 10 C.F.R. § 2.309(f).

²³ Alternatively, PW asserts that the Commission erred because Entergy and Staff filings refer to some of the issues that it now wants to incorporate into its contentions. PW's Motion at 4-5. Entergy and Staff filings are simply not material to the proper scope of Contention 3 as set-out in the Board's order and PW's coupled bases. *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002) ("Where an issue arises over the scope of an admitted contention, NRC opinions have long referred back to the bases set forth in support of the contention.").

²⁴ PW's Motion at 3 and 5-7.

²⁵ PW's Petition at 50. PW's bases for Contention 4 concerned fires, loss of water, and acts of sabotage or terrorism. *Id.* at 64-67.

²⁶ Commission's Order at 24 n. 93 (reserving the admissibility of Contention 4 to a forthcoming decision).

related proceedings arising from the hearings for Vermont Yankee Nuclear Plant and Pilgrim, the First Circuit agreed that a petition for rulemaking is the proper forum for addressing Category 1 spent fuel pool accidents related to fires, loss of water, and potential terrorism.²⁷ The First Circuit stated that “[w]here environmental impacts ... are not plant-specific, the Supreme Court has endorsed ‘the generic method ... as clearly appropriate for conducting the hard look required by NEPA.’”²⁸ The First Circuit also identified that administrative efficiency and agency consistency are furthered “by a generic determination of these effects without needless repetition of the litigation in individual proceedings”²⁹ Site-specific spent fuel pool accidents are outside the scope of license renewal hearings because they are addressed generically as part of the GEIS and are a Category 1 issue. Thus, site-specific analysis is not required and cannot form the proper basis for PW's Contention 3.³⁰

Similarly, off-site health effects were properly rejected by the Board because the scope of a contention is properly limited by its words and its identified bases, and Contention 3 did not address increased cancer rates.³¹ PW based its challenge to the off-site health effects solely on the use of a Gaussian plume model in the MACCS2 code, which does not model cancer

²⁷ *Massachusetts v. NRC*, 522 F.3d 115, 127 (1st Cir. 2008). Massachusetts petitioned for a hearing in both Vermont Yankee Nuclear Plant and Pilgrim, which asserted identical contentions regarding the spent fuel pool.

²⁸ *Id.* (quoting *Balt. Gas & Elec. Co. v. Nat'l Res. Def. Council, Inc.*, 462 U.S. 87, 101 (1983) (citing *Vt. Yankee Nuclear Power Corp. v. Nat'l Res. Def. Council, Inc.*, 435 U.S. 519, 535 n.13 (1978))).

²⁹ *Id.*

³⁰ *Id.* at 130; *Entergy Nuclear Vermont Yankee LLC And Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station) and *Entergy Nuclear Generation Company And Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-07-03, 65 N.R.C. 13, 21 (2007); *Entergy Nuclear Vermont Yankee, LLC* (Vt. Yankee Nuclear Power Station), LBP-06-20, 64 N.R.C. 131, 155 (2006); *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), LBP-06-23, 64 N.R.C. 257, 294-300 (2006); See also 10 C.F.R. § 51, Subpt A, App. B, Table B-1; GEIS at 6-70 – 6-83, 6-85 – 6-86, and 6-91 – 6-92.

³¹ *Duke Energy Corp.*, CLI-02-28, 56 NRC 373, 379 (2002).

rates.³² The increased cancer risks were not properly a part of and cannot now be used to supplement Contention 3. Thus, PW should not be allowed at this late stage to change and/or redefine the scope of its original pleading.³³

PW's Motion suggests that the Commission erred because it did not look to PW's originally proffered contention. It is clear from PW's argument that it believes that the Commission should have decided the issue by applying contention admissibility rules.³⁴ However, the issue before the Commission was summary disposition and not contention admissibility.³⁵ In opposing summary disposition, a non-movant is required to do more than merely rest on its pleading.³⁶ It must advance concrete evidence, which disputes each material fact; otherwise, those facts not disputed are deemed to be admitted.³⁷ In the present case, PW failed to create a material issue of genuine dispute with the exception of the meteorological data inputs remanded to the Board.³⁸ PW bases its motion on information alleged to be in the original petition but does not cite to its opposition to summary disposition with the exception of spent fuel pool accidents and off-site health effects, which as described above are no longer

³² PW's Petition at 28-49. Increased cancer rates were part of PW's Contention 5, which was rejected by the Board. See PW's Petition at 79.

³³ *National Enrichment Facility*, CLI-04-35, 60 NRC at 622.

³⁴ PW's Motion at 3-4. PW spends much of its brief trying to explain why Contention 3 covered items that were not part of its original bases and why, for the first time, it should now be allowed to challenge the GEIS after waiting almost 4 years. PW's Motion at 8-9. PW does not explain why it failed to challenge the Board's explicit redrafting and limitation on the scope of Contention 3, until the instant motion. See PW's Petition for Review at 12-13.

³⁵ Commission's Order at 26-27; PW's Petition for Review at 13-14.

³⁶ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (evidence that is "merely colorable" or is "not significantly probative" will not preclude summary judgment).

³⁷ *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993).

³⁸ Commission's Order at 26-27.

material to the resolution of Contention 3.³⁹

Finally, PW asserts that the Commission rewrote Contention 3.⁴⁰ However, PW did not identify a change in the wording of Contention 3 because the Commission did not change any words.⁴¹ The Commission merely clarified the meaning of meteorological data inputs as used in the contention by identifying the single issue that PW raised as a genuine issue of material dispute.⁴² Thus, PW's Motion should be denied.

B. The Commission's Decision to Limit Evidence to Issues Presented in Pilgrim Watch's Opposition to Summary Disposition is Entirely Proper

Notwithstanding the Commission's Order, PW states that it "expects to present evidence [at hearing] showing that the inputs relating to economic consequences, including Entergy's inputs concerning decontamination, interdiction and health costs were incorrect and that a proper analysis ... considering spent fuel pool accidents" would result in an altered cost-benefit analysis.⁴³ But, during the Board proceedings, PW neglected to dispute material facts related to evacuation times and off-site economic consequences, except as directly related to the meteorological data inputs. Accordingly, the undisputed material facts that were before the Board were properly admitted and no longer need to be resolved at a remand hearing.⁴⁴

PW essentially asserts that the Commission and Board lack the authority to limit its case to issues necessary for resolution of Contention 3, i.e. relevant and material to the

³⁹ See PW's Motion at 3-5; *compare id.* at 6 n.6. PW's concern with off-site health risks is in respect to increased cancer risks, which were not part of the original basis for Contention 3 and, in any event, are category 1 issues not subject to site-specific analysis. 10 C.F.R. § 51, Subpt A, App. B, Table B-1.

⁴⁰ PW's Motion at 2.

⁴¹ Commission's Order at 27.

⁴² *Id.*

⁴³ PW's Motion at 8.

⁴⁴ *Advanced Medical Systems, Inc.*, CLI-93-22, 38 NRC at 102-03.

Commission's or the Board's determination.⁴⁵ Generally, PW would be correct that the Commission and Board cannot direct how PW should present its case, but that freedom is not sacrosanct.⁴⁶ The Commission or the Board may properly limit the presentation to relevant and material information related to the issues in controversy.⁴⁷ The Commission properly limited Contention 3 to meteorological data and related effects. Because PW's opposition to summary disposition failed to raise genuine issues of material dispute,⁴⁸ PW's Motion should be denied.

III. PW's New Argument to the Commission Challenging the GEIS and PRA

PW's Motion argues that the use of PRA techniques "incorrectly discounts possible mitigation alternatives" and the Commission overstepped its authority and exceeded the scope of the issues presented by PW's Petition for Review.⁴⁹ PW asserts that the Commission has effectively prejudged "the societal and economic impacts from severe accidents ..." and concludes that SAMA analysis is a "fantasy case."⁵⁰ Finally, PW states that utilizing PRA likely ensures that "the result of the SAMA analysis will be a dose risk and economic risk that is so low that the industry will never be required to provide real mitigation alternatives that might prevent or reduce the impact of an accident."⁵¹ PW states that because of the application of PRA techniques (i.e. "'mean values of the consequences for each postulated release scenario or category,' [are] 'multiplied by the estimated frequency of occurrence of specific accident

⁴⁵ *Id.*

⁴⁶ See *Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2)*, ALAB-520, 9 NRC 48, 50 n.2 (1979) (stating that the determination of materiality will normally proceed admitting evidence into the record).

⁴⁷ Commission's Order at 27.

⁴⁸ *Advanced Medical Systems, Inc.*, CLI-93-22, 38 NRC at 102-03.

⁴⁹ PW's Motion at 7 and 9.

⁵⁰ PW's Motion at 9

⁵¹ *Id.*

scenarios to determine population dose risk and offsite economic risk for each type of accident studied ...”), the cost to implement a SAMA will far outweigh the calculated benefit.⁵² Before the Board, PW argued that PRA techniques were not part of Contention 3 and did not challenge the GEIS’ SAMA analysis for spent fuel pool accidents in Contention 3.⁵³ It is fundamental to fair proceedings, that PW not be allowed to improperly expand the scope of a proceeding on issues it failed to raise in a timely manner and for the first time in a motion for reconsideration of the Commission’s Order.⁵⁴ Because PW’s current argument is contrary to its position before the Board and was not raised in its Petition for Review, PW’s Motion should be denied.

CONCLUSION

Because the Commission did not commit clear and material error, did not rewrite Contention 3, and properly limited the scope of Contention 3 to the issues actually raised in opposition to summary disposition, PW’s Motion should be denied.

Furthermore, PW’s new argument to the Commission regarding the GEIS and PRA is improper, because it was contrary to PW’s position before Board, was properly rejected by the Board, not appealed by PW, and outside the scope of license renewal. Thus, PW’s Motion should be denied.

Respectfully submitted,



Brian G. Harris
Counsel for NRC Staff

Dated at Rockville, Maryland
This 15th day of April, 2010

⁵² PW’s Motion at 9.

⁵³ PW’s Reply at 14

⁵⁴ *Tennessee Valley Authority* (Hartsville Nuclear Plants, Units 1A, 2A, 1B, and 2B), ALAB-467, 7 NRC 459, 462 (1978).

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE IN OPPOSITION TO PILGRIM WATCH'S MOTION FOR RECONSIDERATION OF CLI-10-11" 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 15th day of April, 2010.

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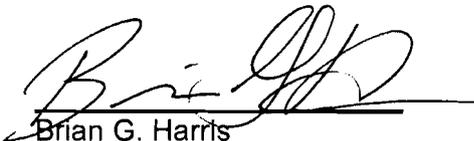
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