October 1, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

# NRC STAFF BRIEF REGARDING TIMELINESS OF PILGRIM WATCH'S RAISING OF MEANS CONSEQUENCE CONCERN

## INTRODUCTION

Pursuant to the Atomic Safety and Licensing Board's ("ASLB") direction during the September 15, 2010 telephone conference between the Board and the parties, the Nuclear Regulatory Commission staff ("Staff") hereby files its brief regarding the timeliness of Pilgrim Watch's ("PW") raising the issue of the Staff's use of the mean consequence values in severe accident mitigation alternative ("SAMA") analysis. As discussed below, the decision to admit the issue is subject to the criteria in10 C.F.R. § 2.309. Because PW did not raise its amendment expanding the scope of Contention 3 beyond its initially proffered bases in a timely manner, its belated admission should be denied.

## PROCEDURAL BACKGROUND

On January 25, 2006, Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (collectively, "Entergy") filed an application to renew the operating license for the Pilgrim

Nuclear Power Station ("Pilgrim").[1] PW filed a petition to intervene in this matter on May 25, 2006.[2] On October 26, 2006, the Board admitted two contentions, Contentions 1 and 3, submitted by PW.[3] Contention 3, as originally proffered, stated:

> The Environmental Report inadequately accounts for off-site health exposure and economic costs in its SAMA analysis of severe accidents. By using probabilistic modeling and incorrectly inputting certain parameters into the modeling software, Entergy has downplayed the consequences of a severe accident at Pilgrim and this has caused it to draw incorrect conclusions about the costs versus benefits of possible mitigation alternatives.[4]

Contention 3 was limited by the Board, by removing that portion objecting to the use of probabilistic risk analysis ("PRA") in SAMA analysis, 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 May 17, 2007, Entergy moved for summary disposition of Contention 3.[6] On June 29, 2007, the Staff and PW filed their responses to Entergy's Motion.[7] On July 9, 2007,

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[1] *See* Letter from Michael Balduzzi, Entergy Nuclear Operations, to U.S. NRC, Re: License Renewal Application, (January 25, 2006) (Agencywide Documents and Access Management System ("ADAMS") Accession No. ML060300028); *see also* Entergy, "Pilgrim Nuclear Power Station License Renewal Application" (Jan. 25, 2006) (ADAMS Accession No. ML060300028) ("LRA").

[2] Request for Hearing and Petition to Intervene by Pilgrim Watch (May 25, 2006) ("Request for Hearing").

[3] *Entergy Nuclear Generation Co. and Entergy Nuclear Operations Inc.* (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257 (2006) ("Contention Order").

[4] Request for Hearing at 26.

[5] Contention Order at 341.

[6] Entergy's Motion for Summary Disposition of Pilgrim Watch Contention 3 ("Motion for Summary Disposition") (May 17, 2007).

[7] NRC Staff Response to Entergy's Motion for Summary Disposition of Pilgrim Watch Contention 3 ("Staff Response") (June, 29, 2007); Pilgrim Watch's Answer Opposing Entergy's Motion for Summary (continued. . .)

PW filed a reply to the Staff's Response.[8] On October 30, 2007, in LBP-07-13, a majority of the Board granted the motion for summary disposition of Contention 3,.[9]

On May 25, 2008, PW filed a Petition for Review of LBP-07-13.[10] Pilgrim Watch did not appeal the Licensing Board's denial of admission of that part of the contention challenging the use of PRA in SAMAs.[11] On March 26, 2010, the Commission issued Memorandum and Order remanding portions of Contention 3 to the Board for hearing.[12] In that Memorandum, the Commission gave a brief description of the NRC's procedure for analyzing SAMAs.[13]

On May 14, 2010, Pilgrim Watch moved to disqualify Judge Abramson.[14] Judge Abramson denied the motion and referred it to the Commission. On August 27, 2010, the Commission affirmed Judge Abramson's decision.[15] In addition to ruling on the disqualification motion, the Commission provided clarification regarding the scope of the remand of Contention

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(. . .continued)

Disposition of Pilgrim Watch Contention 3 ("PW's Opposition") (June 29, 2007).

[8] Pilgrim Watch's Answer to NRC Staff Response to Entergy's Motion for Summary Disposition Of Pilgrim Watch Contention 3 (July 9, 2007).

[9] LBP-07-13, 66 NRC 131 (2007). Judge Young dissented from the Board's Order. *Id.* at 156.

[10] Pilgrim Watch's Petition for Review of LBP-06-848 [sic], LBP-07-13, LBP-06-23 and the Many Interlocutory Decisions in the Pilgrim Nuclear Power Station Proceeding (Nov. 12, 2008) ("Petition for Review").

[11] *Id.* at 12-13.

[12] CLI-10-11, 70 NRC (2010).

[13] *Id.,* slip op. at 37-39.

[14] Motion on Behalf of Pilgrim Watch for Disqualification of Judge Paul B. Abramson in the Pilgrim Nuclear Power Station Relicensing Proceeding (May 14, 2010).

[15] CLI-10-22, 70 NRC (2010).

3.[16] The Commission also mentioned that Pilgrim Watch "questions" the NRC practice of utilizing mean consequence values in SAMA analyses and suggested that it would be "appropriate for the Board on remand to consider whether the NRC's practice is reasonable for a SAMA analysis, and whether PW's concerns are timely raised."[17]

During the September 15, 2010 telephone scheduling conference, the Board ordered the parties to brief the question of whether PW had raised the issue of the use of mean consequence values in a timely fashion.[18] In doing so, the Board instructed the parties to address whether the issue was raised, explicitly or implicitly, in the original Contention 3; and, if not, when the issue was first raised and whether raising the concerns was timely.[19] The Board further instructed the parties to "cite specific portions and language in the original Contention 3 and related filings where such concerns were or should have been discussed."[20]

## DISCUSSION

### I. Legal Standards for Late-Filed Amendments to Contentions

The criteria to be considered when determining the timeliness of amended or new contentions filed after the original petition for intervention and request for hearing are set forth in 10 C.F.R.§ 2.309(f)(2). Under this provision, an amended contention filed after the initial filing period may be admitted with leave of the Board only upon a showing that:

> (i) The information upon which the amended or new contention is based was not previously available;

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[16] CLI-10-22, slip op. at 7-8.

[17] *Id.* at 8, fn. 34.

[18] Order (Confirming Matters Addressed at September 15, 2010, Telephone Conference) at 2, (Sept. 23, 2010).

[19] *Id.*

[20] *Id*.

(ii) The information upon which the amended or new contention is based is materially different than information previously available; and

(iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.[21]

A contention that does not qualify as a timely new contention under 10 C.F.R. § 2.309(f)(2) may be admissible under the provision governing nontimely contentions, 10 C.F.R. § 2.309(c). Nontimely filings may only be entertained following a determination by the Board that a balancing of the eight factors in 10 C.F.R. § 2.309(c) weigh in favor of admission.[22]

The requirements for untimely filings and late-filed contentions are '"stringent."'[23] All eight factors must be addressed by the petitioner.[24] Failure to comply with the pleading

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[21] 10 C.F.R. § 2.309(f)(2).

[22] The eight factors listed at § 2.309(c)(1) are as follows:

(i) Good cause, if any, for the failure to file on time;

(ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;

(iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;

(iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;

(v) The availability of other means whereby the requestor's/petitioner's interest will be protected;

(vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;

(vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and

(viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

[23] *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station)*, CLI-09-7, 69 NRC 235, 260 (2009*). *See also Nuclear Management Co., LLC.*(Palisades Nuclear Power Plant), (CLI-06-17), 63 NRC 727, 732 (2006).

requirements is sufficient grounds for denial of the motion to amend.[25] Of all the eight factors, the first, good cause for failure to file on time, is most important.[26]

Finally, it is well established that"'[n]ew bases for a contention cannot be introduced in a reply brief, or any other time after the date the original contentions are due, unless the petitioner meets the late filing criteria set forth in 10 C.F.R. §§ 2.309(c), (f)(2)."[27]

II. The Concern Regarding the Use of Mean Consequence Values is Not Implicit in Contention 3, as Admitted

The Staff anticipates that PW will claim that its concern with the use of mean consequence values was implicit in Contention 3, as admitted. Thus, the Staff has reviewed the pleading filed by PW in this proceeding for evidence of an intention to include the issue as a basis for Contention 3 and has found none.

The following is a chronological summary of PW's pleadings in this proceeding and the issues raised therein. As demonstrated below, the issue of the use of mean consequence values was not raised by PW until a pleading filed on April 5, 2010,[28] and, therefore, was not raised in a timely manner.

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(. . .continued)

[24] *Oyster Creek*, CLI-06-17, 63 NRC at 260.

[25] *Id*. at 260-61.

[26] *Id.* at 261.

[27] *Id., citing Palisades,* CLI-06-17, 63 NRC at 732.

[28] *See infra*. at 10; Pilgrim Watch Motion for Reconsideration of CLI-10-11(April 5, 2010)("Reconsideration Motion").

A. Pilgrim Watch's Initial Petition to Intervene and Reply to Entergy's and the Staff's Answers

Contention 3, as originally submitted by PW, read:

> The Environmental Report inadequately accounts for off-site health exposure and economic costs in its SAMA analysis of severe accidents. By using probabilistic modeling and incorrectly inputting certain parameters into the modeling software, Entergy has downplayed the consequences of a severe accident at Pilgrim and this has caused it to draw incorrect conclusions about the costs versus benefits of possible mitigation alternatives.[29]

In support of its claim that the use of probabilistic modeling ("PRA") downplays the consequences of a severe accident, PW stated:

> In its SAMA analysis, the Applicant did not fully consider ["'atmospheric releases, fallout onto open bodies of water, releases to ground water, and societal and economic impacts'"]. Instead, the likely impacts of a severe accident have been drastically minimized by using probabilistic modeling which makes the costs of all severe accident appear negligible. … [T]he overarching defect in the Applicant's SAMA analysis is that it looked at severe accident *risks*, rather than severe accident *mitigation alternatives*, as required by the regulations. As described below, any time an Applicant multiplies an accident consequence by an extremely low probability number, the consequences will appear minute. The regulations require a broad assessment of mitigation alternatives, not an easy dismissal by "probability weighting."[30]

PW went on to state that the regulations do not require the use of PRA and that it would make no sense for licensees to be required to do SAMAs if all that was to be done was to multiply all consequences by extremely low probability and reject all SAMAs as too costly.[31]

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[29] Request for Hearing at 26.

[30] *Id.* at 29.

[31] *Id.*

Although there was ample opportunity to do so, there was no mention in the Request for Hearing of a concern with the use of mean consequence values. At the time contentions are being proposed, it is required that a party present all bases for the contention or risk probable exclusion of the issue. Thus, if PW had a concern with the use of mean consequence values, this was the logical time and place to raise it, but they did not.[32] No mention of the issue was made by PW at the contention stage. Nor was there specific attack on PRA methodology.

In PW's reply[33] to Entergy's answer to the Request for Hearing, PW stated that "multiplying the probability of an accident by the consequences of an accident can distort the analysis by making even reasonable mitigation appear more costly than the costs of the accident."[34] PW then stated that this argument is not central to its contention.[35] It concluded by summarizing its argument that the SAMA analysis done by the Applicant is defective because it was done by multiplying probability times consequences to determine risk.[36] There was no reference to or discussion of the use of mean consequence values in SAMAs. Even if the issue had been raised in the reply brief, under NRC precedent it would not have been admitted unless the late-filed criteria in 10 C.F.R. § 2.309(f)(2) had been met.[37]

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[32] *See* fn.27, *supra.*

[33] Pilgrim Watch Reply to Entergy Answer to Request for Hearing and Petition to Intervene by Pilgrim Watch (July 3, 2006) ("Pilgrim Watch Reply").

[34] *Id.* at 14.

[35] *Id.*

[36] *Id.* at 16.

[37] *Oyster Creek*, CLI-09-7, 69 NRC at 261; *Palisades*, CLI=06=17, 63 NRC at 732.

In admitting Contention 3, the Board limited it by denying admission of the broad attack on PRA.[38] The Board found that the contention was admissible as to the claim regarding the specific input data used in the SAMA analysis regarding evacuation time estimates, meteorological data and economic impact data, but inadmissible as to a generic challenge to the use of PRA to evaluate risk, an "accepted and standard practice in SAMA analysis."[39] There was no discussion regarding mean consequence values.

B. Summary Disposition of Contention 3

On June 29, 2007, in its opposition to the Applicant's Summary Disposition Motion, PW, for the first time, used the term "mean", but not in the context of mean consequence values.[40] It was used in reference to the mean of total costs avoided versus the cost of implementing the SAMA.[41] PW asserted that instead of comparing the mean of the costs avoided with the cost of the SAMA, the applicant should use the sum of the costs avoided.[42] PW again raised its objection to the use of PRA.[43]

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[38] LBP-06-23, 64 NRC 257, 338-41 (2006).

[39] *Id.* at 339-40. The Commission, on appeal from the grant of summary disposition as to Contention 3, found that the inputs also included the meteorological portion of the MACCS2 code, in that the adequacy of the straight line Gaussian plume model for meteorological dispersion used for SAMA analysis), was at issue. The Commission remanded the contention to the Board for hearing, as limited by the decision. CLI-10-11, 69 NRC (2010). The Commission agreed with the Board that the generic attack on the use of PRA was inadmissible. *Id.*

[40] Pilgrim Watch's Answer Opposing Entergy's Motion for Summary Disposition of Pilgrim Watch Contention 3 (June 29, 2007) at 6.

[41] *Id*.

[42] *Id.* PW did not raise this issue on appeal. *See* Petition for Review. As discussed *infra.,* even if it is assumed that PW raised the mean issue in the opposition to the Summary Disposition Motion, it would still be untimely. In addition, it was not pursued the subsequent pleadings or on appeal and was only raised after the Commission discussed it in the Remand Order.

[43] *Id.*

On July 17, 2007, PW filed an answer to Entergy's motion to strike portions of its response to the Summary Disposition Motion.[44] In that pleading, PW discussed "probability modeling," stating that its intent was to show that PRA was being used incorrectly, not to attack the use of PRA.[45] PW was concerned that the consequences were being "shortchanged because the input data concerning evacuation times, economic consequences and meteorological patterns are incorrect, underestimated or ignored."[46] Again, the use of mean consequences was not raised.

C. Pilgrim Watch's Appeal of the Summary Disposition of Contention 3

In its brief supporting the Petition for Review, PW appealed the decision of the Board in LBP-07-13, granting summary disposition on Contention 3, as admitted in LBP-06-23,[47] but it did not appeal the narrowing of the Contention by the Board.[48] Thus, there was no appeal of the decision finding the attack on the use of PRA inadmissible.

PW restated the issue on appeal as: "Applicant's SAMA analysis for the Pilgrim plant is deficient in that the input data ... resulting in incorrect conclusions about the costs versus benefits of possible mitigation alternatives, such that further analysis is called for."[49]

PW alleged that the Board erred in granting the summary disposition motion in ignoring the rules of summary disposition, misinterpreting the Contention Order and excluding issues

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[44] Pilgrim Watch's Answer Opposing Entergy's Motion to Strike Portions of Pilgrim Watch's Answer Opposing Entergy's Motion for Summary Disposition of Pilgrim Watch Contention 3 (July 17, 2007.

[45] *Id.* at 11.

[46] *Id.*

[47] Petition for Review at 10.

[48] *Id.* at 11.

[49] *Id.* at 10, citing LBP-06-23, 64 NRC at 341.

admitted by the order, requiring PW to produce detailed calculations, and not requiring the Applicant to analyze spent fuel pool fires and acts of malice in the SAMAs.[50]

PW did challenge the Board's statement that "the use for SAMA analysis of probabilistic . . . methodologies . . . was raised and eliminated" at the contention stage.[51] PW cited Judge Young's dissent, which stated that the Contention Order found that generic challenges to the use of PRA were inadmissible, but specific challenges to the SAMA analysis regarding the three types of inputs (meteorological patterns, evacuation speed and economic consequences) were admitted.[52] However, PW acknowledged that the issue in controversy was not "what method" to use, but "the adequacy of the inputs used by the Applicant to form the basis of the SAMAs.[53] Thus, PW was not engaging in an attack on PRA, but on the specific inputs into the MACCS2 code in the three areas admitted.[54] Again, PW did not raise the use of mean consequence values on appeal. The issues on appeal to the Commission were confined to the inputs to the MACCS2 code and the use of straight line Gaussian plume model, as opposed to a variable trajectory mode, as well as objections to the denial of admission of newly raised health consequence claims.[55]

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[50] *Id.* at 11.

[51] *Id.* at 12, citing Summary Disposition Order a 28.

[52] *Id.* at 12, citing Summary Disposition Order at 26.

[53] *Id.* at 13.

[54] *Id.*

[55] *Id.* at 15.

In its reply to the Staff's and Entergy's answers opposing the Petition for Review, PW stated that it was not challenging the use of PRA.[56] Again, PW did not raise the use of mean consequence values.

In its June 25, 2009 brief in response to CLI-09-11(requesting additional briefing) PW stated that the "disputed issues of material fact raised by P[ilgrim] W[atch] include (i) whether meteorological inputs that Entergy's Gaussian plume model ignored, e.g., the variability of winds, sea breeze effects, the behavior of plumes over water, and re-suspension of contaminants, could lead to different conclusions as to where a concentrated plume from [Pilgrim] would travel, and thus significantly increase the affected area and costs; and (ii) whether appropriate, and more complete meteorological, economic and evacuation time estimate inputs into the MACCS2 code would lead to a different cost-benefit analysis and thus bring more SAMAs into play."[57] While PW discussed the issues in detail, nowhere did it object to or mention the use of mean consequence values in SAMA analysis.

In its response to Entergy's response to CLI-09-11, PW clearly stated that its challenge was that the MACCS2 code, as used by the Applicant, did not "utilize important site-specific meteorological factors and other information."[58] It further admitted that the issue was the inputs to the code.[59] Again, the issue of the use of mean consequence values was not raised.

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[56] Pilgrim Watch Reply to NRC Staff's Answer in Opposition to Pilgrim Watch's Petition for Review of LBP-08-22, LBP-07-13, LBP-06-23 and Interlocutory Decisions (Dec. 1, 2008) at 2; Pilgrim Watch Reply to Energy's Answer Opposing Pilgrim Watch's Petition for Review (Dec. 1, 2008) at 3, fn. 3.

[57] Pilgrim Watch Brief in Response to CLI-09-11(Requesting Additional Briefing)(June 25, 2009). at 3.

[58] Pilgrim Watch Brief in Response to Entergy's Response to CLI-09-11(Requesting Additional Briefing)(July 6, 2009) at 1.

[59] Id.

In its response to the Staff's response to CLI-09-11, PW disputed the Staff's statement that PW did not appeal the Board's narrowing of Contention 3, stating that its position remains that the contention, as narrowed, includes challenges to the particular methodologies used, such as the straight line Gaussian plume.[60] But this statement contradicts PW's position in its brief on Appeal, where it admitted that the issue in controversy was not "what method" to use, but "the adequacy of the inputs used by the Applicant to form the basis of the SAMAs.[61] Again, the issue of the use of mean consequence values was not raised.

D. The Commission Remand of Contention 3

On March 26, 2010, the Commission issued its Memorandum and Order remanding Contention 3 to the Board.[62] Among other topics in the Order, the Commission gave a brief description of NRC practice in SAMA analysis.[63] The discussion was more of an explanation of how SAMAs are analyzed. The Commission said:

> The SAMA analysis is a site-specific *mitigation* analysis. . . .As a mitigation analysis, NRC SAMA analysis is neither a worst-case nor a best-case impacts analysis. It is NRC practice to utilize the *mean* values of the consequence distributions for each postulated release scenario or category – the mean estimated value for predicted total population does and predicted off-site economic costs. These mean consequence values are multiplied by the estimated frequency of occurrence of specific accident scenarios to determine population does risk and offsite economic cost risk for each type of accident sequence studied. There is in SAMA analysis, therefore, an averaging of potential consequences.[64]

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[60] Pilgrim Watch Brief in Response to NRC Staff's Initial Brief in Response to CLI-09-11 (Requesting Additional Briefing)(July 6, 2009) at1.

[61] Petition for Review at 13.

[62] CLI-10-11, 69 NRC (2010).

[63] *Id.* at 37-39.

[64] *Id.* at 38-39 (citations omitted).

It was not until the Commission provided the explanation and published the Order that PW first raised the issue of mean consequence values, although the information regarding NRC practice was previously available.[65]

In its very next pleading to the Commission, filed on April 5, 2010,[66] PW, for the first time, raised the issue of the use of mean consequence values in SAMA analysis, citing portions of the above quote from Commission in CLI-10-11.[67] PW stated that the use of mean values of the consequences "would ensure 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 . . ."[68] Although the issue relates to PW's position that PRA methodologies that multiply the frequency times the consequences lead to unacceptable low risk numbers, it is an issue that had not been raised previously by PW, and probably would not have been raised had not the Commission discussed it in its opinion, by way of providing a description of SAMA analysis.

E. PW's Discussion of Mean Consequences After the Commission's Partial Remand of Contention 3

The issue was next raised during the May 4, 2010 telephone conference call, where there were several discussions pertaining to it.[69] On May12, 2010 PW filed a response to the

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[65] *See id.* at 39, fn.151.

[66] Pilgrim Watch Motion for Reconsideration of CLI-10-11("Reconsideration Motion")(April 5, 2010.

[67] *Id.* at 8, citing CLI-10-11 at 38-39.

[68] *Id.* at 9.

[69] Transcript ("Tr.") at 582, 592, 603, 605-06, 636-37.

Board's May 5, 2010 Order.[70] PW objected to the use of "median results from probabilistic analyses."[71] This is the first time that median results were raised by PW.

In its Motion for Clarification, Pilgrim raised the issue of averaging consequences.[72] In doing so, PW stated that the issue was implicit in the Contention.[73] It went on to cite the report of Dr. O'Kula, one of Entergy's witnesses, which discussed the use of mean consequences.[74]

The logical conclusion based on the chronology discussed above and 1) the absence of any mention or discussion of the use of mean consequence values by PW prior to the Commission's discussion in CLI-10-11, despite numerous opportunities to raise the issue, and 2) the discussions of mean consequence values at every opportunity and in every pleading filed by PW since the Commission's decision, is that PW never thought to raise the issue.

III. The Issue is Untimely and Does Not Satisfy the Balancing Test or Criteria for Admission

Because the deadline for filing initial petitions to intervene has long passed, PW's proposed issue relating to the use of mean consequences, to be potentially admissible, must first either 1) meet the standards for contention timeliness under 10 C.F.R. § 2.309(f)(2), or 2) demonstrate that the balancing test under 10 C.F.R. § 2.309(c) weighs in favor of admission.[75] Only upon demonstration that it satisfies the requirements of at least one of these two regulatory provisions does it become necessary to determine whether the issue is admissible under 10

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[70] Pilgrim Watch Response to ASLB's May 5, 2010 Order (May 12, 2010).

[71] *Id.* at 2-3.

[72] Pilgrim Watch Motion for Clarification ASLB Order (Sept. 2, 2010) (Sept. 9, 2010) at 6-7.

[73] *Id.* at 6.

[74] *Id.*

[75] *See* 10 C.F.R. § 2.309(c); 10 C.F.R. § 2.309(f)(2).

C.F.R. § 2.309(f)(1). In other words, if neither § 2.309(f)(2) nor § 2.309(c) is satisfied, the proposed contention must be deemed inadmissible.[76]

First, PW's proposed issue fails to satisfy 10 C.F.R. § 2.309(f)(2). To satisfy that provision, PW must show that: (1) the information upon which it is based was not previously available; (2) the information upon which it is based is materially different than information previously available; and (3) it has been submitted in a timely fashion based on the availability of the subsequent information.[77] Further, the Board has ordered that contentions based upon new or newly available information be filed *within "30 days after date information received or reasonably available*."[78] However, PW cannot demonstrate that the information was unavailable, as information regarding the NRC's practice of using mean consequence values in SAMA analysis has been available to the public for many years.[79] The information was also referenced in Entergy's LRA for Pilgrim[80] and in the Staff's final supplemental environmental impact statement for the Pilgrim license renewal.[81] It was certainly available when PW filed its contentions in 2006.

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[76] *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-22, 64 NRC 229, 234 (2006).

[77] 10 C.F.R. §§ 2.309(f)(2)(i)-(iii).

[78] Order (Establishing Schedule for Proceeding and Addressing Related Matters) (Dec. 20, 2006) (unpublished) at 7.

[79] *See* NUREG/BR-0184 (1987); NUREG/BR-0058, Rev. 4. *See also* CLI-10-11, 70 NRC at , slip op. at 39, fn. 151.

[80] LRA, Environmental Report, ref. E, 2-19.

[81] NUREG-1437, Supp. 29, vol. 2, Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 29 (Pilgrim), App. G, p. G-41 ("The cost benefit analysis performed by Entergy was based primarily on NUREG/BR-0184 (NRC 1997a) and was executed consistent with this guidance.")

Even untimely issues, though, can potentially still be admissible if a balancing of the factors under § 2.309(c) weighs in favor of admission.[82] Of the eight factors listed in § 2.309(c), good cause is afforded the most weight by the Commission. *See, e.g., Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-05-24, 62 NRC 551, 564 (2005). There is no good cause for raising this issue so late in the proceeding by PW. The Staff submits that the date when PW actually raised the issue of the use of mean consequence values in SAMA analysis was April 5, 2010, after the Commission remanded the contention to the Board.[83] Thus, the Staff submits that, based on the record, PW's concern with the use of mean consequence values in SAMA analysis was not raised in a timely manner. Here, the burden on PW is heavier than if there was a failure to meet one of the other factors. Petitioners must "address the factors…in its nontimely filing."[84] PW has, thus far, failed to demonstrate that its untimely contention should be admitted in spite of its untimeliness.[85] Accordingly, admission of the issue of the use of mean consequence values should be denied.

## CONCLUSION

The Staff has demonstrated, by its review of the pleadings filed by PW in this proceeding, that the issue of the use of mean consequence values in SAMA analysis was not raised until at least April 5, 2010, almost four years after the expiration of the time to file or amend contentions.

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[83] Even assuming the earlier date of June 29, 2007, does not demonstrate that the issue was timely raised, since that date was well past the time for filing contentions. *See* discussion at 9-10, *supra.* In fact, after the reference to mean of the total costs avoided, there is no further mention of the issue and it was never raised on appeal.

[84] 10 C.F.R. § 2.309(c)(2).

[85] The Staff notes that it does not concede that Pilgrim Watch could have established a favorable balance of the § 2.309(c) factors if it had attempted to do so in its Motion.

In addition, no good cause exists justifying PW's late filing on the issue. Therefore, the admission of the issue regarding the use of mean consequence values in the SAMA analysis should be denied.

Respectfully Submitted,

**/RA/**

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Dated at Rockville, Maryland
this 1st of October, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF BRIEF REGARDING TIMELINESS OF PILGRIM WATCH'S RAISING OF MEANS CONSEQUENCE CONCERN " 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 1st day of October, 2010.

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