

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. 50-239-LR
)	
)	ASLBP No. 06-848-02-LR
(Pilgrim Nuclear Power Station))	

NRC STAFF'S ANSWER IN OPPOSITION TO PILGRIM WATCH'S
REQUEST FOR HEARING ON NEW CONTENTION

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December 27, 2010

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1), and in accordance with the December 3, 2010 Order of the Atomic Safety and Licensing Board ("Board") in this proceeding, the staff of the Nuclear Regulatory Commission ("Staff") hereby answers the Pilgrim Watch Request for Hearing on a New Contention ("Request for Hearing"). Except for the pending hearing on Contention 3, as remanded by the Commission in CLI-10-11¹, the evidentiary record has been closed since the Board's decision terminating the proceeding in LBP-08-22.² Because the requirements for re-opening the record apply to the proposed contention, and Pilgrim Watch has not addressed or met those requirements, its request to admit the proposed contention should be denied. In addition, for the reasons discussed below, the proposed contention is inadmissible because (1) it fails to meet the requirements for admission of a new contention; (2) it fails to raise a genuine dispute with the application on a material issue of fact or law; (3) it lacks a basis in law or fact; and (4) it raises issues beyond the scope of this proceeding.

¹ *Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC ____ (March 26, 2010) (slip op. at 39) ("Commission's Order").

² *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-08-22, 68 NRC 590, 593 (2008).

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. On May 25, 2006, Pilgrim Watch filed a petition to intervene in this matter, submitting five contentions for consideration by the Board.³ The Board granted the petition, admitting Pilgrim Watch's Contentions 1 and 3.⁴ As admitted, Contention 1 challenged the adequacy of the applicant's aging management program (AMP) for buried pipes and tanks. Contention 3, which challenged the applicant's Severe Accident Mitigation Alternative (SAMA) Analysis, however, was limited by the Board to input data concerning evacuation times, economic consequences, and meteorological patterns and the costs versus benefits of possible mitigation alternatives.⁵

On October 30, 2007, the Board granted a motion for summary disposition of Contention 3 filed by the applicant; thus, dismissing Contention 3 from further consideration by the Board.⁶ After an evidentiary hearing on the issues in Contention 1, the Board issued its decision on October 30, 2008 disposing of Contention 1 in favor of the applicant and terminating the proceeding.⁷ As a result of the Board's decision, the evidentiary record in the proceeding was closed.

On November 12, 2008, Pilgrim Watch filed its petition for review of LBP-08-22, LBP-07-13, LBP-06-23, and other interlocutory decisions before the Commission.⁸ On June 17, 2010,

³ Request for Hearing and Petition to Intervene by Pilgrim Watch (May 25, 2006)(ADAMS Accession No. ML061630125).

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

⁵ *Id.*

⁶ *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-07-13, 66 NRC 131 (2007). Judge Young dissented from the Board's Order. *Id.* at 156.

⁷ *Pilgrim*, LBP-08-22, 68 NRC at 593.

⁸ Pilgrim Watch's Petition for Review of LBP-08-22, LBP-07-13, LBP-06-23 and the Interlocutory

the Commission issued CLI-10-14 denying Pilgrim Watch's petition for review.⁹

On March 26, 2010, the Commission issued CLI-10-11, reversing in part, affirming in part, and remanding Contention 3, as limited by the Commission's Order, to the Board for further proceedings.¹⁰ The Commission strictly limited the scope of remanded Contention 3 to the SAMA meteorological patterns issue. Currently pending before the Board is the remand proceeding on Contention 3 as limited by the Commission's decision in CLI-10-11. A hearing date has been scheduled for March 2, 2011.¹¹

On November 29, 2010, Pilgrim Watch filed a request for a hearing on a new contention, which states:

Until and unless some third party assumes responsibility for cleanup after a severe nuclear reactor accident to pre-accident conditions, sets a cleanup standard, and identifies a funding source, Entergy should be required to take all of the mitigation steps that would be required by a SAMA (severe accident mitigation alternative) analysis (i) based on a conservative source term using release fractions no lower than those specified in NUREG-1465 or used by the NRC in studies such as NUREG-1450, cleanup to a dose rate of not more than 15 millirem a year, and at least the 95th percentile of the total consequences determined by the EARLY and CHRON modules of the MACCS2 Code, and (ii) does not reduce any costs by use of a discount factor or probabilistic analysis.

Request for Hearing at 1. Pilgrim Watch based its contention (hereinafter the "Cleanup Contention") on a November 20, 2010 news article, *Agencies Struggle to Craft Offsite Cleanup Plan for Nuclear Power Accidents*.¹²

Decisions in the Pilgrim Nuclear Power Station Proceeding (Nov. 12, 2008)(ADAMS Accession No. ML083240599) at 11. The Commission noted that Pilgrim Watch's challenge to LBP-07-13 was addressed in a separate decision, CLI-10-11.

⁹ *Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-14, 71 NRC ____ (June 17, 2010) (slip op. at 39).

¹⁰ *Pilgrim*, CLI-10-11, 71 NRC ____ (slip op. at 39). On April 5, 2010, Pilgrim Watch filed its Motion for Reconsideration of the Commission's Order, CLI-10-11 which was denied by the Commission in CLI-10-15. In CLI-10-15, the Commission further clarified its decision in CLI-10-11.

¹¹ Order (Providing Dates For Hearing and Oral Argument) (Dec. 22, 2010) at 1.

¹² Douglas Guarino, *Agencies Struggle to Craft Offsite Cleanup Plan for Nuclear Power Accidents*, INSIDE EPA, Nov. 20, 2010 (hereinafter "INSIDE EPA NEWS article").

DISCUSSION

I. Pilgrim Watch's Request for Hearing Does Not Satisfy the Commission's Requirements for Reopening the Record

Pilgrim Watch has neither addressed nor met the requirements it must satisfy in order to reopen the record in this proceeding and gain admission of its proposed new contention. Except for the pending hearing on limited Contention 3, the record has been closed since the issuance of the Board's decision in LBP-08-22.¹³ Pilgrim Watch's new contention raises issues not previously in controversy between the parties. See 10 C.F.R. § 2.326(d). Therefore, its request is subject to the criteria governing motions to reopen the record under 10 C.F.R. § 2.326(a).

Pursuant to 10 C.F.R. § 2.326(a), a motion or petition to reopen a closed record to consider additional evidence will not be granted unless all of the following criteria are satisfied:

- (1) The motion must be timely, except that an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented.
- (2) The motion must address a significant safety issue.
- (3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

10 C.F.R. § 2.326(a); *AmerGen Energy Co., LLC*. (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 668 (2008) ("*Oyster Creek I*"). In addition to the standards of 10 C.F.R. § 2.326(a), the petition or the motion must be accompanied by one or more affidavits—given by

¹³ In CLI-10-14, the Commission denied Pilgrim Watch's appeal of matters raised in its Initial Petition for Review which included Pilgrim Watch's challenge to the Board's decision in LBP-08-22. In CLI-10-11, however, the Commission reversed in part, and affirmed in part, Pilgrim Watch's appeal of the Board's summary disposition of Contention 3, remanding Contention 3 for hearing to the Board consistent with the Commission's Order. See CLI-10-11 at 39 and CLI-10-15 at 8-9. Pilgrim Watch attempts to tie their concerns regarding federal agency responsibility in a radiological incident to SAMAs. The only issues related to SAMAs that are pending before the Board, however, are meteorological inputs and they are unrelated to the issues raised in the Cleanup Contention.

“competent individuals with knowledge of the facts alleged” or by experts in the appropriate disciplines—which set forth the factual or technical bases, or both, for the movant’s claims.

10 C.F.R. § 2.326(b). *See also AmerGen Energy Co., LLC*. (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 286, 291 (2009) (*Oyster Creek II*). The affidavit must address each of the criteria in § 2.326(a) and provide a specific explanation of why each criteria is met. 10 C.F.R. § 2.326(b); *Oyster Creek I*, CLI-08-28, 68 NRC at 672. The moving party bears the heavy burden of demonstrating that it meets all of the requirements of § 2.326. *Id.* It is not the licensee or the Staff’s burden to defeat the request to reopen. *See Oyster Creek I*, CLI-08-28, 68 NRC at 674.

The new material in support of a motion to reopen must be set forth with a degree of particularity in excess of the basis and specificity requirements contained in 10 C.F.R. § 2.309(f) for admissible contentions. *See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2)*, ALAB-775, 19 NRC 1361, 1366 (1984), *aff’d sub. nom.*; *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287 (D.C. Cir. 1984), *aff’d on reh’g en banc*, 789 F. 2d 26 (D.C. Cir. 1986). Neither speculation, a showing of a possible violation of a regulatory requirement, nor a showing that a component is safety-related (or in the instant case, an environmental issue), is enough to demonstrate a significant safety issue. *See Oyster Creek I*, CLI-08-28, 68 NRC at 672. The evidence supporting a motion to reopen must not only be new, it must satisfy the Commission’s admissibility standards set forth in 10 C.F.R. § 2.337(a)—it must be “relevant, material, and reliable.” *Id.* In other words, for a Board to grant a motion to reopen, “the moving papers must be strong enough, in the light of any opposing filings, to avoid summary disposition.” *Private Fuel Storage, LLC*. (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 (2005).

The standard for admitting a new contention after the record is closed “is higher than the standard for ordinary late-filed contentions.” *Oyster Creek I*, CLI-08-28, 68 NRC at 668. As a result, even if a contention meets the ordinary requirements for contention admissibility, that

contention will be inadmissible if the proponent does not satisfy the stricter requirements for admission of new contentions after the record has closed. *Private Fuel Storage*, CLI-05-12, 61 NRC at 350.

Pilgrim Watch did not move to reopen the proceeding and did not address the requirements of 10 C.F.R. § 2.326. But even if Pilgrim Watch had addressed the requirements of the regulation, the motion should be denied. As the Staff explains in its discussion of the timeliness requirements of 10 C.F.R. §§ 2.309(c) and (f)(2), *infra* at 7, 11, Pilgrim Watch's new contention is not timely. It is not based on previously unavailable information or information that is materially different from information that was previously available. Accordingly, it fails to meet the requirements of 10 C.F.R. § 2.326(a)(1).

Furthermore, Pilgrim Watch cannot satisfy the requirements of 10 C.F.R. §§ 2.326(a)(2) and (b) because its request for hearing is not accompanied by an expert affidavit that articulates the factual and/or technical basis for the claim that the petition raises a significant safety (or environmental issue). *Oyster Creek I*, CLI-08-28, 68 NRC at 670. Pilgrim Watch did not attach nor rely on expert affidavits. Instead, Pilgrim Watch relies on an INSIDE EPA news article with references to electronic mail which, at best, captures a portion of unresolved federal interagency deliberations regarding radiological incident cooperation and response. It does not raise a significant safety or environmental issue as it relates to the Pilgrim license renewal application under Parts 51 and 54. Further, Pilgrim Watch's statement that it intends to "principally [] rely upon government documents and testimony from David Chanin and Dr. Edward Lyman to support their late-filed contention...", without identifying specific information on which their contention is predicated, does not meet the basis or specificity requirements to support a petition to reopen the record. The Commission's standards are intentionally strict regarding re-opening under Section 2.326(b). *See Private Fuel Storage*, CLI-05-12, 61 NRC at 350. Because Pilgrim Watch does not raise a significant safety or environmental issue, the motion should be denied.

In addition, Pilgrim Watch's request cannot satisfy § 2.326(b) because it fails to demonstrate via affidavit that the proposed contention would "likely" lead to a "materially different result" in the license renewal proceeding, as is required under § 2.326(a)(3). To satisfy § 2.326(a)(3), the evidence supporting Pilgrim Watch's new contention must show a likelihood that the contention would be resolved in Pilgrim Watch's favor such that the applicant's license renewal application would be conditioned or denied. *AmerGen Energy Co., LLC*. (Oyster Creek Nuclear Generating Station), LBP-08-12, 68 NRC 5, 22 (2008), *aff'd Oyster Creek I*, CLI-08-28, 68 NRC at 658. As the Staff explains below, there is little or no likelihood that the contention will be resolved in Pilgrim Watch's favor because the contention is untimely, lacks a basis in law and fact, fails to raise a genuine dispute with the application on a material issue, and raises issues beyond the scope of this proceeding. Neither Pilgrim Watch's request for hearing nor the INSIDE EPA news article puts forth evidence that demonstrates that Pilgrim Watch would likely prevail on its new proposed contention. Accordingly, the request for hearing does not meet the requirements for re-opening the record and should be denied.

II. Pilgrim Watch Has Not Met the Eight-Factor Balancing Test of 10 C.F.R. § 2.309(c) for Late-Filed Contentions

As stated in 10 C.F.R. § 2.326(d), "[a] motion to reopen which relates to a contention not previously in controversy among the parties must also satisfy the requirements for nontimely contentions in § 2.309(c)." *See also, Oyster Creek I*, CLI-08-29, 68 NRC at 668 (stating, "[a]s subsection (d) makes clear, where a motion to reopen proposes a contention not previously part of the proceeding, the requirements for late-filed contentions set out in 10 C.F.R. § 2.309(c) must also be satisfied.")

The eight factors of § 2.309(c)(1) are:

- (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.

10 C.F.R. § 2.309(c)(1). While petitioners must show "favorable balance among the [eight] factors," the first factor is given the most weight.¹⁴ The Commission has held that the most important of these factors is the first, the requirement for the petitioner to demonstrate good cause for the failure to file on time. *Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit 3), CLI-09-05, 69 NRC 115, 125-26 (2009). However, "[g]ood cause has long been interpreted to mean that the information on which the proposed new contention is based was not previously available." *Id.*

Although Pilgrim Watch has addressed each of the eight factors, the request for hearing should be denied because application of the eight factors test does not favor admission.¹⁵

¹⁴ *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-05-32, 62 NRC 813 (2005) (citing *State of New Jersey* (Department of Law and Public Safety), CLI-93-25, 38 NRC 289, 296 (1993)); *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 581 (2006).

¹⁵ The Staff does not contest Pilgrim Watch's arguments regarding 10 C.F.R. § 2.309(c)(1)(ii)-(iv) requirements, as Boards have previously found these criteria to be "not particularly 'applicable' given that they focus on the status of the requestor/petitioner seeking admission to a proceeding (e.g., standing, nature of the requestor/petitioner's affected interest) rather than on new contentions submitted by admitted parties." *Vermont Yankee*, LBP-06-14, 63 NRC at 581. Further, the Staff does not challenge Pilgrim Watch on § 2.309(c)(1)(vi) because it has shown that its "interests are not adequately represented by the other parties" since it is the only intervenor remaining in the proceeding. *Id.*

A. Pilgrim Watch Has Not Demonstrated Good Cause for Failure to File a New Contention on Time

Pilgrim Watch claims good cause by stating that the “information upon which this contention is based did not become available to the public (including Pilgrim Watch) until November 17, 2010.” Request For Hearing at 10. Pilgrim Watch, however, has had sufficient information to put it on notice of the issues it raises in the contention regarding cleanup responsibilities, standards, and funding. The Cleanup Contention is, at best, a compilation of previously-existing information that was available prior to 2006. For example, Pilgrim Watch cites the Price Anderson Act, the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”, also commonly known as “Superfund”) and the Stafford Act.¹⁶ The Price Anderson Act, which provides insurance requirements for licensees regulated by the NRC so that they will have the financial means to address liability claims arising from an extraordinary nuclear occurrence, was passed in 1957,¹⁷ and Pilgrim Watch acknowledges the year of passage in its filing.¹⁸ CERCLA, which provides broad Federal authority to respond to releases or threatened releases of hazardous substances, was passed in 1980.¹⁹ And the Stafford Disaster Relief and Emergency Assistance Act, which provides the statutory authority for most Federal disaster response activities, was passed in 1988.²⁰ All three were laws on the books when Pilgrim Watch filed its original petition in 2006. To the extent that they could be viewed as providing overlapping or conflicting authority, they have done so since their enactment. And Pilgrim Watch’s post-hoc argument that it only recently became aware of it via the publication of

¹⁶ Request for Hearing at 7-8.

¹⁷ Price Anderson Act, 42 U.S.C. § 2210 *et seq.*

¹⁸ Request for Hearing at 8.

¹⁹ Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.*

²⁰ Robert T. Stafford Disaster Relief and Emergency Assistance Act, 47 U.S.C. § 5121 *et seq.*

an INSIDE EPA NEWS ARTICLE cannot demonstrate good cause for an untimely petition.²¹

Consequently, under Commission precedent, Pilgrim Watch has not demonstrated “good cause” for delaying until November 29, 2010 to file on time. *Millstone*, CLI-09-05, 69 NRC at 125-26. Therefore, Pilgrim Watch cannot satisfy the most important factor of the balancing test.

B. Granting Pilgrim Watch's Request For Hearing Will Broaden the Issues and Delay the Proceedings

Although the Commission does not afford 10 C.F.R. § 2.309(c)(1)(vii) the same amount of weight as the good cause factor, the Commission has placed a significant amount of weight on this factor due to the “policy of expediting the handling of license renewal applications – which rests on the lengthy lead time necessary to plan available sources of electricity.” *Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit 3), CLI-05-24, 62 NRC 551, 566-67 (2005). Granting a petition to reopen the record and adding a new contention would “necessarily broaden the issues . . . and delay the proceeding” thus requiring “the reopening [of] a closed administrative adjudicatory record” the Commission has found § 2.309(c)(1)(vii) to weigh against the petitioner. *Id.* at 566. The Board presiding over the hearing on Vermont Yankee's extended power uprate license amendment expanded on this idea when it declined to admit a new, late-filed contention even before the hearing had begun, stating:

Among the remaining factors, NEC's greatest stumbling block is 10 C.F.R. § 2.309(c)(1)(vii) - the fact that admission of this nontimely contention at this late date will substantially broaden and delay this proceeding. If NEC Contention 5 were admitted, the Board either would be forced to significantly delay the litigation and hearing on the admitted contentions, or would need to set a second, later schedule for the litigation of Contention 5. NEC's suggestion that the new contentions could be admitted without substantially disrupting the existing schedule is plainly wrong.

Vermont Yankee, LBP-06-14, 63 NRC at 581 (internal citations omitted).

Pilgrim Watch admits that the issues presented are “somewhat broader than, issues that Pilgrim Watch has sought previously to present” which demonstrates that admission of the

²¹ See also discussion of 10 C.F.R. § 2.309(f)(2), *infra* at 11.

untimely Cleanup Contention will unnecessarily broaden the issues in this proceeding. Request for Hearing at 14. Its assertion that this single new contention will not delay the proceeding because “there is nothing ‘tardy’ about Pilgrim Watch’s petition to add this new petition” is inapposite to the Commission’s policy of expeditiously handling license renewal applications. Pilgrim Watch’s untimely Cleanup Contention clearly raises a new issue that has not been previously addressed by the parties. Pilgrim Watch had sufficient information to raise the issues presented by its request long ago. Assuming the contention was admitted and Pilgrim Watch was allowed to belatedly litigate this issue, the Board would be forced to significantly delay litigation of remanded Contention 3 or set a second, later schedule for litigation of this new contention that would need to address broad policy and legal issues. Without adequate justification, this scenario runs afoul of the Commission’s policy of expediency in these types of proceedings. Thus, the addition of this contention would broaden the issues and unjustifiably delay the proceeding.

Therefore, by failing to first meet the good cause requirement and then to demonstrate a “compelling” balance of the other factors, *Millstone*, CLI-05-24, 62 NRC at 565, Pilgrim Watch has not satisfactorily met the eight-factor balancing test; the petition should be denied.

III. The Cleanup Contention Does Not Meet the Requirements for a New Contention at 10 C.F.R. § 2.309(f)(2)

The Commission does not look with favor on contentions filed after the initial filing period has passed. *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 636 (2004). Thus, a petitioner may file a late contention “only ‘upon a showing that – (i) [t]he information upon which the amended or new contention is based was not previously available; (ii) [t]he information upon which the amended or new contention is based is materially different than information previously available; and (iii) [t]he amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.’” *Id.* (quoting 10 C.F.R. § 2.309(f)(2)(i)-(iii) (alterations in original)).

In this case, the initial filing period passed long ago, in 2006, and the petitioner, Pilgrim Watch, is a current party to this proceeding. Accordingly, the provisions of 10 C.F.R. § 2.309(f)(2) governing late-filed contentions apply. The Cleanup Contention is only admissible if it is based on previously unavailable information or information that is materially different than what was previously available and the contention was filed in a timely fashion based on the availability of the new information.

While the Cleanup Contention was filed after publication of the INSIDE EPA news article, the information upon which the contention is based is not new. Even if one assumes, for the sake of argument, that the statements in the article are all true and accurate, those statements will not support a late filing. Pilgrim Watch's reliance on the date of publication of the article alone does not justify this late filing. The test is not when the intervenor learned the information; it is whether the information is new or different from information previously available. As one Licensing Board recently observed, in denying admissibility of a proposed new contention, an intervenor cannot "satisfy the 'previously unavailable' information standard by showing that, as a subjective matter, he or she only recently became aware of, or realized the significance of, public information that was previously available to all. The 'previously unavailable' standard is not a subjective one." *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 142 (2009), (reversed on other grounds), CLI-10-02, 71 NRC ___ (Jan. 7, 2010)(slip op.).²² A careful examination of the factual assertions that serve as the bases for the Cleanup Contention reveals that they are, at best, a compilation of previously-existing information and thus do not constitute the new information or materially different information that would justify a late-filed contention.

First, Pilgrim Watch asserts, based on the recent news article, that "neither the NRC, nor

²² See also *Tennessee Valley Authority* (Bellefonte Nuclear Power Units 3 and 4), "Memorandum and Order (Ruling on Request to Admit New Contention)," (unpublished) slip op. at 8 (Apr. 29, 2008) (holding that a newly-created document that is a compilation or repackaging of previously-existing information is not equivalent to, and does not provide, information that is "materially different" under 10 C.F.R. § 2.309(f)(2)(ii)).

EPA, nor FEMA is responsible for clean-up".²³ Pilgrim Watch does not cite any legal authority to support its assertion, nor does Pilgrim Watch explain the news article's apparent contradiction of the NRC's broad authority to regulate reactors and nuclear material under the Atomic Energy Act ("AEA").²⁴ However, assuming for the sake of argument that Pilgrim Watch's assertion is correct, Pilgrim Watch has failed to show how this situation is new. All Pilgrim Watch has shown is that it only recently read this article. As the Staff previously explained, none of the laws that Pilgrim Watch cites - the Price Anderson Act, the CERCLA, and the Stafford Act are new. Any overlapping or conflicting authority existed since their enactment.

Pilgrim Watch asserts that "the cleanup standards that will determine what clean-up is required (and hence its cost) have not been defined".²⁵ But Pilgrim Watch does not argue that this uncertainty is new, only that it recently became aware of it. In fact, the NRC cleanup standards at 10 C.F.R. Part 20, Appendix C that Pilgrim Watch cites have been in published regulations since 1991 and were last revised in 1995.²⁶ EPA's CERCLA cleanup standards have been on the books since at least 1997.²⁷ The difference in the standards in these two regulatory programs that Pilgrim Watch cites is not new.

²³ Request for Hearing at 2. Pilgrim Watch mischaracterizes the article, erroneously asserting that the article claims that "no one is responsible for cleaning up the radiation" in the event of a serious accident. *Id.* The article actually states that the agencies are "struggling to determine which agency - and with what money and legal authority - would oversee cleanup in the event of a large-scale accident." INSIDE EPA news article, Request for Hearing, Attachment A at p. 16 (emphasis added). According to the article, it is not a question of no agency having responsibility, the question is rather which of the three will take the lead in overseeing the cleanup. *Id.*

²⁴ The AEA provides the NRC with the authority to regulate "the possession and use of special nuclear material, source material, and byproduct material as the Commission may deem necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property". 42 U.S.C. § 2201(b).

²⁵ Request for Hearing at 2.

²⁶ Standards for Protection Against Radiation, Final Rule, 56 Fed. Reg. 23,465 (May 21, 1991); Standards for Protection Against Radiation, Clarification, Final Rule, 60 Fed. Reg. 20,186 (Apr. 25, 1995).

²⁷ Memorandum from Stephen D. Luftig to National Superfund Policy Managers, et al, dated Aug. 22, 1997, re Establishment of Cleanup Levels for CERCLA Sites with Radioactive Contamination, available at http://www.epa.gov/radiation/docs/cleanup/rad_arar.pdf, last accessed Dec. 21, 2010.

Additionally, Pilgrim Watch asserts that “no funding source has been identified” for cleanup following a serious accident.²⁸ But Pilgrim Watch has not shown that this is a new issue, only that it recently became aware that this might be an issue. This subjective standard, rejected in *Levy County*, LBP-09-10, 70 NRC at 142, will not support the filing of a contention at this late date.

IV. The Cleanup Contention Does Not Meet the General Admissibility Requirements at 10 C.F.R. § 2.309(f)(1).

Late-filed contentions must also meet the general admissibility requirements for all contentions. Accordingly, a late-filed contention must:

- (i) provide a specific statement of the legal or factual issue sought to be raised;
- (ii) provide a brief explanation of the basis for the contention;
- (iii) demonstrate that the issue raised is within the scope of the proceeding;
- (iv) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at the hearing;
- (vi) ...provide sufficient information to show that a genuine dispute with the applicant exists with regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient on a relevant matter as required by law, the identification of such deficiencies and supporting reasons for this belief....

10 C.F.R. § 2.309(f)(1). The Commission has emphasized that the rules on contention admissibility are “strict by design.” *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 34, 358 (2001), *pet. for reconsideration denied*, CLI-02-01, 55 NRC 1 (2002). Failure to comply with any of these requirements is grounds for the dismissal of a contention. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999). Furthermore, a contention will be

²⁸ Request for Hearing at 2.

rejected if:

- (1) it constitutes an attack on applicable statutory requirements;
- (2) it challenges the basic structure of the Commission's regulatory process or is an attack on the regulations;
- (3) it is nothing more than a generalization regarding the petitioner's view of what applicable policies ought to be;
- (4) it seeks to raise an issue which is not proper for adjudication in the proceeding or does not apply to the facility in question; or
- (5) it seeks to raise an issue which is not concrete or litigable.

Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974).

A. The Cleanup Contention Does Not Raise a Genuine Dispute Susceptible of Resolution in This Forum.

An admissible contention must raise a genuine dispute susceptible for resolution before the Board. This requirement ensures that the "adjudicatory process is used to address real, concrete, specific issues that are appropriate for litigation.... The Commission should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing."²⁹ Recently, in rejecting a contention challenging the Staff's license renewal review, the Commission noted, "[o]ur contention pleading rules emphasize that the petitioner must show that a 'genuine dispute *exists with the applicant/licensee* on a material issue of law or fact.'" *Amergen Energy Company, LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 477 (2008) (emphasis in original) (*citing* 10 C.F.R. § 2.309(f)(1)(vi)) (emphasis in original). Thus, where a contention complains of actions by entities that are not before the Board and not subject to the Board's jurisdiction, the contention raises an issue that is not susceptible to resolution by the Board. Such a contention fails to raise a genuine dispute with the application or a dispute susceptible of resolution and is,

²⁹ Statement of Considerations, "Changes to Adjudicatory Process," 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

therefore, inadmissible.

Here, the Cleanup Contention fails to raise a genuine dispute with the application filed by Entergy. The Pilgrim Watch complaint is not with Entergy's application; it is with three federal government agencies. Pilgrim Watch asserts that the NRC, the EPA, and FEMA have failed to agree on which of them will be responsible for a cleanup following a radioactive release, that they have failed to agree on a standard for the cleanup, and that they have not identified a funding source for the cleanup.³⁰ Thus, Pilgrim Watch's dispute lies not with Entergy's application but with the NRC, EPA and FEMA. But these agencies are not before this Board or subject to this Board's jurisdiction or authority.³¹ Thus, this Board cannot resolve the issues raised by the Cleanup Contention. Furthermore, Entergy is not a party to the dispute Pilgrim Watch raises in the contention regarding governmental cleanup responsibilities, standards, and funding. Clearly, Entergy cannot mandate which federal agency will be responsible for the cleanup, set the standard for the cleanup, or identify the funds under CERCLA for a cleanup – this is a matter for resolution by the federal government. The Cleanup Contention raises issues regarding federal agency responsibility, the setting of federal standards and identification of funding, thus does not raise a genuine dispute with the application and is, therefore, inadmissible.

B. The Cleanup Contention Lacks a Basis in Law and Fact.

Pilgrim Watch cites no legal authority in support of its claim that the NRC must require Entergy to implement severe accident mitigation alternatives as part of the NRC's environmental review. To the contrary, under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, the NRC or any other similarly situated federal agency need only take a hard look at the environmental impacts of its actions; NEPA does not require a specific outcome or

³⁰ Request for Hearing at 2.

³¹ While the NRC Staff is a party to this proceeding, the NRC position that the news article Pilgrim Watch complains of relates to the position of the NRC, as an agency – not the position of the Staff on the applicant's license renewal application.

mandate a course requiring the mitigation of potential impacts.³² The Supreme Court directly considered whether NEPA requires mitigation in *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989). The Court noted that while NEPA announced sweeping policy goals, “NEPA itself does not mandate particular results, but simply prescribes the necessary process.” *Id.* at 350 (citing *Strycker’s Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28(1980) and *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978)). “If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs.” *Id.* (citing *Strycker’s Bay Neighborhood Council*, 444 U.S. at 227-28, (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976))). In light of these principles, the Court found a

fundamental distinction ... between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted on the other.

Id. at 352. Thus, the Court concluded that the lower court erred in “in assuming that NEPA requires that action be taken to mitigate the adverse effects of major federal actions.” *Id.* at 353 (internal quotations omitted). As a result, NEPA imposes no obligation on the NRC to require Entergy to implement mitigation alternatives identified in a SAMA analysis.

Furthermore, Pilgrim Watch has failed to state any factual basis for the clean-up SAMA analysis it proffers in its proposed contention. The SAMA analysis Pilgrim Watch would apply differs from the analysis in the Staff’s Final Supplemental Environmental Impact Statement for

³² See, e.g., *Baltimore Gas and Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 97 (1983) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)) (stating that NEPA requires “only that the agency take a ‘hard look’ at the environmental consequences before taking a major action); *Sierra Club v. Army Corps of Engineers*, 446 F.3d 808, 815 (2006) (same); *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 87-88 (1998) (same); *Hydro Resources, Inc.* (P.O. Box 777, Crownpoint, New Mexico 87313), LBP-06-19, 64 NRC 53, 63-64 (2006) (same); see also *Winter v. Nat. Res. Def. Council*, 129 S.Ct. 365, 376 (2008) (stating that “NEPA imposes only procedural requirements” and does not mandate any particular results).

the Pilgrim plant. Pilgrim Watch's proposed SAMA analysis uses source terms more conservative than the Staff's. It assumes that there will be a cleanup that results in a dose rate of not more than 15 millirem a year and ignores the possibility that the land may be condemned if the cost of the cleanup exceeds the value of the land. It uses the 95th percentile of total consequences determined by the MACCS2 Code rather than the mean value that the Staff employs. And, unlike the Staff, Pilgrim Watch does not apply any discount factor or probabilistic analysis to address the likelihood that an accident will occur – it assumes an accident will occur. While Pilgrim Watch asserts that the SAMA analysis should be changed to include these clean up standards, it proffers no factual basis for them. It attached no expert affidavit or documentary evidence in support of them. Its discussion of its factual basis for the Cleanup Contention rests solely on the publication of the INSIDE EPA news article and that article does not address these changes in the context of a SAMA analysis.

C. The Cleanup Contention Raises Issues Beyond the Scope of this Proceeding

Contentions that constitute generalized grievances as to NRC policy are not admissible because they raise issues beyond the scope of licensing board adjudicatory proceedings. *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3) CLI-08-17, 68 NRC 231, 242 (2008). “[A] petitioner may not demand a hearing to express generalized grievances about NRC policies or to attack the NRC's general competence.” *Duke Energy Carolinas, LLC* (William States Lee III Nuclear Station, Units 1 and 2) LBP-08-17, 68 NRC 431, 451-452 (2008). *Vermont Yankee Nuclear Power Corp. and Amergen Vermont, LLC* (Vermont Yankee Nuclear Power Station) CLI-00-20, 52 NRC 151, 165-166 (2000).

The Cleanup Contention is, however, just such a generalized grievance as to NRC policy regarding SAMAs and radioactive cleanup. Pilgrim Watch disagrees with “NRC policy [that] permits the Applicant to use a SAMA analysis in which the costs that are eventually weighed against the benefit of potential mitigation steps are far lower than the likely cost if a

truly severe accident should occur.”³³ Specifically, Pilgrim Watch disagrees with the NRC’s use of probabilistic risk theory and complains that “NRC policy [fails to place] the responsibility for actual clean-up on the licensee; neither does it require the licensee to accomplish any mitigation steps.”³⁴ Further, the contention faults the NRC for failing to arrive at an agreement with the EPA and FEMA regarding radioactive cleanup. Pilgrim Watch’s dissatisfaction with NRC policy, NRC’s interaction with other agencies, and Pilgrim Watch’s criticism of the way it perceives the NRC is handling cleanup issues are not issues that are susceptible to resolution in this proceeding before this Board and raise issues beyond the scope of this proceeding. These are not grounds for an admissible contention.

Furthermore, requiring Entergy to implement mitigation alternatives because three federal agencies have been reportedly unable to come to consensus is fundamentally unfair. In environmental contentions, the Staff’s analysis of environmental issues in its Draft and Final Environmental Impact Statement may indeed be the subject of an admissible contention. But the adequacy of the Staff’s environmental impact analysis is not at issue here. The NRC action Pilgrim Watch complains of is the alleged failure of the Commission to resolve an alleged perceived dispute with the EPA and FEMA regarding radiation cleanup. As such, it does not justify imposition of SAMAs on the Applicant.

CONCLUSION

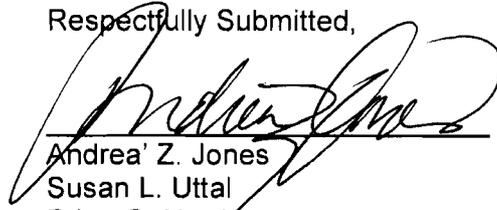
As demonstrated above, the proposed contention in Pilgrim Watch’s Request for Hearing on New Contention is inadmissible because it fails to meet the requirements for re-opening the record; it fails to meet the requirements for admission of a new contention; it fails to raise a genuine dispute with the application on a material issue of fact or law; it lacks a basis in law or fact; and it raises issues beyond the scope of this proceeding. Accordingly, Pilgrim

³³ Request for Hearing at 2.

³⁴ *Id.*

Watch's Request for Hearing on New Contention should be denied.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Andrea Z. Jones", written over a horizontal line.

Andrea Z. Jones
Susan L. Uttal
Brian G. Harris
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 23rd day of December, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC Staff's Answer in Opposition to Pilgrim Watch's Request for Hearing on New Contention" have been served upon the following through deposit in the NRC's internal mail system, with copies by electronic mail, or, as indicated by an asterisk, by deposit in the U.S. Postal Service, with copies by electronic mail this 23rd day of December, 2010:

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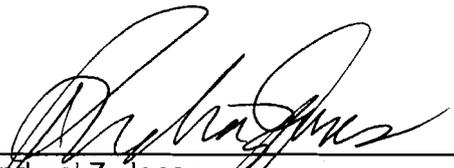
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