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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board Panel

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

**ENERGY ANSWER OPPOSING PILGRIM WATCH
REQUEST FOR HEARING ON A NEW CONTENTION**

Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (collectively “Entergy”) hereby oppose Pilgrim Watch’s Request for Hearing on a New Contention, submitted on November 29, 2010.¹ Pilgrim Watch requests that the Board admit an untimely contention asserting that Entergy’s analysis of severe accident mitigation alternatives (“SAMA”) should be based on source terms in NUREG-1465 and a 15 millirem clean up standard, should use the 95th percentile of the total consequences, and should include no reductions from a discount factor or probabilistic analysis. See PW Request at 1. Pilgrim Watch’s request should be denied because it does not address the standards for reopening a closed record, it is untimely, and it does not meet the factors applicable to a late-filed contention. In addition, Pilgrim Watch’s claims are inadmissible because they lack basis, lack support, and fail to raise a genuine dispute with a material issue of law or fact.

The Commission looks with disfavor on new contentions filed after the initial filing.² As the Commission has repeatedly stressed,

¹ Pilgrim Watch Request for Hearing on a New Contention (Nov. 29, 2010) (“PW Request”).
² Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 N.R.C. 631, 638 (2004).

[O]ur contention admissibility and timeliness rules require a high level of discipline and preparation by petitioners, “who must examine the publicly available material and set forth their claims and the support for their claims at the outset.” There simply would be “no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements” and add new contentions at their convenience during the course of a proceeding based on information that could have formed the basis for a timely contention at the outset of the proceeding. Our expanding adjudicatory docket makes it critically important that parties comply with our pleading requirements and that the Board enforce those requirements.

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 N.R.C. 235, 271-72 (2009) (footnotes omitted).

Here, Pilgrim Watch is using a trade press (*Inside EPA*) article as a pretext to raise issues that could have been pled at the outset at the proceeding (and, in several respects, to raise claims that have previously been rejected in this proceeding). There is no good cause for Pilgrim Watch’s repeated efforts to expand the current remanded proceeding; and at this late juncture, the other factors related to late contentions also weigh strongly against such expansion. In particular, at this late stage of the proceeding now entering its sixth year, litigating a new contention would significantly delay the completion of the proceeding. Moreover, Pilgrim Watch’s conduct with regard to the currently remanded contention, where Pilgrim Watch has sought a very extended, eight month schedule for submission of testimony, only to inform the Board that it does not intend to submit any testimony, demonstrates not only the significant potential for delay but also Pilgrim Watch’s inability to contribute.

I. BACKGROUND

This proceeding involves the application submitted by Entergy in January 2006 seeking renewal of the operating license for Pilgrim.³ On May 25, 2006, Pilgrim Watch filed an

³ See 71 Fed. Reg. 15,222 (Mar. 27, 2006). The current license for Pilgrim expires on June 8, 2012. Id.

intervention petition seeking the admission of five contentions.⁴ This Board admitted two of the five contentions proffered by Pilgrim Watch – Contention 1 relating to buried piping; and Contention 3 challenging the input data concerning (1) evacuation times, (2) economic consequences, and (3) meteorological patterns used in the Pilgrim SAMA analysis.⁵

Following summary disposition of Contention 3,⁶ the Board held a hearing on Contention 1 and then closed the evidentiary record on that contention.⁷ It then issued a decision resolving that remaining contention in Entergy’s favor and terminated the proceeding.⁸

In CLI-10-11, the Commission reversed the summary disposition of the portion of Contention 3 that had raised meteorological modeling issues.⁹ The Commission therefore remanded Contention 3, “as limited by [its] ruling,” to the Board for hearing.¹⁰

Now, nearly five years after the availability of Pilgrim’s license renewal application and three and a half years after the Staff’s issuance of the final environmental impact statement (“EIS”),¹¹ Pilgrim Watch requests that the Board admit a new contention challenging additional aspects of Pilgrim’s SAMA analysis.

⁴ Request for Hearing and Petition to Intervene by Pilgrim Watch (May 25, 2006) (“Petition to Intervene”).

⁵ Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), LBP-06-23, 64 N.R.C. 257, 349 (2006).

⁶ Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), LBP-07-13, 66 N.R.C. 131 (2007).

⁷ Memorandum and Order (Ruling on Pilgrim Watch Motions Regarding Testimony and Proposed Additional Evidence Relating to Pilgrim Watch Contention 1) (June 4, 2008) at 4

⁸ Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), LBP-08-22, 68 N.R.C. 590, 610 (2008).

⁹ Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-11, 71 N.R.C. ___, slip op. at 14, 18 (March 26, 2010).

¹⁰ Id. at 3.

¹¹ NUREG-1437, Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 29 Regarding Pilgrim Nuclear Power Station (July 2007).

II. PILGRIM WATCH HAS NOT ADDRESSED THE STANDARDS FOR REOPENING THE RECORD

Pilgrim Watch's Request should be denied because Pilgrim Watch has failed to address the standards in 10 C.F.R. § 2.326 for reopening the record to litigate a new contention. While the Commission has remanded certain SAMA issues in Contention 3 to the Board for hearing, the Commission has not reopened the record to allow new contention to be admitted. If Pilgrim Watch wants to raise a new contention during the remand, it must address and satisfy the standards in 10 C.F.R. § 2.326. See Entergy Nuclear Vermont Yankee, L.L.C. (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 N.R.C. ___, slip op. at 10 n.37 (July 8, 2010).

Where, as here, the adjudicatory record has been closed, the Commission's rules specify that a motion to reopen that record to consider additional evidence will not be granted unless the following criteria are satisfied:

- 1) The motion must be timely. However, 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 or environmental issue; and
- 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). Further, under the NRC rules,

The motion must be accompanied by affidavits that set forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) of this section have been satisfied. Affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. Evidence contained in affidavits must meet the admissibility standards of this subpart. Each of the criteria must be separately addressed, with a specific explanation of why it has been met. When multiple allegations are involved, the movant must identify with particularity each issue it seeks to litigate and specify the factual and/or technical bases which it believes support the claim that this issue meets the criteria in paragraph (a) of this section.

10 C.F.R. § 2.326(b). In addition, where a motion to reopen relates to a contention not previously in controversy, a motion to reopen must also satisfy the standards for non-timely contentions in 10 C.F.R. § 2.309(c). 10 C.F.R. § 2.326(d).

The Commission has repeatedly emphasized that “[t]he burden of satisfying the reopening requirements is a heavy one.” Oyster Creek, CLI-09-7, 69 N.R.C. at 287 (citing Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 N.R.C. 1, 5 (1986)). “[P]roponents of a reopening motion bear the burden of meeting all of [these] requirements.” Id. (citing Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-10, 32 N.R.C. 218, 221 (1990)). “Bare assertions and speculation . . . do not supply the requisite support.” Id. (citing Amergen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 N.R.C. 658, 674 (2008)).

Pilgrim Watch has made no attempt to address the standards for reopening the record. It has provided no affidavit from any competent individual addressing each of the criteria for reopening. This defect is alone sufficient grounds to reject Pilgrim Watch’s Request. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 N.R.C. 62, 76 (1992), citing Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-89-1, 29 N.R.C. 89, 93-94 (1989).

III. PILGRIM WATCH’S NEW CONTENTION IS NOT TIMELY RAISED

A. Pilgrim Watch’s Concern is Not Timely

As discussed below, Pilgrim Watch’s proposed new contention is untimely because it is not based on information that was previously unavailable. 10 C.F.R. § 2.309(f)(2) states that “[c]ontentions must be based on documents or other information available at the time the petition [to intervene] is to be filed, such as the . . . environmental report.” An intervenor has an

“ironclad obligation to examine the publicly available documentary material . . . with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention.” Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 N.R.C. 135, 147 (1993) (footnote omitted). The Commission has held that “contention pleading rule[s] require[] a petitioner to file NEPA contentions on the applicant’s ER so that environmental issues are raised as soon as possible.” Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-22, 60 N.R.C. 125, 130 (2004) (emphasis added). Other than new or amended contentions challenging new data or conclusions in the NRC Staff’s environmental impact statement (not applicable here), the NRC rules allow contentions to be amended after this initial filing only with the leave of the presiding officer upon a showing that:

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

10 C.F.R. § 2.309(f)(2)(i)-(iii).

Under these standards, it is not sufficient to simply point to some new document (such as the *Inside EPA* article). Rather, a proponent of a new contention must show that it could not have raised its contention earlier. “[T]he unavailability of [a] document does not constitute a showing of good cause for admitting a late-filed contention when the factual predicate for that contention is available from other sources in a timely manner.” Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 N.R.C.1041, 1043 (1983). An intervenor cannot establish good cause for filing a late contention when the information on which the contention is

based was publicly available “for some time” prior to the filing of the contention. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 N.R.C. 13, 21 (1986).

Intervenors are not free simply “to add new contentions at their convenience during the course of a proceeding based on information that could have formed the basis for a timely contention at the outset of the proceeding.” Oyster Creek, CLI-09-7, 69 N.R.C. at 272 (footnote omitted).¹²

Pilgrim Watch does not meet the requirements of 10 C.F.R. § 2.309(f)(2)(i) because its late-filed contention is not based on new information. While Pilgrim Watch argues that its new contention is made timely by a November 10, 2010 *Inside EPA* Article and certain underlying e-mail messages obtained pursuant to a Freedom of Information Act (“FOIA”) request, this argument is specious because the article does not support the modeling changes that Pilgrim Watch’s new contention seeks. See Prairie Island, CLI-10-27, slip op. at 15. Further, each of the challenges to the Pilgrim SAMA analysis in Pilgrim Watch’s new contention – challenges to the source terms, cleanup standard, use of mean rather than 95th percentile consequence values, use of discount factors, and use of probabilistic analysis – could have been raised at the outset of this proceeding.

The source term values used in Entergy’s SAMA analysis are provided in the Environmental Report (“ER”), at Appendix E, Table E.1-11, and the derivation of those source terms, including use of the MAAP code, is described extensively in ER Appendix E at E.1-33 to E.1-52.¹³ Further, the potential challenge to the MAAP code is not new, having been raised in

¹² Similarly, documents that merely collect, summarize, or place into context previously available information do not support the timeliness of a new contention. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 N.R.C. __, slip op. at 17 (Sept. 30, 2010).

¹³ Entergy also provided supplemental information on its SAMA analysis in four letters responding to NRC requests for additional information in 2006. License Renewal Application Amendment 4: Response to Request for Additional Information Regarding Severe Accident Mitigation Alternatives for Pilgrim Nuclear Power Station (July 5, 2006) (ADAMS Accession No. ML061930418); License Renewal Application Amendment 7 (Aug. 30,

the Indian Point proceeding more than three years ago (and rejected). See Riverkeeper, Inc.'s Request for Hearing and Petition to Intervene in the License Renewal Proceeding for the Indian Point Nuclear Power Plant (Nov. 30, 2007) at 68-70 (ADAMS Accession No. ML073410093) ("Riverkeeper Petition"). See also Entergy Nuclear Operations, Inc. (Indian Point, Units 2 and 3), LBP-08-13, 68 N.R.C. 43, 187 (2008).

The clean up dose rates used in Entergy's SAMA analysis are taken from the guidance in the Code Manual for MACCS2 cited in the ER. See NUREG/CR-6613, Code Manual for MACCS2: Volume 1, User's Guide (1998) at 7-8.¹⁴ Pilgrim Watch was aware of this guidance, not only because it was cited in the ER but also because Pilgrim Watch referred to it in its original Petition to Intervene. See Petition to Intervene at 32-33. Moreover, Entergy provided all of the MACCS2 inputs used in its SAMA analysis to Pilgrim Watch as part of its fifth supplemental document disclosure on May 8, 2007, so Pilgrim Watch certainly knew at this juncture what clean up values were used in the analysis. See Entergy's 5th Supplemental Disclosures (May 8, 2007). Further, Pilgrim Watch was certainly aware that there were differing assumptions that one could make concerning the applicable cleanup standards because this issue was explicitly discussed in the Site Restoration Study which Pilgrim Watch cited in its Petition.¹⁵ See D. Chanin and W. Murfin, Site Restoration: Estimation of Attributable Costs from

2006) (ADAMS Accession No. ML062500117); License Renewal Application Amendment 9 (Oct. 6, 2006) (ADAMS Accession No. ML062910173); License Renewal Application Amendment 10 (Dec. 12, 2006) (ADAMS Accession No. ML070100410). The July 5, 2006 and August 20, 2006 letters included discussion of the use of the MAAP Code. In addition, the source terms and use of the MAAP Code were discussed in the NRC's draft EIS in December 2006 (NUREG-1437 Supp. 29, Draft Report (Dec. 2006), App. G. at G-10-to G-12 (ADAMS Accession No. ML063260173) and final EIS in July 2007 (see NUREG-1437 Supp. 29, Final Report (July 2007), App. G, at G-11 to G-12).

¹⁴ The clean up dose standards recommended in the User's Guide are based on the U.S. EPA Manual of Protective Action Guides and Protective Actions for Nuclear Incidents (1992).

¹⁵ Petition to Intervene at 76 n.47. Pilgrim Watch has cited the Site Restoration Study in numerous other pleadings before this Board and the Commission, but has not submitted it as an exhibit. The report may be found at http://www.osti.gov/bridge/product.biblio.jsp?osti_id=249283.

Plutonium-Dispersal Accidents, SAND96-0957, Unlimited Release, UC-502, (May 1996) ("Site Restoration Study") at 2-5 to 2.5 and App. B.¹⁶

Entergy's use of mean output values in the SAMA analysis (as opposed to the 95th percentile advocated in the new contention) has also been apparent from the outset of the proceeding. Entergy's ER clearly indicated the use of mean values. Section 4.21.5 of the ER states:

The method used to perform the Severe Accident Mitigation Analysis (SAMA) was based on the handbook used by the NRC to analyze benefits and costs of its regulatory activities.

ER at 4-31, citing NUREG/BR-0184, Regulatory Analysis Technical Evaluation Handbook (Jan. 1997). This Handbook states:

Section 4.3 of the [Regulatory Analysis Guidelines of the U.S. Nuclear Regulatory Commission] requires the use of best estimates. Often these are evaluated in terms of the mean or "expected value," the product of the probability of some event occurring and the consequences which would occur assuming the event actually happens. Sometimes, measures other than the expected value may be appropriate, such as the median or even a point estimate. However, the expected value is generally preferred.

NUREG/BR-0184 at 4.7, 5.20. The NRC's Regulatory Analysis Guidelines, to which this Handbook refers, similarly state:

Value and impact estimates are to be incremental best estimates relative to the baseline case. . . .

* * *

When possible, best estimates should be made in terms of the "mean" or "expected value." However, depending upon the level of detail available from the data sources employed in the regulatory analysis, acceptable estimates could include other point estimates such as the median. However, the rationale for use of estimates other than mean values should be provided.

¹⁶ The Site Restoration Study identifies both the EPA Protective Action Guidelines and the 15 millirem remediation standard at one time proposed by the EPA in a draft rule. Site Restoration Study, App. B. at B-4 to B-5, B-7 to B-8.

NUREG/BR-0058, Regulatory Analysis Guidelines of the U.S. Nuclear Regulatory Commission (Rev. 4, Sept. 2004), at 23 (emphasis added).¹⁷ Consistent with this NRC guidance, ER Section E.1.5.3, Results, explicitly states:

Table E.1-15 shows estimated base case mean risk values for each release mode. The estimated mean values of PDR and offsite OECR for PNPS are 13.6 person-rem/yr and \$45,900/yr, respectively.

ER at E.1-66 (emphasis added).

Moreover, Pilgrim Watch cannot claim that it was unaware of this issue because it was raised as part of a contention in the Indian Point proceeding three years ago. See Riverkeeper Petition at 70-71. And, of course, this Board has already rejected as untimely Pilgrim Watch's previous attempt to inject this issue into this proceeding. Order (Ruling on Timeliness of Mean Consequences Issue) (Nov. 23, 2010).

The use of discount rates in the Pilgrim SAMA analysis was clearly reflected in the ER. ER at 4-32, 4-34, 4-36, 4-37, 4-38, 4-39, 4-40, 4-41, 4-42, 4-48. Thus, Pilgrim Watch could have challenged it at the outset. Moreover, once more, Pilgrim Watch cannot claim that it was previously unaware of this issue, because this issue too was raised as part of a contention in the Indian Point proceeding three years ago. Riverkeeper Petition at 62.

Finally, Pilgrim Watch not only could have challenged the use of probabilistic modeling at the outset of this proceeding but did so. In 2006, this Board rejected Pilgrim Watch's generic challenge to probabilistic techniques:

[T]o the extent that any part of the contention or basis may be construed as challenging on a generic basis the use of probabilistic techniques that evaluate risk, we find any such portion(s) to be inadmissible. The use of probabilistic risk

¹⁷ Essentially the same language was included in Revision 2 of NUREG/BR-0058 that was in effect when the Handbook was issued.

assessment and modeling is obviously accepted and standard practice in SAMA analyses.

Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), LBP-06-23, 64 N.R.C. 257, 341 (2006) aff'd, CLI-10-11, 71 N.R.C. ___, slip op. at 15-16 (Mar. 26, 2010) (“CLI-10-11”). Pilgrim Watch’s attempt to raise this issue anew is just the sort of ploy for which it has been previously admonished. Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-28, 72 N.R.C. ___, slip op. at 2 n.5 (Nov. 5, 2010) (“We . . . caution Pilgrim Watch against using future filings as a means to re-argue matters previously resolved.”).

Because Pilgrim Watch could have raised any of these issues years ago, the *Inside EPA* article and related materials to which Pilgrim Watch refers provide no basis for admitting any of these late issues. Moreover, those materials bear little relation to the issues in the proposed new contention. Neither the *Inside EPA* article nor the underlying materials contain any discussion of severe accident source terms, use of the 95th percentile in estimating severe accident consequences, use of discount factors in SAMA analysis, or use of probabilistic analysis. While the *Inside EPA* article and some of the underlying FOIA materials do discuss uncertainty on the part of some individuals at the EPA regarding which agency would oversee a cleanup and what cleanup standards would apply, this information is not new. For example, Chapter 3.5 of the 1996 Site Restoration Study discusses the numerous, and sometimes conflicting, responsibilities of multiple federal agencies for off-site restoration after a nuclear incident, and Appendix B of that Study discusses the various cleanup standards that might apply, including the EPA’s Protective Action Guidelines and the EPA’s previously proposed 15 millirem standard. As already discussed, Pilgrim Watch has had all of the inputs used by Entergy in the Pilgrim SAMA

analysis since May 5, 2007, and therefore could have raised any concern with the cleanup values used in the analysis years ago.

B. Pilgrim Watch Does Not Meet the Late Filing Standards in 10 C.F.R. § 2.309(c)

Pilgrim Watch's late-filed contention should not be admitted because Pilgrim Watch has shown no good cause for its extreme tardiness, and a balancing of the factors in 10 C.F.R. § 2.309(c) does not outweigh this failure.

Section 2.309(c)(1) provides that non-timely contentions will not be entertained absent a determination by the Board that the contentions should be admitted based upon a balancing of the following factors:

- (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)(i)-(viii). In keeping with the Commission's disfavor of contentions submitted after the initial filing, these factors are "stringent." Oyster Creek, CLI-09-7, 69

N.R.C. at 260, citing Florida Power & Light Co. et al. (Calvert Cliffs Nuclear Power Plant, Units

1 and 2, *et al.*), CLI-06-21, 64 N.R.C. 30, 33 (2006). “Late petitioners properly have a substantial burden in justifying their tardiness.” Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 N.R.C. 273, 275 (1975).

Commission case law places most importance on whether the petitioner has demonstrated sufficient good cause for the untimely filing.¹⁸ “Good cause” has been consistently interpreted to mean that a proposed new contention be based on information that was not previously available, and was timely submitted in light of that new information. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 N.R.C. 115, 125-26 (2009) citing Pacific Gas & Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-1, 67 N.R.C. 1, 6 (2008).

Pilgrim Watch fails to establish sufficient good cause to excuse its very late-filed contention. As already shown above, the proposed contention is not based on new information. Rather, Pilgrim Watch could have raised each of its claims years ago. Indeed, four of Pilgrim Watch’s five claims (concerning source terms, use of the 95th percentile of consequences, use of discount factors, and opposition to probabilistic analysis) were either raised in the Indian Point proceeding over three years ago or raised and rejected at the outset of this proceeding; and the fifth topic (cleanup levels) was discussed in the Site Restoration Study which Pilgrim Watch cited in its Petition to Intervene in 2006 (see note 15 supra).

Under NRC case law, failure to demonstrate good cause requires the petitioner to make a “compelling” showing with respect to the other factors. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 N.R.C. 156, 165 (1993). In other words,

¹⁸ Tennessee Valley Authority (Watts Bar Nuclear Plant, Unit 2), CLI-10-12, 71 N.R.C. ___, slip op. at 4 (Mar. 26, 2010) (“CLI-10-12”); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-02, 51 N.R.C. 77, 79 (2000).

A petitioner's showing must be highly persuasive; it would be a rare case where [the Commission] would excuse a non-timely petition absent good cause.

Watts Bar, CLI-10-12 at 4 (footnote omitted).

In balancing the remaining late-filed contention factors, the Commission grants considerable weight to factors seven and eight.

We regard as highly important the intervenor's ability to contribute to the development of a sound record on a particular contention. We also are giving significant weight to the potential delay, if any, which might ensue from admitting a particular contention.

Consumers Power Co. (Midland Plant, Units 1 and 2) LBP-82-63, 16 N.R.C. 571, 577 (1982) (citations omitted), citing South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 N.R.C. 881, 895 (1981). Both the seventh and eight factors militate against Pilgrim Watch.

With regard to the seventh factor, adding a new contention will, without a doubt, delay and broaden the proceeding significantly. In this proceeding, the Staff's final EIS for Pilgrim was issued in July 2007 and the final SER was issued in November 2007. Therefore, any further adjudicatory proceedings will necessarily delay the proceeding's completion. Moreover, this proceeding itself is entering its sixth year, notwithstanding the Commission's goal to complete such proceedings in two and one half years.¹⁹ In addition, Pilgrim Watch's conduct in prosecuting the remanded SAMA contention is illustrative of the substantial additional delays that can be expected if a new contention is admitted. Since the Commission's remand at the end of March, 2010, Pilgrim Watch has filed at least ten motions, including three with the

¹⁹ In contested license renewal proceedings, the Commission's long-standing goal has been the issuance of a Commission decision in about two and one half years from the date that the application was received. Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-14, 48 N.R.C. 39, 42 (1998); Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2 and 3), CLI-98-17, 48 N.R.C. 123, 126 (1998). In this proceeding, Entergy's application to renew the Pilgrim operating license was filed in January 2006.

Commission, and has insisted on repeated delays and schedules that have resulted in more than eight months just for Pilgrim Watch's preparation and submission of testimony.

Concerning the eighth factor, it cannot be reasonably expected that Pilgrim Watch will assist in developing a sound record. "When a petitioner addresses this ... criterion it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony." Watts Bar, CLI-10-12, slip op. at 10-11 (footnote omitted). Here, Pilgrim Watch merely asserts that it will rely on expert testimony from David Chanin and Dr. Edwin Lyman, but fails to set out with any particularity the precise issues it plans to cover or what its expert testimony will address.²⁰ Indeed, Pilgrim Watch refuses to disclose what testimony it might provide, asserting that it would be unreasonable to require it to do so.²¹ Thus, Pilgrim Watch makes no showing of any ability to meaningfully contribute to a sound record.

Moreover, Pilgrim Watch's conduct in prosecuting the remanded contention is again illustrative of the lack of contribution that can be expected. Despite having been given more than eight months to prepare its testimony on the remanded contention, on December 2, 2010, Pilgrim Watch filed a memorandum explaining that it will not submit expert testimony in support of Contention 3 because doing so would be a "fool's errand" and "a waste of limited resources." Pilgrim Watch Memorandum Regarding SAMA Remand Hearing at 3 (Dec. 2, 2010).

In sum, factors one, seven and eight – the three most significant factors – count heavily against Pilgrim Watch. As a result, the Board should deny Pilgrim Watch's request for hearing as untimely.

²⁰ See PW Request at 15.

²¹ Id.

IV. PILGRIM WATCH'S NEW CONTENTION DOES NOT MEET THE STRICT CONTENTION ADMISSIBILITY REQUIREMENTS

Even if a proponent of a new contention satisfies the requirements of 10 C.F.R. § 2.309(f)(2) and 10 C.F.R. § 2.309(c), it must also demonstrate that its new contention satisfies the standard for admissibility in 10 C.F.R. § 2.309(f)(1)(i)-(vii). Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 N.R.C. 355, 362-63 (1993).

10 C.F.R. § 2.309(f)(1) requires that a petition:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in connection 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 which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and
- (vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

10 C.F.R. § 2.309(f)(1)(i)-(vi). Pilgrim Watch's contention does not meet these standards either.

A. The Late-Filed Contention Lacks An Identified Basis

Pilgrim Watch's late-filed contention is inadmissible because it fails to provide an explanation of its basis, contrary to the requirements of 10 C.F.R. § 2.309(f)(1)(ii). Pilgrim

Watch provides no basis for contending that source terms using NUREG-1465 release fractions should be used. Pilgrim Watch provides no basis for contending that consequences should be specified at the 95th percentile. Pilgrim Watch provides no basis for contending that discount rates should not be used. And Pilgrim Watch provides no basis for contending that probabilistic analysis should not be used. Further, while the *Inside EPA* article and underlying FOIA materials do discuss cleanup standards, Pilgrim Watch provides no basis for contending that a 15 millirem cleanup standard should be used, rather than the EPA Manual of Protective Action Guides and Protective Actions for Nuclear Incidents. See note 14, supra. In fact, neither the *Inside EPA* article nor the underlying FOIA materials make any mention of a 15 millirem standard.

Pilgrim Watch appears to be arguing that all of these conservatisms should be adopted just because there is uncertainty over who would pay for a cleanup and who would oversee it. But Pilgrim Watch provides no explanation of why any such uncertainty would affect the choice of source terms or methodology for evaluating accident consequences as part of a SAMA analysis.

Further, even Pilgrim Watch's references to the *Inside EPA* article and underlying FOIA materials lack basis. The *Inside EPA* article and underlying materials all relate to a White Paper in bullet form marked "Draft: Do Not Cite or Quote." Portions of this draft are clearly erroneous. For example, the assertion that Price Anderson would be unavailable to pay for environmental cleanup costs from a nuclear incident is wrong. The nuclear liability insurance under the Price Anderson Act covers environmental cleanup costs resulting from an

extraordinary nuclear occurrence ("ENO").²² American Nuclear Insurers, Nuclear Energy Liability Policy (Facility Form), Amendatory Endorsement NE-71 (Jan. 1, 1990).²³ This error also affects the discussion in this draft White Paper and *Inside EPA* article concerning whether EPA authority and cleanup standards under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA")²⁴ would apply, because CERCLA (and consequently cleanup standards under CERCLA) do not apply to a release of source, special nuclear or byproduct material from a nuclear incident if such release is subject to requirements with respect to financial protection under the Price Anderson Act. 42 U.S.C. § 9601(22). Consequently, the materials to which Pilgrim Watch refers have no probative value.

B. The Late-Filed Contention Is Not Within the Scope of the Proceeding and Material to the Findings that the NRC Must Make

The late-filed contention is also inadmissible because Pilgrim Watch fails to demonstrate that it is within the scope of the proceeding, as required by 10 C.F.R. § 2.309(f)(1)(iii).

Although Pilgrim Watch asserts that its contention is challenging the Pilgrim SAMA analysis under the National Environmental Policy Act ("NEPA") (see PW Request at 3), Pilgrim Watch in fact appears to be arguing that Entergy must implement SAMAs based on the most conservative assumptions in order to protect the public health and safety. For example, Pilgrim Watch states:

Absent a responsible third party, clean up standard and guarantee of monies there is not reasonable assurance that public health and safety will be protected in the event of a severe accident.

²² An ENO includes any event causing a discharge or dispersal of nuclear material from its intended place of confinement in amounts offsite, or causing radiation levels offsite, which the NRC determines to be substantial and determines has resulted or will probably result in substantial damages to persons offsite or property offsite. 42 U.S.C. § 2014(j).

²³ See M. Faure & T. Vanden Borre, *Compensating Nuclear Damage: A Comparative Economic Analysis of the U.S. and International Liability Schemes*, 33 Wm. & Mary Envtl. L. & Policy Rev. 219, 241-42 n.101 (2008).

²⁴ 42 U.S.C. §§ 9601 et seq.

PW Request at 9 (emphasis added). And Pilgrim Watch concludes:

Because of the importance of the absence of some third party assuming responsibility for cleanup after a severe nuclear reactor accident to pre-accident conditions, and setting a cleanup standard protective of public health, and identifying a funding source, it is clear that the Applicant must be required to be more conservative so that public health and safety will be properly protected.

Id. at 15 (emphasis added). These allegations exceed the limited scope of the safety review in a license renewal proceeding. See PPL Susquehanna, LLC (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-4, 65 N.R.C. 281, 307-09 (2007) (“The Commission chose, rather, to focus the NRC license renewal safety review ‘upon those potential detrimental effects of aging that are not routinely addressed by ongoing regulatory oversight programs.’”) citing Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 N.R.C. 3, 7 (2001). Certainly, nothing in NEPA “requires” such implementation. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 353 (1989). See also Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 N.R.C. 373, 388 n.77 (2002) (“NEPA does not mandate the *particular decisions* an agency must reach, only the process the agency must follow while reaching its decisions.”) (emphasis in original) (citations omitted).

For the same reason, Pilgrim Watch fails to demonstrate that this contention is material to the findings that the NRC must make to support license renewal. There is no requirement in the NRC’s license renewal rules that an applicant must mitigate severe accident risk in order to protect the public health and safety. See 10 C.F.R. Part 54. Consequently, Pilgrim Watch’s contention also fails to meet 10 C.F.R. § 2.309(f)(1)(iv).

C. The Late-Filed Contention Is Not Supported By Facts or Expert Opinion

The late-filed contention is also inadmissible because it is not supported by any facts or expert opinion, in contravention of 10 C.F.R. §§ 2.309(f)(1)(v). Pilgrim Watch does not present any expert opinion supporting its new contention. Nor does Pilgrim Watch present any facts that would support using NUREG-1465 release fractions, specifying consequences at the 95th percentile, applying a 15 millirem cleanup standard, eliminating discount rates, or foregoing use of probabilistic analysis.

D. The New Contention Fails to Provide Sufficient Information Showing that a Genuine Dispute Exists On a Material Issue of Law or Fact

The late-filed contention is inadmissible because it fails to establish a genuine dispute on a material issue of law or fact, in contravention of 10 C.F.R. §§ 2.309(f)(1)(vi). Pilgrim Watch's arguments, largely based on its own unsupported reasoning, are insufficient to demonstrate a genuine material dispute with the SAMA analysis's cost-benefit conclusions. Under the NRC's Rules of Practice, "a protestant does not become entitled to an evidentiary hearing merely on request, or on a bald or conclusory allegation that such a dispute exists. The protestant must make a minimal showing that material facts are in dispute, thereby demonstrating that an 'inquiry in depth' is appropriate." 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989) (quoting Conn. Bankers Ass'n v. Bd. of Governors, 627 F.2d 245, 251 (D.C. Cir. 1980)).

As a threshold matter, Pilgrim Watch does not make any minimal showing that its claims would affect the outcome of the Pilgrim SAMA analysis and are therefore material. As the Commission has held, it would be unreasonable to trigger full adjudicatory proceedings on a SAMA contention where a petitioner has done nothing to indicate the relative cost and benefit. Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 N.R.C. 1, 12 (2002). Indeed, as explained by the Commission in this

proceeding, Pilgrim Watch must show that it is “genuinely plausible that inclusion of an additional factor or use of other assumptions or models may change the cost-benefit conclusions for the SAMA candidates evaluated....” CLI-10-11, slip op. at 39. Pilgrim Watch has not met this burden. Nor can this omission be excused because Pilgrim Watch has been provided all of the inputs and data used by Pilgrim for performing the SAMA analysis. Indeed, at Pilgrim Watch’s request (presumably made to allow Pilgrim Watch’s experts to run their own analysis), Entergy provided these inputs and data in machine readable form. Letter from D. Lewis to M. Lampert (May 5, 2010).

Further, Pilgrim Watch provides no support demonstrating that its claims raise genuine disputes. Not only does Pilgrim Watch provide no support for its claims, but it fails to address information on the docket that debunks those claims.

For example, Pilgrim Watch’s challenge to the source term values is borrowed from a rejected contention in the Indian Point proceeding (a point that Pilgrim Watch fails to disclose to this Board), and Pilgrim Watch makes no effort to discuss or distinguish that ruling. In Indian Point, the NRC Staff explained that NUREG-1465 addresses only releases into containment and does not apply to the containment release scenario posited by the petitioner in that case. Indian Point, LBP-08-13, 68 N.R.C. at 187.²⁵ The NRC Staff also explained that the MAAP code includes a range of accident scenarios weighted in proportion to their probabilities of occurrence. Id. Accordingly, the Board found the Riverkeeper contention to be inadmissible because it did not demonstrate any genuine dispute. Id. Here, Pilgrim Watch provides absolutely no explanation why or how the source terms in NUREG-1465 are applicable to the Pilgrim SAMA analysis.

²⁵ See also NRC Staff’s Reply to Riverkeeper, Inc.’s Response to the Licensing Board’s Questions Regarding Contention EC-2 (SAMAs) (Apr. 21, 2008) (ADAMS Accession No. ML081130057).

Similarly, Pilgrim Watch fails to provide any support for using the 95th percentile of the total consequences. It provides no explanation why the 95th percentile should be used in a cost-benefit analysis, where the purpose of this analysis is to compare the cost of a SAMA against its expected benefit. Likewise, Pilgrim Watch fails to discuss or distinguish the applicable guidance and precedent support using of mean values. Pilgrim Watch neither discusses nor distinguishes the NRC's Regulatory Analysis Technical Evaluation Handbook or the NRC's Regulatory Analysis Guidelines, both of which provide for use of the mean (expected) values. NUREG/BR-0184 at 4.7, 5.20; NUREG/BR-0058 at 23. Pilgrim Watch does not discuss or distinguish the Commission's statements in CLI-10-11, in which the Commission observed:

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 dose 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 dose risk and offsite economic cost risk for each type of accident sequence studied. There is in SAMA analysis, therefore, an averaging of potential consequences. As a policy matter, license renewal applicants are not required to base their SAMA analysis upon consequence values at the 95th percentile consequence level (the level used for the GEIS severe accident environmental impacts analysis).

CLI-10-11, slip op. at 38-39 (emphasis in original) (footnote omitted).

In the same vein, Pilgrim Watch provides no explanation why use of a discount factor (applied to convert risk in future years to present worth, to produce net present values)²⁶ is inappropriate. Pilgrim Watch provides no explanation why the NRC guidance on determining present worth (NUREG/BR-0058 at 31-32; NUREG/BR-0184 at 5.27, 5.39) is incorrect or should be ignored.²⁷

²⁶ See ER at 4-32 to 4-43.

²⁷ As the NRC's Regulatory Analysis Technical Evaluation Handbook explains, this discounting does not represent an expected reduction in accident risk. Rather, it represents the present value of a stream of potential losses

With respect to the cleanup standard assumed in the modeling, Pilgrim Watch provides no explanation why a 15 millirem standard would apply to offsite decontamination after a severe accident. Pilgrim Watch indicates that the EPA applies this standard to remediations under CERCLA (see PW Request at 9), but provides no explanation why CERCLA (and hence the 15 millirem standard) would apply. As previously discussed, CERCLA (and consequently cleanup standards under CERCLA) do not apply to a release of source, special nuclear or byproduct material from a nuclear incident if such release is subject to requirements with respect to financial protection under the Price Anderson Act. 42 U.S.C. § 9601(22). And as previously discussed, the financial protection requirements under the Price Anderson Act apply to a nuclear incident and extend fully to environmental cleanup costs associated with any accident that the NRC determines to involve a substantial offsite release. Moreover, Pilgrim Watch provides no explanation why application of the Protective Action Guidelines established by the EPA specifically for a nuclear incident (on which the cleanup levels in the SAMA analysis are based) is an inapplicable or inappropriate assumption.

With respect to Pilgrim Watch's attempt once more to challenge use of probabilistic modeling, Pilgrim Watch has already forfeited this claim. In its Petition for Review of numerous Board decisions,²⁸ Pilgrim Watch did not dispute the Board's rejection of the portion of Contention 3 challenging the use of probabilistic modeling. Because Pilgrim Watch chose not to pursue this issue on appeal, it is considered abandoned. International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-01-21, 54 N.R.C. 247, 253 (2001); Limerick, ALAB-828, 23 N.R.C. at 20 n.18.

extending over the remaining life of the facility. Thus, it reflects the expected annual loss due to a single accident, the probability that such an accident could occur at any time over the remaining facility life, and the effects of discounting these potential future losses to present value. NUREG/BR-0184 at 5.27, 5.39.

²⁸ Pilgrim Watch's Petition for Review of LBP-06-848, LBP-07-13, LBP-06-23 and The Interlocutory Decisions in The Pilgrim Nuclear Power Station Proceeding (Nov. 12, 2008).

In sum, Pilgrim Watch's claims are wholly unsupported, fail to demonstrate the existence of any genuine dispute with the Pilgrim SAMA analysis, and fail to demonstrate that any of its claims are material. In essence, this new contention appears to be nothing more than an attempt to raise claims that Pilgrim Watch could have raised at the outset of this proceeding. Not only are these claims untimely, but they are supported by nothing more than Pilgrim Watch's desire to specify worst case assumptions and methods of analysis without one whit of justification.

V. CONCLUSION

For all of the foregoing reasons, Pilgrim Watch's Request should be denied.



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Dated: December 27, 2010

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "Entergy's Answer Opposing Pilgrim Watch Request for Hearing on a New Contention" were served on the persons listed below by deposit in the U.S. Mail, first class, postage prepaid, and where indicated by an asterisk, by electronic mail, this 27th day of December, 2010.

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