

January 24, 2011

**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))

**ENTERGY’S MOTION TO STRIKE PORTIONS OF PILGRIM WATCH’S REPLY TO
ENTERGY’S AND THE NRC STAFF’S ANSWERS OPPOSING PILGRIM WATCH’S
REQUEST FOR HEARING ON A NEW CONTENTION**

Pursuant to 10 C.F.R. § 2.323(a), Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (collectively “Entergy”) hereby move to strike portions of Pilgrim Watch Reply to Entergy’s and the NRC Staff’s Answers Opposing Pilgrim Watch Request for a Hearing on a New Contention (January 14, 2011) (“PW Reply”).¹ The PW Reply impermissibly seeks to supplement the PW Request by amending the contention as initially proffered, providing a new Affidavit of Paul M. Blanch (January 14, 2011) (“Jan. 14 Blanch Affidavit”), and making new factual claims not found in the PW Request and the accompanying December 13, 2010 Declaration from Mr. Blanch. These new items are beyond the scope of a permissible reply and are submitted without any attempt to satisfy the standards for late filed amendments to contentions set forth in 10 C.F.R. §§ 2.309(c) and (f)(2). For these reasons, the identified portions of the PW Reply and the Jan. 14 Blanch Affidavit in its entirety should be stricken.²

¹ The Entergy and NRC Staff Answers were filed in response to the Pilgrim Watch Request for Hearing on a New Contention: Inadequacy of Entergy’s Aging Management of Non-Environmentally Qualified (EQ) Inaccessible Cables (Splices) at Pilgrim Station (Dec. 13, 2010) (“PW Request”).

² This Motion seeks solely to strike the impermissible new claims, arguments, and support contained in the PW Reply and the Jan. 14 Blanch Affidavit. It is not a substantive response to the purportedly amended contention

I. BACKGROUND

On December 13, 2010, nearly five years after the availability of the Pilgrim license renewal application (“LRA” or the “Application”) submitted by Entergy in January 2006,³ and more than three years after the NRC Staff’s issuance of the final safety evaluation report (“SER”),⁴ Pilgrim Watch requested that the Board admit an entirely new contention challenging additional aspects of Pilgrim’s aging management programs (“AMPs”). See PW Request. On January 7, 2011, Entergy and the NRC Staff filed Answers opposing the PW Request.⁵ On January 14, 2011, Pilgrim Watch filed the PW Reply along with the new Jan. 14 Blanch Affidavit that are the subject of this Motion, which moves to strike the portions of the PW Reply that impermissibly seek to supplement the PW Request, and the entirety of the Jan. 14 Blanch Affidavit.

II. ARGUMENT

A. A Reply May Not be Used to Add New Bases for a Contention

The PW Reply raises new, impermissible arguments and factual assertions, and is based in part on the entirely new Jan. 14 Blanch Affidavit, a document that ostensibly responds to the statements in the Entergy and NRC Staff Answers to the PW Request. Both the PW Reply and the Jan. 14 Blanch Affidavit attempt to rehabilitate claims made in the PW Request with these new arguments and factual assertions.

set forth in the PW Reply. In its Reply, Pilgrim Watch indicated that it “will file another new contention” because it “recognizes that the Board might refuse to accept this amended contention.” PW Reply at 3. Pilgrim Watch subsequently filed the new contention on January 20, 2011, supported by another new and substantially different Affidavit from Paul Blanch dated January 19, 2011. Entergy will respond to the substantive claims raised in the new January 20 contention and the January 19 Blanch Affidavit in its Answer to the new contention. For the reasons stated in this Motion, the portions of the PW Reply that raise new claims, compared to its December 13, 2010 contention and the Jan. 14 Blanch Affidavit in its entirety should be stricken from the record.

³ See 71 Fed. Reg. 15,222 (Mar. 27, 2006).

⁴ NUREG-1891, Safety Evaluation Report Related to the License Renewal of Pilgrim Nuclear Power Station (Nov. 2007).

⁵ Entergy Answer Opposing Pilgrim Watch Request for Hearing on a New Contention (Jan. 7, 2011); NRC Staff Answer in Opposition to Pilgrim Watch Request for Hearing on New Contention (Jan. 7, 2011).

Commission precedent and the Part 2 Statement of Considerations published with the Final Rule that amended the 10 C.F.R. Part 2 regulations make clear that a reply is to “be narrowly focused on the legal or logical arguments presented” in the answers of the applicant and NRC Staff. 69, Fed. Reg. 2,182, 2,203 (Jan. 14, 2004). In this case, Pilgrim Watch has clearly gone beyond the scope of an allowable reply by making new arguments and factual assertions in the PW Reply, and by providing a new affidavit that raises new factual claims and arguments in support of the PW Reply.

The Commission has squarely ruled that a reply to an answer may not be used to add new bases for or supplement an otherwise deficient contention. Louisiana Energy Services, L.P. (National Enrichment Facility) (“LES”), CLI-04-25, 60 N.R.C. 223, 225 (2004) and CLI-04-35, 60 N.R.C. 619, 623 (2004); Nuclear Management Co. (Palisades Nuclear Plant), CLI-06-17, 63 N.R.C. 727, 732 (2006); AmerGen Energy Company, LLC (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 N.R.C. 235, 261 (2009). In Palisades, the Commission held that allowing new claims in a reply “would unfairly deprive other participants an opportunity to rebut the new claims.” CLI-06-17, 63 N.R.C. at 732. Such unfairness would result because NRC regulations do not allow the applicant or other parties to respond to a Petitioner’s reply. 10 C.F.R. § 2.309(h)(3).

New arguments or support for a contention “cannot be introduced in a reply brief, or any other time after the date the original contentions are due, unless the petitioner meets the late filing criteria set forth in 10 C.F.R. § 2.309(c), (f)(2).” Oyster Creek, CLI-09-7, 69 N.R.C. at 261 (quoting Palisades, CLI-06-17, 63 N.R.C. at 732). Under the provisions of 10 C.F.R. § 2.309(f)(2), “amended or new contentions filed after the initial filing” may be submitted “only with 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). Pilgrim Watch has neither cited the requirements of 10 C.F.R. § 2.309(f)(2) nor attempted to demonstrate that the new claims raised in its Reply meet these requirements. Nor has Pilgrim Watch attempted to address the factors used in evaluating nontimely contentions set forth in 10 C.F.R. § 2.309(c). Consequently, the new claims raised in the PW Reply are impermissible and should be stricken. Likewise the Jan. 14 Blanch Affidavit is impermissible and should also be stricken.

Furthermore, the PW Reply makes scurrilous, ad hominem statements concerning the NRC Staff affiant that are wholly improper for a pleading before an Atomic Safety and Licensing Board. Such personal attacks should be stricken from the record.

B. New Factual Assertions in PW Reply and Blanch Affidavit to be Stricken

In accordance with Commission regulations and precedent, the Board should strike the following new factual assertions and arguments found in the PW Reply and the Jan. 14 Blanch Affidavit, and strike the Jan. 14 Blanch Affidavit in its entirety.

1. Impermissible Amendment of Contention

Pilgrim Watch impermissibly seeks to amend its contention “to be explicit that it is the ‘new’ [aging management program (“AMP”)] . . . that is deficient.” PW Reply at 2. However, Pilgrim Watch does not even attempt to address the late filing factors of 10 C.F.R. § 2.309(f)(2) required for an amended contention, or of 10 C.F.R. § 2.309(c) required for a late-filed

contention. Consequently, Pilgrim Watch's attempt to amend its (already extremely late) contention should be stricken. Oyster Creek, CLI-09-7, 69 N.R.C. at 261; Palisades, CLI-06-17, 63 N.R.C. at 732.

2. Impermissible Addition of New Affidavit

Pilgrim Watch impermissibly submits the new Jan. 14 Blanch Affidavit. The original three-page Declaration from Mr. Blanch that accompanied the PW Request substantively contained no more than a simple assertion that Mr. Blanch “fully support[ed] all technical and regulatory aspects of this contention on Inaccessible cables.” Attachment B, PW Request at 48, 50. The new Jan. 14 Blanch Affidavit is a 17-page affidavit with 60 paragraphs of assertions. Pilgrim Watch offers no reason or explanation of why the Jan. 14 Blanch Affidavit could not have accompanied the PW Request. The tardy submission of the lengthy Blanch Affidavit deprived Entergy and the NRC Staff the opportunity to respond to Mr. Blanch's multiple assertions in their Answers to the PW Request. Therefore, the new Blanch Affidavit is an impermissible attempt to supplement a Reply and should be stricken in its entirety. Palisades, CLI-06-17, 63 N.R.C. at 732.

3. New Argument Concerning NRC General Design Criterion (“GDC”) 4

Pilgrim Watch now claims for the first time that NRC GDC 4 and other unspecified “federal regulations” do not permit testing of the insulation of submerged cable that is not designed for submerged or wetted conditions. PW Reply at 4 (¶ 7), 17-18 (¶ 3), 37.

The tardy contention as initially proffered was abundantly clear in alleging that Entergy's AMP “for non-environmentally qualified (EQ) inaccessible cables and cable splices at Pilgrim Station is insufficient” PW Request at 1. See also id. at 4 (“Deficiencies in the [AMP] could endanger the safety and welfare of the public”); 9 (“The Applicant has not

‘demonstrate(d) that the effects of aging will be adequately managed’); and 13 (“it could hardly be clearer that sufficiently managing aging of inaccessible cables should be a critical part of relicensing.”) (emphasis in original). The PW Request went on to claim (among other things) that NRC Generic Letter 2007-01 “suggests several procedures that could be implemented to address the degradation of inaccessible cables,” including that “[l]icensees can assess the condition of cable insulation with reasonable confidence using one or more . . . testing techniques,” but (erroneously) alleged that “[n]one of these measures are included in the AMP for Non-EQ Inaccessible Medium-Voltage Cables. PW Request at 23-24 (emphasis in original).

Now, in its Reply, Pilgrim Watch seeks to add a new argument that goes beyond challenging the adequacy of the AMP to manage potential degradation of the cable insulation. Pilgrim Watch contends for the first time that GDC 4 “has no provision or footnote that allows exceptions to the rule when owners promise to test the cables every now and then” and that “[p]eriodically testing a submerged cable when that cable is not designed for that environment is a violation of federal regulations, period.” PW Reply at 17-18. In other words, whereas Pilgrim Watch previously purported to challenge the adequacy of the testing programs, it now contends that such testing is not permissible at all. Pilgrim Watch has impermissibly introduced this new line of argument in its Reply without even attempting to address the late filing criteria contained in 10 C.F.R. §§2.309(c) and (f)(2). Oyster Creek, CLI-09-07, 69 N.R.C. at 261; Palisades, CLI-06-17, 63 N.R.C. at 732. Thus, this new line of argument should be stricken.⁶

⁶ As will be addressed in the Entergy Answer to the PW January 20 version of the contention, this claim is also beyond the scope of a license renewal proceeding because it concerns design issues related to Pilgrim Nuclear Power Station’s (“Pilgrim”) current licensing basis and not the period of extended operation or the programs identified in the license renewal application that will be in place to manage the effects of aging.

4. New Argument Alleging Lack of Baseline Inspection

Pilgrim Watch and Mr. Blanch claim for the first time in the PW Reply and accompanying Jan. 14 Blanch Affidavit that Entergy's amended AMP, "like its predecessor, does not require a baseline review to determine the condition of the submerged Non-EQ cables, prior to license extension and compare their present condition to what it was when installed" and that, therefore, "there is no way to [assess] the adequacy of the AMP." PW Reply at 7 (¶ 11), 19 (¶ 7). Jan. 14 Blanch Affidavit at 14 (¶ 47). This is the first time that either Pilgrim Watch or Mr. Blanch has raised the purported lack of a baseline inspection as a deficiency in the Entergy AMP for non-EQ inaccessible cable. Having deprived Entergy and the NRC Staff of the opportunity to rebut this impermissible new claim in their Answers to the PW Request, it should be stricken. Palisades, CLI-06-17, 63 N.R.C. at 732.

5. New Reliance on Information from the National Electrical Manufacturer's Association ("NEMA") and the National Electric Code ("NEC")

Pilgrim Watch and Mr. Blanch cite for the first time in the PW Reply information prepared by NEMA and the NEC. PW Reply at 21-23 (¶ 9), 32-33, 36; Jan. 14 Blanch Affidavit at 5-7 (¶¶ 18-23), 11 (¶ 36), 14 (¶ 48), 17 (¶ 59). This information purportedly shows "the effect of contaminated water on cables" and the need for "faulty components . . .to be replaced" at Pilgrim due to alleged contamination of water that may have contacted Pilgrim's non-EQ inaccessible cables. See, e.g., PW Reply at 21-23 (¶ 9). The late contention as initially proffered nowhere mentions NEMA or NEC, or otherwise quotes or references any of the NEMA/NEC reports, studies, or opinions on which Pilgrim Watch now belatedly relies. Pilgrim Watch's tardy reliance on these materials has deprived Entergy and the NRC Staff the opportunity to

rebut this information in their Answers to the PW Request and, consequently, it should be stricken. Palisades, CLI-06-17, 63 N.R.C. at 732.⁷

6. Ad Hominem Attacks on NRC Staff

Finally, the PW Reply makes scurrilous, ad hominem attacks on the NRC Staff and the NRC Staff Affiant, an experienced NRC Team Leader with close to 30 years of experience in the nuclear industry, 22 of them at the NRC. PW Reply at 5, 11, 24. Such personal attacks have no place in pleadings before an atomic safety and licensing board and should be stricken from the record. See 10 C.F.R. § 2.314(a) (“parties and their representatives in proceedings subject to this subpart are expected to conduct themselves with honor, dignity, and decorum as they should before a court of law.”); see also Curators of the University of Missouri (Trump-S Project) CLI-95-17, 42 N.R.C. 229, 232 n.1 (1995) (“Intervenor counsels' derogatory description of NRC Staff is . . . wholly inappropriate in legal pleadings”); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB–204, 7 A.E.C. 835, 838 (1974) (“The gratuitous comment of intervenors' counsel was not only unwarranted but unprofessional.”).

⁷ As will be addressed in the Entergy Answer to the PW January 20 version of the contention, this claim is also beyond the scope of a license renewal proceeding because it concerns design issues related to Pilgrim’s current licensing basis and not the period of extended operation or the programs identified in the license renewal application that will be in place to manage the effects of aging.

III. CONCLUSION

For the foregoing reasons, the identified portions of the PW Reply and the Jan. 14 Blanch Affidavit in its entirety should be stricken.⁸

Respectfully submitted,

/Signed electronically by Paul A. Gaukler/

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Dated: January 24, 2011

⁸ Counsel for Entergy certifies that he has consulted with the other parties as required by 10 C.F.R. § 2.323(b). Pilgrim Watch opposes this motion. The NRC Staff does not object to the filing of this motion and will file a response upon reviewing the substance of the motion.

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CERTIFICATE OF SERVICE

I hereby certify that “Entergy’s Motion to Strike Portions of Pilgrim Watch’s Reply to Entergy’s and the NRC Staff’s Answers Opposing Pilgrim Watch’s Request for Hearing on a New Contention” was provided to the Electronic Information Exchange for service on the individuals below, this 24th day of January, 2011. In addition, a copy of this pleading was provided by email to the persons designated by an asterisk below.

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