

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
)
)
(Pilgrim Nuclear Power Station))

NRC STAFF'S RESPONSE
IN SUPPORT OF ENTERGY'S MOTION TO STRIKE

Pursuant to 10 C.F.R. § 2.323(c), the staff of the U.S. Nuclear Regulatory Commission ("Staff") responds to 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 ("Motion to Strike"), filed on January 24, 2011 by Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. ("Entergy"). For the reasons set forth below, the Staff supports Entergy's Motion to Strike, and requests that the Atomic Safety and Licensing Board ("Board") strike the impermissible additions and amendments contained in Pilgrim Watch's Reply,¹ or, in the alternative, not consider the impermissible material in its determination regarding the admissibility of the contention submitted by Pilgrim Watch ("PW") in its December 13, 2010 request for hearing.²

¹ Pilgrim Watch Reply to Entergy's and NRC Staff's Answers Opposing Pilgrim Watch Request for Hearing on New Contention (Jan. 14, 2010) ("PW Reply"), accompanied by an affidavit of Paul M. Blanch ("Blanch Jan. 14 Affidavit").

² 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, (December 13, 2010)("Request for Hearing").

BACKGROUND

On December 13, 2010, PW filed its Request for Hearing asking that the Board admit a new contention challenging Pilgrim Nuclear Power Station's ("Pilgrim") aging management programs ("AMPs") for non-qualified, inaccessible electric cables. On January 7, 2011, Entergy and the NRC Staff filed Answers opposing the Request for Hearing.³ In its answer, Entergy's discussed the January 7, 2011 enhancements made to AMP for non-EQ inaccessible medium voltage cables. Entergy Answer at 9-10.

On January 14, 2011, Pilgrim Watch filed its PW Reply, which contained an amended version of the original new contention in PW Request and added new information and bases. PW Reply. In support, PW filed the Blanch Jan. 14 Affidavit. On January 24, 2011, Entergy filed its Motion to Strike, which moves to strike (1) the portions of the PW Reply that impermissibly seek to supplement the PW Request, and (2) Mr. Blanch's Affidavit, filed January 14, 2011.

DISCUSSION

I. Legal Standard

It is well established in NRC proceedings that a reply cannot expand the scope of the arguments set forth in a hearing request or motion to admit contentions. *See Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 224-225 (2004), *reconsideration denied*, CLI-04-35, 60 NRC 619 (2004); *Nuclear Management Co.* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006); *Entergy Nuclear Operations, Inc., Entergy Nuclear Palisades, LLC, et al.* (Palisades Nuclear Plant, *et al.*) CLI-08-19, 68 NRC 251, 261-62

³ NRC Staff Answer in Opposition to Pilgrim Watch Request for Hearing on New Contention (Jan. 7, 2011) ("Staff Answer"); Entergy Answer Opposing Pilgrim Watch Request for Hearing on New Contention (January 7, 2011) ("Entergy Answer").

(2008). The Commission requires strict adherence to contention admissibility standards, demanding discipline and preparedness on the part of petitioners. *LES*, CLI-04-25, 60 NRC at 224-225. Reply filings that are, in reality, attempts to amend the original petitions and that do not address the late-filing factors in 10 C.F.R. §§ 2.309(c) and (f)(2), cannot be used to support contention admissibility. *LES*, CLI-04-25, 60 NRC at 224 (footnote omitted) (*citing* the Licensing Board, below, LBP-04-14, 60 NRC 40, 58 (2004)). The reply brief should be “narrowly focused on the legal or logical arguments presented in the [other parties’ answers].” *Id.* at 225 (*quoting* Final Rule: “Changes to the Adjudicatory Process,” 69 Fed.Reg. 2182, 2203 (Jan.14, 2004)). As the Commission has stated on several occasions:

As we face an increasing adjudicatory docket, the need for parties to adhere to our pleading standards and for the Board to enforce those standards are paramount. There simply would be “no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements” and add new bases or new issues that “simply did not occur to [them] at the outset.”

Id. (*quoting Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-27, 58 NRC 419, 428-29 (2003) (citation omitted)). Furthermore, raising new claims in a reply unfairly deprives other participants of an opportunity to rebut the claims. *Palisades*, CLI-06-17, 63 NRC at 732.

In applying these standards, Boards have struck, or declined to consider, new bases, information and argument offered in a reply. *E.g. Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 198-199 (2006); *PPL Susquehanna, LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LPB-07-04, 65 NRC 281, 301-302 (2007).

II. PW’s New Bases and Factual Assertions

The PW Reply attempts to amend its contention by changing its subject matter to Entergy’s enhanced AMP for the cables. PW Reply at 2. The Reply also adds several new bases not

raised before and a new affidavit from Mr. Paul M. Blanch. *Id.* at 6-7, 17, 19, 21-22, 32, 37. Yet, in adding the new arguments and bases, PW made no attempt to address the late-filing criteria of 10 C.F.R. §§ 2.309 (c) and (f)(2). *See e.g., LES*, CLI-04-25, 60 NRC at 224. None of the additions are permissible pursuant to the case law discussed above.

In its Motion to Strike, Entergy identified impermissible new arguments, bases and information raised by PW in its Reply.

Entergy argues that the amendment of the contention sought by PW, which changes the focus of the contention to make explicit that the new AMP is deficient, without discussing and meeting the late-filing criteria for a late filed contention in 10 C.F.R. § 2.309(c), or for an amended contention in 10 C.F.R. § 2.309(f)(2) is impermissible. Motion to Strike at 4-5. The Staff agrees with Entergy that such amendment is impermissible without meeting the late filing criteria and that the proffered amendment should be stricken or not considered in determining whether the contention is admissible.⁴

Entergy next asserts that the new, lengthy, Blanch Jan.14 Affidavit should be stricken because it is an attempt to bolster the prior affidavit, which only contained Mr. Blanch's statement that he had read the contention and "fully supports all technical and regulatory aspects" of the contention relating to inaccessible cables. *Id.* at 5. The Staff agrees that the affidavit should be stricken. As noted by Entergy, there is no explanation why the affidavit could not have been filed with the PW Request, and the late filing deprives Entergy and the Staff of an opportunity to respond to the affidavit. *Id.* *See Palisades*, CLI-06-17, 63 NRC at 732.

⁴ The Staff is, by no means, suggesting that the contention, either as originally submitted or as amended, is otherwise admissible. The Staff stands on its objections to the original contention, as stated in the Staff Response, and will respond to PW's most recent motion for a hearing on a new contention, filed January 20, 2011, on or before the due date of February 14, 2011.

The new argument concerning General Design Criterion (“GDC”) 4 is raised for the first time in PW’s Reply, without discussing or meeting the late filing criteria of 10 C.F.R. §§ 2.309(c) and (f)(2). PW alleges that under GDC 4, the licensee is not permitted to test the cables. Motion to Strike at 5 (citing PW Reply at 4, 17-18, 37). This allegation differs substantially from the contention as originally pled, wherein PW claimed that the AMP for the cables is “insufficient”. PW Request at 1, 4, 9, and 13. See Motion to Strike at 5-6. PW then discussed various ways to address degradation of the cables. PW Request at 23-24. Now, as noted by Entergy, PW is changing its position, stating that testing is forbidden, not that the testing is inadequate. Motion to Strike at 6. Based on the foregoing, the Staff agrees that the new argument should be stricken or not considered by the Board.

PW raises another new argument in its Reply: That the AMP is deficient because it does not include a baseline inspection of the cables. PW Reply at 7 and 19; Blanch Jan.14 Affidavit at 14. As with the GDC 4 argument, PW has not raised this issue previously and did not attempt to show that it met the criteria for late filing in 10 C.F.R. §§ 2.309(c) and (f)(2). The Staff agrees that this new argument should be stricken or not considered.

The Staff also agrees that the reliance on documents never discussed in PW’s Request and raised for the first time in the PW Reply is impermissible and should not be considered by the Board in determining the admissibility of the contention. Motion to Strike at 7-8.

Finally, although it should be obvious to all, it bears mentioning that personal attacks on any participant in filings before the Board should not be permitted. Thus, the comments made by PW, at 5 and 11, relating to the Staff’s expert should be stricken. Because PW subsequently

filed a separate motion to admit a contention regarding the enhanced AMP for buried cables,⁵ the staff believes that the best course is to grant the motion to strike or not consider the impermissible portions of PW's Reply, and proceed argument on the January 20, 2011 motion.

CONCLUSION

For the foregoing reasons, the Staff supports Entergy's Motion to Strike and respectfully requests that the impermissible additions to PW's Reply be stricken or not considered by the Board in its determination regarding the admissibility of the proffered contention.

Respectfully Submitted,

/Signed Electronically By/
Susan L. Uttal
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 3rd day of February, 2011

⁵ 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 (January 20, 2011)

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NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

I hereby certify that copies of the foregoing "NRC STAFF'S RESPONSE IN SUPPORT OF ENTERGY'S MOTION TO STRIKE" have been served upon the following by the Electronic Information Exchange, with courtesy copies sent by electronic mail, this 3rd day of February, 2011:

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