

April 7, 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))	

**ENERGY’S REPLY TO PILGRIM WATCH
POST-HEARING MEMORANDUM**

Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (collectively “Entergy”) hereby oppose Pilgrim Watch's request in its Post-Hearing Memorandum, submitted on March 28, 2011, that the Board take “judicial notice” of allegedly “important relevant facts that have arisen since the hearing as a result of” the recent events at the Fukushima Nuclear Power Station.¹

The Board should reject Pilgrim Watch’s request because Pilgrim Watch has provided only a recapitulation of highly generalized and preliminary information gleaned from media reports. Such information does not amount to facts beyond reasonable dispute that exhibit the high degree of reliability and accuracy necessary to invoke judicial notice or official notice. To the contrary, Pilgrim Watch only provides non-expert characterization of media reports along with a *Boston Globe* editorial, which, by its very nature, presents the opinion of the author. Additionally, Pilgrim Watch’s allegedly important facts do not, for the most part, even concern the specific issues in controversy before the Board.²

¹ Pilgrim Watch Post- Hearing Memorandum (Mar. 28, 2011) at 1 (“Memorandum”).

² Pilgrim Watch additionally requests that the Board delay the initial “decision on the application until NRC has evaluated the lessons learned from Fukushima to be assured that the Aging Management Programs for Pilgrim are

I. PILGRIM WATCH'S MEMORANDUM DOES NOT MEET THE STANDARD FOR OFFICIAL NOTICE

The Commission's rules for official notice state that:

The Commission or the presiding officer may take official notice [1] of any fact of which a court of the United States may take judicial notice or [2] of any technical or scientific fact within the knowledge of the Commission as an expert body

10 C.F.R. § 2.337(f)(1). Pilgrim Watch meets neither of these standards.

The allegedly important facts in Pilgrim Watch's Memorandum are not the type of facts of which a court of the United States may take judicial notice. Rule 201 of the Federal Rules of Evidence establishes the kinds of facts of which a court of the United States, and therefore the Board, may take judicial notice:

A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Fed. R. Evid. 201(b).

Judicial notice is therefore appropriate if, and only if, particular facts are indisputable. For example, in Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 N.R.C. 61, 75 (1991), the Commission explained that it is altogether appropriate for the Commission to take notice of the mere existence of a settlement agreement. "Simply put, the existence of the settlement agreement is 'a matter beyond reasonable controversy' and is 'capable of immediate and accurate determination by resort to easily accessible sources of

appropriate." Memorandum at 3. Pilgrim Watch fails to explain how the events in Japan relate in any way to the effects of aging at issue in this license renewal. In any event, any agency action by the NRC based on the lessons learned from Fukushima will be generic in nature and will appropriately apply to affected licensees irrespective of their license renewal status.

indisputable accuracy.” Shoreham, CLI-91-2, 33 N.R.C. at 75 quoting Gov’t of Virgin Islands v. Gereau, 523 F.2d 140, 147 (3d Cir. 1975), cert. denied, 424 U.S. 917 (1976).³

Pilgrim Watch’s Memorandum and attached editorial fail to meet this standard for numerous reasons. Foremost, the Memorandum consists solely of unsupported statements and non-expert opinions based on preliminary media reports. No reference to any source “whose accuracy cannot reasonably be questioned” is provided. Because Pilgrim Watch’s allegedly “important facts” are not supported by any reliable expert, they are altogether inadmissible as evidence, much less the proper subject for judicial notice. As such, Pilgrim Watch’s allegedly “important facts,” interspersed throughout with non-expert opinion and characterizations, are neither indisputable nor beyond reasonable controversy. Indeed, the expert agency in this area, the Nuclear Regulatory Commission, has established a task force to evaluate over a several month period the events at Fukushima and to determine their implications for U.S. nuclear power plants.⁴ If the facts were indisputable and beyond reasonable controversy as Pilgrim Watch claims, there would be no need for such expert investigation and evaluation.

As an example, based on preliminary media reports, Pilgrim Watch asserts that the “areas of impact and contamination . . . cannot be predicted using a straight-line Gaussian plume model.” Memorandum at ¶ 2. However, Pilgrim Watch cites no authoritative source for this allegedly “important fact.” Rather, it is solely the unsupported, non-expert opinion of Pilgrim Watch expressed many times in this proceeding, based on its refusal to acknowledge the purpose

³ See also, e.g., U.S. v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003) (“judicial notice of adjudicative facts that are not subject to reasonable dispute”); Brown v. D.C., 514 F.3d 1279, 1285 (D.C. Cir. 2008) (judicial notice of the year in which the Mayor of Washington, D.C. took office); and Washington Water Power Co. v. FERC, 775 F.2d 305, 328 n.19 (D.C.Cir.1985) (“judicial notice of the United States Geological Survey maps covering the Spokane River and the Army Chief of Engineers List of Bridges Over the Navigable Waters”).

⁴ Nuclear Regulatory Commission Directs Staff on Continuing Agency Response to Japan Events; Adjusts Commission Schedule, NRC Press Release No. 11-055 (Mar. 23, 2011) (ADAMS Accession No. ML110821123); NRC Appoints Task Force Members and Approves Charter for Review of Agency’s Response to Japan’s Nuclear Event, NRC Press Release No.11-062 (Apr. 1, 2011) (ADAMS Accession No. ML110910479).

of a SAMA analysis and how a SAMA analysis probabilistically weights the likelihood of many different outcomes. Entergy and the NRC Staff experts have introduced substantial evidence showing the Gaussian plume is indeed adequate for SAMA analysis purposes. Pilgrim Watch's claim that the key issue in Contention 3 is actually indisputable and subject to judicial notice bespeaks a fundamental misconception of judicial notice.⁵ Similarly, Pilgrim Watch's other alleged "important facts" are simply unsupported assertions and opinions that, by and large, do not even concern issues in controversy before the Board.⁶ As such, judicial notice of Pilgrim Watch's Memorandum is wholly inappropriate.

Similarly, judicial notice of the *Boston Globe* editorial is also improper. The mere publication of the article in the *Boston Globe* does not render the statements contained therein indisputable "facts." For example, in Diablo Canyon, the licensing board rejected an intervenor's motion to take official notice of a news article stating, "the newspaper article information in question does not meet the definition of matters that may be officially noticed in that it is not 'a matter beyond reasonable controversy' and is not 'capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy.'" Pacific Gas & Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-03-11, 58 N.R.C. 47, 72-73 (2003) (citing Shoreham, CLI-91-2, 33 N.R.C. at 75) Moreover, editorials, by their very nature, represent the opinion of the author as opposed to indisputable fact. See Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-74-22, 7 A.E.C. 659, 668 (1974) ("The material sought to be noticed in this regard constitutes opinion by specific

⁵ While official notice is appropriate as to background facts or facts relating only indirectly to the issues, it is inappropriate as to facts directly and specifically at issue in a proceeding. 2 Davis, Administrative Law Treatise, § 15.08 (1958).

⁶ Courts do not take judicial notice of irrelevant facts because to do so serves no purpose. See e.g., Larson v. Dep't of State, 565 F.3d 857, 870 (DC Cir. 2009) ("We deny the plaintiffs' request for judicial notice of articles relating to Guatemala and government secrecy because those articles are irrelevant to our inquiry; taking notice of them would not affect our opinion.").

individuals concerning matters that not only remain in controversy among the parties, but are also the subject of sharp difference of opinion in the scientific and technical community.”) Consequently, it is improper to take judicial notice of the opinions set forth in the *Boston Globe* editorial.

Likewise, none of Pilgrim Watch’s asserted facts meet the second prong of 10 C.F.R. § 2.337(f)(1) – that official notice may be taken “of any technical or scientific fact within the knowledge of the Commission as an expert body.” Under this prong, boards may take official notice of Commission and other official government documents in appropriate circumstances, typically for background related facts or for adjudicative efficiency.⁷ None of Pilgrim Watch’s allegedly “important facts” are, however, based on official Commission records.

Conversely, as discussed above, boards have refused to accord the same weight to newspaper articles and other unreliable or disputable opinions. See, e.g., Diablo Canyon, LBP-03-11, 58 N.R.C. at 72-73. The licensing board in Catawba drew a bright line distinction between (1) particular Commission documents consisting of various published NRC Staff reports, for which official notice might be applied, and (2) excerpts from various articles in periodicals and technical journals for which official notice was inappropriate. As the licensing board explained:

The Board cannot, however, give the same weight to the selected excerpts from the articles in the various periodicals and technical journals sought by Intervenor to be introduced under the provisions of

⁷ See, e.g., Consolidated Edison Co. of N.Y. (Indian Point, Unit No. 2), ALAB-75, 5 A.E.C. 309, 310 (1972) (appeal board took official notice of Commission records regarding the nature and disposition of a fuel problem in another proceeding to establish relevant facts for the same fuel problem in the proceeding before it); Duquesne Light Co. (Beaver Valley Power Station, Unit No. 2), LBP-74-25, 7 A.E.C. 711, 733 (1974) (official notice of Atomic Energy Commission General Manager statement from Commission’s public records that, upon the addition of another reactor at a site, future releases of radioactivity from the site would not exceed the lowest limit established for all reactors at the site); Catawba, LBP-74-22, 7 A.E.C. at 667 (official notice of Staff reports and WASH documents); Curators of the University of Missouri (TRUMP-S Project), CLI-95-1, 41 N.R.C. 71, 87 & n.3 (1995) (official notice of Staff Safety Evaluation Report and letter approving Emergency Plan and of other government agency official reports).

‘official notice.’ The material sought to be noticed in this regard constitutes opinion by specific individuals concerning matters that not only remain in controversy among the parties, but are also the subject of sharp difference of opinion in the scientific and technical community. It must, therefore, be concluded that these documents cannot be noticed as technical or scientific facts within the knowledge of the Commission, as contemplated by § [2.337(f)].

Catawba, LBP-74-22, 7 A.E.C. at 668.

Pilgrim Watch’s Memorandum consisting of non-expert opinions and characterization of facts and the attached editorial cannot be officially noticed by this Board because neither document contains undisputed “technical or scientific fact within the knowledge of the Commission as an expert body.” 10 C.F.R. § 2.337(f)(1). As in Catawba, Pilgrim Watch’s Memorandum merely “constitutes opinion by specific individuals,” and therefore cannot be accorded the same weight as Commission documents. The Memorandum and editorial are not “technical or scientific fact within the knowledge of the Commission as an expert body,” but instead are opinion and views within the knowledge of Pilgrim Watch and the publisher of the *Boston Globe*. Moreover, as noted above, the alleged “important facts” are by and large irrelevant to the resolution of Contention 3. Indeed, it is far from apparent what relevance the *Boston Globe* editorial has to meteorological modeling necessary for a SAMA analysis, which is the subject of Contention 3 as remanded by the Commission.

II. CONCLUSION

For all of the foregoing reasons, the Board should deny Pilgrim Watch's request to take judicial notice of allegedly important facts arising from the recent events at Fukushima.

Respectfully Submitted,

/Signed electronically by Paul A. Gaukler/

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CERTIFICATE OF SERVICE

I hereby certify that copies of Entergy’s Reply To Pilgrim Watch Post-Hearing Memorandum, dated April 7, 2011, was provided to the Electronic Information Exchange for service on the individuals below, this 7th day of April, 2011. In addition, a copy of this pleading was provided by email to the persons designated by an asterisk below.

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