

May 2, 2011

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

Before the Commission

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)	)	
	)	
In the Matter of	)	
	)	Docket Nos. 50-247-LR
Entergy Nuclear Operations, Inc.	)	and 50-286-LR
	)	ASLBP No. 07-858-03-LR
(Indian Point Nuclear Generating Units 2 and 3)	)	

**ENERGY’S ANSWER OPPOSING PETITION  
TO SUSPEND PENDING LICENSING PROCEEDINGS**

**I. INTRODUCTION**

Pursuant to the Commission’s Order of April 19, 2011, Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (collectively “Entergy”) hereby answer and oppose the Emergency Petition to Suspend All Pending Reactor Licensing Decisions Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident (Corrected April 18, 2011) (“Petition”), which Pilgrim Watch and Hudson River Sloop Clearwater, Inc. (“Clearwater”) filed in the Pilgrim and Indian Point license renewal proceedings, respectively.<sup>1</sup> The Petition, which is being filed in no less than twenty-six separate

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<sup>1</sup> On April 14, 2011, Pilgrim Watch filed a version of the Petition dated “April 14-18, 2011.” On April 19, 2011, Pilgrim Watch filed an “Amendment and Errata to Emergency Petition to Suspend All Pending Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident” (April 18, 2011), accompanied by the corrected version of the Petition. On April 19, 2011, Clearwater filed the corrected version of the Petition, along with the Declaration of Dr. Arjun Makhijani in Support of Emergency Petition to Suspend all Pending Reactor Licensing Decisions and Relating

proceedings by some fifty individuals and organizations that have intervened in opposition to those proceedings, requests sweeping actions, including: 1) suspension of all decisions pending completion of the NRC's review of the Fukushima Daiichi accident; 2) suspension of all proceedings, hearings or opportunities for public comment on any issue considered in that review; 3) performance of an environmental analysis of the accident; 4) performance of a safety analysis of the regulatory implications; 5) establishment of procedures and a time table for raising of new issues in pending licensing proceedings; 6) suspension of all decisions and proceedings pending the outcome of any independent Congressional, Presidential or NRC investigations; and 7) for the NRC to request a Presidential investigation.

Petitions to the Commission to suspend proceedings are treated as motions under 10 C.F.R. § 2.323. AmerGen Energy Co., LLC et al. (Oyster Creek Nuclear Generating Station et al.), CLI-08-23, 68 N.R.C. 461, 476 (2008); Pacific Gas & Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-02-23 56 N.R.C. 230, 237 (2002).

While the NRC rules require that motions be addressed to the Presiding Officer when a proceeding is pending, the Commission has previously indicated that suspension motions such as this are best addressed to it. Oyster Creek, CLI-08-23, 68 N.R.C. at 476; Diablo Canyon, CLI-02-23, 56 N.R.C. at 237. Given the Petition's sweeping requests and its applicability to all pending reactor licensing proceedings, Entergy agrees that the Petition should be decided by the Commission rather than individual licensing boards.

As discussed below, the Petition is without merit and should be denied. The Commission considers the suspension of licensing proceedings a "drastic" action that is not warranted absent "immediate threats to public health and safety." Oyster Creek, CLI-08-23, 68

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Rulemaking Decisions Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident (April 19, 2011) ("Makhijani Decl."). Pilgrim Watch filed the Makhijani Decl. on April 19, 2011.

N.R.C. at 484; Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 N.R.C. 151, 173-74 (2000). The Petition makes no claims of “immediate threats to public health and safety,” and certainly, the continuation and completion of the Pilgrim and Indian Point license renewal proceedings pose no such threat because those proceedings are, by Commission design, limited to aging-management issues, which have no apparent bearing on the Fukushima Daiichi accident. Apart from aging-management issues, the sufficiency of a plant’s current licensing basis (“CLB”) to provide adequate protection to the public health and safety, and a plant’s compliance therewith, are reasonably assured by the NRC’s ongoing regulatory processes and oversight, and not by the license renewal process. In this respect, the Commission is conducting extensive reviews to identify and apply the lessons learned from the Fukushima Daiichi accident, and has made it clear that it will use the information from these activities to impose any requirements it deems necessary, irrespective of whether a plant is applying for or has been granted a renewed operating license. Thus, there is simply no basis to interrupt and further delay the Pilgrim and Indian Point license renewal proceedings, which have already been ongoing for more than 62 and 47 months, respectively.

Moreover, the Petition is both procedurally and substantively deficient. Procedurally, (1) the Petition neither addresses nor satisfies the standards for suspending or staying a proceeding, and (2) neither Pilgrim Watch nor Clearwater has met the NRC’s consultation requirements. Substantively, the matters to which the Petition relates are not within the scope of a license renewal proceeding, which is limited to managing the effects of aging; and the Petition’s claims regarding the National Environmental Policy Act (“NEPA”) are not only incorrect but in essence an impermissible challenge to the NRC’s Generic Environmental Impact Statement for License Renewal of Nuclear Plants, NUREG-1437 (May 1996) (“GEIS”).

## II. BACKGROUND

### A. The Pilgrim License Renewal Proceeding

The license renewal proceeding for the Pilgrim Nuclear Power Station (“Pilgrim”), which is now in its sixth year, commenced with Entergy’s submittal of its Application on January 27, 2006. 71 Fed. Reg. 15,222 (Mar. 27, 2006). The Application seeks to renew the Pilgrim operating license, which expires on June 8, 2012, to allow an additional twenty years of operation. *Id.* The Staff’s final supplemental Environmental Impact Statement (“EIS”) for Pilgrim was issued in July 2007<sup>2</sup> and the final Safety Evaluation Report (SER) was issued in November 2007.<sup>3</sup>

On October 16, 2006, the Atomic Safety Licensing Board granted a petition by Pilgrim Watch to intervene in this proceeding and admitted two Contentions.<sup>4</sup> Contention 1 was resolved in favor of Entergy after an April 2008 evidentiary hearing on the merits.<sup>5</sup> Contention 3 was initially resolved in Entergy’s favor on summary disposition prior to this evidentiary hearing,<sup>6</sup> but the Commission subsequently remanded certain limited issues for further hearing.<sup>7</sup>

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<sup>2</sup> NUREG-1437, Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 29, Regarding Pilgrim Nuclear Power Station Final Report (July 2007).

<sup>3</sup> NUREG-1891, Safety Evaluation Report Related to the License Renewal of Pilgrim Nuclear Power Station (Nov. 2007).

<sup>4</sup> Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), LBP-06-23, 64 N.R.C. 257 (2006).

<sup>5</sup> Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), LBP-08-22, 68 N.R.C. 590 (2008). The Commission has affirmed the Licensing Board’s decision on Contention 1 and denied Pilgrim Watch’s petition for review with respect thereto. Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-14, 71 N.R.C. \_\_\_, slip op. at 29 (June 17, 2010).

<sup>6</sup> Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), LBP-07-13, 66 N.R.C. 131 (2007).

<sup>7</sup> Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-11, 71 N.R.C. \_\_\_ (Mar. 26, 2010)

The hearing on the remanded issues was completed in March 2011, and the parties are awaiting a decision by the Atomic Safety and Licensing Board.<sup>8</sup>

B. Indian Point License Renewal Proceeding

The license renewal proceeding for Indian Point Nuclear Generating Units 2 and 3 (“IP2” and “IP3,” and collectively the “Indian Point Energy Center” or “IPEC”), which is now entering its fifth year, commenced with Entergy’s submittal of its Application on April 30, 2007.<sup>9</sup> The Application seeks to renew the operating licenses for IP2 and IP3, which expire on September 9, 2013, and December 12, 2015, respectively, to allow an additional twenty years of operation. See 72 Fed. Reg. at 42,134. The Staff’s final SER was issued in November 2009,<sup>10</sup> and the final supplemental EIS was issued in December 2010.<sup>11</sup>

On July 31, 2008, the Atomic Safety and Licensing Board issued a Memorandum and Order admitting the State of New York, Riverkeeper, Inc., and Clearwater as Parties to this proceeding.<sup>12</sup> The Board admitted a number of safety and environmental contentions, and litigation remains ongoing. There also are several proposed new and amended contentions pending before the Board, primarily based on the final supplemental EIS. A hearing on the admitted contentions is expected to be held in 2012.

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<sup>8</sup> Also fully briefed and argued and pending before the Board for decision on admissibility are two late-filed Pilgrim Watch contentions. See Order (Addressing Joint Motion, Motion in Limine, Proposed Findings of Fact and Conclusions of Law/Concluding Statements of Position, and Argument to be held March 9, 2011) (Feb. 22, 2011).

<sup>9</sup> See 72 Fed. Reg. 42,134 (Aug. 1, 2007).

<sup>10</sup> See NUREG-1930, Safety Evaluation Report Related to the License Renewal of Indian Point Nuclear Generating Units Nos. 2 and 3 (Nov. 2009).

<sup>11</sup> NUREG-1437, Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 38, Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3 (Dec. 2010).

<sup>12</sup> See Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), LBP-08-13, 68 N.R.C. 43 (2008); Licensing Board Memorandum and Order (Authorizing Interested Governmental Entities to Participate in this Proceeding) (Dec. 18, 2008) at 2.

### C. The Scope of License Renewal Proceedings

The Commission has specifically limited the safety review in license renewal proceedings to the matters specified in 10 C.F.R. §§ 54.21 and 54.29(a),<sup>13</sup> which focus on managing the aging of certain systems, structures and components, and review of time-limited aging analyses. See Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 N.R.C. 3, 7-8 (2001); Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2)), CLI-02-26, 56 N.R.C. 358, 363 (2002). Thus, the potential effect of aging is the issue that essentially defines the scope of license renewal proceedings. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 N.R.C. 631, 637 (2004).

This scope is based on the principle, established in the rulemaking proceedings, that with the exception of the detrimental effects of aging, the existing regulatory processes are adequate to ensure that the current licensing bases (“CLB”) of operating plants provide and maintain an adequate level of safety. 60 Fed. Reg. at 22,464, 22,481-82. A plant’s CLB is not static, but rather is an “evolving set of requirements and commitments for a specific plant that [is] modified as necessary over the life of a plant to ensure continuation of an adequate level of safety.” Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-14, 71 N.R.C. \_\_\_ slip op. at 4 (June 17, 2010), quoting 60 Fed. Reg. at 22,474. Therefore,

[i]n developing the renewal regulations, the Commission concluded that the “only issue” where the regulatory process may not adequately maintain a plant’s current licensing basis involves the potential

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<sup>13</sup> The Commission has stated that the scope of review under its rules determines the scope of admissible issues in a renewal hearing. Final Rule, Nuclear Power Plant License Renewal Revisions, 60 Fed. Reg. 22,461, 22,482 n.2 (May 8, 1995). “Adjudicatory hearings in individual license renewal proceedings will share the same scope of issues as our NRC Staff review, for our hearing process (like our Staff’s review) necessarily examines only the questions our safety rules make pertinent.” Turkey Point, CLI-01-17, 54 N.R.C. at 10.

“detrimental effects of aging on the functionality of certain systems, structures, and components in the period of extended operations.”

Id. at 5. Consequently, license renewal does not focus on operational issues or on the adequacy of a plant’s CLB (other than with respect to aging), because these issues “are effectively addressed and maintained by ongoing agency oversight, review, and enforcement.” Millstone, CLI-04-36, 60 N.R.C. at 638 (footnote omitted).<sup>14</sup> Aside from the issue of aging management, the adequacy of a plant’s CLB is not within the scope of license renewal review. Turkey Point, CLI-01-17, 54 N.R.C. at 23 (affirming rejection of a contention alleging spent fuel pool vulnerability to external hazards).

#### D. The NRC Response to the Fukushima Daiichi Accident

On March 11, 2011, the Tohoku-Taiheiyou-Oki Earthquake occurred near the east coast of Honshu, Japan. This magnitude 9.0 earthquake and the subsequent tsunami caused significant damage to at least four of the six units of the Fukushima Daiichi nuclear power station as the result of a sustained loss of both the offsite and on-site power systems. NRC Information Notice 2011-05, Tohoku-Taiheiyou-oki Earthquake Effects on Japanese Nuclear Power Plants (Mar. 18, 2011) at 1 (ADAMS Accession No. ML110760432).

The Commission has been closely monitoring the activities in Japan and reviewing all information available.<sup>15</sup> It has dispatched a team of experts to Japan, to support both the

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<sup>14</sup> See also Federal Respondents’ Memorandum on the Events at the Fukushima Daiichi Nuclear Power Station at 18, New Jersey Env’tl. Fed’n v. NRC, No. 09-2567 (3d Cir. Apr. 4, 2011) (“Federal Respondents’ Memorandum”) (“the license renewal hearing process . . . focuse[s] strictly on contentions relating to the ‘potential detrimental effects of aging that are not routinely addressed by ongoing regulatory programs’ . . . ; the license renewal process [is] ‘not intended to duplicate the Commission’s ongoing review of operating reactors.’”).

<sup>15</sup> Statement by Chairman Jaczko to the Senate Environment and Public Works Committee and Clean Air and Nuclear Safety Subcommittee (Apr. 12, 2011) (ADAMS Accession No. ML111020070) (“Chairman Jaczko April 12 Statement”).

Japanese authorities and the U.S. embassy. In addition, the Commission is already conducting extensive reviews to identify and apply the lessons learned from the Fukushima Daiichi accident.

The Commission has created a task force, made up of current senior managers and former NRC experts with relevant experience, to conduct both short-term and long-term analyses of the lessons that can be learned from the Fukushima Daiichi accident. In the short term, to be completed in 90 days, the task force has been directed to

- evaluate currently available technical and operational information from the events that have occurred at the Fukushima Daiichi nuclear complex in Japan to identify potential or preliminary near term/immediate operational or regulatory issues affecting domestic operating reactors of all designs, including their spent fuel pools, in areas such as protection against earthquake, tsunami, flooding, hurricanes; station blackout and a degraded ability to restore power; severe accident mitigation; emergency preparedness; and combustible gas control.
- develop recommendations, as appropriate, for potential changes to inspection procedures and licensing review guidance, and recommend whether generic communications, orders, or other regulatory requirements are needed.

Tasking Memorandum – COMGBJ-11-0002 – NRC Actions Following the Events In Japan (Mar. 23, 2011) at 1 (ADAMS Accession No. ML110950110). This effort will be informed by stakeholder input, and the Task Force report will be released to the public. Id. The longer term actions, which will begin as soon as NRC has sufficient technical information from the events in Japan with the goal of no later than the completion of the 90-day near-term report, will include evaluation of all technical and policy issues related to the event to identify potential research, generic issues, changes to the reactor oversight process, rulemakings, and adjustments to the regulatory framework that should be conducted by NRC. Id. at 2. It will also include evaluation of potential interagency issues such as emergency preparedness. Id.

The longer-term review will receive input from and interact with all key stakeholders. Id. Within six months, the Task Force will provide a report with recommendations to the

Commission, which will be reviewed by the Advisory Committee on Reactor Safeguards and will be released to the public under the NRC's normal procedures. Id. at 2.

In addition, the nuclear power industry has taken a number of actions at each licensed reactor site, including:

- verification of the capability to mitigate conditions that result from severe adverse events, including the loss of significant operational and safety systems due to natural events, fires, aircraft impact and explosions;
- verification of the capability to mitigate a total loss of electric power to a nuclear power plant;
- verification of the capability to mitigate flooding and the impact of floods on systems inside and outside the plant; and
- identification of the potential for loss of equipment functions during seismic events appropriate for the site and the development of mitigating strategies to address potential vulnerabilities.

The NRC Staff is also proceeding with independent assessments of nuclear power plant readiness to address beyond design-basis natural phenomena. NRC Information Notice 2011-05 at 4-5.

The Commission has made it clear that it will use the information from these activities to impose any requirements it deems necessary.

NRC has already announced its plan to draw upon “lessons learned” from the Japan events, as the agency has done previously after natural or man-made disasters. As in the past, NRC will conduct rulemaking, or issue orders and other directives, to make upgrades required to implement whatever short-term or longer-term safety improvements emerge from the Task Force directed by the Commission to analyze the Fukushima Daiichi disaster.

Federal Respondents' Memorandum at 21-22. The NRC has also made it clear that it has the authority to do so.

In response to the disaster at Fukushima Daiichi, NRC has authority to order . . . licensees of operating nuclear plants[] to adopt whatever

measures NRC determines are needed in the short term for continued assurance of the public health and safety while NRC considers longer-term measures, including changes in its safety regulations. Such measures may be subject to site-specific considerations.

Id. at 2-3.

While the Commission is thus carefully examining the implications of the Fukushima Daiichi accident, its current, informed assessment is that U.S. plants remain safe.

[W]e have been very closely monitoring the activities in Japan and reviewing all currently available information. Review of this information, combined with our ongoing inspection and licensing oversight, gives us confidence that the U.S. plants continue to operate safely.

Chairman Jaczko April 12 Statement at 3.

NRC has stated that licensed nuclear power reactors in the United States are currently safe, and may continue to operate under NRC's comprehensive scheme of safety regulations and inspections, pending development of any new safety measures that emerge as NRC's "lessons-learned" project moves forward.

Federal Respondents' Memorandum at 3.

### **III. DISCUSSION**

#### **A. Suspension of Proceedings Would Be a Drastic Action That Is Inappropriate In the Absence of Any Immediate Threat to Public Health and Safety**

As previously noted, the Commission considers suspension of licensing proceedings to be a "drastic" action that is not warranted absent "immediate threats to public health and safety."

Oyster Creek, CLI-08-23, 68 N.R.C. at 484; Vermont Yankee, CLI-00-20, 52 N.R.C. at 173-74.

The Petition makes no claims of "immediate threats to public health and safety," and none can be shown in the context of the Pilgrim and Indian Point license renewal proceedings because the scope of the safety review in these proceedings is limited to aging management issues that have no apparent connection to the Fukushima Daiichi accident. The continuation and completion of

the Pilgrim and Indian Point license renewal proceedings pose no threat to public health and safety because the sufficiency of each plant's CLB to provide adequate protection to the public health and safety – on which the Petition is focused – is reasonably assured by the NRC's ongoing regulatory processes and oversight and not by the license renewal process. In this respect, the Commission is already conducting extensive reviews to identify and apply the lessons learned from the Fukushima Daiichi accident, and the Commission has made it clear that it will use the information from these activities to impose any requirements it deems necessary irrespective of the status of license renewal for individual plants. As the Commission has recently explained:

As with the post-TMI and post-9/11 regulatory enhancements, any “lessons learned” from the Fukushima Daiichi event will be applied generically to all reactors, . . . as appropriate to their location, design, construction, and operation.

Federal Respondents' Memorandum at 13. This application of lessons learned will occur as part of the Commission's ongoing regulatory process, irrespective of and wholly apart from the license renewal process:

NRC's comprehensive and ongoing oversight of licensed facilities will assure that useful data and “lessons learned” from Fukushima Daiichi disaster will be absorbed by changes in NRC rules, orders, and license amendments as needed, accompanied by the public participation required by statute and regulation. This process is distinct, however, from the disposition of specific contentions admitted for hearing (or proposed for admission) in a license renewal adjudication. . . .

Id. at 17-18. In sum, any measures that the Commission determines are necessary to protect public health and safety as a result of its review of the Fukushima Daiichi accident will be addressed by the Commission as part of its ongoing regulatory process that is applicable to all plants, and not in the context of the license renewal process or limited to those plants that happen

to be seeking license renewal. Thus, there is simply no basis to interrupt the Pilgrim and Indian Point license renewal proceedings.

B. Suspension is Not Warranted By Any Administrative Considerations

In denying similar suspension petitions submitted after 9/11, the Commission also considered whether moving forward with proceedings would prove an obstacle to fair and efficient decision making, or prevent appropriate implementation of any rule or policy changes that might emerge from its ongoing evaluation of that event. Diablo Canyon, CLI-02-23, 56 N.R.C. at 238; Private Fuel Storage, LLC, (Independent Spent Fuel Storage Installation), CLI-01-26, 54 N.R.C. 376, 380 (2001); McGuire/Catawba, CLI-01-27, 54 N.R.C. at 389-90; Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-28, 54 N.R.C. 393, 399 (2001). Neither of these additional considerations would justify suspending the Pilgrim and Indian Point proceeding.

In considering whether moving forward with proceedings would prove an obstacle to fair and efficient decision making, the Commission has specifically rejected arguments like the one presented in the Petition that proceedings should be stayed because the normal processes for filing new contentions, rulemaking comments and motions to reopen would be “cumbersome,” “place an unfair burden on intervenors,” and be limited by intervenors’ resources. Petition at 24.

We are unpersuaded by [petitioner’s] assertion that the “piecemeal” nature of the adjudication “makes it impossible to perform a complete or effective presentation of the issues . . . with the scope of the current hearing” and “is wasteful of [the Petitioners’] resources.” . . . We have repeatedly rejected such resource-related arguments in prior proceedings, and do so again here. As we stated . . . in Indian Point, CLI-01-8, 53 NRC at 229-30, “litigation inevitably results in parties’ loss of both time and money. We cannot postpone cases by many weeks or months simply because going forward will prove difficult for litigants or their lawyers.”

McGuire/Catawba, CLI-01-27, 54 N.R.C. at 391.

In addition, the Commission has held that it has a responsibility to go forward with pending proceedings. Private Fuel Storage, CLI-01-26, 54 N.R.C. at 381.

During the time when the NRC is pursuing its top-to-bottom reassessment of its regulations and policies on terrorism, the agency must also continue to meet its statutory responsibilities for licensing and regulation of all nuclear facilities and materials in a timely and efficient manner. *See Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18 (1998). Permitting unnecessary delays would contravene the Commission's fundamental duties to the general public, as well as to applicants and licensees. The Commission's objectives are to provide a fair hearing process, to avoid unnecessary delays in the NRC's review and hearing processes, and to produce an informed adjudicatory record that supports agency decision making on matters related to the NRC's responsibilities for protecting public health and safety, the common defense and security, and the environment. Id. at 19. Consistent with this policy, the Commission has a history of not delaying adjudications to await extrinsic actions, absent special needs of efficiency or fairness. See *Private Fuel Storage*, CLI-01-26, 54 NRC at 381-83 and references cited therein; *McGuire & Catawba*, CLI-01-27, 54 NRC at 390-91.

Savannah River, CLI-01-28, 54 N.R.C. at 400 (emphasis added) (footnote omitted). See also McGuire/Catawba, CLI-01-27, 54 N.R.C. at 391 ("This general reluctance [to suspend proceedings] is firmly grounded in our longstanding commitment to efficient and expeditious decisionmaking. . . .").

Further, the Commission has been particularly reluctant to suspend license renewal proceedings based on broad ranging claims concerning design and operational issues having no apparent connection to the scope of license renewal proceedings:

License renewal, by its very nature, contemplates a limited inquiry -- i.e., the safety and environmental consequences of an additional 20-year operating period. License renewal focuses on *aging* issues, not on everyday operating issues. Hence, it is far from clear that upcoming terrorism-related changes in our rules, if any, will bear on license renewal reviews.

McGuire/Catawba, CLI-01-27, 54 N.R.C. at 391 (emphasis in original; footnotes omitted). In this respect, the Petition neither alleges nor makes any direct connection between the recent Fukushima Daiichi events and the effects of aging at issue in a license renewal proceeding. The Petition's discussion of the Indian Point proceeding makes no claim that any admitted contentions are related to or affected by the Fukushima Daiichi events. See Petition at 10. While the Petition asserts baldly that the Fukushima Daiichi accident is relevant to two late-filed contentions that Pilgrim Watch has asked the Licensing Board to admit concerning the aging management of inaccessible cable and an alleged lack of measures for cleanup after a severe nuclear reactor accident (see Petition at 11), it provides no explanation of the alleged relevance or any technical support for this conclusory claim.

In considering whether moving forward with proceedings would prevent appropriate implementation of any rule or policy changes that might emerge from its ongoing evaluation of an event, the Commission has held:

[E]very license the Commission issues is subject to the possibility of additional requirements. The Commission can modify license requirements by rule, regulation, or order; and changes can be applicable to both applicants and licensees. Thus, as in *Private Fuel Storage*, “holding up these proceedings is not necessary to ensure that the public will realize the full benefit of our ongoing regulatory review. . . .”

Diablo Canyon, CLI-02-23, 56 N.R.C. at 240 (emphasis in original) (footnote omitted). The same is true here, where the Commission has stated unequivocally that “any ‘lessons learned’ from the Fukushima Daiichi event will be applied generically to all reactors, . . . as appropriate to their location, design, construction, and operation.” Federal Respondents’ Memorandum at 13. In sum, no basis exists for the Commission to suspend the Pilgrim and Indian Point license renewal proceedings. Any issue concerning the adequacy of the CLB to provide adequate protection of the public health and safety will be addressed as part of the NRC’s ongoing

regulatory process applicable to all operating nuclear reactors in the United States, and will be applied irrespective of whether a plant is applying for or has been granted a renewed operating license. “No safety, technical, or policy justification exists to single out particular reactors for different treatment just because of their place in the licensing queue. . . .” Federal Respondents’ Memorandum at 13.

C. Petitioners Have Not Met the Standards for a Stay

The Petition should also be denied because it neither addresses nor satisfies the NRC’s standards for seeking a stay. Because of the nature of the relief sought (which includes suspension of decisions), the Petition is in effect a motion for a stay. 10 C.F.R. § 2.342(e) sets forth the standards applicable to stay motions.<sup>16</sup> The Petition’s failure to address these standards requires its denial. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-2, 37 N.R.C. 55, 58 & n.2 (1993).

Application of these standards militates strongly against a stay in this instance. The most important factor in considering a stay is whether the moving party will be irreparably injured if the stay is not granted. Shieldalloy, CLI-10-08, slip op. at 12. The NRC requires “a showing of a ‘threat of immediate and irreparable harm’ that will result absent a stay.” Id. No such harm exists here. The injury claimed in the Petition is:

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<sup>16</sup> In determining whether to grant a stay, the Commission will consider:

- (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
- (2) Whether the party will be irreparably injured unless a stay is granted;
- (3) Whether the granting of a stay would harm other parties; and
- (4) Where the public interest lies.

10 C.F.R. § 2.342(e). See also Shieldalloy Metallurgical Corp. (License Amendment Request for Decommissioning of the Newfield, New Jersey Site), CLI-10-08, 71 N.R.C. \_\_\_ (Jan. 7, 2010); Virginia Petroleum Jobbers Ass’n v. FPC, 259 F.2d 921, 925 (D.C. Cir.1958).

If the Commission fails to [grant the relief sought] intervenor groups will be placed in the position of rushing to file contentions, rulemaking comments, and motions to re-open closed hearing records, based on whatever evaluations they are able to make of slowly-emerging and ever-evolving information from the accident. Such a process would not only be cumbersome, but its effectiveness would be limited by whatever limitations the intervenors or petitioners had on their resources for making a technical evaluation of the information yielded by the accident. It would place an unfair burden on intervenors and petitioners by forcing them to perform analyses that should be performed by the government in the first instance.

Petition at 23-24. This alleged injury not only is speculative, but also does not constitute the type of harm that supports a motion to stay. The cost and inconvenience of litigating challenges to pending applications are not the kind of injury that warrants postponing licensing proceedings, and a petitioner “is not injured or prejudiced in a cognizable sense simply because it may incur litigating costs and inconvenience from moving forward with the adjudication before the generic review is completed.” Savannah River, CLI-01-28, 54 N.R.C. at 400.

Other factors to be considered in deciding whether to grant a motion to stay are whether the granting of a stay would harm other parties or be inconsistent with the public interest. Here, both these factors cut against the granting of a stay. As Entergy has previously explained in the Pilgrim license renewal proceeding,<sup>17</sup> continued delay in the completion of the proceeding is injurious to Entergy. Apart from the significant financial costs (not only the litigation costs, but significant monthly capital carry costs), the uncertainty about whether Entergy’s renewal application will be granted makes business and investment decisions extremely difficult. Pilgrim’s operating license expires in June 2012, which at this juncture makes it unclear whether Entergy should be investing in plant improvements to support extended operation. The uncertainty also makes decisions on fuel procurement very difficult and is an impediment to

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<sup>17</sup> Entergy’s Opposition to Pilgrim Watch’s Motion for Reconsideration of CLI-10-11 (Apr. 8, 2010) at 8-9.

Entergy's ability to enter into contracts for the sale of the plant's power beyond its current expiration date. Finally, the uncertainty is unfair to plant employees, who are left to guess at the prospects for continued employment beyond the immediate future. With the approaching license expiration date for IP2 in September 2013, Indian Point is facing similar circumstances.

Moreover, the NRC has made it clear that granting requests to suspend licensing processes pending consideration of generic issues would be inconsistent with the public interest because it would be contrary to the agency's duties to the applicants and the general public. See Savannah River, CLI-01-28, 54 N.R.C. at 400. As stated by the Commission there:

The Commission's objectives are to provide a fair hearing process, to avoid unnecessary delays in the NRC's review and hearing processes, and to produce an informed adjudicatory record that supports agency decision making on matters related to the NRC's responsibilities for protecting public health and safety, the common defense and security, and the environment. *Id.* at 19. Consistent with this policy, the Commission has a history of not delaying adjudications to await extrinsic actions, absent special needs of efficiency or fairness.

Id. (emphasis in original).

Finally, the Petition makes no showing that the events at Fukushima Daiichi are relevant to the merits of the Pilgrim or the Indian Point license renewal proceedings – let alone any showing that the petitioners are likely to prevail on the merits of any related issue. As discussed, the Commission has excluded design and operational issues from the scope of license renewal proceedings, and has made it abundantly clear that any new requirements the Commission determines are necessary as a result of its review of the Fukushima Daiichi events will be imposed apart from and irrespective of license renewal.

D. Petitioners Have Not Met the Consultation Requirements for a Motion

The Commission should reject the Petition for failing the certification requirements contained in 10 C.F.R. § 2.323(b), which provides in relevant part that,

[a] motion must be rejected if it does not include a certification by the attorney or representative of the moving party that the movant has made a sincere effort to contact other parties in the proceeding to resolve the issue(s) raised in the motion, and that the movant's efforts to resolve the issue(s) have been unsuccessful.

10 C.F.R. § 2.323(b) (emphasis added). As previously stated, the Commission treats suspension petitions like this as motions. The Petition contains no certification, and neither Pilgrim Watch nor Clearwater made any effort to contact Entergy or its counsel to consult on the matters raised in the motion. Consequently, the Commission should reject the Petition out of hand. See U.S. Dep't of Energy (High Level Waste Repository), Order of the Secretary (Dec. 22, 2009) (ADAMS Accession No. ML093561409) (rejecting a motion to suspend the proceeding for failing the certification requirement contained in 10 C.F.R. § 2.323(b)).

E. Neither the AEA Nor NEPA Mandate Suspension of the Proceedings or Deferral of Decisions

The Petition is incorrect in asserting that the Atomic Energy Act ("AEA") and NEPA preclude the NRC from issuing licenses until it has completed its investigations of the Fukushima Daiichi accident and considered the safety and environmental implications of the accident. See Petition at 24. Contrary to the Petition's claims, the Commission is not required by the AEA to make findings on the Fukushima Daiichi accident before issuing a renewed

license.<sup>18</sup> Nor is the Commission required to prepare an EIS or environmental assessment on that accident before proceeding with license renewals.

In license renewal proceedings, the Commission’s findings under the AEA for all matters other than those relating to aging management are based on the principle – established in the rulemaking proceedings promulgating 10 C.F.R. Part 54 – that the NRC’s regulatory process is adequate to ensure that the licensing basis of all currently operating plants provides and maintains an acceptable level of safety so that operation will not be inimical to public health and safety or common defense and security. See 56 Fed. Reg. 64,943, 64,946-47, 64,961 (Dec. 13, 1991); 60 Fed. Reg. at 22,463-64. The Commission therefore concluded that the decision to issue a renewed operating license need not include a licensing review of the adequacy of or compliance with a plant’s licensing basis. 56 Fed. Reg. at 64,960. The assertion in the Petition that the NRC cannot make the requisite safety findings without completion of its investigation into the Fukushima Daiichi accident (Petition at 24-25) – and the unfounded claim that the NRC Task Force’s charter “raises significant questions about the adequacy of the NRC’s regulatory program on a wide range of important safety issues, including the safety of spent fuel storage, seismic and flooding risks, station blackout, emergency planning, and severe accident management guidelines” (id. at 25) – are simply attacks on the standards for issuance of a renewed license in 10 C.F.R. § 54.29. Such attacks on an NRC rule are impermissible. See 10 C.F.R. § 2.335.

Similarly, the Petition’s claims that NEPA requires that the Commission “immediately suspend all pending licensing . . . decisions until it has addressed the significance of the new

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<sup>18</sup> The Petition is also wrong in claiming that after the Three Mile Island accident, the Commission “suspended all licensing actions while it considered the lessons to be learned from the accident.” Petition at 25. See McGuire/Catawba, CLI-01-27, 54 N.R.C. at 390 & n.10; Private Fuel Storage, CLI-01-26, 54 N.R.C. at 381-82.

information revealed by the Fukushima Daiichi accident in environmental assessments and/or EISs” (Petition at 27, footnote omitted) is erroneous and misplaced on several accounts, particularly in the context of license renewal. The NRC has issued the GEIS to evaluate environmental issues generic to all plants renewing their operating licenses. In this context, the NRC has evaluated and determined as a generic matter that the probability-weighted consequences from severe accident impacts are small for all plants.<sup>19</sup> Similarly, the NRC has evaluated and determined generically that the environmental impacts on spent fuel storage, including accident risk, are small for all plants.<sup>20</sup> While tragic, the events at Fukushima Daiichi do not imply that the NRC’s evaluation of severe accidents at U.S. nuclear plants is incorrect, or that the GEIS needs to be supplemented. It is well established that a supplemental EIS is only required where new information “provides a seriously different picture of the environmental landscape.” Nat’l Comm. for the New River v. FERC, 373 F.3d 1323, 1330 (D.C. Cir. 2004) (emphasis in original), quoting City of Olmsted Falls v. FAA, 292 F.3d 261, 274 (D.C. Cir. 2002). Numerous courts have so ruled.<sup>21</sup> Furthermore, the Commission has adopted this same standard.<sup>22</sup> As the Supreme Court made clear in Marsh v. Oregon Natural Resources Council,

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<sup>19</sup> 10 C.F.R. Part 51, App. B, Table B-1; GEIS at 5-114 to 5-115.

<sup>20</sup> 10 C.F.R. Part 51, App. B, Table B-1; GEIS at 6-72 to 6-75 and 6-91 to 6-92; Pilgrim, CLI-10-14, slip op. at 31-35; Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station & Pilgrim Nuclear Power Station), CLI-07-3, 65 N.R.C. 13, 19-21, reconsideration denied, CLI-07-13, 65 N.R.C. 211 (2007), aff’d sub nom., Massachusetts v. NRC, 522 F.3d 115 (1st Cir. 2008). See also Denial of PRM-51-10 & PRM-51-12, 73 Fed. Reg. 46,204 (Aug. 8, 2008), aff’d, New York v. NRC, 589 F.3d 551 (2d Cir. 2009) (per curiam).

<sup>21</sup> See also In re Operation of the Missouri River Sys. Litig., 516 F.3d 688, 693 (8th Cir. 2008) (“seriously different picture of the environmental impact”); Town of Winthrop v. FAA, 535 F.3d 1, 9 (1st Cir. 2008) (substantial change in conditions since the data used in the EIS were gathered); Sierra Club v. U.S. Army Corps of Eng’rs, 295 F.3d 1209, 1215-16 (11th Cir. 2002) (significant impact not previously covered); S. Trenton Residents Against 29 v. FHA, 176 F.3d 658, 663 (3d Cir. 1999) (“seriously different picture of the environmental impact”); Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 443 (4th Cir. 1996) (same); Village of Grand View v. Skinner, 947 F.2d 651, 657 (2d Cir. 1991) (significant impact not previously covered); Sierra Club v. Froehlke, 816 F.2d 205, 210 (5th Cir. 1987) (“seriously different picture of the environmental impact”); Wisconsin v. Weinberger, 745 F.2d 412, 418 (7th Cir. 1984) (same).

<sup>22</sup> Hydro Resources, Inc., CLI-01-04, 53 N.R.C. 31, 52 (2001) (“The new circumstance must reveal a seriously different picture of the environmental impact of the proposed project.”) (internal quotes and citations omitted).

490 U.S. 360 (1989) (cited in the Petition), a requirement to supplement an EIS every time new information comes to light “would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made.” Marsh, 490 U.S. at 373 (footnote omitted). Moreover, the Commission has held on more than one occasion that a mere claim of new and significant information does not open up its generic findings to consideration in individual license renewal proceedings, because this would defeat the purpose of resolving issues generically in the GEIS. Vermont Yankee/Pilgrim, CLI-07-3, 65 N.R.C. at 21; Pilgrim, CLI-10-14, slip op. at 36.

Other than vague, generalized claims, the Petition presents no information suggesting that the Fukushima Daiichi events render either the probabilities or consequences of severe accidents at U.S. plants significantly different from those presented in the GEIS, either generically or on a plant specific basis.<sup>23</sup> While Dr. Makhijani’s Declaration makes conclusory claims that the Fukushima Daiichi accident affects the NRC’s NEPA severe accident determinations, the specific Fukushima Daiichi events and facts relied upon by Dr. Makhijani do not support his claims.

Dr. Makhijani’s claims focus on spent fuel pool accidents and not severe reactor accidents. While he claims that the occurrence of spent fuel pool accidents at Fukushima Daiichi “significantly undermines the NRC’s conclusion that high-density pool storage of spent fuel

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The NRC Staff has also published guidance that defines “new and significant” information for purposes of updating the GEIS that is consistent with the above judicial and NRC precedent that a supplemental EIS is only required where new information provides a seriously different picture of the environmental landscape. See Supplement 1 to Regulatory Guide 4.2, Preparation of Supplemental Environmental Reports for Applications to Renew Nuclear Power Plant Operating Licenses (Sept. 2000) (“RG 4.2S1”) at 4.2-S-4 (“New and significant information is . . . (2) information that was not considered in the analyses summarized in NUREG-1437 and that leads to an impact finding different from that codified in 10 CFR Part 51”) (emphasis added).

<sup>23</sup> The Petition simply claims, incorrectly, that “by its own admission, the NRC has new information that concededly could have a significant effect on its regulatory program and the outcome of its licensing decisions for individual reactors.” Petition at 26-27. The NRC has never stated that Fukushima alters the probability or consequences of severe accidents as previously determined by the NRC in the GEIS or elsewhere.

poses a “very low risk” (Makhijani Decl. ¶ 24, citing the NRC’s 2008 denial of the rulemaking petitions filed by the Massachusetts and California Attorney Generals),<sup>24</sup> he provides no information showing that U.S. plants (particularly those on the east coast) are vulnerable to the type of accident scenarios that occurred at Fukushima Daiichi. In particular, he makes no showing that tsunami or station blackout risk at these plants is higher than previously assumed, or that spent fuel pool risk at U.S. plants is anything other than very low.

Moreover, Dr. Makhijani appears to believe, mistakenly, that the fact the earthquake and tsunami caused accidents at “three reactors and four spent fuel pools [has] drastically changed the underlying frequency data that should go into the estimation of the probability of severe accidents at light water reactors.” Makhijani Decl. ¶ 24. He provides no support for this erroneous claim. Severe reactor accident frequency is calculated on a per reactor year basis based on the annual probability of events that could cause a severe accident at a reactor.<sup>25</sup> The fact that the same initiating event could cause, or has caused, severe accidents at more than one reactor does not, by itself, change the annual frequency of occurrence of that particular initiating event for purposes of calculating severe accident frequencies.<sup>26</sup> Likewise, because the frequency of severe accidents is calculated on a per year of reactor operation basis, the analysis of consequences of severe accidents at sites with multiple reactors can be determined by summing

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<sup>24</sup> The Attorney General of Commonwealth of Massachusetts; the Attorney General of California; Denial of Petitions for Rulemaking, 73 Fed. Reg. 46,204, 46,207 (Aug. 8, 2008) (“Rulemaking Denial”). In its denial of the rulemaking petitions, the NRC referred to a long series of NRC studies which showed that the risk of a spent fuel pool fire is “very low,” as well as to provisions made at U.S. plants to provide mitigative measures to deal with a complete loss of both offsite and emergency power.

<sup>25</sup> See, e.g., NUREG-1872, Final Environmental Impact Statement for an Early Site Permit (ESP) at the Vogtle ESP Electric Generating Plant Site (Aug. 2008) at 5-81.

<sup>26</sup> In this respect, significant new data concerning initiating events, such as the earthquake and tsunami that occurred in Japan, would be used to appropriately update initiating event distributions that correspond to plant events given that a seismic and/or tsunami event has occurred whether or not any reactor accident has occurred as a result of the initiating event.

the annual frequency of the consequence for each unit being considered.<sup>27</sup>

In addition, Dr. Makhijani provides no support for his claim that “the Fukushima accident indicates that the health consequences of a severe reactor accident and/or spent fuel pool fire could be significantly greater than that estimated by the NRC in EISs for license renewal and new reactor licensing.” Makhijani Decl. ¶ 29.<sup>28</sup> He acknowledges that a detailed evaluation of the consequences for Fukushima Daiichi will take time and more data (*id.*), and he provides no basis for this claim other than unsupported speculation that “if the probability is much higher for a single failure and if multiple failures can happen at the same site, then the number of expected fatal cancers would be higher, all other things being equal. *Id.* (emphasis added). Without any showing that these probabilities would in fact increase, this speculation is meaningless. In any event, the GEIS considers combined risk. In this respect, the GEIS in its Conclusion section for “Dose and Adverse Health Effects from Atmospheric Releases” states:

As can be seen from the data in Tables 5.10 and 5.11 [which provide, respectively, the predicted early fatality and latent fatality estimates per reactor year for all sites at their middle year of license renewal], the risk of early and latent fatalities from individual nuclear power plants is small. It represents only a small fraction of the risk to which the public is exposed from other sources. Even if the predicted early and latent fatalities from all 118 plants were considered (that is, the risk to the population of the United States from all 118 nuclear power plants), this would only result in a predicted risk of approximately one additional early fatality per year and approximately 30 additional latent fatalities per year, which is still a small fraction of the approximately 100,000 early and 500,000 latent cancer fatalities per year from other sources.

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<sup>27</sup> See, e.g., NUREG-1872 at 5-81 (“The risks presented in the tables that follow are risks per year of reactor operation. . . . [I]f two new Westinghouse AP1000 reactors were built, the risks would apply to each reactor, and the total risk for new reactors at the site would be twice the risk for a single reactor.”)

<sup>28</sup> Dr. Makhijani ignores the fact that the NRC’s analyses of reactor severe accidents and spent fuel pool zirconium fires encompass far more consequential events than appear to have occurred at Fukushima Daiichi. For example, NRC analysis of severe accident events include large early releases, which did not occur at Fukushima Daiichi; and the NRC’s analyses of spent fuel pool accidents include zirconium fires in fully loaded spent fuel pools (see NUREG-1738 and NUREG-1353, *infra* notes 29, 30 32 and 38), which do not appear to have occurred at Fukushima Daiichi.

GEIS at 5-44 (emphasis added). Dr. Makhijani provides no new and significant information in his declaration to show that this conclusion of the GEIS is materially wrong such that a different conclusion would be reached, i.e., an impact finding different from that codified in 10 CFR Part 51. Hydro Resources, Inc., CLI-01-04, 53 N.R.C. at 52; RG 4.2S1 at 4.2-S-4.

Dr. Makhijani's other claims concerning spent fuel pool accidents ignore, among other things, the broad, bounding nature of the Commission's more recent spent fuel pool evaluation, as well as the spent fuel mitigative measures that have been implemented at all U.S. plants following the events of September 11. Specifically:

- Dr. Makhijani refers to an apparent hydrogen explosion at the Fukushima Daiichi Unit 4 spent fuel pool and claims that hydrogen explosions “were not considered” in the NRC analysis of spent fuel fires. However, Dr. Makhijani ignores the fact that the most recent SFP study (NUREG-1738<sup>29</sup>) relied upon in the Rulemaking Denial “conservatively assumed” that, for any drop of the spent fuel pool water level below the top of the spent fuel, a “zirconium fire involving all of the spent fuel would occur . . .”<sup>30</sup> This conservative assumption would automatically encompass any SFP event during which hydrogen is generated, and thus the Commission's studies do not ignore but bound this potential mechanism. As noted by the Rulemaking Denial, even with its conservative assumptions NUREG-1738 “found the risk of an SFP fire to be low

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<sup>29</sup> NUREG-1738, Technical Study of Spent Fuel Pool Accident Risk at Decommissioning Nuclear Power Plant (2001). Although for decommissioned plants, the Commission has treated NUREG-1738 as the latest in the line of NRC studies for spent fuel accidents also applicable to operating plants. See, e.g., Rulemaking Denial, 73 Fed. Reg. at 46,208-209; Waste Confidence Decision Update, 75 Fed. Reg. 81,037, 81,069-70, 81,073 (Dec. 23, 2010). In this respect, NUREG-1738 conducted analyses for plants that had only recently been shut down (starting at 30 or 60 days after final shutdown depending on the analyses) and moreover assumed that, because the plant was permanently shutting down, the full core would be unloaded into the spent fuel pool. NUREG-1738 at 2-1, 3-28, A1A-3 – A1A-4, A4-2. Because of its assumption that the full core had just recently been off-loaded to the spent fuel pool, the analysis in NUREG-1738 would generally be conservative compared to an operating plant where typically only one-third of the core is off-loaded to the spent fuel pool at each refueling outage.

<sup>30</sup> 73 Fed. Reg. at 46, 207. In fact the actual assumption in NUREG-1738 was even more conservative. NUREG-1738 assumed that a spent fuel fire involving all of the spent fuel assemblies would occur whenever the “water level reached 3 feet from the top of the spent fuel.” NUREG-1738 at 3-1; see also, e.g., *id.* at 2-1.

and well within the Commission's Safety Goals.”<sup>31</sup>

- Dr. Makhijani also claims that events at Fukushima Daiichi show the assumptions in the NUREG-1353 study<sup>32</sup> of spent fuel pool fires to be incorrect. Makhijani Decl. ¶ 23. However, the subsequent NUREG-1738 study with its conservative assumptions, which did not utilize the computer code and assumptions used in NUREG-1353, produced results and conclusions similar to those in NUREG-1353.<sup>33</sup>
- Dr. Makhijani also claims that, based on apparent boiling at three of the Fukushima Daiichi spent fuel pools, the “NRC’s estimate of loss of cooling probability accompanied by a fire is far too low probably by orders of magnitude.” Makhijani Decl. ¶ 22. However, the loss of cooling events at all three units were precipitated by the same event, total loss of both off-site and on-site power caused by the earthquake and tsunami. As previously discussed, the fact that a single event caused accidents at multiple units at Fukushima Daiichi does not, by itself, change the estimated severe accident frequency at a U.S. plant. Moreover, as with his other claims, Dr. Makhijani provides no analysis, reference, or any other basis to support his spent fuel pool fire probability claims.
- More importantly, Dr. Makhijani ignores the fact that all U.S. operating plants have implemented mitigative measures following the September 11 terrorist attacks to provide alternate spent fuel pool cooling capability assuming a total loss of off-site and on-site power, such as that which occurred at Fukushima Daiichi.<sup>34</sup> As the Rulemaking Denial notes, these measures include an internal strategy that “implements a diverse SFP makeup system that can supply the required amount of makeup water and SFP spray to remove decay heat,” and an external strategy that “involves using an independently-powered, portable, SFP coolant makeup and spray capability system that enhances spray and rapid coolant makeup to mitigate a wide

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<sup>31</sup> 73 Fed. Reg. at 46,207.

<sup>32</sup> NUREG-1353, Regulatory Analysis for the Resolution of Generic Issue 82, Beyond Design Basis Accidents in Spent Fuel Pools (Apr. 1989).

<sup>33</sup> The Rulemaking Denial summarizes the various studies done over the years on which the NRC has determined the risk of spent fuel pool zirconium fires to be very low. 73 Fed. Reg. at 46,208-209.

<sup>34</sup> 73 Fed. Reg. at 46, 208, 46,209. These measures grew out of Section B.5.b of EA-02-026, “Order for Interim Safeguards and Security Compensatory Measures” (Feb. 25, 2002) See also 67 Fed. Reg. 9,792 (Mar. 4, 2002).

range of possible scenarios that could reduce SFP water levels.”<sup>35</sup> While the exact course of events at Fukushima Daiichi is still yet to be determined, these measures implemented at all U.S. operating plants would mitigate the type of events that occurred at Fukushima Daiichi.<sup>36</sup>

- Finally, Dr. Makhijani claims that Fukushima Daiichi indicates that the health effects and economic costs of a spent fuel pool fire could be greater than the NRC has “currently” estimated. Makhijani Decl. ¶¶ 29-30. However, as noted above, Dr. Makhijani points to no facts from Fukushima Daiichi that support this claim. Instead, he compares estimates in a 1997 Brookhaven Study with those in NUREG-1353.<sup>37</sup> This Brookhaven Study was available to the NRC when it performed its NUREG-1738 study in 2001, and is extensively referenced in NUREG-1738’s consequences assessment of a zirconium spent fuel fire.<sup>38</sup> The Brookhaven Study was therefore available when the Commission denied the Massachusetts and California rulemaking petitions, and does not constitute new information.

In summary, the information presented by the Petition and Dr. Makhijani does not show the existence of new and significant information from the Fukushima Daiichi events – i.e., any new information that would materially affect and paint a seriously different picture of the environmental landscape from that previously considered in the GEIS for severe accidents and

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<sup>35</sup> 73 Fed. Reg. at 46,209 (emphasis added).

<sup>36</sup> The Rulemaking Denial noted that, based on the implementation of these additional strategies following September 11, 2001, the probability, and accordingly, the risk, of a SFP zirconium fire initiation is expected to be less than reported in NUREG-1738 and previous studies.” 73 Fed. Reg. at 46,209.

<sup>37</sup> R.J. Travis, R.E. Davis, E.J. Grove, M.A. Azarm, A Safety and Regulatory Assessment of Generic BWR and PWR Permanently Shutdown Nuclear Power Plants, BNL-NUREG-52498, NUREG/CR-6451 (Brookhaven National Laboratory, 1997).

<sup>38</sup> NUREG-1738 at 3-28 and Appendix 4 (“Consequence Assessment from Zirconium Fire”). NUREG-1738 is referenced in the Draft Revision 1 of the GEIS as the primary basis for the draft Revision 1 conclusion that spent fuel pool accidents are a Category 1 issue. Draft Report for Comment, NUREG-1437, Volume 2, Revision 1, Generic Environmental Impact Statement for License Renewal of Nuclear Plants, (July 2009) Appendix E, Environmental Impact of Postulated Accidents, E.3.7 Impact from Accidents at Spent Fuel Pools, at E-32 to E-37. Dr. Makhijani repeatedly refers to NUREG-1353 which predates NUREG-1738, and nowhere in his Declaration references or acknowledges the existence of NUREG-1738, which is the primary study upon which the Commission relied in the Rulemaking Denial and in the recent update of the Waste Confidence ruling. Rulemaking Denial, 73 Fed. Reg. at 46,208-209; Waste Confidence Decision Update, 75 Fed. Reg. at 81,070, 81,073.

spent fuel pool accidents that would result in an impact finding different from that codified in 10 C.F.R. Part 51. Hydro Resources, Inc., CLI-01-04, 53 N.R.C. at 52; RG 4.2S1 at 4. The Petition thus provides no basis for preparing any supplemental environmental analysis.

The Petition is also wrong in asserting that the NRC must at least prepare an environmental assessment to determine the significance of the Fukushima Daiichi information. “[N]either NEPA nor the CEQ regulations” prescribe how an agency is to determine the existence of new and significant information that would require supplementation under NEPA. N. Idaho Cmty. Action Network v. DOT, 545 F.3d 1147, 1154 (9th Cir. 2008), citing Price Rd. Neighborhood Ass’n v. DOT, 113 F.3d 1505, 1509-10 (9th Cir. 1997). Accordingly, following the Supreme Court’s mandate in Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 543 (1978) that administrative agencies should be free to fashion their own rules of procedures to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties, the courts have allowed agencies to employ different approaches that utilize various types of non-NEPA processes and documentation. These include processes and documentation (other than preparing an environmental assessment or a supplemental EIS with public participation) for determining whether alleged new impacts are sufficiently significant to warrant supplemental analysis and formal supplementation of existing NEPA documents.<sup>39</sup> It is clear from these and other cases that there is no requirement for public participation under NEPA in an agency’s determination of whether a NEPA supplement is required. See, e.g., Friends of the Clearwater v. Dombeck, 222 F.3d 552, 560 (9th Cir. 2000) (“Although NEPA requires agencies to allow the

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<sup>39</sup> See, e.g., North Idaho Community Action Network, 545 F.3d at 1154 (internal agency reevaluation of projected impacts from new information); Highway J Citizens Group v. Mineta, 349 F.3d 938, 959-60 (7th Cir. 2003), cert. denied, 541 U.S. 974 (2004) (agency-requested expert analysis); Hodges v. Abraham, 300 F.3d 432, 446, 448 (4th Cir. 2002) (agency record of decision based on review of previous NEPA documents), cert. denied, 537 U.S. 1105 (2003); Marsh, 490 U.S. at 383-85 (agency supplemental information report based on agency-requested expert analysis).

public to participate in the preparation of an SEIS, there is no such requirement for the decision whether to prepare an SEIS.”). See also Northwoods Wilderness Recovery, Inc. v. U.S. Dep’t of Agriculture Forest Serv., 192 Fed. Appx. 369, 377 (6th Cir. 2006) (citing Dombeck).

Accordingly, the Commission is free to dispose of the Petition’s claims in its decision on the Petition. No environmental assessment is required.

#### **IV. CONCLUSION**

For all of the above stated reasons, the Petition should be denied.

Respectfully submitted,

/Signed electronically by David R. Lewis/

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Dated: May 2, 2011

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

Before the Commission

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 Petition to Suspend Pending Licensing Proceedings, dated May 2, 2011, was provided to the Electronic Information Exchange for service on the individuals below, this 2<sup>nd</sup> day of May, 2011.

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**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

Before the Commission

In the Matter of	)	
	)	Docket Nos. 50-247-LR
Entergy Nuclear Operations, Inc.	)	and 50-286-LR
	)	
(Indian Point Nuclear Generating Units 2 and 3)	)	ASLBP No. 07-858-03-LR

CERTIFICATE OF SERVICE

I hereby certify that copies of Entergy's Answer Opposing Petition to Suspend Pending Licensing Proceedings, dated May 2, 2011, were served on the persons below by deposit in the U.S. mail, first class, postage prepaid, and by email, this 2<sup>nd</sup> day of May, 2011.

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