July 15, 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 MOTION TO STRIKE PORTIONS OF THE COMMONWEALTH OF MASSACHUSETTS REPLY TO ENTERGY AND THE NRC STAFF ANSWERS OPPOSING WAIVER PETITION AND MOTION TO ADMIT 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 the Commonwealth of Massachusetts Reply to the Responses of the NRC Staff and Entergy to Commonwealth Waiver Petition and Motion to Admit Contention or in the Alternative for Rulemaking (July 5, 2011) ("Reply").[1] The Reply impermissibly seeks to supplement the Commonwealth's Contention and attempt to reopen the hearing record by providing a new Declaration from Dr. Thompson,[2] and adding new bases and support not found in the Contention or its related filings, including the Thompson Report and the initial Thompson Declaration. These new items are beyond the scope of a permissible reply and are submitted without any

[1] The Entergy and NRC Staff Answers were filed in response to the Commonwealth of Massachusetts' Contention Regarding New and Significant Information Revealed by the Fukushima Radiological Accident (June 2, 2011) ("Contention") and its related filings, including a report entitled New and Significant Information From the Fukushima Daiichi Accident in the Context of Future Operation of the Pilgrim Nuclear Power Plant; A report for Office of the Attorney General, Commonwealth of Massachusetts (Gordon R. Thompson, Institute for Resource and Security Studies) (June 1, 2011) ("Thompson Report") and the accompanying Declaration of Dr. Gordon R. Thompson in Support of Commonwealth of Massachusetts' Contention and Related Petitions and Motions (June 1, 2011) ("Thompson Declaration" or "Thompson Decl.").

[2] Declaration of Gordon R. Thompson in Reply to Entergy's Answer of June 27, 2011 and NRC Staff's Response of June 27, 2011 (July 5, 2011) ("Thompson Reply Declaration" or "Thompson Reply Decl.").

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, further discussed below, the Atomic Safety and Licensing Board ("Board") should strike the July 5, 2011 Thompson Reply Declaration in its entirety and the identified portions of the Commonwealth's Reply.

Commission case law is abundantly 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.[3] 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, 224-25 (2004) (rejecting petitioners' "late attempt to reinvigorate thinly supported contentions by presenting entirely new arguments" and "various new claims in support of their contentions" in their reply briefs) and CLI-04-35, 60 N.R.C. 619, 623 (2004) ("our rules do not allow . . . using reply briefs to provide, for the first time, the necessary threshold support for contentions"); Nuclear Management Co. (Palisades Nuclear Plant), CLI-06-17, 63 N.R.C. 727, 730-32 (2006) (affirming the Licensing Board's rejection of petitioners' untimely attempt to supplement their contention on reply); AmerGen Energy Company, LLC (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 N.R.C. 235, 261, 276 (2009) ("support for a contention must be provided when the contention is filed, not at some later date") (footnote omitted). In Palisades, the Commission held that allowing new claims in a reply "would unfairly deprive other participants of 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).

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[3] Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,203 (Jan. 14, 2004).

The case law described above is consistent with other precedent governing motions to reopen the hearing record, which applies to the Commonwealth's Contention. The Appeal Board long ago ruled that, "to justify the granting of a motion to reopen the moving papers must be strong enough, in the light of any opposing filings, to avoid summary disposition. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 A.E.C. 520, 523 (1973) (emphasis added) (footnote omitted). In other words, the movant's initial papers must provide the necessary basis and support to avoid summary disposition, and the movant cannot supplement an insufficient initial showing on reply.

Thus, entirely new arguments, claims, factual basis, 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). "There simply would be 'no end to NRC licensing proceedings if petitioners could disregard [the Commission's] timeliness requirements' and add new bases or new issues that 'simply did not occur to [them] at the outset.'" LES, CLI-04-25, 60 N.R.C. at 225 (footnote omitted). Rather, under 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).

In this case, the Commonwealth has gone beyond the scope of an allowable reply by submitting the Thompson Reply Declaration and making new arguments in its Reply without citing or attempting to meet the requirements of 10 C.F.R. § 2.309(f)(2) or the nontimely contention requirements in 10 C.F.R. § 2.309(c). Consequently, the Thompson Reply Declaration and any corresponding arguments in the Commonwealth's Reply should be struck.

The Thompson Reply Declaration raises multiple examples of impermissible new claims, bases, and arguments, which demonstrate why it should be struck. First, on multiple occasions, Dr. Thompson refers to "nuclear safety regulation," reactor designs, and the purported need for "science-based investigations" into what happened at Fukushima. Thompson Reply Decl. at ¶¶ 5, 10, 12. But, the Contention as initially proffered is an environmental contention seeking to challenge Pilgrim's severe accident mitigation alternatives ("SAMA") analysis. Apart from the fact that these newly raised issues are not within the limited safety scope of a license renewal proceeding, Dr. Thompson's belated attempt to change the focus of the Contention from environmental impacts to safety issues is impermissible under the case law cited above.[4]

Similarly, in Paragraphs 10-11 of his Reply Declaration, Dr. Thompson appears to recast the entire nature of the Contention. In the Thompson Report accompanying the Contention as proffered, Dr. Thompson claimed that "the licensee's SAMA analysis for Pilgrim should be re-

[4] In any event, the Commission is already considering, and will address, the safety-related implications of Fukushima. The Commission has created a Task Force to conduct both short-term and long-term analyses of the lessons that can be learned from the Fukushima Daiichi accident, and the long term actions 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 undertaken by the NRC. Tasking Memorandum – COMGBJ-11-0002 – NRC Actions Following the Events In Japan (Mar. 23, 2011) at 1-2 (ADAMS Accession No. ML110950110). The Commission has made it clear that it "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." Federal Respondents' Memorandum on the Events at the Fukushima Daiichi Nuclear Power Station at 2-3, New Jersey Envtl. Fed'n v. NRC, No. 09-2567 (3d Cir. Apr. 4, 2011).

done with a baseline CDF that is increased by an order of magnitude," and that "any accident-mitigation measure or SAMA that is credited for the future license operation of the Pilgrim NPP should be incorporated in the plant's design basis." Thompson Report at 17-18. This stands in stark contrast to the analysis that Dr. Thompson now contends must be done. Dr. Thompson now asserts that, "[f]or the purpose of safety regulation, it would be prudent and responsible to assume, until proven otherwise, that a particular [nuclear power plant ("NPP")] has a [core damage frequency ("CDF")] as indicated by direct experience," that the "licensee should have the burden of proving that a particular NPP has – by virtue of its design, site, or standard of operation – a CDF that is substantially lower than is indicated by direct experience," and that, for Pilgrim, the "burden of proof is especially significant" given the design similarities between Pilgrim and Fukushima units. Thompson Reply Decl. at ¶ 10. He goes on to state that the licensee's burden must, among other things, "uphold high scientific standards." Id. at ¶ 11. Dr. Thompson's new claim that Entergy must perform a new analysis demonstrating the sufficiency of the CDF used in the Pilgrim SAMA analysis nowhere appears in his Report or his initial Declaration. Dr. Thompson's attempt to completely recast the Contention on reply should not be countenanced.[5]

Also impermissibly new is Dr. Thompson's attempt to differentiate between the radiological risk posed by a nuclear power plant and that posed by other technologies, such as automobiles, and assertions concerning the level of uncertainty in probabilistic risk analysis and the purported primacy of empirical data in a scientific debate. Thompson Reply Decl. at ¶ 7.

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[5] In any event, the remedy that Dr. Thompson now requests be performed has already been performed. The Pilgrim SAMA analysis is based on a probabilistic risk assessment ("PRA") analyzing plant-specific reactor and containment design features, operating procedures, and site considerations. Declaration of Joseph R. Lynch, Lori Ann Potts, and Dr. Kevin R. O'Kula in Support of Entergy's Answer Opposing Commonwealth of Massachusetts Claims of New and Significant Information Based on Fukushima (June 27, 2011) ("Entergy Declaration" or "Entergy Decl.") at ¶¶ 18-36. As with the Thompson Report and the initial Thompson Declaration, Dr. Thompson fails to point to any alleged specific inadequacies in the Pilgrim SAMA analysis.

Nowhere did these arguments appear in his Report and initial Declaration. Likewise, neither Dr. Thompson's Report nor his initial Declaration discussed the NRC's Accident Sequence Precursor ("ASP") program or its alleged relevance to the use of direct experience when developing PRA analyses, on which Dr. Thompson now relies. Id. at ¶¶ 8-9. Aside from the fact that the PRA underlying the Pilgrim SAMA does incorporate direct experience and empirical data,[6] these arguments were not previously raised in either the Thompson Report or his initial Declaration. Thus, Entergy and its experts were deprived of the opportunity to respond to them.

The Board should also strike those portions of the Commonwealth's Reply that rely on the impermissible Thompson Reply Declaration, including (a) the last paragraph beginning on page 3 through end of that paragraph on page 4; (b) the last sentence of the first full paragraph on page 8 and n. 16; and (c) the last sentence of the first partial paragraph on page 9 and n. 17.

For the foregoing reasons, the Board should strike the July 5, 2011 Thompson Reply Declaration in its entirety and the identified portions of the Commonwealth's Reply.[7]

Respectfully submitted,

/Signed Electronically by Paul A. Gaukler/
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Dated: July 15, 2011

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[6] Entergy Decl. at 26-28.

[7] Counsel for Entergy certifies that he has consulted with the other parties as required by 10 C.F.R. § 2.323(b). The Commonwealth 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 if necessary.

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CERTIFICATE OF SERVICE

I hereby certify that copies of Entergy Motion to Strike Portions of the Commonwealth of Massachusetts Reply to Entergy and the NRC Staff Answers Opposing Waiver Petition and Motion to Admit Contention, dated July 15, 2011, were provided to the Electronic Information Exchange for service on the individuals below, this 15th day of July, 2011.

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