

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
Entergy Nuclear Generation Co., and)	Docket No. 50-293-LR
Entergy Nuclear Operations, Inc.)	
)	ASLBP No. 06-848-02-LR
(Pilgrim Nuclear Power Station))	

NRC STAFF'S RESPONSE TO COMMONWEALTH OF MASSACHUSETTS'
MOTION TO SUPPLEMENT BASES TO PROPOSED CONTENTION
TO ADDRESS NRC TASK FORCE REPORT ON
LESSONS LEARNED FROM FUKUSHIMA

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September 6, 2011

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
PROCEDURAL BACKGROUND	2
DISCUSSION.....	5
I. The Amended Contention’s Spent Fuel Pool Claims Are Outside the Scope of this Proceeding	5
II. The Amended Contention Does Not Meet the Reopening Standards	6
A. Massachusetts’ Amended Contention Must Meet the Standards for Reopening	6
B. A Materially Different Result Would Not Be Likely.....	7
C. The Amended Contention Does Not Raise a Significant Environmental Issue or an Exceptionally Grave Issue	11
D. The Amended Contention is Not Accompanied by a Sufficient Affidavit	14
III. The Amended Contention Does is Not Based on New or Different Information.....	15
IV. The Amended Contention is Inadmissible Under 10 C.F.R. § 2.309(f)(1).....	17
A. The Amended Contention Does Not Address the Section 2.309(f)(1) Factors	19
B. The Amended Contention is Outside the Scope of this Proceeding.....	20
C. The Amended Contention is Not Material to this Proceeding.....	21
D. The Amended Contention Lacks an Adequate Factual Basis	21
CONCLUSION	23

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1), the staff of the Nuclear Regulatory Commission ("Staff") files its response opposing the Commonwealth of Massachusetts' ("Massachusetts") Motion to Supplement Bases to Commonwealth Contention to Address NRC Task Force Report on Lessons Learned from the Radiological Accident at Fukushima ("Amended Contention").¹

Massachusetts filed the Amended Contention to supplement an earlier contention it filed in this proceeding after the Fukushima accident ("GEIS Contention").² Massachusetts alleges that the recently published Recommendations for Enhancing Reactor Safety in the 21st

¹ Commonwealth of Massachusetts Motion to Supplement Bases to Commonwealth Contention to Address NRC Task Force Report on Lessons Learned from the Radiological Accident at Fukushima (August 11, 2011) (Agencywide Document Access and Management System ("ADAMS") Accession No. ML11223A284) ("Amended Contention"). Attached to the Amended Contention is a Declaration of Dr. Gordon R. Thompson Addressing New and Significant Information Provided by the NRC's Near-Term Task Force Report on the Fukushima Accident (Aug. 11, 2011) (ADAMS Accession ML11223A283) ("Thompson Declaration").

² See Commonwealth of Massachusetts' Motion To Admit Contention And, If Necessary, to Reopen Record Regarding New and Significant Information Revealed By Fukushima Accident (June 2, 2011) (ADAMS Accession No. ML111530340); Commonwealth of Massachusetts' Contention Regarding New and Significant Information Revealed By the Fukushima Radiological Accident (June 2, 2011)(ADAMS Accession No. ML111530343) (collectively "GEIS Contention").

Century: The Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident (“TFR”) provides additional support for its claims in the GEIS Contention.³

The Staff opposes the motion. The Amended Contention by itself, and in conjunction with the GEIS Contention, is inadmissible for several reasons. Most importantly, the record in this proceeding is closed, and the Amended Contention does not meet the Commission’s standards for reopening a closed record under 10 C.F.R. § 2.326. Specifically, the Amended Contention does not meet the requirements of section 2.326 because it does not demonstrate that consideration of the TFR would likely result in a different outcome in this case. Moreover, although the Amended Contention purports to raise environmental claims, the TFR contains recommendations to augment the NRC’s safety regulations. Consequently, the TFR does not provide sufficient information to demonstrate a significant environmental issue. In addition, the Amended Contention is inadmissible under 10 C.F.R. §§ 2.309(c), (f)(1), and (f)(2) because it is not timely and raises issues that are not material to this proceeding, are outside of this proceeding’s scope, and lack an adequate factual basis. For those reasons, the Amended Contention should be denied.

PROCEDURAL BACKGROUND

The history of this license renewal proceeding spans over five years and includes scores of pleadings. Accordingly, only those portions of the procedural history directly relevant to the discussion below will be addressed herein.

By letter dated January 27, 2006, Entergy Nuclear Operations, Inc. (“Applicant” or “Entergy”) submitted an application for renewal of Operating License No. DPR-35 for Pilgrim for an additional 20 years.⁴ On May 26, 2006, Massachusetts filed an initial hearing request,⁵

³ Recommendations for Enhancing Reactor Safety in the 21st Century: The Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident (Jul. 12, 2011) (ADAMS Accession No. ML111861807).

⁴ Letter from Michael A. Balduzzi, Entergy Nuclear Operations, to U.S. NRC, Re: License

which the Atomic Safety and Licensing Board (“ASLB” or “Board”) denied.⁶ Subsequently, Massachusetts participated in these proceedings as an interested state under 10 C.F.R. § 2.315(c).⁷

On May 25, 2006, the intervenor group, Pilgrim Watch, filed a petition to intervene in this matter and submitted five contentions for consideration by the Board.⁸ The Board granted the petition and admitted two contentions.⁹ The Board granted Applicant’s motion for summary disposition with respect to the contention that challenged the Applicant’s analysis of severe accident mitigation alternatives (“SAMA”).¹⁰ After an evidentiary hearing on the remaining contention, which challenged the adequacy of the applicant’s aging management program for buried pipes and tanks, the Board disposed of that contention in favor of the Applicant.¹¹

Renewal Application (Jan. 25, 2006) (ADAMS Accession No. ML060300026).

⁵ Massachusetts Attorney General’s Request for a Hearing and Petition for Leave to Intervene with respect to Entergy Nuclear Operations Inc.’s Application for Renewal of the Pilgrim Nuclear Power Plant Operating and Petition for Backfit Order Requiring New Design Features to Protect Against Spent Fuel Pool Accidents (May 26, 2006) (ADAMS Accession No. ML061630088).

⁶ *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 288 (2006). The Commission affirmed the Board’s decision and denied rehearing. See *Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station & Pilgrim Nuclear Power Station), CLI-07-3, 65 NRC 13, 21, *reconsideration denied*, CLI-07-13, 65 NRC 211 (2007), *aff’d sub nom, Massachusetts v. NRC*, 522 F.3d 115 (1st Cir. 2008) (upholding Commission decision that generic challenges to GEIS Category 1 issues may only be made by petition for rulemaking).

⁷ Commonwealth of Massachusetts’ Notice of Intent to Participate as an Interested State (May 6, 2008) (ADAMS Accession No. ML081500531).

⁸ Request for Hearing and Petition to Intervene by Pilgrim Watch (May 25, 2006) (ADAMS Accession No. ML061630125).

⁹ *Pilgrim*, LBP-06-23, 64 NRC at 341.

¹⁰ *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-07-13, 66 NRC 131 (2007). Judge Young dissented from the Board’s Order. *Id.* at 156.

¹¹ *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-08-22, 68 NRC 590 (2008).

Pilgrim Watch filed an appeal, and on March 26, 2010, the Commission issued CLI-10-11, reversing in part, affirming in part, and remanding the SAMA contention, as limited by the Commission's Order, to the Board for further proceedings.¹²

Pilgrim Watch then filed two new contentions in late 2010.¹³ At a hearing on March 9, 2011, the Board heard argument on the remanded SAMA contention and the admissibility of the 2010 contentions regarding the implementation of SAMAs and inaccessible cables.¹⁴ On July 19, 2011, the Board ruled in the Applicant's favor on the remanded SAMA contention¹⁵ and denied admission of the 2010 contentions a few weeks later.¹⁶ In the intervening time, Pilgrim Watch filed two more SAMA contentions in this proceeding, which are still pending before this Board.¹⁷ On June 2, 2011, Massachusetts filed the GEIS Contention, as well as a petition for waiver of the Commission's regulations to permit full consideration of the new contention or, in the alternative, a petition for rulemaking to rescind those regulations ("Waiver Petition"),¹⁸ and a

¹² *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 317 (2010).

¹³ Pilgrim Watch Request for Hearing on a New Contention (Nov. 29, 2010) (ADAMS Accession No. ML103420305); Pilgrim Watch Request for Hearing on a New Contention: Inadequacy of Entergy's Aging Management of Non-Environmentally Qualified (EQ) Inaccessible Cables (Splices) at Pilgrim Station (Dec. 13, 2010) (ADAMS Accession No. ML103500400).

¹⁴ Transcript of Hearing Regarding Pilgrim Nuclear Power Station in Plymouth, Massachusetts on March 9, 2011 (ADAMS Accession No. ML110740699).

¹⁵ *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-11-18, 74 NRC ____ (Jul. 19, 2011) (slip op. at 32) (ADAMS Accession No ML11200A224)

¹⁶ *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-11-20, 74 NRC ____ (Aug. 11, 2011) (slip op. at 31) (ADAMS Accession No ML11223A183).

¹⁷ Pilgrim Watch Request for Hearing on Post Fukushima SAMA Contention (May 12, 2011) (ADAMS Accession No. ML111320647); Pilgrim Watch Request for Hearing on a New Contention Regarding Inadequacy of Environmental Report, Post Fukushima (June 1, 2011) (ADAMS Accession No. ML111530448).

¹⁸ Commonwealth of Massachusetts' Petition for Waiver of 10 C.F.R. Part 51 Subpart A, Appendix B or, in the Alternative, Petition for Rulemaking to Rescind Regulations Excluding Consideration of Spent Fuel Storage Impacts from License Renewal Environmental Review (June 2, 2011) (ADAMS Accession No. ML111530342).

conditional motion to suspend Pilgrim's license renewal proceeding pending resolution of the petition for rulemaking. The Staff answered the conditional motion to suspend on June 13, 2011.¹⁹ The Staff responded to the GEIS Contention and the Waiver Petition on June 27, 2011.²⁰ The Board has yet to rule on the GEIS Contention.

DISCUSSION

I. The Amended Contention's Spent Fuel Pool Claims Are Outside the Scope of this Proceeding

The Amended Contention seeks to supplement the GEIS Contention Massachusetts filed on June 2, 2011. The GEIS Contention alleged that "the environmental impacts analysis and the SAMA analysis in [Supplement] 29 to the Generic Environmental Impact Statement (GEIS) for License Renewal (1996) are inadequate to satisfy NEPA because they fail to address new and significant information revealed by the Fukushima accident." GEIS Contention at 5. Specifically, the GEIS contention alleged that "[t]he new and significant information shows that both core-melt accidents and spent fuel pool accidents are significantly more likely than estimated or assumed in [Supplement 29] of the License Renewal GEIS or the SAMA analysis for [Pilgrim]." *Id.* Because the GEIS contention challenged the environmental impacts of onsite fuel storage, a topic the Commission has already generically resolved in its regulations, Massachusetts also filed a petition to waive those regulations

In response to that contention, the Staff noted that Massachusetts' spent fuel pool claims were outside of the scope of this license renewal proceeding. NRC Staff's Response. at 7-8,

¹⁹ NRC Staff's Answer in Opposition to Commonwealth of Massachusetts' Conditional Motion to Suspend Pilgrim Nuclear Power Plant License Renewal Proceeding Pending Resolution of Petition for Rulemaking to Rescind Spent Fuel Pool Exclusion Regulations (Jun. 13, 2011) (ADAMS Accession No. ML111640493).

²⁰ NRC Staff's Response to Commonwealth of Massachusetts' Motion to Admit Contention and, If Necessary, Re-Open Record Regarding New and Significant Information Revealed by Fukushima Accident (Jun. 27, 2011) (ADAMS Accession No. ML11178A380) ("NRC Staff's Response"); NRC Staff's Response to the Commonwealth of Massachusetts' Petition for Waiver of 10 C.F.R. Part 51 Subpart A, Appendix B or, in the Alternative, Petition for Rulemaking (Jun. 27, 2011) (ADAMS Accession No. ML111780776) ("NRC Staff Response to Waiver Petition").

21. The Staff opposed the Waiver Petition on the grounds that it did not meet the Commission's standard for waiver under 10 C.F.R. § 2.335. NRC Staff Response to Waiver Petition at 1. Among other things, the Staff noted that the Waiver Petition did not make a *prima facie* case for waiver because it did not raise any issues unique to Pilgrim. NRC Staff Response to Waiver Petition at 8-11 (*quoting Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 559-60 (2005)).

In the Amended Contention, Massachusetts "incorporates by reference its filings submitted to the ASLB on June 2, 2011." Amended Contention at 7. Consequently, the Staff relies on its previous responses to those filings in the NRC Staff Response and the NRC Staff Response to the Waiver Petition. In addition, nothing in the Amended Petition or TFR suggests that the Fukushima accident raised any spent fuel pool issues with site specific applicability to Pilgrim. Amended Petition at 3-6. Thus, the Staff maintains that the Commission's regulations bar Massachusetts' spent fuel pool claims and Massachusetts has not provided adequate support for its petition to waive those regulations. In contrast, the Commission's regulations do not exclude Massachusetts' challenges to the SAMA analysis. But as discussed below, the Amended Petition does not provide support for those claims that is sufficient to meet the high standards of the Commission's regulations governing reopening.²¹

II. The Amended Contention Does Not Meet the Reopening Standards

A. Massachusetts' Amended Contention Must Meet the Standards for Reopening

The Commission has held that once the evidentiary record in a proceeding closes, "a motion to file new or amended contentions must address the motion to reopen standards."

Dominion Nuclear Connecticut, Inc. (Millstone Power Station, Unit 3), CLI-9-5, 69 NRC 115, 120

²¹ Similarly, to the extent the Amended Contention challenges the Commission's generic determination that the environmental impacts of severe reactor accidents would be small, that claim also challenges a regulation and is therefore outside the scope of license renewal, absent a waiver. See 10 C.F.R. Part 51 Appendix A, Table B-1. The Amended Contention does not attempt to show that such a waiver is justified.

(2009). The evidentiary record in this case has been closed since 2008. See Memorandum and Order (Ruling on Pilgrim Watch Motions Regarding Testimony and Proposed Additional Evidence Relating to Pilgrim Watch Contention 1) (June 4, 2008) (ADAMS Accession No. ML081560375) (“we consider that the record with regard to Contention 1 is effectively closed, and to the extent necessary we here and now formally so close it”); *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-08-09, 67 NRC 353, 356 (2008) (“we direct the Board to close the evidentiary record on Pilgrim Watch Contention 1”). Because Contention 1 was the only active contention at that time, any contentions on new issues filed after the Board closed the record would need to meet the Commission’s standards for reopening. 10 C.F.R. § 2.326(d). Consequently, Massachusetts’ Amended Contention must meet the requirements for reopening a closed record under 10 C.F.R. § 2.326.

The Staff extensively discussed the reopening standard in previous filings in this proceeding. NRC Staff’s Response at 5-6 and n. 18 (citing NRC Staff’s Answer in Opposition to Pilgrim Watch Request for Hearing on New Contention (Jan. 7, 2011) (ADAMS Accession No. ML110070837)). In brief, a motion to reopen must satisfy the requirements 10 C.F.R. § 2.326(a). To meet that standard the motion must be timely, demonstrate that a materially different result would be likely, raise a significant environmental or safety issue, and rely on an affidavit from a competent expert. *Id.* Because the SAMA claims in Massachusetts’ Amended Contention do not meet any of these standards, the Amended Contention should not be admitted.

B. A Materially Different Result Would Not Be Likely

Under 10 C.F.R. § 2.326(a)(3), a motion to reopen a closed record “must *demonstrate* that a materially different result would be or would have been *likely* had the newly proffered evidence been considered initially.” 10 C.F.R. § 2.326(a)(3) (emphasis added). One board has explained that under this standard “[t]he movant must show that it is *likely* that the result would

have been materially different, *i.e.*, that it is more probable than not that [the movant] would have prevailed on the merits of the proposed new contention.” *Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-10-19, 72 NRC ___ (Oct. 28, 2010) (slip op. at 26) (ADAMS Accession No. ML103010136) *aff’d by* CLI-11-2, 73 NRC ___, (2011) (ADAMS Accession No. ML110691312). The Commission has found a claim that simply states that new information “contradicts some of the Board’s factual findings, and then states that this prong of the reopening test is met . . . falls far short of meeting” § 2.326(a)(3)’s requirements. *Amergen Energy Company* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 290-91 (2009) (internal quotations omitted).

The “ultimate concern” for a SAMA analysis “is whether any additional SAMA should have been identified as potentially cost-beneficial, not whether further analysis may refine the details in the SAMA NEPA analysis.” *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-09-11, 69 NRC 529, 533 (2009). “Unless it looks genuinely plausible that inclusion of an additional factor or use of other assumptions or models may change the cost-benefit conclusions for the SAMA candidates evaluated, no purpose would be served to further refine the SAMA analysis, whose goal is only to determine what safety enhancements are cost-effective to implement.” *Pilgrim*, CLI-10-11, 71 NRC at 317. Consequently, to prevail on its Amended Contention, Massachusetts must demonstrate that the information its Amended Contention cites will likely result in identifying at least one more cost-beneficial SAMA. *Id.*

The Amended Contention does not contain any information that would likely lead to the identification of one more cost-beneficial SAMA. The Amended Contention contains an extensive summary of the TFR’s findings. Amended Contention at 3-4. The Amended Contention notes that the TFR found “no imminent risk was posed by operation or licensing such that U.S. plants should be shut down immediately,” did not reach conclusions on

environmental matters under NEPA, proposed “to increase the level of safety associated with adequate protection of the public health and safety,” and “recommended that the NRC incorporate some potential severe accidents into the design basis and subject them to mandatory safety regulations.” *Id.* at 3-5 (internal quotations omitted). From these descriptions, the Amended Contention concludes that “the values assigned to the cost-benefit analysis for Pilgrim SAMAs should be re-evaluated in light of the Task Force’s finding that the value of some SAMAs is so high that they should be required as a matter of course.” *Id.* at 5.

But, the Amended Contention misreads the Task Force’s conclusions. The TFR represents a review under the Atomic Energy Act (“AEA”), the act governing the NRC’s safety review, not the National Environmental Policy Act (“NEPA”), the act that controls the NRC’s environmental reviews and SAMA analyses. The AEA requires the NRC to ensure the safe operation of nuclear power plants. *Union of Concerned Scientists v. NRC*, 824 F.2d 108, 109 (D.C. Cir. 1987). Under Section 182.a of the AEA, the Commission must ensure that “ ‘the utilization or production of special nuclear material will . . . provide adequate protection to the health and safety of the public.’ ” *Id.* (quoting 42 U.S.C. § 2232(a)) (alterations in original). Moreover, the AEA “prohibits the Commission from considering costs in setting the level of adequate protection and requires the Commission to impose backfits, regardless of cost, on any plant that fails to meet this level.” *Union of Concerned Scientists*, 824 F.2d at 119-20.

In contrast, NEPA only requires that “agencies take a hard look at environmental consequences” of federal actions. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (internal quotations omitted). The NRC conducts the SAMA analysis, which is inherently a cost-benefit analysis, to satisfy the requirements of NEPA, not the AEA. 10 C.F.R. § 51.53(c)(3)(ii)(L); *Limerick*, 869 F.2d at 730-31. In previously filed affidavits, the Staff has established that the SAMA analysis “is not a safety analysis,” or an evaluation of whether a

plant's design provides adequate protection, but is a site-specific "systematic search for potentially cost-beneficial enhancements *to further reduce* nuclear power plant accident risk."²²

The Commission established the Task Force following the Fukushima Dai-ichi accident to "conduct a methodical and systematic review of the NRC's process and regulations to determine whether the agency should make additional improvements to its regulatory system and to make recommendations to the Commission for its policy direction." TFR at 1. The Task Force first concluded that "a sequence of events like the Fukushima accident is unlikely to occur in the United States[.] Therefore, continued operation and continued licensing activities do not pose an imminent risk to public health and safety." TFR at vii. Nonetheless, the Task Force chose to recommend "significant reinforcements to NRC requirements and programs." *Id.* at 5. Consequently, the Task Force proposed to "redefine what level of protection of the public health is regarded as adequate." *Id.* at 4. In addition, the Task Force proposed a list of safety enhancements to reinforce the NRC's existing regulatory structure. *Id.* at ix.

Therefore, the Task Force made recommendations under the safety standards of the AEA. But, contrary to Massachusetts' claims, the TFR did not consider any SAMAs or reach any conclusions about whether certain mitigation measures would be cost-beneficial. Amended Contention at 5. In fact, the TFR explicitly declined to include level 3 probabilistic risk assessments, the type of computations that underlie the SAMA analysis,²³ in its recommendations. TFR at 21-22. Moreover, the Task Force specifically disclaimed any intent to require a Level 3 PRA as part of its recommendations at a subsequent public meeting with

²² Affidavit of Dr. Nathan E. Bixler and Dr. S. Tina Ghosh in Support of the NRC Staff's Answer in Opposition to Pilgrim Watch's Request for Hearing on Post Fukushima SAMA Contention, at 4-5 (June 6, 2011) (ADAMS Accession No. ML111570502) ("Bixler and Ghosh Affidavit").

²³ NRC Staff Testimony of Nathan E. Bixler and S. Tina Ghosh Concerning the Impact of Alternative Meteorological Models on the Severe Accident Mitigation Alternatives Analysis, at 7-8 (Jan. 3, 2011) (ADAMS Accession No. ML110030966) ("Bixler and Ghosh Testimony").

the Commission. Briefings on the Task Force Review of NRC Processes and Regulations Following the Events in Japan at 48 (Jul. 19, 2011) (ADAMS Accession No. ML112020051).

In previously filed testimony, the Staff has noted that “it would require at least a doubling of benefits before the next SAMA on the candidate list could become potentially cost-beneficial (hence at a minimum a doubling of benefits is required to change the results of the SAMA analysis).”²⁴ Nothing in the TFR, the Amended Contention, or the attached Thompson Declaration indicate that the benefit of any existing SAMA could double or that any new SAMA would prove cost-beneficial. Those documents certainly do not contain any information that indicates such a result would be more likely than not. Rather, the Amended Contention and Thompson Declaration primarily summarize the TFR’s findings, which, as discussed above, do not reach any specific conclusions about whether individual mitigation measures would result in enough risk reduction in to be cost-beneficial. As a result, they do not provide sufficient support to meet the Commission’s high reopening standard, and the Board should reject the Amended Contention.

C. The Amended Contention Does Not Raise a Significant Environmental Issue or an Exceptionally Grave Issue

Under 10 C.F.R. § 3.326(a)(2), a motion to reopen “must address a significant safety or environmental issue.” As discussed in the Staff’s answer to the GEIS Contention, the Commission has never established what level of environmental significance a motion to reopen must demonstrate to meet this standard in the context of reactor licensing. NRC Staff Response at 11. With respect to safety issues, NRC precedent states, petitioners “must establish either that uncorrected ... errors endanger safe plant operation, or that there has been a breakdown of the quality assurance program sufficient to raise legitimate doubt as to the

²⁴ Bixler and Ghosh Affidavit, at 4. The majority of the Board agreed with this assessment. *Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-11-18, 74 NRC __ (Jul. 19, 2011) (slip op. at 26) (ADAMS Accession No. ML11200A224).

plant's capability of being operated safely.” *Public Service Company of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-940, 32 NRC 225, 243 (1990). Outside of the reactor context, the Commission has held that environmental claims that “paint a seriously different picture of the environmental landscape” will meet this standard. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-06-03, 63 NRC 19, 29 (2006) (“*PFS*”). Under this standard, an issue is significant “when it raises a previously unknown environmental concern, but not necessarily when it amounts to mere additional evidence supporting one side or the other of a disputed environmental effect.” *Id.* Therefore, a motion to reopen to consider an environmental issue must show an issue of considerable significance. The standard may require the issue to be equivalent to a safety issue that challenges the very safety of the reactor, but at a minimum, the issue must at least provide a meaningfully different view of the environmental impacts of the proposed licensing action.

The Amended Contention asserts that “the values assigned to the cost-benefit analysis for Pilgrim SAMAs should be re-evaluated in light of the Task Force’s finding that the value of some SAMAs is so high that they should be required as a matter of course.” Amended Contention at 5. But, as discussed above, the TFR’s findings address the standard of reasonable assurance of adequate protection under the AEA; the TFR does not explicitly consider NEPA issues. Consequently, on its face, the TFR does not contain any information that could constitute an environmental issue that is so significant it provides a “seriously different picture of the environmental landscape.” *PFS*, CLI-06-03, 63 NRC at 29.

Moreover, even if information in the TFR relates to the Pilgrim SAMA analysis, Massachusetts does not allege that it reveals a “previously unknown environmental concern.” *Id.* Rather, Massachusetts simply alleges that the TFR may change the cost-benefit estimates on some SAMA candidates reviewed in the SAMA analysis. Amended Contention at 5. But, this amounts to a claim that additional evidence supports one side of an already considered dispute, whether any additional SAMAs would be cost-beneficial, which is precisely the type of

claim that the Commission indicated would not constitute a significant environmental concern in *Private Fuel Storage*. *Private Fuel Storage*, CLI-06-03, 63 NRC at 29.

Consequently, the conclusions in the TFR do not demonstrate that the Amended Contention raises a “significant” environmental issue. The TFR makes recommendations related to the NRC’s safety review of existing reactors under the AEA, not the NRC’s environmental review under NEPA. As a result, the motion to reopen should be denied under 10 C.F.R. § 2.326(a)(2).

In addition, under 10 C.F.R. § 2.326(a)(1), a motion to reopen the record must be timely unless it raises “an exceptionally grave issue.” In the Staff’s response to the GEIS Contention, the Staff argued that the GEIS Contention was untimely because it relied on information related to the Fukushima accident, which was still developing and therefore not appropriate for adjudication. NRC Staff Response at 13-16. The Thompson Declaration, which accompanies the Amended Contention, acknowledges that the TFR recognizes “limitations in currently-available information about the Fukushima accident.” Thompson Declaration at 2. As a result, the Thompson Declaration notes “the potential exists for emergence, during coming months and years, of new information that could significantly alter findings in the Task Force report.” *Id.* Consequently, neither the Amended Contention, the TFR, nor the Thompson Declaration contains information that undermines the Staff’s earlier conclusion that Massachusetts’ contention is untimely. This is particularly true in light of the rigorous requirements to re-open a closed record, which set a higher standard for “admitting a new contention after the record closes” than the standard “an ordinary late-filed contention” must meet. *Amergen Energy Company, LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 668 (2008).

Moreover, the Amended Contention itself does not contain new information for the reasons discussed below. See *infra*, Discussion Section III. The Staff recognizes that 10 C.F.R. § 2.326(a)(1) allows that “an exceptionally grave issue may be considered in the

discretion of the presiding officer even if untimely presented.” The Amended Contention raises claims related to the Staff’s environmental analysis under NEPA, particularly the SAMA portion of that analysis. Amended Contention at 5. But, a SAMA analysis is not directly related to safety. Rather, a SAMA analysis is a “systematic search for potentially cost-beneficial enhancements *to further reduce* nuclear power plant accident risk.” Bixler and Ghosh Affidavit at 4-5. Therefore, the Amended Contention does not, and indeed cannot, raise an exceptionally grave issue.

D. The Amended Contention is Not Accompanied by a Sufficient Affidavit

Pursuant to 10 C.F.R. § 2.326(b), a motion to reopen “must be accompanied by affidavits that set forth the factual and/or technical bases for the movant’s claim that the criteria of paragraph (a) of this section have been satisfied.” In that affidavit, “[e]ach of the criteria must be separately addressed, with specific explanation of why it has been met.” 10 C.F.R. § 2.326(b). While Massachusetts filed the Thompson Declaration with the Amended Contention, that declaration does not mention the criteria of § 2.326(a), let alone explain how the amended contention meets those requirements. As a result, the Thompson Declaration does not provide sufficient support for the Amended Contention under the clear terms of § 2.326(b).

While, the Amended Contention itself purports to address these factors, it only provides a cursory analysis of the § 2.326(a) factors. With respect to the significance and different result prongs of § 2.326(a), the Amended Contention simply refers to Sections II and III of the contention, which provide a general description of the TFR and the Thompson Declaration. Amended Contention at 10-11. These statements do not explicitly address the § 2.326(a) factors, let alone provide “a specific explanation” of why the Amended Contention meets these factors. Amended Contention at 4-5. As a result, the Amended Contention and Thompson Declaration are facially defective attempts to reopen, and the request to reopen should be denied. *Oyster Creek*, CLI-09-7, 69 NRC at 291.

III. The Amended Contention is Not Based on New or Different Information

Pursuant to § 2.326(d), a motion to reopen seeking admission of a contention on a previously uncontested issue must meet the criteria in 10 C.F.R. § 2.309(c).²⁵ Section 2.309(c) requires a balancing of eight listed factors. All eight factors must be addressed by the petitioner. *Oyster Creek*, CLI-09-7, 63 NRC at 260. Failure to comply with the pleading requirements is sufficient grounds for denial of the motion to amend or admit a new contention. *Id.* at 260-61. And, of all the eight factors, the first, good cause for failure to file on time, is most important. *Id.* at 261. “Good cause has long been interpreted to mean that the information on which the proposed new contention is based was not previously available.” *Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit 3), CLI-09-05, 68 NRC 115, 125-26 (2009).

The Commission has repeatedly addressed the issue of intervenors essentially waiting for the Staff to summarize information into a convenient form to serve as the basis of a contention. Most recently in *Prairie Island*, the Commission stated that “[b]y permitting [intervenors] to wait for the Staff to compile all relevant information in a single document, the

²⁵ The eight factors listed at § 2.309(c)(1) are as follows:

- (i) Good cause, if any, for the failure to file on time;
- (ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
- (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;
- (iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;
- (v) The availability of other means whereby the requestor's/petitioner's interest will be protected;
- (vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;
- (vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and
- (viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

Board improperly ignored [intervenors'] obligation to conduct its own due diligence." See, e.g., *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC ____ (Sep. 30, 2010) (slip op. at 18). The Commission emphasized in *Oyster Creek* that

[O]ur contention admissibility and timeliness rules require a high level of discipline and preparation by petitioners, who must examine the publicly available material and set forth their claims and the support for their claims at the outset. There simply would be no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements and add new contentions at their convenience during the course of a proceeding based on information that could have formed the basis for a timely contention at the outset of the proceeding. Our expanding adjudicatory docket makes it critically important that parties comply with our pleading requirements and that the Board enforce those requirements.

Oyster Creek, CLI-09-7, 69 NRC at 271-72 (footnotes and internal quotation marks omitted).

Finally, the Commission stressed that an intervenor has an "iron-clad obligation to examine the publicly available documentary material ... with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention." *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 147 (1993) (internal quotation marks and footnote omitted). *Accord Shaw Areva MOX Services, LLC* (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 NRC 55, 65 n.47 (2009); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 386 (2002); *Turkey Point*, CLI-01-17, 54 NRC at 24-25.

In this case, Massachusetts asserts that the Amended Contention is timely because it is "based upon the NRC's own Task Force Report (July 12, 2011) on the lessons learned from the accident at Fukushima, which was not yet released at the time the Commonwealth filed its initial contention." Amended Contention at 8. Therefore Massachusetts claimed that the TFR and Thompson Declaration provide "additional bases for its contention" that were "not available at the time [Massachusetts] filed its contention on June 12, 2011." *Id.* at 2. But, Massachusetts' admits that "the Task Force recommendations support and are consistent with those opinions

previously provided by Dr. Thompson in support of the Commonwealth's June 2, 2011 contention" ("Thompson Report").²⁶ *Id.* at 6.

Although the Amended Contention challenges the adequacy of the NRC regulatory approach to SAMAs, the Thompson Report did so well before the NRC published the TFR on similar grounds. The Amended Contention claims that "the values assigned to the cost-benefit analysis for Pilgrim SAMAs should be re-evaluated in light of the Task Force's finding that the value of some SAMAs is so high that they should be required as a matter of course." Amended Contention at 5. As discussed above, the Staff believes that this summary misstates the TFR's conclusions, but even if Massachusetts' interpretation of the TFR were correct, that interpretation is substantially similar to claims Massachusetts has already made. The Thompson Report asserted that "any accident-mitigation measure or SAMA that is credited for the future licensed operation of the Pilgrim NPP should be incorporated in the plant's design basis." Thompson Report at ¶ 16. Since the conclusions Massachusetts draws from the TFR are similar to those stated in the Thompson Report, the late-filed contention should be dismissed because it does not rest on any new or different information, and thus good cause is lacking. The Commission has clearly held that Staff's documents which summarize information that has been previously disclosed elsewhere cannot serve as the basis for new information to support a late-filed contention. In this case, the information Massachusetts relies on was already available and disclosed in its own expert's report.

IV. The Amended Contention is Inadmissible Under 10 C.F.R. § 2.309(f)(1)

The Commission has indicated that amended contentions must meet the "general contention admissibility requirements of § 2.309(f)(1)" in addition to the late filing criteria.²⁷

²⁶ "New and Significant Information From the Fukushima Dai-ichi Accident in the Context of Future Operation of the Pilgrim Nuclear Power Plant" (June 1, 2011) (ADAMS No. ML111530339).

²⁷ In order to be admitted, a contention must satisfy the following requirements:

Pa'ina Hawaii, LLC, CLI-10-18, 72 NRC __ (Jul. 8, 2010) (slip op. at 40 n. 171) (ADAMS Accession No. ML101890843). The requirements of Section 2.309(f)(1) ensure that contentions raise matters appropriate for adjudication in the proceeding in which they are raised, establish a sufficient foundation to warrant further inquiry, and provide the other parties with sufficient notice of the issues so that they will know what they will have to address. *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974). As the Commission noted when it revised the hearing regulations, it "should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and

(f) Contentions. (1) A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request of petition must:

(i) Provide a specific statement of the issue of law or fact to be raised or controverted;

(ii) Provide a brief explanation of the basis for the contention;

(iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;

(iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;

(v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to supports its position on the issue; and

(vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petition disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

susceptible to, resolution in an NRC hearing.” Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

Because the record in this proceeding is closed, Massachusetts must set forth the basis of its new contention with “a degree of particularity in excess of the basis and specificity requirements contained in 10 C.F.R. § 2.714(b) [now § 2.309(f)(1)] for admissible contentions.” *Diablo Canyon*, ALAB-775, 19 NRC at 1366. See also *Oyster Creek*, CLI-08-28, 68 NRC at 668 (“Commission practice holds that the standard for admitting a new contention after the record is closed is higher than for an ordinary late-filed contention.”). Support for Massachusetts’ Amended Contention must “be more than mere allegations; it must be tantamount to evidence.” *Diablo Canyon*, ALAB-775, 19 NRC at 1366. In other words, the evidence must comport with the requirements for admissible evidence at hearing in 10 C.F.R. § 2.337—it must be relevant, material, and reliable. See *id* at 1366-67.

A. The Amended Contention Does Not Address the Section 2.309(f)(1) Factors

A proposed contention must address all of the factors in 10 C.F.R. § 2.309(f)(1). The Amended Contention does not specifically address these factors, but instead “relies upon and incorporates by reference its filings submitted to the ASLB on June 2, 2011.” Amended Contention at 7. However, “a Board is not to permit ‘incorporation by reference’ where the effect would be to circumvent NRC-prescribed . . . specificity requirements.” *Consolidated Edison Co. of New York* (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 132-33 (2001). “The Commission expects parties to bear their burden and to clearly identify the matters on which they intend to rely with reference to a specific point. The Commission cannot be faulted for not having searched for a needle that may be in a haystack.” *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 241 (1989).

From the outset, therefore, the Amended Petition cannot satisfy the Commission’s admissibility requirements under section 2.309(f)(1) because it does not even address them. Rather, it attempts to incorporate previous arguments for why the GEIS Contention met the

section 2.309(f)(1) factors. Amended Contention at 7. But, these arguments do not provide any indication for why the Amended Contention, which seeks to add the TFR to the bases of the GEIS Contention, would also be admissible. Rather, it leaves the parties and the Board to guess how Massachusetts believes the Amended Contention is admissible. Consequently, it amounts to precisely the type of incorporation by reference the Commission found would circumvent the requirements for specificity in pleading. As a result, the Amended Contention should be rejected.

B. The Amended Contention is Outside the Scope of this Proceeding.

Petitioners assert that their Amended Contention is based upon the TFR's findings and recommendations. Amended Contention at 4-5. By their terms, however, the TFR's recommendations are intended to apply to all existing plants, regardless of renewal status. TFR at ix. Only recommendation 5 is limited to plants with specific containment types – BWR Mark I and Mark II containments. *Id.* The TFR also outlines a suggested approach to implement its recommendations. TFR at Appendix A. The TFR envisions that many of its recommendations will ultimately be implemented via the rulemaking process using orders to implement new requirements while the rulemaking process is ongoing. *Compare* TFR Appendix A at 73 “Recommended Rulemaking Activities” *with* TFR Appendix A at 74-75 “Recommended Orders.” Currently the TFR's recommendations are being considered by the Commission for application to all operating plants. See Staff Requirements Memorandum SECY-11-0093, Near-Term Report and Recommendations for Agency Actions Following the Events in Japan, Aug. 18, 2011 (ADAMS Accession No. ML112310021).

In accordance with long-standing NRC policy, licensing boards are not to entertain contentions on topics that are or are likely to become the subject of general rulemaking. *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-10-19, 72 NRC__ (July 8, 2010) (slip op. at 2-3)(ADAMS Accession No. ML101890873). Further, if a party is not satisfied with the Commission's generic resolution of an issue, the remedy lies in the

rulemaking process, not in an individual adjudicatory proceeding. *Id.* at 3. Because TFR recommendations are generic in nature and, if adopted by the Commission will likely become the topic of orders and general rulemaking, the Amended Contention is not within the scope of this proceeding.

C. The Amended Contention is Not Material to this Proceeding

As discussed above, the Amended Contention attempts to raise environmental claims, particularly challenges to the SAMA analysis. Amended Contention at 5. But, the TFR's recommendations primarily relate to redefining what level of protection of the public health and safety should be regarded as adequate under the AEA. TFR at 4. The TFR's recommendations that the NRC take additional steps to ensure adequate protection do not have any bearing on whether the agency has fully considered environmental impacts in this proceeding. As a result, the conclusions in the TFR are immaterial to the Staff's environmental review, and therefore admission of this environmental contention, which is based exclusively on those findings, should be denied. 10 C.F.R. § 2.309(f)(1)(iv), (vi).

D. The Amended Contention Lacks an Adequate Factual Basis

Moreover, the Amended Contention does not raise an adequately supported challenge to the SAMA analysis. The Amended Contention simply alleges that the "cost-benefit analysis for the Pilgrim SAMAs should be re-evaluated in light of the Task Force's finding that the value of some SAMAs is so high that they should be required as a matter of course." Amended Contention at 5. But, as discussed above, this conclusion misstates the TFR's findings. The TFR evaluated various mitigation measures under the AEA, without regard to their cost to implement. *See Supra*, Discussion Section II.B. Consequently, the TFR did not make any conclusions with respect to the cost to implement various mitigation measures, let alone whether those costs would outweigh the benefits of such measures.

In fact, the TFR makes no reference whatsoever to SAMAs. The TFR does make reference to probabilistic risk assessments ("PRA"), but that discussion does not reference PRA

levels in the SAMA context. TFR at 21-22. As Staff experts have previously explained, PRAs have traditionally been divided into three levels: level 1 is the evaluation of the combinations of plant failures that can lead to core damage; level 2 is the evaluation of core damage progression and possible containment failure resulting in an environmental release for each core-damage sequence identified in level 1; and level 3 is the evaluation of the consequences that would result from the set of environmental releases identified in level 2.²⁸ All three levels of the PRA are required to perform a SAMA analysis. Bixler and Ghosh Testimony, at 8. The TFR states that their framework of recommendations “could be implemented on the basis of full-scope Level 1 core damage assessment PRAs and Level 2 containment performance assessment PRAs.” TFR at 21. However, the TFR “has not recommended including Level 3 PRA as a part of a regulatory framework.” *Id.* at 22. Moreover, the Task Force specifically disclaimed any intent to require a Level 3 PRA as part of its recommendations at a subsequent public meeting with the Commission. Briefings on the Task Force Review of NRC Processes and Regulations Following the Events in Japan, at 48 (Jul. 19, 2011) (ADAMS Accession No. ML112020051). Since the TFR does not recommend a Level 3 PRA analysis and the Task Force specifically rejected the idea during their presentation to the Commission, SAMAs are clearly not a part of their recommendations.

Finally, the Amended Contention asserts that the TFR provides additional support for the recommendations from its expert, Dr. Thompson. Amended Contention at 6. But, on its face, the Thompson Declaration acknowledges that the TFR only provides tangential support for its conclusions. Thompson Declaration at 4-6. The declaration frequently acknowledges that the TFR “does not directly discuss,” “directly address,” and “specifically address” many of Dr. Thompson’s earlier recommendations. *Id.* Consequently, the TFR does not appear to provide additional support for the claims in the GEIS Contention.

²⁸ Bixler and Ghosh Testimony at 7-8.

CONCLUSION

As demonstrated above, the Amended Contention does not meet the Commission's high standards for reopening the record, is untimely, and also fails to meet the general requirements for admissibility. Accordingly, the record should not be reopened to admit Massachusetts' Amended Contention, and because the contention itself is inadmissible, it should be denied.

Respectfully submitted,

/Signed Electronically By/

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Dated at Rockville, Maryland
this 6th day of September, 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC Staff's Response to Commonwealth of Massachusetts' Motion to Supplement Bases to Proposed Contention to Address NRC Task Force Report on Lessons Learned from Fukushima " has been served upon the following by the Electronic Information Exchange, this 6th day of September, 2011:

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