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)	)	

ENTERGY'S ANSWER OPPOSING COMMONWEALTH MOTION TO SUPPLEMENT BASES TO COMMONWEALTH CONTENTION TO ADDRESS NRC TASK FORCE REPORT ON LESSONS LEARNED FROM FUKUSHIMA

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TABLE OF CONTENTS

I. BACKGROUND 3

II. LEGAL STANDARDS 6

III. THE TASK FORCE REPORT RAISES ISSUES THAT ARE OUTSIDE THE SCOPE OF LICENSE RENEWAL AND ARE IRRELEVANT TO THE PILGRIM SAMA ANALYSIS 6

- **A. The Task Force Report Concerns Plant Design and Licensing Basis Issues That Are Outside The Scope of License Renewal and Does Not Concern SAMA Analyses ....** 6
- **B. The Commonwealth's and Dr. Thompson's Attempt to Transform Potential New Design Basis Requirements Into SAMAs Ignores and Contradicts the Fundamental Function and Purpose of SAMAs ....** 11

IV. THE MOTION PROVIDES NO BASIS TO DISTURB THE COMMISSION'S CATEGORY 1 DETERMINATION FOR ENVIRON-MENTAL RISKS PRESENTED BY SPENT FUEL POOLS DURING THE RENEWAL TERM 17

V. THE MOTION FAILS TO MEET THE STANDARDS FOR REOPENING THE RECORD, FOR LATE-FILED CONTENTIONS, AND FOR ADMISSION OF A CONTENTION 20

- **A. The Task Force Report Does Not Support Reopening the Record ....** 20
- **B. Failure to Meet the Requirements for Non-Timely Filings ....** 25
- **C. The Motion Does Not Meet the Standards For Admissible Contentions ....** 27
  1. The Motion Raises Issues Outside the Scope of This Proceeding and Impermissibly Seeks to Challenge NRC Rules 27
  2. The Motion Fails to Demonstrate a Genuine Dispute on a Material Issue of Fact or Law 29

VI. CONCLUSION 30

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Pursuant to 10 C.F.R. § 2.323(c) and the Atomic Safety and Licensing Board ("Board")'s August 17, 2011 Order,[1] Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (collectively "Entergy") hereby oppose the Commonwealth of Massachusetts' Motion to Supplement the Bases of its proposed contention to address the NRC Task Force Report on lessons learned from Fukushima.[2] As set forth in this Answer, the Motion should be denied for many reasons.

Foremost, the Motion impermissibly seeks to raise current licensing and design basis issues that are beyond the scope of license renewal. The Motion is premised solely on Task Force recommendations (that are preliminary and subject to final Commission action) concerning current licensing and design basis issues that fall outside the limited confines of aging management issues considered in license renewal. In essence, the Commonwealth seeks to

[1] Order (Granting NRC Staff's Unopposed Motion for Extension) (Aug. 17, 2011).

[2] 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 (Aug. 11, 2011) ("Motion"). Included with the Motion is the Declaration of 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) ("August 2011 Thompson Decl.").

litigate the Task Force's preliminary recommendations for strengthening the NRC's regulatory framework and safety regulations – generic topics that are clearly outside the scope of this proceeding and prohibited as challenges to the NRC's current rules. In an attempt to circumvent this prohibition, the Commonwealth argues that "the values assigned to the cost-benefit analysis for Pilgrim [severe accident mitigation alternatives ("SAMAs")] should be re-evaluated in light of the <u>Task Force's finding that the value of some SAMAs is so high</u> that they should be required as a matter of course." Motion at 5 (emphasis added). This argument lacks any merit. It misstates the Report's recommendations, which are not premised on National Environmental Policy Act ("NEPA") or SAMA considerations, directly violates fundamental NEPA cost-benefit precepts underlying SAMAs repeatedly enunciated by the Commission, improperly conflates the NRC's safety and environmental reviews, and is simply at odds with the NRC's responsibilities under NEPA and its implementing regulations. The Commonwealth is attempting to get through the back door claims that the Commission has repeatedly barred at the front door – litigation of current licensing and design basis issues in license renewal proceedings. As such, the Motion must be rejected.

Additionally, the Motion must be denied because, like the Commonwealth's Contention, it (1) impermissibly seeks to raise and litigate in this license renewal proceeding Category 1 issues resolved by the Generic Environmental Impact Statement for License Renewal of Nuclear Plants, NUREG-1437 (1996) ("GEIS"), (2) fails to meet the stringent requirements in 10 C.F.R. § 2.326 for reopening a closed hearing record, (3) fails to meet the standards for considering a late-filed contention, and (4) fails to meet the standards for an admissible contention. For these and other reasons set forth below, the Motion (as well as the original Contention) must be denied.

I. BACKGROUND

On June 2, 2011, the Commonwealth filed its proposed Contention and related papers based on events at the Fukushima Dai-ichi Nuclear Power Plant.[3] Both Entergy and the NRC Staff filed answers on June 27, 2011 opposing the admission of the Commonwealth's Contention and the Waiver Petition.[4]

On July 12, 2011, the NRC's Near Term Task Force ("Task Force") issued its Report on its evaluation of the accident at the Fukushima Dai-ichi Nuclear Power Plant.[5] The Task Force was established, at the direction of the Commission, to conduct

> [a] systematic and methodical review of U.S. Nuclear Regulatory Commission processes 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, in light of the accident at the Fukushima Dai-ichi Nuclear Power Plant.

Task Force Report at vii; see also Appendices B and C to the Task Force Report.

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[3] The Commonwealth's filings included the (1) Commonwealth of Massachusetts' Contention Regarding New and Significant Information Revealed by the Fukushima Radiological Accident (June 2, 2011) ("Contention"); (2) 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) ("Waiver Petition"); (3) 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 (4) Declaration of Dr. Gordon R. Thompson in Support of Commonwealth of Massachusetts' Contention and Related Petitions and Motions (June 1, 2011) ("June 2011 Thompson Decl."). The case background leading up to the Commonwealth's Contention is set forth in Entergy's Answer at 6-14.

[4] Entergy's Answer Opposing Commonwealth Contention and Petition for Waiver Regarding New and Significant Information Based on Fukushima (June 27, 2011) ("Entergy Answer"); 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 (June 27, 2011) ("NRC Staff Contention 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 (June 27, 2011) ("NRC Staff Waiver Petition Response").

[5] Recommendations for Enhancing Reactor Safety in the 21st Century: the Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident (July 12, 2011) ("Task Force Report")

In response to this directive, the Task Force evaluated the NRC's current regulatory approach for protecting against accidents resulting from natural phenomena (including mitigation of consequences and ensuring emergency preparedness) based on insights from the Fukushima Dai-ichi accident for improvements and enhancements to the NRC's regulatory framework. Based on its evaluation, the Task Force arrived at 12 overarching recommendations "intended to clarify and strengthen the regulatory framework" for protecting against such accidents. Id. at vii-ix, 69-70. While concluding that improving and enhancing the NRC's regulatory framework is "an appropriate, realistic, and achievable goal," the Task Force found that:

> The current regulatory approach, and more importantly, the resultant plant capabilities allow the Task Force to conclude that a sequence of events like the Fukushima accident is unlikely to occur in the United States and some appropriate mitigation measures have been implemented, reducing the likelihood of core damage and radiological releases. Therefore, continued operation and continued licensing activities do not pose an imminent risk to public health and safety.

Id. at vii (emphasis added); see also id. at 18.

The Commonwealth's Motion at 4-5 focuses on the Task Force's first overarching recommendation for clarifying the regulatory framework discussed in Section 3 of the Task Force Report, and in particular the Task Force recommendations concerning the NRC's definition of design basis. As discussed in Section 3 of the Report, the Task Force recommends a new, "enhanced" regulatory framework "for the future" that would establish a new category of mandatory safety regulations of "extended design basis" requirements for beyond design basis accidents. Id. at 19-22. While proposing this major restructuring of the Commission's regulatory framework, the Task Force reaffirmed the adequacy of the Commission's current regulatory approach as follows:

> As described in Section 3 of the report, in light of the low likelihood of an event beyond the design basis of a U.S. nuclear power plant and the current mitigation capabilities at those facilities, the Task Force concludes that continued operation of these plants and continued licensing activities do not pose an imminent risk to the public health and safety. Further, the Task Force concludes that the current regulatory approach and regulatory requirements continue to serve as a basis for the reasonable assurance of adequate protection of public health and safety until the actions set forth below have been implemented.

Task Force Report at 73 (emphasis added).

On August 11, 2011, the Commonwealth filed its Motion and the August 2011 Thompson Declaration based on the Task Force Report.

On August 19, 2011, the Commission issued a Staff Requirements Memorandum[6] directing the Staff to take certain actions in light of the Task Force Report, including:

- By September 9, 2011, the NRC Staff is to produce a paper outlining which of the Task Force's overarching recommendations 2 – 12 the Staff believes should be implemented (either in whole or in part) without unnecessary delay.
- By October 3, 2011, the NRC Staff is to produce a paper prioritizing Task Force overarching recommendations 2 - 12. This paper is expected to lay out all agency actions to be taken in responding to lessons learned from the Fukushima Dai-ichi accident.
- The NRC Staff has 18 months to consider the Task Force's first and broadest recommendation, the call for revising the NRC's regulatory approach. The paper is expected to provide options, including a recommended course of action, in dealing with the Task Force's first recommendation.

SRM at 1-2.

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[6] Staff Requirements – SECY-11-0093 – Near-Term Report and Recommendations for Agency Actions Following the Events in Japan (Aug. 19, 2011) ("SRM").

II. LEGAL STANDARDS

The legal standards applicable to amended contentions, reopening the hearing record, late contentions, admissible contentions, and petitions for waiver of NRC rules are set forth in Entergy's Answer at 14-18 and 45-48 and are hereby incorporated by reference.

III. THE TASK FORCE REPORT RAISES ISSUES THAT ARE OUTSIDE THE SCOPE OF LICENSE RENEWAL AND ARE IRRELEVANT TO THE PILGRIM SAMA ANALYSIS

A. THE TASK FORCE REPORT CONCERNS PLANT DESIGN AND LICENSING BASIS ISSUES THAT ARE OUTSIDE THE SCOPE OF LICENSE RENEWAL AND DOES NOT CONCERN SAMA ANALYSES

The Motion should be rejected because the Task Force Report recommendations which the Commonwealth relies upon concern issues that are outside the scope of license renewal and otherwise are irrelevant to the Pilgrim SAMA analysis. As discussed, the Task Force's focus was on recommendations concerning the licensing, design and operational basis of nuclear power plants. The Task Force did not look at Fukushima through the lens of a SAMA analysis.

In contrast, the Commonwealth's proposed Contention, as proffered, focuses solely on the environmental and SAMA analyses supporting Pilgrim license renewal. The Contention claims that the "environmental impacts of re-licensing the Pilgrim NPP have been underestimated" and "the [Pilgrim] SAMA analysis is deficient because it ignores or rejects mitigative measures that may now prove to be cost-effective in light" of purported "new and significant information revealed by the Fukushima accident that is likely to affect the outcome of those analyses." Contention at 5-6. The Contention does not raise any safety-related issues concerning the adequacy of the Pilgrim's aging management programs for license renewal.

In its Motion, the Commonwealth broadly asserts that the Task Force Report contains "additional new and significant information on the impacts of relicensing the Pilgrim plant . . .

which provides further support for [the Commonwealth's] contention." Motion at 1. However, the Motion's discussion of the relevance of the Task Force Report focuses on the Task Force's recommendations for proposed future changes to the safety findings required for the "licensing of reactors" and the "level of safety that is minimally required for the protection of public health and safety" and for the establishment of mandatory extended design basis safety-related requirements for beyond design basis accidents. Id. at 4-5. These recommendations directly concern a plant's licensing and design basis, as the Commonwealth clearly understands and reflects in its closing summary description of the Task Force Report:

> In support of and in parallel with its recommendations to upgrade the design basis, the Task Force proposed a series of specific safety investigations, design changes, equipment upgrades, and improvements to emergency planning and operating procedures.

Id. at 5.

In his declaration, Dr. Thompson similarly makes broad, incorrect assertions of the Task Force Report's relevance to the Commonwealth's environmental Contention,[7] but his specific discussion of the Report acknowledges that the Task Force Report is concerned with plant design basis issues and not environmental issues. Indeed, Dr. Thompson characterizes the 12 overarching Task Force recommendations as follows:

> Six of the recommendations directly involve re-evaluation or upgrading of the designs of currently-licensed NPPs. Those recommendations directly respond to design weaknesses. Four of the recommendations pertain to emergency preparedness. Those recommendations seek to compensate for design weaknesses. Two of the recommendations pertain to the NRC regulatory framework and regulatory practice . . . . Thus, all of the Task Force

[7] For example, Dr. Thompson broadly claims that the Task Force Report "supports [his] conclusion" that the "existing SAMA analysis for the Pilgrim plant should be entirely re-done" and "[i]t follows . . . that the Pilgrim-specific supplement to the GEIS for license renewal of nuclear power plants should be re-done." August 2011 Thompson Decl. at ¶ IV-2. As discussed below (see pages 22-25, infra), this is clearly not the case.

recommendations respond, in varying ways, to clearly-evident weaknesses in the design of NRC-licensed NPPs.

August 2011 Thompson Decl. at ¶ II-2 (emphasis added) (footnotes omitted).[8]

Thus, despite the Commonwealth's claim that "the NRC should not make a final decision on whether to relicense the Pilgrim plant unless and until the NRC takes a hard look at the environmental impacts of relicensing, in light of the [purported] new and significant information identified by [Dr. Thompson] and in the Task Force Report," Motion at 3-4, none of the issues focused on by the Commonwealth and Dr. Thompson from the Task Force Report concern license renewal – for Pilgrim or any other nuclear power plant. This is because the scope of review in a license renewal proceeding is limited to managing the effects of aging. Issues concerning the adequacy of a plant's design basis – which is part of a plant's current licensing basis ("CLB")[9] – are beyond this limited scope. Thus, a proposed contention or an amendment to an already proffered contention seeking to raise such issues is an impermissible challenge to the license renewal regulations in 10 C.F.R. Part 54.

[8] Further, the Commonwealth and Dr. Thompson focus on those Task Force recommendations that would add new extended design basis requirements for nuclear power plants to address beyond design basis events, which are now considered solely in the context of severe accidents. Specifically, the Commonwealth and Dr. Thompson focus on Task Force Recommendations 5 (requiring reliable hardened vent designs in boiling water reactor facilities with Mark I and Mark II containments); 6 (identify insights about hydrogen control and mitigation inside containment or other buildings); and 7 (enhance spent fuel pool makeup capability and instrumentation for the spent fuel pool). August 2011 Thompson Decl. at ¶¶ III-5, III-9, III-11, III-13.

[9] Commission regulations define the CLB as "the set of NRC requirements applicable to a specific plant and a licensee's written commitments for ensuring compliance with and operation within applicable NRC requirements and the plant-specific design basis (including all modifications and additions to such commitments over the life of the license) that are docketed and in effect. The CLB includes the NRC regulations contained in 10 CFR parts 2, 19, 20, 21, 26, 30, 40, 50, 51, 52, 54, 55, 70, 72, 73, 100 and appendices thereto; orders; license conditions; exemptions; and technical specifications. It also includes the plant-specific design-basis information defined in 10 CFR 50.2 as documented in the most recent final safety analysis report (FSAR) as required by 10 CFR 50.71 and the licensee's commitments remaining in effect that were made in docketed licensing correspondence such as licensee responses to NRC bulletins, generic letters, and enforcement actions, as well as licensee commitments documented in NRC safety evaluations or licensee event reports." 10 C.F.R. § 54.3 (emphasis added).

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),[10] which focus on managing the aging of certain systems, structures, and components, and the review of time-limited aging analyses. See Turkey Point, CLI-01-17, 54 N.R.C. at 7-8; 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 10 C.F.R. Part 54 rulemaking proceedings, that with the exception of the detrimental effects of aging, the existing regulatory processes are adequate to ensure that the CLB of operating plants provide and maintain an adequate level of safety.[11] 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 22,473. 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 "detrimental effects of aging on the functionality of

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[10] 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." Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 N.R.C. 3, 10 (2001).

[11] Final Rule, Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. 22,461, 22,464, 22,481-82 (May 8, 1995).

> certain systems, structures, and components in the period of extended operations."

Id. at 5 (footnote omitted). 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),[12] and the "Commission did not believe it necessary or appropriate to throw open the full gamut of provisions in a plant's current licensing basis to re-analysis during the license renewal review." Turkey Point, CLI-01-17, 54 N.R.C. at 9. "License renewal reviews are not intended to 'duplicate the Commission's ongoing reviews of operating reactors.'" Id. at 7 (citation omitted).

Thus, aside from the issue of aging management, the adequacy of a plant's CLB, including the adequacy of its design basis, is not within the scope of license renewal review. Here, although attempting to circumvent this prohibition under the guise of environmental claims, the Motion clearly, and impermissibly, seeks to raise and litigate the Task Force recommendations for long term enhancements of the Commission's regulatory structure that would – if adopted and implemented by the Commission – modify the current licensing basis of operating plants, such as Pilgrim. That the Motion is in fact attacking the adequacy of the current design basis of the Pilgrim plant based on the Task Force recommendations is laid bare by the express statements to that effect in the Motion and the August 2011 Thompson Declaration quoted above. The Commonwealth's attempt to transform design basis requirements into SAMAs improperly conflates the NRC's safety and environmental reviews,

[12] See also Federal Respondents' Memorandum on the Events at the Fukushima Daiichi Nuclear Power Station at 18, New Jersey Envtl. 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.'").

and as discussed below, is simply at odds with the NRC's responsibilities under NEPA and its implementing regulations as repeatedly reaffirmed by the Commission. As such, licensing and design basis issues concerning current plant operations – such as spent fuel pool instrumentation and accident mitigation, hardened vents, and hydrogen control and mitigation – raised in the Task Force Report and relied upon by the Commonwealth and Dr. Thompson as additional support for the proposed Contention are outside the scope of this proceeding.

B. THE COMMONWEALTH'S AND DR. THOMPSON'S ATTEMPT TO TRANSFORM POTENTIAL NEW DESIGN BASIS REQUIREMENTS INTO SAMAS IGNORES AND CONTRADICTS THE FUNDAMENTAL FUNCTION AND PURPOSE OF SAMAS

In their attempt to circumvent the prohibition against litigating CLB claims in license renewal proceedings, the Commonwealth and Dr. Thompson erroneously attempt to transform potential new design basis requirements for nuclear plants into SAMAs. The Commonwealth alleges that the Task Force has "suggest[ed] that some severe accident mitigation measures should be adopted into the design basis, i.e., the set of regulations adopted without regard to their cost which establish the minimum level of adequate protection required for all nuclear power plants." Motion at 5. On this basis, and this basis alone with no supporting analysis or precedent, the Commonwealth 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." Id. As discussed below, the Commonwealth's and Dr. Thompson's attempt to transform SAMAs into design basis requirements regardless of costs evidences a fundamental misunderstanding of the purpose of SAMAs in a NEPA analysis that misinterprets and misapplies the Task Force Report recommendations. It improperly conflates the NRC's safety and environmental reviews, and is

simply at odds with the NRC's responsibilities under NEPA and its implementing regulations as repeatedly reaffirmed by the Commission.

It is well-established that SAMAs are additional measures that can be taken beyond a plant's already existing design basis, or plant operating basis, to further reduce the already low risk of a severe accident, and that they are only considered for implementation if first determined to be potentially cost-beneficial in reducing the risk (i.e. occurrence and/or consequences) of severe accidents. As the Commission has previously explained in this proceeding:

> Mitigation alternatives or "SAMAs" refer to safety enhancements such as a new hardware item or procedure intended to reduce the risk of severe accidents. The purpose of the SAMA review is to ensure that any plant changes that have a potential for significantly improving severe accident safety performance are identified and assessed. NRC SAMA analysis evaluates a number of potential accident progression sequences (scenarios) and the possible safety enhancements that may reduce the risk of those accident scenarios. The analysis assesses whether and to what extent the probability-weighted consequences of the analyzed severe accident sequences would decrease if a specific SAMA were implemented at a particular facility. SAMA analysis is used for determining whether particular SAMAs would sufficiently reduce risk – *e.g.*, by reducing frequency of core damage or frequency of containment failure – for the SAMA to be cost-effective to implement. The SAMA analysis therefore is a probabilistic risk assessment analysis. If the cost of implementing a particular SAMA is greater than its estimated benefit, the SAMA is not considered cost-beneficial to implement.

Entergy Nuclear Generation Co., et al. (Pilgrim Nuclear Power Station), CLI-10-11, 71 N.R.C. __, slip op. at 3 (Mar. 26, 2010) ("CLI-10-11") (emphasis added) (quotation and footnote omitted). In that same decision, the Commission stated:

> 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.

Id. at 39 (emphasis added). Thus, the Commonwealth's assertion that the values assigned in the Pilgrim cost-benefit analysis should be re-evaluated because the value of certain mitigation measures is so high that "they should be required as a matter of course" completely ignores the above purpose and functions of SAMAs as explicitly defined by the Commission.

Further, nothing in NEPA requires that the NRC consider mitigation alternatives without regard to cost. The Commission's regulations implementing NEPA expressly provide that (with certain exceptions not applicable here) an applicant's environmental report and the NRC Staff's Environmental Impact Statement ("EIS") should include consideration of the economic, technical and other benefits and costs of the proposed action and alternatives. 10 C.F.R. §§ 51.45(c), 51.71(d). As explained by the Commission in connection with SAMAs:

> Ultimately, NEPA requires the NRC to provide a "reasonable" mitigation alternatives analysis, containing "reasonable" estimates, including, where appropriate, full disclosures of any known shortcomings in available methodology, disclosure of incomplete or unavailable information and significant uncertainties, and a reasoned evaluation of whether and to what extent these or other considerations credibly could or would alter the Pilgrim SAMA analysis conclusions on which SAMAs are cost-beneficial to implement.

Entergy Nuclear Generation Co., et al. (Pilgrim Nuclear Power Station), CLI-10-22, 72 N.R.C. __, slip op. at 9-10 (Aug. 27, 2010) ("CLI-10-22") (emphasis added).

In neither the Motion nor the proposed Contention does the Commonwealth or Dr. Thompson provide any information whatsoever indicating that the quantitative assessment of SAMAs evaluated for Pilgrim (i.e. the estimated risk that could be averted or cost) is incorrect. The Motion and proposed Contention, and the supporting Thompson report and declarations, are devoid of any information, analysis, or explanation demonstrating that any particular SAMA is potentially cost beneficial, as required both by Commission regulation and case law.

Furthermore, contrary to the Commonwealth's implication, the Task Force Report provides no conclusions as to the value of any particular SAMAs. Nor does the Task Force Report provide any conclusion with respect to the value of any particular SAMA as it might be implemented at any particular plant. As stated, the Task Force was not looking at Fukushima through the lens of a SAMA analysis under NEPA, but rather through the lens of enhancing and making more logical the Commission's current regulatory approach and regulatory requirements, which the Task Force explicitly confirmed provide "reasonable assurance of adequate protection of public health and safety" pending the adoption of any enhanced requirements. Task Force Report at 73.

Thus, the Commonwealth undertakes an unfounded leap in logic, and the underlying premise for the Motion (i.e., that the Task Force Report supports the Commonwealth's Contention challenging the Pilgrim SAMA analysis) is fatally flawed. The Task Force Report is not concerned with SAMAs. Rather, the Task Force Report makes a series of recommendations for the long-term enhancement of safety that would modify the current licensing and design basis for all plants, which the Commission may or may not adopt and implement. The Commission has requested that the NRC Staff outline which of the Task Force's recommendations (except for recommendation No. 1) the Staff believes should be implemented (either in whole or in part) without unnecessary delay, and to prioritize those recommendations. SRM at 1-2. And over the next 18 months, the NRC Staff will consider the Task Force's recommendation calling for revising the NRC's regulatory approach. Id. 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 (emphasis added).

At bottom, the Commission either will implement all, part, or none of the Task Force's recommendations concerning operating plants' design bases referenced by the Commonwealth and Dr. Thompson. To the extent the Commission adopts the recommendations,[13] the requirements would be established by regulation or order and incorporated into the current licensing basis for operating plants, regardless of the cost-benefit analysis performed at any plant, and would supersede the result of any plant-specific SAMA analysis.

Regardless, however, of whatever actions the Commission may take with respect to those recommendations, the Commonwealth and Dr. Thompson have failed to demonstrate that the Task Force Report and its recommendations support the proposed Contention, which is premised on the alleged inadequacy of the Pilgrim SAMA analysis. Because they proffered a NEPA SAMA contention, the Commonwealth and Dr. Thompson are required by Commission case law governing SAMA analysis to make a showing, or provide information showing, that any particular mitigation measure identified in the Task Force Report is potentially cost beneficial, which neither the Motion nor the August 2011 Thompson declaration do. The Commission has explicitly held that because there are numerous conceivable SAMAs and thus it will always be possible to come up with some mitigation alternative that has not been addressed by a licensee, accordingly,

[13] As stated by Commissioner Svinicki in her vote on SECY-11-0093, "the delivery of the Near-Term Task Force report is not the final step in the process of learning from the events at Fukushima. It is an important, but early step. Now, the conclusions drawn by the six individual members of the Near-Term Task Force must be open to challenge by our many stakeholders and tested by the scrutiny of a wider body of experts, including the [Advisory Committee on Reactor Safeguards], prior to final Commission action." Comm'r Svinicki Comments on SECY-11-0093, "Near-Term Report and Recommendations for Agency Actions Following the Events in Japan," at 2 (July 19, 2011) (ADAMS Accession No. ML112010167).

> whether a SAMA alternative is worthy of more detailed analysis in an Environmental Report or SEIS hinges upon whether it may be cost-beneficial to implement . . . [I]t would be unreasonable to trigger full adjudicatory proceedings based merely upon a suggested SAMA under circumstances in which the Petitioners have done nothing to indicate the approximate relative cost and benefit of the SAMA.

Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 N.R.C. 1, 11-12 (2002) (emphasis added). Given the absence of any such indication by the Commonwealth here, the Motion must be denied.

Moreover, nowhere do the Commonwealth or Dr. Thompson challenge how the Pilgrim SAMA analysis explicitly addresses the issues they raise. Whereas Dr. Thompson asserts that "filtered venting of containment should be considered in a re-done SAMA analysis for Pilgrim," August 2011 Thompson Decl. at ¶ III-13, nowhere does he challenge or dispute the already existing Pilgrim SAMA analysis, which, as explained by Entergy's declarants,[14] determined that a filtered direct torus vent was not potentially cost beneficial. Entergy Decl. at ¶¶ 92-99. Likewise, Dr. Thompson's claims regarding hydrogen control, August 2011 Thompson Decl. at ¶ III-9, nowhere allege any deficiency in the Pilgrim SAMA analysis' consideration of the potential for hydrogen explosions. Entergy Decl. at ¶¶ 79-88. Having failed to show any deficiency in these aspects of the Pilgrim SAMA analysis, the Commonwealth and Dr. Thompson cannot show, and in fact do not show, that the Pilgrim SAMA analysis ought to be redone to address issues that it already addresses.

[14] Declaration of Joseph R. Lynch, Lori Ann Potts, and Dr. Kevin R. O'Kula in Support of Entergy Answer Opposing Commonwealth Claims of New and Significant Information Based on Fukushima (June 27, 2011) ("Entergy Declaration" or "Entergy Decl.").

Thus, having failed to provide any information demonstrating that any particular SAMA is cost beneficial and having failed to show any deficiency in the Pilgrim SAMAs that were analyzed, the Motion must be denied.[15]

IV. THE MOTION PROVIDES NO BASIS TO DISTURB THE COMMISSION'S CATEGORY 1 DETERMINATION FOR ENVIRONMENTAL RISKS PRESENTED BY SPENT FUEL POOLS DURING THE RENEWAL TERM

As previously addressed in Entergy's Answer (at 6-14, 44-54), for license renewal, spent fuel pool ("SFP") environmental issues are codified in the Commission's regulations as Category 1 issues. 10 C.F.R. Part 51 Subpart A, App. B. Therefore, absent a waiver, they are not subject to litigation in individual licensing renewal proceedings. 10 C.F.R. § 2.335(a), (b). The Commonwealth's Contention seeks to raise SFP environmental issues and, accordingly, the Commonwealth has petitioned the Board for a waiver of the Category 1 determination in this proceeding. See generally, Waiver Petition. However, the proposed Contention and Dr. Thompson's June 2011 Report and Declaration provided no basis for waiver of the rule. See Entergy Answer at 44-54. The Motion and Dr. Thompson's August 2011 Declaration suffer from the same fatal flaws as the original Contention and the June 2011 Report and Declaration. They provide no basis for a waiver under 10 C.F.R. § 2.335, and as such their claims regarding the alleged environmental risks of SFPs impermissibly challenge Commission regulations.

In the Motion, the Commonwealth claims that the Task Force recommendations "support and are consistent with" Dr. Thompson's June 2011 Report and Declaration supporting the

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[15] In this context as a proponent for reopening the hearing record, it is the Commonwealth's burden to demonstrate that a materially different result would be likely. AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 N.R.C. 658, 673-76 (2008). Absent any indication of the approximate relative cost and benefit of any proposed SAMA, or any showing of a deficiency in Pilgrim SAMAs that were analyzed, the Board should conclude that the "new contention is much too thinly supported to conclude that taking it to hearing would 'likely' cause a different result within the meaning of [the] reopening rule." Private Fuel Storage (Independent Spent Fuel Storage Installation), CLI-05-12, 61 N.R.C. 345, 355 (2005).

proposed Contention, including those concerning SFPs. Motion at 6. More specifically, Dr. Thompson claims that the Task Force's call for enhanced SFP instrumentation and water makeup capability "implicit[ly] endorse[s]" his purported findings regarding nuclear plant operators' ability to mitigate an accident, and the effect of that capability on the conditional probability of a spent fuel pool accident. August 2011 Thompson Decl. at ¶¶ III-4, III-5. He also claims that these same recommendations "effectively acknowledge[]" that there is a substantial conditional probability of a SFP fire during a reactor accident at Pilgrim. Id. at ¶¶ III-10, III-11.

Notably, while claiming that the Task Force supports its SFP claims, the Commonwealth has not sought to supplement its Waiver Petition, and for good reason. Even a cursory review of the Task Force Report reveals that it provides no basis for waiver of the Commission's Category 1 determination for the environmental risks posed by SFPs during the renewal term.

First, the Task Force Report does not identify the existence of any special circumstances (i.e. new information raising a significant environmental impact) such that the purpose of the Commission's Category 1 determination would not be served by the application of the rule. The Task Force Report provides no new factual information regarding the events at Fukushima. Indeed, the factual summary of the Fukushima event provided in the Report comes "from the Japanese utility and official Japanese Government sources, including the "Report of the Japanese Government to the IAEA Ministerial Conference on Nuclear Safety," Task Force Report at 9, which was also included as Exhibit 4 to the Declaration of Mr. Lynch, Ms. Potts, and Dr. O'Kula supporting Entergy's Answer opposing the Contention. As set forth in Entergy's Answer, these factual sources of the Fukushima accident, as well as the IAEA report,[16] presented no new and

[16] The Great East Japan Earthquake Expert Mission, IAEA International Fact Finding Expert Mission of the Fukushima Dai-ichi NPP Accident Following the Great East Japan Earthquake and Tsunami (May 24 – June 2, 2011).

significant information regarding SFPs that was not already considered in the analyses that led to the Category 1, "SMALL" impact finding. Entergy Answer at 49-51. Among other reasons, no SFP fire occurred at any of the Fukushima SFPs, and thus the events at Fukushima corroborate the Commission's determination rejecting the Commonwealth's previous rulemaking petition that there would be "a significant amount of time" from the initiating event to the possible onset of a zirconium fire, "thereby providing a substantial opportunity for both operator and system event mitigation." Id. at 50-51 (quoting 73 Fed. Reg. at 46,208).

Moreover, nothing in the Task Force Report supports Dr. Thompson's opinion that "there is a substantial conditional probability of a spent-fuel-pool fire during a reactor accident." August 2011 Thompson Decl. at ¶ III-4. In fact, the Report contradicts Dr. Thompson's opinion because the Task Force found that "some appropriate mitigation measures have been implemented [at U.S. plants], reducing the likelihood of core damage and radiological releases" and concluded that "continued operation and continued licensing activities do not pose an imminent risk to public health and safety." Task Force Report at vii; see also id. at 18, 73.

Second, even assuming the Task Force recommendations identified the existence of special circumstances, those circumstances are clearly generic to all operating nuclear power plants and not specific to Pilgrim. Although Dr. Thompson claims that the Task Force Report raise issues specific to Pilgrim, the Task Force recommendations concerning SFPs would apply to all plants. The Task Force Report did not limit its SFP recommendations to any specific plant or group of plants. Nor did it point to any unique circumstances at the Pilgrim plant or to unique circumstances at any other plant or group of plants that necessitated the recommended changes. Rather, its SFP recommendations were part and parcel of the Task Force's overarching

recommendations for the long-term enhancement of the NRC's regulations and regulatory approach following the Fukushima event.

In short, the Task Force Report provides no support for the Commonwealth's Waiver Petition.

V. THE MOTION FAILS TO MEET THE STANDARDS FOR REOPENING THE RECORD, FOR LATE-FILED CONTENTIONS, AND FOR ADMISSION OF A CONTENTION

In addition to the reasons stated above, the Commonwealth's Motion must also be denied because, like the Commonwealth's Contention, it (1) fails to meet the stringent requirements in 10 C.F.R. § 2.326 for reopening a closed hearing record, (2) fails to meet the standards for considering a late-filed contention, and (3) fails to meet the standards for an admissible contention.

A. THE TASK FORCE REPORT DOES NOT SUPPORT REOPENING THE RECORD

The Commonwealth's arguments that its Motion satisfies the NRC's standards for reopening a closed record (Motion at 10-12) are without merit. Contrary to the Commonwealth's claims, the Motion neither addresses a significant environmental issue nor establishes that a materially different result would be or would have been likely had the newly proffered information, i.e., the Task Force Report, been considered initially.[17]

As set forth in Entergy's Answer, the Commission equates the standard for raising a significant environmental issue under Section 2.326 with the standard that governs whether

[17] For the reasons set forth in Entergy's Answer at 18-21, the Commonwealth also does not meet the criterion of 10 C.F.R. § 2.326(b) that a supporting affidavit "be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised." Furthermore, the August 2011 Thompson Declaration does not explain how the Motion meets the requirements of 10 C.F.R. § 2.326(a), and is also deficient under 10 C.F.R. § 2.326(b) for that reason. Likewise as discussed in Section V.B, infra, the Motion does not meet the timeliness criterion of 10 C.F.R. § 2.326(a)(1).

supplementation of an EIS is required. Entergy Answer at 28. The issuance of the Task Force Report does not meet the standard of new and significant information as that phrase is used in the NEPA context to require supplementation of an EIS. In the NEPA context, for new information to be considered significant, thus triggering an agency's duty to supplement an environmental impact statement, that information must materially alter some environmental finding or conclusion in that impact statement. As discussed in Entergy's Answer, 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.[18] Furthermore, the Commission has adopted this same standard.[19] As the Supreme Court made clear in Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 373 (1989), 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" (footnote omitted).

[18] 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).

[19] 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). 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 Regulatory Guide 4.2S1 – Supplement 1 to Regulatory Guide 4.2, Preparation of Supplemental Environmental Reports for Applications to Renew Nuclear Power Plant Operating Licenses (Sept. 2000) 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).

Here, nothing in the Task Force Report would materially alter the Pilgrim SAMA analysis. As stated, the Task Force explicitly concluded that "a sequence of events like the Fukushima accident is unlikely to occur in the United States" and that "some appropriate mitigation measures have been implemented, reducing the likelihood of core damage and radiological releases" even assuming the occurrence of such an accident. Task Force Report at vii; see also id. at 73 ("in light of the low likelihood of an event beyond the design basis of a U.S. nuclear power plant and the current mitigation capabilities at those facilities, the Task Force concludes that continued operation of these plants and continued licensing activities do not pose an imminent risk to the public health and safety"). Additionally, the Task Force observed that the Fukushima accident itself – which involved partial if not full core melts at three of the Dai-ichi reactor units as well as SFP radiological releases – resulted in "no fatalities and the expectation of no significant radiological health effects." Id. at iii (emphasis added); see also id. at vii (the accident was "without significant health consequences" (emphasis added)). The Task Force statements corroborate the statements of Entergy's declarants that the Pilgrim SAMA analysis considered much larger radioactive releases than those which occurred at Fukushima and that the radiological releases assumed in the single-unit Pilgrim SAMA analysis more than bound the reported releases from all of the Fukushima Dai-ichi units. Entergy Decl. at ¶¶ 89-91.

Thus, absent actual or expected significant health consequences resulting from the Fukushima accident being greater than predicted, the Commonwealth cannot credibly contend that further consideration of the Fukushima accident scenario would materially alter the results of the Pilgrim SAMA analysis. Therefore, the Task Force Report fails to provide a seriously different picture of the environmental landscape, and does not raise any significant environmental issues. For the same reasons, the Task Force Report does not demonstrate that a

materially different result would be likely. Nothing in the Task Force Report is inconsistent with the conclusions reached in Entergy's previously filed Declaration. Indeed, as noted, the Task Force statements concerning the limited impacts of the Fukushima accident corroborate the Entergy Declaration.

Dr. Thompson claims that the findings in the Task Force report call for "substantial revision of the Pilgrim-specific supplement to the NRC's generic environmental impact statement (GEIS) for license renewal of nuclear power plants, especially Appendix G of that supplement" concerning the Pilgrim SAMA analysis. August 2011 Thompson Decl. at ¶ I-8. However, as previously discussed, the Commonwealth and Dr. Thompson provide no information demonstrating that any particular SAMA is cost beneficial, or otherwise challenge the SAMAs that were analyzed (e.g., filtered DTV). Commission SAMA precedent requires much more. McGuire, CLI-02-17, 56 N.R.C. at 11-12. Moreover such "bare assertions and speculation . . . do not supply the requisite support" to satisfy the Section 2.326 standards. AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 N.R.C. 235, 287 (2009) (citing Oyster Creek, CLI-08-28, 68 N.R.C. at 674).[20]

Likewise, the Commonwealth's and Dr. Thompson's claim that the "Task Force Report recommendations support and are consistent with" Dr. Thompson's opinions in his June 2, 2011 Report (Motion at 6; see also, e.g., Thompson August 2011 Decl. at ¶¶ I-9, II-1, II-3, III-1, IV-1) are based on Dr. Thompson's bare assertion and misreading of the Task Force Report. For example, Dr. Thompson erroneously claims that the Task Force Report shows "a clear preference for direct experience" in lieu of "any resort to PRA estimates." August 2011 Thompson Decl. at ¶ III-3. To the contrary, the Task Force Report clearly endorses the use of

[20] See also note 15, supra.

PRAs (see, e.g., Task Force Report at 20-22). The Task Force Report notes that its proposed new regulatory framework for the long-term enhancement of safety could be implemented "on the basis of full-scope Level 1 core damage assessment PRAs and Level 2 containment performance assessment PRAs," id. at 21, and states that the Level 1 and Level 2 PRA "metrics of core damage frequency and large early release provide very effective, relatively simple, well-documented and understood measures of safety for decisionmaking," id. at 22 (emphasis added). Thus, the Task Force Report contradicts and provides no support for Dr. Thompson's claim in Issue 1 of his June 2011 Report that the Pilgrim PRA-calculated core damage frequency should be disregarded in favor of direct experience.[21]

Similarly, Dr. Thompson's other claims of Task Force support are wrong, based on mere speculation, or meaningless in the context of the failure of the Commonwealth or Dr. Thompson to provide any information demonstrating that any particular SAMA is cost beneficial, or to otherwise challenge the SAMAs that were analyzed. For example, Dr. Thompson claims that Task Force Report "clearly support[s]" his findings concerning hydrogen control. August 2011 Thompson Decl. at ¶ III-9. But, as discussed in Entergy's Declaration, the Pilgrim SAMA analysis fully accounts for potential hydrogen explosions. Entergy Decl. at ¶¶ 79-88. Dr. Thompson makes no claim that Task Force Report findings somehow demonstrate that the Pilgrim SAMA analysis failed to appropriately account for potential hydrogen explosions. Similarly, Dr. Thompson claims that, even though the Task Force Report does not discuss filtered venting, it "implies that filtered venting of containment should be considered in a re-done SAMA analysis for Pilgrim." August 2011 Thompson Decl. at ¶ III-13. Again, however, other

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[21] More broadly, Dr. Thompson's claims in paragraph III-3 of his declaration that the Task Force Report eschewed PRA estimates for purposes of SAMA analysis in favor of direct experience are invalid because, as discussed in Section III, supra, the Task Force did not look at Fukushima through the lens of a NEPA SAMA analysis, but was discussing a new enhanced regulatory safety framework for the future.

than his bare, unsupported assertion, Dr. Thompson provides no information on how or why the Pilgrim SAMA analysis of filtered venting (see Entergy Decl. at ¶¶ 92-99) is inadequate in view of the Task Force Report. Commission precedent requires much more. McGuire, CLI-02-17, 56 N.R.C. at 11-12, particularly in the context of reopening a closed record (see note 15, supra).

In summary, the Task Force Report provides no basis to reopen the closed hearing record in this proceeding. The Commonwealth and Dr. Thompson have failed to show that any information from the Task Force Report upon which they rely would materially alter some environmental finding or conclusion in the NRC's Pilgrim-specific supplement to the GEIS for the Pilgrim license renewal.

B. FAILURE TO MEET THE REQUIREMENTS FOR NON-TIMELY FILINGS

As set forth in Entergy's Answer, the Commonwealth's proposed Contention does not satisfy the Commission's standards for non-timely filings set forth in 10 C.F.R. §§ 2.309(f)(2), 2.309(c)(1), and 10 C.F.R. § 2.326(a)(1). Entergy Answer at 21-27, 54-57. As set forth there, all of the proposed Contention's claims could have been raised long before the Fukushima Dai-ichi accident and the Commonwealth has failed to show good cause or to satisfy the other factors for a late-filed contention. Nothing in the Task Force Report alters the fact that the Commonwealth's proposed Contention is untimely and fails to meet the requirements for non-timely filings.

As discussed above, the Task Force Report provides no new factual information concerning the Fukushima accident that was previously unavailable, nor does the Task Force Report provide any other previously unavailable factual information relevant to the Commonwealth's SAMA claims. See pages 14, 18, supra. Indeed, neither the Motion nor the August 2011 Thompson Declaration makes any claims of new facts in the Task Force Report

relevant to their SAMA claims. Rather, they solely reference and rely upon the Task Force Report recommendations for regulatory improvements for the long-term enhancement of safety, which are irrelevant and immaterial to the cost-benefit analysis upon which Commonwealth's SAMA claims are premised, as already discussed. The fact that the Task Force members have made recommendations for regulatory improvements based on Fukushima does not make any of the facts or implications of the Fukushima Dai-ichi accident new. The factual predicate available to the Commonwealth for its proposed Contention remains unchanged by the Task Force Report, and the Commonwealth and Dr. Thompson could have reached the same conclusions as the Report. As made clear by Commission precedent, the Commonwealth may not "delay filing a contention [or a contention amendment] until a document becomes available that collects, summarizes and places into context the facts supporting that contention" or contention amendment. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 N.R.C. __, slip op. at 17 (Sept. 30, 2010).[22] Otherwise the late-filing requirements of the Commission's regulations would be eviscerated.

Thus, the Commonwealth's proposed Contention remains untimely even taking into account the Task Force Report.

C. THE MOTION DOES NOT MEET THE STANDARDS FOR ADMISSIBLE CONTENTIONS

Aside from the Commonwealth's failure to satisfy the standard for reopening a closed record and to meet the Commission's late-filing requirements, the Commonwealth's claims

[22] See also Entergy Nuclear Vt. Yankee, LLC (Vermont Yankee Nuclear Power Station), CLI-11-02, __ N.R.C. ___, slip op. at 9 (Mar. 10, 2011) (holding that an NRC inspection report "does not inform the issue of timeliness" where the factual information discussed in the inspection report was previously available, and accordingly denying admission of a contention based on the inspection report as untimely.

based upon the Task Force Report also fail to meet the standards for the admission of a contention for a host of reasons.

1. The Motion Raises Issues Outside the Scope of This Proceeding and Impermissibly Seeks to Challenge NRC Rules

For the reasons discussed above, the Motion's new bases for the Commonwealth's proposed Contention are inadmissible because they seek to raise issues that fall outside the scope of this adjudicatory proceeding, contrary to the requirement of 10 C.F.R. § 2.309(f)(1)(iii). It is well established that a petitioner is not entitled to an adjudicatory hearing to attack generic NRC requirements or regulations. 10 C.F.R. § 2.335(a) provides that "no rule or regulation of the Commission, or any provision thereof, concerning the licensing of production and utilization facilities, source material, special nuclear material, or byproduct material, is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding subject to this part." Further, the Commission has long held that "a licensing proceeding . . . is plainly not the proper forum for . . . challenges to the basic structure of the Commission's regulatory process." Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 A.E.C. 13, 20, aff'd in part on other grounds, CLI-74-32, 8 A.E.C. 217 (1974) (footnote omitted); see also Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 N.R.C. 328, 334 (1999). Thus, a contention which collaterally attacks a Commission rule or regulation is not appropriate for litigation and must be rejected. Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 A.E.C. 79, 89 (1974). Likewise, a proposed contention that seeks to litigate a generic determination established by

Commission rulemaking is "barred as a matter of law." Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 N.R.C. 5, 29-30 (1993).[23]

The Motion impermissibly challenges Commission regulations in several key respects, already discussed above, as follows:

- The Motion impermissibly seeks to raise and litigate in this proceeding the Task Force recommendations for the long-term enhancement of the Commission's regulatory process that would – if adopted and implemented by the Commission – modify the current licensing basis of operating plants, such as Pilgrim. However, issues concerning the adequacy of the CLB are beyond the limited scope of license renewal, and a contention seeking to raise such issues is an impermissible challenge to the license renewal regulations in 10 C.F.R. Part 54. See Pilgrim, CLI-10-14, slip op at 5.
- The Commonwealth's assertion that the Task Force recommendations must be evaluated as SAMAs without consideration of cost (Motion at 5) is also an impermissible challenge to the NRC rules. The Commission's regulations implementing NEPA expressly provide that (with certain exceptions not applicable here) an applicant's environmental report and the NRC Staff's EIS should include consideration of the economic, technical and other benefits and costs of the proposed action and alternatives. 10 C.F.R. §§ 51.45(c), 51.71(d). Any suggestion to the contrary is an impermissible challenge to the NRC rules, barred by 10 C.F.R. § 2.335(a).
- As the Commonwealth has previously recognized in its Waiver Petition, the Motion's and Dr. Thompson's claim that the Pilgrim-specific supplement to the GEIS should consider Task Force recommendations to modify the spent fuel pool to enhance spent fuel pool makeup capability and instrumentation (Motion at 6-7;

[23] Likewise, a contention which "advocate[s] stricter requirements than those imposed by the regulations" is "an impermissible collateral attack on the Commission's rules" and must be rejected. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 N.R.C. 1649, 1656 (1982); see also Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-19, 33 N.R.C. 397, 410, aff'd in part and rev'd in part on other grounds, CLI-91-12, 34 N.R.C. 149 (1991).

August 2011 Thompson Decl. at ¶¶ I-8, IV-2) is an impermissible challenge to a Category 1 issue embodied in Commission regulation, 10 C.F.R. Part 51, Subpart A, Appendix B.

Thus, the Motion impermissibly challenges Commission regulations.[24]

2. The Motion Fails to Demonstrate a Genuine Dispute on a Material Issue of Fact or Law

The Motion's new bases for the Commonwealth's proposed Contention are also inadmissible because they fail to demonstrate a genuine dispute as required by 10 C.F.R. § 2.309(f)(1)(vi). As already discussed, the Motion fails to demonstrate a genuine dispute on a material issue of fact or law in the following key respects:

- The issuance of the Task Force Report, relied upon by the Commonwealth as providing the new bases for its proposed Contention, does not meet the standard of new and significant information necessary to trigger the supplementation of an EIS as that phrase is used in the NEPA context. See pages 20-23, supra.
- Although the Motion asserts that the Task Force recommendations must be evaluated as SAMAs without consideration of cost (Motion at 5), the Task Force Report provides no conclusions on the value of any particular SAMAs. Rather, the Task Force recommendations concern long term enhancements to the Commission's safety regulations unrelated to any SAMA mitigation analysis. Nothing in NEPA requires the NRC to consider mitigation alternatives without regard to cost, and the Commission has made clear that the goal of SAMA analysis "is only to determine what safety enhancements are cost-effective to implement." Pilgrim, CLI-10-11 at 39.

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[24] Additionally, the Task Force Report 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. See Task Force Report at 73-75. It is well established that issues that are being considered, or are likely to be considered, for rulemaking should not be admitted as contentions. Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 & 3), CLI-10-19, 72 N.R.C. __, slip op. at 2-3 (July 8, 2010); Oconee, CLI-99-11, 49 N.R.C. at 345 (citing Douglas Point, ALAB-218, 8 A.E.C. at 85).

- Most significant, neither the Motion nor the August 2011 Thompson Declaration provide any information indicating that the quantitative assessment of any Pilgrim SAMA (i.e. the estimated risk that could be averted or cost) is incorrect or demonstrating that any particular SAMA is cost beneficial, as required by Commission case law. The NRC has held that, because there are numerous conceivable SAMAs and thus it will always be possible to come up with some mitigation alternative that has not been addressed by a licensee, it would be unreasonable to undertake full adjudicatory proceedings based merely upon a suggested SAMA where the petitioners have done nothing to indicate the approximate relative cost and benefit of the SAMA. McGuire, supra, CLI-02-17, 56 N.R.C. at 11-12.

In summary, the Motion fails to demonstrate a genuine dispute of material fact or law as required by Commission regulation and legal precedent.

CONCLUSION

For all of the foregoing reasons, the Commonwealth's Motion to Supplement the Bases of its proposed Contention should be denied.

Respectfully submitted,

/Signed Electronically by Paul A. Gaukler/

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Dated: September 6, 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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 Commonwealth Motion to Supplement Bases to Commonwealth Contention to Address NRC Task Force Report on Lessons Learned from Fukushima" dated September 6, 2011, were provided to the Electronic Information Exchange for service on the individuals below, this 6th day of September, 2011.

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