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 PILGRIM WATCH'S PETITION FOR REVIEW

David R. Lewis
Paul A. Gaukler
PILLSBURY WINTHROP SHAW PITTMAN LLP
2300 N Street, NW
Washington, D.C. 20037
Tel. (202) 663-8000

Counsel for Entergy L.L.C.

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ENTERGY'S ANSWER OPPOSING PILGRIM WATCH'S PETITION FOR REVIEW

Pursuant to 10 C.F.R. § 2.341, Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (collectively "Entergy") respond in opposition to the September 23, 2011 Pilgrim Watch Petition for Review in the Pilgrim Nuclear Power Station ("PNPS" or "Pilgrim") license renewal proceeding.[1] The Petition seeks review of the Atomic Safety and Licensing Board ("Board") decision in LBP-11-23[2] denying Pilgrim Watch's requests for hearing on two new contentions related to the Fukushima Daiichi accident. As discussed below, the Commission should deny the Petition because Pilgrim Watch does not identify any substantial question warranting review, or any error of fact or law in the Board's rulings, which are clearly correct.

Once again, Pilgrim Watch's repeated refusal to address or comply with Commission rules for reopening a closed record renders its Petition meritless. Pilgrim Watch relied on and continues to press meritless arguments that the evidentiary record remains open on all issues until the proceeding closes, and the reopening standards do not apply to requests to litigate new contentions, notwithstanding clear language in the NRC rules and case law to the contrary. Fur-

[1] Pilgrim Watch's Petition for Review of Memorandum and Order (Denying Pilgrim Watch's Requests for Hearing on New Contentions Relating to Fukushima Accident) Sept. 8, 2011 (Sept. 23, 2011) ("Petition").

[2] Memorandum and Order (Denying Pilgrim Watch's Requests for Hearing on New Contentions Relating to Fukushima Accident), LBP-11-23, 74 N.R.C. __, slip op. (Sept. 8, 2011) ("LBP-11-23"). Administrative Judge Ann Marshall Young issued a separate statement ("Sep. Statement") concurring in part and dissenting in part.

ther, Pilgrim Watch's claims that its contentions raised new and significant information do not withstand scrutiny. Pilgrim Watch has made no showing that the Fukushima accident paints a seriously different picture of the environmental landscape. To the contrary, Pilgrim's severe accident mitigation alternatives ("SAMA") analysis considers a wide range of severe accidents with consequences far more serious than those experienced at Fukushima. Pilgrim Watch's repeated claims that Entergy "drastically underestimated offsite consequences," or "ignored" the "larger off-site consequences" at Fukushima, and the like,[3] are entirely unsupported and ignore the broad scope of the severe accident scenarios considered in the Pilgrim License Renewal Application ("LRA") that more than bound the releases reported at Fukushima.[4] Indeed, the Commission has since ruled that Fukushima has not revealed "significant" environmental information, i.e., information presenting a seriously different picture of the environmental landscape.[5]

The Commission's decision in CLI-11-05 confirms the Board majority's ruling that neither contention presented significant (let alone grave) information warranting reopening of the record. Pilgrim Watch also failed to meet the other requirements for reopening a closed record. All of Pilgrim Watch's challenges could have been raised at the proceeding's outset, and therefore, the contentions were not timely. Furthermore, Pilgrim Watch's claims consist of a series of "bare assertions and speculations," of the type quoted above, that the Commission has repeatedly rejected as "insufficient to support the heavy burden placed on the proponent of a motion to reopen to demonstrate" that a materially different result would be or would have been likely.[6]

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[3] E.g., Petition at 10, 17.

[4] As discussed later in this Answer, the expert witness declarations that Entergy submitted in response to each of Pilgrim Watch's hearing requests further explain and elaborate on the Pilgrim SAMA analysis set forth in the LRA.

[5] Ameren Missouri, *et al.* (Callaway Plant, Unit 2, *et al.*), CLI-11-05, 74 N.R.C. __, slip op. at 30-31 (Sept. 9, 2011) "(CLI-11-05").

[6] See, e.g., Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-08, 74 N.R.C. __, slip op. at 15 n.48 (Sept. 27, 2011) ("CLI-11-08"), citing AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 N.R.C. 658 (2008) (CLI-08-28").

Finally, Pilgrim Watch's claim that the reopening standards do not apply to NEPA issues (Petition at 22) and its implication that the mere allegation of new and significant information trumps the Commission's procedural requirements and triggers further analysis under NEPA runs afoul of the Supreme Court's decision in Vermont Yankee[7] and numerous other precedents. It is long settled that NEPA imposes no hearing requirement nor establishes any other procedural requirements that would proscribe application of the Commission's procedures for considering Pilgrim Watch's allegedly new and significant information. Pilgrim Watch is not entitled to an adjudicatory hearing on its purported new and significant information where it fails to meet the Commission's procedural requirements for a hearing. For these reasons, as well as the other grounds set forth in this Answer, the Commission should deny Pilgrim Watch's Petition.

I. STATEMENT OF THE CASE

This proceeding involves the LRA submitted by Entergy nearly six years ago seeking renewal of the operating license for Pilgrim.[8] Pilgrim Watch intervened and was granted a hearing on two contentions, one relating to buried piping and the other challenging certain input data used in analysis of SAMAs.[9] Following summary disposition of the SAMA contention, the Board held an evidentiary hearing on the buried piping contention followed by a decision resolving it in Entergy's favor.[10]

In CLI-10-11, the Commission partially reversed the summary disposition of the SAMA contention and remanded the Contention "as limited by [its] ruling, to the Board for hearing."[11]

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[7] Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978).

[8] See 71 Fed. Reg. 15,222 (Mar. 27, 2006).

[9] Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), LBP-06-23, 64 N.R.C. 257, 288, 295-300, 349 (2006).

[10] Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), LBP-08-22, 68 N.R.C. 590, 610 (2008).

[11] Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-11, 71 N.R.C. 287, 290 (2010) ("CLI-10-11").

Following the remand, Pilgrim Watch sought unsuccessfully to expand the scope of the remand to include issues never raised as part of its contention and issues that had already been resolved. See, e.g., CLI-10-15[12] (denying Pilgrim Watch motion for reconsideration); CLI-10-28[13] (denying Pilgrim Watch motion for clarification). Unsuccessful in its efforts to expand the remanded contention, Pilgrim Watch then commenced a campaign of requests for hearings on new contentions, in each case refusing to address the standards for reopening the record.[14] Pilgrim Watch's current Petition involves the denial of the last two of those requests.

In particular, on May 12, 2011, Pilgrim Watch filed its Request for Hearing on Post Fukushima SAMA Contention,[15] which claimed that the Pilgrim SAMA analysis is inadequate because it does not account for purported new and significant "lessons learned" from Fukushima related to the possibility of ongoing recriticalities. Recriticality Contention at 3. Pilgrim Watch therefore claimed that Entergy should perform a "fresh analysis," id. at 13, but nowhere showed that consideration of its assertions would make any difference in the SAMA analysis. Both Entergy and the NRC Staff opposed this request,[16] pointing out that the contention neither addressed nor met the reopening standards, was untimely, and did not meet the admissibility standards. Although Pilgrim Watch had made no attempt to address the reopening standards, both

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[12] Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-15, 71 N.R.C. __, slip op. (June 17, 2010) ("CLI-10-15").

[13] Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-28, 71 N.R.C. __, slip op. (Nov. 5, 2010) ("CLI-10-28").

[14] As discussed in Entergy's Motion for Issuance of Renewed License (Aug. 23, 2011), currently before the Commission, Pilgrim Watch has filed five requests for hearing on new contentions, as well as six post-hearing memoranda attempting to expand the record on the remanded contention or supplement its requests for hearing on new contentions.

[15] Pilgrim Watch Request for Hearing on Post Fukushima SAMA Contention (May 12, 2011) ("Recriticality Contention"). Appended to the Fukushima Recriticality Contention (at pp. 20-21) is a Statement of David Chanin ("Chanin Statement").

[16] Entergy's Answer Opposing Pilgrim Watch Request for Hearing on Post-Fukushima SAMA Contention (June 6, 2011) ("Entergy Recriticality Answer"); NRC Staff's Answer in Opposition to Pilgrim Watch's Request for Hearing on Post[-]Fukushima SAMA Contention (June 6, 2011) ("NRC Staff Recriticality Answer").

Entergy[17] and the NRC Staff[18] also submitted expert declarations showing <u>inter alia</u> that the Re-criticality Contention failed to demonstrate that a materially different result would be likely under 10 C.F.R. § 2.326(a)(3). In reply, Pilgrim Watch argued that the reopening standards in 10 C.F.R. § 2.326 are inapplicable to a new contention and that the record remains open on all issues until the proceeding itself closes.[19]

On June 1, 2011, Pilgrim Watch filed its second Fukushima-related hearing request.[20] Therein, Pilgrim Watch alleged that the direct torus vents ("DTVs") at Fukushima units 1-3 failed to operate, resulting in large offsite consequences. DTV Contention at 1-2; <u>see also</u> <u>id.</u> at 6, 29. As a result, Pilgrim Watch contended that Entergy must "conduct a new analysis – based on what Fukushima has taught about reality," <u>id.</u> at 2, but again failed to make any showing that such an analysis would change any result in the SAMA analysis. Both Entergy and the NRC Staff opposed this request, again pointing out that the reopening standards were neither addressed nor met, that the contention was untimely, and that the admissibility standards were not met.[21] Again, Entergy submitted an expert declaration demonstrating <u>inter alia</u> that the DTV Contention fails to demonstrate that a materially different result would be likely under 10 C.F.R.

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[17] Declaration of Thomas L. Sowdon and Dr. Kevin R. O'Kula In Support of Entergy's Answer Opposing Pilgrim Watch Request for Hearing on Post-Fukushima SAMA Contention (June 6, 2011) ("Entergy Recriticality Decl.").

[18] 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 (June 6, 2011) ("NRC Staff Recriticality Aff.").

[19] Pilgrim Watch Reply to Entergy's and NRC Staff's Answers to Pilgrim Watch Request for Hearing on Post Fukushima SAMA Contention (June 13, 2011) at 2-8 ("PW Recriticality Reply").

[20] Pilgrim Watch Request for Hearing on a New Contention Regarding Inadequacy of Environmental Report, Post Fukushima (June 1, 2011) ("DTV Contention"). Appended to the PW Request (at pp. 33-34) is a statement from Arnold Gunderson, which is titled the "Affidavit of Arnold Gundersen" ("Gundersen Aff."), even though the document does not appear to be a sworn document as it does not state that it was made under penalty of perjury.

[21] Entergy's Answer Opposing Pilgrim Watch Request for Hearing on a New Contention Regarding Inadequacy of Environmental Report, Post-Fukushima (June 27, 2011) ("Entergy DTV Answer"); NRC Staff's Answer in Opposition to Pilgrim Watch's Request for Hearing in a New Contention Regarding Inadequacy of Environmental Report, Post Fukushima (June 27, 2011) ("NRC Staff DTV Answer").

§ 2.326(a)(3).[22] In reply, Pilgrim Watch once again argued that its contention was "not seeking to reopen any record" and "is not an attempt to show that 'a materially different result . . . would be or would have been likely had the newly proffered evidence been considered initially.'"[23]

In LBP-11-23, the full Board rejected the Recriticality Contention. LBP-11-23 at 9-25; Sep. Statement at 1, 30-31. The Board held that the reopening standards applied, that Pilgrim Watch had not provided an affidavit addressing those standards as NRC rules require, and had not shown that it met those standards. LBP-11-23 at 7, 39-40; Sep. Statement at 30-31. In addition, a majority of the Board rejected the Recriticality Contention for also failing to satisfy the standards for non-timely contentions and admissible contentions. LBP-11-23 at 21-25, 39-40.

A majority of the Board also rejected the DTV Contention. The Board majority found that Pilgrim Watch had met none of the reopening criteria contained in 10 C.F.R. § 2.326(a). LBP-11-23 at 32-33. Indeed, the Board majority ruled that, given Pilgrim Watch's failure to supply an affidavit satisfying the requirements Section 2.326(b), there was "no basis whatsoever for [it] to find that the requirements of Section 2.326(a) are addressed, let alone satisfied" by any of the purported support for the DTV Contention put forth by Pilgrim Watch and its witness. Id. at 34. The Board majority also found the contention untimely under Section 2.309(c), and that it failed to meet the admissibility standards under Section 2.309(f)(1). Id. at 34-38.

II. STANDARD OF REVIEW

A petition for review is granted only at the discretion of the Commission, "giving due weight to the existence of a substantial question with respect to the following relevant considera-

[22] Declaration of Joseph R. Lynch, Lori Ann Potts and Dr. Kevin R. O'Kula in Support of Entergy's Answer Opposing Pilgrim Watch Request For Hearing on A New Contention Regarding Inadequacy of Environmental Report, Post-Fukushima (June 27, 2011) ("Entergy DTV Decl.").

[23] Pilgrim Watch Reply to Entergy's and NRC Staff's Answers to Pilgrim Watch Request for Hearing on a New Contention Regarding Inadequacy of Environmental Report, Post Fukushima (July 5, 2011) ("PW DTV Reply") at 1,4.

tions": (i) a finding of material fact that is "clearly erroneous" or conflicts with a finding as to the same fact in a different proceeding; (ii) a necessary legal conclusion that is "without governing precedent" or "contrary to established law;" (iii) the raising of a "substantial and important question of law, policy, or discretion;" (iv) "the conduct of the proceeding involved a prejudicial procedural error;" or (v) the raising of "any other considerations which the Commission may deem to be in the public interest."[24] An appeal that does not point to an error of law or an abuse of discretion by the Board, but simply restates the contention with additional support, will not meet the requirements for a valid appeal.[25]

When considering a petition for review, the Commission is free to affirm a board decision on any ground finding support in the record, whether previously relied on or not.[26] Further, the Commission gives substantial deference to its boards' determinations on threshold issues, such as whether a contention is admissible or a pleading meets the requirements of Section 2.326, and "will not sustain an appeal [on such issues] that fail to show a board committed clear error or abuse of discretion." Vogtle, CLI-11-08 at 5; AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 N.R.C. 235, 260 (2006) ("CLI-09-7").

III. THE COMMISSION SHOULD DENY PILGRIM WATCH'S PETITION

Pursuant to 10 C.F.R. § 2.341, the Commission should deny the Petition because, as set forth below, Pilgrim Watch has failed to identify any clear error of fact, error of law, procedural error, or abuse of discretion by the Board. Among other deficiencies, Pilgrim Watch's hearing requests failed to address, let alone meet, the Commission's standards for reopening the record,

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[24] 10 C.F.R. § 2.341(b)(4); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation) ("PFS"), CLI-03-8, 58 N.R.C. 11, 17 (2003).

[25] Shieldalloy Metallurgical Corp. (Amendment Request for Decommissioning of the Newfield, New Jersey Facility), CLI-07-20, 65 N.R.C. 499, 503-05 (2007).

[26] PFS, CLI-05-1, 61 N.R.C. 160, 166 (2005) (citing federal precedent).

which clearly apply here. This failure alone warrants rejection of the Petition. Pilgrim Watch can hardly contend that the Board committed any procedural or other legal error in rejecting the hearing requests when Pilgrim Watch totally disregarded this procedural requirement.

A. The Commission's Standards for Reopening a Closed Record Clearly Apply and are Consistent with NEPA

Pilgrim Watch repeats its meritless argument that new contentions are not required to satisfy the standards for reopening the record. Petition at 7-9. As fully explained in Entergy's Answer Opposing Pilgrim Watch's Petition for Review of LBP-11-20 (which is also pending before the Commission), controlling precedent and the Commission's regulations make clear that Pilgrim Watch's position is flat wrong.[27] For example, 10 C.F.R. § 2.326 explicitly applies "to a contention not previously in controversy among the parties." 10 C.F.R. § 2.326(d). Indeed, the Third Circuit has recently upheld application of the reopening standards to a contention that raises a new issue, holding that to rule otherwise would render Section 2.326(d) meaningless.[28] Consistent with the explicit terms of the regulation and Commission and federal court precedent, the full Board correctly held that the reopening standards apply to Pilgrim Watch's contentions. LPB-11-23 at 5-8; Sep. Statement at 1. The Board thus acted consistently with governing law and precedent in applying the reopening standards. Pilgrim Watch identifies no clear error here in the Board's ruling on this threshold issue.

Pilgrim Watch nevertheless asserts that the "[r]eopening rules do not apply to NEPA," claiming that NRC rules cannot prevent consideration of new contentions on material, NEPA-related issues. Petition at 22 (citing Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1443-44 (D.C. Cir. 1984) ("UCS I"). See also id. at 6-7, 12 (claiming that NEPA "trumps"

[27] Entergy's Answer Opposing Pilgrim Watch's Petition for Review (Sept. 6, 2011) at 8-10 ("Entergy's Sept. 6 Answer").

[28] New Jersey Envtl. Fed'n v. NRC, 645 F.3d 220, 233 (3d Cir. 2011).

Commission procedural requirements). This argument has been squarely rejected on multiple occasions by the Commission and federal courts.

It is well established that NEPA imposes no procedural requirements beyond those established in the Act, and that agency procedural requirements are not brushed aside upon a mere allegation that new and significant information ought to be considered under NEPA. The Supreme Court long ago ruled that "the only procedural requirements imposed by NEPA are those stated in the plain language of the Act."[29] Adhering to this precedent, the federal courts have explained that NEPA does not alter the procedures employed (or not employed) by an agency for considering environmental issues.[30] In particular:

> [I]t [is] unreasonable to suggest that the NRC must disregard its procedural timetable every time a party realizes based on NRC environmental studies that maybe there was something after all to challenge it either originally opted not to make or which simply did not occur to it at the outset.

UCS II, 920 F.2d at 55 (footnote omitted). Thus, NEPA does not require that the NRC abandon its procedures every time someone alleges new and significant environmental information.

Contrary to Pilgrim Watch's assertion, UCS I did not proscribe application of the Commission's reopening standards or any other procedural requirements to purported new and significant information. The D.C. Circuit has made it clear that UCS I only "stands for the proposition that Section 189(a) prohibits the NRC from preventing all parties from ever raising in a hearing on a licensing decision a specific issue it agrees is material to that decision."[31] Likewise, in UCS II, the Court held that UCS I does not prohibit the NRC from employing a balancing test to preclude consideration of alleged new "information."[32] Consistent with this precedent, the

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[29] Vermont Yankee, 435 U.S. at 548 (citation omitted).

[30] Union of Concerned Scientists v. NRC, 920 F.2d 50, 56 (D.C. Cir. 1990) ("UCS II") (citing Vermont Yankee, 435 U.S. at 548).

[31] NIRS v. NRC, 969 F.2d 1169, 1174 (D.C. Cir. 1992) (emphasis in original).

[32] UCS II, 920 F.2d at 55 (emphasis in original).

Commission has explicitly rejected the claim that its reopening standards violate UCS I, specifically pointing to that decision's statement that "'[S]ection 189(a)'s hearing requirement does not unduly limit the Commission's wide discretion to structure its licensing hearings in the interests of speed and efficiency.'"[33]

Pilgrim Watch also erroneously claims that the Pilgrim-related environmental analyses must be redone or otherwise supplemented in order for the Commission to fulfill its obligation to take a "hard look" at the purportedly new information Pilgrim Watch has raised. Petition at 3-6. To the contrary, Supreme Court precedent makes clear that NEPA does not require that an agency "supplement an EIS every time new information comes to light after the EIS is finalized" because to require otherwise "would render agency decisionmaking intractable."[34] Rather, supplementation of an EIS on the basis of new information is required only where the new information "paint[s] a 'seriously different picture of the environmental landscape.'"[35]

Following the Supreme Court's mandate in Vermont Yankee, the courts have allowed agencies to employ different approaches for determining whether alleged new impacts are sufficiently significant to warrant supplemental analysis and formal supplementation of existing NEPA documents.[36] Consideration of a request for hearing is another such approach.[37] Here,

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[33] Oyster Creek, CLI-08-28, 68 N.R.C. at 677 (quoting UCS I), aff'd, New Jersey, 645 F.3d at 232 (rejecting claim that USC I precluded application of the reopening standards where the Commission did not categorically bar the petitioner from raising a contention and applied the reopening standard because the administrative record was closed at the time the contention was raised).

[34] Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 373 (1989) (footnote omitted).

[35] Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-06-03, 63 N.R.C. 19, 28 (2006) (quoting National Comm. for the New River v. FERC, 373 F.3d 1323, 1330 (D.C. Cir. 2004), quoting City of Olmsted Falls v. FAA, 292 F.3d 261, 274 (D.C. Cir. 2002) (emphasis in original)).

[36] See, e.g., N. Id. Cmty. Action Network v. DOT, 545 F.3d 1147, 1154 (9th Cir. 2008) (internal agency reevaluation of projected impacts from new information); Highway J Citizens Group v. Mineta, 349 F.3d 938, 959-60 (7th Cir. 2003), cert. denied, 541 U.S. 974 (2004) (agency-requested expert analysis); Hodges v. Abraham, 300 F.3d 432, 446, 448 (4th Cir. 2002) (agency record of decision based on review of previous NEPA documents), cert. denied, 537 U.S. 1105 (2003); Marsh, 490 U.S. at 383-85 (agency supplemental information report based on agency-requested expert analysis).

the Board has evaluated Pilgrim Watch's claims of new and significant information under the standards of 10 C.F.R. § 2.326 and has given the required hard look under NEPA to Pilgrim Watch's claims of new and significant information. In this regard, the record shows that the radioactive releases assumed in the Pilgrim SAMA analysis more than bounded the cumulative radioactive releases from all three damaged Fukushima reactors combined, Entergy Recriticality Decl. at ¶¶ 34-43, thus demonstrating that Fukushima does not paint any different picture (let along a seriously different picture) of the environmental landscape.

Supporting the hard look provided by the Board, the Commission has generally reviewed the environmental impacts from Fukushima and concluded that they do not present any new and significant information warranting any NEPA action at this time. CLI-11-05 at 30-31. In that ruling, the Commission reiterated its longstanding precedent that supplemental environmental review is required only when new information "present[s] a seriously different picture of the environmental impact of the proposed project from what was previously envisioned," which "is not the case here, given the state of information available." Id. at 31 (emphasis added) (citation omitted).[38] Consistent with the Commission's evaluation of the Fukushima accident and the record before it, the Board majority correctly ruled that both contentions contained unsupported speculation that failed to paint any picture of the environmental landscape, let alone a seriously different one. LBP-11-23 at 15, 33 n.152. In this respect, the Board majority noted its agreement with the facts set out by Entergy in its supporting declarations, referred to above, that:

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[37] See PFS, CLI-06-03, 63 N.R.C. at 27 (ruling that, even assuming all factual uncertainties in petitioner's favor, "the consequences are not so significant that NEPA would require reopening the record and amending the FEIS").

[38] The Commission's ruling is further supported by the Near Term Task Force Report. The NRC Fukushima Task Force Report states that the Fukushima accident – which involved partial if not full core melts at three reactor units – resulted in "no fatalities and the expectation of no significant radiological health effects." NRC Fukushima Task Force Report at iii; see also id. at vii (the accident was "without significant health consequences"). The Task Force also concluded, based on the U.S. current regulatory approach, and "more importantly, the resultant plant capabilities . . . 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." Id.

> The severe accident releases used for the Pilgrim SAMA analysis represent a range of releases from small to very large based on the different possible severe accident scenarios for the Pilgrim plant, and include releases that are many times greater than the releases that occurred at the Fukushima reactors. The severe accident releases assumed for the Pilgrim SAMA analysis more than bound the reported releases from Fukushima.

LBP-11-23 at 36 n.158 (emphasis added). Pilgrim Watch never identified any evidence disputing this fact. See, e.g., PW DTV Reply at 27-28 (conclusorily asserting only that increased Fukushima release estimates are significant). In sum, the Board made no clear error in applying the reopening standards to Pilgrim Watch's contentions, and has determined that they do not allege sufficiently significant new impacts to warrant supplemental analysis. NEPA requires no more.

B. Pilgrim Watch Provides No Legitimate Basis to Disturb the Rulings Rejecting Its Contentions

None of Pilgrim Watch's remaining arguments on appeal demonstrate any clear error of law or any other defect in the Board majority's rulings.

1. Both Contentions Were Fatally Flawed for Failing to Provide an Affidavit Compliant with Section 2.326(b)

The Board majority correctly ruled that Pilgrim Watch failed "to satisfy the requirements of Section 2.326(b) to provide an affidavit specifically addressing each reopening criteria" in Sections 2.326(a)(1)-(3). Section 2.326(b) expressly requires that the affidavit must "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," and "[e]ach of the criteria must be separately addressed, with a specific explanation of why it has been met." 10 C.F.R. § 2.326(b). The Board majority found that Pilgrim Watch "ha[d] intentionally failed to" meet these requirements. LBP-11-23 at 39 (emphasis added). Pilgrim Watch submitted only the un-notarized Chanin Statement in support of the Recriticality Contention, which set forth his professional experience and stated merely that he had "'read and reviewed the enclosed contention and fully support[s] all its statements.'"

LBP-11-23 at 17 (citing Chanin Statement at ¶ 7).[39] For the DTV Contention, the majority found that Mr. Gundersen stated only that he "supported" the hearing request and otherwise

> provide[d] no technical information, provide[d] nothing explicit regarding operator actions or operation of, and provides no information as to operability or non-operability of the DTVs either at Pilgrim or at the Fukushima plants[, n]or . . . any specific information respecting offsite consequences of severe accidents of any sort nor link anything which occurred at Fukushima to the Pilgrim Plant.

Id. at 27. Although the Board majority did not reject either contention solely on this ground, the Commission has squarely held that failure to supply affidavits "fully" compliant with Section 2.326(b) is sufficient grounds to reject a contention. Vogtle, CLI-11-08 at 9 (emphasis added).[40]

On appeal, Pilgrim Watch conflates the explicit affidavit requirement in Section 2.326(b) imposed on a proponent for reopening a closed record with the summary disposition rule, which permits a summary disposition opponent to file an answer with or without an affidavit. Petition at 23. Pilgrim Watch's argument is clearly incorrect because its position would read the Section 2.326(b) affidavit requirement entirely out of existence. Although the Commission has held that the summary disposition standard is a tool that may be used to evaluate the strength of a reopening proponent's papers,[41] the Commission has explicitly ruled that the standards for summary disposition do not supplant the reopening standards in Section 2.326.[42] Thus, Pilgrim Watch offers no legitimate basis to disturb the majority's rulings.

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[39] The majority also found that the Chanin Statement failed the Section 2.326(b) requirement to demonstrate that Mr. Chanin was competent to address the reopening standards. LBP-11-23 at 18.

[40] The dissent claims that denying Pilgrim Watch's contentions for failing to comply with Section 2.326(b) would "elevate form over substance," and it proceeds to "look at the substance and reality of what Pilgrim Watch provides." Sep. Statement at 52. However, contrary to the dissent's reasoning, in its recent Vogtle decision the Commission explicitly approved the Board majority's approach of refusing to "fill in the blanks itself" by examining the affidavits submitted in order to "find something to satisfy each of the § 2.326(a) criteria". CLI-11-08 at 8.

[41] E.g., Vogtle, CLI-11-08 at 10 ("the moving papers must be strong enough, in the light of any opposing filings, to avoid summary disposition").

[42] Oyster Creek, CLI-08-28, 68 N.R.C. at 674.

2. Neither Hearing Request Was Timely

The first substantive criterion for reopening a closed record is that the motion be timely. 10 C.F.R. § 2.326(a)(1). To be timely, a new or amended contention (except for those challenging new data or conclusions in the NRC Staff's EIS, not applicable here), must demonstrate that the information upon which the contention is based (i) "was not previously available" and (ii) "is materially different than information previously available," and (iii) that the contention "has been submitted in a timely fashion based on the availability of the subsequent information." 10 C.F.R. § 2.309(f)(2)(i)-(iii). Thus, for a contention to be timely, the contention's proponent must show that it could not have been raised earlier.[43] Intervenors are not free simply to "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."[44]

Adhering to this Commission precedent, the Board majority correctly ruled that the Recriticality Contention "regards limitations and phenomena that were widely known, and should have been known to Pilgrim Watch, at the outset of this proceeding, and 'thus could have been raised long ago, rendering [it] untimely now.'" LBP-11-23 at 13-14 (citation omitted). The majority reasoned that the alleged "shortcoming of the MACCS2 code (and therefore the Pilgrim SAMA analysis) regarding modeling long term releases is not new, and was well known at [the] inception of this proceeding," particularly because Mr. Chanin "has been aware of the limitation on release durations since the inception of the code itself (which is many years before com-

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[43] See, e.g., Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 N.R.C. 62, 76 (1992).

[44] Entergy Nuclear Vermont Yankee, L.L.C. (Vermont Yankee Nuclear Power Station), CLI-11-02, 73 N.R.C. __, slip op. (Mar. 10, 2011) at 6 (quoting Oyster Creek, CLI-09-7, 69 N.R.C. at 271-72 . ("CLI-11-02"). See also LBP-11-20, slip op. at 25 n. 110 (quoting Final Rule, Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,536 (May 30, 1986), which explains that under NRC case law "timely" is defined as "'whether the issues sought to be presented could have been raised at an earlier time.'").

mencement of this proceeding)." Id. at 13.[45] Likewise, the Board majority correctly ruled that the DTV Contention was untimely because "all of the information [Pilgrim Watch] asserts to be newly derived from the accidents at Fukushima . . . regard issues respecting plant configuration, equipment, components and operations and operator performance that were analyzed in the original LRA and regard issues that have been widely recognized for many years." LBP-11-23 at 32.[46]

Echoing the concurrence and dissent, Pilgrim Watch claims that both contentions were timely because they were based on a "real accident" and "direct experience" from Fukushima, versus information that was "theoretically" known at the time the application was filed in 2006. Petition at 10-11, 14. Pilgrim Watch's conclusory assertions that Fukushima made the contentions timely do not withstand scrutiny. Although the Fukushima accident was "new" in that it occurred more than five years after Entergy submitted the LRA, the mere fact that it occurred does not mean that Pilgrim Watch's contentions were timely. As made clear by analogous NRC precedent, the pertinent questions are whether Fukushima brought to light information concern-

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[45] Indeed, in its intervention petition, Pilgrim Watch itself pointed to a 2004 study conducted by the Department of Energy identifying "precautions" to be observed when using the MACCS2 code, including that it is "best suited for 'short' duration plumes." Request for Hearing and Petition to Intervene by Pilgrim Watch (May 25, 2006) at 33 n.14. Also, in its Recriticality Contention, Pilgrim Watch claimed that releases from the 1986 Chernobyl accident extended longer in time than the period assumed in the Pilgrim SAMA analysis. Recriticality Contention at 2.

[46] The Board identifies one "possibl[e]" exception to its un-timeliness finding concerning Pilgrim Watch's assertion that the Fukushima operators intentionally failed to operate the DTVs. Id. at 32 (emphasis added). However, the Board majority rejected this possibility because

> Pilgrim Watch offer[ed] nothing to link either the asserted failure of the Fukushima DTVs to operate or the operator actions at the Fukushima plants to what might reasonably be expected of the DTVs at Pilgrim or of operators of the Pilgrim Plant as they comply with the plant procedures and their training, nor does it offer anything to support its implication that adding this possibility would alter the probability associated with DTV failure and thereby materially alter the SAMA cost-benefit analysis. This latter concern is pure speculation.

Id. Thus, the Board majority did not "find any 'new' information in Pilgrim Watch's observations or challenges to Pilgrim in this contention" because it offered no "new information to support [its] speculation" and "nor . . . any definitive data[] respecting the occurrences at the Fukushima plants, let alone any information provided that relates these possibilities to the Pilgrim Plant or its operations or operability." Id. at 32-33. With respect to the latter point, the Entergy DTV Declaration pointed out that the venting procedures under which the Pilgrim plant is operated are markedly different than those that were employed at Fukushima and would have required venting much sooner than what occurred at Fukushima. Entergy DTV Decl. at ¶¶ 26-33.

ing radioactive release duration and DTV operability that was previously unavailable and materially different than previously available information.[47] The answer is no.

This situation is analogous to that in the Vermont Yankee[48] license renewal proceeding, which addressed whether an NRC inspection report that revealed that certain safety-related electrical cables had been exposed to submerged conditions (i.e., "real" information concerning "direct experience" with submergence) rendered timely a challenge to the aging management program addressing submerged cables. Vermont Yankee, CLI-11-02 at 9. The Commission found the challenge untimely because the "long-term submergence of safety-related cables was a possibility . . . evident since the outset of the proceeding." Id. Applied here, Pilgrim Watch nowhere explains why Fukushima renders timely its challenge to the MACCS2 code's inability to model a radioactive release of long duration where that inability was evident long before the accident. Likewise, Pilgrim Watch fails to explain how the alleged failures of the Fukushima DTVs renders timely its challenge to the Pilgrim SAMA analysis which includes accident scenarios that explicitly consider failure of the DTV.[49] In short, Pilgrim Watch demonstrates no clear error in the majority's ruling here.

3. Neither Contention Raised a Grave or Significant Issue

To reopen a closed record, the issue sought to be raised must be significant if timely raised, or exceptionally grave if untimely raised. 10 C.F.R. § 2.326(a)(1)-(2). The Commission has made it abundantly clear that merely asserting that something "might turn up" to support an

[47] Well established precedent makes clear that a new document containing previously available information does not make a contention based on that document timely. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 N.R.C. 1041, 1043 (1983) ("[T]he unavailability of [a] document does not constitute a showing of good cause for admitting a late-filed contention when the factual predicate for that contention is available from other sources in a timely manner").

[48] CLI-11-02.

[49] Entergy's DTV Declaration explains in detail how the very issues that Pilgrim Watch claims were brought to light by Fukushima were in fact already analyzed in the Pilgrim SAMA analysis. Entergy DTV Decl. at ¶¶ 42-62.

intervenor's concerns does not raise a significant issue and is therefore insufficient to restart the hearing process.[50] Also, Commission precedent explicitly holds that "bare assertions and speculation . . . do not supply the requisite support" to satisfy the Section 2.326 standards.[51]

Consistent with this precedent, the Board majority correctly ruled that neither hearing request raised any significant, let alone grave, issue. The majority found that both contentions only speculated that a fresh SAMA analysis might lead the NRC to require additional mitigative measures, thus failing to "to paint a 'seriously different picture of the environmental landscape,'" as required by the Commission in PFS.[52] LBP-11-23 at 14-15, 29-30, 33. In particular, the Board majority ruled that the Recriticality Contention merely

> speculat[ed] that there might be other cost-effective mitigation mechanisms if its speculation respecting recriticalities were correct and those recriticalities were somehow included in the SAMA analysis through their speculated increased probabilities of longer term releases.

Id. at 16. Likewise, the majority found that the DTV Contention

> offers only unsupported qualitative speculation, entirely without quantification or challenge to the existing LRA, as to the impact of the issues raised.

Id. at 33 n.152. Because bare speculation cannot provide the requisite support for a motion to reopen,[53] it thus cannot paint a seriously different picture of the environmental landscape. The majority's rulings are supported by CLI-11-05, which found that Fukushima had not presented a seriously different picture of environmental impacts. CLI-11-05 at 31.

Pilgrim Watch claims that the Recriticality Contention raised a significant issue because it asserted that the Pilgrim SAMA analysis did not consider radioactive releases of long duration.

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[50] AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 N.R.C. 461, 486 (2008) (rejecting a motion to reopen where movants provided no Section 2.326(b) affidavit, but only mere speculation that the contention might materially alter conclusions in the final safety evaluation report) (emphasis in original).

[51] Oyster Creek, CLI-09-7, 69 N.R.C. at 287 (citing CLI-08-28, 68 N.R.C. at 674).

[52] PFS, CLI-06-03, 63 N.R.C. at 28. The majority adopted this standard "to determine whether an issue raised is significant enough to satisfy" Section 2.326(a)(2). LBP-11-23 at 15.

[53] Oyster Creek, CLI-09-7, 69 N.R.C. at 287.

Petition at 11. Echoing the concurrence and dissent, Pilgrim Watch claims that "'months of releases would be significant on some level.'" Id. at 12.[54] But, Pilgrim Watch provides only speculation to this effect, and nowhere demonstrates that months of (very low) radioactive releases are significantly different than those assumed in the Pilgrim SAMA analysis. Indeed, Entergy explained that any radioactive releases from any alleged recriticalities would be very small and negligible compared to the large airborne releases assumed in the Pilgrim SAMA analysis. Entergy Recriticality Decl. at ¶¶ 28-43.

Likewise, Pilgrim Watch claims that the DTV Contention raised a significant issue because it alleges that all three Fukushima DTVs failed to operate, thus causing three containment failures. Petition at 17-18.[55] But, Pilgrim Watch does not, and cannot, show any different picture (let alone a seriously different picture) of Pilgrim's environmental impacts where, as explained in detail by Entergy's declarants, the Pilgrim SAMA analysis explicitly analyzes all of the issues that Pilgrim Watch claims are significant from Fukushima regarding its DTV contention (i.e., pressure buildup, operator error and DTV failure, hydrogen explosions, containment breach, and large radioactive releases). Entergy DTV Decl. at ¶¶ 42-69. Pilgrim Watch and its witness nowhere challenged that analysis, except for baseless and conclusory claims that are insufficient to meet a proponent's heavy burden to reopen a closed record. By the same token, the Petition totally ignores the detailed explanation in Entergy's declaration. See Petition at 17-22. In short, Pilgrim Watch demonstrates no clear error in the majority's ruling.

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[54] Although Pilgrim Watch refers to the concurrence and dissent on this point, in fact the concurrence ruled against Pilgrim Watch on the Recriticality Contention, holding that Pilgrim Watch's bare assertions failed to demonstrate a genuine dispute with Entergy's and the Staff's detailed declarations, see Sep. Statement at 30-31, which show that the releases from any (alleged) recriticalities would be very small compared to the large releases considered in the SAMA analysis, and thus would not materially alter the SAMA analysis.

[55] Pilgrim Watch relies upon newspaper articles to support its claim that the Fukushima DTVs failed to operate and containments failed, DTV Contention at 10-13, which the dissent accepts as "legitimate support . . . sufficient to warrant further inquiry." Sep. Statement at 52. To the contrary, a motion to reopen must be supported by "evidence . . . [that] meet[s] the admissibility standards of this subpart," 10 C.F.R. § 2.326(b), and it is well established that newspaper articles present "evidentiary shortcomings." Oyster Creek, CLI-08-28, 68 N.R.C. at 672.

4. Pilgrim Watch Failed to Demonstrate that a Materially Different Result Would Be or Would Have Been Likely

Pilgrim Watch also had to demonstrate that a "materially different result would be or would have been likely" had any newly proffered evidence been considered initially. 10 C.F.R. § 2.326(a)(3) (emphasis added). The Commission has repeatedly emphasized that "[t]he burden of satisfying the reopening requirements is a heavy one."[56] It is "self evident" that "a motion to reopen is an 'extraordinary action,' and that a heavy burden is put on proponents" who must, among other things, present material, probative evidence.[57] "Bare assertions and speculation . . . do not supply the requisite support," and "substantive information and argument" is required to constitute a successful demonstration of "likelihood" under Section 2.326(a)(3).[58] "Expert opinion is admissible only if . . . the factual basis for that opinion is adequately stated and explained in the affidavit."[59] In the end, a "motion to reopen requires more than a possibility. It requires a demonstration that the petitioner is likely to succeed."[60]

In the SAMA analysis context, Commission precedent explicitly holds that,

> 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.[61]

Further, previously in this proceeding, the Commission explained:

> 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

[56] Oyster Creek, CLI-09-7, 69 N.R.C. at 287 (citation omitted).

[57] 51 Fed. Reg. at 19,538.

[58] Vermont Yankee, CLI-11-02 at 16 & n.69 (citations omitted).

[59] Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-4, 61 N.R.C. 71, 81 (2005) (emphasis added) (citation omitted).

[60] Vermont Yankee, LBP-10-19, 72 N.R.C. __, slip op. at 27 (Oct. 28, 2010) (emphasis added), aff'd CLI-11-02.

[61] 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) ("CLI-02-17") (emphasis added).

> 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.

CLI-10-11, 71 N.R.C. at 317 (emphasis added).

Other than conclusory statements, neither Pilgrim Watch nor the dissent account for this explicit Commission precedent. In essence, both claim that the Pilgrim SAMA analysis must take into account the Fukushima accident because of the similarity of its design to Pilgrim, even absent any showing that the Pilgrim SAMA analysis would likely be materially affected in any way. E.g., Petition at 3-5; Sep. Statement at 49-50 (citing Calvert Cliffs[62]). As succinctly explained by the Board majority in response to this claim:

> [B]oth Pilgrim Watch and our colleague simply plead that the reality of the releases at Fukushima (which are purely macroscopic observations without supporting microscopic data or information) must somehow be included in Pilgrim's SAMA analyses, without suggesting anything respecting how the methods of Pilgrim SAMA analyses might be altered to adapt the macroscopic observations from the Fukushima Accidents to the microscopic input, assumptions and modeling required for SAMA analysis.

LBP-11-23 at 11 n.49. Indeed, the dissent concedes that "in this instance, Pilgrim Watch was unable . . . to show whether or how the outcome of the SAMA cost-benefit conclusions would be changed." Sep. Statement at 51 (emphasis added) (footnote omitted).[63] In short, Pilgrim Watch provided nothing to indicate the approximate relative cost and benefit of any SAMA as required by Commission precedent and failed to show that a materially different result would be likely.[64]

[62] Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC (Calvert Cliffs Nuclear Power Plant Unit 3), Memorandum and Order (Denying Summary Judgment of Contention 10C, Denying Amended Contention 10C, and Deferring Ruling on Contention 1) (Aug. 26, 2011) ("Calvert Cliffs Order").

[63] The dissent's claim that the situation here is no different than with respect to Contention 3 (id.) ignores the fact that, in the context of reopening a closed record, the "burden . . . to demonstrate that the motion should be granted" rests with the petitioner and not the applicant. Oyster Creek, CLI-08-28, 68 N.R.C. at 673 (emphasis added).

[64] The dissent's reliance on the Calvert Cliffs Order, 10, 49-50, is unavailing. The dissent contends that the proposition that NEPA obligations cannot be evaded by claiming that no relevant NEPA conclusions would be changed where purported new and significant information considered "would reasonably seem to apply in the SAMA analysis context" with respect to the DTV Contention. Sep. Statement at 50. As the Board majority notes, however, Calvert Cliffs concerned "the question of whether or not alternatives to generation of power via a nuclear power plant

Adhering to the Commission's explicit SAMA precedent, the majority correctly ruled that neither contention demonstrated that a materially different result would have been likely. The Board majority held that the failure to provide an affidavit compliant with Section 2.326(b) precluded it from finding that Pilgrim Watch had made the required demonstration, and that Pilgrim Watch otherwise only provided "bare unsupported assertions." LBP-11-23 at 17, 19 n.84, 33-34. For the Recriticality Contention, the majority ruled that the Chanin Statement and the accompanying "unreviewed website-posted-document" contained conclusory statements that

> fail[ed] to either address any of the Section 2.326 criteria or to provide any information that would enable [the majority] to conclude (or even address whether) Pilgrim Watch satisfied the requirements of Section 2.326(a)(3).

Id. at 19 n.84.[65] Further, the majority found that Pilgrim Watch's "vague speculation that other SAMAs might become cost effective . . . fails to establish that the asserted deficiencies would . . . alter the result of the SAMA analysis." Id. at 22 (emphasis added) (footnote omitted). As for the DTV contention, the majority ruled that Pilgrim Watch and Mr. Gundersen had utterly failed

> to provide any technical support for this contention and [failed] completely to address not only the foundation necessary to establish either a genuine dispute with the application on any material issue of fact or the likelihood of a different result, but also fail[ed] to address any of the relevant provisions of Section 2.326(a).

Id. at 34 (emphasis added). In particular, Pilgrim Watch "offer[ed] nothing to link either the asserted failure of the Fukushima DTVs to operate or the operator actions at the Fukushima plants to what might reasonably be expected of the DTVs at Pilgrim or of operators of the Pilgrim

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should be investigated as part of the applicant's (and ultimately the Staff's) NEPA obligations to examine alternatives to the proposed action of granting the license for a nuclear power plant." LBP-11-23 at 16 n.71. Here, the Commission has enacted a rule that certain license renewal applicants perform a SAMA analysis, the required NEPA investigation has been performed, and the Commission has determined that challenges to that analysis are not admissible absent a showing by a petitioner that consideration of other factors could plausibly change the SAMA cost-benefit conclusions. McGuire/Catawba, CLI-02-17, 56 N.R.C. at 11-12; Pilgrim, CLI-10-11, 71 N.R.C. at 317.

[65] The concurrence agreed that the Recriticality Contention failed to meet the Section 2.326(a)(3) requirements because "[t]oo much of its presentation indeed consists of indications that further analysis is in order, or of what appears to be true, or bare assertions such as what 'the only reasonable hypothesis' would be." Sep. Statement at 30. See also id. at 13 (Mr. Chanin's statements were "less detailed, more conclusory, and at times imprecise").

Plant," and offered nothing "to support its implication that adding this possibility would alter the probability associated with DTV failure and thereby materially alter the SAMA cost-benefit analysis." Id. at 32. In other words, nothing in either contention "links [Pilgrim Watch's] concerns about [Fukushima] to the particulars of [Pilgrim] that merits resolution in this adjudicatory proceeding." Vogtle, CLI-11-08 at 15 (finding no clear error in licensing board ruling that intervenor failed to meet the Section 2.326(a)(3) criteria).

Pilgrim Watch demonstrates no clear error by the Board majority. Pilgrim Watch claims that the Recriticality Contention "show[ed] a dispute on a material issue to warrant further analysis," but nowhere avers that it demonstrated that a materially different result would be likely. Petition at 12. It also reiterates claims that "[r]eopening is not required," and that "NEPA requirements trump procedural requirements," id., arguments that (as previously discussed) are clearly incorrect. Pilgrim Watch claims that the DTV Contention showed a materially different result by repeating conclusory assertions from the contention. For example, Pilgrim Watch claims that "failure of unfiltered [DTVs] at Fukushima contributed to increasing the probability of a failure of the vent at Pilgrim and of a severe accident," id. at 19; that this asserted "increased probability in turn would change the cost-benefit analysis," id.; and (impermissibly borrowing an argument from the Commonwealth) that the Pilgrim SAMA analysis underestimated the probability of a severe release by an order of magnitude, id. at 20.[66] But, such "general arguments and conclusory statements asserting the substantive merits of [its] proposed contention" are "insufficient to support an appeal." Vogtle, CLI-11-08 at 6.[67]

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[66] Entergy moved to strike Pilgrim Watch's impermissible attempt to supplement its contention on reply by borrowing the Commonwealth's argument. Entergy Motion to Strike Portions of Pilgrim Watch Reply to Entergy and the NRC Staff Answers Opposing Pilgrim Watch Request for Hearing on a New Contention (July 15, 2011) at 3.

[67] Pilgrim Watch impermissibly seeks to amend its contention by now claiming "actual operator error" at Pilgrim. Petition at 21-22. But, "Appellants may not amend their contentions on appeal." CLI-11-08 at 7 (citation omitted).

The Commission also should affirm the majority's ruling on the additional ground that Entergy's expert submissions far outweighed Pilgrim Watch's (non-expert) support and showed that a materially different change in the Pilgrim SAMA analysis was not likely. Although the Board majority (as well as the dissent) "decline[d] to consider competing expert views" because such weighing "is only appropriate for a hearing on the merits," LBP-11-23 at 37-38; see also id. at 17 n.74, Sep. Statement at 11 (citing LBP-11-20,[68] Concurrence and Dissent at 17-18 & n.72), Entergy respectfully submits that, in the record reopening context, it is appropriate to weigh expert submissions in order to "evaluate[] whether a petitioner has provided sufficient support to justify admitting the contention for further litigation." Vogtle, CLI-11-08 at 7.[69]

The governing regulation specifies that the requisite affidavit must "set forth the factual and/or technical bases," "be given by competent individuals," and contain admissible evidence. 10 C.F.R. § 2.326(b). There would seem little point to these requirements if a licensing board were unable to weigh the evidence contained in competing affidavits. Indeed, when promulgating the Section 2.326(b) affidavit requirement, the Commission stated that "the credentials of allegers should be subject to some scrutiny to allow the presiding officer to assess the proper weight to be given to the alleger's testimony."[70]

In addition, in Oyster Creek, the Commission expressly made clear that the "submissions of [the parties'] "experts must be weighed" in determining whether the party seeking reopening has met its "deliberately heavy and deliberately placed" burden to show that materially different result is likely.[71] The Commission's PFS decision makes clear that it is entirely appropriate in

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[68] Memorandum and Order (Denying Pilgrim Watch's Requests for Hearing on Certain New Contentions), LBP-11-20, 74 N.R.C. __, slip op. (Aug. 11, 2011) ("LBP-11-20").

[69] The Commission went on to state that "the Board appropriately applied its technical and legal expertise to evaluate the proposed contention and the support provided for that contention . . . relative to our reopening standards." Id.

[70] 51 Fed. Reg. at 19,537 (emphasis added).

[71] Oyster Creek, CLI-08-28, 68 N.R.C. at 674-675 (emphasis added) (footnote omitted).

this respect for the Board to evaluate "thinly supported" allegations against a "rather overwhelming written record" and conclude that such allegations are insufficient to demonstrate that a materially different result would be likely.[72] The Third Circuit found the need for weighing competing expert affidavits apparent from the express terms of the regulation. The Court rejected a petitioner's claim that "the NRC impermissibly weighed the evidence" because "the reopening rule requires [petitioner] to proffer evidence demonstrating 'safety significance' and that prior admission of the evidence would have led to a 'materially different result.'"[73]

Here, Pilgrim Watch's "thinly supported" allegations do not stand up against Entergy's "rather overwhelming written record." Entergy demonstrated that the Pilgrim SAMA analysis assumed radioactive releases far greater than the cumulative radioactive releases from all three damaged Fukushima reactors. Thus Fukushima revealed no information (including alleged recriticalities) that would materially alter the SAMA analysis. Entergy Recriticality Decl. at ¶¶ 34-43; see also Energy DTV Decl. at ¶¶ 63-69. Similarly, Entergy showed that the DTV Contention failed to raise any genuine dispute with the Pilgrim SAMA analysis because all of its claims were explicitly addressed in the analysis, which Pilgrim Watch nowhere disputed. Entergy DTV Decl. at ¶¶ 42-62. Thus, Entergy's expert submissions far outweighed Pilgrim Watch's conclusory assertions and bare allegations, further demonstrating that Pilgrim Watch's allegations would not make any material difference.

5. The Contentions Failed to Satisfy the Section 2.309 Standards for Late-Filed and Admissible Contentions

For the same reasons that the Board majority ruled the contentions untimely under Section 2.326(a)(1), the majority correctly ruled that Pilgrim Watch failed to demonstrate good

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[72] PFS, CLI-05-12, 61 N.R.C. 345, 353-55 (2005) ("CLI-05-12").
[73] New Jersey, 645 F.3d at 234 (emphasis added) (citation omitted)..

cause for its late filing of the contentions under 10 C.F.R. § 2.309(c), and failed to make a compelling showing on the remaining late factors. LBP-11-23 at 24-25, 34-35.[74] The majority also correctly found the contentions inadmissible under Section 2.309(f)(1). LBP-11-23 at 21-23. In particular, the majority ruled that Pilgrim Watch failed to demonstrate any genuine dispute on a material issue, which pursuant to Commission precedent in this context requires more than just "vague speculation that other SAMAs might become cost effective" and an "indication of the size of changes in consequences that could be expected" as a result of the concerns raised in the contentions. LBP-11-23 at 22; see also id. at 36. As previously discussed, Pilgrim Watch failed to make the requisite showing. Pilgrim Watch nowhere disputes this in its Petition. Accordingly, the majority ruling should be affirmed.[75]

IV. CONCLUSION

For the reasons set forth above, the Commission should reject Pilgrim Watch's Petition.

Respectfully Submitted,

/signed electronically by David R. Lewis/

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David R. Lewis
Paul A. Gaukler
PILLSBURY WINTHROP SHAW PITTMAN LLP
2300 N Street, NW
Washington, DC 20037-1128
Tel. (202) 663-8000
E-mail: david.lewis@pillsburylaw.com
Counsel for Entergy

Dated: October 3, 2011

[74] Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 N.R.C. 156, 165 (1993) (failure to demonstrate good cause requires the petitioner to make a "compelling" showing with respect to the other factors).

[75] Pilgrim Watch and the dissent request that the Commission exercise sua sponte review of the issues raised in Pilgrim Watch's contentions prior to any decision on the LRA. Petition at 24-25 (citing Sep. Statement at 54-55). Apart from their being current licensing basis issues beyond the scope of license renewal, the Board majority correctly noted that "it would be counterproductive for the Commission to single out the Pilgrim Plant for particular examination specifically because its license renewal application is presently being litigated or considered by the Commission" in light of the NRC's Fukushima Task Force's finding that continued licensing activities do not pose an imminent risk to public health and safety. LBP-11-23 at 41. This position is supported by the Commission's ruling that Fukushima has revealed no new and significant environmental impact information. CLI-11-05 at 30-31.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "Entergy's Answer Opposing Pilgrim Watch's Petition for Review" dated October 3, 2011, was provided to the Electronic Information Exchange for service on the individuals below, this 3rd day of October, 2011.

Secretary
Att'n: Rulemakings and Adjudications Staff
Mail Stop O-16 C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
hearingdocket@nrc.gov

Office of Commission Appellate Adjudication
Mail Stop O-16 C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
OCAAmail@nrc.gov

Administrative Judge
Ann Marshall Young, Esq., Chair
Atomic Safety and Licensing Board
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Ann.Young@nrc.gov

Atomic Safety and Licensing Board
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Dr. Richard F. Cole
Atomic Safety and Licensing Board
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Richard.Cole@nrc.gov

Administrative Judge
Dr. Paul B. Abramson
Atomic Safety and Licensing Board
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Paul.Abramson@nrc.gov

Susan L. Uttal, Esq.
Andrea Z. Jones, Esq.
Brian Harris, Esq.
Beth Mizuno, Esq.
Office of the General Counsel
Mail Stop O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Susan.Uttal@nrc.gov ; andrea.jones@nrc.gov ;
brian.harris@nrc.gov ; beth.mizuno@nrc.gov

Matthew Brock, Assistant Attorney General
Commonwealth of Massachusetts
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
Martha.Coakley@state.ma.us
Matthew.Brock@state.ma.us

Ms. Mary Lampert
148 Washington Street
Duxbury, MA 02332
mary.lampert@comcast.net

Sheila Slocum Hollis, Esq.
Duane Morris LLP
505 9th Street, NW
Suite 1000
Washington, DC 20006
sshollis@duanemorris.com

Mr. Mark D. Sylvia
Town Manager
Town of Plymouth
11 Lincoln St.
Plymouth, MA 02360
msylvia@townhall.plymouth.ma.us

Richard R. MacDonald
Town Manager
878 Tremont Street
Duxbury, MA 02332
macdonald@town.duxbury.ma.us

Chief Kevin M. Nord
Fire Chief and Director, Duxbury Emergency
Management Agency
688 Tremont Street
P.O. Box 2824
Duxbury, MA 02331
nord@town.duxbury.ma.us

Katherine Tucker, Esq.
Law Clerk,
Atomic Safety and Licensing Board Panel
Mail Stop T3-E2a
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Katie.Tucker@nrc.gov

/signed electronically by David R. Lewis/

____
David R. Lewis