

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S ANSWER TO PILGRIM WATCH'S PETITION FOR REVIEW OF
MEMORANDUM AND ORDER (DENYING PILGRIM WATCH'S REQUESTS FOR
HEARING ON NEW CONTENTIONS RELATING TO FUKUSHIMA ACCIDENT)

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October 3, 2011

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.341(b)(3), the staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby files its answer in opposition to Pilgrim Watch's ("PW") Petition for Review ("PW Petition") of the Memorandum and Order of the Atomic Safety and Licensing Board (Denying Pilgrim Watch's Request for Hearing on New Contentions Relating to Fukushima Accident), September 8, 2011. In its Memorandum and Order (Denying Pilgrim Watch's Requests for Hearing on New Contentions Relating to Fukushima Accident), LBP-11-23, 74 NRC ____, (Sept. 8, 2011) (slip op.)(LBP-11-23"), the Board denied the admission of two new contentions submitted by PW alleging that the Severe Accident Mitigation Analysis ("SAMA") is inadequate because it ignores new information associated with the accident at the Fukushima Dai-ichi Nuclear Power Plant ("Fukushima"), specifically (1) the alleged effect of re-criticality during a severe accident and the release of radionuclides over a prolonged period ("Re-Criticality Contention") and (2) the probability of containment failure due to the failure of the direct torus vent (DTV) to operate ("DTV Contention").

Contrary to PW's assertions, the Atomic Safety and Licensing Board ("Board") properly

applied the reopening standard to these contentions and found PW's new contentions inadmissible for failure to satisfy that standard. In addition, the Board found that the contentions were inadmissible for failure to meet the general contention admissibility standards in 10 C.F.R. § 2.309(f)(1), and for failure to meet the standards for untimely new contentions in 10 C.F.R. § 2.309(c). As demonstrated herein, the Board's findings of fact were correct and its rulings were supported by precedent and not in conflict with existing case law. Accordingly, the PW Petition should be denied.

PROCEDURAL BACKGROUND

Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. ("Entergy" or "Applicant") submitted a license renewal application for the Pilgrim Nuclear Generating Station ("Pilgrim") on January 25, 2006.¹ In response to a Federal Register notice of opportunity for hearing,² PW filed a petition to intervene in this matter on May 25, 2006, submitting five contentions for consideration.³

The Board admitted two of PW's proposed contentions—Contention 1, challenging Entergy's aging management program for buried piping, and Contention 3, challenging Entergy's SAMA analysis.⁴ On October 30, 2007, a Board majority granted the motion for summary disposition of Contention 3.⁵ On April 10, 2008, an evidentiary hearing was held on Contention 1, and shortly thereafter, on June 4, 2008, the Board formally closed the evidentiary record.⁶

¹ Entergy Nuclear Operations, Inc., License Renewal Application – Pilgrim Nuclear Power Station (January 25, 2006) (Agencywide Documents and Access Management System ("ADAMS") Accession No. ML060300028).

² Entergy Nuclear Operations, Inc., Pilgrim Nuclear Power Station; Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License No. DPR-35 for an Additional 20-Year Period, 71 Fed. Reg. 15,222 (Mar. 27, 2006).

³ Request for Hearing and Petition to Intervene by Pilgrim Watch (May 25, 2006) (ADAMS Accession No. ML061630125).

⁴ *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 348-49 (2006).

⁵ *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power

The Board issued an initial decision disposing of Contention 1 in favor of the Applicant on October 30, 2008.⁷ PW filed a petition for review of the Board's initial decision and other interlocutory decisions,⁸ which the Commission denied on June 17, 2010 in CLI-10-14.⁹

The Commission reversed the summary disposition of Contention 3 and remanded it to the Board for further proceedings as limited by the Commission's Order.¹⁰ On July 29, 2011, the Board issued a partial initial decision finding in favor of the Applicant on the remanded Contention 3.¹¹ The Board's decision on remanded Contention 3 is currently pending before the Commission on a petition for review filed by PW.¹²

A few months after it filed its petition on remanded Contention 3, PW filed a request for a hearing on new contentions related to cleanup costs and inaccessible cables.¹³ The Board

Station), LBP-07-13, 66 NRC 131 (2007).

⁶ Memorandum and Order (Ruling on Pilgrim Watch Motions Regarding Testimony and Proposed Additional Evidence Relating to Pilgrim Watch Contention 1) (June 4, 2008) at 3 (ADAMS Accession No. ML081560375).

⁷ *Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-08-22, 68 NRC 590, 609 (2008).

⁸ Pilgrim Watch's Petition for Review of LBP-08-22, LBP-07-13, LBP-06-23 and the Interlocutory Decisions in the Pilgrim Nuclear Power Station Proceeding (Nov. 12, 2008) at 11 (ADAMS Accession No. ML083240599).

⁹ *Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-14, 71 NRC ___ (June 17, 2010) (slip op. at 39).

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

¹¹ See generally *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-11-18, 74 NRC ___ (July 19, 2011)(slip op.).

¹² Pilgrim Watch Request for Review of the Partial Initial Decision (Rejecting Upon Remand Pilgrim Watch's Challenge To Meteorological Modeling In SAMA Analysis in Entergy's License Renewal Application (July 19, 2011) (ADAMS Accession No. ML11215A133)

¹³ See Pilgrim Watch Request for Hearing on a New Contention (November 29, 2010)(ADAMS Accession No. ML103420305); Pilgrim Watch Request for Hearing on a New Contention: Inadequacy of Entergy's Aging Management of Non-Environmentally Qualified Inaccessible Cables (Splices) at Pilgrim Station (December 13, 2010) (ADAMS Accession No. ML103500400); Pilgrim Watch Request for Hearing on a New Contention: Inadequacy of Entergy's Aging Management of Non-Environmentally Qualified Inaccessible Cables (Splices) at Pilgrim Station (January 20, 2010)(ADAMS Accession No.

denied PWs requests for hearing on the cleanup and inaccessible cables contentions.¹⁴ The Board's decision on these contentions is also currently pending before the Commission on a petition for review.¹⁵

Subsequent to the accident at Fukushima, PW filed requests for hearing on two new contentions. On May 12, 2011, 2011, PW filed its proposed Re-Criticality Contention:¹⁶

The Environmental Report is inadequate post Fukushima Daiichi because Entergy's SAMA analysis ignores new and significant lessons learned regarding the possible off-site radiological and economic consequences in a severe accident.¹⁷

On June 1, 2011, PW submitted its proposed DTV Contention:¹⁸

Based on new and significant information from Fukushima, the Environmental Report is inadequate post Fukushima Daiichi. Entergy's SAMA analysis ignores new and significant issues raised by Fukushima regarding the probability of both containment failure, and subsequent larger off-site consequences due to failure of the direct torus vent (DTV) to operate.¹⁹

The Board denied PWs request for hearing on the Re-Criticality Contention and DTV Contention.²⁰ On September 23, 2011, pursuant to 10 C.F.R. § 2.341(b)(1), PW filed a petition for review of the Board's decision denying PWs request for hearing on the two post-Fukushima

ML110200267).

¹⁴ Memorandum and Order (Denying Pilgrim Watch's Requests for Hearing on Certain New Contentions), LBP-11-20, 74 NRC ____ (Aug. 11, 2011) (slip op at 3.).

¹⁵ See Pilgrim Watch's Petition For Review Of Memorandum And Order (Denying Pilgrim Watch's Requests For Hearing On Certain New Contentions) (Aug. 11, 2011) (ADAMS Accession No. ML11238A118).

¹⁶ Pilgrim Watch Request for Hearing on Post Fukushima SAMA Contention ("Post Fukushima SAMA Contention") (May 12, 2011) (ADAMS Accession No. ML111320651).

¹⁷ *Id.* at 1.

¹⁸ Pilgrim Watch Request for Hearing on a New Contention Regarding Inadequacy of Environmental Report, Post Fukushima (June 1, 2011) (ADAMS Accession No. ML111530448).

¹⁹ *Id.* at 1.

²⁰ Memorandum And Order (Denying Pilgrim Watch's Requests for Hearing on New Contentions Relating to Fukushima Accident), LBP-11-23, 74 NRC ____, (Sept. 8, 2011) (slip op. at 3).

contentions.

ARGUMENT

I. Legal Standards

A. The Standard for Review of a Board Decision

The procedural regulations at 10 C.F.R. § 2.341(a)(1) govern PW's petition for review. Subsection (b)(4) provides that the Commission may grant a petition for review "giving due weight to the existence of a substantial question" with respect to one or more of the following considerations:

- (1) a clearly erroneous finding of fact;
- (2) a necessary legal conclusion is without precedent or conflicts with existing law;
- (3) the appeal raises a substantial and important question of law or policy;
- (4) the proceeding involved a prejudicial procedural error; or
- (5) any other consideration the Commission determines to be in the public interest.

10 C.F.R. § 2.341(b)(4).

The Commission has stated that the standard regarding "clear error" is quite high, requiring a showing that the Board's findings are "not even plausible in light of the record viewed in its entirety."²¹ The Commission defers to a licensing board's findings of fact as long as the "Licensing Board has issued a plausible decision that rests on carefully rendered findings of fact[.]"²² Thus, the Commission will reject or modify a Licensing Board's findings only if, after accounting for appropriate deference to the "primary fact finder," the Commission is "convinced

²¹ *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11, 25-26 (2003) ("PFS") (citing *Anderson v. Bessemer City*, 470 U.S. 564, 573-76 (1985)).

²² *Id.*

that the record *compels* a different result.²³ The Commission will not overturn a board's findings simply because it might have reached a different result or because the record could support a view different from that of the board.²⁴

With respect to a board's conclusions of law, a petitioner must show an "error of law or abuse of discretion" by the board.²⁵ The Commission will reverse a board's legal conclusions only "if they are a departure from or contrary to established law."²⁶

As explained more fully below, PW has failed to demonstrate that the Board's factual findings are clearly erroneous or that the Board's legal conclusions depart from or are contrary to established law.²⁷ Therefore, PW does not meet its burden under 10 C.F.R. § 2.341(b)(4) and its petition for review should be denied.

B. The Standard for Reopening the Record

Once the record is closed, it will not be reopened except upon a strong, well-supported showing of singular circumstances. Accordingly, the regulations provide that a motion to reopen the record will not be granted unless it satisfies the following three criteria:

- (1) The motion must be timely, except that an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented;
- (2) The motion must address a significant safety issue; and

²³ *General Public Utilities* (Three Mile Island Nuclear Station, Unit No. 1) ALAB-881, 26 NRC 465, 473 (1987)(citing *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 357 (1975)) (emphasis added).

²⁴ See *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1; Sequoyah Plants, Units 1 & 2; Browns Ferry Nuclear Plant, Units 1, 2 & 3), CLI-04-24, 60 NRC 160, 189 (2004) ("TVA"); *PFS*, CLI-03-8, 58 NRC at 26 (quoting *Kenneth G. Pierce* (Shorewood, Illinois), CLI-95-6, 41 NRC 381, 382 (1995)).

²⁵ *USEC, Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 439 n.32 (2006).

²⁶ *TVA*, CLI-04-24, 60 NRC at 190 (internal quotations omitted).

²⁷ The Staff has not addressed the criteria for review based on prejudicial procedural error, substantial and important questions of law or policy, or "other consideration the Commission determines to be in the public interest" because PW's Petition did not rely on or address those criteria.

(3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

10 C.F.R. § 2.326(a). *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 668 (2008). The motion must be accompanied by an affidavit that provides the factual and/or technical bases for the movant's claim that the three criteria in 10 C.F.R. § 2.326(a) are satisfied. 10 C.F.R. § 2.326(b). The evidence supporting the motion must satisfy the Commission's admissibility standards in 10 C.F.R. § 2.337(a); it must be "relevant, material, and reliable." *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-12, 68 NRC 5, 16 (2008). Moreover, "the moving papers must be strong enough, in the light of any opposing filings, to avoid summary disposition." *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 (2005) *citing* *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-05-5, 61 NRC at 116, *quoting Vermont Yankee*, ALAB-138, 6 AEC at 523-24.

In addition, 10 C.F.R. § 2.326(d) expressly states that where the contention raises an issue not previously in controversy, the contention must satisfy the requirements for admission of nontimely contentions at 10 C.F.R. § 2.309(c). A nontimely contention will only be admitted upon a balancing of eight factors, the most important of which is good cause for the failure to file on time.²⁸ The contention must also meet the standard for late-filed contentions, or contentions filed after the initial filing period has passed. Such contentions are allowed "only upon a showing that—(i) [t]he information upon which the amended or new contention is based was not previously available; (ii) [t]he information upon which the amended or new contention is based is materially different than information previously available; and (iii) [t]he amended or new contention has been submitted in a timely fashion based on the availability of the subsequent

²⁸ *Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit 3), CLI-09-5, 69 NRC 115, 125-26 (2009).

information.” *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 636 (2004) (quoting 10 C.F.R. § 2.309(f)(2)(i)-(iii)).

Finally, the contention must meet the general admissibility requirements in 10 C.F.R. § 2.309(f).

II. The Board Properly Applied the Reopening Standard to the New Post-Fukushima Related Contentions

The Board determination that the new contentions must satisfy the reopening standard in 10 C.F.R. § 2.326 was proper. The Board closed the record in this proceeding years ago.²⁹ The Re-Criticality Contention and the DTV Contention, filed almost three years to the day since the Board closed the record, must therefore meet the regulatory requirements for reopening. This application of the reopening standard is not only in accordance with the regulatory requirements at 10 C.F.R. § 2.326, it is consistent with prior Commission case law³⁰ and federal appellate court precedent.³¹

In its petition, PW argues that the reopening standard does not apply because the record was never closed as to the Re-Criticality or the DTV Contentions.³² According to PW, the reopening standard can only be applied to a contention that has been adjudicated and with respect to which the record is closed; it cannot apply to new contentions, i.e., it cannot apply to contentions that have not previously been in controversy through an actual hearing on the merits. However, PW's interpretation is inconsistent with the plain language of 10 C.F.R. § 2.326(d), which explicitly addresses “motion[s] to reopen which relate[] to a contention not

²⁹ Memorandum and Order (Ruling on Pilgrim Watch Motions Regarding Testimony and Proposed Additional Evidence Relating to Pilgrim Watch Contention 1) (June 4, 2008) at 3-4 (unpublished); LBP-11-23 at 1-2.

³⁰ *Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 NRC ____ (July 8, 2010) (slip op. at 10 n.37) (ADAMS Accession No. ML101890775).

³¹ *New Jersey Environmental Federation v. NRC*, No. 09-2567, 2011 WL 1878642, at *9-10 (3rd Cir. May 18, 2011).

³² PW Petition at 7-9.

previously in controversy among the parties” and requires that such motions satisfy the requirements for admissibility of nontimely contentions, in addition to satisfying the standards for reopening. As the Third Circuit observed, in the *New Jersey Environmental Federation* case, PWs interpretation of 10 C.F.R. § 2.326 would render that regulatory language “meaningless.”³³

Because the Board’s decision applying the reopening standard to PWs Re-Criticality and DTV Contentions is consistent with Commission precedent and not in conflict with existing law, it should be affirmed. Furthermore, as shown below, the Board’s rejection of the new contentions for failure to meet the specific reopening standards is well-reasoned, supported by the facts and not clearly erroneous. The Board’s determination that the contentions do not meet the reopening standards because 1) they are untimely; 2) they fail to raise a significant safety or environmental issue, and 3) they are unsupported by expert affidavits is also consistent with the Commission’s decisions in *Oyster Creek*.³⁴ The Board’s further rejection of the contentions for failure to show that materially different results would have been likely is supported by the Commission’s decisions in *Oyster Creek* and *Private Fuel Storage*.³⁵ Accordingly, the Board’s application of the reopening standards and Commission decisions should be upheld.

PW complains that the reopening standard is unduly burdensome.³⁶ However, the reopening criteria are intentionally strict.³⁷ They were fashioned in this way in an effort to avoid delay in agency decision-making as a result of untimely filings, particularly after the record has closed. In its Order denying, *inter alia*, PWs petition seeking suspension of the Pilgrim license

³³ *New Jersey Environmental Federation v. NRC*, 2011 WL 1878642, at *9-10.

³⁴ *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 486 (2008); *Oyster Creek*, CLI-08-28, 68 NRC at 667-676.

³⁵ *Oyster Creek*, CLI-08-23, 68 NRC at 486; *Oyster Creek*, CLI-08-28, 68 NRC at 673-75 (2008); *PFS*, CLI-05-12, 61 NRC at 350.

³⁶ PW Petition at 6.

³⁷ *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 286-87 (2009).

renewal proceeding, the Commission acknowledged the heavy burden applicable to motions to reopen:

[O]ur rules deliberately place a heavy burden on proponents of contentions, who must challenge aspects of license applications with specificity, backed up with substantive technical support; mere conclusions or speculation will not suffice. An even heavier burden applies to motions to reopen.³⁸

Nevertheless, the reopening standard allows for the adjudication of contentions late in the day if they raise timely or exceptionally grave, significant and material issues. As shown below, PW has not established that its proposed contentions meet those standards.

PW also argues that the NRC cannot use the reopening standard to avoid its obligations under the National Environmental Protection Act (NEPA) and that NEPA trumps NRC's procedural requirements. In support, PW cites and quotes *Commonwealth of Massachusetts v. NRC*, 522 F.3d 115 (1st Cir. 2008). PW's reliance on the case is misplaced. The reopening standard is a regulatory requirement which must be met whether the matter sought to be raised is an issue under the Atomic Energy Act or NEPA. Moreover, the reopening standard was not at issue in *Massachusetts v. NRC*.³⁹ Instead, the issue in the case was the NRC's procedural regulatory structure, which the Court specifically approved. That regulatory structure directed Massachusetts into a rulemaking proceeding rather than the Pilgrim license renewal adjudicatory proceeding. The Court affirmed the NRC's decision, giving deference to the agency's interpretation of its own procedural regulations, noting that although NEPA imposes an obligation on the NRC to consider environmental impacts in its license renewal proceedings, "the statute does not mandate *how* the agency must fulfill that obligation." *Id.* at 130 (emphasis in

³⁸ *Union Electric Company d/b/a/ Ameren Missouri* (Callaway Plant, Unit 2), *et al.*, CLI-11-05, 74 NRC ___, ___ (Sept. 9, 2011) (slip op. at 33) ("Order Denying Suspension Petitions").

³⁹ In addition, the quoted language in PW Petition at pages 6 and 12 attributed to *Massachusetts v. NRC* appears nowhere in that case and the page cited (page 371) does not refer to any part of *Massachusetts v. NRC*, but to *Duncan's Point Lot Owners Association, Inc. v. FERC*, 522 F.3d 371 (D.C. Cir. 2008).

original).

A. Reopening Standard, Timeliness

The Board correctly determined that the contentions were not timely raised because, contrary to PW's claims, the information upon which the contentions relied was not new. After a careful examination of PW's arguments, the Board found that PW's re-criticality contention boiled down to the assertion that the Fukushima accident revealed that severe accidents could involve re-criticality and releases of radionuclides over a period of weeks or months and that the MACCS2 Code used in the SAMA analysis did not and could not model such an accident.⁴⁰ The Board correctly observed that this information was not new and that these issues could have been raised at the outset of the proceeding. The Board also found that, with one exception, all of the information underlying the DTV contention was widely known for years and analyzed in the Pilgrim license renewal application and, thus, not new.⁴¹

With respect to PW's claim that the Fukushima accident revealed new information regarding plant operators' hesitancy to open unfiltered DTVs, the Board noted that PW failed to show any link between those alleged actions and the Pilgrim plant or its operators.⁴² In addition, as the Commission noted, "the full picture of what happened at Fukushima is still far from clear" and thus, requests that the NRC take action under NEPA because of the events at Fukushima are premature.⁴³ While PW vigorously disagrees with the Board's finding that the contentions were not timely raised, it puts forward no evidence or case law in support of its position.

⁴⁰ LBP-11-23 at 10-11.

⁴¹ *Id.* at 32-33.

⁴² *Id.* at 32, 34-35.

⁴³ Order Denying Suspension Petitions at 30.

Accordingly, PW failed to show that its contentions were timely and thus failed to meet the reopening requirement in 10 C.F.R. § 2.326(a)(1).⁴⁴

B. Reopening Standard, Significant Safety or Environmental Issue

The Board found that the Re-Criticality Contention failed to meet the reopening requirement that the contention raise a significant safety or environmental issue.⁴⁵ The Board observed that PW only speculates that additional cost-beneficial measures may be identified if the SAMA analysis is revised to incorporate re-criticality and long term releases of radionuclides.⁴⁶ Additionally, the Board noted that PW had not established a nexus between the events at Fukushima and the Pilgrim plant and had failed to show that the environmental impacts at Pilgrim will be changed in any way.⁴⁷ In further support, the Board explained that the same line of reasoning that supports the conclusion that the contention fails to raise an exceptionally grave issue also supports a determination that the contention does not raise a significant safety or environmental issue.⁴⁸

Similarly, the Board found the PW failed to show that the DTV contention addressed a significant safety or environmental issue.⁴⁹ The Board explained that it was relying on the Commission's decision in *Private Fuel Storage*: that the new information "paint a seriously different picture of the environmental landscape."⁵⁰ It approved Entergy's argument that PW's

⁴⁴ The reopening requirement at 10 C.F.R. § 2.326(a)(1) contains a provision that allows reopening on a contention that is not timely raised if the issue presents an exceptionally grave issue. The Board majority accurately characterized PW's claims regarding re-criticality, extended periods of release, and DTV failure as speculative and unsupported and determined that they did not present exceptionally grave issues. In its petition, PW did not challenge the Board's determination on that point.

⁴⁵ LBP-11-23 at 15-17.

⁴⁶ *Id.*

⁴⁷ *Id.* at 15-16.

⁴⁸ *Id.* at 16-17.

⁴⁹ *Id.* at 32-34.

⁵⁰ *Id.* at 33 n. 153; *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-06-

DTV contention was speculative because it rested on claims that incorporation of the phenomena PW championed “might” result in additional mitigation measures qualifying as cost-beneficial.⁵¹ In addition, the Board approved the Staff’s argument that the contention did not raise a significant environmental issue because the issue goes to the SAMA analysis, which is an analysis that is aimed at reducing risk at “a plant that has no identified safety vulnerabilities” and where the issue has been thoroughly examined and is presently being re-examined for safety enhancements, by the NRC Task Force on Fukushima.⁵² Thus, the Board found that the DTV contention failed to raise a significant safety or environmental issue.

PW counters that, because the SAMA analysis is intended to determine which safety enhancement might be cost-effective, it raises a significant safety issue.⁵³ But the fact that safety enhancements are at issue in the SAMA analysis does not in and of itself mean that there is a significant safety issue, only that there is a potential safety enhancement for consideration, review and possibly implementation. As the Staff explained, the SAMA analysis is redundant of previous plant examinations for vulnerabilities and, as such, does not raise a significant issue, particularly where the plant “has no identified safety vulnerabilities.”⁵⁴

PW dismisses the notion that “continuing criticality” is not significant as “nonsense” and scoffs at the idea that containment failure associated with a failure of the DTV is not significant.⁵⁵ But the issue is not whether an accident involving continuing criticality is significant

03, 63 NRC 19, 28 (2006) (internal quotation marks deleted).

⁵¹ LBP-11-23 at 33 n.152; Entergy’s Answer Opposing Pilgrim Watch’s Request for Hearing on a New Contention Regarding Inadequacy of Environmental Report, Post-Fukushima, June 27, 2011, at 17-19 (ADAMS Accession No. ML11781377).

⁵² LBP-11-23 at 33; NRC Staff’s Answer in Opposition to Pilgrim Watch’s Request for Hearing on a New Contention Regarding Inadequacy of Environmental Report, Post-Fukushima, June 27, 2011 (“Staff DTV Answer”) at 12 (ADAMS Accession No. ML111780781).

⁵³ PW Petition at 3.

⁵⁴ Staff DTV Answer at 11-13.

⁵⁵ PW Petition at 12, 17.

or whether containment failure is significant. The proper question, as the Board recognized, is whether incorporation of the proffered material will change the SAMA results in a significant way.⁵⁶ In the absence of a supporting affidavit from an affiant who is qualified as an expert in the field, the Board had no basis for finding that re-criticality and prolonged releases would have changed the SAMA analysis in any way, much less in a significant way. With respect to the DTV contention, the Board properly found that the DTV affiant failed to provide any technical support for the proposition that incorporation of the DTV issue would result in a change in the SAMA analysis.⁵⁷ Accordingly, PW failed to show that its contentions raised significant safety or environmental issues and thus failed to meet the reopening requirement in 10 C.F.R. § 2.326(a)(2).

C. Reopening Standard, Required Affidavit on the Reopening Requirements

The regulation governing reopening in 10 C.F.R. § 2.326(b) requires that a motion for reopening be accompanied by affidavits setting forth the factual and/or technical bases for the movant's claim that it met the reopening requirements. The Board noted that neither affiant who PW proffered on the contentions addressed the reopening requirements. Both affiants merely stated that they had reviewed PW's contentions and supported the statements made in the contentions. Even if PW's affidavits could be read as adopting every statement in the pleadings, those affidavits still did not address all of the reopening requirements. This is because PW's pleadings themselves did not fully address the reopening requirements.⁵⁸ The pleadings did not fully address the reopening requirements because PW insisted that reopening was inapplicable.

Moreover, the Board properly determined that PW had not qualified its re-criticality

⁵⁶ LBP-11-23 at 14-17.

⁵⁷ *Id.* at 34.

⁵⁸ In its Request for Hearing on the DTV Contention, PW argued that it had shown that a materially different result would have been likely had the new information been considered in the first instance and asserted that it was making this argument to satisfy this prong of the reopening requirements. DTV Request for Hearing at 29 n.26. However, as discussed below, PW's discussion consisted of conclusory, unsupported statements, which fail to meet the reopening requirements.

affiant as an expert⁵⁹ and that the GLG Research article (for which no author was identified) could not be counted as expert support for the Re-Criticality Contention.⁶⁰ In addition, the Board found that the DTV affiant provided no technical support for the contention, failed to establish a genuine dispute on a material issue of fact, and failed to demonstrate the likelihood of a materially different result.⁶¹

While PW and Judge Young, in her partial dissent,⁶² assert that there may be some contradiction and confusion in the interplay between 10 C.F.R. §§ 2.710 and 2.1205 as to whether an affidavit is required in an answer to a motion for summary disposition,⁶³ there is no confusion in the reopening criteria in 10 C.F.R. § 2.326(b). Section 2.326(b) states that an affidavit “must” be filed and it is clear what that affidavit should cover: “the factual and/or technical bases for the movant’s claim” that the motion is timely or addresses an exceptionally grave issue, that the motion addresses a significant safety or environmental issue, and that it demonstrates that a materially different result would have been likely.

D. Reopening Standard, Showing of Likelihood of Materially Different Result

Pursuant to the third reopening requirement, an intervenor must show that a materially different result would have been likely had the evidence it proffers been considered in the first

⁵⁹ LBP-11-23 at 17-18; see *Progress Energy Florida, Inc.* (Combined License Application, Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-02, 71 NRC 27, 30 (2010) (affirming appropriateness of board’s evaluation of expert’s qualifications in determining whether contention was adequately supported by expert opinion).

⁶⁰ LBP-11-23 at 18; see *Louisiana Power & Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1330 n.16 (1983) (held undocumented newspaper article with no ostensible connection to facility at issue was insufficient to support reopening).

⁶¹ LBP-11-23 at 33-34.

⁶² PW Petition at 23-24; Memorandum and Order (Denying Pilgrim Watch’s Requests for Hearing on New Contentions Relating to Fukushima Accident), Administrative Judge Ann Marshall Young, Concurring in Part and Dissenting in Part (Sept. 8, 2011) (“Concurrence and Dissent”) at 54-55.

⁶³ A motion for, or answer to, summary disposition that addresses no issues of fact but only issues of law would not require a supporting affidavit. Accordingly, it is possible that an answer to a motion for summary disposition could be filed with or without an affidavit – with an affidavit to address any issues of fact and without an affidavit in the absence of any issue of fact.

instance. With respect to both contentions, the Board found that PW failed to meet this requirement because it put forward only unsupported assertions and that, in the absence of an affidavit from an expert that demonstrated a materially different result would obtain, the requirement had not been met.⁶⁴ In contrast, and for this limited purpose, the Staff and Entergy submitted affidavits by experts that demonstrated that no materially different result was likely to occur.⁶⁵ As the Commission held in *Oyster Creek*, bare assertions and claims without supporting technical detail do not demonstrate that a materially different result would have been likely and thus will not support reopening.⁶⁶

PW asserts it meets this reopening requirement because it is seeking a materially different result: “additional SAMAs and possibly not issuing a license until the problems at [Pilgrim] raised in the May and June contentions [have] been fixed.”⁶⁷ While these are, arguably, materially different results,⁶⁸ this is not the end of the inquiry. In addition to establishing materially different results, PW must show a likelihood that these materially different results would have occurred had the evidence it proffers now been considered in the first instance. And this is what PW has failed to do.

⁶⁴ LBP-11-23 at 17-18.

⁶⁵ 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 Contention, June 6, 2011, ¶ 17 at page 9 (ADAMS Accession No. ML111570502); Declaration of Dr. 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, ¶¶ 25 – 43 at pp 11-24 (ADAMS Accession No. ML111570508); 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 (ADAMS Accession No. ML11178A385).

⁶⁶ *Oyster Creek*, CLI-09-7, 69 NRC at 287.

⁶⁷ PW Petition at 19.

⁶⁸ The Staff does not agree that delaying issuance of the renewed license is a materially different result that may support reopening. PW did not argue this when it filed the DTV Contention. The concept -- not issuing the license until the issues raised by the contentions have been resolved -- only surfaced in Judge Young’s partial dissenting opinion and that opinion was issued after the DTV Contention and the associated pleadings were filed.

The affidavits PW submitted did not establish the likelihood of materially different results. Not only were the affiants not qualified to give expert opinions,⁶⁹ they failed to show how the new information would result in additional SAMAs being found to be cost beneficial. In its Re-Criticality Contention, PW did not explain how the SAMA analysis would have been different if the information PW proffered on re-criticality and the release period had been incorporated into it. Accordingly, PW failed to show that there was a likelihood that any additional cost beneficial SAMAs would have been identified. In its DTV Contention, PW claimed that offsite consequence from failure of the DTV would outweigh the cost of mitigation measures that reduced the risk of containment failure.⁷⁰ PW's affiant repeated this statement without providing any additional factual or technical support or any explanatory rationale.⁷¹ Accordingly, PW cannot be said to have addressed this reopening requirement in any substantive way and certainly not in a manner sufficient to meet its heavy burden for reopening the record.

PW argues that requiring it to show the likelihood of a materially different result would have the effect of holding PW to an incorrect and unduly burdensome legal standard.⁷² In support, PW cites *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989), for the proposition that the NRC must consider new and significant environmental information up until the time the proposed action is taken.⁷³ This is a misreading of *Marsh*. While the Supreme Court in *Marsh* stated that an agency must take a "hard look" at significant new information, the Court also recognized that "an agency need not supplement an EIS every time new information comes to light after the EIS is finalized." *Marsh*, 490 US at 373. As the Court observed, such a

⁶⁹ LBP-11-23 at 21, 31-32, 33.

⁷⁰ Pilgrim Watch Request for Hearing on a New Contention Regarding Inadequacy of Environmental Report, Post Fukushima at 32.

⁷¹ *Id.* at Appendix A (Affidavit of Arnold Gundersen), p. 33 (unnumbered).

⁷² PW Petition at 6.

⁷³ *Id.*

requirement “would render agency decision making intractable, always awaiting updated information only to find the new information outdated by the time a decision is made.” *Id.* Thus, *Marsh* may not be used as PW would have it used, to render agency decision-making subject to every natural event that occurs in the world on the speculation that those events will occur in identical fashion at a power plant in the United States.

PW also asserts that it is the NRC that must take a hard look at the lessons learned from Fukushima, not an intervenor, such as itself.⁷⁴ This is exactly what the NRC is doing. As the Commission explained in its Order Denying Suspension, when and if new information comes to light that should be considered in the preparation of NEPA documents, the NRC will consider it and will do so in accordance with the regulations at 10 C.F.R. § 51.72.⁷⁵ As the Commission explained, such “information must be both new and significant and it must bear on the proposed action or its impacts .and must present a seriously different picture of the environmental impact of the proposed project from what was previously envisioned.”⁷⁶

III. The Board Properly Found that PWs Contentions Did Not Meet the Requirements of 10 C.F.R. §§ 2.309(c) and 2.309(f)(2)

Where, as here, the contentions raise issues not previously in controversy, the contentions must also meet the requirements of 10 C.F.R. § 2.309(c) for the admission of nontimely contentions. Good cause for the failure to file on time is the most important of the factors to be weighed. In addition, the contentions must meet the requirements for the admissibility of late-filed contentions in 10 C.F.R. § 2.309(f)(2), i.e., the contentions must be based on information that was not previously available and materially different than information previously available and the contentions must have been submitted in a timely fashion. As

⁷⁴ *Id.* at 6.

⁷⁵ Order Denying Suspension Petitions at 30-31.

⁷⁶ *Id.* at 31, quoting *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-99-22, 50 NRC 3, 14 (1999) (internal quotations omitted).

demonstrated above, the Board properly found that the contentions were not based on new information.⁷⁷ Consequently, PW has not established good cause for the failure to file on time or that the contentions were not based on previously unavailable information. The Board's rejection of the contentions for failure to meet the requirement for the filing of nontimely and late-filed contentions was correct and should, therefore, be upheld.

IV. The Board's Finding that PW's Re-Criticality Contention Failed to Meet the Admissibility Requirements of 10 C.F.R. § 2.309(f)(1) Is Well-Founded

In addition to denying PW's Re-Criticality Contention for failing to meet the re-opening standard and timeliness, the Board properly denied it for failing to satisfy the requirements of 10 C.F.R. § 2.309(f)(1).⁷⁸ Specifically, the Board determined that the Re-Criticality Contention failed to satisfy the requirements of § 2.309(f)(1)(iii) that it raise an issue within the scope of the proceeding, § 2.309(f)(1)(iv) that it raise an issue material to the decision to be made, § 2.309(f)(1)(v) that it contain a concise statement of facts, expert opinion, and documents to be relied on, and § 2.309(f)(1)(vi) that it present a genuine dispute on a material issue of law or fact.⁷⁹ PW failed to show that the Board's ruling was erroneous or inconsistent with existing law.

PW asserts that it raised a contention within the scope of this proceeding because the Re-Criticality Contention "addresses a defect in the SAMA, a Category 2 issue" and that since Category 2 issues are subject to adjudication in license renewal proceedings, it raised a contention that is within scope.⁸⁰ However, PW goes on to assert that its proposed changes to the SAMA analysis would "justify requiring Entergy to add mitigation [measures]..."⁸¹ The Board agreed with Entergy that to require mitigation measures unrelated to age-related degradation

⁷⁷ See *supra* at 11-12.

⁷⁸ LBP-11-23 at 23.

⁷⁹ *Id.*

⁸⁰ PW Petition at 9.

⁸¹ *Id.*

would exceed the limited jurisdiction of license renewal proceeding.⁸² While indeed Category 2 issues are in scope, PW's contention goes further to require a result beyond the scope of this proceeding and the Board, consistent with Commission precedent, refused to admit the contention.⁸³

PW also claims that the Board erred when it found that PW had failed to raise a material issue. PW argued that the Re-Criticality contention did raise a material issue because the contention challenged "a deficiency or error in application [that has] "some independent health and safety significance."⁸⁴ PW asserts, without support, that "changes to the SAMA analysis to account for prolonged releases will significantly increase offsite costs and justify requiring Entergy to add mitigation to reduce risk, and...significantly increase public safety during license renewal."⁸⁵ The Board properly found that these conclusory and unsupported statements do not suffice to establish a material issue. The Board, following Commission guidance in this case,⁸⁶ determined that PW "failed to establish that the asserted deficiencies would, if accounted for as requested by [PW], alter the result of the SAMA analysis."⁸⁷ Accordingly, the Board denied the contention for failure to show a genuine dispute on a material issue of fact or law.⁸⁸

With respect to the Board's finding that PW failed to identify any genuine dispute of law or fact, PW asserts that "the [Pilgrim] Environmental Report is inadequate post-Fukushima Daiichi because Entergy's SAMA analysis ignores new and significant lessons learned regarding

⁸² LBP-11-23 at 23; Entergy's Answer Opposing Pilgrim Watch Request for Hearing on Post-Fukushima SAMA Contention, June 6, 2011, at 27-28 (ADAMS Accession No. ML111570509).

⁸³ LBP-11-23 at 23; *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3,7 (2001).

⁸⁴ PW Petition at 9 (internal quotation marks omitted).

⁸⁵ *Id.* at 9 – 10.

⁸⁶ *Pilgrim*, CLI-10-11, 71 NRC at 317.

⁸⁷ LBP-11-23 at 22.

⁸⁸ *Id.*

the possible off-site radiological and economic consequences in a severe accident' and that "a longer [radioactive] release can cause offsite consequences that will affect cost-benefit analyses and that [t]he Fukushima crisis...shows that releases can extend into many days, weeks, and months."⁸⁹ The Board, in addressing this issue, stated that "[PW] fails to show that [these lessons learned] would change the outcome of the SAMA cost-benefit balancing at issue"⁹⁰

The Board accurately described PW's contention as vague and speculative and found that it was insufficient to establish the existence of a genuine issue in dispute.⁹¹ Thus, the Board's determination that PW's Re-Criticality Contention failed to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iii)–(vi) was well founded and PW's Petition should be denied.⁹²

V. The Board's Finding that PW's DTV Contention Failed to Meet the Admissibility Requirements of 10 C.F.R. § 2.309(f)(1) Is Well-Founded

In its decision, the Board explains, in a section by section analysis, why the DTV Contention failed to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iii)–(vi).⁹³ PW's Petition does not challenge any of these conclusions.⁹⁴ Because PW, in its petition, has not challenged the Board's finding that the DTV Contention failed to satisfy the contention admissibility requirements, the Board's determination that the DTV contention fails to meet the requirements of 10 C.F.R. § 2.309(f)(1) should be upheld.

⁸⁹ PW Petition at 9 (internal quotation marks omitted).

⁹⁰ LBP-11-23 at 22.

⁹¹ *Id.*

⁹² PW did not challenge the Board's finding that PW failed to provide "a concise statement of alleged fact or expert opinion".

⁹³ LBP-11-23 at 36 – 38.

⁹⁴ See PW Petition at 12 – 23. PW specifically directs the Commission to examine "whether the Board erred (i) in requiring reopening in the first place[,] (ii) in finding that PW's June 1 Contention [(DTV Contention)] did *in fact* meet the requirements of 10 C.F.R. § 2.326, and (iii) in failing to understand that a NEPA review is both justified and required prior to licensing." PW Petition at 13. PW only references the general admissibility criteria at 10 C.F.R. § 2.309 once and only discusses it in a conclusory and cursory fashion, asserting on page 16 of the petition, that "[t]he majority's argument that the May and June Contentions were 'untimely' and failed to satisfy 2.326 or 3.209 (sic) approaches the absurd." PW Petition at 16.

VI. PWs Request That the Staff Review the Issues Raised in the Contentions Prior to Deciding the License Renewal Application Should Be Denied

PW asked that the Commission order the Staff to take a “hard look” at the issues raised in its contentions and delay a final decision on Pilgrim license renewal until those issues are resolved.⁹⁵ PW based that request on a recommendation by Judge Young in her concurring and dissenting opinion.⁹⁶ The Staff respectfully submits that the Commission has effectively rejected this approach. Shortly after the Fukushima accident occurred, PW asked the Commission to suspend license renewal proceedings pending a review of the Fukushima accident and its implications for American nuclear power plants.⁹⁷ The Commission denied the petition, explaining that

we find no imminent risk to public health and safety if we allow our regulatory processes to continue. Instead of finding obstacles to fair and efficient decision-making, we see benefits from allowing our processes to continue so that issues unrelated to the Task Force’s review can be resolved. We have well-established processes for imposing any new requirements necessary to protect public health and safety and the common defense and security. Moving forward with our decisions and proceedings will have no effect on the NRC’s ability to implement necessary rule or policy changes that might come out of our review of the Fukushima Daiichi events.⁹⁸

Consistent with the Commission’s denial of the suspension petitions, the Commission should also deny PWs request that the issues it raised in the Re-Criticality Contention and the DTV Contention be reviewed by the Staff before a final decision is made on the issuance of a renewed license for Pilgrim.

⁹⁵ PW Petition at 24-25.

⁹⁶ Concurrence and Dissent at 54-55.

⁹⁷ Emergency Petition to Suspend All Pending Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident, filed April 14 to 18, 2011, at 11 (ADAMS Accession No. ML111040587).

⁹⁸ Order Denying Suspension Petitions at 29.

CONCLUSION

As demonstrated above, the Atomic Safety and Licensing Board correctly applied the reopening standard to Pilgrim Watch's new Post-Fukushima contentions regarding re-criticality and the direct torus vent and found that the contentions failed to meet the requirements for reopening. In addition, the Board found that the contentions failed to meet the requirements for nontimely and late-filed contentions and that they failed to meet the general admissibility requirements applicable to all contentions in NRC proceedings. The Board's majority decision was correct, consistent with precedent and not in conflict with existing law. Accordingly, Pilgrim Watch's petition for review should be denied. Furthermore, Pilgrim Watch's request that the license renewal be delayed pending review of the issues raised in its contentions should be denied consistent with the Commission's prior decision denying Pilgrim Watch's petition for suspension of the license renewal proceeding.

Respectfully submitted,

/Electronically signed/

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Dated at Rockville, Maryland
This 3rd day of October, 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S ANSWER TO PILGRIM WATCH'S PETITION FOR REVIEW OF MEMORANDUM AND ORDER (DENYING PILGRIM WATCH'S REQUESTS FOR HEARING ON NEW CONTENTIONS RELATING TO FUKUSHIMA ACCIDENT)" have been served upon the following by the Electronic Information Exchange this 3rd day of October, 2011:

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Dated at Rockville, Maryland
This 3rd day of October, 2011