UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S ANSWER TO THE COMMONWEALTH OF MASSACHUSETTS' BRIEF IN SUPPORT OF APPEAL FROM LBP-11-35

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December 19, 2011

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(b), the staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby answers in opposition to the Commonwealth of Massachusetts' ("Commonwealth") Brief In Support of Appeal From LBP-11-35, December 8, 2011 ("Commonwealth's Brief"). After an evidentiary hearing, several prehearing conferences and oral arguments, and the closing of the record (which was followed by Commission review and remand), a process that has taken over five and a half years, the Commonwealth has now filed a new contention asserting that the Pilgrim Severe Accident Mitigation Alternatives ("SAMA") analysis was flawed for failing to consider information related to the Three Mile Island, Chernobyl, and Fukushima Dai-ichi events. In its brief, the Commonwealth asserts that the Atomic Safety and Licensing Board ("Board") erred when it applied existing NRC regulations governing contention admissibility including the re-opening standard, 10 C.F.R. § 2.326(a), the late-filed contention standard, 10 C.F.R. § 2.309(c), and the general contention admissibility standards, 10 C.F.R. § 2.309(f)(1), to its contention. The Commonwealth contends that the appropriate standard for determining contention admissibility should be the standard set forth in *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989). The Commonwealth also

alleges that the Board's Order is refuted by the record. As demonstrated herein, the Board did not err when it applied the contention admissibility requirements set forth in the regulations. Furthermore, the Board's legal determination that the Commonwealth's contention did not meet the requirements for an admissible contention is well supported by precedent, existing case law, and the record. Accordingly, the Commonwealth's request for review 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] On May 26, 2006, the Commonwealth filed a petition to intervene and a contention asserting that the Applicant had failed to address new and significant information regarding the environmental impacts of spent fuel pool accidents.[2] Pilgrim Watch also filed a petition to intervene in this matter on May 25, 2006, submitting five contentions for consideration.[3]

The Board rejected the Commonwealth's contention.[4] The Board noted that the Commission had already addressed the environmental impacts of spent fuel pool accidents in a generic manner by rule and that absent a waiver of that rule, the issue cannot be addressed in a license renewal proceeding.[5] The Commonwealth petitioned the Commission to review the

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

[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, 288 (2006)

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

Board's rejection of its spent fuel pool contention.[6] On January 22, 2007, the Commission affirmed the Board's rejection of the Commonwealth's contention and denied a subsequent motion for reconsideration.[7]

The Board, however, admitted two of Pilgrim Watch's proposed contentions – Contention 1, challenging Entergy's aging management program for buried piping and tanks, and Contention 3, challenging Entergy's SAMA analysis.[8] On October 30, 2007, a Board majority granted Entergy's motion for summary disposition of Contention 3.[9] 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.[10]

The Board issued an initial decision disposing of Contention 1 in favor of the Applicant on October 30, 2008.[11] Pilgrim Watch filed a petition for review of the Board's initial decision on Contention 1, the summary disposition of Contention 3 and other interlocutory decisions.[12] The

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Station), CLI-07-03, 65 NRC 13 (2007); motion for reconsideration of CLI-07-03 denied in CLI-07-13, 65 NRC 211 (2007).

[6] Massachusetts Attorney General's Brief on Appeal of LBP-06-23 (Oct. 31, 2006) (ADAMS Accession No. ML063120343).

[7] Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station) and Entergy Nuclear Generation Co and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-07-03, 65 NRC 13, motion for reconsideration denied, CLI-07-13, 65 NRC 211 (2007).

[8] *Pilgrim,* LBP-06-23, 64 NRC at 348-49.

[9] *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-07-13, 66 NRC 131, 154 (2007).

[10] 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).

[11] *Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-08-22, 68 NRC 590, 610 (2008).

12 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).

Commission affirmed the Board's initial decision on Contention 1 and remanded in part Contention 3 to Board for additional proceedings.[13]

On July 19, 2011, the Board issued a partial initial decision finding in favor of the Applicant on the remanded Contention 3.[14] The Board's decision on remanded Contention 3 is currently pending before the Commission on a petition for review filed by Pilgrim Watch along with other additional petitions filed by Pilgrim Watch.[15]

Subsequent to the accident at Fukushima on May 2, 2011, the Commonwealth filed a motion to hold this proceeding in abeyance[16] and asked the Commission to exercise its supervisory jurisdiction over license renewal proceedings to ensure that the Pilgrim Board considered what the Commonwealth claimed was new and significant information from the Fukushima event regarding spent fuel pool accidents and risks.[17] The Commission denied the

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[13] *Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-14, 71 NRC 449, 477 (2010) (affirming the Board's initial decision on Contention 1); . *Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 317 (2010) (reversing and remanding in part the Board's summary disposition of Contention 3).

[14] *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.) (ADAMS Accession No. ML11200A224).

[15] 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); Pilgrim Watch Petition for Review of Memo and Order (Denying Pilgrim Watch's Requests for Hearing on Certain New Contentions) (Aug. 26, 2011) (ADAMS Accession No. ML11238A118); Pilgrim Watch Petition for Review of Memo and Order (Denying Pilgrim Watch's Requests for Hearing on New Contentions Relating to Fukushima Accident) (Sept. 8, 2011) (ADAMS Accession No. ML11266A103); Pilgrim Watch Petition for Review of Memo and Order (Denying Commonwealth of Massachusetts' Request for Stay, Motion for Waiver, and Request for Hearing on a New Contention Relating to the Fukushima Accident) (Nov. 28, 2011) (ADAMS Accession No. ML11342A223).

[16] Commonwealth of Massachusetts Motion to Hold Licensing Decision in Abeyance Pending Commission Decision Whether to Suspend the Pilgrim Proceeding to Review the Lessons of the Fukushima Accident (May 2, 2011) ("Stay Request") (ADAMS Accession No. ML111220326).

[17] Commonwealth of Massachusetts Response to Commission Order Regarding Lessons Learned from the Fukushima Daiichi Nuclear Power Station Accident, Joinder in Petition to Suspend the License Renewal Proceeding for the Pilgrim Nuclear Power Plant, and Request for Additional Relief (May 2, 2011) (ADAMS Accession No. ML111220307).

Commonwealth's motion to hold the proceeding in abeyance on the grounds that it failed to satisfy the three part test set in *Private Fuel Storage*.[18] The Commission found that the Commonwealth had shown no immediate threat to public health and safety and that it had failed to show that continuing with the proceeding would prove an obstacle to fair and efficient decision making or that it would prevent the implementation of any pertinent rule or policy change.[19]

On June 2, 2011, the Commonwealth filed a motion to admit a new contention, accompanied by a request for waiver, challenging the site-specific Pilgrim SAMA analysis based on information related to the Fukushima accident.[20] This motion to admit a new contention now serves as the basis for this appeal to the Commission. The Commonwealth's new contention asserts:

> [T]he environmental impact analysis and the SAMA analysis in Supp. 29 to the Generic Environmental Impact Statement (GEIS) for License Renewal are inadequate to satisfy NEPA because they fail to address new and significant information revealed by the Fukushima accident that is likely to affect the outcome of those analyses. The new and significant information shows that both core-melt accidents and spent fuel pool accidents are significantly more likely than estimated or assumed in Supp. 29 of the License Renewal GEIS or the SAMA analysis for the Pilgrim NPP. As a result, the environmental impacts of relicensing the Pilgrim NPP have been underestimated. In addition, the SAMA analysis is deficient because it ignores or rejects mitigative measures that may now prove to be cost-effective in light of this new understanding of the risks of relicensing Pilgrim.[21]

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[18] *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 36) ("Order Denying Suspension Petitions").

[19] *Id.* at 19-20, 36.

[20] Commonwealth of Massachusetts' Motion to Admit Contention and, If Necessary, to Reopen Record Regarding New and Significant Information Revealed by Fukushima Accident (June 2, 2011) ("Motion to Admit") (ADAMS Accession No. ML111530340); Commonwealth of Massachusetts' Petition for Waiver of 10 C.F.R. Part 51 Subpart A, Appendix B or, in the Alternative, Petition for Rulemaking to Rescind Regulations Excluding Consideration of Spent Fuel Storage Impacts from License Renewal Environmental Review (June 2, 2011) ("Waiver Petition") (ADAMS Accession No. ML111530342).

[21] Commonwealth of Massachusetts' Contention Regarding New and Significant Information

On August 11, 2011, the Commonwealth filed a motion to supplement the bases of its proposed contention.[22] On November 28, 2011, the Board Majority ruled on the Commonwealth's Motion, denying the Stay Request, Waiver Request, and Motion to Admit, while granting the leave to supplement.[23] The Commonwealth filed this appeal of the Board's denial of its motions and requests on December 8, 2011.[24]

ARGUMENT

I. Legal Standard for Interlocutory Appeal of Licensing Board Order Denying a Petition to Intervene or Request for a Hearing

Pursuant to 10 C.F.R. § 2.311(b), an order denying a petition to intervene and/or request for hearing may be appealed by the petitioner on the question as to whether the request should have been granted.

A. The Standard for Reopening the Record

In deciding whether to admit the proffered contention, the Board applied the regulatory requirements for the admission of contentions on a closed record, i.e., the Board applied the reopening standard to the Commonwealth's contention.[25] The Board was correct in doing so because of the procedural posture of the case. The record had closed in June 2008 and the

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Revealed by the Fukushima Radiological Accident (June 2, 2011) (ADAMS Accession No. ML111530343) at 5-6.

[22] Commonwealth of Massachusetts Motion to Supplement Bases to Commonwealth to Commonwealth Contention to Address NRC Task Force Report on Lessons Learned from the Radiological Accident at Fukushima (Aug. 11, 2011) (ADAMS Accession No. ML11223A284).

[23] *Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-11-35, 74 NRC ___ (Nov. 28, 2011) (slip op. at 70) (ADAMS Accession No. ML11332A152). Judge Young filed a separate opinion concurring in the results only. *Id.* at 72. For ease of reading, the Board Majority will be referred to as "the Board," the Board Majority opinion will be referred to as the "Board Order" or the "Board's decision," and Judge Young's opinion concurring in the result only will be referred to as "Judge Young's opinion."

[24] Commonwealth of Massachusetts' Notice of Appeal of LBP-11-35 and Brief in Support of Appeal (December 8, 2011) (ADAMS Accession No. ML11342A168) ("Commonwealth's Brief").

[25] LBP-11-35 at 17.

Commonwealth's contention, which was filed over three years later, was subject to the requirements for reopening. 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 re-open 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
>
> (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 section 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), LBP-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." *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973).

B. The Standard for Timely, Untimely, and Late Filed Contentions

While the standard for admissibility of a contention associated with a motion to reopen is high, see *Private Fuel Storage*, CLI-05-12, 61 NRC at 350, 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. Finally, the contention must 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 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) (alterations in original)).

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

II. The Regulations on Contention Admissibility Are Applicable to the Commonwealth's Contention

The Commonwealth alleges that its new contention should not have been held to the requirements of the regulations governing administrative hearing rights under the Atomic Energy Act of 1954 ("AEA"), as amended, and argues that Board failed to follow the controlling legal precedent in *Marsh,*[26] by failing to consider new and significant information. The Commonwealth's claim fails for several reasons. First, the NRC's regulations applying the reopening standard to contentions raised only after the record has closed have been affirmed on review by the pertinent federal court. *New Jersey Environmental Federation, v. NRC,* 645 F.3d 220, 232-33 (3d Cir. 2011). The Commonwealth's claims also fail because (1) the Board properly applied the contention admissibility requirements, (2) it did consider the allegedly new and significant information proffered by the Commonwealth; and (3) its determination that the

[26] Commonwealth's Brief at 14. The Staff addresses the merits of Massachusetts complaints regarding the application of the NRC's regulations to Massachusetts's contention in Section V., *infra.*

information did not meet the regulatory requirements for admissibility is well-supported by the record.

Recently, the Third Circuit examined whether the NRC can apply its reopening standard to contentions asserted after the closing of the record. The Court stated that "[t]o accept [intervenor's] argument that the motion to reopen standard may never be applied in situations where a petitioner seeks to add previously unlitigated material would effectively render the regulation [for re-opening a closed record] meaningless." *New Jersey Environmental Federation*, 645 F.3d at 233. The Court found "no basis to question the NRC's application of its regulations here." *Id.* Like the issue presented to the Third Circuit, the Commonwealth sought to raise a contention on unlitigated material after the record had been closed. As the Third Circuit affirmed in *New Jersey Environmental Federation*, the Board, here, applied the appropriate standards to determine that the Commonwealth failed to raise a contention that would satisfy the NRC's re-opening standards.

First, intervenors have no hearing rights under NEPA. "[W]hile NEPA clearly mandates that an agency fully consider environmental issues, it does not itself provide for a hearing on those issues." *Kelley v. Selin*, 42 F.3d 1501, 1512 (6th Cir. 1995) *quoting Union of Concerned Scientists v. U.S. Nuclear Regulatory Commission*, 920 F.2d 50, at 56 (D.C. Cir. 1990). The hearing rights the Commonwealth enjoys here are rights that stem from the Section 189a of the AEA, codified at 42 U.S.C. § 2239(b). And "NEPA does not alter the procedures agencies may employ in conducting public hearings." *Id.* The procedural regulations that apply to those hearing rights are in 10 C.F.R. Part 2; specifically, the criteria governing reopening the record to admit new contentions and the test for admissibility of timely filed and late-filed contentions in 10 C.F.R. §§ 2.326 and 2.309. The Board followed those regulatory requirements in assessing the Commonwealth's proposed contention and, based on the criteria in those rules, rejected the

Commonwealth's contention.[27] Pursuant to those regulations, the Board examined whether the Commonwealth had raised a new issue in a timely fashion,[28] whether the issue raised a significant environmental issue,[29] and whether the Commonwealth had demonstrated that a materially different result would have been likely had the information been considered.[30]

The Board found that the information was not new and not significant and that the Commonwealth had failed to demonstrate a materially different result would have been likely. The Board's decision was well-supported by the record and legal analysis. As discussed below and contrary to the Commonwealth's claims, there was no attempt by the Board to create any special proceedings or to use the procedural regulations to make it more difficult for the Commonwealth to obtain a hearing on its contention. The proper application of the regulations by the Board simply precludes admission of the Commonwealth's contention.

III. The Board Properly Applied the Regulations for Contention Admissibility

The Commonwealth's claim that it has met its burden of raising new and significant information[31] is premised on a fundamental misunderstanding of the regulations governing admissibility and what was required to admit a contention challenging the Severe Accident Mitigation Alternatives ("SAMA") analysis.[32] The Board did not simply apply the re-opening standard as seems to be the Commonwealth's central complaint.[33] As it was required to do, the Board also evaluated the contention under the late filed contention standard found in 10 C.F.R.

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[27] LBP-11-35 at 2, 49-70.

[28] LBP-11-35 at 50-53.

[29] LBP-11-35 at 55-57.

[30] LBP-11-35 at 58-59.

[31] Commonwealth's Brief at 16.

[32] The Commonwealth's assertions that it presented "new and significant information" and its misunderstanding of SAMA analysis are discussed in Section IV, *infra.*

[33] LBP-11-35 at 65-70.

§ 2.309(c) and the general contention admissibility requirements applicable to all contentions in 10 C.F.R. § 2.309(f).[34] Much of the Board's analysis centers on whether the Commonwealth raised and adequately supported an issue that is within the scope of the proceeding, that has a basis in law or fact, and raises a material issue of genuine dispute with application.[35]

The Board found that the majority of the issues raised by the Commonwealth and its witness, Dr. Gordon Thompson, were outside the scope of the proceeding — (1) challenges regarding assumptions for operator actions, (2) Emergency Damage Mitigation Guidelines ("EDMGs"), (3) secrecy of mitigation measures, and (4) hydrogen control measures — or were already dismissed by the Board and Commission— (1) spent fuel pools (dismissed previously) and (2) previous decisions regarding the Commonwealth's spent fuel pool claims.[36]

The Board then turned its attention to one remaining issue advanced by the Commonwealth's expert.[37] The Commonwealth claimed that core damage frequencies ("CDF") for all light water reactors were an order of magnitude too low based on the direct evidence from accidents at Three Mile Island, Chernobyl, and Fukushima Dai-ichi.[38] The Board determined that the Commonwealth's expert engaged in "bare speculation."[39] The Commonwealth urged that the contention be admitted because it believed that if its assertions regarding Fukushima were incorporated, more SAMAs might have been considered.[40] The Board found that the

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[34] LBP-11-35 at 65-70.

[35] LBP-11-35 at 65-70.

[36] LBP-11-35 at 65.

[37] LBP-11-35 at 65.

[38] LBP-11-35 at 65.

[39] LBP-11-35 at 59.

[40] LBP-11-35 at 65.

Commonwealth's assertions were not supported by its witness' speculation.[41] The Board's Order specifically states that the Commonwealth failed to identify any specific changes that would be made to the SAMA analysis determinations or how Fukushima would affect any specific SAMA analysis for accidents at Pilgrim.[42] The Board pointed out that Commonwealth's contention failed to address how the Pilgrim SAMA analysis, which specifically examines station blackout ("SBO") and appropriate mitigation measures, was affected or would result in different conclusions based the events at Fukushima Dai-ichi.[43] The Commonwealth failed to raise a contention within the scope of this proceeding, failed to support its contention with other than bare speculation, and failed to raise a genuine or material issue with respect to the Pilgrim's license renewal application. Accordingly, the Board was correct when it denied admission of the contention.

IV. The Board Considered the Information the Commonwealth Proffered Regarding the NRC Task Force Report and the Commonwealth's Expert's Opinion

With respect to the NRC Task Force Report, the Commonwealth avers that Pilgrim's SAMA analysis is flawed because the Task Force made recommendations regarding potential changes that might impact how the NRC evaluates the safety of nuclear power plants. The Commonwealth also asserts that the Board's finding that Fukushima is of "no significance [to the Pilgrim SAMA analysis] is contrary to the NRC's ... Task Force and ... regulations."[44] Finally, the Commonwealth asserts that the Board "arbitrarily rejects the position of the Commonwealth's expert ...."[45] But, these generalized challenges are not supported by the

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[41] LBP-11-35 at 59.

[42] LBP-11-35 at 59.

[43] LBP-11-35 at 59.

[44] Commonwealth's Brief at 19.

[45] *Id.*

record and the Board's careful analysis. The Board's Order clearly explains the basis for its analysis and the support in the record for its decision. The Board examined the Commonwealth's contention and its supporting facts and found them lacking. The Board determined that the Commonwealth presented no evidence linking the specific events at Fukushima Dai-ichi to the Pilgrim SAMA analysis.[46] Accordingly, the Board found that the Commonwealth had failed to raise a material issue of genuine dispute with the Pilgrim license renewal application.[47] Additionally, the Board found that the Commonwealth had attempted to raise issues previously rejected by the Board and Commission, or issues outside the scope of the proceeding and immaterial to Pilgrim's SAMA analysis.[48]

The Board then turned to Dr. Thompson's single in-scope assertion that direct experience shows that the CDF used by Pilgrim in its SAMA analysis is an order of magnitude too low. The Board understood that the Commonwealth disagreed with the conclusions of Pilgrim's SAMA analysis. The Board determined that the Commonwealth and its expert failed to raise a dispute with any specific part of Pilgrim's SAMA analysis related to the accident specific CDFs or additional accident scenarios not already considered. The Board noted that the Pilgrim SAMA analysis had already accounted for SBO type impacts and analyzed potential methods to mitigate any impact, a point that the Commonwealth had not disputed.[49]

Finally, the Board found that this argument regarding direct experience raised by Dr. Thompson in his report should have been raised at the outset of this proceeding.[50] The Board found that if the direct experience calculation of CDF asserted by Dr. Thompson was true now, it

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[46] LBP-11-35 at 50.

[47] *See, e.g.*, LBP-11-35 at 50, 52, 59, 65.

[48] LBP-11-35 at 50.

[49] LBP-11-35 at 52.

[50] LBP-11-35 at 53.

was also true prior to the accident at Fukushima.[51] The Board found that the Commonwealth's theory regarding estimating CDF would have resulted in a CDF more than five times higher than CDFs utilized in the Pilgrim SAMA analysis at the outset of this proceeding.[52] Thus, the Commonwealth's contention was untimely and properly denied.

V. The Board Correctly Applied NEPA's Standards for Considering New and Significant Information

The Commonwealth's claim that the NRC has failed to consider new and significant information is unfounded. First, the standard the Board applied encompasses a hard look at the proffered new and significant information. Second, the Board's extensive and well-supported opinion shows that it applied that standard and took a hard look at the Commonwealth's claims and found that they were not based on new and significant information.

The standard that the Commonwealth asserts should have been used – whether new and significant information has been put forward – is central to the standard codified in the regulations governing reopening, 10 C.F.R. 2.326(a)(1) and (2). The Commission's regulations governing reopening provide:

> (a) A motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied:
>
> (1) The motion must be timely. However, 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 or environmental issue; and
>
> (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.

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[51] LBP-11-35 at 53.

[52] Id.

Thus, the Commonwealth's assertions regarding the application of the regulatory standards to their contention are misplaced. *New Jersey Environmental Federation*, 645 F.3d at 232-33.

Contrary to the Commonwealth' statements, *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989), supports the Board's action. *Marsh* stands for the proposition that where, as here, an agency has issued a final EIS, it need not take further action unless new information comes to light that is both new and significant. The Board, based on the record before it, found that the information that the Commonwealth proffered was not new and not significant. In *Marsh* the issuance of a supplement to a final environmental impact statement was at issue; here adding a contention to reopen a closed record is at issue. Both actions involve the end of agency inquiry. In order to re-start that inquiry, the basis for the request to re-start must be grounded in information that is of a quality sufficient to justify that result. Otherwise, as the *Marsh* court observed, agency decision making would be rendered "intractable" and the agency would "always be awaiting updated information only to find the new information outdated by the time a decision is made." *Id.* at 373. Per the Commission's procedural regulations, that information must be timely submitted and must address a significant safety or environmental issue and must be supported by a demonstration that a materially different result would be likely. 10 C.F.R. § 2.326(a).

Here, the Board found that the information was not new and significant and, on that basis, rejected the contention. While the Fukushima accident and the information regarding it are new, the Commonwealth's contention originates with information that is more than two decades old -- the accidents at Three Mile Island and Chernobyl. As discussed previously, the Board determined that utilizing direct experience from previous accidents at Three Mile Island and Chernobyl should have been raised at the outset of this proceeding and the additional information regarding core damage frequency resulting from Fukushima Dai-ichi did not present

a new issue.[53] If Three Mile Island, Chernobyl, and Fukushima Dai-ichi showed that the Pilgrim SAMA core damage frequency figures were too low, they were also too low based only Three Mile Island and Chernobyl.[54] In fact, the Chernobyl accident's radiological release is greater than that experienced by the Fukushima accident. Thus, the issue existed before the accident at Fukushima occurred and data from Fukushima cannot properly be used to rejuvenate it.

In addition, the Board found that the Commonwealth had not established any environmental impact that would or might arise from the failure to revise the SAMA analyses. Accordingly, the Board found that the Commonwealth had failed to show that the information it proffered was significant. Because the Commonwealth had failed to indicate "any particular positive environmental impact from any such implementation nor any specific negative environmental impact from failure to do so",[55] the Board ruled that the Commonwealth had failed to make the required showing of significance. Because the Board's determination was neither arbitrary nor capricious, but was instead supported by the record and the sound application of the Commission's procedural regulations, it should be affirmed.

The Commonwealth also complains that in coming to its conclusion, the Board engaged in a determination of the merits of the Commonwealth's contention and that in so doing the Board applied a more rigorous standard for the admission of the contention than the regulations allow. This argument, however, ignores the procedural posture of this matter, i.e., that the record in this proceeding has closed, and that the regulation applicable under these circumstances, 10 C.F.R. 2.326(a)(3), requires that a proponent of a contention in reopening "demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially." As the Commission has made clear, when a

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[53] LBP-11-35 at 52.

[54] Id.

[55] LBP-11-35 at 57

proceeding has closed and a new contention is then proffered, the stricter standard is appropriate.[56] The reopening criteria 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*, Pilgrim Watch's petition seeking suspension of the Pilgrim license 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.[57]

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 herein, the Commonwealth has failed to meet the reopening standard. As the Board's decision is consistent with established Commission precedent, it was not legally erroneous.

VI. The Board Findings Are Not Contradicted by the Record

In addition to asserting that the Board committed legal error, the Commonwealth also asserts that the Board's findings are contradicted by the record. However, as shown below, the record supports the Board's decision.

First, the Commonwealth asserts that the Board's treatment of data relating to Three Mile Island and Chernobyl was illogical and contrary to scientific method.[58] But this is not a complaint of lack of support in the record. The Board explained in full, as discussed above, that the application of the recent Fukushima accident data could not be used to render the old data

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

[57] *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").

[58] Commonwealth's Brief at 28.

from Three Mile Island and Chernobyl new. The new Fukushima data only provided additional information that was not new or different from the information available from Three Mile Island and Chernobyl. Accordingly, a contention relying on a calculation of CDF utilizing Three Mile Island and Chernobyl should have been filed in the first instance, back in 2006, when the original contentions were filed. The Commonwealth's contention is thus untimely.

Second, relying on the Commission's determination to review lessons learned from the Fukushima accident and to apply them to enhance safety at all U.S. nuclear plants, the Commonwealth asserts that there is a link between the Fukushima accident and the assumptions used in the Pilgrim SAMAs.[59] However, as the Board explained, the fact that the Commission is taking steps to address lessons learned from the Fukushima accident is, by itself, insufficient to establish relevance to the Pilgrim SAMA assumptions or how the Fukushima accident data would change those assumptions. Throughout its decision, the Board addressed the absence of a demonstrated connection between the Pilgrim SAMA assumption and information known to date from the Fukushima accident. [60]

The Commonwealth also asserts that Dr. Thompson addressed SAMA costs and that the Board's finding to the contrary was not supported by the record. However, Dr. Thompson himself admitted that he did not address the costs or the benefits of SAMAs. He wrote: "The methodology used by the licensee to assess the benefits and costs of potential SAMAs can be challenged in various respects. Here, however, we focus solely on the probability of a radioactive release." Dr. Thompson frankly admitted that his analysis did not address the costs

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[59] Commonwealth's Brief at 28-29.

[60] LBP-11-35 at 50, 51, and 54.

and benefits of potential SAMAs at Pilgrim.[61] Thus, the Board's finding that Dr. Thompson did not address SAMA costs and benefits is clearly supported by the record.

The Commonwealth also asserts that the Board erred when it rejected the Commonwealth's contention regarding spent fuel pools as beyond the scope of this proceeding.[62] Again, this assertion is not an assertion of a lack of a record. Instead, the Commonwealth makes the legal argument that when new and significant information is raised, even with respect to a generic issue (such as the environmental consequences of spent fuel pools) that the Commission has addressed by rule, that issue must be admitted. This argument was raised by the Commonwealth in support of its original contention in 2006[63] and was rejected by this Board[64] and twice by the Commission on appeal.[65] New and significant information is not the only criteria that must be satisfied in order to obtain admission of a contention on a generic (Category 1) issue.[66] As the Board explained, the Commonwealth failed to show that the

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[61] The Commonwealth also claimed that Dr. Thompson stated that the benefits of filtered containment venting would rise by a factor of ten and that he "cited information for the requisite calculations for comparison (i.e., the benefit would rise from $872,000 to $8,720,000). *See* Thompson 2011 Report at 16." Those dollar figures appear nowhere in the Thompson Report. They appear only in argument by counsel.

[62] Commonwealth's Brief at 29.

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

[64] *Pilgrim,* LBP-06-23, 64 NRC at 288.

[65] *Vermont Yankee and Pilgrim,* CLI-07-03, 65 NRC 13 (2007); *motion for reconsideration denied*, CLI-07-13, 65 NRC 211 (2007).

[66] Absent a waiver or grant of exception, Commission regulations (such as the regulation in 10 C.F.R. § 51.71(d) and 10 C.F.R. Part 51, Subpart A, Appendix B, that identifies spent fuel pools as generic issues and beyond the scope of license renewal) are not subject to attack in an adjudicatory proceeding such as this. In order to obtain a waiver of a regulation, a party must show that strict application of the rule would not serve the purpose for which it was adopted; special circumstances that were not considered when the rule was adopted; circumstances unique to the facility, rather than common to a large class of facilities; and that waiver of the regulation is necessary to reach a significant issue. *See Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 559-60 (2005).

Fukushima accident raised issues that are unique and specific to the Pilgrim spent fuel pools and, for that reason, the spent fuel pool contention was denied.[67]

Finally, the Commonwealth asserts that the concurring opinion of Judge Young-- stating that the Fukushima accident presented new and significant information-- rebuts the Board Majority's determination that no such information was provided by the Commonwealth.[68] However, Judge Young's opinion does not constitute record evidence that can be used to rebut the Board Majority's ruling on a petition for review. As the Commission noted in *Oyster Creek*, "a dissenting judicial opinion cannot substitute for the movant's affidavit required to be submitted with that motion to reopen, and thus cannot be considered to be 'additional evidence'." *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI 08-28, 68 NRC 658, 672-73 (2008).

CONCLUSION

As demonstrated above, the Board correctly applied the Commission's adjudicatory regulations governing reopening, late-filled contentions, and contention admissibility consistent with existing Commission precedent. The Board properly determined that the Commonwealth failed to raise an admissible contention. The contentions were not timely, raised issues beyond the scope of the proceeding, and tried to re-raise issues previously rejected by the Commission earlier in this proceeding. Moreover, the Board's legal determination that Commonwealth did not meet the Commission's admissibility requirements for reopening is supported by precedent

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[67] LBP-11-35 at 15-16.

[68] Commonwealth's Brief at 30.

and is not in conflict with existing case law. The Board's Order is well supported by the record. Accordingly, the Commonwealth's request for review should be denied.

Respectfully submitted,

/Electronically signed/
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Dated at Rockville, Maryland
This 19th day of December, 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 THE COMMONWEALTH OF MASSACHUSETTS' BRIEF IN SUPPORT OF APPEAL FROM LBP-11-35" have been served upon the following by the Electronic Information Exchange this 19th day of December, 2011:

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