**UNITED STATES OF AMERICA**
**NUCLEAR REGULATORY COMMISSION**

Before the Commission

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

# ENTERGY'S ANSWER OPPOSING PILGRIM WATCH'S PETITION FOR REVIEW OF LBP-12-01

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

Counsel for Entergy L.L.C.

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**ENTERGY'S ANSWER OPPOSING**
**PILGRIM WATCH'S PETITION FOR REVIEW OF LBP-12-01**

Pursuant to 10 C.F.R. § 2.341, Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (collectively "Entergy") respond in opposition to the January 26, 2012 Pilgrim Watch Petition for Review in the Pilgrim Nuclear Power Station ("PNPS" or "Pilgrim") license renewal proceeding.[1] The Petition seeks review of the Atomic Safety and Licensing Board ("Board") decision in LBP-12-01[2] in which a majority of the Board denied Pilgrim Watch's last remaining request for hearing on a new contention related to the Fukushima Daiichi accident. The Commission should deny the Petition because Pilgrim Watch does not identify any substantial question warranting review, or any error of fact or law in the Board majority's rulings.

Pilgrim Watch's claim that its Contention raised new and significant information does not withstand scrutiny. Pilgrim Watch made no showing that the Fukushima accident paints a seriously different picture of the environmental landscape concerning the severe reactor accidents analyzed for the Pilgrim severe accident mitigation alternatives ("SAMA") analysis. The claim that Entergy must redo the Pilgrim SAMA analysis in light of Fukushima (e.g., Petition at 16) is

[1] Pilgrim Watch's Petition for Review of Memorandum and Order (Denying Pilgrim Watch's Request for Hearing on a New Contention Relating to Fukushima Accident) Jan. 11, 2012 (Jan. 26, 2012) ("Petition").

[2] Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), LBP-12-01, 74 N.R.C. __, slip op. (Jan. 11, 2012) ("LBP-12-01"). Administrative Judge Ann Marshall Young dissented in a separate statement ("Dissent").

entirely unsupported and ignores the wide range of severe accident scenarios already considered in that analysis – accident scenarios with consequences far more serious than those experienced at Fukushima.[3] Indeed, in Callaway, CLI-11-05, the Commission ruled that Fukushima has not revealed information presenting a seriously different picture of the environmental landscape.[4] Callaway confirms the Board majority's ruling that the Contention failed to present significant (let alone grave) information warranting reopening of the record.

Pilgrim Watch also failed to meet the other requirements for reopening a closed record. All of Pilgrim Watch's claims could have been raised at the proceeding's outset and therefore were untimely. Furthermore, Pilgrim Watch's claims consist of a series of "bare assertions and speculations" of the type that the Commission has repeatedly rejected as "insufficient to support the heavy burden placed on the proponent of a motion to reopen."[5]

Having resolved the last remaining issue before it, the Board majority appropriately terminated the proceeding. Pilgrim Watch's (and the dissent's) claim that this proceeding should remain open until some unknown time in the future when the Commission might determine that Fukushima has presented significant environmental information (Petition at 18) is contrary to the Commission's rejection of similar requests in Callaway, where the Commission refused to hold reactor licensing in abeyance based on Fukushima. Further, such a claim runs counter to Supreme Court precedent[6] holding that an agency need not supplement an EIS every time new information comes to light, because otherwise its decision making would become intractable, al-

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

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

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

[6] Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989).

ways awaiting updated information only to find the new information outdated. In short, having presented no new and significant information, Pilgrim Watch demonstrates no error in the majority's decision, which should be upheld.

## I. STATEMENT OF THE CASE

This proceeding involves the LRA submitted by Entergy six years ago seeking renewal of the operating license for Pilgrim.[7] Entergy has previously summarized the development of this proceeding in response to Pilgrim Watch's prior petitions for review pending before the Commission,[8] and those summaries will not be repeated here.

On November 18, 2011 – more than three years after the Board closed the evidentiary record in this proceeding[9] – Pilgrim Watch filed its third request for a hearing on a proposed new contention related to Fukushima.[10] Pilgrim Watch claimed that the Pilgrim SAMA analysis is inadequate because it does not account for purported new and significant "lessons learned" from Fukushima. Aqueous Contention at 1-2. Specifically, Pilgrim Watch alleged that the MELCOR Accident Consequence Code System, Version 2 ("MACCS2") computer code used to perform a portion of the Pilgrim SAMA analysis failed to model the aqueous transport and dispersion of radioactive materials, such as has occurred at Fukushima. Id. Pilgrim Watch therefore claimed that Entergy should "redo Pilgrim's SAMA analysis," id. at 3, but, as found by the Board majority, relied on only bare assertions and nowhere demonstrated that consideration of its assertions

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

[8] See Entergy's Answer Opposing Pilgrim Watch's Request for Review (Aug. 15, 2011); Entergy's Answer Opposing Pilgrim Watch's Petition for Review (Sept. 6, 2011); Entergy's Answer Opposing Pilgrim Watch Petition for Review (Oct. 3, 2011).

[9] Memorandum and Order (Ruling on Pilgrim Watch Motions Regarding Testimony and Proposed Additional Evidence Relating to Pilgrim Watch Contention 1) (June 4, 2008) at 4 (unpublished).

[10] Pilgrim Watch Request for Hearing on a New Contention Regarding Inadequacy of Environmental Report, Post Fukushima (Nov. 18, 2011) ("Aqueous Contention"). The Aqueous Contention included as Exhibit 1 a Declaration of Arnold Gundersen Supporting A Request by Pilgrim Watch for a New Contention Hearing Regarding the Inadequacy of Pilgrim Station's Environmental Report, Post Fukushima (Nov. 17, 2011) ("Gundersen Decl.").

would likely make any material difference in the SAMA analysis results. Both Entergy and the NRC Staff opposed the hearing request, pointing out that the Contention failed to meet the Commission's standards for reopening the record, late-filed contentions, and admissible contentions.[11] Entergy also submitted an expert declaration[12] showing inter alia that consideration of Pilgrim Watch's claims were not significant and would not materially alter the Pilgrim SAMA analysis results, and thus failed the reopening criteria in 10 C.F.R. §§ 2.326(a)(2), (3). In reply,[13] Pilgrim Watch continued to argue that the Section 2.326 reopening standards are inapplicable to its Contention. But Pilgrim Watch nevertheless claimed that it had met those standards, even though it nowhere demonstrated, for example, that any SAMA that would likely become potentially cost beneficial upon consideration of its concerns.

In LBP-12-01, a majority of the Board rejected the Aqueous Contention, LBP-12-01 at 1, holding that the reopening standards applied to the Contention, and Pilgrim Watch had failed to meet those standards. LBP-12-01 at 11-19. Among other rulings, the majority held that Pilgrim Watch could have raised long ago the issues in the Contention, and thus it was not timely. Id. at 12-14. The majority also ruled that Pilgrim Watch failed to satisfy the requirement in Section 2.326(a)(3) that it "demonstrate that a materially different result would likely have been reached had its purported new evidence been considered initially." Id. at 16 (emphasis in original). In addition, the majority ruled that Pilgrim Watch had failed to meet the Commission's standards

[11] Entergy's Answer Opposing Pilgrim Watch Request for Hearing On a New Contention Regarding Inadequacy of Environmental Report, Post-Fukushima (Dec. 13, 2011) ("Entergy Answer"); NRC Staff's Answer in Opposition to Pilgrim Watch's Request for Hearing On a New Contention Regarding Inadequacy of Environmental Report, Post Fukushima (Dec. 13, 2011) ("NRC Staff Answer").

[12] Declaration of Mr. Joseph R. Lynch 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 (Dec. 13, 2011) ("Entergy Decl.").

[13] Pilgrim Watch Reply to Entergy's and NRC Staff's Answers to Pilgrim Watch Request for Hearing on a New Contention Regarding Inadequacy of Environmental Report, Post Fukushima – Aqueous Discharges (Dec. 20, 2011) ("PW Reply") at 37-55.

for late-filed contentions in Section 2.309(c), id. at 19, as well as the standards for admissible contentions in Section 2.309(f)(1). Id. at 19-22. With respect to the latter, the majority held that neither Pilgrim Watch nor its affiant Arnold Gundersen "has indicated with any specificity how the [Pilgrim] SAMA analysis results could be affected" and therefore "fail[ed] to provide the requisite sufficient information which would 'show' a dispute" under Section 2.309(f)(1)(vi). Id. at 20. Having resolved the last pending issue, the majority terminated the proceeding. Id. at 27.

## II. STANDARD OF REVIEW

A petition for review is granted only at the discretion of the Commission, "giving due weight to the existence of a substantial question with respect to the following relevant considerations": (i) a finding of material fact that is "clearly erroneous" or conflicts with a finding as to the same fact in a different proceeding; (ii) a necessary legal conclusion that is "without governing precedent" or "contrary to established law;" (iii) the raising of a "substantial and important question of law, policy, or discretion;" (iv) "the conduct of the proceeding involved a prejudicial procedural error;" or (v) the raising of "any other considerations which the Commission may deem to be in the public interest."[14] An appeal that simply restates the contention with additional support will not meet the requirements for a valid appeal.[15]

The Commission is free to affirm a board decision on any ground finding support in the record, whether previously relied on or not.[16] Further, the Commission gives substantial deference to its boards' determinations on threshold issues, such as whether a contention is admissible

[14] 10 C.F.R. § 2.341(b)(4); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation) ("PFS"), CLI-03-8, 58 N.R.C. 11, 17 (2003) (footnote omitted).

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

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

or a pleading meets the requirements of Section 2.326, and "will not sustain an appeal [on such issues] that fail to show a board committed clear error or abuse of discretion."[17]

## III. THE COMMISSION SHOULD DENY PILGRIM WATCH'S PETITION

Pursuant to 10 C.F.R. § 2.341, the Commission should deny the Petition because, as set forth below, Pilgrim Watch has failed to identify any clear error of fact, error of law, procedural error, or abuse of discretion by the Board majority. Instead, Pilgrim Watch relies on erroneous arguments made by the dissent, which disregard controlling Commission precedent and therefore provide no basis to overturn the majority's ruling.

### A. Pilgrim Watch Presented No Seriously Different Picture of Environmental Impacts from that Already Considered in Pilgrim's SAMA Analysis

As the Commission has previously explained in this proceeding, NRC SAMA analysis

> evaluates a number of potential accident progression sequences (scenarios) and the possible safety enhancements that may reduce the risk of those accident scenarios. The analysis assesses whether and to what extent the probability-weighted consequences of the analyzed severe accident sequences would decrease if a specific SAMA were implemented at a particular facility. SAMA analysis is used for determining whether particular SAMAs would sufficiently reduce risk . . . for the SAMA to be cost effective to implement.

Pilgrim, CLI-10-11, 71 N.R.C. 287, 291 (2010). In accordance with these requirements, Entergy performed a SAMA analysis to identify potential changes to the Pilgrim plant, or its operations, that could reduce the risk (the likelihood or the impact, or both) of a severe reactor accident for which the benefit of implementing the change outweighs the cost of implementation.[18] The Pilgrim SAMA analysis models numerous severe accident scenarios to develop the expected annual average of the potential consequences for those accidents. E.g., id. at Table E.1-15.

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[17] Vogtle, CLI-11-08 at 5; AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station) ("Oyster Creek"), CLI-09-7, 69 N.R.C. 235, 260 (2006).

[18] See generally, Pilgrim License Renewal Application Environmental Report, Attachment E, Severe Accident Mitigation Alternatives Analysis.

In order to require supplementation of the Pilgrim SAMA analysis (and other environmental documents) in light of new information, clear Commission and judicial precedent holds that the new information must present "'a seriously different picture of the environmental impact of the proposed project from what was previously envisioned.'"[19] Thus, the requirement to supplement is not based on the mere occurrence of new information, but rather on new information must that results in a "seriously different" impact.

The Board majority evaluated the Pilgrim Watch's Aqueous Contention, and Entergy's and the NRC Staff's responses thereto, and concluded that the Contention presented no significant information – i.e., no information that painted a seriously different picture from the postulated severe accident progression sequences already considered in the Pilgrim SAMA analysis. LBP-12-01 at 14-15. The majority concluded that Pilgrim Watch (1) "failed to provide any information that links the events at Fukushima to the risk of a severe accident at the Pilgrim site," (2) "assert[ed] without scientific support that the events of Fukushima must be considered in the Pilgrim SAMA analysis without providing any information about the plant, or its design, operation, and maintenance," and (3) "merely [sought] a revision of Entergy's SAMA analysis that may or may not result in other SAMAs becoming cost-effective." Id. at 13, 15. The majority's ruling is consistent with the Commission's view that the current information on Fukushima does not present a seriously different picture of the impacts of nuclear plant licensing. Callaway, CLI-11-05 at 31.

In addition, Entergy submitted uncontroverted attestation demonstrating that the Aqueous Contention did not raise any significant information that would alter the Pilgrim SAMA analysis

[19]Callaway, CLI-11-05 at 31, quoting Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-99-22, 50 N.R.C. 3 (1999); see also PFS, CLI-06-03, 63 N.R.C. 19, 28 (2006) (quoting National Comm. for the New River v. FERC, 373 F.3d 1323, 1330 (D.C. Cir. 2004), quoting City of Olmsted Falls v. FAA, 292 F.3d 261, 274 (D.C. Cir. 2002).

conclusions. First, as it has done in response to Pilgrim Watch's prior Fukushima-related contentions, Entergy demonstrated that the Pilgrim SAMA analysis considers accident scenarios that involve atmospheric radiological releases several times larger than the releases (atmospheric and aqueous) that occurred from the three damaged Fukushima reactors combined. Because the quantity of a radiological release essentially determines the consequences from a severe accident, Fukushima has revealed no information that would alter the Pilgrim SAMA analysis. Entergy Decl. at ¶¶ 53-64. Neither Pilgrim Watch nor Mr. Gundersen took issue with Entergy's expert comparison of the Fukushima and Pilgrim SAMA releases. Second, Entergy demonstrated that the potential consequences from atmospheric releases are far greater than potential consequences resulting from the aqueous releases at issue in Pilgrim Watch's Contention. Atmospheric releases have greater, more immediate, and direct impact to persons and populated areas, resulting in greater consequences. Thus, Entergy showed that, if the Pilgrim SAMA analysis were redone based on the assumption that some portion of the radioactive release were to escape into the environment via an aqueous pathway (e.g., discharges into Cape Cod Bay), rather than the entire radioactive release being released into the atmosphere, less consequences (and thus less costs for SAMA purposes) would result. Entergy Decl. at ¶¶ 41-50.

None of Pilgrim Watch's arguments on appeal demonstrate any error in the majority's ruling. First, Pilgrim Watch adopts the dissent's erroneous rationale that the fact that the Fukushima accident occurred means ipso facto that it revealed new and significant information with respect to Pilgrim's SAMA analysis, and that the Pilgrim SAMA analysis must be revised in light of the accident. Petition at 18 ("'once the [Fukushima] accident happened, it presented new information'") (quoting Dissent at 18); see also Petition at 17-21. This argument simply assumes that because an accident has occurred it must be considered and, as such, ignores the pertinent

question of what information has the Fukushima accident revealed that is seriously different from the severe accident scenarios presented and analyzed in the Pilgrim SAMA analysis.

Second, Pilgrim Watch and the dissent claim that Pilgrim Watch did link Fukushima to Pilgrim by noting that the two plants share "essentially identical" BWR Mark 1 designs. Petition at 4, 5, 14; Dissent at 14-16, 18. Pilgrim Watch also claims that Mr. Gundersen "directly linked what happened at Fukushima" to Pilgrim by asserting that "'[t]he area impacted by the disaster at Fukushima is enormous" and "there is every reason to expect that a similarly large area would be affected by a similar accident at Pilgrim.'" Petition at 7 (quoting Gundersen Decl.). But these superficial assertions do not challenge the Pilgrim SAMA analysis. Simply noting that Fukushima and Pilgrim share a similar design, and merely asserting that a "similarly large area" would be impacted by a severe accident at Pilgrim, fail to present any "seriously different" picture of the environmental impacts considered in the Pilgrim SAMA analysis. These arguments provide no information suggesting (let alone demonstrating) that Pilgrim Watch's claims would result in seriously different consequences (and thus costs) than those already postulated in the Pilgrim SAMA analysis.[20]

Third, Pilgrim Watch claims that the "Commission has recognized that the events at Fukushima are relevant to Pilgrim" because the Commission has "acknowledged that the lessons learned from Fukushima," as evidenced by the Fukushima Task Force's recommendations, "are relevant to the nuclear reactors in the United States." Petition at 8, 19. However, merely being

[20] Pilgrim Watch erroneously asserts that Entergy's experts "nowhere say that there are any differences between the Pilgrim BWR and Fukushima's." Petition at 5. In fact, Entergy's experts testified that Pilgrim and Fukushima are different in multiple respects, including that Pilgrim has markedly different venting procedures and is a single-unit site. Entergy Decl. at ¶¶ 27-38. Pilgrim Watch also erroneously asserts that Entergy's experts provided only speculation that even assuming a Fukushima-type accident were to occur at Pilgrim, ocean water contamination would fall below regulatory limits within months, and that Pilgrim Watch's assertions would not materially alter the Pilgrim SAMA analysis. Petition at 6 (citing Entergy Decl. at ¶¶ 66-67). This is not true. The paragraphs cited by Pilgrim Watch – Entergy Decl. at ¶¶ 66-67 – summarized testimony provided in earlier paragraphs providing extensive scientific and technical support for the points made in those paragraphs. See Entergy Decl. at ¶¶ 23-28, 43-52 and associated footnotes.

"relevant" to Pilgrim is not the same as presenting a seriously different picture of environmental impacts. And, in any event, Pilgrim Watch's assertion is not correct. The Commission explicitly concluded that the Fukushima Task Force's Recommendations concerned current licensing basis issues, and that "[i]t is not clear whether any enhancements or changes considered by the Task Force will bear on our *license renewal* regulations, which encompass a more limited review" "focused on aging management." Callaway, CLI-11-05 at 26 (emphasis in original).

Pilgrim Watch's failure to paint a seriously different picture of the environmental landscape means that it has also failed to meet the standard for raising a significant environmental issue in order to reopen the record under Section 2.326(a)(2). Commission precedent equates the two standards.[21] In addition, the majority ruled that the Contention failed to raise a significant environmental issue under Section 2.326 because the Contention contravened Commission precedent holding that "bare assertions and speculation . . . do not supply the requisite support" to satisfy the Section 2.326 standards,[22] and that merely asserting that something "might turn up" to support an intervenor's concerns does not raise a significant issue sufficient to restart the hearing process.[23] LBP-12-01 at 15. On appeal, Pilgrim Watch offers only more speculation that the Pilgrim SAMA analysis fails to model an accident that could "potentially" impact the maritime economy with "results [that] could be catastrophic." Petition at 12 (emphasis added), which is legally insufficient to meet the requirements in Section 2.326.

Pilgrim Watch (and the dissent) also assert that the majority erred in terminating the proceeding because it is not yet clear what, if any, significance Fukushima-related information

[21] PFS, CLI-06-03, 63 N.R.C. at 29 (claimed additional environmental impacts were "not so significant or central to the FEIS's discussion of environmental impacts that an FEIS supplement (and the consequent reopening of our adjudicatory record) is reasonable or necessary").

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

[23] Oyster Creek, CLI-08-23, 68 N.R.C. 461, 486 (2008) (rejecting a motion to reopen where movants provided only mere speculation that the contention might materially alter conclusions in the final safety evaluation report) (emphasis in original).

might hold. Petition at 18; Dissent at 18-19. The Commission has previously rejected similar arguments. In Callaway, the Commission rejected the claim that it would be inconsistent with the Atomic Energy Act ("AEA") and the National Environmental Policy Act ("NEPA") for the Commission to continue to issue licenses and apply any Fukushima lessons-learned retrospectively. Callaway, CLI-11-05 at 21. In so ruling, the Commission noted that, "for the licenses that the NRC issues before completing its [Fukushima] review, any new Fukushima-driven requirements can be imposed later, if necessary to protect the public health and safety." Id. at 29 (footnote omitted). In addition, the Commission made clear that "safety and environmental regulation is by its very nature a dynamic process," and the fact that "new information and new analyses constantly emerge" that "may lead to fresh regulatory approaches" is "not a reason to halt ongoing regulatory activity in the meantime." Id.

The Commission's Callaway ruling is consistent with the Supreme Court's decision in Marsh that supplementation of an EIS is required only when new information is also sufficiently significant. Otherwise, agency decision making would become "intractable, always awaiting updated information only to find the new information outdated by the time a decision is made." Marsh, 490 U.S. at 373 (footnote omitted). Pilgrim Watch's and the dissent's position that the Pilgrim license renewal proceeding should be held open indefinitely because Fukushima-related information might, at some unknown time in the future, be deemed significant under NEPA would result in intractable decision making in the extreme.

In summary, Pilgrim Watch failed to show that Fukushima presented any picture of environmental impacts seriously different from that already presented in the Pilgrim SAMA analysis, and the Board majority correctly rejected the Contention and terminated the proceeding.

### B. Pilgrim Watch and the Dissent Would Apply an Incorrect Standard of Proof

Despite Pilgrim Watch's claim that it met the requirements of Section 2.326, Petition at 21-23, Pilgrim Watch asserts that "at the contention stage" Entergy and the NRC Staff have the burden to conduct a new SAMA analysis. Id. at 15. Pilgrim Watch contends that it met its own burden simply by "demonstrate[ing] that the Pilgrim SAMA analysis . . . [is] flawed and should be redone." Id. at 16. Pilgrim Watch's arguments apply an incorrect standard of proof.

Pilgrim Watch erroneously focuses on contention admissibility. The question is not only whether Pilgrim Watch has met the standards for an admissible contention, but also whether it has met the standards for reopening a closed record under Section 2.326, and for late-filed contentions under Section 2.309. The cases on which Pilgrim Watch relies (Petition at 15) are inapt because they did not analyze whether a hearing request met the requirements of Section 2.326. The licensing boards in Diablo Canyon[24] and Indian Point[25] ruled only on whether petitioners had met the contention admissibility standards set forth in Section 2.309(f)(1). Nowhere did either licensing board address whether the petitioner had demonstrated under Section 2.326, e.g., that a materially different result would be or would have been likely.

The dissent also applies an incorrect standard of proof in claiming that Pilgrim Watch demonstrated that a materially different result would have been likely because it showed that material issues were still in dispute and thus provided sufficient information to defeat a summary disposition motion. Dissent at 4, 10. But as the majority correctly notes (LBP-12-01 at 26), this is not the correct standard by which to determine whether Pilgrim Watch has "demonstrated that a materially different result . . . would have been likely." 10 C.F.R. § 2.326(a)(3). The dissent

[24] Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-10-15, 72 N.R.C. __ (Aug. 4, 2010) slip op. at 20.

[25] Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), LBP-08-13, 68 N.R.C. 43 (2008).

conflates two separate issues: (1) the evidentiary burden required to support a motion to reopen the record, which is akin to the evidentiary burden needed to withstand summary disposition; and (2) the standard of proof that must be met in order to reopen the record, which is governed by Section 2.326, not Section 2.710 (which applies to summary disposition motions).

With respect to the evidentiary burden required "to justify the granting of a motion to re-open," the Commission has explained that "the moving papers must be strong enough, in the light of any opposing filings, to avoid summary disposition."[26] The Commission explained what it meant by this standard when affirming a licensing board ruling that "the information provided [by the reopening proponent] was not of a caliber sufficient to avoid a summary disposition motion." Id. at 15. In so ruling, the Commission cited to, and thus affirmed, (1) the licensing board ruling that the reopening proponent's "evidence" consisted of only "unsupported and unexplained allusions,"[27] and (2) its own precedent in Oyster Creek that bare assertions and speculation are insufficient to support the heavy burden placed on the proponent of a motion to reopen to demonstrate that a motion should be granted.[28] The relation between the evidentiary burdens for supporting a motion to reopen and avoiding summary disposition is evident from Section 2.710, which provides in relevant part that "a party opposing the motion may not rest upon the mere allegations or denials of his answer." 10 C.F.R. § 2.710(b) (emphasis added).

Separate and apart from the evidentiary burden required to support a motion to reopen the record is the standard of proof that must be met in order to succeed. Turning again to Oyster Creek, the Commission explicitly rejected an argument that the Section 2.710 standard of proof for summary disposition should apply to reopening the record because use of that standard – i.e.,

[26] Vogtle, CLI-11-08 at 10, quoting PFS, CLI-05-12, 61 N.R.C. 345, 350 (2005) (emphasis added).
[27] Vogtle, LBP-10-21, 72 N.R.C. __, slip op. at 25 (Nov. 30, 2010) ("LBP-10-21").
[28] Id. at 15 & n.48, citing Vogtle, LBP-10-21at 25 & Oyster Creek, CLI-08-28, 68 N.R.C. at 674.

whether any genuine issue of fact remains – would eviscerate the Section 2.326 standards for re-opening the record. Oyster Creek, CLI-08-28, 68 N.R.C. at 673-74. Section 2.326 requires a more stringent showing, including whether the moving party has timely raised a significant issue (or untimely raised an exceptionally grave issue), and has demonstrated that a materially different result would be likely. See id.; 10 C.F.R. § 2.326(a)(1)-(3). In addition, the Commission ruled that use of the summary disposition standard would improperly shift the burden onto the non-moving party – exactly the opposite of what Section 2.326 requires. Id.[29]

In short, Pilgrim Watch and the dissent would apply standards of proof that fall far short of those in Section 2.326, and thus demonstrate no clear error of law in the majority's ruling.

### C. The Dissent's Unsupported Estimate of Consequence Costs Violates Commission Precedent on Conducting SAMA Analysis

Pilgrim Watch erroneously relies on an analysis put forward by the dissent that purports to show that Pilgrim Watch raised a genuine dispute on "what the cost would be of aqueous contamination originating in an accident" at Pilgrim, and that this cost is many times more than the amount required to make the next SAMA potentially cost beneficial. Petition at 15 n.11, 17; Dissent at 10-11 & n.31. The dissent's analysis is flawed in several respects and therefore fails to show any error in the majority's ruling rejecting the Contention.

First, the dissent cites to no portion of the record to support its cost estimate for severe reactor accident consequences ($370,000,000). Neither Pilgrim Watch nor Mr. Gundersen pro-

[29] For these reasons, the dissent's reliance on the Commission's reversal of a narrow portion of the summary disposition of Pilgrim Watch Contention 3, Dissent at 4 n.10, is misplaced. The dissent notes that Pilgrim Watch succeeded in avoiding summary disposition on a portion of Contention 3, even though Pilgrim Watch "did not include any showing of exactly how any changes would alter the ultimate SAMA cost-benefit conclusions." Dissent at 4 n. 10. This, the dissent claims, supports its position that Pilgrim Watch is not required to show that the SAMA cost-benefit conclusions would be materially different in order to meet the standard in Section 2.326(a)(3). Id. The dissent's analogy between the Commission's remand of a portion of Contention 3 and the Aqueous Contention is inapt. When remanding a portion of Contention 3, the Commission was not applying the stringent standard of proof for motions to reopen set forth in Section 2.326, but rather the less rigorous standard of proof for avoiding summary disposition in Section 2.710. Pilgrim, CLI-10-11, 71 N.R.C. at 297-98.

vided this estimate. Nor does the dissent provide any foundation for its consequence cost assumptions, e.g., that the costs of aqueous radiological contamination would amount to 10% of the coastal maritime economy. See Dissent at 10-11 n.31. These assumptions are simply unsupported speculation by the dissent.

Second, the dissent's analysis is fundamentally incorrect because it does not multiply the asserted consequences by their frequency of occurrence. In SAMA analysis,

> [i]t is NRC practice to utilize the *mean* values of the consequence distributions for each postulated release scenario or category – the mean estimated value for predicted total population dose and predicted off-site economic costs. These mean consequence values are multiplied by the estimated frequency of occurrence of specific accident scenarios to determine population dose risk [("PDR")] and off-site economic cost risk [("OECR")] for each type of accident sequence studied.

Pilgrim, CLI-10-11, 71 N.R.C. at 316 (emphasis added). Thus, even if there were some non-speculative, record-based justification for the dissent's consequence cost calculation (for which there is none), the dissent's calculation is inconsistent with the concept of risk because it is not multiplied by the postulated accident's estimated frequency of occurrence. Furthermore, conservatively assuming that the frequency of an accident resulting in $370,000,000 in economic cost to the coastal economy is equal to the highest one postulated in the Pilgrim SAMA analysis (2.26E-06 per year for CAPB-14, see Pilgrim ER Attachment E, at Table E.1-15), the weighted cost is $836.20/year ($370,000,000 x 2.26E-06/year = $836.20/year). This amount is 1.6% of the total base case mean OECR currently calculated for the SAMA analysis – $52,600/year. See Pilgrim ER Attachment E, at Table E.1-15. Entergy provided uncontroverted attestation that, for the next SAMA to be determined potentially cost beneficial, the OECR would need to increase by nearly a factor of 3 (2.98) if the PDR stays constant. Entergy Decl. at ¶ 49. A 1.6% increase in OECR falls far short of the amount necessary to identify a potentially cost beneficial SAMA.

Accordingly, the dissent's non-frequency-weighted consequence cost calculation cannot show (inter alia) that a materially different result in the Pilgrim SAMA analysis would have been likely under Section 2.326, or that a genuine dispute exists with the Pilgrim SAMA analysis under Section 2.309(f)(1)(vi).[30]

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

Pilgrim Watch's remaining arguments on appeal demonstrate no clear error in the Board majority's rulings. Despite Pilgrim Watch's claims to the contrary (Petition at 4, 21-23),[31] the Section 2.326 reopening standards apply.[32] Pilgrim Watch failed to meet each of them. Pilgrim Watch also failed to meet the standards for late-filed contentions and admissible contentions.

#### 1. The Hearing Request Was Not Timely and Failed to Raise Any Exceptionally Grave Issue

The first substantive criterion for reopening a closed record is that the motion be timely. 10 C.F.R. § 2.326(a)(1). To be timely, Pilgrim Watch's Contention must have demonstrated that the information upon which it is based (i) "was not previously available" and (ii) "is materially different than information previously available," and (iii) that the Contention "has been submitted in a timely fashion based on the availability of the subsequent information." 10 C.F.R. § 2.309(f)(2)(i)-(iii). Thus, Pilgrim Watch was required to show that the Contention could not

[30] Indeed, nowhere does Pilgrim Watch provide any testimony regarding the frequency of its alleged severe accident scenario for the Pilgrim plant. As the Board majority notes, Pilgrim Watch does not reference or challenge, based on Fukushima, the initiating events or equipment failure probability assumptions relied on in the Pilgrim SAMA analysis. LBP-12-01 at 21. Entergy's experts provided testimony that a Fukushima-type accident at Pilgrim is highly unlikely in the range of severe accidents, which themselves are highly unlikely. Entergy Decl. at ¶¶ 24-38.

[31] Adding to its erroneous arguments that the reopening standards do not apply to its contentions, Pilgrim Watch mistakenly asserts that LBP-12-01 was the first Board order that "terminated" this proceeding. Petition at 21 & n.13. The Board's October 30, 2008 Initial Decision – which resolved the last remaining issue before the Board at the time – clearly states "this proceeding is terminated." Pilgrim, LBP-08-22, 68 N.R.C. 590, 610 (2008).

[32] Entergy has fully responded to Pilgrim Watch's erroneous arguments that the reopening standards do not apply to its contentions. See Entergy's Answer Opposing Pilgrim Watch Petition for Review (Oct. 3, 2011) at 8-12.

have been raised earlier.[33] Intervenors are not free simply to "add new contentions at their convenience during the course of a proceeding based on information that could have formed the basis for a timely contention at the outset of the proceeding."[34] Rather, intervenors have an "ironclad obligation to examine the publicly available documentary material . . . with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention."[35] Documents that merely collect, summarize, or place into context previously available information do not support the timeliness of a new contention.[36]

Adhering to this precedent, the Board majority correctly ruled that the Aqueous Contention concerns "limitations of the MACCS2 Code [that] have been present for decades and Pilgrim Watch cannot reasonably assert that it has just now learned of those limitations, given that it has had access to an expert [David Chanin] in that code." LBP-12-01 at 12-13. The majority also correctly ruled that SECY 11-0089 "compile[d] previously available information" on the MACCS2 Code's aqueous transport and dispersion modeling limitation, which "cannot serve to satisfy the requirement for 'new' information." Id. at 13 (footnote omitted). Further, the majority correctly ruled that the radioactively-contaminated water releases at Fukushima have been known since the early stages of the accident, as recognized by Pilgrim Watch's own media sources included in the hearing request. Id. at 12. Thus, Pilgrim Watch could have raised its

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

[34] Entergy Nuclear Vermont Yankee, L.L.C. (Vermont Yankee Nuclear Power Station), CLI-11-02, 73 N.R.C. __, slip op. (Mar. 10, 2011) at 6 (quoting Oyster Creek, CLI-09-7, 69 N.R.C. at 271-72 . ("CLI-11-02"). See also LBP-11-20, 74 N.R.C. __, slip op. at 25 n. 110 (Aug. 11, 2010) (quoting Final Rule, Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,536 (May 30, 1986), which explains that, under NRC case law, "timely" is defined as "'whether the issues sought to be presented could have been raised at an earlier time.'").

[35] Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 N.R.C. 135, 147 (1993) (footnote omitted).

[36] Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 N.R.C. __, slip op. at 17 (Sept. 30, 2010).

concerns many months sooner. Id. at 13.[37] As discussed supra, the majority also correctly ruled the Contention untimely because Pilgrim Watch failed to link the events of Fukushima with the risk of a severe accident at Pilgrim or otherwise "present any new information respecting the [Pilgrim] LRA." Id. at 14.

On appeal, Pilgrim Watch concedes that (1) the "publicly available information" on "the limitations in the MACCS2 Code" states that the code "model[s] atmospheric releases," and (2) news sources dating back to the early stages of the accident reported contaminated water releases into the Pacific Ocean. Petition at 10 (emphasis omitted), 11. Pilgrim Watch nonetheless claims that the Contention was timely because it did not know the importance of the MACCS2 Code's aqueous release modeling limitation until the publication of SECY 11-0089. Id. at 10, 11. This argument contravenes the Commission's requirement that Pilgrim Watch demonstrate that it could not have raised its issue earlier. Whenever Pilgrim Watch deemed the issue "important" is irrelevant to the question of whether Pilgrim Watch could have earlier raised its challenge.[38] Further, the releases of contaminated water were known since the early stages of the accident, and SECY 11-0089 was published in July 2011.[39] Pilgrim Watch offers no legitimate reason to excuse its failure to raise its Contention within 30 days of the availability of that information.[40] Pilgrim Watch and Mr. Gundersen claim that TEPCO covered up pertinent information, Petition

[37] The dissent also found the timeliness of the Contention to be questionable. See Dissent at 3.

[38] The timeliness of a new contention depends on when the information upon which it is based was available to the public, and not on an intervenor's awareness of it. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 N.R.C. 115 126 (2009).

[39] Pilgrim Watch has abandoned its claim that the timeliness of its Contention should be based on the Commission's September 11, 2011 voting record on SECY 11-0089, and not the July 7, 2011 SECY paper itself. On appeal, Pilgrim Watch nowhere mentions the Commission voting record, and claims only that, for example, "before SECY 11-0089," there was no public information to support its claims. Petition at 9. Even if its claim were true (it is not), Pilgrim Watch should have filed its hearing request within 30 days of the issuance of SECY 11-0089 because its statement concerning the MACCS2 Code was no more or less true when the Commission issued its voting record.

[40] Vogtle, CLI-11-08 at 3 n.8 (approving of a 30-day time limit for filing new contentions where that limit was "consistent with [the Board's] requirement that motions seeking the admission of new or amended contentions be filed within thirty days of the date the information that forms the basis for the contention becomes available").

at 11 (citing Gundersen Decl. at ¶ 21), but this claim is spurious. The only support provided for this claim is the assertion that TEPCO denied, for a period of five weeks, that the Fukushima accident was "at least a Level 7." Gundersen Decl. at ¶ 21. But, as Mr. Gundersen's own website makes explicitly clear, the change in severity classification was announced on or about April 13, 2011, seven months before the Contention was filed.[41] Neither Mr. Gundersen nor Pilgrim Watch explain how the April 2011 severity classification is in any way relevant to the Contention, or could be a plausible reason for waiting seven months to raise the Contention. This argument is also belied by Pilgrim Watch's own media references, which make clear that information on the radioactively-contaminated water releases has been available since April 2011.[42]

Because the Contention is untimely, Pilgrim Watch was required to demonstrate the existence of an exceptionally grave issue. 10 C.F.R. § 2.326(a)(1). The Contention had to present "a sufficiently grave threat to public safety."[43] This "narrow exception" to the requirement that issues be timely raised is to "be granted rarely and only in truly extraordinary circumstances." Id. (emphasis added). Disregarding this clear standard, Pilgrim Watch (and the dissent) claim that the Contention raised an exceptionally grave issue, thus overriding any lack of timeliness. Petition at 11-13; Dissent at 3-4.

The Aqueous Contention raised no grave issue. First, neither Pilgrim Watch nor Mr. Gundersen claimed before the Board that the Contention raised any exceptionally grave issue. Nor did they explain how an alleged deficiency in the Pilgrim SAMA analysis could present a sufficiently grave threat to public safety. Indeed, as the majority correctly ruled, no issue raised

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[41] See "Fukushima Accident Severity Level Raised to '7'" (Apr. 13, 2011), available at http://www.fairewinds.com/updates (last visited February 1, 2012).

[42] Even if the Contention were timely (which it is not), it still fails to meet the Section 2.326(a)(2) standard of raising a significant environmental issue as discussed supra.

[43] 51 Fed. Reg. at 19,536, quoting Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-124, 6 A.E.C. 358, 365 n.10 (1973).

by the Aqueous Contention can reasonably be found to have any (or grave) safety significance because the Pilgrim SAMA analysis does not regard safety matters at all. LBP-12-01 at 16 n.62.

Second, the only rationale provided for the claim of grave circumstances – "if there were an accident . . . results could be catastrophic," Dissent at 11 (emphasis added) – fails the Commission's repeated admonishment that "bare assertions and speculation are insufficient to support the heavy burden placed on the proponent of a motion to reopen to demonstrate that the motion should be granted."[44] Further, were this rationale accepted for determining exceptionally grave circumstances, it would eviscerate the Commission's requirement that such determination be "granted rarely and only in truly extraordinary circumstances." Any mere claim of new and significant information challenging a SAMA analysis would present exceptionally grave issues.

Finally, Pilgrim Watch's and the dissent's claim of exceptionally grave issues is inconsistent with the Commission's determination not to suspend reactor licensing proceedings in light of Fukushima because "[it does] not believe that an imminent risk will exist during the time period needed to apply changes to operating plants."[45]

In short, the Contention was not timely raised, and the claim that it raised an exceptionally grave issue simply cannot be squared with the Commission's high standards for making such a showing. Pilgrim Watch therefore demonstrates no clear error in the majority's ruling.

**2. Pilgrim Watch Provided No Demonstration that a Materially Different Result Would Have Been Likely and No Affidavit Compliant with Section 2.326(b)**

Pilgrim Watch's Contention also failed to demonstrate that a "materially different result would be or would have been likely" had any newly proffered evidence been considered initially. 10 C.F.R. § 2.326(a)(3) (emphasis added). The Commission has repeatedly emphasized that

[44] Vogtle, CLI-11-08 at 15 n. 48 (citing Oyster Creek, CLI-08-28, 68 N.R.C. at 674).

[45] LBP-12-01 at 15 n.59, quoting Callaway, CLI-11-05.

"[t]he burden of satisfying the reopening requirements is a heavy one."[46] It is "self evident" that "a motion to reopen is an 'extraordinary action,' and that a heavy burden is put on proponents" who must, among other things, present "material, probative evidence."[47] "Bare assertions and speculation . . . do not supply the requisite support," and "substantive information and argument" is required to constitute a successful demonstration of "likelihood" under Section 2.326(a)(3).[48] "[G]eneral arguments and conclusory statements asserting the substantive merits of [its] proposed contention" are "insufficient to support an appeal."[49] "Expert opinion is admissible only if . . . the factual basis for that opinion is adequately stated and explained in the affidavit."[50] In the end, a "motion to reopen requires more than a possibility. It requires a demonstration that the petitioner is likely to succeed."[51]

In the SAMA analysis context, the Commission explained in this proceeding that "the question is not . . . whether the SAMA analysis can be refined further" but "whether the Pilgrim SAMA analysis resulted in erroneous conclusions on the SAMAs found cost-beneficial to implement." Pilgrim, CLI-10-11, 71 N.R.C. at 315 (emphasis added). In other words,

> [u]nless it looks genuinely plausible that inclusion of an additional factor or use of other assumptions or models may change the cost-benefit conclusions for the SAMA candidates evaluated, no purpose would be served to further refine the SAMA analysis, whose goal is only to determine what safety enhancements are cost-effective to implement.

Id. at 317 (emphasis added). The motion must also be supported by an affidavit that "specifically address[es] each reopening criteria" and "set[s] forth the factual and/or technical bases for

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

[47] 51 Fed. Reg. at 19,538.

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

[49] Vogtle, CLI-11-08 at 6.

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

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

the movant's claim that the criteria" have been met "with a specific explanation of why it has been met." 10 C.F.R. § 2.326(b). Failure to supply an affidavit "fully" compliant with Section 2.326(b) is sufficient grounds to reject a contention. Vogtle, CLI-11-08 at 9 (emphasis added).

Adhering to this precedent, the Board majority correctly ruled that Pilgrim Watch failed to demonstrate that any other SAMAs would likely have been considered cost-beneficial had its concerns been considered. LBP-12-01 at 16. Rather, Pilgrim Watch provided only "bare speculations and bare assertions" and provided no "information indicating how much the mean consequences of the severe accident scenarios could reasonably be expected to change," or "some minimal information as to the cost of implementation of other SAMAs it believes might become cost effective." Id. at 16-17. The majority also noted that Entergy's uncontested Declaration shows that the Pilgrim SAMA analysis "consider[s] releases via atmospheric pathways which cause substantially more environmental damage (thus creating situations which cause considerably greater costs)" than would result had the SAMA analysis modeled a portion of the radioactive release through an aqueous pathway. Id. at 17. See Entergy Decl. at ¶¶ 41-52.

The majority similarly ruled that Pilgrim Watch failed to provide an affidavit compliant with the requirements of Section 2.326(b) because Mr. Gundersen's Declaration provided only "bare speculation" and "no facts or data to support [his] bald assertions." LBP-12-01 at 17. Further, Mr. Gundersen "ma[de] no reference to, and present[ed] no discussion of, how the Pilgrim (or any other) SAMA analysis is performed or how it could be expected that the mean consequences of the spectrum of accident scenarios analyzed for Pilgrim in its SAMA analysis could be so altered as to make additional SAMAs cost-effective to implement." Id. at 17-18.

Pilgrim Watch's arguments on appeal demonstrate no clear error by the Board majority. Pilgrim Watch generally claims that it and Mr. Gundersen (1) showed that pumping water into a

leaking reactor at Pilgrim "could" result in radioactively contaminated water leaking into the environment; (2) provided information that demonstrated that the Pilgrim SAMA analysis is "flawed"; and (3) "'demonstrate[d]' that a 'different result of the Pilgrim SAMA analysis could be obtained by consideration of the asserted new information.'" Petition at 7, 16, 22 (emphasis added). Pilgrim Watch's speculative claims fail to meet the stringent Section 2.326(a)(3) standard. It is not enough merely to claim that the SAMA analysis is not accurate or can be refined further. Pilgrim Watch was required to provide probative evidence demonstrating that the SAMA's cost-benefit conclusions would likely be materially different.

Pilgrim Watch also asserts that Entergy and the NRC Staff have to perform a proper "post-Fukushima SAMA analysis" that takes Pilgrim Watch's concerns into account. Petition at 6, 15, 22. But this assertion contravenes explicit Commission precedent that the burden is on the proponent of reopening the record to demonstrate that a materially different result would be likely. Oyster Creek, CLI-08-28, 68 N.R.C. at 673-74.

Thus, Pilgrim Watch offers no legitimate basis to disturb the majority's rulings.[52]

### 3. The Contention Failed to Satisfy the Standards for Late-Filed and Admissible Contentions

For the same reasons that it ruled the Contention untimely under Section 2.326(a)(1), the majority correctly ruled that Pilgrim Watch failed to demonstrate good cause for its late filing under 10 C.F.R. § 2.309(c). LBP-12-01 at 19. Absent good cause, Pilgrim Watch had to make a

[52] With respect to whether the Gundersen Declaration satisfied the requirements of Section 2.326(b), Pilgrim Watch concedes that Mr. Gundersen failed to specifically identif[y] the statements in his Declaration as addressing the reopening standards," but adopts the dissent's argument that to reject the Contention on that ground would elevate form over substance. Petition at 23 (quoting Dissent at 12). Their argument, however, would reject the proviso that "[e]ach of the [reopening] criteria must be separately addressed, with a specific explanation of why it has been met." 10 C.F.R. § 2.326(b). As explained in the Statement of Considerations for the rule, the Commission explicitly intended that reopening proponents strictly adhere to the specified affidavit form. 51 Fed. Reg. at 19,535.

compelling showing on the remaining late factors,[53] but could not do so because one of the heaviest of the remaining factors – whether admitting the contention would broaden and delay the proceeding – weighed heavily against Pilgrim Watch. LBP-12-01 at 19. This is consistent with the Commission's ruling that "the introduction of a new contention, well after the contested proceeding closed, would broaden the issues and delay the proceeding," Vogtle, CLI-11-08 at 18, and should be upheld. Pilgrim Watch relies on a split appeal board decision and a licensing board decision to claim that no undue delay would occur (Petition at 23), but those decisions provide no support. Those decisions' analyses of whether delay would ensue considered, respectively, a late intervention petition that (1) introduced no new issues and was submitted prior to the start of discovery; and (2) was submitted before any hearing on admitted contentions.[54] These circumstances are not applicable here.

The majority also correctly found that the contentions failed to raise a genuine dispute on a material issue under Section 2.309(f)(1) because Pilgrim Watch and Mr. Gundersen only "speculate that changes might result" in the SAMA analysis, and fail to challenge any specific portion of the application or the initiating event or equipment failure probability assumptions relied on in the Pilgrim SAMA analysis. LBP-12-01 at 19-22. On appeal, Pilgrim Watch argues that "it does not take an earthquake or tsunami to cause a power loss." Petition at 6. But this assertion does not dispute the station blackout scenarios considered in the Pilgrim SAMA analysis, or otherwise show that those scenarios are now erroneous in view of Fukushima. Purporting to rely on Mr. Gundersen's statements, Pilgrim Watch also claims that the Board majority and En-

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

[54] See Long Island Lighting Company (Jamesport Nuclear Power Station), ALAB-292, 2 N.R.C. 631, 650 n.26 (1975) and South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-81-11, 13 N.R.C. 420, 425 (1981).

tergy's experts "ignore[d] that increased damages and costs depend on the combined effect of atmospheric and aqueous releases." Petition at 25 (emphasis in original) (citing Gundersen Decl. at ¶ 17). That is not what Mr. Gundersen stated. He stated only that "such [contaminated water] releases might add significantly to the atmospheric release fallout onto open bodies of water." Gundersen Decl. at ¶ 17 (emphasis added). The majority appropriately found that such speculation failed to raise a genuine dispute. Furthermore, contrary to Pilgrim Watch's unsupported claim, Entergy's experts directly addressed this issue. They attested that Pilgrim's SAMA analysis considers atmospheric releases greater than the total combined radiological atmospheric and aqueous releases at Fukushima. Entergy Decl. at ¶¶ 53-64. Entergy's experts also attested that modeling of aqueous releases would result in less consequences and not identify any additional potentially cost beneficial SAMAs for multiple reasons. Id. at ¶¶ 41-50. The Board majority relied on this "uncontested expert testimony." LBP-12-01 at 17. Pilgrim Watch has thus failed to demonstrate any clear error of law or fact in the majority's ruling.

## IV. CONCLUSION

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

Respectfully Submitted,

/signed electronically by David R. Lewis/

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

Dated: February 6, 2012

**UNITED STATES OF AMERICA**
**NUCLEAR REGULATORY COMMISSION**

Before the Commission

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

CERTIFICATE OF SERVICE

I hereby certify that copies of Entergy's Answer Opposing Pilgrim Watch's Petition for Review of LBP-12-01, dated February 6, 2012, was provided to the Electronic Information Exchange for service on the individuals below, this 6th day of February, 2012.

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

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

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

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

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

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

Susan L. Uttal, Esq.
Maxwell C. Smith, Esq.
Brian Harris, Esq.
Beth Mizuno, Esq.
Lauren Woodall, Esq.
Office of the General Counsel
Mail Stop O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Susan.Uttal@nrc.gov; Maxwell.Smith@nrc.gov;
brian.harris@nrc.gov; beth.mizuno@nrc.gov;
Lauren.Woodall@nrc.gov

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

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

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

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

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

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

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

/signed electronically by David R. Lewis/

David R. Lewis