

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY LICENSING BOARD

In the Matter of

Docket # 50-293-LR

Entergy Corporation

Pilgrim Nuclear Power Station

License Renewal Application

Filed April 16, 2012

**PETITIONERS' OPPOSITION TO ENTERGY'S MOTION TO STRIKE
PETITIONERS' AFFIDAVIT AND PORTIONS OF PETITIONERS' REPLY**

Petitioners Jones River Watershed Association, Inc. (JRWA) and Pilgrim Watch (PW) hereby submit this opposition to April 5, 2012 Entergy's Motion to Strike Petitioners' Affidavit and Portions of Petitioners' Reply. (Entergy's Motion). Entergy moves to strike in its entirety Petitioners' Reply Affidavit of Alex Mansfield, dated March 25, 2012) (Mansfield Reply Affidavit) and portions of Petitioners' March 26, 2012 Reply (Petitioners' Reply) on the grounds that they contain new information not raised in the original petition, and that NRC rules do not allow a reply to a motion to reopen the record. Entergy's Motion relies upon case law and a factual record that does not support the Motion as claimed. Therefore, Entergy's Motion should be denied.

Mansfield Reply Affidavit

Entergy's arguments in support of the motion to strike the Mansfield Reply Affidavit are spurious. First, having submitted its own expert declaration (the Scherer Affidavit) in opposition to the Petitioners' contention, Entergy now complains that Petitioners should not be permitted to contest Scherer's opinion with its own expert declaration, and claims that somehow Petitioners are "making new arguments" or "new legal theories." Entergy Motion at 2 (emphasis supplied). However, having opened the door to challenge Petitioners' contention with its own expert affidavit, Entergy's complaint is inconsistent with *the Commission's own rule* allowing for a reply in these circumstances and *standard rules of practice for rebuttal*. 10 C.F.R. § 2.309 (h)(2). In essence, Entergy would like the Board to apply a double-standard: that Entergy be allowed to reply with an affidavit to Petitioners' affidavit, but that Petitioners are barred from having the same opportunity.

Indeed, since Entergy's opposition to the Petitioners' contention relied upon expert-supported arguments that Petitioners had not previously seen, and on new information brought forward by the Scherer Affidavit, necessarily the Petitioners in turn must rely upon their expertise to contest them. See, *Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station)*, LBP-07-13, 66 N.R.C. 131, 163, n. 40 (2007)(Marshall, J. dissent) *citing Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041)*, CLI-93-22, 38 N.R.C. 98, 102 (1993).

Second, it is also illogical for Entergy to argue that issues it raised in the Scherer Affidavit in opposition to the Petitioners' initial contention and in the supporting Mansfield Affidavit, to which Entergy responded in rebuttal, somehow are "new" and outside the scope of

the matters raised by the initial contention itself. These matters arose from the debate on the Petitioners' initial contention, are "reasonably inferable" from the contention, and thus fall permissibly within its scope. *See Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station)*, CLI-10-11, 2010, WL 1235387, 15 (2010). Moreover, Entergy's claim that these are "new" issues also is refuted by the factual record. The Mansfield Reply Affidavit did not add new information except to respond to assertions contained in the new Scherer Affidavit.

Entergy claims that the "Mansfield Reply Affidavit raises new claims, including multiple paragraphs of allegations concerning the "thermal conditions at the PNPS discharge location," Mansfield Reply Affidavit at ¶¶ 6-11, 17 (emphasis in original), even though his initial Affidavit made only brief mention of "thermal loading." See Mansfield Affidavit at ¶30. Mansfield's Reply Affidavit was a clarification of his original statement, since Scherer's response reflected a misreading or misinterpretation of the statements in the first Mansfield Affidavit about the thermal pollution from PNPS. Mansfield's First Affidavit discussed impacts to turtles from discharge; Scherer's response considered Mansfield's affidavit as if it concerned the *intake* only (i.e. impingement and mortality in the intake structure); Mansfield's Reply Affidavit clarified this point. Consistent with its right to reply, Petitioners are not constrained from providing additional support in rebuttal, where Entergy has chosen to contest certain issues at the contention admission stage of the proceeding.

Third, Entergy misrepresents the purpose of its Scherer Affidavit in claiming that it was not submitted to address the factors of 2.309, but only the reopening standards of 2.326. The Scherer Affidavit itself states that he will "offer his expert opinion that potential impact of the continued operation of PNPS will have no discernible effects on ESA-listed species." Scherer Aff. ¶ 5. Entergy's own March 19, 2012 Answer to the JRWA and PW motion to reopen and hearing request relies on the Scherer affidavit in arguing that the 10 C.F.R. 2.309 standards are

not met (see, e.g. Parts V and VI of Entergy's Answer "Energy has demonstrated that no materially different result would be likely", p. 42)

Fourth, Entergy's Motion complains that Petitioners' Reply is an impermissible reply relating to the reopening standards, stating that NRC rules do not allow a reply to a motion to reopen under 10 C.F.R. 2.326. Entergy Motion, p. 2. This argument gains Entergy nothing, as the Mansfield Reply Affidavit and Petitioners' Reply address the contention factors of 10 C.F.R. 2.309 and the factors of 2.326. The mere fact that § 2.326 also requires that a petition to reopen address some of the same factors as does § 2.309 (such as showing there is a "significant safety or environmental issue", 2.326(a)(2) and a "materially different result", 2.326(a)(3)), by necessity meaning that a motion to reopen under § 2.236 and hearing petition under 2.309 will overlap, does not provide grounds for striking Petitioners' reply and accompanying Mansfield Reply Affidavit. *Compare* 2.326(a)(2) and (3) to 2.309(f)(1) and (2).

Portions of Petitioners' Reply

Entergy moves to strike part of Petitioner's Reply, claiming the Reply's chart laying out in detail how Petitioners original affidavits track § 2.326 is "new" information. This argument is spurious on its face. Entergy contends that under NRC case law, a deficient contention cannot be saved by statements submitted in a reply. *See e.g.* Entergy Motion at page 2, citing *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 N.R.C. 223 (2004). However, the Petitioners' contention as initially filed clearly satisfies the NRC's pleading requirements. Therefore the cases relied upon by Entergy have no application to this case.

Entergy complains that the Reply should be stricken in part because it contains allegations and arguments to which it has not had a chance to respond. Entergy Motion, p. 4. As

an example, Entergy says "This includes the allegation that the 2006 BA and the 2012 Supplemental BA do not consider "action area," "cumulative effects," "destruction or adverse modification," and "effects of the action," Reply at 8-10, whereas Petitioners initial filings (incorrectly) claimed only that the Pilgrim SEIS failed to consider specified "cumulative impacts" and the "action area." Mansfield Affidavit at ¶¶ 29-30." Entergy is grasping at straws: the 2006 biological assessment is an appendix to the SEIS, hence the Mansfield Affidavit by referring to the SEIS by its terms included a reference to the 2006 biological assessment, and Entergy could have easily responded to this point in its March 19, 2012 answer. Making this same claim with regard to the February 29, 2012 supplemental biological assessment that the NRC Staff submitted to the National Marine Fisheries Service (NMFS), Entergy is merely highlighting that the NRC Staff is continuing to build the record in this proceeding, necessitating reopening of the environmental impact statement, as required by the National Environmental Policy Act (NEPA) (see Petitioners' March 8, 2012 filing).¹

Conclusion

Entergy's motion to strike should be denied because the facts and law establish that the Petitioners' Reply and the Mansfield Reply Affidavit fall squarely within the scope of what is allowed under NRC rules.

¹ Notably, Entergy does not complain that the NRC Staff in its March 26, 2012 "Answer to Correction and Supplement to Jones River Watershed Association and Pilgrim Watch's Petitions to Intervene and Motions to Supplement" added an entirely new document to the record: The March 26, 2012 NMFS letter saying that the agency does not concur with the NRC Staff "no effects" finding in the 2006 and 2012 biological assessments.

Respectfully submitted,

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