

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ann Marshall Young, Chair
Dr. Paul B. Abramson
Dr. Richard F. Cole

In the Matter of

Docket No. 50-293-LR

ENERGY NUCLEAR GENERATION
COMPANY and ENERGENCY NUCLEAR
OPERATIONS, INC.
(Pilgrim Nuclear Power Station)

ASLBP No. 12-920-07-LR-BD01

June 18, 2012

MEMORANDUM AND ORDER

(Denying Petition for Intervention and Request to Reopen
Proceeding and Admit New Contention)

On May 2, 2012, for the second time since the January 11, 2012, termination of this proceeding,¹ Pilgrim Watch, an intervenor in the earlier proceeding, has jointly with Jones River Watershed Association (JRWA, collectively Petitioners) moved to reopen the proceeding and petitioned for intervention on behalf of JRWA.² The motion is accompanied by a new contention raising challenges, under the Endangered Species Act (ESA) and the National Environmental Policy Act (NEPA), to the Nuclear Regulatory Commission (NRC) Staff's review of the application of Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (collectively, Entergy), for renewal of the Pilgrim plant's operating license for an additional

¹ See LBP-12-01, 75 NRC __, __ (slip op. at 27) (Jan. 11, 2012).

² [JRWA] and Pilgrim Watch Motion to Reopen, Request for Hearing and Permission to File New Contention in the Above-Captioned License Renewal Proceeding on Violations of the Endangered Species Act with Regard to the Roseate Tern (Mar. 8, 2012) [hereinafter Motion]. The two organizations filed additional joint motions to reopen and admit a new contention on March 8, 2012, and May 14, 2012.

twenty-year period.³ Petitioners assert in their new contention that the NRC failed to comply with the ESA and NEPA in considering the impacts of relicensing Pilgrim on the roseate tern, a federally-listed endangered species.

This licensing board, comprised of the same members who have been involved in this proceeding for some years, was again constituted for the purpose of evaluating the Petitioners' current motion. For the reasons discussed below, we must deny the motion, finding that Petitioners' motion and new contention are untimely and fail to satisfy the requirements of 10 C.F.R. §§ 2.326 and 2.309, subsections (c) and (f)(2).

I. Background

The background of this proceeding has been discussed in earlier orders and need not be fully recounted here. In brief, Pilgrim Watch first petitioned to intervene in opposition to Entergy's license renewal application in 2006.⁴ The licensing board granted the petition,⁵ adjudicated two of Pilgrim Watch's contentions following evidentiary hearings⁶ (one held after a Commission remand of a portion of a contention previously dismissed through summary disposition⁷), and otherwise ruled on numerous others.⁸ In January of this year a majority of the licensing board ruled inadmissible Pilgrim Watch's final outstanding contention and terminated the proceeding before the board, a ruling that was recently upheld by the Commission.⁹

³ See 71 Fed. Reg. 15,222, 15,222 (Mar. 27, 2006).

⁴ Request for Hearing and Petition to Intervene by Pilgrim Watch (May 25, 2006).

⁵ LBP-06-23, 64 NRC 257, 348-49 (2006).

⁶ LBP-08-22, 68 NRC 590, 596 (2008), *aff'd*, CLI-10-14, 71 NRC 449 (2010); LBP-11-18, 74 NRC __, __ (slip op. at 1-2) (July 19, 2011), *aff'd*, CLI-12-01, 75 NRC __, __ (Feb. 9, 2012).

⁷ CLI-10-11, 71 NRC 287 (2010).

⁸ See, e.g., LBP-11-20, 74 NRC __, __ (slip op. at 2-3) (Aug. 11, 2011), *aff'd*, CLI-12-10, 75 NRC __ (Mar. 30, 2012); LBP-11-23, 74 NRC __, __ (slip op. at 3) (Sep. 8, 2011), *aff'd*, CLI-12-03, 75 NRC __ (Feb. 22, 2012). The Commonwealth of Massachusetts also intervened and proffered contentions; the board found none of its contentions admissible.

⁹ LBP-12-01, 75 NRC __, __ (slip op. at 27) (Jan. 11, 2012), *aff'd*, CLI-12-15, 75 NRC __ (June 7, 2012).

Petitioners filed the instant motion on May 2, 2012. On May 10, the Commission referred Petitioners' motion to the Atomic Safety and Licensing Board Panel,¹⁰ and, on May 15, this licensing board was established.¹¹ Entergy¹² and the NRC Staff¹³ filed their answers to the motion on May 16. Petitioners replied to Entergy's and the Staff's answers on May 23.¹⁴ On June 4, the NRC Staff filed an answer opposing Petitioners' reply.¹⁵

II. Applicable Legal Standards

In order for Petitioners' motion to be granted and the contention to be admitted, Petitioners must fulfill each of the following sets of requirements found in the Commission's regulations: (1) because the record in this proceeding is currently closed, the motion must meet the requirements of 10 C.F.R. § 2.326 for reopening a closed record; (2) under 10 C.F.R. § 2.309(f)(2), the contention, being filed after the deadline for initial intervention petitions, must have been submitted in a timely fashion, based on new information that is materially different from information previously available; (3) consideration of the contention under a balancing of the factors set forth at 10 C.F.R. § 2.309(c) must weigh in favor of admitting the contention; and

¹⁰ Memorandum from Annette L. Vietti-Cook, Secretary, to E. Roy Hawkens, Chief Administrative Judge, Atomic Safety and Licensing Board Panel, at 1 (May 10, 2012).

¹¹ Although composed of the same judges as the previous licensing board, this is a new board established specifically to address these new motions in a currently closed proceeding.

¹² Entergy's Answer Opposing [JRWA]'s and Pilgrim Watch's Motion to Reopen Hearing Request on Contention Related to the Roseate Tern (May 16, 2012) [hereinafter Entergy Answer].

¹³ NRC Staff's Answer to [JRWA] and Pilgrim Watch's Motion to Reopen the Record and Request for a Hearing with Regard to the Roseate Tern (May 16, 2012) [hereinafter NRC Staff Answer].

¹⁴ [JRWA] and Pilgrim Watch Reply to Answers of NRC Staff and Entergy Opposing Petitions/Motions to Reopen, Intervene, and for Hearing on Roseate Tern Contention (May 23, 2012) [hereinafter Petitioners' Reply].

¹⁵ NRC Staff's Answer to Motion for Leave to Reply to NRC Staff and Entergy's Opposition to the Roseate Tern Contention (June 4, 2012). The Staff asks us to deny Petitioners' request for leave to file their reply. Because the conclusion we reach disposing of Petitioners' motion is independent of the arguments made in their reply, the Staff's motion is effectively moot and does not require a ruling.

finally, (4) the contention must satisfy the general contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(i)-(vi).¹⁶

III. Petitioners' New Contention

Petitioners summarize their new contention as follows:

Petitioners proffer evidence of procedural and substantive violations of the ESA with regard to the roseate tern by showing: (1) that the NRC staff was required to conduct a biological assessment pursuant to ESA § 7, 16 U.S.C. § 1536(c)(1), and it did not, (2) that Entergy's license application is inaccurate and incomplete in material aspects regarding the roseate tern, (3) that the U.S. Fish and Wildlife Service (USFWS) unlawfully ignored the requirement for a biological assessment and without a scientific basis declared the roseate tern to be "probably transient," contrary to widely known and available data, (4) that there is significant potential for adverse effects on roseate terns during the relicensing period, (5) that the NRC staff environmental impact statement [EIS] contradicts the USFWS finding that the roseate tern is present at PNPS but is "probably transitory," rendering the statement inadequate, and (6) that therefore, the NRC staff should be ordered to conduct a biological assessment on the Roseate tern and to supplement the environmental impact statement with this data.¹⁷

Under the ESA, a federal agency must consult with the USFWS and the National Marine Fisheries Service (NMFS) in order to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence" of any species that has been listed as threatened or endangered, or to destroy or adversely modify critical habitat.¹⁸

The ESA further provides that the acting agency shall request of USFWS and NMFS "information whether any species which is listed or proposed to be listed may be present in the area" of the action; if the Services advise that such species are present, the acting agency is to prepare a biological assessment (BA) to identify any species "which is likely to be affected by

¹⁶ See also 10 C.F.R. 2.326(d).

¹⁷ Motion at 5-6. This Licensing Board does not, of course, have jurisdiction to rule on any challenge by Petitioners to any act of the USFWS.

¹⁸ 16 U.S.C. § 1536(a)(2). For a more detailed overview of the ESA requirements, see LBP-12-10, 75 NRC __ (May 24, 2012), in which the licensing board denied Pilgrim Watch and JWRA's motion to reopen the proceeding and admit a contention based in part on the ESA.

such action.”¹⁹ The joint regulations of the USFWS and NMFS implementing the procedural requirements of the ESA provide further clarification on the requirements with respect to biological assessments.²⁰

Petitioners’ essential complaint is that the NRC never prepared a BA for the roseate tern. Petitioners allege that the NRC Staff incorrectly relied on a letter from USFWS, sent prior to the NRC’s own assessment, in which USFWS concluded that the renewed license was “not likely to adversely affect” the roseate tern.²¹ Petitioners assert that this conclusion is erroneous, in part because it was based on flawed information in the environmental report (ER) that Entergy submitted as part of its license renewal application.²²

In support of their motion and contention, Petitioners offer the affidavit of Ian Christopher Thomas Nisbet, PhD., an environmental scientist and expert on the roseate tern.²³ Dr. Nisbet in his affidavit reviews information about the roseate tern’s habits and habitat, and suggests that Entergy, USFWS, and the NRC Staff should have known that their conclusions about the roseate tern’s presence in the vicinity of Pilgrim and the effects of the plant on the tern were flawed.²⁴

In response, Entergy and the NRC Staff point to provisions in the Services’ ESA regulations stating that the contents of the BA “are at the discretion of the Federal agency”²⁵ and that preparation of the BA “may be consolidated with interagency cooperation procedures

¹⁹ 16 U.S.C. § 1536(c).

²⁰ See, e.g., 50 C.F.R. § 402.12.

²¹ Motion at 15-16.

²² *Id.* at 16-17.

²³ Affidavit of Ian Christopher Thomas Nisbet, Ph.D. (Apr. 30, 2012) [hereinafter Nisbet Affidavit].

²⁴ *Id.* at 3-5, 7-8.

²⁵ 50 C.F.R. § 402.12(f).

required by other statutes, such as” NEPA.²⁶ Accordingly, Entergy and the Staff argue that the analysis of endangered species in the Staff’s EIS operated as the equivalent of the BA.²⁷ Additionally, the Staff argues that USFWS concluded the consultation process required by the ESA when it forwarded to the NRC Staff (in response to the Staff’s request for a species list) its letter to Entergy concluding that relicensing was “not likely to adversely affect” the roseate tern.²⁸ Entergy and the NRC Staff also argue that the motion and contention are untimely, a matter we turn to below.

IV. Ruling on Motion to Reopen and New Contention

Petitioners’ new contention is inadmissible primarily because it has not been timely presented, nor has it been shown that it should nonetheless be admitted under any other relevant criteria. With certain exceptions discussed further herein, the reopening standards of 10 C.F.R. § 2.326 and the admissibility criteria of § 2.309(f)(2) require that any contention be timely. Although NRC regulations do not provide a precise definition of “timely,” licensing boards have often found a new contention to be timely if it has been filed within thirty days of the availability of information on which the contention is based.²⁹

To the extent Petitioners criticize the accuracy of statements in Entergy’s ER, the time for challenging the ER passed when the NRC Staff released its draft supplemental EIS. Although NRC regulations allow for filing contentions challenging the ER with the initial petition³⁰ and prior to the time the Staff’s environmental review documents are completed, in this instance

²⁶ *Id.* § 402.06.

²⁷ See NRC Staff Answer at 19-21; Entergy Answer at 11-12.

²⁸ See NRC Staff Answer at 22-23.

²⁹ See, e.g., *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-08, 74 NRC __, __ (slip op. at 3 & n.8) (2011).

³⁰ See 10 C.F.R. 2.309(f)(2).

the Staff completed the draft EIS in December 2006 and the final EIS in July 2007,³¹ rendering any challenge to the ER both untimely and moot.

As to the 2007 Final Supplemental EIS (FSEIS), this document includes an analysis of the impact of the licensing action on the roseate tern,³² as well as the letter from USFWS that the Staff maintains concluded the ESA consultation.³³ Petitioners' claim that the NRC Staff has failed to comply with certain procedural requirements of the ESA is also based on events and information from 2007 and earlier. Petitioners assert that 10 C.F.R. § 2.309(f)(2) allows them to bring their contention now because it is based on data or conclusions in the FSEIS that differ significantly from those in the ER.³⁴ But as the Staff correctly points out,³⁵ that provision does not allow petitioners an indefinite period of time within which to file a contention. Petitioners' ESA claim may properly be viewed as arising with publication of the FSEIS in July 2007, and should have been filed, if not within 30 days of that time, then certainly at a time significantly earlier than nearly five years later.

Petitioners point to several more recent developments that they claim provide "new information" that renders the contention timely. Each of these pieces of information, however, is either not new or not materially different from information that was previously available. For example, the most recent information in the Nisbet Affidavit concerning sighting of roseate terns is from August 2011, seven months before the motion was filed.³⁶

Petitioners also rely on a report completed in 2000 by ENSR, a consultant to Ent

³¹ Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Regarding Pilgrim Nuclear Power Station - Final Report, NUREG-1437, Supplement 29 (2007) (ADAMS Accession No. ML071990020) [hereinafter FSEIS].

³² See *id.* at 4-64.

³³ *Id.* at E-8 to -9.

³⁴ Motion at 28.

³⁵ See NRC Staff Answer at 7-8.

³⁶ See Motion at 29.

ergy, which was cited in both the ER and the FSEIS as support for the conclusion that relicensing would have no adverse impact on fish populations, *i.e.*, the food supply for the roseate tern.³⁷ Petitioners argue that, because the report was made available to them only recently, “following repeated requests,” the report should be considered new information.³⁸ They do not, however, explain why they did not request the 12-year-old report earlier, or why they were unable to locate the report in the NRC’s electronic public document system.³⁹ Nor do they show how the information in the report is materially different from what was already available in the ER or the FSEIS.⁴⁰ Entergy and the Staff both argue that the relevant conclusions of the ENSR report were previously available, and Petitioners offer nothing to demonstrate the opposite.

Petitioners also offer evidence of recent violations of the Clean Water Act as new information.⁴¹ But as Petitioners’ motion shows, the asserted pollution limit exceedances at issue began in 2010.⁴² That noncompliance with the effluent limitations may have continued does not excuse Petitioners from waiting until now to bring their contention. Further, the violations of which Petitioners complain involve one pollutant, chlorine,⁴³ and neither the motion nor the Nisbet Affidavit draws any connection between chlorine emitted from Pilgrim and any adverse impacts on the roseate tern.

Petitioners say they should be excused from application of a 30-day timeliness

³⁷ *Id.* at 23, 44.

³⁸ *Id.* at 23.

³⁹ See ENSR Corp., Redacted Version, 316 Demonstration Report - Pilgrim Nuclear Power Station (March 2000) (ADAMS Accession No. ML061390357).

⁴⁰ The report also fails to provide support for Petitioners’ contention. Rather than cast doubt on the conclusions of the FSEIS, the report supports the conclusion in the ER and FSEIS of no adverse impact on the roseate tern. See *id.* at 1-1; Motion at 23, 44.

⁴¹ See Motion at 22.

⁴² See *id.* n. 20.

⁴³ *Id.*

requirement because they acted reasonably in expecting USFWS and the NRC Staff to comply with proper procedures.⁴⁴ We cannot agree that a years-long delay in raising these issues is reasonable. Because the motion and contention are based on information that is neither new nor materially different from information that was previously available, the motion to reopen and accompanying contention are untimely under both 10 C.F.R. § 2.326 and § 2.309(f)(2).

This conclusion is not changed by Petitioners' supporting affidavit of Dr. Nisbet. Although quite detailed and thorough in other respects, Dr. Nisbet in his affidavit does not substantively address the reopening criteria as required by 10 C.F.R. § 2.326(b), providing only the cursory and conclusory statement that, "[in his] professional opinion, this is a significant environmental issue and a materially different result would have been likely if the evidence proffered in this affidavit had been considered in a timely fashion."⁴⁵ The affidavit provides a great deal of information about the roseate tern, but does not, with any specificity, explain how this information would alter the actual conclusions of the USFWS or NRC regarding the effects of the additional operation of Pilgrim on the tern. Dr. Nisbet provides support for that part of the contention asserting that USFWS and NRC incorrectly gauged the presence of roseate terns at the Pilgrim site, stating, for example, that, "[p]rior to 1999 LBP [Long Beach, Plymouth] was known to be used by staging roseate terns but was thought to be a relatively minor site, with a maximum of 240 birds in August 1988."⁴⁶ But, again, it is not explained how this or related information would alter the USFWS or NRC conclusions.

Nor does Dr. Nisbet suggest that the information he presents demonstrates an "exceptionally grave issue," within the terms of 10 C.F.R. § 2.326(a)(1), which allows a motion to reopen to be granted, "even if untimely presented," when the motion presents an "exceptionally

⁴⁴ See *id.* at 30-31.

⁴⁵ Nisbet Affidavit at 8.

⁴⁶ *Id.* at 4-5.

grave issue.” And in any event, the Commission has defined an exceptionally grave issue as one which raises “a sufficiently grave threat to public safety.”⁴⁷ Although we have no doubt that noncompliance with the Endangered Species Act is a serious matter, the possibility of adverse effects on the roseate tern has not been shown to involve any “threat to public safety.” We must therefore conclude that Petitioners’ motion to reopen fails to meet the requirement of section 2.326(a)(1). We further find that the contention fails to meet either the timeliness requirements of 10 C.F.R. § 2.309(f)(2) or the requirements of 10 C.F.R. § 2.309(c), which permits untimely filings in certain circumstances. No good cause has been shown for the contention’s untimeliness, and under the circumstances discussed herein, we find no other considerations weigh sufficiently in Petitioners’ favor to admit the contention.⁴⁸

Because we find that the motion and contention are untimely and fail to meet the reopening criteria, we need not rule on other contention admissibility requirements under 10 C.F.R. § 2.309(f)(1), or delve any further into the substantive allegations of the contention. But we remind the NRC Staff that it is ultimately their obligation to comply with NEPA and the ESA. Petitioners have raised genuine concerns that appropriate procedures were not followed in this case. For example, although the NRC Staff may be correct that the FSEIS is the functional equivalent of a BA, there is no evidence that the FSEIS was ever submitted to USFWS as required by the ESA regulations. In addition, although the roseate tern population nesting at the LBP site has increased in recent years,⁴⁹ Dr. Nisbet (who clearly has significant expertise on the roseate tern and how it may be affected by environmental considerations) presents extensive additional information and considerations that may warrant further attention by the NRC Staff.

⁴⁷ Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,536 (May 30, 1986); *see also Hydro Res., Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-00-12, 52 NRC 1, 5 (2000) (“we will reopen the record only when the new evidence raises an ‘exceptionally grave issue’ calling into question the safety of the licensed activity”).

⁴⁸ *See, e.g.* in this regard NRC Staff Answer at 15-17.

⁴⁹ *See* Nisbet Affidavit at 5; NRC Staff Answer at 21, 25-26; Entergy Answer at 35-36.

V. Conclusion and Order

For the foregoing reasons, we conclude that the May 2, 2012, contention filed by Pilgrim Watch and JRWA:

- a. Fails to satisfy the criteria for reopening a closed record under 10 C.F.R. § 2.326;
and
- b. Fails to satisfy the admissibility criteria of 10 C.F.R. § 2.309(f)(2) and § 2.309(c).

Each of these failures separately requires denial of this request for hearing by Pilgrim Watch and JRWA. The petition to intervene and motion to reopen are therefore both DENIED.

Pursuant to 10 C.F.R. § 2.341(a), this decision will constitute a final decision of the Commission forty (40) days from the date of issuance, *i.e.*, on July 30, 2012, unless a petition for review is filed in accordance with 10 C.F.R. § 2.341(b), or the Commission directs otherwise. Any party wishing to file a petition for review on the grounds specified in section 2.341(b)(4) must do so within fifteen (15) days after service of this decision. A party must file a petition for review to have exhausted its administrative remedies before seeking judicial review.

Within ten (10) days after service of a petition for review, any other party to the proceeding may file an answer supporting or opposing Commission review. Any petition for review and any answer shall conform to the requirements of 10 C.F.R. § 2.341(b)(2)-(3).

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Ann Marshall Young, Chair
ADMINISTRATIVE JUDGE

/RA/

Dr. Paul B. Abramson
ADMINISTRATIVE JUDGE

/RA/

Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 18, 2012⁵⁰

⁵⁰ Copies of this Memorandum and Order were filed with the agency's EIE system for service to the parties on this date.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
ENERGY NUCLEAR GENERATION CO.) Docket No. 50-293-LR-ESA-Roseate-Tern
AND)
ENERGY NUCLEAR OPERATIONS, INC.) ASLBP No. 12-920-07-LR-BD01
)
(Pilgrim Nuclear Power Station))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Denying Petition for Intervention and Request to Reopen Proceeding and Admit New Contention) (LBP-12-11)** have been served upon the following persons by Electronic Information Exchange (EIE) and by electronic mail as indicated by an asterisk*.

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Docket No. 50-293-LR-ESA-Roseate-Tern
ASLBP No. 12-920-07-LR-BD01
MEMORANDUM AND ORDER (Denying Petition for Intervention and Request to Reopen
Proceeding and Admit New Contention) (LBP-12-11)

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[Original signed by Nancy Greathead]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 18th day of June 2012