

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Gregory B. Jaczko, Chairman
Kristine L. Svinicki
George Apostolakis
William D. Magwood, IV
William C. Ostendorff

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

CLI-10-15

MEMORANDUM AND ORDER

Pilgrim Watch, the intervenor in this license renewal proceeding, has filed a motion for reconsideration of our decision in CLI-10-11, 71 NRC ____ (Mar. 26, 2010) (slip op.).¹ Both the NRC Staff and the applicants, Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (together, Entergy) oppose the motion. We will grant a petition for reconsideration only upon a showing of “compelling circumstances,” such as a “clear and material error,” which “could not have been reasonably anticipated” and “that renders the decision invalid.”² Pilgrim Watch’s motion sets forth its disagreement with portions of our ruling in CLI-10-11, but does not

¹ *Pilgrim Watch Motion for Reconsideration of CLI-10-11* (Apr. 5, 2010) (Motion).

² See 10 C.F.R. § 2.341(d) (referencing the standard found in § 2.323(e)).

demonstrate any material error or fundamental misunderstanding on our part. We therefore deny the motion.

The issue before us in CLI-10-11 was whether the Atomic Safety and Licensing Board erred in granting summary disposition of Pilgrim Watch's Contention 3, a contention challenging the Severe Accident Mitigation Alternatives (SAMA) analysis in Entergy's Environmental Report. In LBP-07-13, a Board majority agreed with Entergy that, based upon new sensitivity studies, no genuine material dispute remained over any of the admitted issues regarding three aspects of the SAMA analysis: "evacuation times," "economic impact," and "meteorological patterns."³ The majority therefore dismissed Contention 3 in its entirety, with one judge dissenting.⁴

In CLI-10-11, we agreed with Pilgrim Watch that the majority erred in declaring that no genuine material dispute remained on Contention 3's meteorological patterns claims.⁵ We therefore reversed the Board's summary disposition ruling in part, and remanded the meteorological patterns issue to the Board for hearing. But we agreed with the majority that Pilgrim Watch failed to raise any genuine material dispute for hearing on the evacuation timing and economic cost analysis issues.⁶

In its motion for reconsideration, Pilgrim Watch does not contest our conclusions on the remanded meteorological patterns issue or the evacuation timing issue, but argues that we improperly "rewrote Contention 3 to limit" the scope of issues that were part of the "economic consequences" portion of Contention 3.⁷ Specifically, Pilgrim

³ See LBP-07-13, 66 NRC 131, 141-46 (2007).

⁴ *Id.* at 156-68.

⁵ See CLI-10-11, 71 NRC ___ (slip op. at 14-26).

⁶ See *id.* (slip op. at 27-36).

⁷ See Motion at 2.

Watch argues that we “rewrote Contention 3 . . . to exclude any input data concerning the effects of a spent fuel accident; and . . . to exclude inputs concerning decontamination/interdiction clean-up costs and health costs.”⁸ Pilgrim Watch claims that these issues were all part of Contention 3 as originally submitted, and that Pilgrim Watch did not “add anything to expand the scope of the contention beyond what was accepted by the Board, recognized by Entergy and the Staff, and already of record throughout the filings.”⁹

Pilgrim Watch’s argument that we “rewrote” Contention 3 to exclude “input data” claims involving “the effects of a spent fuel accident” lacks any basis in fact. The full Board in its contention admissibility decision rejected Pilgrim Watch’s spent fuel pool SAMA claims (raised in a separate contention, Contention 4) as an impermissible challenge to our license renewal regulations, and as beyond the scope of NRC SAMA analysis, which focuses upon reactor accidents.¹⁰ The majority’s decision on summary disposition accordingly rejected the Pilgrim Watch arguments on spent fuel pool fires as outside the scope of Contention 3 and of NRC SAMA analysis,¹¹ a conclusion we confirmed in CLI-10-11.¹² The admitted Contention 3 never included spent fuel pool accident risk claims.

⁸ *See id.*

⁹ *See id.* at 5.

¹⁰ *See* LBP-06-23, 64 NRC at 280-300. In Contention 4, Pilgrim Watch argued that Entergy’s Environmental Report was deficient because it did not analyze the environmental impacts of onsite spent fuel pool storage, and did not provide a SAMA analysis of spent fuel pool accidents. *See id.* at 281-82.

¹¹ *See* LBP-07-13, 66 NRC at 147-48 (referring to rejected spent fuel pool contentions submitted in this proceeding by Pilgrim Watch and the Massachusetts Attorney General).

¹² *See* CLI-10-11, 71 NRC __ (slip op. at 33-34). We noted, additionally, that we would further address Pilgrim Watch’s spent fuel pool arguments in a separate decision addressing Pilgrim Watch’s petition for review of LBP-06-23, the Board decision that (continued . . .)

We likewise did not “rewrite” Contention 3 to exclude “health” cost claims. The majority repeatedly stressed that Pilgrim Watch’s opposition to summary disposition inappropriately raised various new “health” cost arguments, which were “simply not reasonably inferable” as part of Contention 3’s admitted economic cost analysis challenges.¹³ We agreed that the new “health” cost arguments were *never* a part of Contention 3’s admitted economic cost analysis challenges, and further noted that some of the new “health” claims are not even cognizable under the National Environmental Policy Act (NEPA).¹⁴

Under our rules, petitioners must set forth their contentions “with particularity”:¹⁵

The scope of a contention is limited to issues of law and fact *pled with particularity* in the intervention petition, including its stated bases, unless the contention is satisfactorily amended in accordance with our rules. . . . Parties and licensing boards must be on notice of the issues being litigated, so that parties and boards may prepare for summary disposition or for hearing. Our procedural rules are designed to ensure focused and fair proceedings.¹⁶

It “should not be necessary to speculate about what a pleading is supposed to mean,” and petitioners bear the responsibility for setting forth their grievances clearly.¹⁷

rejected Contention 4 as inadmissible. *See id.* at 34. In a separate Memorandum and Order issued today, we affirmed the Board’s decision. *See* CLI-10-14, 71 NRC ___ (slip op. June 17, 2010).

¹³ *See* LBP-07-13, 66 NRC at 148; *see also id.* at 143-44, 145-46.

¹⁴ *See* CLI-10-11, 71 NRC ___ (slip op. at 29-31).

¹⁵ 10 C.F.R. § 2.309(f)(1). “It is simply insufficient, for example, for a petitioner to point to an Internet web site or article and expect the Board on its own to discern what *particular* issue a petitioner is raising . . . and why.” *USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 457 (2006) (emphasis added).

¹⁶ *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), CLI-10-5, 70 NRC ___ (Jan. 7, 2010) (slip op. at 14) (emphasis added). *See also, e.g., Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 359 (2001).

¹⁷ *See Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 194 (1999) (citation omitted).

Our “contention standards . . . require petitioners to plead specific grievances, not simply to provide general “notice pleadings.”¹⁸ Accordingly, under longstanding NRC practice, if a question arises over the scope of an admitted contention, the Board or Commission will refer back to the bases set forth in support of the contention.¹⁹

Here, Contention 3 specifically described a failure to “account for the loss of economic activity in Plymouth County,” such as lost “business value,” “[t]he fact that the business is an on-going business with inventory, equipment, and income generation capability,” and losses associated with impacts to the “tourism sector.”²⁰ Contention 3 did not include, for example, a challenge to the underlying conversion factor (dollar value per rem of exposure) used to compute health exposure costs, even though Entergy’s Environmental Report clearly and *repeatedly* had specified the conversion factor that was used – a standard factor from NRC guidance documents.²¹ In short, we did not

¹⁸ See *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 428-29 (2003).

¹⁹ See, e.g., *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379, 386 (2002) (citing *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988), *aff’d sub nom. Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir. 1991)); *Crow Butte Resources, Inc.* (North Trend Expansion Area), CLI-09-12, 69 NRC 535, 543, 553 (2009); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991).

²⁰ *Request for Hearing and Petition to Intervene By Pilgrim Watch* (May 25, 2006) (Petition for Hearing) at 44-45.

²¹ See, e.g., License Renewal Application (Pilgrim Nuclear Power Station), Appendix E, Environmental Report at 4-32, 4-36, 4-45. See also NUREG/BR-0184, Regulatory Analysis Technical Handbook, Final Report (June 1997) at 5.26.

Moreover, as the majority stressed, the challenged “off-site economic costs” portion of the SAMA analysis *did not encompass* the valuation of health consequences from dose exposure. See CLI-10-11, 71 NRC ___ (slip op. at 30 n.118 (citing LBP-07-13, 66 NRC at 145-46)). The Pilgrim SAMA analysis *separately* assessed the monetary value of health consequences to off-site population in an “off-site exposure costs” analysis. See also, e.g., Environmental Report at 4-32, 4-36, 4-43. The only obvious arguments bearing on health and dose exposure in Contention 3 went to the accuracy of atmospheric (continued . . .)

remove any “health” cost claims from the scope of Contention 3, but agreed with the majority that Pilgrim Watch improperly sought to oppose summary disposition with various distinctly new economic cost analysis challenges never proffered, supported, or admitted as part of Contention 3’s economic cost claims.

We also noted that Pilgrim Watch’s opposition to summary disposition raised particular new challenges that decontamination or “clean-up” costs had been dramatically underestimated in the SAMA analysis.²² Again, these were claims nowhere intimated by Contention 3 as proffered or admitted, as both Entergy and the Staff argued.²³ More significantly, quite apart from any timeliness or contention scope issues

dispersion modeling (which depicts the projected plume trajectory and related radionuclide deposition), the meteorological patterns issue we remanded for hearing.

²² CLI-10-11, 71 NRC __ (slip op. at 30-31).

²³ See *id.* & n.119. The specific “decontamination” arguments found beyond the scope of Contention 3 were that the economic cost analysis fundamentally mischaracterized decontamination costs because its underlying decontamination “assumptions are based on a radiological weapon event’ where ‘particulates are relatively large and swept up with a broom” (an argument never specifically raised in the opposition to summary disposition and therefore waived), and a claim that the analysis failed to account for the “difficulty of conducting ecological restoration.” See *id.* (slip op. at 30).

Pilgrim Watch appears to believe that, because its contention broadly referred to “economic infrastructure” and “economic activity,” it was free to add at will all manner of distinctly new claims simply by labeling these as issues falling within the infinitely broad umbrella of “economic activity,” regardless of whether Contention 3 gave adequate notice of the challenges, or provided the necessary support for their admission. See Motion at 5-6. But as we have stressed, NRC contention standards do not allow for general “notice pleading[s], with details to be filled in later.” *Millstone*, CLI-01-24, 54 NRC at 363 (citation omitted). Pilgrim Watch’s motion now sets forth an expansive definition of what it states it meant by “economic infrastructure,” asserting a litany of matters neither outlined in its contention, nor even identified or argued before the Board in Pilgrim Watch’s opposition to summary disposition. See Motion at 5-6.

Pilgrim Watch is correct that NRC SAMA analyses routinely account for decontamination costs, as Entergy documents properly described. See Motion at 4-5. Contention 3 acknowledged that SAMA economic cost calculations include decontamination costs, an undisputed point. See Petition for Hearing at 43-44; CLI-10-11, 71 NRC at __ (slip op. at 31 n.119). That all parties were aware that decontamination costs are part of SAMA analysis has no bearing on the timeliness of the particular (continued . . .)

bearing on the decontamination/cleanup arguments, we considered *all* of Pilgrim Watch's economic cost arguments on summary disposition, but agreed with the Board majority that Pilgrim Watch failed to present any significantly probative evidence of a genuine material dispute on any of its economic cost input claims.²⁴ Whether within the scope of Contention 3 or not, none of Pilgrim Watch's economic cost arguments raised a genuine material dispute for hearing. Pilgrim Watch provides us with no reason to revisit that conclusion.

Building off of its initial claim, Pilgrim Watch additionally argues that we applied the incorrect standard of review in considering the Board's grant of summary disposition, and thereby improperly "limit[ed]" the evidence that Pilgrim Watch may present at the remand hearing. Pilgrim Watch suggests that, absent the Board's error in granting summary disposition and our subsequent error in reviewing that decision, Pilgrim Watch later would have "assembled and submitted" more evidence to support Contention 3 on "inputs relating to economic consequences," including evidence on "spent fuel pool accident consequences," "decontamination," and "health costs."²⁵

This argument is without merit. The premise of Pilgrim Watch's argument depends on the viability of its position that we improperly limited the scope of Contention 3. However, as we explained above, the scope of Contention 3 was dictated by Pilgrim Watch in its original pleading, not by our decision in CLI-10-11. With regard to summary disposition, while Pilgrim Watch certainly was not required to present all of its supporting

"decontamination" claims Pilgrim Watch later sought to introduce to oppose summary disposition. Simply put, Contention 3 neither challenged underlying assumptions regarding how decontamination costs are computed, nor asserted "ecological restoration" claims. Moreover, even if timely, Pilgrim Watch's opposition to summary disposition raised no supported, genuine material dispute on these claims.

²⁴ CLI-10-11, 71 NRC __ (slip op. at 31 & n.121).

²⁵ Motion at 7-8.

evidence at the summary disposition stage, it was incumbent upon it to provide some significantly probative evidence of a genuine material dispute to counter Entergy's motion for summary disposition, which addressed the three parts of Contention 3: meteorological patterns, evacuation timing inputs, and economic cost analysis.

At the summary disposition stage, the quality of evidentiary support is "expected to be of a higher level than that at the contention filing stage."²⁶ Because Pilgrim Watch failed to provide significantly probative evidence of a genuine material dispute for hearing on the evacuation inputs and economic cost issues, we affirmed the Board majority's conclusion that no material dispute remained on those portions of the contention. Pilgrim Watch therefore cannot now insist that it is free to "present evidence" on remand challenging the inputs in the Pilgrim SAMA off-site economic costs analysis, to the extent that such evidence is not within the scope of the remanded meteorological patterns issue, as explained in CLI-10-11.²⁷

In CLI-10-11, we gave careful and generous consideration to all of Pilgrim Watch's arguments challenging the Board majority's dismissal of Contention 3. Pilgrim Watch's motion for reconsideration points to no compelling circumstances such as clear and material error or oversight that would render the Commission's decision invalid and

²⁶ CLI-10-11, 71 NRC ___ (slip op. at 36) (quoting Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, Final Rule, 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989)).

²⁷ We also note that Pilgrim Watch's motion closes with the suggestion that we have "prejudged" the SAMA analysis issue because in CLI-10-11 we noted that the GEIS concludes, based on an extensive and bounding analysis, the probability-weighted consequences of a severe accident are "small" for all plants. Motion at 9. See *also* CLI-10-11, 71 NRC ___ (slip op. at 37, 39). We have not prejudged the issue. Pilgrim Watch itself acknowledged the distinction between the GEIS's generic severe accident consequences finding and the requirement for a site-specific SAMA analysis: "*even though* the probability of a severe accident is so low that the impacts can be considered small, all plants must still individually consider alternatives to mitigate the consequences of those accidents." Petition for Hearing at 29 (emphasis in original).

therefore is *denied*. Finally, we encourage the Board's continued progress in establishing the schedule for the remainder of the proceeding and achieving its timely conclusion.²⁸

IT IS SO ORDERED.²⁹

For the Commission

[NRC SEAL]

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland
this 17th day of June, 2010.

²⁸ Late last week, Judge Abramson issued a decision denying a motion by Pilgrim Watch requesting that he recuse himself from this proceeding. See Decision (Denying Motion on Behalf of Pilgrim Watch for My Self-Disqualification from the Remand Proceedings and Referring Motion to the Commission) (June 10, 2010). Judge Abramson has referred the matter to us pursuant to 10 C.F.R. § 2.313(b)(2). We will address the referral in the near term.

²⁹ Commissioner Apostolakis did not participate in this matter.