

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Gregory B. Jaczko, Chairman
Peter B. Lyons
Dale E. Klein
Kristine L. Svinicki

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

ENTERGY NUCLEAR VERMONT)
YANKEE, LLC, and ENTERGY)
NUCLEAR OPERATIONS, INC.) Docket No. 50-271-LR
)
(Vermont Yankee Nuclear Power)
Station))
_____)

CLI-09-10

MEMORANDUM AND ORDER

The Commonwealth of Massachusetts (“the Commonwealth”) has petitioned the Commission for review of LBP-08-22 and LBP-08-25, Partial Initial Decisions issued by Atomic Safety and Licensing Boards in the *Pilgrim* and *Vermont Yankee* license renewal proceedings.¹ Applicants Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.

¹ See *Commonwealth of Massachusetts Petition for Review of LBP-08-22* (Nov. 12, 2008)(“Pilgrim Petition”); *Commonwealth of Massachusetts Petition for Review of LBP-08-25 and Request for Consolidated Ruling* (Dec. 2, 2008)(“Vermont Yankee Petition”). To avoid duplicative argument, the Commonwealth’s Vermont Yankee Petition adopts and incorporates by reference its Pilgrim Petition. See Vermont Yankee Petition at 2 n.3.

(collectively, “Entergy”),² and the NRC Staff oppose the petitions for review. Because the factual and legal issues the petitions raise are the same for both the *Pilgrim* and *Vermont Yankee* proceedings, the Commonwealth requests that the Commission issue a single decision addressing both petitions. Our decision today consolidates and addresses both petitions for review.

For reasons outlined further below, we have construed the Commonwealth’s petitions as a request for Commission action, and not as actual “petitions for review” under 10 C.F.R. § 2.341. Although we deny the particular relief requested in the Commonwealth’s requests, our decision today acknowledges the Commonwealth’s concerns and explains how the Commission will handle them, thereby rendering further, formal relief unnecessary.

Earlier decisions bearing on the *Pilgrim* and *Vermont Yankee* license renewal applications recount in some detail both the procedural background of this case and the NRC’s regulatory process for license renewal.³ Below we provide a condensed case history.

I. Background

The Commonwealth petitioned for a hearing and to intervene in the *Pilgrim* and *Vermont Yankee* license renewal proceedings, submitting in both proceedings a single and essentially identical contention.⁴ The contentions claimed that the applicants’ license renewal applications

² Entergy Nuclear Operations, Inc. and Entergy Nuclear Generation Co. are licensees for the Pilgrim nuclear reactor facility. Entergy Nuclear Operations, Inc. and Entergy Nuclear Vermont Yankee, LLC are licensees for the Vermont Yankee facility. In this decision, we refer collectively to the license applicants as “Entergy.”

³ See, e.g., *Massachusetts v. United States*, 522 F.3d 115 (1st Cir. 2008); LBP-06-20, 64 NRC 131, 148-49, 152-61 (2006); LBP-06-23, 64 NRC 257, 274-300 (2006); CLI-07-3, 65 NRC 13 (2007).

⁴ See *Massachusetts Attorney General’s Request for a Hearing and Petition for Leave to Intervene with Respect to Entergy Nuclear Operation’s Inc.’s Application for Renewal of the Pilgrim Nuclear Power Plant Operating License* (May 26, 2006)(ML061630088) (“Contention/Pilgrim”) at 21-47; *Massachusetts Attorney General’s Request for a Hearing and Petition for Leave to Intervene with Respect to Entergy Nuclear Operations Inc.’s Application for*

failed to comply with the National Environmental Policy Act (NEPA) and with NRC environmental regulations because the applications did not address new and significant information on the risks of potential spent fuel pool accidents in pools with high-density storage racks. This information, the Commonwealth claimed, was never “previously considered by the NRC in any EIS,” and “show[ed] that the impact of high-density spent fuel pool storage” would be “significantly greater than contemplated in prior [NRC] EISs,” including the Generic Environmental Impact Statement for License Renewal of Nuclear Plants (GEIS), issued in 1996.⁵ The contentions additionally claimed that the license renewal applications were deficient because they did not provide a NEPA analysis of the potential impacts of deliberate attacks on the spent fuel pool, and did not analyze alternatives to mitigate spent fuel pool accidents.

Separate Licensing Boards in the *Pilgrim* and *Vermont Yankee* proceedings found the Commonwealth’s contention beyond the scope of a license renewal proceeding and therefore inadmissible. Both Boards highlighted the NRC’s regulatory review process for license renewal, in which the environmental review is divided into those NEPA issues deemed appropriate for generic analysis and those warranting a site-specific environmental impacts analysis. Issues found not to require a plant-specific environmental analysis are designated as “Category 1” issues.⁶ For such issues, the NRC’s GEIS for license renewal provides a generic environmental analysis – generally applicable to all plants or to a distinct subcategory of plants. Because “Category 1” issues already have been reviewed on a generic basis for all plants, an applicant’s Environmental Report need not provide a site-specific analysis of these issues.⁷ In contrast,

Renewal of the Vermont Yankee Nuclear Power Plant Operating License (May 26, 2006)(ML061640065)(“Contention/Vermont Yankee”) at 21-47.

⁵ See Contention/Vermont Yankee at 23; Contention/Pilgrim at 23.

⁶ See generally NUREG-1437, Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Final Report, Vol. 1 (May 1996)(“GEIS”) at 1-5 to 1-11.

⁷ See 10 C.F.R. § 51.53(c)(3)(i).

applicants must provide a plant-specific analysis of all “Category 2” issues.⁸ The GEIS’s conclusions on the environmental impacts of “Category 1” issues are codified in Table B-1, 10 C.F.R. Part 51, Appendix B to Subpart A.

In rejecting the Commonwealth’s contention, the *Pilgrim* and *Vermont Yankee* Boards found that the potential environmental impacts of storing spent fuel in pools for an additional 20 years – including the risk of spent fuel pool accidents – already had been generically addressed in the GEIS as a “Category 1” issue that does not require a site-specific impacts analysis.⁹ The Boards went on to conclude that because “Category 1” environmental impacts findings are codified in NRC regulations, such findings normally may not be attacked in individual NRC adjudicatory proceedings, unless the Commission waives the rule at issue for a particular proceeding, or the rule is changed or suspended due to a rulemaking review.¹⁰ The Boards noted, however, that new and significant information going to the validity of a generic “Category 1” finding appropriately could be raised in a petition for rulemaking, and that the Commonwealth in fact had filed a rulemaking petition raising concerns similar to its spent fuel pool contention.¹¹

In CLI-07-3, the Commission affirmed the *Pilgrim* and *Vermont Yankee* Board decisions, concurring that the Commonwealth’s contention impermissibly attacked the GEIS’s generic “Category 1” finding on spent fuel pool storage impacts.¹² We confirmed that “[b]ecause the generic environmental analysis was incorporated into a regulation, the conclusions of that

⁸ See 10 C.F.R. § 51.53(c)(3)(ii).

⁹ See LBP-06-20, 64 NRC 131, 152-61 (2006); LBP-06-23, 64 NRC at 280-300. The current GEIS concludes that the environmental effects of onsite spent fuel pool storage during the license renewal term would not be significant. See GEIS at 6-85 to 6-86; see *also id.* at 6-70 to 6-75; 6-79 to 6-83.

¹⁰ LBP-06-20, 64 NRC at 155-61; LBP-06-23, 64 NRC at 288-99. See *also* 10 C.F.R. § 2.335(a).

¹¹ LBP-06-20, 64 NRC at 161; LBP-06-23, 64 NRC at 299 (referencing Massachusetts Attorney General’s Petition for Rulemaking to Amend 10 C.F.R. Part 51 (Aug. 25, 2006)(ML062640409)).

¹² See CLI-07-3, 65 NRC at 19-21.

analysis may not be challenged in litigation unless the rule is waived . . . for a particular proceeding or the rule itself is suspended or altered in a rulemaking proceeding.”¹³

Like the Boards, we emphasized that the appropriate avenue for challenging a generic “Category 1” environmental impacts conclusion was through the rulemaking petition that the Commonwealth had already filed. We further made clear that if the rulemaking review were not resolved before the licensing proceedings were completed, the Commonwealth could seek to have the licensing proceedings suspended pending an NRC decision on its rulemaking petition, if it participated in the proceedings as an interested State, under 10 C.F.R. § 2.315(c).¹⁴

The Commonwealth sought Commission reconsideration of CLI-07-3. We denied reconsideration, but again clarified that while the Commonwealth was not an admitted “party” to either licensing proceeding, it would be able to request that the proceedings be stayed – pending a decision on the petition for rulemaking – if it sought to participate as an interested State.¹⁵

The Commonwealth sought judicial review in the U.S. Court of Appeals for the First Circuit. The court upheld the NRC decisions.¹⁶ To assure that the Commonwealth would have sufficient opportunity to request participation as an interested State, if it so chose, the court stayed the close of the then-ongoing hearing process in the *Pilgrim* and *Vermont Yankee* proceedings for 14 days from the date of issuance of court’s mandate in the case.¹⁷ Soon thereafter, in May 2008, the Commonwealth filed a notice of intent to participate as an

¹³ *Id.* at 17-18. Where there are unusual circumstances that would render a “Category 1” analysis inapplicable to a particular plant, a petitioner may seek a rule waiver; Commission approval of a rule waiver could allow litigation of a contention on a “Category 1” issue. *Id.* at 20.

¹⁴ *Id.* at 22 & n.37.

¹⁵ CLI-07-13, 65 NRC 211, 214-15 & n.16 (2007).

¹⁶ *Massachusetts v. United States*, 522 F.3d 115 (1st Cir. 2008).

¹⁷ *Id.* at 130.

interested State in the *Pilgrim* and *Vermont Yankee* proceedings, enabling the Commonwealth to request that final decisions in those proceedings be stayed pending review of the rulemaking petition.¹⁸

In August 2008, the NRC denied the Commonwealth's petition for rulemaking.¹⁹ After considering the Commonwealth's arguments and cited studies, the NRC concluded that the spent fuel pool environmental impacts findings in the GEIS (NUREG-1437), codified in 10 C.F.R. Part 51, Appendix B to Subpart A, Table B-1, "remain valid, both for SFP [spent fuel pool] accidents and for potential terrorist attacks that could result in an SFP fire."²⁰ The Commonwealth and two other states have sought judicial review of the rulemaking denial.²¹

II. The Commonwealth's Petitions for Review

Currently before the Commission are the Commonwealth's petitions for review of LBP-08-22 (in the *Pilgrim* proceeding) and LBP-08-25 (in the *Vermont Yankee* proceeding). These are Partial Initial Decisions resolving issues litigated before the *Pilgrim* and *Vermont Yankee* Boards.²² The Commonwealth was not involved in litigating the admitted contentions addressed in the Boards' decisions, and the petitions for review do not challenge any specific factual or legal finding made in LBP-08-22 or LBP-08-25. Indeed, the Commonwealth earlier made clear

¹⁸ See *Commonwealth of Massachusetts' Notice of Intent to Participate As An Interested State* (May 6, 2008)(ML081350190 in *Vermont Yankee* proceeding; ML081500531 in *Pilgrim* proceeding).

¹⁹ See Denial of Petitions for Rulemaking, 73 Fed. Reg. 46,204 (Aug. 8, 2008)(the NRC also denied a petition for rulemaking filed by the Attorney General for the State of California, who had raised nearly identical spent fuel pool claims).

²⁰ See *id.* at 46,206.

²¹ The three consolidated cases are pending before the U.S. Court of Appeals for the Second Circuit. See *New York v. NRC*, Nos. 08-3903-ag(L), 08-4833-ag(CON), 08-5571-ag(CON) (2d Cir.).

²² See LBP-08-22, 68 NRC __ (slip op. Oct. 30, 2008); LBP-08-25, 68 NRC __ (slip op. Nov. 24, 2008).

that it has “no interest” in the contentions of the admitted parties, which are unrelated to its spent fuel pool concerns.²³

Instead, the Commonwealth seeks assurance that “in the event . . . the Commonwealth prevails” in its judicial challenge to the NRC’s rulemaking denial, the judicial result will inform the *Pilgrim* and *Vermont Yankee* license renewal actions.²⁴ The Commonwealth claims that “the NRC cannot, consistent with NEPA, reach final closure on the relicensing” without applying or otherwise taking into account – in the individual renewal proceedings – the court of appeals’ ultimate decision regarding the rulemaking denial.²⁵ Specifically, the Commonwealth states that “[w]hile the NRC has discretion to select a generic rulemaking process to resolve environmental issues in an individual proceeding,” it must assure that the “results of the generic rulemaking process” will be “plugged into’ the individual licensing decisions from which the rulemaking issues arose.”²⁶ In short, the Commonwealth claims that because “the NRC’s compliance with NEPA is still subject to pending litigation, it would be improper for the NRC to terminate the [Pilgrim and Vermont Yankee] relicensing proceeding[s] without accounting for this litigation.”²⁷

The Commonwealth requests that the NRC either (1) defer a final decision in the license renewal actions until the rulemaking litigation is completed; or (2) “expressly condition” any

²³ See CLI-08-9, 67 NRC 353, 356 n.16, citing *Reply Brief for Petitioner Commonwealth of Massachusetts* at 13 (Nov. 8, 2007)(ML073250351).

²⁴ See *Pilgrim* Petition at 3.

²⁵ See *id.*

²⁶ See *id.* at 15-16 (citation omitted).

²⁷ *Id.* at 15. The Commonwealth similarly argues that it would be “arbitrary and capricious” under the Administrative Procedure Act (APA) for the NRC to remove the generic spent fuel pool impacts issue from the licensing proceedings, and “then refuse to ensure it will in fact reconnect and ‘plug in’ the final ruling from the Court on this issue.” *Id.* at 16. It also claims the NRC would violate the Atomic Energy Act (AEA) and NRC regulations if it did not assure that the “final judicial decision on the NRC’s rulemaking process” is taken into account in the licensing actions.” *Id.* at 17.

Pilgrim or Vermont Yankee license renewal “on compliance with the court ruling.”²⁸ It styles its request as “petitions for review” and seeks reversal of the Board decisions because they are not “conditioned upon, or otherwise properly structured to take account of, the Commission’s new and significant information regarding the risks of SFP accidents, as may be finally determined by the courts.”²⁹

Entergy and the NRC Staff oppose the petitions for review.³⁰ Both argue that the petitions are not proper appeals because the Commonwealth did not participate on the contentions resolved in the Board decisions. Both further claim that the Commonwealth’s request in effect is a motion for a stay of the license renewal proceedings pending judicial review, but that the Commonwealth has made no effort to address the NRC standards for issuance of a stay, found in 10 C.F.R. § 2.342(e). Entergy urges that the Commonwealth “not be permitted to circumvent [NRC] requirements by characterizing its requests as an ‘appeal.’”³¹

We agree that the Commonwealth’s petitions are not proper “petitions for review” pursuant to 10 C.F.R. § 2.341. The Commonwealth did not participate on the contentions resolved in the Board decisions, and nowhere indicates that it ever even requested the Boards to stay or condition their final decisions. Nor do the petitions meet – or even address – the NRC standards for a motion for a stay, found in 10 C.F.R. § 2.342(e). The petitions for review in fact challenge nothing the Boards actually decided. Nonetheless, we have reviewed the Commonwealth’s petitions, construing them as, in effect, a request for direct Commission

²⁸ *Id.* at 15.

²⁹ *Id.* at 4.

³⁰ See *Entergy’s Answer to Commonwealth of Massachusetts Petition for Review of LBP-08-22* (Nov. 24, 2008) (“*Entergy’s Answer re: LBP-08-22*”); *NRC Staff’s Answer in Opposition to the Commonwealth of Massachusetts’ Petition for Review of LBP-08-22* (Nov. 24, 2008); *Entergy’s Answer to Commonwealth of Massachusetts Petition for Review of LBP-08-25 and Request for Consolidated Ruling* (Dec. 11, 2008); *NRC Staff’s Answer in Opposition to the Commonwealth of Massachusetts’ Petition for Review of LBP-08-25* (Dec. 10, 2008).

³¹ *Id.* at 6.

action. We address the merits of the Commonwealth's request as an exercise of our ultimate supervisory control over our proceedings.³²

Because NRC license renewal regulations codify environmental impacts conclusions for a number of generically reviewed issues, these issues normally fall outside the scope of individual license renewal proceedings. But our rules recognize the possibility of new and significant information calling into question prior generic findings, and our decisions have consistently pointed to the petition for rulemaking device as one means "to alert the Commission to [new] information that may render a GEIS finding incorrect."³³ Here, virtually from the outset of the *Pilgrim* and *Vermont Yankee* license renewal proceedings, the Commonwealth consistently and timely raised its spent fuel pool impacts concerns. Not long after the license renewal proceedings began, the Commonwealth filed a petition for rulemaking challenging the NRC's generic spent fuel pool analysis, as well as adjudicatory contentions on the same issue. In addition, the Commonwealth timely filed its intent to participate in the renewal proceedings as an interested State, and in fact has taken every conceivable procedural step to assure that the ultimate outcome of its rulemaking petition (now under judicial review) would inform the NEPA analysis for the *Pilgrim* and *Vermont Yankee* licensing proceedings.

Moreover, while the First Circuit found that the NRC acted reasonably in using a "generic method" of conducting the required NEPA "hard look" at impacts, and in requiring the Commonwealth to raise its NEPA concerns in a rulemaking petition rather than in adjudicatory contentions, the court stressed that what "ensures ultimate compliance with NEPA is judicial review."³⁴ It was the court's clear expectation that the Commonwealth, by following the

³² See, e.g., *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-02-23, 56 NRC 230, 237 (2002).

³³ See *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 12, 14-15 (2001).

³⁴ See *Massachusetts*, 522 F.3d at 127, 130.

alternate path the NRC set forth, would still have a “*meaningful* opportunity” to seek judicial review of the “results of the . . . rulemaking petition.”³⁵

We gave careful consideration to the Commonwealth’s petition for rulemaking, and we stand by the decision that no new rulemaking proceeding is warranted. But if, contrary to our expectation, the Commonwealth prevails on judicial review, we will respond accordingly, including taking any steps in the *Pilgrim* and *Vermont Yankee* license renewal proceedings called for to assure that the judicial review results are implemented in a “meaningful” way. Entergy recognizes as much: “[i]f the Commonwealth were to ultimately prevail . . . the Commission certainly has the authority to supplement its environmental analysis for Pilgrim [and Vermont Yankee] to comply or be consistent with such a decision.”³⁶

We cannot anticipate in advance of a judicial decision the precise NRC remedies that may be appropriate if the Commonwealth’s challenge prevails. But our commitment to effectuate the court’s conclusion in a fashion respectful of the First Circuit’s views and mindful of the Commonwealth’s long-maintained interests and efforts renders unnecessary the relief the Commonwealth seeks.

If the Court of Appeals issues a decision in favor of the Commonwealth, the Commission will issue an order indicating whether any further steps in these proceedings are necessary.

IT IS SO ORDERED.

For the Commission

(NRC SEAL)

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 4th day of June, 2009.

³⁵ See *id.* at 130-31 (emphasis added).

³⁶ See Entergy’s Answer re: LBP-08-22 at 6.