RAS 12525

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)	)	

ENTERGY'S BRIEF IN OPPOSITION TO THE MASSACHUSETTS ATTORNEY GENERAL'S APPEAL OF LBP-06-23

David R. Lewis
Paul A. Gaukler

PILLSBURY WINTHROP SHAW PITTMAN LLP
2300 N Street, N.W.
Washington, DC 20037-1128
Tel. (202) 663-8474
Counsel for Entergy Nuclear Generation Company
and Entergy Nuclear Operations, Inc.

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Pursuant to 10 C.F.R. § 2.311(a), Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (hereinafter collectively referred to as "Entergy") submit this brief in opposition to the appeal filed by the Massachusetts Attorney General in the Pilgrim license renewal proceeding. The Massachusetts Attorney General's Notice of Appeal[1] and Brief on Appeal[2] request that the Commission review and reverse that portion of the Atomic Safety and Licensing Board's ("Licensing Board" or "Board") Memorandum and Order (Ruling on Standing and Contentions of Petitioners Massachusetts Attorney General and Pilgrim Watch), LBP-06-23, 64 N.R.C. ___ (Oct.16, 2006) ("LBP-06-23") denying the Attorney General's contention and related hearing request alleging the need for the Pilgrim relicensing Environmental Report ("ER") to address the impacts of severe spent fuel accidents. The Attorney General's appeal should be denied because it is untimely. In addition, LBP-06-23 should be affirmed because the Board properly rejected the Attorney General's sole contention based on the Commission's precedent in

[1] Massachusetts Attorney General's Notice of Appeal of LBP-6-23 (Oct. 31, 2006).

[2] Massachusetts Attorney General's Brief on Appeal of LBP-6-23 (Oct. 31, 2006) ("Brief").

Turkey Point[3] that on-site spent fuel storage is a Category 1 environmental issue for which the environmental impacts have been codified by regulation as "small." Hence, as the Commission held in Turkey Point, "all" onsite spent fuel storage environmental issues, "including accident risk," are not subject to hearing in individual licensing renewal proceedings absent a waiver or suspension and amendment of the rules. 54 N.R.C. at 23 (emphasis added).

The Massachusetts Attorney General's contention in the Pilgrim license renewal proceeding is virtually identical to the contention submitted by the Attorney General in the Vermont Yankee license renewal proceeding, which the Vermont Yankee Licensing Board rejected in its Memorandum and Order (Ruling on Standing, Contentions, Hearing Procedures, State Statutory Claim, and Contention Adoption), LBP-06-20, 64 N.R.C. ___ (Sept. 22, 2006) ("LBP-06-20"). Furthermore, the grounds on which the Pilgrim and the Vermont Yankee Licensing Boards denied the Attorney General's contention are identical – that on-site spent fuel storage is a Category 1 environmental issue for which the impacts are codified by Commission rule to be "small" and are therefore not subject to litigation in individual license renewal proceedings absent Commission waiver of the rules. The Attorney General has previously appealed LPB-06-20 denying his contention in the Vermont Yankee relicensing proceeding,[4] and Entergy and the NRC Staff have filed briefs opposing the Attorney General's appeal.[5] The arguments raised by the Attorney General in the instant appeal of LBP-06-23 are essentially identical to the arguments raised in his

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[3] Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 N.R.C. 3 (2001) ("Turkey Point").

[4] See Massachusetts Attorney General's Notice of Appeal of LBP-6-20 (Oct. 3, 2006) and Massachusetts Attorney General's Brief on Appeal of LBP-6-20 (Oct. 3, 2006) ("Mass AG VY Brief").

[5] Entergy's Brief in Opposition to the Massachusetts Attorney General's Appeal of LBP-06-20 (Oct. 13, 2006) ("Entergy VY Brief"); NRC Staff's Brief in Opposition to Massachusetts Attorney General's Appeal of LBP-06-20 (Oct. 13, 2006) ("Staff VY Brief").

appeal of LBP-06-20. Those arguments are meritless and should be rejected for the reasons set forth in Entergy's and the NRC Staff's opposition briefs in LBP-06-20.[6]

The Commission should affirm the Pilgrim and Vermont Yankee Licensing Board decisions because those decisions are firmly founded on Turkey Point and are fully in accordance with NRC regulations and the National Environmental Policy Act ("NEPA"). As the Attorney General acknowledges, the Commission has discretion to address environmental issues by generic rulemaking. The Attorney General's claim that a petitioner can challenge an ER for not addressing assertedly new and significant information runs afoul of the Commission's determination to handle spent fuel issues in license renewal proceedings by generic rule. Because the Commission's NEPA consideration of spent fuel impacts is codified in NRC regulation, the asserted new and significant information can only be handled under the Commission's established mechanisms for waiver or suspension and amendment of the rule as described in Turkey Point. The Attorney General's filing of a Rulemaking Petition tacitly concedes this point.

STATEMENT OF THE CASE

Entergy submitted an application, dated January 25, 2006, requesting renewal under 10 C.F.R. Part 54 of Operating License DPR-35 for the Pilgrim Nuclear Power Station for an additional 20-year period beyond its current license expiration date (the "Application"). On March 27, 2006, the Nuclear Regulatory Commission ("NRC" or "Commission") published a Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing ("Notice")

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[6] The Attorney General recommends that his appeals of LBP-06-20 and LBP-06-23 "be considered together" because his "contentions [in the two cases] and the decisions rejecting them are so similar." Brief at 4. Entergy agrees that it would make sense for the Commission to consider the appeals together because of (1) the virtual identity of the contentions raised by the Attorney General in the Pilgrim and Vermont Yankee proceedings, (2) the identical rationale of the Licensing Board decisions rejecting the contentions, and (3) the similarity of the arguments made on appeal in both proceedings.

regarding the Application. 71 Fed. Reg. 15,222 (Mar. 27, 2006). The Notice permitted any person whose interest may be affected to file a request for hearing and petition for leave to intervene within 60 days of the notice. Id.

On May 26, 2006, the Attorney General submitted a petition to intervene seeking admission of a single contention concerning the alleged need for the ER to address the environmental impacts of severe spent fuel pool accidents because of asserted new and significant information concerning the likelihood and severity of such accidents.[7] The Attorney General also filed a "Petition for Backfit Order" that sought to require that the Pilgrim spent fuel pool be returned to its original low-density storage configuration and to use dry storage for any excess spent fuel. Id.

On June 22, 2006, Entergy and the NRC Staff filed their Answers to the Attorney General's Petition. Both Entergy and the Staff acknowledged the Attorney General's standing, but determined that the Attorney General's sole contention concerning spent fuel pool fires was inadmissible because (1) the Contention was an impermissible challenge to the NRC's rules and generic determinations, and (2) the Contention did not in fact raise any new and significant information concerning spent fuel pool fires.[8] On June 29, 2006, the Attorney General filed a Reply to the Entergy and NRC Staff Answers.[9]

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[7] Massachusetts Attorney General's Request for a Hearing and Petition for Leave to Intervene with Respect to Entergy Nuclear Operations, Inc.'s Application for Renewal of the Pilgrim Nuclear Power Plant Operating License and Petition for Backfit Order Requiring New Design Features to Protect Against Spent Fuel Pool Accidents (May 26, 2006) ("Petition").

[8] NRC Staff Answer Opposing Massachusetts Attorney General's Request for Hearing and Petition for Leave to Intervene and Petition for Backfit Order (June 22, 2006) ("Staff Answer"); Entergy's Answer to the Massachusetts Attorney General's Request for a Hearing, Petition for Leave to Intervene, and Petition for Backfit Order (June 22, 2006) ("Entergy Answer").

[9] Massachusetts Attorney General's Reply to Entergy's and NRC Staff's Responses to Hearing Request and Petition to Intervene With Respect to Pilgrim License Renewal Proceeding (June 29, 2006) ("Reply").

A Prehearing conference was held on July 6 and 7, 2006, during which the Licensing Board heard oral argument concerning the admissibility of the petitioners' contentions, including the Attorney General's Contention.[10] At that conference, the Attorney General advised the Board and the parties that he would be filing a Rulemaking Petition raising the same issues as those raised in his Contention. Prehearing Tr. at 89.

On August 25, 2006, the Attorney General submitted a Petition for Rulemaking which requested that the Commission amend 10 C.F.R. Part 51 based on the same asserted new and significant information raised in the Attorney General's Contention[11] and incorporated the Contention and its supporting materials. Like the Contention, the Rulemaking Petition claims that asserted new and significant information shows that the determination made in the license renewal GEIS[12] that "the likelihood of a fuel-cladding fire is highly remote" is incorrect and it requests the Commission (at 3) to "withhold any decision to renew the operating licenses for the Pilgrim and Vermont Yankee nuclear power plants until the requested rulemaking has been completed and until the NRC has completed" the related NEPA process that may be required by any amended rule. On August 30, 2006, counsel for Entergy requested that the Commission act on and resolve the Rulemaking Petition by November 2007 in order to avoid any potential for delay in the renewal of the Pilgrim and Vermont Yankee licenses.[13]

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[10] In the Matter of Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), Docket No. 50-293-LR, ASLBP No. 06-848-02-LR, Oral Arguments on Contentions (July 6 and 7, 2006) ("Prehearing Tr.").

[11] Massachusetts Attorney General's Petition for Rulemaking to Amend 10 C.F.R. Part 51 (Aug. 25, 2006) ("Rulemaking Petition").

[12] NUREG-1437, Generic Environmental Impact Statement for License Renewal of Nuclear Plants (1996) ("GEIS" or "NUREG-1437").

[13] Letter to Chairman Klein and Commissioners McGaffigan, Merrifield, Jaczko, and Lyons from David R Lewis, Counsel for Entergy (Aug. 30, 2006).

On October 10, 2006, the Commission issued an Order denying the Attorney General's "Petition for Backfit Order" that had been filed along with his Contention in both the Pilgrim and Vermont Yankee license renewal proceedings[14] The Attorney General's Petitions had sought to require that the Pilgrim and Vermont Yankee spent fuel pools be returned to their original low-density storage configuration and to use dry storage for any excess spent fuel. Id.

On October 16, 2006, the Pilgrim Licensing Board issued LBP-06-23. The Board ruled that, even assuming the Attorney General has presented new and significant information related to the risks and environmental impacts of high density racking in spent fuel pools, as a matter of law the Contention is inadmissible because the Commission has already decided, in Turkey Point, that licensing boards cannot admit an environmental contention regarding a Category 1 issue. LBP-06-23, slip op. at 31-32; see also id. at 39-46. Accordingly, the Board found the Attorney General's Contention to be inadmissible and denied the Attorney General's hearing request. Id. at 46. In doing so, the Board did not reach the issue of whether the Attorney General had in fact supplied new and significant information in his Contention. Id. at 32.

On October 31, 2006, the Massachusetts Attorney General filed his Notice of Appeal and Brief on Appeal appealing the denial by the Pilgrim Licensing Board of his Request for Hearing and Petition for Leave to Intervene. The Brief on Appeal mirrors in large part the Attorney General's October 3, 2006 brief filed in support of his appeal of LBP-06-20 issued in the Vermont Yankee licensing renewal proceeding September 22, 2006.[15] Similar to LBP-06-23, the Vermont Yankee Licensing Board in LBP-06-20 denied the Attorney General's contention and related

[14] Order, CLI-06-26, 64 N.R.C. ____, slip op. (Oct. 10, 2006).

[15] Mass AG VY Brief. See note 4, supra.

hearing request alleging the need for Entergy's Vermont Yankee ER to address the impacts of severe spent fuel accidents based on the Commission's Turkey Point decision that on-site spent fuel storage is a Category 1 environmental issue for which the environmental impacts have been codified by regulation to be "small." On October 13, 2006, both Entergy and the NRC Staff filed briefs opposing the Attorney General's appeal of LBP-06-20.[16]

ARGUMENT

I. THE ATTORNEY GENERAL'S APPEAL IS UNTIMELY

The Commission's regulation governing appeals from rulings on petitions to intervene provides that an order denying a petition to intervene "may be appealed . . . within ten (10) days after the service of the order." 10 C.F.R. § 2.311(a). Here, the Board's Memorandum and Order denying the Attorney General's request for hearing and petition to intervene was issued October 16, 2006. As reflected in the Memorandum and Order, the Board served its decision that same day by electronic e-mail transmission to counsel for the parties. LBP-06-23, slip op. at 115 n. 478. Hence, to be timely, the Attorney General's appeal needed to be filed by October 26, 2006.

The Attorney General's appeal was not filed, however, until October 31, 2006, five days after the filing deadline imposed by 10 C.F.R. § 2.311(a). The Attorney General claims (Brief at 19-20 n.19) that he was entitled to add five days to his response period under 10 C.F.R. § 2.306[17] because the certificate of service prepared by the Secretary's Office solely refers to the Secretary's service of the decision by first class mail and does not mention the Board's electronic ser-

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[16] Entergy VY Brief; Staff VY Brief. See note 5, supra.

[17] 10 C.F.R. § 2.306 provides in part that "[w]henever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper upon him or her and the notice or paper is served upon by first class mail, five (5) days are added to the prescribed period."

vice of the decision. The Attorney General does not deny, however, that his counsel timely received the Board's decision by electronic transmission on October 16, 2006. The Board's e-mail sending the decision to counsel (set forth in footnote 18, below) clearly included both Diane Curran, counsel to the Attorney General for this proceeding, and Matthew Brock, Assistant Attorney General for the Environmental Protection Division of the Office of the Massachusetts Attorney General, and also counsel of record for the Attorney General.[18]

Thus, the Board's decision was simultaneously served the same day by electronic transmission and first class mail. It is well established under Commission practice that, where service is accomplished by both electronic transmission and first class mail, the applicable response period is that established for service by electronic transmission unless otherwise stated.[19] The Attorney General does not suggest otherwise, but merely seeks to exploit the clerical error in the Secretary's certificate of service, without any attempt to notify the Secretary of the error or seek

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From: Ann Young [AMY@nrc.gov]
Sent: Monday, October 16, 2006 12:45 PM
To: lampert@adelphia.net; Matthew.brock@ago.state.ma.us; SSHollis@duanemorris.com; dcurran@harmoncurran.com; mollyhbartlett@hotmail.com; Ann Young; HearingDocket; Jered Lindsay; Karen Valloch; Margaret Parish; OCAAMAIL@nrc.gov; Paul Abramson; Richard Cole; SECY; Susan Uttal; SherVerne Cloyd; Lewis, David R.; Gaukler, Paul A.; msylvia@townhall.plymouth.ma.us
Subject: Memorandum and Order in Pilgrim proceeding
Attachments: Pilgrim Mem & Order Ruling on Conts - 10-16-06 - LBP-06-23.wpd

Pilgrim Mem & Order Ruling on ...

Attached is a Memorandum and Order ruling on the Petitions of Pilgrim Watch and the Massachusetts Attorney General in the Pilgrim license renewal proceeding.

Administrative Judge Ann Marshall Young
Chair, Atomic Safety and Licensing Board

19 See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-03-30, 58 N.R.C. 454, 495 (2003).

clarification of the filing deadline. Since the Attorney General was actually served by electronic transmission on October 16, his appeal is untimely, and the failure to meet a filing deadline provides a sufficient basis to deny the requested relief. See, e.g., Private Fuel Storage, L.L.C. (Independent Fuel Storage Installation), LBP-00-28, 52 N.R.C. 226, 234-239 (2000), aff'd CLI-01-1, 53 N.R.C. 1 (2001) (denying admission of late-filed contentions based on draft EIS where the contentions were filed six days after the deadline established by the licensing board for the filing of such contentions). Accordingly, the Attorney General's appeal should be dismissed.

II. THE BOARD CORRECTLY DENIED ADMISSION OF THE ATTORNEY GENERAL'S CONTENTION BECAUSE THE CONTENTION IMPERMISSIBLY CHALLENGES COMMISSION REGULATIONS

As in his appeal of the Vermont Yankee decision (LBP-06-20), the Attorney General argues that the Pilgrim Licensing Board in LBP-06-23 erred in relying upon Turkey Point in ruling that his Contention was inadmissible because (1) Turkey Point is allegedly inapposite here, (2) Turkey Point as applied by the Board is inconsistent with the NRC's regulations, and (3) Turkey Point as applied by the Board is inconsistent with NEPA. Brief at 14-16. For the reasons set forth in Entergy's Vermont Yankee Brief opposing the Attorney General's appeal of LBP-06-20 – which Entergy fully incorporates be reference here[20] – none of these arguments are meritorious. The Turkey Point decision is directly on point, the Board correctly applied Turkey Point in accordance with the decision and NRC regulations, and Turkey Point is fully consistent with the NRC's regulations and NEPA. Hence, the Commission should deny the Attorney General's ap-

[20] Similar to the approach followed by the Attorney General, rather than repeating Entergy's arguments from its Vermont Yankee brief in full, Entergy incorporates those arguments by reference in this brief and will only summarize them herein.

peal and affirm the decision of the Pilgrim Licensing Board (as well as the decision of the Vermont Yankee Licensing Board).

A. Turkey Point is Fully Applicable to This Case and Its Application here is Fully Consistent with NRC Regulations

Contrary to the Attorney General's claim that Turkey Point is inapposite here (Brief at 14), Turkey Point is squarely on point and controlling for the reasons set forth in Entergy's Vermont Yankee Brief (at 7-9), incorporated by reference here. In Turkey Point, the Commission clearly held that (1) all spent fuel environmental issues – including accident risk – are Category 1 issues resolved generically in the GEIS and, as such, fall outside the scope of license renewal proceedings, and (2) claims of new and significant information affecting Category 1 finding do not transform such findings into litigable issues within the scope of a license renewal proceeding. Rather, as specified by the Commission in Turkey Point, any claims of new and significant information affecting Category 1 findings must be pursued under the waiver or rulemaking provision of the Commission's regulations. Indeed, a contrary ruling would open a Pandora's box that would obviate the Commission's objective of utilizing generic findings to avoid unnecessary litigation of the same issue in numerous individual licensing proceedings (discussed below).

Likewise contrary to the Attorney General's claim (Brief at 14-16), Turkey Point as applied here is fully consistent with NRC regulations for the reasons set forth in Entergy's Vermont Yankee Brief (at 9-17), incorporated by reference here. The Attorney General's arguments wholly ignore that GEIS Category 1 findings are formally codified as Commission rules at 10 C.F.R. Part 51, Appendix B, Table B-1. Hence, they are not "subject to attack . . . in any adjudicatory proceeding." 10 C.F.R. § 2.335(a) (emphasis added). Because Category 1 findings are codified as Commission regulation, such findings can only be addressed in individual NRC adju-

dicatory licensing proceedings if the rule is either waived or else suspended and amended (as elucidated in Turkey Point).

In this light, the Attorney General's statutory interpretation arguments are clearly off base. The Attorney General's claim (Brief at 14-15 & n. 16) that the Licensing Board improperly relied upon regulatory history because of the asserted plain meaning of 10 C.F.R. § 51.53(c)(3)(iv) ignores (1) Supreme Court precedent cautioning against rote application of any plain meaning rule, no matter how clear the words may appear on superficial examination; (2) the inherent ambiguities in the language of 10 C.F.R. § 51.53(c)(3)(iv) relied upon by the Attorney General, particularly when viewed in context with other Commission regulations; and (3) the fundamental conflict of the Attorney General's interpretation with established Commission jurisprudence and 10 C.F.R. § 2.335(a), which forbid challenges to Commission rules in license adjudications (absent waiver or amendment of the rule). See Entergy VY Brief at 11-14. The regulatory history properly relied upon by the Board establishes the Commission's clear intent to avoid any such conflict between the license renewal rules and fundamental precepts of Commission jurisprudence embodied in 10 C.F.R. § 2.335(a).

Similarly, the Attorney General's claim (Brief at 15-16) that the regulatory history relied upon by the Board does "not square with the NRC's overall regulatory scheme for the litigation of contentions in license renewal cases" ignores the fundamental purpose of the license renewal rulemaking to codify generic NEPA issues in order to avoid repeated litigation of the same issue in individual licensing proceedings. Contrary to this fundamental objective, the Attorney General's position would eliminate any finality on generic issues by allowing their litigation based solely on an allegation that the applicant should have recognized some asserted new and signifi-

cant information. In contrast, requiring a waiver or suspension and amendment of generic rules to address new and significant information preserves the finality of the generic rules while still permitting appropriately packaged challenges to the rules where truly warranted (e.g., where a prima facie showing is made in a waiver petition). See Entergy VY Brief at 14-15.

Furthermore, as explained in Entergy's Vermont Yankee Brief (at 15-17), there is no inconsistency as claimed by the Attorney General (Brief at 15) between the scope of the Staff's review concerning Category 1 issues and the requirement that petitioners seek waiver or amendment of the rule in order to litigate asserted new and significant information concerning a Category 1 issue. In neither case can new and significant information be considered and incorporated into the supplemental EIS absent prior Commission approval because in both instances the generic determination codified in the Commission's rules must first be waived or amended. See SECY-93-052 discussed at pages 16-17 & n. 25 of Entergy's VY Brief.

B. Turkey Point is Fully Consistent with NEPA

As in his appeal of the Vermont Yankee decision, the Attorney General erroneously claims (Brief at 16) that Turkey Point as applied by the Pilgrim Licensing Board in LBP-06-23 "is inconsistent with NEPA." As set forth in Entergy's Vermont Yankee Brief (at 17-19) and as conceded by the Attorney General (Brief at 3), the Commission has ample authority under Vt. Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978) and Baltimore Gas & Elec. Co. v. NRDC, 462 U.S. 87, 100-01 (1983) to proceed generically in implementing NEPA and need not allow litigation of generic NEPA issues in each individual licensing proceeding. Hence, Turkey Point is fully consistent with NEPA.

C. The Commission's Procedural Pleading Requirements are Clear and No Hearing is Required Under the Atomic Energy Act or NEPA

The Attorney General's claims (Brief at 16-18) that the Licensing Board's interpretation of Turkey Point undermines the clarity of the Commission's procedural rules for the pleading of contentions are meritless. The Attorney General suggests that the Board's ruling in LBP-06-23 conflicts with 10 C.F.R. § 2.309(f) which requires a petitioner to base his or her NEPA contentions on an applicant's ER. That provision, however, only provides that petitioners are to file contentions based on the application, including the ER. It neither specifies the information to be included in the ER nor what constitutes an admissible contention. Nor, more importantly, does 10 C.F.R. § 2.309(f) authorize a challenge to Commission regulations which is expressly forbidden under 10 C.F.R. § 2.335(a). That such challenges are not countenanced in adjudicatory licensing proceedings is well established Commission jurisprudence.[21]

Thus, the Commission's procedural requirements are clear. Contentions are to be based on an applicant's ER, but challenges to Commission regulation, such as those raised by the Attorney General here, are not countenanced. Rather, waiver or suspension and amendment of the rules are the only available avenues for a petitioner in such circumstances. Again, this is well established by Commission jurisprudence.[22] As such, the precedent relied upon by the Attorney

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[21] See, e.g., Potomac Electric Power Company (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 A.E.C. 79, 89 (1974).

[22] See, e.g., Connecticut Yankee Atomic Power Co. (Haddam Neck Plant), CLI-03-7, 58 N.R.C. 1, 6 (2003) ("There are two vehicles available for making a request to avoid application of an NRC rule in an individual adjudicatory proceeding. First, a party may petition for rulemaking. . . . Second, a party may request waiver of a rule. . . ."); Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), CLI-72-31, 5 A.E.C. 25, 26 (1972) (citing to the former 10 C.F.R. § 2.758, now codified at § 2.335, which provides for parties to seek a waiver or exception from the Commission's regulations).

General (McElroy Electronics Corp. v. FCC, 990 F.2d 1351, 1358 (D.C. Cir. 1993)) is wholly inapplicable here.[23]

Furthermore, the Attorney General's claim (Brief at 17) that no "assurance" is provided that a petitioner who seeks waiver or amendment of the rule "will eventually receive an opportunity to file a contention if the NRC refuses to change its previous generic determination" erroneously presumes that an opportunity for adjudicatory hearing must be granted. It is well established, however, by the Supreme Court precedent cited above that the Commission may choose to proceed by generic rulemaking to resolve generic NEPA issues in lieu of repeated individual adjudications of the same issue. Where the Commission has made that choice, as here, an adjudicatory hearing is mandated only upon satisfying the requirements for waiver or suspension and amendment of the rule.

Similarly, the Attorney General's related claim (Brief at 19) that the "Commission does not have discretion" to deny both his Contention and his petition for rulemaking again erroneously presumes that some type of hearing is required absent satisfying the requirements for waiver or suspension and amendment of the rule. Contrary to the Attorney General's claim, nei-

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[23] McElroy concerned the obligation of federal agencies "to state [their] directives in plain and comprehensible English" and whether a certain 1987 Federal Communications Commission ("FCC") order met that obligation, i.e., could "reasonably be construed to give adequate notice that applications. . .could not be filed" until after certain events and conditions had occurred. 990 F. 2d at 1353. The Court found the FCC's post-hoc construction of the order to be based on obscure and imprecise language buried in a footnote that was furthermore unsupported by the body of the order and subsequent FCC conduct. 990 F. 2d at 1360-63. In contrast, well established NRC jurisprudence and regulation establish that only two vehicles are available to avoid application of a NRC rule in an NRC licensing proceeding, waiver or amendment and suspension of the rule. Furthermore, Turkey Point clearly held that this long standing jurisprudence applies in the context of Category 1 findings codified in the NRC regulations. Thus, the issue is not the clarity of the NRC's procedural requirements. They are abundantly clear. Rather, as discussed in the text above, the Attorney General's real complaint is the lack of "assurance" that the alternative procedures clearly mandated by Commission regulation and Turkey Point will provide the relief or result that he seeks to obtain. However, the Attorney General is entitled to the relief he seeks to obtain only if he satisfies the requirements for waiver or for amendment and suspension of the rules, and cannot complain if he fails to meet those standards.

ther the Atomic Energy Act nor NEPA mandates a hearing on challenges to the Commission's regulatory structure or Commission regulation.[24] Accordingly, if the Attorney General has presented no new and significant information that would lead to an impact finding different from that codified in 10 C.F.R. Part 51 which would be necessary to amend the rule – as Entergy believes is clearly the case – the Commission should reject the Attorney General's rulemaking petition on that grounds as well as rejecting the Contention on the wholly independent grounds as an impermissible challenge to Commission regulations.

Finally, the Attorney General's suggestion (Brief at 17-18) that the Commission should consider a person who has chosen to comment on the draft supplemental EIS as having exhausted administrative remedies is meritless. While providing an opportunity for public comment satisfies NEPA's requirement for public involvement in the NEPA process (see LBP-06-23, slip op. at 43-44 n. 169), public comment on a draft EIS does not exhaust administrative remedies under the NRC's rules and procedures, and for good reason. The Commission has established formal mechanisms for a person to participate in the NRC licensing of a proposed facility (involving the filing of a petition to intervene, proposed contentions, and as appropriate a waiver request under 10 C.F.R. § 2.335) as well as for a member of the public to request the suspension and amendment of applicable generic Commission rules (i.e., the filing of a petition for rulemaking under 10 C.F.R. § 2.802). Both mechanisms involve developing an administrative record to serve as the basis for considered Commission action and decision and subsequent judicial review. Under Commission regulation and judicial precedent, a person must exhaust these

[24] See, e.g., Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8A.E.C. 13, 20-21 (1974), affirmed in part on other grounds, CLI-74-32, 8 A.E.C. 217 (1974) (footnotes omitted); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 348 (1989), cited by the Licensing Board, LBP-06-23, slip op. at 43-44 n. 169.

available administrative processes, as applicable, before seeking judicial redress of Commission action.[25] Thus, while a member of the public can certainly exercise his of her right to public participation in the NEPA process by commenting on a draft EIS, such comments do not exhaust the available administrative remedies.

III. THE ATTORNEY GENERAL'S CONTENTION IS ALSO INADMISSIBLE BECAUSE IT PROVIDES NO NEW AND SIGNIFICANT INFORMATION

As set forth in Entergy's Vermont Yankee Brief (19-29), the Attorney General's Contention is also inadmissible because it does not present any "new and significant" information that would alter the generic findings of the GEIS for on-site spent fuel storage codified in 10 C.F.R. Part 51, Appendix B, Table B-1, and hence provides no basis for an admissible contention. While the Board did not rule on this issue, it is well established that "successful parties before the Licensing Board . . . may urge that its decision be sustained on any ground which finds support in the record." Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 N.R.C. 347, 357 (1975). Accordingly, the Attorney General's Appeal of LBP-06-23 should be rejected on this ground as well as set forth in Entergy's Vermont Yankee Brief.

IV. THE MOTHER'S FOR PEACE DECISION IS NOT CONTROLLING HERE

As in his appeal of the Vermont Yankee decision, the Attorney General argues (Brief at 18) that the Commission should overturn its existing precedent precluding consideration of terrorism in NRC licensing proceedings and apply the Ninth Circuit's decision in San Luis Obispo

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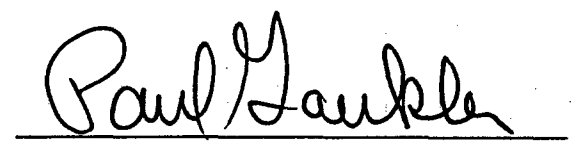
[25] 10 C.F.R. § 2.341(b)(1) ("a party to an NRC proceeding must file a petition for Commission review before seeking judicial review of agency action"); see, e.g., McKart v. U.S., 395 U.S. 185, 193 (1969) ("'no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted") (quoting Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938). See also Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 526-27 (1978) (describing the "exhaustive review" conducted by the NRC Staff on a nuclear power plant construction permit, and the subsequent adjudicatory process that culminates in the final agency decision, which may then be appealed to the court of appeals).

Mothers for Peace v. NRC, 449 F.3d 1016 (9th Cir. 2006). However, as set forth in Entergy's Vermont Yankee Brief (at 29-30), the Mothers for Peace decision is not controlling here and should not be applied here by the Commission. Furthermore, as discussed in Entergy's Vermont Yankee Brief (at 29), the Commission has previously held that, even if the Commission is required to consider terrorism, the GEIS considers sabotage in connection with license renewal and has concluded that, if such an event were to occur, the resultant core damage and radiological release would be no worse than those expected from internally initiated events. Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2), CLI-02-26, 56 N.R.C. 358, 365 n.24 (2002) (citations omitted).

CONCLUSION

For the reasons stated above, the Commission should affirm the Licensing Board's decision dismissing the Massachusetts Attorney General's Petition to Intervene and Contention.

Respectfully Submitted,



David R. Lewis
Paul A. Gaukler
PILLSBURY WINTHROP SHAW PITTMAN LLP
2300 N Street, N.W.
Washington, DC 20037-1128
Tel. (202) 663-8474
Counsel for Entergy Nuclear Generation Company
and Entergy Nuclear Operations, Inc.

Dated: November 10, 2006

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 Brief in Opposition to the Massachusetts Attorney General's Appeal of LBP-06-23" dated November 10, 2006, were served on the persons listed below by deposit in the U.S. Mail, first class, postage prepaid, and where indicated by an asterisk by electronic mail, this 10th day of November, 2006.

*Dale Klein, Chairman
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 G15
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: chairman@nrc.gov

*Jeffrey S. Merrifield, Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 C1
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: cmrmerrifield@nrc.gov

*Edward McGaffigan, Jr., Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 G15
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: cmrmcgaffigan@nrc.gov

*Gregory B. Jaczko, Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 C1
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: cmrjaczko@nrc.gov

*Peter B. Lyons, Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 C1
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: cmrlyons@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, D.C. 20555-0001
amy@nrc.gov

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

*Administrative Judge
Dr. Richard F. Cole
Atomic Safety and Licensing Board
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
rfc1@nrc.gov

Office of Commission Appellate Adjudication
Mail Stop O-16 C1
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

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

*Susan L. Uttal, Esq.
* Marian L. Zobler, Esq.
Office of the General Counsel
Mail Stop O-15 D21
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
slu@nrc.gov; mlz@nrc.gov

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

*Diane Curran, Esq.
Harmon, Curran, Spielberg &Eisenberg, LLP
1726 M Street, N.W., Suite 600
Washington, D.C. 20036
dcurran@harmoncurran.com

*Matthew Brock, Esq.
Assistant Attorney General
Environmental Protection Division
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
Matthew.brock@ago.state.ma.us

*Ms. Mary Lampert
148 Washington Street
Duxbury, MA 02332
lampert@adelphia.net

*Molly H. Bartlett, Esq.
52 Crooked Lane
Duxbury, MA 02332
mollyhbartlett@hotmail.com

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

*Sheila Slocum Hollis, Esq.
Duane Morris LLP
1667 K Street, N.W.
Suite 700
Washington, D.C. 20006
sshollis@duanemorris.com

Paul A. Gaukler