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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Before the Atomic Safety and Licensing Board

December 1, 2006 (10:10am)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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

**ENTERGY'S BRIEF ON THE DEADLINE FOR A PARTY
TO REQUEST THE USE OF SUBPART G HEARING PROCEDURES**

Pursuant to the schedule established by the Atomic Safety and Licensing Board ("Licensing Board" or "Board") during the November 20, 2006 Pre-Hearing Conference Call,¹ Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. ("Entergy") hereby file this brief on the required timing for a request to employ Subpart G hearing procedures. The tentative schedule outlined by the Board during the prehearing conference would set a deadline of November 12, 2007 for a party to request the use of Subpart G hearing procedures for any part of this proceeding, which would be 13 days after the parties' final identification of hearing witnesses.² Entergy respectfully submits, however, that the deadline for requesting the use of Subpart G hearing procedures has long expired. The Board's proposed schedule allowing a party to request the use of Subpart G hearing procedures in mid-proceeding, less than a month before the filing of direct testimony, is inconsistent with the Commission's new Rules of Practice,

¹ In the Matter of Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), Docket No. 50-293-LR, Pre-Hearing Conference Call (Nov. 20, 2006) ("Prehearing Tr.") at 535-36. See also Order (Regarding Schedule for Proceeding and Related Matters) (Nov. 29, 2006).

² Prehearing Tr. at 523-24.

which require that the applicable hearing procedures be addressed and established at the outset of a proceeding. Moreover, switching to Subpart G procedures (with the time-consuming and expensive formal discovery procedures that would then apply) for any part of the hearing shortly before the filing of direct testimony would significantly delay and disrupt this proceeding. Accordingly, the Board's schedule for this licensing proceeding should not allow a party to request the use of Subpart G hearing procedures for any part of this licensing proceeding. Rather, the Board should adhere to its ruling in the October 16 Memorandum and Order that "[t]he hearing" for this licensing proceeding "will be conducted in accordance with the informal adjudicatory procedures prescribed in Subpart L of 10 C.F.R. Part 2."³

Under the new Rules of Practice, a person petitioning to intervene in a proceeding has the burden of demonstrating in its initial petition that Subpart G procedures are appropriate. 10 C.F.R. § 2.309(g), which permits⁴ a petitioner to address the selection of hearing procedures in its intervention petition, expressly provides that:

If a request/petition relies upon § 2.310(d) [governing use of Subpart G procedures in reactor licensing proceedings], the request/petition must demonstrate by reference to the contention and bases provided and the specific procedures in subpart G of this part, that resolution of the contention necessitates resolution of material issues of fact which may be best determined through the use of the identified procedures.

³ 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"), slip op. at 113. As discussed further below, the Board went on to correctly note in its Memorandum and Order that the Board can entertain and allow a request for cross-examination under Subpart L "as necessary to ensure the development of an adequate record for decision." *Id.* (footnote omitted).

⁴ The first sentence of 10 C.F.R. § 2.309(g) is permissive presumably because there is no need for a petitioner to address the selection of hearing procedures if the petitioners accepts the Subpart L procedures as appropriate. The second sentence of 10 C.F.R. § 2.309(g) makes it clear that if a petitioner wants to use Subpart G procedures, its petition must demonstrate that the use of those procedures are appropriate.

10 C.F.R. § 2.309(g) (emphasis added). This provision was explained by the Commission in the final statement of considerations for the new Rules of Practice as follows:

Section 2.309(g) requires that the request for hearing/petition to intervene address the question of the type of hearing procedures (e.g., formal hearing under Subpart G, informal hearings under Subpart L, “fast track” informal procedures under Subpart N) that should be used for the proceeding. This is not a requirement for admission as a party to the proceeding, but a requestor/petitioner who fails to address the hearing procedure issue would not later be heard to complain in any appeal of the hearing procedure selection ruling. In addition, the final rule requires that if the requestor/petitioner asks for a formal hearing on the basis of § 2.310(d), the request for hearing/petition to intervene must demonstrate, by reference to the contention and the bases provided and the specific procedures in Subpart G, that resolution of the contention necessitates resolution of material issues of fact which may best be determined through use of the identified procedures.

69 Fed. Reg. 2,182, 2,221 (Jan. 14, 2004). See also id. at 2,202-03. Thus, the new Rules of Practice contemplate that, as a threshold matter, the petition must address the potential use of Subpart G procedures if a petitioner wants a formal hearing.

Similarly, the new rules require a licensing board to establish the applicable hearing procedures at the outset of the proceeding. 10 C.F.R. § 2.310 requires a licensing board to determine the hearing procedures to be used “[u]pon a determination that a request for hearing/petition to intervene should be granted.”

Moreover, the selection of hearing procedures is determined by the nature of the admitted contentions and not by the subsequent selection of witnesses. 10 C.F.R. § 2.309(g) requires a petitioner to demonstrate “by reference to the contention and [its] bases” that resolution of a contention necessitates use of Subpart G procedures. Similarly, 10 C.F.R. § 2.310(d) provides that the hearing on the contention will be conducted under Subpart G if a licensing board finds “that resolution of the contention or contested matter necessitates resolution of issues of material fact relating to the occurrence of a past activity, where the credibility of an eyewitness may

reasonably be expected to be at issue. . . .” The statement of considerations explains that this finding is to be “based upon the materials submitted in the request for hearing/petition to intervene under § 2.309.” 69 Fed. Reg. at 2,222 (emphasis added). Accordingly, under these rules, if – and only if – an intervention petition requests that certain contentions be resolved through Subpart G procedures, the licensing board examines each such contention to determine (1) whether it necessitates resolution of material facts related to the occurrence of a past activity, and (2) if so, whether the credibility of eyewitnesses “may reasonably be expected.” 69 Fed. Reg. at 2,222. The test expressly set forth in the regulations and confirmed in the final statement of considerations is not based on the identification and selection of witnesses.

Consistent with these procedures, the Licensing Board has already ruled that “[t]he hearing will be conducted in accordance with the informal adjudicatory procedures prescribed in Subpart L of 10 C.F.R. Part 2.” LBP-06-23 at 113. The Board based this ruling on the fact that Pilgrim Watch’s petition to intervene did not request the use of Subpart G hearing procedures. The Board stated in this regard that “[o]ur ruling” that the hearing will be conducted in accordance with Subpart L procedures “is based on the absence of any request or demonstration, pursuant to 10 C.F.R. § 2.309(g) . . . that resolution of any admitted contention necessitates the utilization of the procedures set forth in Subpart G of 10 C.F.R. Part 2. Id. (emphasis added).⁵ Pursuant to 10 C.F.R. § 2.311(d), the Board’s ruling selecting the hearing procedures to be employed for this license proceeding could be appealed no later than ten days after issuance of the order selecting the procedure. Pilgrim Watch, however, filed no such appeal.

⁵ As Pilgrim Watch did not address the selection of hearing procedures in its petition to intervene, Entergy argued in its Answer that Subpart L procedures should be employed for the hearing because the petitioner had not met the burden of demonstrating that Subpart G procedures were appropriate for use here. Entergy’s Answer to the Request for Hearing and Petition to Intervene by Pilgrim Watch and Notice of Adoption of Contention, (June 26, 2006) at 62.

The Board's proposed scheduling order allowing a party to request the use of Subpart G hearing procedures 13 days after the parties' final identification of hearing witnesses is inconsistent with its ruling in LBP-06-23. There is no basis for the Board to disregard its previously correct ruling in LBP-06-23 and to offer a party a second chance to request use of Subpart G hearing procedures. As stated, neither 10 C.F.R. § 2.309(g) nor 10 C.F.R. § 2.310(d) provides for such requests except in an initial intervention petition. Pilgrim Watch never argued for the need to use Subpart G procedures when it filed its contentions, did not appeal the Board's previous selection of procedures, and has no entitlement to a second opportunity.

Furthermore, a second opportunity for a party to request the use of Subpart G hearing procedures in mid-proceeding could seriously disrupt and delay this proceeding. A Subpart G proceeding includes an opportunity for interrogatories, document requests, requests for admission, and depositions. If the Board were to grant a request made for a Subpart G proceeding that was filed November 12, 2007 – only three weeks before the scheduled filing of pre-filed direct testimony⁶ – the added discovery alone could add many months to the schedule, at time when all the parties would be preparing their pre-filed direct testimony for the evidentiary hearing scheduled for submittal three weeks hence. It is likely for this very reason that the Commission's amended Rules of Practice require the hearing procedure to be selected at the outset of a proceeding.

The Board suggests that allowing a request for the use of Subpart G hearing procedures in mid-proceeding is necessary in the event a witness is identified by a party whose credibility as

⁶ The Board's tentative schedule requires the filing of pre-filed direct testimony by December 3, 2007. See Pre-hearing Tr. at 524.

an eye-witness of a past activity or motive or intent is challenged by another party.⁷ However, hinging the choice of hearing procedures on the identification of witnesses is contrary to 10 C.F.R. § 2.309(g), which requires the hearing procedures to be determined “by reference to the contention and [its] bases,” and not by reference to subsequently identified witnesses.⁸ Moreover, allowing identification of a witness to trigger the use of Subpart G hearing procedures could result in Subpart G procedures being employed not only with respect to the discovery and cross-examination pertaining to that witness, but with respect to the discovery and cross-examination of other witnesses, including experts whose testimony is unrelated to past occurrences. Such an approach could effectively eliminate the use of informal hearing procedures intended by the Commission because resolution of virtually every contention will involve establishing some facts related to past occurrences (such as the foundation for the expert testimony).

Entergy recognizes that there could be special circumstances where the Board might allow some cross-examination of particular witnesses. Motions to allow cross-examination are permitted by 10 C.F.R. § 2.1204(b) and can be granted within the framework of Subpart L. Indeed, the Board expressly noted in LBP-06-23 this avenue for allowing cross-examination in Subpart L proceedings as follows:

Upon an appropriate request, pursuant to 10 C.F.R. § 2.1204(b) and in accordance with the schedule to be set as indicated below, the Licensing Board will allow cross-examination as necessary to ensure the development of an adequate record for decision.

⁷ Prehearing Tr. at 523-24.

⁸ As discussed above, the test under the NRC’s rules for determining the use of Subpart G hearing procedures is focused on “the contention and [its] bases,” and hinges on whether “resolution of the contention or contested matter” necessitates resolution of material issues of fact “related to the occurrence of a past activity.” 10 C.F.R. § 2.310(d) (emphasis added). As stated, the burden is on a petitioner to make such a demonstration, and here none was made. Nor is none apparent from the contentions themselves.

LBP-06-23, slip op. at 113.⁹ In addition, Entergy recognizes that there could be special circumstances where a party might seek the Board's leave to depose a witness (or where parties voluntarily agree to a limited number of depositions). The Board has the authority under 10 C.F.R. § 2.336(a) to modify the discovery rules in a Subpart L proceeding if such a request is warranted. By these means, if the credibility of a particular witness becomes an issue, the Licensing Board can allow additional procedures pertaining just to that witness, without upsetting the entire proceeding. Entergy does not object to a deadline for requesting cross-examination or other procedures with respect to a specific witness, but believes that allowing requests "for a Subpart G proceeding" would greatly exceed the Commission's expectations, the regulatory text, and the rulemaking history.

Accordingly, Entergy requests that the Board reconsider and delete the proposed provision of its scheduling order that would set a deadline for a party to request the use of Subpart G hearing procedures 13 days after the parties' final identification of hearing witnesses. In its place, the Board should include the following provision:

November 12, 2007. Deadline for requests pursuant to 10 C.F.R. § 2.1204 for cross-examination by the parties, or for any other procedural modification relating to the presentation of testimony or evidence.

Furthermore, Entergy requests that the Board's scheduling order make clear that any request for additional procedures must be made within 10 days of the occurrence giving rise to the request, as required by 10 C.F.R. § 2.323(a). Where a party has previously disclosed its testifying witnesses and the bases for their opinions pursuant to 10 C.F.R. § 2.336(a)(1), an

⁹ The Board cited as support CAN v. NRC, 391 F.3d 338, 351 (1st Cir. 2004), "wherein the First Circuit upheld the validity of the Subpart L regulations on the basis of NRC's representation that the opportunity for cross-examination under 10 C.F.R. § 2.1204(b)(3) of Subpart L is equivalent to the opportunity for cross-examination under the Administrative Procedure Act (APA), 5 U.S.C. §556(d), *i.e.*, that cross-examination is available whenever it is 'required for a full and fair adjudication of the facts.'" Id.

opponent should not be permitted to await the final witness list before requesting additional procedures. This clarification would be consistent with the Board's statements during the Prehearing Conference call¹⁰ and would prevent any later misunderstanding or disappointment.

Respectfully Submitted,



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¹⁰ Prehearing Tr. at 534-35 (“... if a witness gets named in the final witness list that hasn’t been named before that, that a party has reason to believe with regard to that witness alone or those witnesses that are named only at that point, that they can make a request with regard to that contention”).

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Entergy's Brief on the Deadline for a Party to Request the Use of Subpart G Hearing Procedures," dated December 1, 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 1st day of December, 2006.

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