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February 1, 2007

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
BEFORE THE COMMISSION

DOCKETED  
USNRC

February 6, 2007 (9:45am)

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In the Matter of )  
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Entergy Nuclear Operations, Inc. )  
 )  
(Vermont Yankee Nuclear Power Station) )  
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Docket No. 50-293-LR

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

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In the Matter of )  
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Entergy Nuclear Operations, Inc. )  
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(Vermont Yankee Nuclear Power Station) )  
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Docket No. 50-271-LR

**MASSACHUSETTS ATTORNEY GENERAL'S MOTION  
FOR RECONSIDERATION AND CLARIFICATION OF CLI-07-03**

**I. INTRODUCTION**

Pursuant to 10 C.F.R. §§ 2.323(e), 2.341, and 2.345, Martha Coakley, the Attorney General of Massachusetts ("Attorney General")<sup>1</sup> requests reconsideration and clarification of CLI-07-03, the U.S. Nuclear Regulatory Commission's ("NRC's" or "Commission's") Memorandum and Order of January 22, 2007. CLI-07-03 affirms decisions by the Atomic Safety and Licensing Boards ("ASLBs") in the Pilgrim and Vermont Yankee license renewal proceedings, which rejected the Attorney General's contentions seeking consideration of new and significant information regarding the

<sup>1</sup> Martha Coakley took the office of Massachusetts Attorney General on January 17, 2007, replacing Thomas F. Reilly.

environmental risks posed by continued high-density pool storage of spent fuel at the Pilgrim and Vermont Yankee plants during their license renewal terms.<sup>2</sup>

The Attorney General seeks reconsideration of CLI-07-03 in three related respects in which it is internally inconsistent, unclear, or potentially prejudicial to the Attorney General's claims. First, CLI-07-03 is unclear with respect to whether the NRC's decision represents final agency action for purposes of review under the Hobbs Act, 28 U.S.C. § 2342. By affirming the ASLBs' dismissal of the Attorney General's contentions, CLI-07-03 could be construed to constitute a final decision with respect to her right to participate in the individual license renewal proceedings for the Pilgrim and Vermont Yankee nuclear power plants. Yet, the NRC concedes that it has not yet resolved the Attorney General's substantive claims under the National Environmental Policy Act (NEPA) with respect to each individual plant and that those issues have yet to be addressed in the Attorney General's petition for rulemaking now pending before the NRC. Absent reconsideration and clarification, CLI-07-03 could be interpreted to trigger a premature decision by the Attorney General whether to file a petition for review in the U.S. Court of Appeals, or alternatively forfeit her right to seek judicial review of the individual license renewal decisions for Pilgrim and Vermont Yankee -- even though these issues may be resolved in the subsequent rulemaking.

Second, the NRC concluded that the Attorney General's request that the NRC apply the results of the final rulemaking petition to the individual Pilgrim and Vermont Yankee facilities is premature, because the individual licensing proceedings may not be

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<sup>2</sup> *Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station)*, LBP-06-23, 64 NRC (October 16, 2006); *Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station)*, LBP-06-20, 64 NRC 131 (2006).

concluded for a year or more. Yet the NRC did not clarify whether the Attorney General -- absent a judicial challenge now -- could contest a decision by the NRC in the future not to apply the final rulemaking to the two facilities when the licensing proceedings are completed.

Third, more broadly, CLI-07-03 contains apparently conflicting statements with respect to whether, absent a judicial appeal now, the Attorney General may in the future seek enforcement of NEPA in the individual license renewal proceedings for Pilgrim and Vermont Yankee.

Therefore the Attorney General requests reconsideration and clarification of CLI-07-03 to (a) confirm it is a non-final decision with respect to the Attorney General, (b) clarify that the Attorney General continues to have party status in the individual license renewal proceedings until those proceedings are concluded, and (c) further clarify that the Attorney General has the right to seek judicial review, as necessary, to ensure the application of the final rulemaking to the individual license renewal proceedings for Pilgrim and Vermont Yankee.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

In the spring of 2006, the Attorney General submitted to the NRC's Atomic Safety and Licensing Board ("ASLB") virtually identical hearing requests in the NRC license renewal proceedings for the Pilgrim and Vermont Yankee nuclear plants.<sup>3</sup> In each case, the hearing request included a single contention charging that Entergy Nuclear

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<sup>3</sup> Massachusetts Attorney General's Request for a Hearing and Petition to Intervene With Respect to Entergy Nuclear Operations Inc.'s Application for Renewal of the Pilgrim Nuclear Plant Operating License, etc. (May 26, 2006); Massachusetts Attorney General's Request for a Hearing and Petition to Intervene With Respect to

Operations' ("Entergy's") license renewal application is inadequate because it fails to consider significant new information regarding the risk of a catastrophic accident in the plant's high density fuel pool.

In each case, the ASLB rejected the contention on the ground that it impermissibly challenged NRC regulations for implementing NEPA. These regulations preclude consideration of the environmental impacts of spent fuel storage in NRC license renewal proceedings, based on past environmental studies.

The Attorney General appealed the ASLB's decisions in the fall of 2006, arguing that the ASLBs erred in refusing to admit the Attorney General's contentions.<sup>4</sup> The Attorney General also recognized that the Commission has the discretion to resolve the concerns raised in the Attorney General's contentions through a rulemaking proceeding rather than individual adjudications, and the Attorney General is prepared to utilize the rulemaking process in accordance with the NRC directive.<sup>5</sup> However, if the Attorney General does so, she wants to ensure that she will not waive or prejudice her rights to ensure that the Commission will still will meet its non-discretionary NEPA obligation to consider the significant new information offered by the Attorney General and apply the results of the rulemaking, including any regulatory changes, to the license renewal decision for Pilgrim and Vermont Yankee.<sup>6</sup>

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Entergy Nuclear Operations Inc.'s Application for Renewal of the Vermont Yankee Nuclear Plant Operating License, etc. (May 26, 2006).

<sup>4</sup> Massachusetts Attorney General's Notice of Appeal of LBP-06-20 and Brief on Appeal of LBP-06-20 (October 3, 2006); Massachusetts Attorney General's Notice of Appeal of LBP-06-23 and Brief on Appeal of LBP-06-23 (October 31, 2006).

<sup>5</sup> Brief on Appeal of LBP-06-20 at 2, Brief on Appeal of LBP-06-23 at 3.

<sup>6</sup> Brief on Appeal of LBP-06-20 at 2-3, Brief on Appeal of LBP-06-23 at 19.

While disagreeing with the ASLBs' conclusion that the contentions were inadmissible, the Attorney General therefore filed a rulemaking petition in the summer of 2006 out of an abundance of caution and to address the alternative rulemaking process.<sup>7</sup> The petition requested consideration of the same substantive issue as the contentions, and indeed was based almost entirely on the contentions. The only difference was that the petition sought generic consideration of the issues rather than seeking to litigate them in each individual license renewal proceeding. The Attorney General described the petition as a "companion" to the contentions filed in the individual license renewal proceedings, and argued that the Commission should withhold any decision to renew the operating licenses for the Pilgrim and Vermont Yankee nuclear power plants until the requested rulemaking proceeding has been completed and until the NRC has completed the NEPA process for consideration of environmental impacts of high-density pool storage of spent fuel at the Pilgrim and Vermont Yankee nuclear plants.<sup>8</sup>

In CLI-07-03, the Commission ruled that the ASLBs in the Pilgrim and Vermont Yankee cases had correctly interpreted the NRC's regulations with respect to the inadmissibility of the Attorney General's contentions.<sup>9</sup> The Commission declined to rule on the Attorney General's request that it withhold final decisions in the Vermont Yankee and Pilgrim license renewal proceedings until the rulemaking petition is resolved, concluding that it was "premature" to make such a ruling because final decisions in those proceedings are not expected for at least another year.<sup>10</sup> The Commission also pointed to

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<sup>7</sup> Massachusetts Attorney General's Petition for Rulemaking to Amend 10 C.F.R. Part 1 (Docket No. PRM-51-10) (August 25, 2006).

<sup>8</sup> Petition for Rulemaking at 3.

<sup>9</sup> *Id.*, slip op. at 6-7.

<sup>10</sup> *Id.*, slip op. at 9 n.37.

an NRC regulation which allows a petitioner who has filed a petition for rulemaking to “request the Commission to suspend all or any part of any licensing proceeding to which the petitioner is a party pending disposition of the petition for rulemaking.”<sup>11</sup> But the Commission did not say whether the Massachusetts Attorney General would be entitled to make a motion under § 2.802 in the future, or to seek judicial review of the denial of that motion, given that the issuance of CLI-07-03 could be construed to have ended her status as a party to the proceeding.

### III. ARGUMENT

Pursuant to 10 C.F.R. §§ 2.323(e) and 2.345, the Commission will reconsider a decision upon demonstration of “a compelling circumstance, such as the existence of a clear and material error in a decision, which could not have been reasonably anticipated.” In addition, the Commission “will sometimes entertain a reconsideration motion in order to clarify the meaning or intent of language in one of its decisions.” *Duke Energy Corporation* (Catawba Nuclear Station, Units 1 and 2), CLI-CLI-04-37, 61 NRC 646, 648 (2004), citing *Curators of the University of Missouri* (TRUMP-S Project), CLI-95-8, 41 NRC 386, 390-91 (1995).

Here, the Commission’s intent is unclear with respect to the finality of CLI-07-03. By affirming the ASLB’s decisions to reject the Attorney General’s “sole contention” in the Pilgrim and Vermont Yankee cases, the Commission could be construed to have taken final action against the Attorney General, and denied her the right to participate as a

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<sup>11</sup> *Id.*, citing 10 C.F.R. § 2.802.

party in either of those proceedings.<sup>12</sup> In two other significant aspects, however, the language of CLI-07-03 could be interpreted that the decision is non-final. First, CLI-07-03 acknowledges that its ruling relates only to the appropriate venue for raising the Attorney General's environmental concerns, and that the merits of those concerns have yet to be resolved.<sup>13</sup> Second, in refusing to rule on the Attorney General's request that it withhold final decisions in the Pilgrim and Vermont Yankee cases until the rulemaking petition is resolved, the Commission suggests that at some future date the Attorney General will be entitled, as a "party" to the Pilgrim and Vermont Yankee license renewal proceedings, to move to suspend those proceedings pending completion of the proceeding on the Attorney General's rulemaking petition.<sup>14</sup> If that is the case, then CLI-07-03 would not appear to constitute a final decision.

The lack of clarity regarding the finality of CLI-07-03 is a compelling circumstance because it leaves uncertain two questions: first, does the Attorney General have any continuing rights in the individual license renewal proceedings for Pilgrim and Vermont Yankee if the NRC fails to apply the results of the now-pending petition for rulemaking proceeding to those two individual license renewal decisions? And second, must the Attorney General decide now whether to petition the U.S. Court of Appeals for review of CLI-07-03 and the underlying ASLB decisions in order to protect her right under the Hobbs Act to judicially challenge the Commission's ultimate decision

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<sup>12</sup> The Attorney General did not seek interested state status under 10 C.F.R. § 2.315, nor does the Attorney General believe it is clear that interested state status would protect her interests in resolution of the claims raised in her contentions.

<sup>13</sup> *Id.*, slip op. at 7.

<sup>14</sup> *Id.*, slip op. at 37 n.9, citing 10 C.F.R. § 2.802.

regarding the merits of her NEPA claims with respect to the renewal of the Pilgrim and Vermont Yankee licenses?

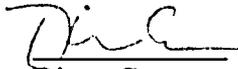
With respect to the question of the Attorney General's continuing right of participation in the Pilgrim and Vermont Yankee cases, NRC caselaw suggests that, if CLI-07-03 is construed to render the Attorney General a non-party, she would not be allowed to use 10 C.F.R. § 2.802 to seek suspension of the Pilgrim and Vermont Yankee license renewal decisions if, at some point in the future, the Commission proposes to renew the Pilgrim and Vermont Yankee licenses before it has completed the proceeding on the petition for rulemaking. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), CLI-83-25, 18 NRC 327, 330 (1983). Yet, it is not reasonable to suppose that the Commission would have offered the remedy of a § 2.802 motion if it were not actually available to the Attorney General.

With respect to the question of finality for purposes of judicial review, *Thermal Ecology Action v. AEC*, 433 F.2d 524, 526 (D.C. Cir. 1970), suggests that, if CLI-07-03 is construed by a reviewing court to be final agency action, then the Attorney General must decide now whether to appeal within 60 days or otherwise forfeit her right of review. But the Commission has not yet resolved the substantive claims of the Attorney General's contentions, and any judicial appeal now may become moot as a result of the subsequent rulemaking proceeding. The Commission also appears to contemplate that the Attorney General will have "party" status for purposes of a motion to suspend the Pilgrim and Vermont Yankee license renewal decisions if it later appears those decisions may issue before the NRC has completed the proceeding on the Attorney General's petition for rulemaking. CLI-07-03, slip op. at 9 n.37.

The Attorney General requests that the Commission reconsider CLI-07-03 and clarify that it is a non-final decision with respect to the Attorney General's right to participate in the Pilgrim and Vermont Yankee license renewal proceedings, for two reasons. First, the Commission has not yet resolved the environmental claims of the Attorney General's contentions on the merits. As the Commission recognizes, it may be necessary for the Attorney General, at some later date, to seek relief from the Commission under 10 C.F.R. § 2.802 or other lawful process in order to ensure that the results of the petition for rulemaking are applied to the individual license renewal decisions for Pilgrim and Vermont Yankee. CLI-07-03 should be revised to establish that the Attorney General has the right, as a party to those cases, to insist that the results of the proceeding on the petition for rulemaking must be applied in the individual license renewal proceedings.

Second, to issue CLI-07-03 as a final decision with respect to the Attorney General's rights of participation in the Pilgrim and Vermont Yankee license renewal proceedings would be wasteful of all the parties' resources. As CLI-07-03 is currently written, the Attorney General may be required to interpret it as a final decision for purposes of the Hobbs Act. If so, to protect her rights, the Attorney General would have to decide now whether to file a petition for review of CLI-07-03, LBP-06-20, and LBP-06-23 within 60 days. In order to conserve the parties' resources, the Commission should amend CLI-07-03 to clearly establish that it is not a final decision for purposes of triggering the obligation to file a petition for review under the Hobbs Act.





Diane Curran

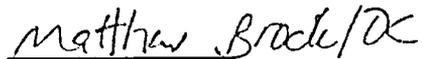
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February 1, 2007

**CERTIFICATE OF SERVICE – PILGRIM  
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I certify that on February 1, 2007, copies of the foregoing Massachusetts Attorney General's Motion for Reconsideration and Clarification of CLI-07-03 and Massachusetts Attorney General's Motion for Leave to File Motion for Reconsideration and Clarification of CLI-07-03 were served on the following by electronic mail and/or first-class mail:

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**CERTIFICATE OF SERVICE: VERMONT YANKEE  
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I certify that on February 1, 2007, copies of the foregoing Massachusetts Attorney General's Motion for Reconsideration and Clarification of CLI-07-03 and Massachusetts Attorney General's Motion for Leave to File Motion for Reconsideration and Clarification of CLI-07-03 were served by electronic mail and/or first-class mail on the following:

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