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RAS 13089

February 16, 2007

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

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February 16, 2007 (5:58pm)

Before the Commission

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

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

In the Matter of )  
)  
Entergy Nuclear Generation Company ) Docket No. 50-293-LR  
and Entergy Nuclear Operations, Inc. )  
(Pilgrim Nuclear Power Station) )

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

Pursuant to 10 C.F.R. §2.323(e), Entergy Nuclear Vermont Yankee, LLC, Entergy Nuclear Operations, Inc., and Entergy Nuclear Generation Company (hereinafter collectively referred to as "Entergy") hereby respond to – and oppose – the Massachusetts Attorney General's February 1, 2007 "Motion for Leave to File Motion for Reconsideration and Clarification of CLI-07-03" ("Motion for Leave") and "Motion for Reconsideration and Clarification of CLI-07-03" ("Reconsideration Motion"). In her Reconsideration Motion, the Attorney General requests that the Commission "(a) confirm [that CLI-03-07] 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.” Reconsideration Motion at 3.

The Attorney General, however, completely fails to show the compelling circumstances necessary under the NRC’s rules of practice for the Commission to reconsider its decision. Nor does she show that the Commission’s decision is ambiguous or unclear in any respect. Hence the Attorney General’s motions must be denied.

## **I. PROCEDURAL BACKGROUND**

On May 26, 2006, the Attorney General filed in both the Vermont Yankee and Pilgrim license renewal proceedings a “Request for Hearing and Petition for Leave to Intervene” (the “Petitions”).<sup>1</sup> The Petitions were essentially identical. They both alleged that new and significant information showed that the “continued storage of spent fuel in high-density storage racks in the [Applicants’ pools] poses a significant and reasonably foreseeable environmental risk of a severe fire and offsite release of a large amount of radioactivity” (Petitions at 2), and they claimed as such that the Environmental Reports for both the Vermont Yankee and Pilgrim license renewal proceedings needed to address the environmental impacts of severe spent fuel pool accidents. Both Entergy and the NRC Staff acknowledged the Attorney General’s standing, but determined that the Attorney General’s contention concerning spent fuel pool fires was inadmissible because (1) the Contention was an impermissible challenge to the NRC’s rules and

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<sup>1</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 [ ] (May 26, 2006); 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 Vermont Yankee Nuclear Plant Operating License [ ] (May 26, 2006).

generic determinations, and (2) the Contention did not in fact raise any new and significant information concerning spent fuel pool fires.<sup>2</sup>

The Atomic Safety and Licensing Boards (“Licensing Board” or “Boards”) for both the Vermont Yankee and Pilgrim proceedings denied the Attorney General’s Petitions to intervene and request for a hearing because, under NRC regulations for license renewal proceedings, the continued storage of spent nuclear fuel is a “Category 1” issue, i.e., the issue has been determined generically by the GEIS<sup>3</sup> and is not subject to litigation and consideration in individual license renewal proceedings. Hence, both Boards determined that the Attorney General’s contention was inadmissible and denied the Attorney General’s Petition to intervene and request for hearing. LBP-06-20, 64 NRC 131, 161 (2006) (“For the reasons discussed above, AG Contention 1 is inadmissible and the AG’s hearing request is denied”) (emphasis added); LBP-06-23, 64 NRC 257, 349 (2006) (emphasis added) (“The Massachusetts Attorney General’s Request for Hearing and Petition to Intervene is denied.”) (emphasis added).

Dissatisfied with these determinations, the Attorney General appealed both Licensing Board decisions to the Commission.<sup>4</sup> The Attorney General’s appeals were filed pursuant to 10 C.F.R. § 2.311, which allows interlocutory appeals of an “order denying a petition to intervene and/or request for hearing” by “the requestor/petitioner on the question as to whether the request and/or petition should have been granted.” 10 C.F.R. § 2.311(b).

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<sup>2</sup> In both the Vermont Yankee and Pilgrim license renewal dockets, the NRC Staff and Entergy filed the following responses: 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); 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).

<sup>3</sup> NUREG-1437, Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Final Report, Vol. 1 (May 1996) (“GEIS”).

<sup>4</sup> In the Pilgrim docket: Massachusetts Attorney General’s Brief on Appeal of LBP-06-23 (Oct. 31, 2006). In the Vermont Yankee docket: Massachusetts Attorney General’s Brief on Appeal of LBP-06-20 (Oct. 3, 2006).

The Commission duly considered the appeals, and on January 22, 2007, issued its decision affirming the Boards' actions in both the Pilgrim and Vermont Yankee license renewal proceedings.<sup>5</sup> The Commission found that, not only was the Category 1 issue raised by the Attorney General inappropriate for consideration in an individual licensing proceeding<sup>6</sup>, but the appropriate mechanism for considering such an issue is through a rulemaking petition<sup>7</sup>, which the Attorney General has already filed.<sup>8</sup> Hence, the Commission concluded that "the Licensing Boards were correct to reject the Mass AG's sole contention in the two cases" and "therefore *affirm[ed]* the Boards' decisions."<sup>9</sup>

Following the Commission's decision, the Attorney General now asserts that CLI-07-03 is "internally inconsistent, unclear, or potentially prejudicial to the Attorney General's claims." Reconsideration Motion at 2. The Attorney General thus seeks leave to file her Motion for Reconsideration and Clarification.

## II. ARGUMENT

### A. Applicable Legal Standard for Reconsideration

The Commission's revised rules of practice promulgated in January 2004 provide that:

Motions for reconsideration may not be filed except upon leave of the presiding officer or the Commission, upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid.

10 C.F.R. § 2.323(e). The compelling circumstances standard for granting leave to file a motion for reconsideration "is intended to permit reconsideration only where manifest injustice

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<sup>5</sup> CLI-07-03, 65 NRC \_\_\_, slip op. at 1, 10.

<sup>6</sup> CLI-07-03, slip op. at 6.

<sup>7</sup> CLI-07-03, slip op. at 2.

<sup>8</sup> Massachusetts Attorney General's Petition for Rulemaking to Amend 10 C.F.R. Part 51 (Aug. 25, 2006) ("Rulemaking Petition").

<sup>9</sup> CLI-07-03, slip op. at 10 (emphasis in original).

would occur in the absence of reconsideration, and the claim could not have been raised earlier.”  
69 Fed. Reg. 2,182, 2,207 (Jan. 14, 2004).

B. The Attorney General Provides No Basis for The Commission to Reconsider CLI-07-03

The Attorney General’s request for reconsideration must be denied because the Attorney General provides no compelling circumstances required to support reconsideration under 10 C.F.R. § 2.323(e). The Attorney General has made no showing “of a clear and material error” in the Commission’s decision that would render the decision invalid. Nor do the Attorney General’s Motions refer to any other allegedly compelling circumstances that would support reconsideration. Indeed, the Attorney General tacitly concedes the lack of compelling circumstances by asserting that reconsideration is also appropriate for requesting the Commission “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 [sic], 61 NRC 646, 648 (2004), citing Curators of the University of Missouri (TRUMP-S Project), CLI-95-8, 41 NRC 386, 390-91 (1995).” Reconsideration Motion at 6. The current rules, however, provide no basis for reconsideration to request clarification as such.<sup>10</sup> While there could conceivably be instances of compelling circumstances where “manifest injustice would occur in the absence of” clarification, that is not the case here.

At the heart of the Attorney General’s Motions is the claim that treating CLI-07-03 as a final appealable decision would remove the Attorney General as a party to the Vermont Yankee and Pilgrim license renewal proceedings so that she could not invoke 10 C.F.R. § 2.802 to seek a stay of the license renewal proceedings pending resolution of the Attorney General’s rulemaking

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<sup>10</sup> The decisions cited by the Attorney General were rendered prior to the major January 2004 amendment of the Commission’s rules of practice. The Attorney General cites no cases subsequent to the amendment of the rules to support her position.

petition. The Attorney General points to various statements in CLI-03-07 to claim ambiguity about whether the Commission intended for the Attorney General to have “the right, as a party to [the Vermont Yankee and Pilgrim license renewal proceedings], to insist that the results of the proceeding on the petition for rulemaking must be applied in the individual license renewal proceedings.” Reconsideration Motion at 9 (emphasis added).

However, there can be no ambiguity or confusion in this respect because the Attorney General has never been a party to the Vermont Yankee and Pilgrim license renewal proceedings. The Board and Commission rulings held that the Attorney General was not entitled to become a party because the Attorney General had not met the requirements for being a party to a licensing proceeding. A petitioner who seeks to intervene in an NRC proceeding is not automatically a “party” under the NRC’s rules of practice. Rather, 10 C.F.R. § 2.309(a) expressly provides that a petitioner who “desires to participate as a party” in a licensing proceeding will be granted “party” status only upon satisfaction of two specific requirements: (1) satisfaction of standing requirements under § 2.309(d); and (2) the proposal of “at least one admissible contention that meets the requirements of paragraph (f) of this section.” 10 C.F.R. § 2.309(a). While provision is made in the rules for the granting of party status to petitioners who fail to meet the standing requirements under § 2.309(d), no provision is made for petitioners to be named as a party to a proceeding upon failure to propose at least one admissible contention. See generally 10 C.F.R. § 2.309.

Here, as held by both Licensing Boards and affirmed by the Commission, the Attorney General failed to proffer an admissible contention. Accordingly, the Attorney General failed to meet the requirements “to participate as a party” in the Vermont Yankee and Pilgrim license renewal proceedings, and both Boards denied the Attorney General’s request for a hearing.

Moreover, the Attorney General clearly understood that the Board decisions had denied her party status upon taking an appeal of the Board decisions under 10 C.F.R. § 2.311. An intervenor's right to appeal under 10 C.F.R. § 2.311 is only available when the intervenor has been denied admission as a party. The Attorney General understood this provision of the regulation as being applicable to herself when she appealed the Board decisions under 10 C.F.R. § 2.311. It is now specious for the Attorney General to assert ambiguity as to whether she is a party to the Vermont Yankee and Pilgrim license renewal proceedings because the Attorney General clearly understood that she was not a party in these proceedings when taking her appeals under 10 C.F.R. § 2.311.

Similarly, the Attorney General's attempt to disturb the finality of CLI-07-03 by arguing that the Attorney General has a right to insist that the "results of the proceeding on the petition for rulemaking must be applied in the individual license renewal proceedings," Reconsideration Motion at 9, is meritless. As recognized by the Commission in the Turkey Point license renewal decision, a rulemaking is a wholly separate avenue from licensing adjudication. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 10 (2001). In addition to seeking admission to a proceeding as a party, any interested person is allowed under the NRC rules to "petition the Commission to issue, amend, or rescind any regulation." 10 C.F.R. § 2.802(a). The procedures and standards for submitting such a petition are contained in § 2.802. Rulemakings and licensing adjudications are distinct and different proceedings.

The Attorney General claims that she will lose her rights under 10 C.F.R. § 2.802(d) unless the Commission acts to clarify that she is a party to the proceeding. The Attorney General, however, never had any rights under this provision. It provides in whole that:

The [rulemaking] petitioner may 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.

10 C.F.R. § 2.802(d) (emphasis added). As explained, the Attorney General was never a party to the proceeding and therefore was never entitled to any rights under 10 C.F.R. § 2.802(d).

Similarly, the Attorney General's claim that the Commission may have intended that she be able to avail herself of a 10 C.F.R. § 2.802(d) request "to suspend all or any part of any licensing proceeding," Reconsideration Motion at 6, is likewise without merit. The Commission could never have intended any such circumstance. As explained by the Commission when it amended to § 2.802 to allow a petitioner to request "to suspend all or any part of any licensing proceeding," such a request can be made only where the petitioner has challenged a rule on the ground that unique or unusual circumstances of the facility at issue would undermine the rule:

Section 2.758, pertaining to challenges of AEC regulations in adjudicatory proceedings, has been changed to clarify that such "challenges" can be made only on the ground that special circumstances in the particular proceeding are such that application of the regulation would not serve the purposes of the rule and justify a waiver or exception to the general rule. In this connection, § 2.802 has been amended to permit a petition for stay of a licensing proceeding pending action on the petition.

Final Rule, Restructuring of Facility License Application Review and Hearing Processes, 37 Fed. Reg. 15,127, 15,127 (July 28, 1972) (emphasis added). As noted by the Commission, the Attorney General "does not argue that unique or unusual characteristics of the Pilgrim and Vermont Yankee facilities undermine the GEIS's generic determinations." CLI-07-03, slip op. at 7. Consequently, a § 2.802(d) petition to suspend either license renewal proceeding is not available to the Attorney General.

In sum, nothing in the Commission's decision is ambiguous or unclear, and no clarification is required. There is no question that CLI-07-03 is a "final" decision under the NRC's procedural rules. There is no question, even for the Attorney General, that she is not a party in this license renewal proceeding. Finally, there is no question that, as a non-party, the Attorney General has no standing to request a stay in the license renewal proceeding for Vermont or Pilgrim.

### III. CONCLUSION

For the foregoing reasons, the Attorney General's Motion for leave to request reconsideration of CLI-07-03 must be denied.<sup>11</sup>

Respectfully Submitted,



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Dated: February 16, 2006

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<sup>11</sup> The Attorney General's argument that clarification is needed in order to "conserve the parties' resources" is irrelevant to the issue of whether the CLI-07-03 is final and appealable. Reconsideration Motion at 9. Moreover, if the Appeals Court were convinced that further action should not be taken on any appeal that the Attorney General may take of CLI-07-03 until the Commission acts on the Attorney General's rulemaking petition, it could stay further proceedings on the appeal until such time as the Commission acted on the rulemaking petition.

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
Entergy Nuclear Vermont Yankee, LLC	)	Docket No. 50-271-LR
and Entergy Nuclear Operations, Inc.	)	ASLBP No. 06-849-03-LR
	)	
(Vermont Yankee Nuclear Power Station)	)	
In the Matter of	)	
	)	
Entergy Nuclear Generation Company	)	Docket No. 50-293-LR
and 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 Response to Massachusetts Attorney General's Motion for Reconsideration and Clarification of CLI-07-03," dated February 16, 2007, were served on the persons listed below by deposit in the U.S. Mail, first class, postage prepaid, or with respect to Judge Elleman by overnight mail, and where indicated by an asterisk by electronic mail, this 16th day February, 2007.

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