United States Court of Appeals
For the First Circuit

Nos. 07-1482

COMMONWEALTH OF MASSACHUSETTS

Petitioner

v.

UNITED STATES; UNITED STATES NUCLEAR REGULATORY COMMISSION

Respondents

No. 07-1483

COMMONWEALTH OF MASSACHUSETTS

Petitioner

v.

UNITED STATES; UNITED STATES NUCLEAR REGULATORY COMMISSION

Respondents

ENTERGY'S OPPOSITION TO THE COMMONWEALTH OF MASSACHUSETTS' MOTION TO HOLD THE PETITIONS FOR REVIEW IN ABEYANCE

Pursuant to Rule 27(a)(3) of the Federal Rules of Appellate Procedure, Entergy Nuclear Operations, Inc., Entergy Nuclear Vermont Yankee LLC, and Entergy Nuclear Generation Company (collectively, "Entergy") file[1] their opposition to the Commonwealth of

[1] Fed. R. App. P. 27(a)(3) allows "[a]ny party" to the proceeding to file a response to a motion. Although not as yet a party to this proceeding, currently pending before this Court is Entergy's April 20, 2007 Motion for Intervention as of Right which neither the Petitioner nor the Respondents oppose. Thus, Entergy respectfully requests this Court to consider its Opposition to the Commonwealth of Massachusetts' Motion to Hold the Petitions for Review in Abeyance.

Massachusetts' ("Commonwealth" or "Massachusetts") April 24, 2007 Motion to Hold Petitions For Review In Abeyance ("Abeyance Motion").[2]

Holding the Commonwealth's Petitions for Review in abeyance is inappropriate. The Commonwealth's petition for rulemaking currently pending before the Commission concerns generic industry-wide issues wholly separate and distinct from the Commission decisions that denied the Commonwealth intervention in the Vermont Yankee Nuclear Power Station ("VYNPS") and Pilgrim Nuclear Power Station ("PNPS") license renewal proceedings. Indeed, the Nuclear Regulatory Commission ("NRC" or "Commission") decisions[3] challenged in the Commonwealth's Petitions for Review are final agency action fully ripe for immediate judicial review. There is no basis to hold in abeyance this Court's consideration of the Petitions for Review until the conclusion of either the VYNPS or PNPS license renewal proceedings, or until the Commission rules on the Commonwealth's petition for rulemaking.

I. BACKGROUND

As the Commonwealth acknowledges, the NRC rejected basically identical spent fuel pool contentions in the VYNPS and PNPS license renewal proceedings on the "procedural ground" that the contentions impermissibly challenged NRC regulations. Abeyance Motion at 4. Briefly explained, both NRC regulation and Commission precedent expressly prohibit the admission of contentions that challenge the NRC's regulations in plant specific licensing

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[2] Fed. R. App. P. 27(a)(3) and 26(a)(2) provide for 8 days, excluding weekends and legal holidays, to file a response to a motion. Fed. R. App. P. 26(c) provides an additional 3 calendar days for service where, as is the case here, the filing is not delivered on the date of service stated in the proof of service. Thus, Entergy's Opposition is due on May 7, 2007.

[3] Entergy Nuclear Vermont Yankee LLC and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 N.R.C. 131 (Sept. 22, 2006); Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), LBP-06-23, 64 N.R.C. 257 (Oct. 16, 2006); Entergy Nuclear Vermont Yankee LLC and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station) and Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-07-03, __ N.R.C. __ (Jan. 22, 2007), reconsideration denied, CLI-07-13, __ N.R.C. __ (Mar. 15, 2007).

proceedings absent a waiver being granted by the Commission. 10 C.F.R. § 2.335(a) & (b)[4]; CLI-07-03, slip op. at 3. The regulation at issue here is the Commission's generic determination that "spent fuel from an additional 20 years of operation can be safely accommodated . . . with small environmental effects" at nuclear power plants whose licenses are renewed. CLI-07-03, slip op. at 3 & n.14 (emphasis added). This generic determination has been "expressly incorporated" into the Commission's regulations. CLI-07-03, slip op. at 3; 10 C.F.R. Part 51, Subpart A, Appendix B, Table B-1 "Summary of Findings on NEPA Issues for License Renewal of Nuclear Power Plants."

Here, the Commonwealth chose not to petition for a waiver of the regulation but nevertheless advanced a contention in both the VYNPS and PNPS license renewal proceedings that directly challenged this Commission regulation. Both Licensing Boards rejected the contentions for impermissibly challenging the regulation. LPB-06-20, 64 N.R.C. at 155, LBP-06-23, 64 N.R.C. at 288. The Commission affirmed. CLI-07-03, slip op. at 10.

These decisions are in line with long standing Commission precedent. The Commission has repeatedly held that its generic determinations, such as the spent fuel pool issue finding, cannot be challenged in an individual licensing proceeding. See CLI-07-03, slip op. at 6 (citing Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 N.R.C. 3 (2001)). Rather, the Commission has promulgated a rule embodying its policy determination that its regulations cannot be attacked in individual licensing proceedings. 10 C.F.R. §2.335(a). As applied to the instant proceeding, the Commission simply believes that "[i]t makes more sense" for the NRC to address generic concerns "relating to spent fuel storage for all plants across the board" rather than in individual licensing proceedings. CLI-07-03, slip

[4] For the convenience of the Court, a copy of 10 C.F.R. § 2.335 is provided at Exhibit 1.

op. at 7 (emphasis added). Indeed, apparently recognizing the appropriate means to seek redress of its spent fuel pool concerns, on August 25, 2006, the Commonwealth file a rulemaking petition that seeks redress of its spent fuel pool concerns "across the board" to all reactors. Massachusetts Attorney General; Receipt of Petition for Rulemaking, 71 Fed. Reg. 64,169, 64,170 (Nov. 1, 2006).[5]

II. THE COMMONWEALTH'S PETITION FOR RULEMAKING IS WHOLLY SEPARATE AND DISTINCT FROM ITS REJECTED INTERVENTION PETITIONS IN THE VYNPS AND PNPS LICENSE RENEWAL PROCEEDINGS

It is only the NRC's procedural ruling denying the Commonwealth's intervention petition in each license renewal proceeding that is the subject of the Petitions for Review before this Court. However, the Commonwealth seeks to entangle its Petitions for Review – which concern the simple procedural issue of whether the Commonwealth impermissibly sought to challenge generic Commission regulations in the context of individual licensing proceedings – with its separate petition for rulemaking currently pending before the Commission, which seeks to amend the Commission's generic regulation that the environmental impacts of on-site spent fuel storage are "small" because of alleged new and significant information.[6] The validity of the Commission's procedural decisions in the VYNPS and PNPS licensing proceedings under review here are in no way affected by the resolution of the generic rulemaking proceeding. Therefore, the Commonwealth's effort to entangle the rulemaking proceeding with the license renewal proceedings should be rejected.

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[5] For the convenience of the Court, a copy of the Petition for Rulemaking is provided at Exhibit 2.

[6] Despite the Commonwealth's claims of new and significant information, the issue raised by the Commonwealth has been extensively studied and no new and significant information exists that would in any way alter the Commission's generic determination that the environmental impacts of on-site spent fuel storage are "small." See Nuclear Energy Institute's Comments on the Massachusetts Attorney General's "Petition for Rulemaking to Amend 10 C.F.R. Part 51" (PRM-51-10), dated Mar. 19, 2007 at 5; see also LBP-06-20, 64 N.R.C. at 160 ("This ground is well trod.").

Furthermore, the Commonwealth's petition for rulemaking, on its face, seeks remedies that would impact all nuclear power plants, not just VYNPS or PNPS. The rulemaking petition seeks to "revoke[] 'across the board'" "NRC's conclusion regarding the degree of vulnerability of high-density spent fuel storage pools to fire" because the conclusion is "contained in numerous NEPA and other licensing documents, and affects many licensing decisions." 71 Fed. Reg. at 64,170. Thus, it would be inappropriate to focus on the license renewal proceedings of two nuclear power plants pending resolution of a generic issue that impacts all nuclear plants. Even assuming that the Commission found any portion of the rulemaking petition to have merit (see note 6 supra), the Commission could still extend the licenses of the two plants and undertake any actions it thought necessary to address the rulemaking petition. The Commission has a quiver full of regulatory arrows at its disposal (e.g., issuing a fleet-wide order; promulgating a rule; commencing a generic environmental impact proceeding) that are the appropriate means to redress the Commonwealth's "across the board" concerns at issue in its petition for rulemaking.

Moreover, postponing review of the Commonwealth's Petitions for Review would not "significantly advance [this Court's] ability to deal with the legal issues presented nor aid [this Court] in their resolution." Duke Power Co. v. Carolina Envt'l. Study Group, 438 U.S. 59, 82 (1978). Waiting for either license renewal proceeding to conclude will not render any more clear whether the Commission appropriately applied its regulations and denied the Commonwealth's intervention petitions into the VYNPS and PNPS license renewal proceedings. Likewise, waiting for the Commission to rule on the Commonwealth's petition for rulemaking will not help to answer whether the Commission appropriately rejected the Commonwealth's contentions because they impermissibly challenged its regulations. Deferring action on the Commonwealth's Petitions for Review could only potentially delay the license renewal proceedings should this

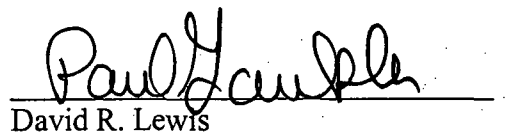
Court conclude that the Commission acted wrongfully in denying the Commonwealth's intervention petitions and remand the matter to the Commission for further action.

Lastly, the Hobbs Act governs judicial review of NRC decisions. 28 U.S.C. § 2342(4); Massachusetts v. NRC, 878 F.2d 1516, 1519 (1st Cir. 1989). In enacting the Hobbs Act, Congress has declared its strong preference for immediate review of NRC decisions by providing a short time limitation – 60 days – for a party aggrieved by an NRC action to file a petition for review. 28 U.S.C. § 2344; see Eagle-Picher Indus. v. EPA, 759 F.2d 905, 918 (D.C. Cir. 1985) (stating that "Congress has emphatically declared a preference for immediate review" of agency action where it provided a ninety day limitation on petitions for review) (emphasis added); Ass'n of Am. R.R.s v. ICC, 846 F.2d 1465, 1469 (D.C. Cir. 1988) (holding that Eagle-Picher "applies with full force" to appeals filed under the Hobbs Act). Thus, it would be contrary to congressional intent to hold the Petitions for Review in abeyance pending any one of the three triggering events suggested by the Commonwealth.

III. CONCLUSION

For the reasons set forth above, this Court should deny the Commonwealth's Motion to Hold the Petitions for Review in Abeyance.

Respectfully submitted,



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Dated: May 4, 2007

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EXHIBIT 1

(1) Whether the requesting party has exercised due diligence to adhere to the schedule;

(2) Whether the requested change is the result of unavoidable circumstances; and

(3) Whether the other parties have agreed to the change and the overall effect of the change on the schedule of the case.

(c) The presiding officer shall provide written notification to the Commission any time during the course of the proceeding when it appears that there will be a delay of more than forty-five (45) days in meeting any of the dates for major activities in the hearing schedule established by the presiding officer under 10 CFR 2.332(a), or that the completion of the record or the issuance of the initial decision will be delayed more than sixty (60) days beyond the time specified in the hearing schedule established under 10 CFR 2.332(a). The notification must include an explanation of the reasons for the projected delay and a description of the actions, if any, that the presiding officer or the Board proposes to take to avoid or mitigate the delay.

[70 FR 20461, Apr. 20, 2005]

§ 2.335 Consideration of Commission rules and regulations in adjudicatory proceedings.

(a) Except as provided in paragraphs (b), (c), and (d) of this section, no rule or regulation of the Commission, or any provision thereof, concerning the licensing of production and utilization facilities, source material, special nuclear material, or byproduct material, is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding subject to this part.

(b) A party to an adjudicatory proceeding subject to this part may petition that the application of a specified Commission rule or regulation or any provision thereof, of the type described in paragraph (a) of this section, be waived or an exception made for the particular proceeding. The sole ground for petition of waiver or exception is that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted. The petition must be accompanied by an affidavit that identifies the specific aspect or aspects of the subject matter of the proceeding as to which the application of the rule or regulation (or provision of it) would not serve the purposes for which the rule or regulation was adopted. The affidavit must state with particularity the special circumstances alleged to justify the waiver or exception requested. Any other party may file a response by counter affidavit or otherwise.

(c) If, on the basis of the petition, affidavit and any response permitted under paragraph (b) of this section, the presiding officer determines that the petitioning party has not made a *prima facie* showing that the application of the specific Commission rule or regulation (or provision thereof) to a particular aspect or aspects of the subject matter of the proceeding would not serve the purposes for which the rule or regulation was adopted and that application of the rule or regulation should be waived or an exception granted, no evidence may be received on that matter and no discovery, cross-examination or argument directed to the matter will be permitted, and the presiding officer may not further consider the matter.

(d) If, on the basis of the petition, affidavit and any response provided for in paragraph (b) of this section, the presiding officer determines that the *prima facie* showing required by paragraph (b) of this section has been made, the presiding officer shall, before ruling on the petition, certify the matter directly to the Commission (the matter will be certified to the Commission notwithstanding other provisions on certification in this part) for a determination in the matter of whether the application of the Commission rule or regulation or provision thereof to a particular aspect or aspects of the subject matter of the proceeding, in the context of this section, should be waived or an exception made. The Commission may, among other things, on the basis of the petition, affidavits, and any response, determine whether the application of the specified rule or regulation

(or provision thereof) should be waived or an exception be made. The Commission may direct further proceedings as it considers appropriate to aid its determination.

(e) Whether or not the procedure in paragraph (b) of this section is available, a party to an initial or renewal licensing proceeding may file a petition for rulemaking under § 2.802.

§ 2.336 General discovery.

(a) Except for proceedings conducted under subparts G and J of this part or as otherwise ordered by the Commission, the presiding officer or the Atomic Safety and Licensing Board assigned to the proceeding, all parties, other than the NRC staff, to any proceeding subject to this part shall, within thirty (30) days of the issuance of the order granting a request for hearing or petition to intervene and without further order or request from any party, disclose and provide:

(1) The name and, if known, the address and telephone number of any person, including any expert, upon whose opinion the party bases its claims and contentions and may rely upon as a witness, and a copy of the analysis or other authority upon which that person bases his or her opinion;

(2)(i) A copy, or a description by category and location, of all documents and data compilations in the possession, custody, or control of the party that are relevant to the contentions, provided that if only a description is provided of a document or data compilation, a party shall have the right to request copies of that document and/or data compilation, and

(ii) A copy (for which there is no claim of privilege or protected status), or a description by category and location, of all tangible things (*e.g.*, books, publications and treatises) in the possession, custody or control of the party that are relevant to the contention.

(iii) When any document, data compilation, or other tangible thing that must be disclosed is publicly available from another source, such as at the NRC Web site, *http: //www.nrc.gov*, and/or the NRC Public Document Room, a sufficient disclosure would be the location, the title and a page reference to the relevant document, data compilation, or tangible thing.

(3) A list of documents otherwise required to be disclosed for which a claim of privilege or protected status is being made, together with sufficient information for assessing the claim of privilege or protected status of the documents.

(b) Except for proceedings conducted under subpart J of this part or as otherwise ordered by the Commission, the presiding officer, or the Atomic Safety and Licensing Board assigned to the proceeding, the NRC staff shall, within thirty (30) days of the issuance of the order granting a request for hearing or petition to intervene and without further order or request from any party, disclose and/or provide, to the extent available (but excluding those documents for which there is a claim of privilege or protected status):

(1) The application and/or applicant/licensee requests associated with the application or proposed action that is the subject of the proceeding;

(2) NRC correspondence with the applicant or licensee associated with the application or proposed action that is the subject of the proceeding;

(3) All documents (including documents that provide support for, or opposition to, the application or proposed action) supporting the NRC staff's review of the application or proposed action that is the subject of the proceeding;

(4) Any NRC staff documents (except those documents for which there is a claim of privilege or protected status) representing the NRC staff's determination on the application or proposal that is the subject of the proceeding; and

(5) A list of all otherwise-discoverable documents for which a claim of privilege or protected status is being made, together with sufficient information for assessing the claim of privilege or protected status of the documents.

(c) Each party and the NRC staff shall make its initial disclosures under paragraphs (a) and (b) of this section, based on the information and documentation then reasonably available to it. A party, including the NRC staff, is not excused from making the required

EXHIBIT 2

19, 2002, to the Commission on the proposed amendments to Part 35 that if the requirements for recognition of specialty board certifications were to become effective as drafted, there could be potential shortages of individuals qualified to serve as RSOs, AMPs, ANPs, and AUs because they would no longer meet T&E requirements under the certification pathway. The petitioner also states that the ACMUI was concerned that the specialty boards might be "marginalized" and that ACMUI urged the Commission to address T&E issues associated with recognition of specialty boards. The petitioner notes that the NRC modified the regulation by reinserting Subpart J until October 24, 2005.

The petitioner requests that 10 CFR 35.57 be amended to recognize medical physicists certified by either the ABR or ABMP on or before October 24, 2005, "as grandfathered for the modalties that they practiced as of October 24, 2005." The petitioner also states that this amendment "should be independent of whether or not a medical physicist was named on an NRC or an Agreement State license as of October 24, 2005." The petitioner states that 10 CFR 35.57 should also be amended to recognize all individuals certified by the named boards in Subpart J for RSOs who have relevant work experience even if an individual has not been formally "named" as an RSO and that these individuals "need to be grandfathered as an RSO by virtue of certification providing the appropriate preceptor statement is submitted."

The petitioner states that although the AAPM, ABR, and ABMP recognize that it was never the NRC's intent to deny recognition to any currently practicing medical physicist or to minimize the importance of a certifying board, these organizations remain concerned about the NRC staff's method used to grant recognized status to the process used by certifying boards. The petitioner is concerned that the effective date assigned by the staff once it recognizes a board's process may force individuals certified prior to that date to have to pursue the alternate pathway. The petitioner indicates that it has affirmed with the ABR and ABMP that they believed that existing diplomates' certifications (i.e., certificates issued before October 25, 2005) would continue to be recognized by the NRC or an Agreement State. The petitioner believes that medical physicists have demonstrated competence to practice through ABR or ABMP certification and remains concerned that the effective date assigned by the NRC staff after it recognizes a board's process may force individuals certified before that date to pursue the alternate pathway. The petitioner believes that the current provision places an undue burden on the medical community and could result in a shortage of AMPs and RSOs.

The petitioner notes that the AMP is a recent addition to licenses granted under 10 CFR part 35 and Agreement State regulations. The petitioner describes the previous regulations before the concept of the AMP was introduced as "inconsistent." The petitioner believes this inconsistency was the basis for the requirement to list an AMP on licenses. The petitioner also states that this requirement specifies that an individual must have a statement signed by a "preceptor AMP" attesting that the individual is capable of acting independently for the specified modality. The petitioner indicated that without medical physicists listed on licenses prior to the new regulation, there is limited opportunity for a medical physicist to serve as a preceptor. The petitioner believes that for a medical physicist to be "grandfathered" under the new regulation, the individual must have been listed on a license as of the effective date of the regulation. The petitioner has stated that its suggested amendment to § 35.57 would allow individuals to serve as AMPs or preceptor AMPs without having to be recognized via the "alternate pathway."

The petitioner also notes that licensees can specify only one individual as an RSO under the current provisions, unlike the position of AU for which there are typically multiple individuals named on a license. The petitioner believes this makes it more difficult for an AMP or other Board diplomates to have acquired the requisite grandfather status before October 24, 2005. The petitioner has stated that the NRC should recognize individuals who were certified by a board listed in former Subpart J for § 35.50 (RSO) and § 35.51 (AMP) prior to October 24, 2005.

The petitioner concluded that its proposed amendment should be enacted expeditiously to permit individuals certified by the boards listed in Subpart J to continue practicing medical physics and serving as RSOs to assure the continuation of high quality patient care.

Dated at Rockville, Maryland, this 26th day of October 2006.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

[FR Doc. E6–18363 Filed 10–31–06; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 51

[Docket No. PRM–51–10]

Massachusetts Attorney General; Receipt of Petition for Rulemaking

AGENCY: Nuclear Regulatory Commission.

ACTION: Petition for rulemaking; notice of receipt.

SUMMARY: The Nuclear Regulatory Commission (NRC) is publishing for public comment a notice of receipt of a petition for rulemaking, dated August 25, 2006, which was filed with the Commission by Diane Curran on behalf of Massachusetts Attorney General. The petition was docketed by the NRC on September 19, 2006, and has been assigned Docket No. PRM–51–10. The petitioner requests that the NRC revoke certain regulations in their entirety, and revoke other regulations to the extent that these regulations, in the petitioner's view, state, imply, or assume that the environmental impacts of storing spent nuclear fuel in high-density pools are not significant; issue a generic determination to clarify that the environmental impacts of high-density pool storage of spent fuel, will be considered significant; and require that any NRC licensing decision concerning high-density pool storage of spent nuclear fuel be accompanied by an environmental impact statement that addresses the environmental impacts of this storage and alternatives for avoiding or mitigating any environmental impacts. The petitioner is seeking the generic treatment of spent fuel pool hazards because he believes that a pool accident at any operating nuclear power plant in the New England and Mid-Atlantic states could significantly affect the health, environmental, and economic well-being of Massachusetts.

DATES: Submit comments by January 16, 2007. Comments received after this date will be considered if it is practical to do so, but the Commission is able to assure consideration only for comments received on or before this date.

ADDRESSES: You may submit comments on this petition by any one of the following methods. Please include *PRM–51–10* in the subject line of your comments. Comments on petitions submitted in writing or in electronic form will be made available for public inspection. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any

information in your submission that you do not want to be publicly disclosed.

Mail comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attn: Rulemakings and Adjudications Staff.

E-mail comments to: SECY@nrc.gov. If you do not receive a reply e-mail confirming that we have received your comments, contact us directly at (301) 415–1966. You may also submit comments via the NRC's rulemaking Web site at *http://ruleforum.llnl.gov.* Address questions about our rulemaking Web site to Carol Gallagher (301) 415–5905; e-mail *cag@nrc.gov.* Comments can also be submitted via the Federal eRulemaking Portal *http://www.regulations.gov.*

Hand deliver comments to: 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 a.m. and 4:15 p.m. Federal workdays. (Telephone (301) 415–1966).

Fax comments to: Secretary, U.S. Nuclear Regulatory Commission at (301) 415–1101.

Publicly available documents related to this petition may be viewed electronically on the public computers located at the NRC's Public Document Room (PDR), Room O1 F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland. The PDR reproduction contractor will copy documents for a fee. Selected documents, including comments, may be viewed and downloaded electronically via the NRC rulemaking Web site at *http://ruleforum.llnl.gov.*

Publicly available documents created or received at the NRC after November 1, 1999, are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this site, the public can gain entry into the NRC's Agencywide Document Access and Management System (ADAMS), which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the PDR Reference staff at 1–800–397–4209, 301–415–4737 or by e-mail to *pdr@nrc.gov.*

A copy of the petition can be found in ADAMS under accession number ML062640409. A paper copy of the petition may be obtained by contacting Betty Golden, Office of Administration, Nuclear Regulatory Commission, Washington DC, 20555–0001, telephone 301–415–6863, toll-free 1–800–368–5642, or by e-mail *bkg2@nrc.gov.*

FOR FURTHER INFORMATION CONTACT: Michael T. Lesar, Chief, Rulemaking, Directives and Editing Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Telephone: 301–415–7163 or Toll Free: 1–800–368–5642.

SUPPLEMENTARY INFORMATION:

Background

The petitioner states that this petition for rulemaking is a companion to the contentions filed by the Massachusetts Attorney General on May 26, 2006, before the NRC's Atomic Safety and Licensing Board (ASLB) in the license renewal proceedings for the Pilgrim and Vermont Yankee nuclear power plants, and raises the same substantive concern as those contentions, namely, that spent fuel stored in high-density fuel storage pools is much more vulnerable to fire than the NRC's NUREG–1437, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants" (May 1996) (GEIS) concludes. The petitioner states that the petition relies on and incorporates by reference the legal and technical assertions made in the Massachusetts Attorney General's contentions. The 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 can be found in NRC's ADAMS system at accession number ML061640032.

The petitioner has filed this petition in the event that the ASLB rules that certain NRC regulations render the petitioner's contentions inadmissible.

Petitioner's Request

The petitioner requests that the NRC:

• Revoke 10 CFR 51.53(c)(2) and 51.95(c), and Table B–1 of appendix A to 10 CFR part 51; and revoke 10 CFR 51.23(a) and (b), 51.30(b), 51.53, 51.61, and 51.80(b) to the extent that these regulations state, imply, or assume that the environmental impacts of high-density pool storage are insignificant and therefore need not be considered in any National Environmental Policy Act of 1969 (NEPA) analysis. The petitioner assets that the revocation of these regulations, which according to the petitioner, "codify" the use of the GEIS by the NRC, is necessary to ensure compliance with NEPA in the Pilgrim and Vermont Yankee license renewal cases. In this regard, the petitioner asserts that new and significant information, provided by the petitioner, shows that spent nuclear fuel stored in high-density fuel storage pools is much more vulnerable to fire than the GEIS concludes.

• Issue a generic determination that the environmental impacts of high-density pool storage of spent fuel, including the environmental impacts of accidents arising from this storage, are significant.

• Amend its regulations concerning severe accident mitigation alternatives (SAMAs). The petitioner requests that the body of SAMAs that must be discussed in an environmental impact statement or related supplement or in an environmental assessment, under 10 CFR 51.53(c)(3)(ii)(L) and Table B–1 appendix A to 10 CFR part 51 (Postulated Accidents: Severe Accidents) must include alternatives to avoid or mitigate the impacts of high-density pool fires.

• Require that any NRC licensing decision that approves high-density pool storage of spent fuel at a nuclear power plant or any other facility must be accompanied by an environmental impact statement that addresses the environmental impacts of high-density pool storage of spent fuel at that nuclear plant or facility, and presents a reasonable array of alternatives for avoiding or mitigating those impacts.

Conclusion

The petitioner asserts that a generic rulemaking would be the most effective means to ensure broad protection of public health and the environment. The petitioner states that NRC's conclusion regarding the degree of vulnerability of high-density spent fuel storage pools to fire is contained in numerous NEPA and other licensing documents, and affects many licensing decisions. Consequently, the petitioner asserts that this NRC conclusion should be revoked "across the board" to ensure that future NRC licensing decisions are not based on inadequate consideration of environmental risks or measures for avoiding or reducing those risks. Moreover, the petitioner asserts he has an interest in seeking generic treatment of spent fuel pool hazards because he believes that a pool accident at any one of the operating nuclear power plants in the New England or Mid-Atlantic states could have a significant effect on the health, environmental, and economic well-being of the Commonwealth of Massachusetts.

Dated at Rockville, Maryland, this 26th day of October 2006.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

[FR Doc. E6–18364 Filed 10–31–06; 8:45 am]

BILLING CODE 7590–01–P

United States Court of Appeals
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Respondents

CERTIFICATE OF SERVICE

Pursuant to Rule 15(d) of the Federal Rules of Appellate Procedure and First Circuit Local Rule 15(d), I hereby certify that true copies of the foregoing "Entergy's Opposition to the Commonwealth of Massachusetts' Motion to Hold the Petitions for Review in Abeyance" were served upon the following by United States mail, first class, postage prepaid, on this 4th day of May, 2007:

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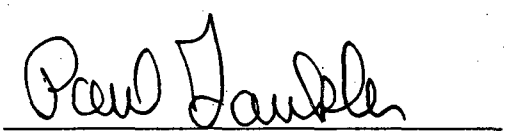

Paul A. Gaukler

United States Court of Appeals
For the First Circuit

No. 07-1482

COMMONWEALTH OF MASSACHUSETTS

Petitioner

v.

UNITED STATES; UNITED STATES NUCLEAR REGULATORY COMMISSION

Respondents

No. 07-1483

COMMONWEALTH OF MASSACHUSETTS

Petitioner

v.

UNITED STATES; UNITED STATES NUCLEAR REGULATORY COMMISSION

Respondents

ENTERGY'S RESPONSE IN OPPOSITION TO THE NEW ENGLAND COALITION'S MOTION TO INTERVENE AS PETITIONER

Pursuant to Rule 27(a)(3) of the Federal Rules of Appellate Procedure, Entergy Nuclear Operations, Inc., Entergy Nuclear Vermont Yankee LLC, and Entergy Nuclear Generation Company (collectively, "Entergy") file[1] their opposition to the New England Coalition's ("NEC") April 20, 2007 Motion to Intervene as Petitioner ("Motion to Intervene").[2]

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[1] Fed.R.App.P. 27(a)(3) allows "[a]ny party" to the proceeding to file a response to a motion. Although not as yet a party to this proceeding, currently pending before this Court is Entergy's April 20, 2007 Motion for Intervention as of Right which neither the Petitioner nor the Respondents oppose. Thus, Entergy respectfully requests this Court to consider its Response in Opposition to the New England Coalition's Motion to Intervene as Petitioner.

[2] Fed.R.App.P. 27(a)(3) and 26(a)(2) provide for 8 days, not including Saturdays, Sundays, or legal holidays, to file a response to a Motion. Fed.R.App.P. 26(c) provides for an additional 3 calendar days for service where, as is the

Allowing NEC to intervene is unwarranted because NEC took no part in the proceedings before the U.S. Nuclear Regulatory Commission ("NRC") regarding the issue that gave rise to the review petitions herein. Moreover, NEC chose to rely on Petitioner Commonwealth of Massachusetts Attorney General ("Attorney General") to act as its representative with respect to the issue that is now on appeal. Thus it cannot plausibly claim that its interest on the issue will not be adequately represented by the Attorney General. Accordingly, NEC has no right, reason or need to intervene in this proceeding and its participation would only burden the Court and the parties without benefiting anyone.

I. BACKGROUND

On May 26, 2006, the Attorney General and NEC filed separate petitions to intervene in the NRC proceeding for the renewal of the operating license of the Vermont Yankee Nuclear Power Station ("VY"). *Entergy Nuclear Vermont Yankee LLC & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 N.R.C. 131, 140 (2006) ("LBP-06-20"). The Attorney General sought litigation of a single contention, which alleged that the VY license renewal application failed to satisfy the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370f, and the NRC's implementing regulation, 10 C.F.R. § 51.53(c)(3)(iv), because it did not address the risk of a catastrophic accident in the plant's high-density spent fuel storage pool due to a wide range of causes including terrorist attacks, natural phenomena, operator error, and equipment failure. LBP-06-20, 64 N.R.C. at 152-53. For its part, NEC raised six proposed contentions, none of which related to spent fuel pool accidents. *Id.* at 175-201.

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case here, the filing is not delivered on the date of service stated in the proof of service. Thus, Entergy's Opposition is due on May 7, 2007.

On June 5, 2006, NEC moved to "adopt" the Attorney General's contention. *Id.* at 206.[3] Other than filing a motion to adopt the Attorney General's contention, NEC took no steps to participate in the litigation of the contention. NEC filed no briefs in support of the admissibility of the Attorney General's contention. It did not participate in the oral argument on the contention held on August 1, 2006 by the Atomic Safety and Licensing Board ("Board") that presides over the VY license renewal proceeding. In LBP-06-20, the Board issued its decision ruling on petitions to intervene, in which it rejected the Attorney General's contention. LBP-06-20, 64 N.R.C. at 161. The Attorney General then filed a petition for Commission review of the dismissal of its contention. NEC did not file a response in support of the Attorney General's petition for review, which was denied by the Commission. CLI-07-03, 65 NRC __ (Jan. 22, 2007). Nor did NEC file a response to the Attorney General's motion for reconsideration, which was also denied. CLI-07-13, 65 N.R.C. __ (Mar. 15, 2007). In short, NEC chose not to take part in the administrative litigation of the Attorney General's contention, and was in no way a participant in the proceeding with respect to that contention.

II. ARGUMENT

A. NEC has no right to intervene since it was not a party to the proceeding on which the instant petition to review is based

It is well established, in this Circuit and elsewhere, that under the Hobbs Act only a "party aggrieved" by a final order of an agency may file a petition for its review in a Federal Court of Appeals.[4] *See, e.g., Clark & Reid, Inc. v. Household Gods Carriers' Bureau, Inc.,* 804

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[3] NEC's motion to adopt the Attorney General's contention was never ruled on by the Board because the Board found that the Attorney General's contention was inadmissible.

[4] The Hobbs Administrative Orders Review Act, ch. 1189, 28 U.S.C. §§ 2341-2351 ("Hobbs Act") provides for direct Court of Appeals review of the final orders of six agencies (the Interstate Commerce Commission, the Department of Agriculture, the Federal Maritime Commission, the Maritime Administration, and the NRC). 28 U.S.C. § 2344 states in pertinent part that "[a]ny party aggrieved by the final order [of the agency] may, within 60 days of its entry, file a petition to review the order in the court of appeals wherein venue lies."

F.2d 3, 6-7 (1st Cir. 1986); *American Civil Liberties Union v. FCC*, 774 F.2d. 24, 25-26 (1st Cir. 1985) ("*ACLU*"); *Blackstone Valley Nat'l Bank v. Board of Governors of the Federal Reserve System*, 537 F.2d 1146, 1147 (1st Cir. 1976); *Gage v. AEC*, 479 F.2d 1214, 1218 (D.C. Cir 1973); *Sierra Club v. NRC.*, 825 F.2d 1356, 1360-61 (9th Cir. 1987); *Wales Transport, Inc. v. ICC*, 728 F.2d 774, 776 n. 1 (5th Cir. 1982). It is equally well settled that a "party aggrieved by the final order" is one who participated in the proceeding from which the final order issued. *ACLU*, 774 F.2d at 25. This is consistent with the Congressional intent to limit the number of persons entitled to petition for review. *Id.* at 25-26.

NEC is clearly not a "party aggrieved" by the NRC final order with respect to the spent fuel accident contention because, as discussed above, it took no part in the litigation of the contention and missed two opportunities to present its views on the contention to the ultimate decision-makers, the NRC Commissioners. NEC thus would have no right to file a petition for review of the NRC's final order, and *a fortiori* has no right to intervene in the review sought by the one aggrieved party, the Attorney General.

B. NEC has provided no evidence that its interest cannot be adequately represented by the Attorney General

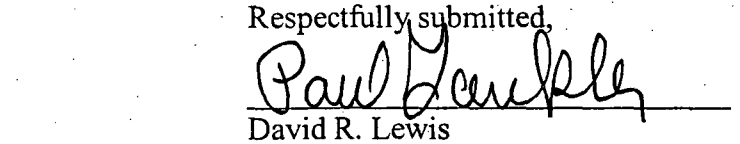
Under the NRC's regulations, if a petitioner seeks to adopt the contention of another sponsoring petitioner, the petitioner who seeks to adopt the contention must agree that the sponsoring petitioner shall act as the representative with respect to that contention. 10 C.F.R. § 2.309(f)(3). Indeed, in its motion to adopt the Attorney General's contention, NEC averred that the Attorney General "shall be the representative for its Contention." New England Coalition's Notice of Adoption of Contentions, or in the Alternative, Motion to Adopt Contentions (June 5, 2006) at 2. Having agreed that the Attorney General would take the lead in the litigation of the

spent fuel accident contention, and having allowed the Attorney General to bear the full brunt of the litigation before the NRC, NEC can hardly argue now that the Attorney General will not be capable of representing NEC's interests. Indeed, NEC has provided nothing to suggest that the Attorney General "is incapable of competently and aggressively representing" NEC's interest during this Court's review. *ACLU,* 774 F.2d at 26. To the contrary, the Attorney General has assiduously pursued the spent fuel pool accident issue in two different NRC proceedings and has filed a petition for rulemaking currently pending before the Commission which seeks to amend the Commission's generic regulation that the environmental impacts of on-site spent fuel storage are "small" because of alleged new and significant information. Therefore, NEC's interest is adequately represented by the Attorney General and NEC's participation in this proceeding is unnecessary.[5]

III. CONCLUSION

For the reasons set forth above, this Court should deny NEC's Motion to Intervene.

Respectfully submitted,



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Dated: May 4, 2007

[5] NEC suggests that "Massachusetts may not fully represent NEC's interests in this matter. Massachusetts' position will be influenced by a broad spectrum of policy considerations and constituencies, and may not be fully consistent with that of NEC . . ." Motion to Intervene at 3. NEC offers no basis for this speculative argument, which is inconsistent with the history of this proceeding. If the concern is that the Attorney General may somehow settle this proceeding, the very authority that NEC cites in support of its argument – *Sierra Club v. EPA*, 358 F.3d 516 (7th Cir. 2004) – makes it clear that "fear[] that the parties will settle the proceeding. . . is a reason to deny rather than allow intervention. . . . Officious intermeddlers ought not to be allowed to hijack litigation that the real parties in interest can resolve to mutual benefit." 358 F.3d at 518.

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CERTIFICATE OF SERVICE

Pursuant to Rule 15(d) of the Federal Rules of Appellate Procedure and First Circuit Local Rule 15(d), I hereby certify that true copies of the foregoing "Entergy's Response in Opposition to the New England Coalition's Motion to Intervene as Petitioner" were served upon the following by United States mail, first class, postage prepaid, on this 4th day of May, 2007:

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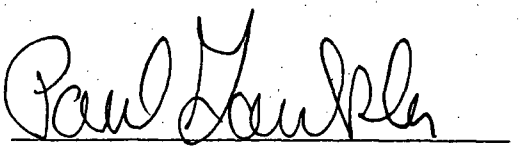

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May 4, 2007

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Mr. Richard Cushing Donovan
Clerk of Court
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Boston, MA 02210

Subject: **Consolidated Case Nos. 07-1482, 07-1483**
Commonwealth of Massachusetts v. United States; United States Nuclear Regulatory Commission

Dear Mr. Donovan:

On behalf of Entergy Nuclear Operations, Inc., Entergy Nuclear Vermont Yankee LLC, and Entergy Nuclear Generation Company (collectively "Entergy"), please find enclosed for filing an original and three photocopies of (1) "Entergy's Opposition to the Commonwealth of Massachusetts' Motion to Hold the Petitions for Review in Abeyance"; and (2) "Entergy's Response in Opposition to the New England Coalition's Motion to Intervene as Petitioner."

I have also enclosed an additional copy of each filing to be date stamped and returned via the enclosed self addressed, stamped envelope for our files.

As indicated on the Certificate of Service, a copies of the filings have been served on all parties to the administrative proceeding below, pursuant to Fed. R. App. P. 15(d).

Sincerely yours,

Paul Gaukler

Paul A. Gaukler

Enclosures

cc: Service List