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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

COMMONWEALTH OF)
MASSACHUSETTS,)
))
Petitioner,)
))
v.)
))
UNITED STATES NUCLEAR REGULATORY)
COMMISSION and the UNITED STATES)
OF AMERICA,)
))
Respondents)

Nos. 07-1482 and
07-1483

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

In arguing that the Commonwealth of Massachusetts' ("Commonwealth's") consolidated petitions for review are "fully ripe for immediate judicial review," Entergy mischaracterizes this case as involving one "simple procedural issue" unrelated to the pending rulemaking proceeding, *i.e.*, "whether the Commonwealth impermissibly sought to challenge generic [Nuclear Regulatory] Commission regulations in the context of individual licensing proceedings . . ." Entergy's Opposition to the Commonwealth of Massachusetts' Motion to Hold the Petitions for Review in Abeyance at 4 (May 4, 2007) ("Opposition"). To the contrary,

this case involves the same multiple claims of violations of the National Environmental Policy Act, the Atomic Energy Act, the Administrative Procedure Act, and NRC regulations for implementation of these statutes, as raised in the generic rulemaking proceeding. *See* Commonwealth Petitions for Review, Nos. 07-1482 and 07-1483 (March 22, 2007).

Entergy's narrow procedural argument also ignores the Commonwealth's key claim in this case that the NRC violated NEPA by refusing to prepare an environmental impact statement regarding the risks of continued spent fuel storage at the Pilgrim and Vermont Yankee nuclear power plants. Still, while the Commission made final and reviewable disposition of the claim by rejecting the Commonwealth's hearing request, *Commonwealth of Massachusetts v. NRC*, 879 F.2d 1516, 1520 (1st Cir. 1989), and thereby forced this appeal, the Commission (a) has not articulated its position on the merits of this issue in the individual license renewal proceedings for the Pilgrim and Vermont Yankee plants and (b) has declared it is instead "appropriate" to address the Commonwealth's substantive NEPA concerns in the pending generic rulemaking proceeding.¹

¹ *Entergy Nuclear Vermont Yankee LLC and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station); Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.*

The Court should defer its review until “the question arises in some more concrete and final form” in the outcome of the rulemaking proceeding.

Eagle-Picher Industries v. United States EPA, 759 F.2d 905, 915 (D.C. Cir. 1985) (“*Eagle-Picher v EPA*”), quoting *Continental Air Lines v. CAB*, 522 F.2d 107, 125 (D.C. Cir. 1974) (*en banc*); *Midwestern Gas Transmission Co. v. FERC*, 589 F.2d 603, 618 (D.C. Cir. 1978).²

Moreover, even Entergy’s “simple procedural issue” of whether the NRC lawfully treated the Commonwealth’s NEPA claims as an impermissible challenge to its generic NEPA regulations cannot plausibly be characterized as “fully ripe” or “wholly separate and distinct” from the rulemaking proceeding. Opposition at 2. According to the NRC itself, the rulemaking proceeding may provide the Commonwealth with an alternative procedure for challenging the NRC’s NEPA regulations. *See* CLI-07-03, slip op. at 6. If the Commission grants the rulemaking petition, the

(Pilgrim Nuclear Power Station), CLI-07-03, _ NRC _, slip op. at 6 (January 22, 2007)(Attachment A, Commonwealth Motion).

² The Commonwealth’s request for deferral of judicial review is not open-ended, however. If the NRC has not concluded the rulemaking proceeding before it has completed the individual license renewal proceedings for Pilgrim or Vermont Yankee, the Commonwealth requests the Court to reinstate these petitions in order to preserve its right to seek full and timely NEPA compliance in the course of the NRC’s license renewal

procedural question identified by Entergy will become moot, thus warranting deferred review in this case.

Nor has Entergy demonstrated that the requested delay would cause it to suffer “immediate and practical” harm. *Eagle-Picher v. EPA*, 759 F.2d at 915. In fact, given that (a) the NRC has projected that the Pilgrim and Vermont Yankee license renewal proceedings will be completed by July 2008, (b) the Commonwealth has not asked the Court to hold this proceeding in abeyance beyond the date when the earliest of those proceedings is completed, and (c) the Pilgrim and Vermont Yankee licenses are not due to expire until June of 2012, it does not appear that holding this proceeding in abeyance will cause Entergy any harm at all. It is also noteworthy that the NRC does not object to postponing review or argue that a postponement would interfere in any way with its regulatory activities.

Finally, while the Hobbs Act may reflect Congress’ “strong preference” for immediate review [Opposition at 6], the Court’s countervailing “interest in postponing review is strong if the agency position whose validity is in issue is not in fact the agency’s final position.”

decisions. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (environmental analysis must be completed “before the die is cast”).

Eagle-Picher v. EPA, 759 F.2d at 917, quoting *Continental Airlines v. CAB*, 522 F.2d at 125. As the D.C. Circuit reasoned in *Continental Airlines*:

If the [government's] position is likely to be abandoned or modified before it is actually put into effect, then its review wastes the court's time and interferes with the process by which the agency is attempting to reach a final decision.

Id. Here, because the NRC has taken no position at all in the proceeding below regarding the central question of whether it has complied with NEPA, briefing of the issue would be grossly inefficient. The briefing would be far more effective and efficient if it were based on a merits decision from the NRC in the rulemaking proceeding. It is also possible that the rulemaking decision will satisfy the Commonwealth's substantive concerns and thereby moot this case.

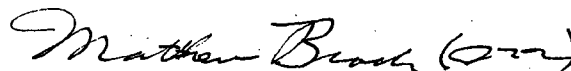
Accordingly, the Commonwealth's motion to hold these petitions in abeyance should be granted.

Respectfully submitted,

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COMMONWEALTH OF MASSACHUSETTS,
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Respondents

CERTIFICATE OF SERVICE

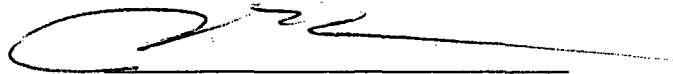
I hereby certify that I have this day served the foregoing document dated at Boston this 14th day of May 2007 upon the following persons:

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May 14, 2007

BY HAND

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RE: Commonwealth of Massachusetts v. NRC,
Nos. 07-1482 and 07-1483

Dear Mr. Donovan:

Enclosed for filing please find an original and three copies of the Commonwealth of Massachusetts' Reply to Entergy's Opposition to Motion to Hold Petitions For Review in Abeyance together with a Certificate of Service.

Very truly yours,

A handwritten signature in black ink that reads "Matthew Brock" followed by a stylized flourish.

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enclosure

cc: Service List

