

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS:

SERVED 01/15/08

Dale E. Klein, Chairman
Gregory B. Jaczko
Peter B. Lyons

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

CLI-08-02

MEMORANDUM AND ORDER

Today we deny the request of Intervenor Pilgrim Watch for interlocutory review of the Atomic Safety and Licensing Board's summary disposition of one of two contentions admitted in this proceeding.¹ In the disputed order, the Board granted the applicant's motion for summary disposition of Pilgrim Watch's contention on the adequacy of the applicant's analysis of severe accident mitigation alternatives (SAMAs) prepared in connection with the license renewal application for the Pilgrim Nuclear Power Station. Because we find that Pilgrim Watch has demonstrated no grounds for interlocutory

¹ Memorandum and Order (Ruling on Motion to Dismiss Petitioners' Contention 3 Regarding Severe Accident Mitigation Alternatives), LBP-07-13, 66 NRC ___, slip op. October 30, 2007.

review, its appeal must await the Board's final decision.

BACKGROUND

On January 25, 2006, Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (together, Entergy) applied to renew the operating license for the Pilgrim Nuclear Power Station for an additional 20 years.

Pilgrim Watch petitioned to intervene in the proceeding. On October 16, 2006, the Board granted Pilgrim Watch's hearing request and admitted two of its proposed contentions.² Pilgrim Watch's Contention 3 reads, as admitted by the Board:

Applicant's SAMA analysis for the Pilgrim plant is deficient in that input data concerning (1) evacuation times, (2) economic consequences, and (3) meteorological patterns are incorrect, resulting in incorrect conclusions about the costs versus benefits of possible mitigation alternatives, such that further analysis is called for.³

In May, 2007, Entergy filed a Motion for Summary Disposition of Pilgrim Watch Contention 3.⁴ Entergy's motion claimed that it had performed further analysis that showed that changes in the input data for the three factors listed in Contention 3 would have a negligible affect on the outcome of the SAMA cost/benefit analysis. A majority of the Board agreed that Entergy's calculations demonstrated that no genuine issue of material fact pertaining to the relative costs and benefits of SAMAs remained in dispute,

² LBP-06-23, 64 NRC 257 (2006).

³ LBP-06-23, 64 NRC at 341.

⁴ Entergy's Motion for Summary Disposition of Pilgrim Watch Contention 3 (May 17, 2007)(Motion for Summary Disposition).

and the majority granted summary disposition.

One judge, however, dissented on the ground that the majority had improperly *weighed* evidence rather than using the proper summary disposition standard that no genuine issue of material fact remains in dispute.⁵ That judge also argued that the majority had incorrectly narrowed the admitted contention, primarily by eliminating any challenge to the specific computer code that Entergy used to perform its SAMA computations.⁶

On appeal, Pilgrim Watch echoes the dissenting judge's argument that the Board applied the wrong standard for granting summary disposition. Pilgrim Watch argues that the Board essentially would have required Pilgrim Watch to provide its own calculations to "disprove" Entergy's analysis.⁷ But Pilgrim Watch maintains that the Board should not, at the summary disposition stage, try to "untangle the expert affidavits' and decide 'which experts are more correct.'"⁸ Further, Pilgrim Watch puts forth arguments regarding the proper scope of Contention 3, which, it says, comprised deficiencies in Entergy's computer model, not merely the inputs that that particular

⁵ LBP-07-13, 66 NRC ___, slip op. at 27.

⁶ LBP-07-13, 66 NRC ___, slip op. at 34-36.

⁷ See Pilgrim Watch Brief on Appeal of LBP-07-13 Memorandum and Order (Ruling of [sic.] Motion to Discuss [sic.] Petitioner's Contention 3 Regarding Severe Accident Mitigation Alternatives) (Nov. 13, 2007) (Appeal) at 19.

⁸ Appeal at 8, citing *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-4, 61 NRC 71, 80 (2005)(citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation) LBP-01-39, 54 NRC 497, 510 (2001).

model demanded.⁹

DISCUSSION

We do not reach the question of whether the Board correctly or incorrectly granted summary disposition on Contention 3, because we find Pilgrim Watch's appeal to be an inappropriate request for interlocutory review, not, as Pilgrim Watch appears to assume, a petition for review of a final decision.

The Commission disfavors review of interlocutory Board orders, which would result in unnecessary "piecemeal interference with ongoing Licensing Board proceedings."¹⁰ The current proceeding is ongoing, with one contention still pending.¹¹ Our rules of procedure allow a party to pursue interlocutory appeal only where the ruling "affects the basic structure of the proceeding in a pervasive or unusual manner," or where the ruling threatens the party adversely affected by it with "immediate, serious, and irreparable harm" that could not be alleviated through a petition for review of the Board's final decision."¹²

⁹ Appeal at 8-16.

¹⁰ We have expressed this view previously in this very proceeding. *Entergy Nuclear Operation Inc.* (Pilgrim Nuclear Power Station), CLI-07-2, 65 NRC 10, 12 (2007); *see, e.g., Amergen Energy Company, LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 125-26 (2006); *Exelon Generation Co., LLC* (Early Site Permit for the Clinton ESP Site), CLI-04-31, 60 NRC 461, 466-67 (2004).

¹¹ *See* LBP-07-12, 66 NRC __ (denying Entergy's Motion for Summary Disposition on Pilgrim Watch Contention 1 on aging management of pipes and buried tanks), reconsideration denied, Memorandum and Order (unpublished) (November 14, 2007).

¹² 10 C.F.R. § 2.341(f)(2). In addition to the two situations in which our rules permit a party to seek review of an interlocutory Board order, the Commission may review a Board ruling pursuant to the inherent supervisory powers it exercises over agency adjudications. *See, e.g., Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-07-1, (continued. . .)

Pilgrim Watch's appeal brief did not even address the two grounds stated in our regulations for interlocutory review, let alone try to meet them. Instead, it argued that the Board's ruling on Contention 3 was final as to that contention, and that the ruling was erroneous for the reasons given in the dissenting judge's opinion.¹³

As an initial matter, the ruling on Contention 3 is not a "final" decision. Our rules of procedure allow petitions for review after a full or partial initial decision, which are considered "final" decisions.¹⁴ The ruling below is neither of these. A partial initial decision is one rendered following an evidentiary hearing on one or more contentions, but that does not dispose of the entire matter. The provision expressly permitting immediate review of a "partial initial decision" is an exception to the Commission's established policy of disfavoring interlocutory appeals. A grant of summary disposition does not fall within this codified exception.

Because the Board's order is interlocutory, Pilgrim Watch must do more than

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65 NRC 1 (2007) (Review taken where significant issue may affect multiple pending or imminent licensing proceedings, and listing other examples of appropriate issues for *sua sponte* review (see n. 11-19)); *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-06-20, 64 NRC 15, 20-21 (2006) (novel questions of potentially broad application). We see no compelling reason to exercise that inherent power here.

¹³ Appeal at 4.

¹⁴ See 10 C.F.R. § 2.341(b)(1). See Final Rule, Procedures for Direct Commission Review of Decisions of Presiding Officers, 56 Fed. Reg. 29403 (July 27, 1991). The rule making partial initial decisions immediately appealable codified the Commission's longstanding practice of considering a Board order appealable where it "disposes of a major segment of the case or terminates a party's right to participate." See *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-731, 17 NRC 1073, 1074-75 (1983), quoting *Toledo Edison Co.* (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 758 (1975).

claim that the Board erred. The mere potential for legal error does not justify *interlocutory* review – the party seeking review must show grounds for interlocutory review under 10 C.F.R. § 2.341(f)(2).¹⁵ This brings us to our next point: that the rejection of a particular contention on summary disposition does not warrant interlocutory Commission review under the two grounds stated in our rules.

Review based on a “pervasive or unusual” effect on the “basic structure of a proceeding” litigation is granted only in extraordinary circumstances.¹⁶ The Commission has repeatedly found the simple denial of admission of a contention does not present this type of situation.¹⁷ A former Atomic Safety and Licensing Appeal Board also found that the grant of summary disposition for lack of a material issue did not have a “pervasive or unusual” effect on the litigation.¹⁸ Similarly, the broadening of issues for

¹⁵ See, e.g., *Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), CLI-01-25, 54 NRC 368, 373 (2001)(“A mere legal error is not enough to warrant interlocutory review because interlocutory errors are correctable on appeal from final Board decisions”); *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-98-8, 47 NRC 307, 320 & n.4 (1998).

¹⁶ See, e.g., *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205, 213-14 & n.15 (2002)(Commission undertook interlocutory review of a petition that questioned “the very structure” of the two-step licensing process announced for a proposed mix-oxide fuel fabrication facility); *Safety Light Corp.* (Bloomsburg Site Decontamination), CLI-92-13, 36 NRC 79, 85-86 (1994)(Board’s order consolidating an informal subpart L proceeding with a formal subpart G proceeding affected the “basic structure” of the proceeding a “pervasive and unusual manner”).

¹⁷ See, e.g., *Seabrook*, ALAB-731, 17 NRC at 1075 (Board grant of summary disposition on finding no material fact issue did not affect the structure of the proceeding in a pervasive and unusual manner). See also *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1 (2001)(Board’s refusal to admit late-filed contentions did not have a “pervasive and unusual effect” on the litigation); see also *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77 (2000)(Board’s refusal to admit late-filed contention did not have a “pervasive and unusual effect” on the litigation).

¹⁸ *Seabrook*, ALAB-731, 17 NRC at 1075.

hearing caused by the Board's admission of a contention that the applicant opposes does not constitute a "pervasive and unusual effect on the litigation."¹⁹

In addition, we do not see any potential for the Board's ruling to cause Pilgrim Watch "immediate, serious, and irreparable harm." To be "irreparable," the harm must be of a kind that cannot be reversed on appeal, as when the challenged order would reveal safeguards or privileged information to persons not authorized to review it.²⁰ We fail to see any irreparable harm that could befall Pilgrim Watch from waiting to raise its concerns later.

¹⁹ See *Haddam Neck*, CLI-01-25, 54 NRC 368, 374 (increased litigation burden of one contention, where other contentions were pending in proceeding, did not have pervasive effect on the structure of the litigation); *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93-94 (1994) (same).

²⁰ See, e.g., *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 71 (2004)(concerning the potential release of safeguards information); *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-95-15, 42 NRC 181, 184 (1995) (privileged information). See also *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-8, 55 NRC 222, 224-25 (2002)(inquiry into internal financial affairs of an Indian Tribe was itself the harm threatened by contested Board order, necessitating immediate Commission review).

Therefore, we hold that Pilgrim Watch's appeal must wait until the Board has reached its final decision in this case. For the foregoing reasons, the request is denied.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 15th day of January 2008

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AND)
ENTERGY NUCLEAR OPERATIONS, INC.) Docket No. 50-293-LR
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-08-02) have been served upon the following persons by electronic mail this date, followed by deposit of paper copies in the U.S. mail, first class, and NRC internal mail.

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Dated at Rockville, Maryland
this 15th day of January 2008