

November 24, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
)
ENTERGY NUCLEAR GENERATION)
COMPANY AND ENTERGY NUCLEAR) Docket No. 50-293-LR
OPERATIONS, INC.)
)
(Pilgrim Nuclear Generating Station))

NRC STAFF'S ANSWER IN OPPOSITION TO THE
COMMONWEALTH OF MASSACHUSETTS'
PETITION FOR REVIEW OF LBP-08-22

INTRODUCTION

Pursuant to 10 C.F.R. § 2.341(b)(3), the Staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby responds to the Commonwealth of Massachusetts' ("Commonwealth" or "MassAG") petition for review of the Atomic Safety and Licensing Board's ("Board") Initial Decision, LBP-08-22, 68 NRC ____ (October 30, 2008) (slip op.) ("Initial Decision").¹ For the reasons set forth herein, the Staff submits that the Petition should be denied, on the grounds that the issue of the admissibility of the Commonwealth's contention was previously disposed of by the Commission in CLI-07-03² and CLI-07-13.³ In addition, the

¹ Judge Young filed a separate concurring opinion on October 31, 2008. Concurring Opinion of Administrative Judge Ann Marshall Young to Initial Decision issued October 30, 2008, LBP-08-22, 68 NRC __ (October 31, 2008) (slip op.) ("Concurring Opinion").

² *Entergy Nuclear Vermont Yankee, LLC., et al.* (Vermont Yankee Nuclear Power Station and Pilgrim Nuclear Power Station), CLI-07-03, 65 NRC 13 (2007).

³ *Entergy Nuclear Vermont Yankee, LLC., et al.* (Vermont Yankee Nuclear Power Station and Pilgrim Nuclear Power Station), CLI-07-13, 65 NRC 211 (2007).

Commonwealth has not met the criteria set forth in 10 C.F.R. § 2.341(b)(2)(i)-(v) or (4)(i)-(v) for Commission review, nor has it met the criteria set forth in 10 C.F.R. § 2.342 for a stay.

BACKGROUND

This case arises from the January 25, 2006 application by Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (collectively, Entergy) to renew the operating license for the Pilgrim Nuclear Power Station (Pilgrim) for an additional twenty-year period.⁴ On March 27, 2006, the NRC published a notice of acceptance for docketing and opportunity for hearing regarding the license renewal application.⁵ In response to the *Federal Register* notice, Pilgrim Watch and the MassAG filed intervention petitions.⁶ Subsequently, on June 5, 2006, Pilgrim Watch gave notice pursuant to 10 C.F.R. §§ 2.309(f)(3) and 2.323 of its adoption of the contention filed by the MassAG.⁷ On June 16, 2006, the MassAG filed a letter requesting that the Board apply the June 2, 2006 decision of the U.S. Court of Appeals for the Ninth Circuit in, *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006), in ruling on its contention.

On June 7, 2006, the Board was established to preside over the proceeding. On July 6 and 7, 2006, the Board held oral argument, in Plymouth, Massachusetts, on the admissibility of

⁴ See Letter from Michael Balduzzi, Entergy Nuclear Operations, to U.S. NRC, Re: License Renewal Application, (January 25, 2006) (Agencywide Documents and Access Management System (“ADAMS”) Accession No. ML060300028).

⁵ 71 Fed. Reg. 15,222 (March 27, 2006).

⁶ See Request for Hearing and Petition to Intervene, May 25, 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 Pilgrim Nuclear Power Plant Operating License and Petition for Backfit Order Requiring New Design Features to Protect Against Spent Fuel Pool Accidents, May 26, 2006.

⁷ See Request for Hearing and Petition to Intervene by Pilgrim Watch (May 25, 2006).

the petitioners' contentions, with Pilgrim Watch, the MassAG, the NRC Staff, Entergy, and the Town of Plymouth participating. On October 16, 2006, the Board issued an order denying the MassAG's hearing request.⁸ In its Order, the Board concluded that the MassAG had failed to advance at least one admissible contention. *Id.* at 348. On October 31, 2006, the MassAG filed an appeal asserting that the Board erred in its refusal to hear its contention.⁹

On August 25, 2006, the MassAG filed a petition for rulemaking based on the same issues raised in its contention.

On January 22, 2007, the Commission issued CLI-07-03, affirming the decision of the Board rejecting the MassAG's contention. The contention had alleged that new and significant information casts doubt on NRC's previous findings regarding the environmental impacts of fires in spent fuel pools and challenged the finding in the GEIS¹⁰ that "the environmental effects of storing spent fuel for an additional 20 years" at nuclear reactor sites would not be significant. CLI-07-03, 65 NRC at 16, 17. Because the finding was incorporated into a regulation, it could be challenged during a hearing absent a waiver of the rule by the Commission. *Id.* The Commission affirmed the Board's decision that the GEIS finding was controlling absent a waiver of the finding, pursuant to 10 C.F.R. § 2.335, or a successful rulemaking, pursuant to 10 C.F.R. § 2.802. CLI-07-03, 65 NRC at 16.

⁸ See Memorandum and Order (Ruling on Standing and Contentions of Petitioners Massachusetts Attorney General and Pilgrim Watch), LBP-06-23, 64 NRC 257 (2006) ("Contention Order"). The Contention Order also granted the hearing request of Pilgrim Watch as to Contentions 1 and 3. The Order further denied admission of Pilgrim Watch's contentions 2, 4, and 5. Pilgrim Watch's Contention 4 is very similar to the Commonwealth's contention, in that they both raise issues concerning spent fuel pool accidents. Contention Order at 280-281.

⁹ See Massachusetts Attorney General's Brief on Appeal of LBP-06-23 (October 31, 2006) (MassAG Appeal).

¹⁰ NUREG-1437, Generic Environmental Impact Statement (GEIS) for License Renewal (1996).

On March 15, 2007, the Commission denied the MassAG's motion for reconsideration of CLI-07-03,¹¹ finding no demonstration of compelling circumstances that would form a basis for reconsideration. CLI-07-13 at 214. The Commission also held that the decision in CLI-07-03 was a final decision and thus the MassAG was precluded from requesting a stay of the final decisions in the Pilgrim and Vermont Yankee renewal matters, pursuant to 10 C.F.R. § 2.802. *Id.* at 214-15.

The Commonwealth appealed the Commission's decision as to Pilgrim and Vermont Yankee in CLI-07-03 to the U.S. Court of Appeals for the First Circuit. The Court of Appeals denied the appeals, affirming the NRC's decision to deny party status to the Commonwealth.¹² The Court also stayed the close of the Pilgrim and Vermont Yankee license renewal hearings for fourteen days after the issuance of the mandate in the case before the 1st Circuit. *Massachusetts v. NRC*, 522 F. 3d at 130. The sole purpose of the stay was to afford the Commonwealth the opportunity to request interested state status, pursuant to 10 C.F.R. § 2.315(c), so that, if necessary, it could request a stay of the licensing proceedings pending disposition of its petition for rulemaking, pursuant to 10 C.F.R. § 2.802(d). *Id.* The Commonwealth filed its notice of intent to participate as an interested state in both the Pilgrim and Vermont Yankee proceedings on May 6, 2008.¹³ It did not request a stay at that time. On August 8, 2008, the petition for rulemaking was denied by the Commission.¹⁴ Thereafter, the

¹¹ *Entergy Nuclear Vermont Yankee, LLC, et al.* (Vermont Yankee Nuclear Power Station and Pilgrim Nuclear Power Station), CLI-07-13, 65 NRC 211 (2007).

¹² *Massachusetts v. NRC*, 522 F.3d 115, 118 (1st Cir. 2008).

¹³ Commonwealth of Massachusetts' Notice of Intent to Participate as an Interested State, (May 6, 2008).

¹⁴ Denial of Petitions for Rulemaking, 73 FR 46,204 (Aug. 8, 2008).

Commonwealth filed an appeal of the denial with the Court of Appeals.¹⁵ That matter is still pending.

On October 30, 2008, after a hearing on the merits as to Pilgrim Watch's Contention 1, a majority of the Board issued its Initial Decision, LBP-08-22, resolving the contention in favor of the Applicant, Entergy, and on October 31, 2008, Judge Young issued her Concurring Opinion.¹⁶

On November 12, 2008, the Commonwealth filed the instant petition for review requesting that the Commission review and reverse the Initial Decision because the Board failed to take into account the "new and significant information" regarding the risks of spent fuel pool accidents. The Commonwealth also requested that the Commission review and correct its "own errors and omissions for failure to ensure that [the] final decision in the pending Circuit Court proceeding on the NRC's Rulemaking Decision . . . will . . . properly be taken account of, as a material part of the Pilgrim license extension process. . . ."¹⁷ In addition, the Commonwealth requested that the Commission either "defer" the conclusion of the license renewal until the Federal Court litigation is completed and the Court's ruling is incorporated into the license renewal, or condition the license renewal on compliance with the court ruling.¹⁸

¹⁵ See *Massachusetts v. NRC*, No. 08-2267 (1st Cir., filed Sept. 30, 2008) (to be transferred to the 2nd circuit).

¹⁶ LBP-08-22, 68 NRC ____ (slip op.)

¹⁷ Commonwealth of Massachusetts Petition for Review of LBP-08-22 (Nov. 12, 2008). ("Petition for Review"). The Staff notes that the Commonwealth did not comply with 10 C.F.R. § 2.342(c)(2), in that it does not contain a table of contents or a table of cases, statutes, regulations and other authorities, as required for a brief in excess of ten pages.

¹⁸ Petition for Review at 15.

DISCUSSION

I. Failure to Address the Criteria for Review

The Commonwealth is requesting that the Commission review and reverse the Board's Initial Decision in this matter, yet it alleges no legal or factual error in the Initial Decision. It also requests that the Commission review and correct its own erroneous rulings in this matter. The Commonwealth is seeking review of a decision that deals solely with Pilgrim Watch's Contention 1, which concerns the integrity of underground pipes that may carry radioactive liquids. The contention and the Initial Decision are not related to any of the issues raised in the Petition for Review.

The Commission's regulations at 10 C.F.R. § 2.341 require that a petition for review contain: a concise summary of the decision for which review is sought; a statement, including record citation, "where the matters of fact or law raised in the petition for review were previously raised before [the Board] and, if they were not, why they could not have been raised;" a concise statement why the decision is erroneous; and a concise statement why Commission review should be exercised. 10 C.F.R. § 2.341(b)(2)(i)-(iv). The petition may be granted, in the Commission's discretion, giving due weight to the existence of a substantial question with respect to: "[a] finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding; [a] necessary legal conclusion is without governing precedent or is a departure from or contrary to established law; [a] substantial question of law, policy, or discretion has been raised; [t]he conduct of the proceeding involved a prejudicial procedural error; or [a]ny other consideration which the Commission may deem to be in the public interest." 10 C.F.R. § 2.341(b)(4)(i)-(v).

The Commonwealth has simply failed to address any of the factors in §§ 2.341(b)(2) or 2.341(b)(4), as they may relate to the Initial Decision. In fact, the Commonwealth does not raise any issues relating to the contents or holding of the Initial Decision. Therefore, the Petition for Review should be denied.

II. Failure to Address the Criteria for a Stay

As a preliminary matter, although the Commonwealth's pleading is couched in terms of a petition for review of the Board's Initial Decision, it appears to be, in fact, a motion for a stay of the Board's decision, in that the Commonwealth is asking that the final decision in the license renewal matter be deferred for an indefinite period of time.

Regarding the request for a stay, during the pendency of the appeal of the license renewal decision to the Court of Appeals, the NRC represented to the Court that the Commonwealth could attain interested governmental entity status in the Pilgrim license renewal proceeding and avail itself of the 10 C.F.R. § 2.802(d) stay procedure.¹⁹ The Court found that the NRC was bound by this statement and accordingly issued an Order staying the license renewal proceeding in order to permit the Commonwealth to attain such status. The NRC fully complied with this Order.

The Commonwealth's rulemaking petition was denied on August 8, 2008. The denial is the NRC's final disposition of the petition. The stay provisions of 10 C.F.R. § 2.802(d) allow for a stay only "pending disposition of the petition for rulemaking." The petition for rulemaking has been disposed of via the Commission's final order denying the petition. Thus, §2.802(d) is no longer applicable and any motion for a stay must meet the requirements of 10 C.F.R. § 2.342.

The Commonwealth failed to address the requirements for a stay in the Petition for Review. Preliminarily, 10 C.F.R. § 2.342 requires that a motion for a stay be filed within 10 days of the Board's decision and be no longer than ten pages. In addition, the moving party must demonstrate that the following factors weigh in its favor:

- (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
- (2) Whether the party will be irreparably injured unless a stay is granted;

¹⁹ *Massachusetts v. NRC*, 522 F.3d at 129 n.8.

(3) Whether the granting of a stay would harm other parties; and

(4) Where the public interest lies.

10 C.F.R. § 2.342(e).²⁰ The first two factors are the most important.²¹ The Commonwealth has failed to address any of the factors listed above, “which is reason enough” to deny the stay motion.²² Even if the Commonwealth had attempted to address the factors, it would be difficult for the Commonwealth to demonstrate, for example, that it is likely to prevail on the merits in this case for the reasons stated herein. In addition, it would be difficult to show that it was likely to prevail in the rulemaking appeal. As the 1st Circuit noted, the Commission has “broad authority to promulgate rules and regulations.”²³ The decisions made by the NRC are entitled to “substantial deference.”²⁴ Therefore, the Petition for Review, to the extent that it is a motion for a stay, should be denied.

III. The Issue Raised in the Petition for Review Regarding the Admission of a Contention relating to Spent Fuel Pool Accidents has Already been Decided by the Commission and the Court of Appeals

The Commonwealth previously appealed the Board’s denial of admission of its contention to the Commission.²⁵ When the Commission affirmed the Board’s decision,²⁶ the

²⁰ See *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-13, 67 NRC ____, (slip op. at 4) (Jun. 17, 2008).

²¹ *Id.*

²² *Id.*

²³ *Massachusetts v. NRC*, 522 F.3d at 127 .

²⁴ *Id.*

²⁵ MassAG Appeal.

²⁶ The Commission affirmed the Board’s decision denying admission of the MassAG’s contention, holding that “Category 1 findings based on the GEIS analysis [are] not subject to attack in an individual licensing proceeding.” *Pilgrim*, CLI-07-03, 65 NRC at 19. The Commission also said that “any contention on a “Category 1” issue amounts to a challenge to our regulations that bars challenges to generic environmental findings.” *Id.* at 20. However, the Commission may grant a waiver, upon request, if (continued. . .)

Commonwealth appealed to the Court of Appeals, which affirmed the Commission's decision. Now the Commonwealth raises the same issues in this appeal; *i.e.* that the NRC has failed to take a "hard look" at the environmental consequences of a major action²⁷ and failed to consider "new and significant" information regarding increased risk and consequences of spent fuel fires.²⁸ These arguments have already been heard, analyzed, and found to be lacking by three tribunals.²⁹ The Commonwealth has had its day in court regarding the admission of its contention in the Pilgrim license renewal case. It is now seeking another bite at the apple to which it is not entitled. The Commission should, therefore, deny the Petition for Review.

CONCLUSION

For the reasons set forth above, the Commission should deny the Commonwealth of Massachusetts' Petition for review of LBP-08-22.

Respectfully submitted,

/RA/

Susan L. Uttal
Counsel for NRC Staff

Dated at Rockville, Maryland
This 24th day of November, 2008

(. . .continued)

special circumstances exist. *Id.* The Commission, in a second holding, reaffirmed its holding in *Turkey Point* that no discussion of mitigation alternatives is required in a license renewal application for a Category 1 issue. *Id.* at 21.

²⁷ Petition for Review at 12.

²⁸ *Id.* at 13-14.

²⁹ The Commonwealth has added a new argument: that the Commission has refused to ensure that it will "properly address" the Court's rulemaking appeal ruling in the Pilgrim license renewal. *Id.* at 14-16. This argument assumes without basis that the Commission will not comply with binding and applicable orders of the Court, if any, and should be rejected.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
)
ENTERGY NUCLEAR GENERATION)
COMPANY AND ENTERGY NUCLEAR) Docket No. 50-293-LR
OPERATIONS, INC.)
)
(Pilgrim Nuclear Generating Station))

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER IN OPPOSITION TO THE COMMONWEALTH OF MASSACHUSETTS' PETITION FOR REVIEW OF LBP-08-22" in the above-captioned proceeding have been served on the following by electronic mail and by deposit in the U.S. Nuclear Regulatory Commission's internal mail system, or, as indicated by an asterisk (*), by electronic mail and by deposit in the U.S. Mail system this 24th day of November, 2008.

Administrative Judge
Richard F. Cole
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Richard.Cole@nrc.gov

Administrative Judge
Paul B. Abramson
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Paul.Abramson@nrc.gov

Administrative Judge
Ann Marshall Young, Chair
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Ann.Young@nrc.gov

Office of Commission Appellate
Adjudication
Mail Stop: O-16G4
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: OCAAMAIL.Resource@nrc.gov

Atomic Safety and Licensing Board
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(VIA INTERNAL MAIL ONLY)

Office of the Secretary
Attn: Rulemakings and Adjudications Staff
Mail Stop: O-16G4
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Hearing.Docket@nrc.gov

Sheila Slocum Hollis*
Duane Morris LLP
1667 K Street, NW, Suite 700
Washington, DC 20006
E-mail: sshollis@duanemorris.com

Mary Lampert*
148 Washington Street
Duxbury, MA 02332
E-mail: mary.lampert@comcast.net

Chief Kevin M. Nord*
Fire Chief & Director Duxbury Emergency
Management Agency
668 Tremont Street
Duxbury, MA 02332
E-mail: nord@town.duxbury.ma.us

Richard R. MacDonald*
Town Manager
878 Tremont Street
Duxbury, MA 02332
E-mail: macdonald@town.duxbury.ma.us

Terence A. Burke, Esq.*
Entergy Nuclear
1340 Echelon Parkway
Mail Stop: M-ECH-62
Jackson, MS 39213
E-mail: tburke@entergy.com

David R. Lewis, Esq.*
Paul A. Gaukler, Esq.
Pillsbury, Winthrop, Shaw, Pittman, LLP
2300 N Street, NW
Washington, DC 20037-1137
E-mail: david.lewis@pillsburylaw.com
paul.gaukler@pillsburylaw.com

Town Manager*
Town of Plymouth
11 Lincoln St.
Plymouth, MA 02360
E-mail: msylvia@townhall.plymouth.ma.us

Matthew Brock, Esq.*
Assistant Attorney General, Chief
Environmental Protection Division
Office of the Attorney General
One Ashburton Place, 18th Floor
Boston, MA 02108
E-mail: matthew.brock@state.ma.us

/RA/

Susan L. Uttal
Counsel for the NRC Staff