

RAS# J-172

November 24, 2008

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

Before the Commission

November 24, 2008 5:32 pm

In the Matter of )  
 )  
Entergy Nuclear Generation Company and )  
Entergy Nuclear Operations, Inc. )  
 )  
(Pilgrim Nuclear Power Station) )

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

Docket No. 50-293-LR  
ASLBP No. 06-848-02-LR

**ENTERGY'S ANSWER TO  
COMMONWEALTH OF MASSACHUSETTS  
PETITION FOR REVIEW OF LBP-08-22**

I. INTRODUCTION

Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (collectively, "Entergy") hereby answer the Commonwealth of Massachusetts Petition for Review of LBP-08-22 (Nov. 12, 2008) ("Petition"). The Commonwealth's Petition should be denied because it is not a proper appeal of the Atomic Safety and Licensing Board's Initial Decision in LPB-08-22. Rather, the Petition appears to be seeking a stay of license renewal without any attempt to meet the standards for a stay prescribed by the NRC rules.

II. STATEMENT OF FACTS

This proceeding involves Entergy's application to renew the operating license for the Pilgrim Nuclear Power Station. The Commonwealth petitioned to intervene in this proceeding on May 26, 2006, and requested a hearing on a single contention alleging the need for the Environmental Report to address the environmental impacts of spent fuel pool accidents because

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of information alleged to be new and significant.<sup>1</sup> Shortly thereafter, the Commonwealth submitted a Petition for Rulemaking to the Commission requesting that the Commission amend 10 C.F.R. Part 51 based on the same allegedly new and significant information.<sup>2</sup> On October 16, 2006, the Atomic Safety and Licensing Board denied the Commonwealth's hearing request as a challenge to a generic Category 1 determination codified in the NRC rules, which is impermissible absent a waiver. LBP-06-23, 64 N.R.C. 257, 288, 295-300 (2006).

On appeal by the Commonwealth, the Commission affirmed the Licensing Board's ruling. CLI-07-3, 65 N.R.C. 13 (2007). The Commission found that the Commonwealth had not presented grounds for a waiver, but instead sought to raise generic concerns that were more appropriately addressed through the Commonwealth's rulemaking petition. *Id.* at 20. The Commission also responded to a request in the Commonwealth's rulemaking petition to defer any decision in the Pilgrim license renewal proceeding until completion of the rulemaking. *Id.* at 22 & n.37. The Commission found this request to be premature. *Id.* In response to a motion by the Commonwealth for reconsideration, the Commission explained how the Commonwealth could participate in the proceeding as an Interested State, which would enable Commonwealth to later move to stay the license renewal proceeding if it appeared that the NRC might issue the renewed license prior to a decision on the Commonwealth's rulemaking petition. CLI-07-13, 65 N.R.C. 211, 214-15 & n.16 (2007).

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<sup>1</sup> Massachusetts Attorney General's Request for a Hearing and Petition for Leave 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).

<sup>2</sup> Massachusetts Attorney General's Petition for Rulemaking to Amend 10 C.F.R. Part 51 (Aug. 25, 2006). See also 71 Fed. Reg. 64,169 (Nov. 1, 2006).

On judicial review, the U.S. Court of Appeals for the First Circuit upheld the Commission's decisions. Massachusetts v. United States, 522 F.3d 115 (1st Cir. 2008). The Court issued a brief administrative stay to permit the Commonwealth to request to participate as an Interested State in the NRC proceeding so that it could protect its interests in the manner that the Commission had prescribed. Id. at 130 & n.9.

Thereafter, the Commonwealth provided notice that it intended to participate as an Interested State, in order to "reserve[] the right, at some future point in this proceeding, to file motions to the Commission pursuant to 10 C.F.R. § 2.802 and/or 10 C.F.R. § 2.342, to suspend or stay the proceeding or any final decision issued in the proceeding, pending adequate resolution of the Commonwealth's rulemaking petition. . . ." Commonwealth of Massachusetts' Notice of Intent to Participate as an Interested State (May 6, 2008) at 1. The Commonwealth stated,

The Commonwealth is not requesting a stay at this time because it anticipates that such a request may be rendered unnecessary by the Commission's ruling on the rulemaking petition prior to issuing its decision on the relicensing.

Id. at 2.

On August 8, 2008, the Commission denied the Commonwealth's rulemaking petition. 73 Fed. Reg. 46,204 (Aug. 8, 2008). The Commonwealth is currently seeking judicial review of that decision.

On October 30, 2008, the Atomic Safety and Licensing Board issued its Initial Decision resolving the remaining contention of Pilgrim Watch (the only intervening party) in the proceeding Pilgrim license renewal proceeding. LBP-08-22, 68 N.R.C. \_\_\_, slip op. (Oct. 30,

2008).<sup>3</sup> The Commonwealth did not participate in the hearing on that Contention. In its Initial Decision, the Licensing Board noted the Commonwealth's notice of intent to participate as an Interested State had not requested any stay, and that the Commission had subsequently ruled on the Commonwealth's rulemaking petition, denying it. LBP-08-22, slip op. at 6 n.22.

The Commonwealth now petitions the Commission for review of LBP-08-22. The Commonwealth requests that the Commission reverse the Initial Decision because the Licensing Board "failed to make the Initial Decision and the Pilgrim license extension conditioned upon, or otherwise properly structured to take account of, the Commonwealth's new and significant information regarding the risks of [Spent Fuel Pool] accidents, as may finally be determined by the Courts." Petition at 4 (footnote omitted). The Commonwealth also demands that the Commission "correct [its] own errors and omissions to ensure that final decision in the pending Circuit Court proceeding on the NRC's Rulemaking Decision . . . will be applied back to, made a condition of, or otherwise properly be taken account of, as a material part of the Pilgrim license extension process in which these issues arose." Id.

### III. ARGUMENT

The Commonwealth's Petition should be denied because it is not a proper appeal of the Licensing Board's Initial Decision. The effect of the Commonwealth's petition for judicial review of the Commission's rulemaking decision was not an issue raised before, or decided by, the Board. Indeed, as the Licensing Board noted, the Commonwealth did not seek any stay. LBP-08-22, slip op. at 6 n.22. Since the Commonwealth did not raise these matters before the Board, it has no grounds to now appeal the Licensing Board's alleged "failure" to condition or

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<sup>3</sup> Pilgrim Watch has petitioned the Commission for review of the Initial Decision and other prior rulings in the proceeding. Pilgrim Watch's Petition for Review of LBP-06-848 (sic), LBP-07-13, LBP-06-23, and the Interlocutory Decisions in the Pilgrim Nuclear Power Station Proceeding (Nov. 12, 2008).

stay its Initial Decision. See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-778, 20 N.R.C. 42, 47-48 (1984) (“A party cannot be heard to complain later about a decision that fails to address an issue no one sought to raise.”). As a general rule, the NRC will not entertain on appeal arguments that a Licensing Board had no opportunity to address. Public Service Electric & Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 N.R.C. 43, 49 (1981).

The Commonwealth does not challenge any portion of the Initial Decision resolving Pilgrim Watch’s Contention. The Commonwealth does not identify any error in that decision. Moreover, since the Commonwealth did not participate in the litigation of Pilgrim Watch’s Contention, it has no right to appeal the decision resolving that Contention. An Interested State that takes no part in the hearing before the Licensing Board has no right to appeal the Licensing Board decision resolving the litigated issues. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-583, 11 N.R.C. 447, 449 (1980).

Similarly, there is no basis for the Commonwealth’s request that the Commission “review and correct the Commission’s own errors and omissions. . . .” Petition at 4. The Commonwealth has already appealed the Commission’s prior rulings on its contention in this proceeding, and those rulings were upheld by the First Circuit. See Massachusetts v. United States, supra. The Commonwealth has no right to revisit the Commission’s prior decisions.

In sum, the Commonwealth’s Petition presents no grounds for review of the Licensing Board’s Initial Decision. Rather, the Commonwealth’s Petition is in effect suggesting that the Commission stay the Pilgrim license renewal proceeding pending judicial review of the Commission decision on the rulemaking petition. See Petition at 3 (“[T]he NRC should not issue

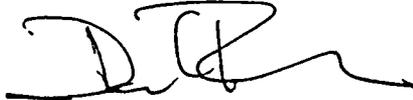
a final ruling in the relicensing process while the appeal of the Rulemaking Decision is adjudicated.”). The Commonwealth, however, has not moved for a stay, and has made no attempt to address the standards in the NRC rules for issuance of a stay. See 10 C.F.R. § 2.342(e). It should not be permitted to circumvent these requirements by characterizing its requests as an “appeal.”

Further, there is no need for a stay. If the Commonwealth were to ultimately prevail in its current petition for judicial review, the Commission certainly has the authority to supplement its environmental analysis for Pilgrim to comply or be consistent with such a decision.

#### IV. CONCLUSION

For all of the foregoing reasons, the Commonwealth of Massachusetts’ Petition for Review of LBP-08-22 should be denied.

Respectfully Submitted,



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Dated: November 24, 2008

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

Before the Commission

In the Matter of	)	
	)	
Entergy Nuclear Generation Company and	)	Docket No. 50-293-LR
Entergy Nuclear Operations, Inc.	)	ASLBP No. 05-848-02-LR
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CERTIFICATE OF SERVICE

I hereby certify that copies of "Entergy's Answer to Commonwealth of Massachusetts Petition for Review of LBP-08-22," dated November 24, 2008, were served on the persons listed below by deposit in the U.S. Mail, first class, postage prepaid, and where indicated by an asterisk by electronic mail, this 24<sup>th</sup> day of November, 2008.

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