

December 10, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
ENTERGY NUCLEAR VERMONT YANKEE,)	
LLC, and ENTERGY NUCLEAR)	Docket No. 50-271-LR
OPERATIONS, INC.)	
)	
(Vermont Yankee Nuclear Power Station))	

NRC STAFF'S ANSWER IN OPPOSITION TO THE
COMMONWEALTH OF MASSACHUSETTS'
PETITION FOR REVIEW OF LBP-08-25

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") Partial Initial Decision, LBP-08-25, 68 NRC ____ (November 24, 2008) (slip op.) ("LBP-08-25" or "Initial Decision") in the Vermont Yankee license renewal proceeding. For the reasons set forth herein and in the Staff's Answer to the MassAG's Petition for Review of LBP-08-22 in the Pilgrim license renewal proceeding, the Staff submits that the Petition for Review of the Board's partial initial decision in the Vermont Yankee proceeding should be denied.

STATEMENT OF THE CASE

This case arises from the January 25, 2006 application by Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. ("collectively, Entergy") to renew the operating license for the Vermont Yankee Nuclear Power Station ("Vermont Yankee") for an

additional twenty-year period.¹ On March 27, 2006, the NRC published a notice of acceptance for docketing and opportunity for hearing regarding the license renewal application.² In response to the *Federal Register* notice, the MassAG, the New England Coalition ("NEC"), the Vermont Department of Public Services ("DPS"), and the Town of Marlboro, Vermont filed intervention petitions.³ The MassAG's sole contention alleged that Entergy's Environmental Report for the Vermont Yankee license renewal did not satisfy the National Environmental Policy Act ("NEPA") because it failed to address new and significant information regarding the environmental impacts of spent fuel pool accidents.⁴

On June 5, 2006, DPS and NEC gave notice, pursuant to 10 C.F.R. §§ 2.309(f)(3) and 2.323, of their intent to adopt the MassAG's contention.⁵ 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.⁶

¹ 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. ML060300085).

² 71 Fed. Reg. 15,220 (March 27, 2006).

³ See 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 Power Plant Operating License and Petition for Backfit Order Requiring New Design Features to Protect Against Spent Fuel Pool Accidents (May 26, 2006) ("MassAG Petition"); [NEC] Petition for Leave to Intervene, Request for Hearing, and Contentions (May 26, 2006); [DPS] Notice of Intention to Participate and Petition To Intervene (May 26, 2006); Letter from Dan MacArthur, Director of Emergency Management, Town of Marlboro, to Office of the Secretary, NRC (Apr. 27, 2006).

⁴ See MassAG Petition at 21.

⁵ See [DPS] Notice of Intent to Adopt Contentions and Motion for Leave To Be Allowed To Do So (June 5, 2006); [NEC's] Notice of Adoption of Contentions, or in the Alternative, Motion to Adopt Contentions (June 5, 2006). In addition to adopting the MassAG contention, DPS and NEC also adopted each other's contentions.

⁶ Letter from Diane Curran and Matthew Brock to Administrative Judges Karlin, Elleman, and Wardwell (June 16, 2006) at 2.

On August 1 and 2, 2006, the Board held oral argument in Brattleboro, Vermont on the admissibility of the petitioners' contentions, with the MassAG, NEC, DPS, the NRC Staff, Entergy, and the Town of Marlboro participating. On September 22, 2006, the Vermont Yankee Board issued an order finding the MassAG contention inadmissible and denying the MassAG's hearing request.⁷ On October 3, 2006, the MassAG filed an appeal asserting that the Board erred in its refusal to hear its contention.⁸

On August 25, 2006, the MassAG filed a petition for rulemaking based on the same issues raised in its contention.⁹

On January 22, 2007, the Commission issued CLI-07-03, which affirmed the Board's decision rejecting the MassAG's contention.¹⁰ The contention had alleged that new and significant information casted doubt on NRC's previous findings regarding the environmental impacts of fires in spent fuel pools and challenged the finding in the GEIS¹¹ that "the environmental effects of storing spent fuel for an additional 20 years" at nuclear reactor sites would not be significant.¹² Because the finding was incorporated into a regulation, it could not

⁷ See *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 161 (2006) ("LBP-06-20").

⁸ See Massachusetts Attorney General's Brief on Appeal of LBP-06-20 (October 3, 2006) ("MassAG Appeal").

⁹ See Massachusetts Attorney General; Receipt of Petition for Rulemaking, 71 Fed. Reg. 64,169, 64,170 (November 1, 2006). The MassAG's petition stated that it was a "companion" to its contention, raised the same substantive concern as the contention, and "relies on and incorporates by reference the legal and technical assertions" made in its contention. *Id.*

¹⁰ *Entergy Nuclear Vermont Yankee, LLC, et al.* (Vermont Yankee Nuclear Power Station and Pilgrim Nuclear Power Station), CLI-07-03, 65 NRC 13, 16 (2007) ("CLI-07-3").

¹¹ NUREG-1437, Generic Environmental Impact Statement (GEIS) for License Renewal (1996).

¹² *Vermont Yankee*, CLI-07-3, 65 NRC at 16, 17.

be challenged during a hearing absent a waiver of the rule by the Commission.¹³ 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. § 2.802.¹⁴ On March 15, 2007, in CLI-07-13, the Commission denied the MassAG's motion for reconsideration of CLI-07-03,¹⁵ finding no demonstration of compelling circumstances that would form a basis for reconsideration.¹⁶ 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 decision in the Vermont Yankee renewal proceeding, pursuant to 10 C.F.R. § 2.802.¹⁷

The Commonwealth appealed the Commission's decision 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.¹⁸ The Court also stayed the close of the Vermont Yankee license renewal hearing for fourteen days after the issuance of its opinion.¹⁹ 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).²⁰ The Commonwealth filed a notice of intent to participate as an

¹³ *Id.*

¹⁴ *Id.* at 16.

¹⁵ *Entergy Nuclear Vermont Yankee, LLC, et al.* (Vermont Yankee Nuclear Power Station and Pilgrim Nuclear Power Station), CLI-07-13, 65 NRC 211 (2007) ("CLI-07-13").

¹⁶ *Vermont Yankee, et al.*, CLI-07-13, 65 NRC at 214.

¹⁷ *Id.* at 214-15.

¹⁸ *Massachusetts v. NRC*, 522 F.3d 115, 118 (1st Cir. 2008).

¹⁹ *Id.* at 130.

²⁰ *Id.*

interested state in the Vermont Yankee proceeding on May 6, 2008.²¹ It did not request a stay at that time, or at any time thereafter. On August 8, 2008, the Commission denied the MassAG's petition for rulemaking.²² Thereafter, the Commonwealth filed an appeal of the denial with the Court of Appeals for the First Circuit.²³ That matter is still pending.

On November 24, 2008, after a hearing on the merits as to NEC's Contentions 2A, 2B, 3 and 4, the Board issued LBP-08-25, resolving Contentions 2A and 2B in favor of NEC and Contentions 3 and 4 in favor of Entergy.²⁴

On December 2, 2008, the Commonwealth filed the instant petition for review requesting that the Commission review and reverse LBP-08-25 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 Vermont Yankee license extension process. . . ."²⁵ The Commonwealth, referring to its

²¹ Commonwealth of Massachusetts' Notice of Intent to Participate as an Interested State (May 6, 2008).

²² The Attorney General of Commonwealth of Massachusetts, The Attorney General of California; Denial of Petitions for Rulemaking, 73 Fed. Reg. 46,204 (Aug. 8, 2008).

²³ See *Massachusetts v. NRC*, No. 08-2267 (1st Cir. filed Sept. 30, 2008) (under order of transfer to the U.S. Court of Appeals for the Second Circuit).

²⁴ *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-08-25, 68 NRC ___, slip op. at 153. Contentions 2A and 2B assert inadequacies in Entergy's analyses of the effects of metal fatigue on reactor components, Contention 3 asserts inadequacies in Entergy's aging management program (AMP) for the steam dryer, and Contention 4 asserts inadequacies in Entergy's AMP for plant piping subject to flow-accelerated corrosion. *Id.* at 1-2. Because Contentions 2A and 2B were decided in NEC's favor, the Board stated that "license renewal is not authorized and thus cannot be granted until 45 days after Entergy satisfactorily completes [supplemental] metal fatigue calculations and serves them on the parties," and is holding the proceeding open on Contentions 2A and 2B until that time. *Id.* at 2.

²⁵ Commonwealth of Massachusetts Petition for Review of LBP-08-25 and Request for Consolidated Ruling (Dec. 2, 2008) ("VY Petition for Review").

recently filed petition for review in the Pilgrim license renewal proceeding,²⁶ asserts that “the NRC cannot lawfully close out the Vermont Yankee relicensing proceeding while the question of whether it complied with statutory preconditions to relicensing . . . is still being adjudicated before the Court of Appeals.”²⁷ The Commonwealth further states that, by doing so, the Vermont Yankee Board “repeats the same legal error committed by the Pilgrim [Board].”²⁸

DISCUSSION

To avoid unnecessary duplication, the Staff hereby adopts and incorporates by reference its Answer in opposition to the MassAG’s petition for review in the Pilgrim license renewal proceeding.²⁹ In short, the VY Petition for Review, like its counterpart in the Pilgrim proceeding, fails to address the criteria for discretionary review of a Board’s initial decision under 10 C.F.R. § 2.341³⁰ and fails to address the criteria for a stay under § 2.342. Furthermore, the Commission’s decision to deny the MassAG’s contention in both the Vermont Yankee and Pilgrim proceedings was affirmed by the Court of Appeals for the First Circuit. The petition for rulemaking was the procedural avenue that afforded the Commonwealth an opportunity to raise its concerns and present its “new and significant information” to the

²⁶ Commonwealth of Massachusetts Petition for Review of LBP-08-22 (Nov. 12, 2008) (“Pilgrim Petition for Review”). In the VY Petition for Review, the Commonwealth states that, to avoid duplication, it adopts the Pilgrim Petition for Review and incorporates it by reference. VY Petition for Review at 2 n.3.

²⁷ VY Petition for Review at 1-2.

²⁸ *Id.* at 1.

²⁹ NRC Staff’s Answer in Opposition to the Commonwealth of Massachusetts’ Petition for Review of LBP-08-22 (November 24, 2008).

³⁰ Like the Pilgrim Petition for Review, the VY Petition for Review does not assert any error in the Board’s decision in LBP-08-25, which decided contentions completely unrelated to the Commonwealth’s contention and subsequent petition for rulemaking regarding spent fuel pool accidents. The Board’s decision is a determination of whether the *license renewal applicant* has made the required showings under the Commission’s regulations, and does not address actions of the Commission or the Staff. Therefore, it is inappropriate to attempt to use a petition for review of the Board’s decision under § 2.341 as a vehicle for challenging the NRC’s alleged failure to comply with NEPA.

Commission; therefore, by considering the petition for rulemaking, the Commission met its NEPA obligations.³¹

Finally, the Commonwealth asserts that “NRC cannot, consistent with NEPA, reach final closure on the relicensing in a manner that does not take account of the Commonwealth’s pending challenge [in the court of appeals] to the Rulemaking Decision, in the event that the Commonwealth prevails in that proceeding.”³² Therefore, the Commonwealth suggests that the NRC should either “not issue a final ruling . . . while the appeal . . . is adjudicated” (essentially, the NRC should stay the relicensing), or the NRC should “expressly condition any approval of the license extension on a provision that the relicensing decision must be made consistent with any court ruling on the Rulemaking Decision.” *Id.* This argument should be rejected because it assumes, without basis, that the Commission would not comply with binding and applicable orders of a federal appeals court.³³ Furthermore, the Supreme Court has stated, with regard to NEPA, that “[t]he only role for a court is to insure that the agency has taken a ‘hard look’ at environmental consequences; it cannot ‘interject itself within the area of discretion of the executive as to the choice of the action to be taken.’”³⁴ Thus, while an appeals court could conceivably find that the Commission failed to take the requisite “hard look,” the court would not

³¹ See 73 Fed. Reg. at 46,212. Following a detailed explanation of the reasons for its denial of the MassAG’s rulemaking petition, the Commission concluded that the studies submitted by the MassAG did not constitute new and significant information, and that the findings related to spent fuel pools set forth in NUREG-1437 and 10 C.F.R. Part 51, Subpart B, Appendix B, Table B-1, remain valid. See 73 Fed. Reg. at 46,206-46,212.

³² VY Petition for Review at 2.

³³ On the contrary, the Commission has followed such orders. See *Pacific Gas and Electric Co.*, (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-1, 67 NRC 1, 4-5 (2008), in which the Commission considered proposed NEPA terrorism contentions pursuant to the Ninth Circuit’s remand in *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016, 1028 (9th Cir. 2006), *cert. denied*, 127 S.Ct. 1124 (2007).

³⁴ *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976), citing *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972).

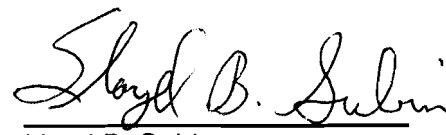
make substantive determinations regarding technical or environmental issues that are within the agency's discretion. Therefore, the Commonwealth's expectation that an appeals court would make substantive determinations regarding spent fuel pool issues or "requirements for relicensing involving SFP risks,"³⁵ which the Commission would then "apply back" to a relicensing decision, is incorrect.

In summary, as noted in the Staff's Answer to the Pilgrim Petition for Review, the Commonwealth has had its day before the Commission and in court regarding the admission of its contention in the *Vermont Yankee* and *Pilgrim* license renewal proceedings. It is now seeking another opportunity to which it is not entitled. The Commission should, therefore, deny this Petition for Review.

CONCLUSION

For the reasons set forth above, the Commission should deny the Commonwealth of Massachusetts' Petition for Review of LBP-08-25.

Respectfully submitted,


Lloyd B. Subin
Counsel for NRC Staff

Dated at Rockville, Maryland
This 10th day of December, 2008

³⁵ See, e.g., Pilgrim Petition for Review at 14, 16.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
ENTERGY NUCLEAR VERMONT YANKEE,)	
LLC and ENTERGY NUCLEAR)	Docket No. 50-271-LR
OPERATIONS, INC.)	
)	
(Vermont Yankee Nuclear Power 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-08-25" 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 10th day of December, 2008.

Alex S. Karlin, Chair
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: ask2@nrc.gov

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

William H. Reed*
Administrative Judge
Atomic Safety and Licensing Board
1819 Edgewood Lane
Charlottesville, VA 22902
E-mail: whrcville@embargo.com

Zachary Kahn, Law Clerk
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Zachary.Kahn@nrc.gov

Richard E. Wardwell
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: rew@nrc.gov

Lauren Bregman, Law Clerk
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Lauren.Bregman@nrc.gov

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

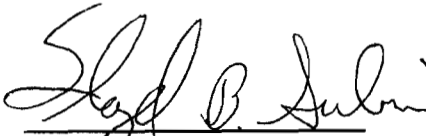
Sarah Hofmann, Esq.*
Director of Public Advocacy
Department of Public Service
112 State Street - Drawer 20
Montpelier, VT 05620-2601
E-mail: sarah.hofmann@state.vt.us

Raymond Shadis*
37 Shadis Road
PO Box 98
Edgecomb, ME 04556
E-mail: shadis@prexar.com

David R. Lewis, Esq.*
Matias F. Travieso-Diaz, Esq.
Elina Teplinsky, Esq.
Blake J. Nelson, Esq.
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, NW
Washington, DC 20037-1128
E-mail: david.lewis@pillsburylaw.com
matias.travieso-diaz@pillsburylaw.com
elina.teplinsky@pillsburylaw.com
blake.nelson@pillsburylaw.com

Peter C.L. Roth, Esq.*
Office of the Attorney General
33 Capitol Street
Concord, NH 3301
E-mail: peter.roth@doj.nh.gov

Anthony Z. Roisman, Esq.*
National Legal Scholars Law Firm
84 East Thetford Rd.
Lyme, NH 03768
E-mail: aroisman@nationallegalscholars.com



Lloyd B. Subin
Counsel for the NRC Staff