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# THE COMMONWEALTH OF MASSACHUSETTS
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December 2, 2008

Office of the Secretary
Annette L. Vietti-Cook
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Attn: Rulemakings and Adjudications Staff

**Re: Petition for Review of LBP-08-25**
**Vermont Yankee Nuclear Power Station**
**Docket No. 50-271-LR, ASLBP No. 06-849-03-LR**

Dear Secretary Vietti-Cook:

Enclosed for filing in the above-captioned matter, please find the Commonwealth of Massachusetts Petition for Review of LBP-08-25 and Request for Consolidated Ruling.

Very truly yours,

Matthew Brock
Assistant Attorney General
Environmental Protection Division

Enclosures
cc: Service List

DOCKETED
USNRC

December 2, 2008 (2:50pm)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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| In the Matter of | ) | |
| ENTERGY NUCLEAR VERMONT YANKEE L.L.C. AND ENTERGY NUCLEAR OPERATIONS, INC. | ) | Docket No. 50-271-LR<br>ASLBP No. 06-849-03-LR |
| (Vermont Yankee Nuclear Power Station) | ) | |

**COMMONWEALTH OF MASSACHUSETTS PETITION FOR REVIEW OF LBP-08-25 AND REQUEST FOR CONSOLIDATED RULING**

## I. Background

On November 24, 2008, the Vermont Yankee Atomic Safety and Licensing Board (Vermont Yankee ASLB) issued a Partial Initial Decision (PID) to approve the license extension for the Vermont Yankee nuclear power plant for another twenty years. The Vermont Yankee ASLB also stated that, unless appealed, the PID would constitute the final decision of the Nuclear Regulatory Commission (NRC or Commission) on the license extension. PID at 1, 153 – 154.[1]

By approving the license extension, the Vermont Yankee ASLB thereby repeats the same legal error committed by the Pilgrim ASLB, as detailed by the Commonwealth in its recent appeal to the Commission on the Pilgrim relicensing decision:[2] that the NRC cannot lawfully

1 The Vermont Yankee ASLB did decide that a few limited issues or conditions remained to be addressed, that had been raised by other parties in contentions before the Board. See PID at 2. However, the Vermont Yankee ASLB made clear that, notwithstanding those limited open issues, the PID would constitute final agency action on all other issues to approve the license, unless a timely appeal was filed. PID at 153 – 154.
2 See Commonwealth Petition for Review of LBP-08-22 (November 12, 2008)(Commonwealth Petition, Attachment 1 hereto) and Commonwealth of

close out the Vermont Yankee relicensing proceeding while the question of whether it complied with statutory preconditions to relicensing involving the risks of spent fuel pool (SFP) storage is still being adjudicated before the Court of Appeals. See Commonwealth Petition 11 – 17; Commonwealth Reply at 2 – 3.

The National Environmental Policy Act, 42 U.S.C. §§ 4321-4370(f) (NEPA), requires the NRC to take a hard look at the new and significant information that the Commonwealth presented on the risks of spent fuel pool accidents in a manner that informs its decision whether to grant an operating license extension for the Vermont Yankee plant for another twenty years. It follows that the 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 to the Rulemaking Decision, in the event that the Commonwealth prevails in that proceeding. To remedy this problem, the NRC should not issue a final ruling in the relicensing process while the appeal of the Rulemaking Decision is adjudicated. Alternatively, if the NRC chooses to move forward with the relicensing, it should at a minimum 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. Through such a provision, the NRC can ensure that final resolution of the SFP issues – as adjudicated by the Courts -- will be given due consideration and application by NRC decision makers in the Vermont Yankee relicensing process.[3]

## II. Request for Relief

Pursuant to 10 C.F.R. § 2.341, the Commonwealth therefore petitions the NRC:

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Massachusetts Reply to NRC Staff's Answer in Opposition to the Commonwealth of Massachusetts' Petition for Review of LBP-08-22 (December 1, 2008) (Commonwealth Reply, Attachment 2 hereto).

3 To avoid duplicative argument, the Commonwealth adopts and incorporates by reference the Commonwealth Petition and Commonwealth Reply, attached hereto, in support of the present Vermont Yankee Petition for Review.

(a) to review and reverse the November 24, 2008 Partial Initial Decision by the Vermont Yankee ASLB, that approved the application by Entergy to extend the operating license for the Vermont Yankee nuclear power plant for another twenty years, and which, unless reversed, will represent final action by the Commission, because the Vermont Yankee ASLB failed to make the PID and the Vermont Yankee license extension conditioned upon, or otherwise properly structured to take account of, the Commonwealth's new and significant information regarding the risks of SFP accidents, as may be finally determined by the Courts; and

(b) review and correct the Commission's own errors and omissions for failure to ensure that the final decision in the pending Circuit Court proceeding on the NRC's Rulemaking Decision, regarding these SFP risks, will be applied back to, made a condition of, or otherwise properly be taken account of, as a material part of the Vermont Yankee license extension process in which these issues arose.

## III. Request for Consolidated Ruling

Because the relevant factual background and legal issues raised by the Commonwealth's Petitions for Review are the same for the Pilgrim and Vermont Yankee license extension proceedings, the Commonwealth requests that the Commission, for the convenience and clarity of all parties, issue a single decision addressing both Petitions.

## IV. Conclusion

The Commonwealth requests that its Petition for Review be granted and that the Commission grant the relief as requested herein.

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December 2, 2008

**CERTIFICATE OF SERVICE – VERMONT YANKEE LICENSE RENEWAL PROCEEDING**

I certify that on December 2, 2008, a copy of the foregoing document was served on each of the following by electronic mail and first-class mail, except where noted:

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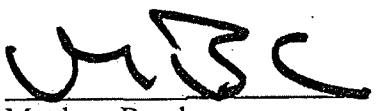

Matthew Brock

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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November 12, 2008 2:23 pm

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RULEMAKINGS AND
ADJUDICATIONS STAFF

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| In the Matter of | ) | |
| | ) | |
| ENTERGY NUCLEAR GENERATION COMPANY AND ENTERGY NUCLEAR OPERATIONS, INC. | ) | Docket No. 50-293-LR |
| | ) | ASLBP No. 06-848-02-LR |
| (Pilgrim Nuclear Power Station) | ) | |

**COMMONWEALTH OF MASSACHUSETTS**
**PETITION FOR REVIEW OF LBP-08-22**

## I. Introduction

In January, 2006, Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (Entergy) submitted an application to the Nuclear Regulatory Commission (NRC or Commission) to extend the operating license for the Pilgrim nuclear power plant for another twenty years, which otherwise will expire in June, 2012. In May, 2006, the Commonwealth of Massachusetts (Commonwealth) filed a contention in the Pilgrim license extension proceeding on grounds that Entergy's application failed to comply with the National Environmental Policy Act and other applicable law because the application failed to address new and significant information on the risk of severe accidents involving spent fuel pools (SFPs) caused by terrorist attack, natural phenomena, equipment failure, or operator error.[1]

1 *See* 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. May 26, 2006. ADAMS No. ML061630088.

The NRC determined that the SFP issue raised by the Commonwealth was a generic one and in effect divided the Pilgrim relicensing proceeding into two parts: the generic SFP issue would be considered by the Commission through a separate rulemaking process while the remaining issues would be addressed by the Pilgrim Atomic Safety and Licensing Board (Pilgrim ASLB) in the individual relicensing proceeding. However, claiming it was "premature" to do so, the Commission refused the Commonwealth's request to ensure that the agency would take account of, or otherwise apply, any final generic decision on SFP issues to the individual Pilgrim license extension proceeding in which these issues arose.

Subsequently the NRC terminated the rulemaking proceeding and denied the Commonwealth's rulemaking petition on SFP issues. *See* Notice of Denial of Petitions for Rulemaking PRM-51-10 and PRM 51-12. ADAMS No. ML081890124. 73 Fed. Reg. 46,204 (Aug 8, 2008). (Rulemaking Decision). The Pilgrim ASLB has now resolved all remaining issues before it and terminated the Pilgrim license extension proceeding.[2]

The Commonwealth and two other states have appealed the Rulemaking Decision, and those three appeals are pending in the United States Court of Appeals for the Second Circuit.[3] In its appeal, the Commonwealth will argue, inter alia, that to deny the Commonwealth's rulemaking petition, the NRC improperly relied on extra-record evidence, classified studies, and other undisclosed documents never subject to public

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[2] Licensing Board Initial Decision at 26. (LBP-08-22). Oct. 30, 2008. Reference Nos. 06-848-02-LR, 50-293-LR, RAS J-162. ADAMS No. ML083040206 (Initial Decision).
[3] *Massachusetts v. United States Nuclear Regulatory Commission*, No. 08-2267 (1st Cir. filed Sept. 30, 2008)(now under Order of transfer to the Second Circuit). *State of New York v. United States Nuclear Regulatory Commission*, No. 08-3903-ag (2nd Cir. filed Aug. 8, 2008). *Blumenthal v. United States Nuclear Regulatory Commission*, No. 08-4833-ag (2nd Cir. filed Oct. 1, 2008).

review or comment or an environmental impact statement process, and it repeatedly offered only conclusory statements or assurances, without record support, on the adequacy of its mitigation measures to address the SFP risks raised by the Commonwealth's rulemaking petition. In lieu of litigating these substantive issues in what remains of the individual relicensing proceeding, we will raise them in the pending appeal of the Rulemaking Decision, which is consistent with the First Circuit's prior review of the Pilgrim relicensing process. See *Massachusetts v. NRC*, 522 F. 3d 115, 127 (1st Cir. 2007). In the relicensing proceeding, however, the question remains what to do about the fact that whether the NRC has adequately addressed the SFP risks is still actively being litigated in a separate pending proceeding.

The National Environmental Policy Act, 42 U.S.C. §§ 4321-4370(f) (NEPA), requires the NRC to take a hard look at the new and significant information that the Commonwealth presented on the risks of spent fuel pool accidents in a manner that informs its decision whether to grant an operating license extension for the Pilgrim plant for another twenty years. It follows that the 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 to the Rulemaking Decision, in the event that the Commonwealth prevails in that proceeding. To remedy this problem, the NRC should not issue a final ruling in the relicensing process while the appeal of the Rulemaking Decision is adjudicated. Alternatively, if the NRC chooses to move forward with the relicensing, it should at a minimum 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. Through such a provision, the NRC can ensure

that final resolution of the SFP issues – as adjudicated by the Courts -- will be given due consideration by NRC decision makers in the Pilgrim relicensing process.

Pursuant to 10 C.F.R. § 2.341, the Commonwealth therefore petitions the NRC:

(a) to review and reverse the October 30, 2008 Initial Decision by the Pilgrim ASLB, that approved the application by Entergy to extend the operating license for the Pilgrim nuclear power plant for another twenty years, and which, unless reversed, will represent final action by the Commission, because the Pilgrim ASLB 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 SFP accidents, as may be finally determined by the Courts;[4] and

(b) review and correct the Commission's own errors and omissions for failure to ensure that final decision in the pending Circuit Court proceeding on the NRC's Rulemaking Decision, regarding these SFP risks, 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.

## II. Statement of Facts

### A. The Commonwealth contentions on the risks of spent fuel pool accidents.

On May 26, 2006, the Commonwealth of Massachusetts, through its Attorney General, submitted hearing requests and contentions in the separate license renewal

[4] *See* LBP-08-22 at 1.

proceedings for the Pilgrim and Vermont Yankee nuclear power plants.[5] In each proceeding, the Commonwealth filed a virtually identical contention claiming that Entergy's relicensing applications violated NEPA, and NRC implementing regulation 10 C.F.R. § 51.53(c)(3)(iv), because Entergy did not address significant new information about the environmental risks of operating the Pilgrim and Vermont Yankee nuclear power plants for an additional twenty years. *See* Pilgrim and Vermont Yankee Contentions at 21-50. This new and significant information, set forth in the NRC Staff's 2001 Report, a report by the National Academy of Sciences, and the expert report prepared by Dr. Gordon Thompson, showed that if a fuel pool were to suffer even a partial loss of cooling water, whether caused by terrorist attack, natural phenomena, equipment failure, or operator error, the high-density racks would, over a wide range of scenarios, inhibit the flow of water, air or steam over the exposed portion of the fuel assemblies, causing some of the fuel to ignite within hours. The fire could then propagate within the pool and lead to a large atmospheric release of radioactive isotopes extending beyond Massachusetts borders (Pilgrim) or across the border into Massachusetts communities (Vermont Yankee). In a separate expert report submitted by the Commonwealth in support of the contentions, Dr. Jan Beyea concluded that such a large atmospheric release could cause thousands of cases of cancer and billions of dollars

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5 *See* 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 (May 26, 2006). Ref. Nos. 50-293-LR, ASLBP 06-848-02-LR, RAS 11753. ADAMS No. ML061630088 (Pilgrim Contention); *see also* 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 Vermont Yankee Nuclear Power Plant Operating License (May 26, 2006). Ref Nos. 50-271-LR, ASLBP 06-849-03-LR, RAS 11758. ADAMS No. ML061640065 (Vermont Yankee Contention).

in economic damage. *See Massachusetts v. NRC*, 522 F.3d 115, 122 – 123 (1st Cir. 2008); *see also* Pilgrim Contention, Exhibit 2, Report to the Massachusetts Attorney General on the Potential Consequences of a Spent-Fuel-Pool Fire at the Pilgrim or Vermont Yankee Nuclear Plant at 5-25.

The Commonwealth contended that in light of this new and significant information, the NRC must revisit the conclusion of its 1996 License Renewal Generic Environmental Impact Statement (GEIS) that spent fuel storage poses no significant environmental impacts. *See* Pilgrim and Vermont Yankee Contentions at 21-23. Consistent with the U.S. Court of Appeals for the Ninth Circuit's recent decision in *San Luis Obispo Mothers for Peace v. NRC,* 449 F.3d 1016 (9th Cir. 2006), *cert. denied*, 127 S.Ct. 1124 (2007), the Commonwealth also requested the NRC to reverse its policy of refusing to consider the environmental impacts of intentional attacks on nuclear facilities.[6] In *San Luis Obispo Mothers for Peace*, the Ninth Circuit held that "none of the four factors upon which the NRC relies to eschew consideration of the environmental effects of a terrorist attack satisfies the standard of reasonableness," and remanded the case to the agency to fulfill its responsibilities under NEPA. 449 F. 3d at 1035.

**B. The NRC Rejects the Commonwealth's Contentions.**

In each relicensing proceeding for Pilgrim and Vermont Yankee, a separate panel of the NRC's Atomic Safety and Licensing Board (ASLB) rejected the Commonwealth's contention on the procedural ground that the contention impermissibly challenged NRC regulation 10 C.F.R. Part 51, Appendix B. *See* Entergy Nuclear Generation Company

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6 *See* Letters from the Commonwealth of Massachusetts to the ASLBs for the Pilgrim and Vermont Yankee License Renewals, dated 6/16/06 at 1. *See also* Pilgrim and Vermont Yankee Contentions at 33-47.

and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257 (2006); Entergy Nuclear Vermont Yankee LLC and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131 (2006). That regulation precludes consideration of the environmental impacts of spent fuel storage in NRC license renewal proceedings. LBP-06-23 at 288. Appendix B is based on the 1996 License Renewal GEIS, which concluded that spent fuel storage impacts are insignificant. *Id.* at 278.

In each case, the ASLB also ruled that Appendix B precludes the Commonwealth from seeking consideration of new and significant information regarding the environmental impacts of terrorist attacks on the Pilgrim and Vermont Yankee spent fuel pools. *Id.* at 288, LBP-06-20 at 154-162. The ASLBs concluded that, in order to challenge the Pilgrim or Vermont Yankee license renewal application's failure to address this new and significant information, the Commonwealth must first petition the NRC to change its rules or seek a waiver of the regulations prohibiting consideration of these impacts in license renewal hearings. *Id.* (LBP-06-23 at 288 and LBP-06-20 at 156).

**C. The Commonwealth files an alternative Rulemaking Petition.**

While disagreeing with the ASLBs' procedural rulings that the contentions were inadmissible under NRC regulations, the Commonwealth submitted a rulemaking petition to the NRC in the summer of 2006 to address the alternative rulemaking process.[7] The rulemaking petition sought revocation of the regulation promulgated by the NRC in 1996 prohibiting consideration of the environmental impacts of spent fuel storage in individual

[7] Massachusetts Attorney General's Petition for Rulemaking to Amend 10 C.F.R. Part 51 (PRM-51-10). Aug. 25, 2006. ADAMS No. ML062640409. 71 Fed.Reg. 64, 169 (November 1, 2006).

license renewal cases, based on the new and significant information set forth in the Pilgrim and Vermont Yankee contentions. *Id.* The Commonwealth also asserted that NEPA requires the NRC to apply or otherwise take due account of any decision on the generic rulemaking petition as part of the individual Pilgrim and Vermont Yankee licensing proceedings. *Id.*

**D. The Commonwealth files administrative appeals of ASLB decisions.**

To protect its rights to ensure that the NRC complies with NEPA for the license extensions at the specific plants of concern – Pilgrim and Vermont Yankee – the Commonwealth also appealed LBP-06-20 and LBP-06-23 to the NRC Commissioners, claiming that the ASLBs erred in refusing to admit the Commonwealth's contentions.[8] In the alternative, the Commonwealth asserted that if the NRC intended to use the rulemaking process to address the Commonwealth's substantive concerns regarding the environmental impacts of high-density spent fuel storage at the Pilgrim and Vermont Yankee nuclear power plants, NEPA requires the NRC to apply or otherwise take account of the results of the rulemaking in the individual license renewal proceedings before the licenses can be extended. *See* Brief on Appeal of LBP-06-20 at 2-3.

In CLI-07-03, the Commission affirmed LBP-06-20 and LBP-06-23 on procedural grounds, holding that the ASLBs had correctly concluded that the Commonwealth's contentions were inadmissible because they challenged an NRC

[8] Massachusetts Attorney General's Brief on Appeal of LBP-06-20. Oct. 3, 2006. Ref. Nos. 50-271-LR, ASLBP 06-849-03-LR, LBP-06-20, RAS 12359. ADAMS No. ML062860156. Massachusetts Attorney General's Brief on Appeal of LBP-06-23. Oct. 31, 2006. Ref Nos. 50-293-LR, ASLBP 06-848-02-LR, LBP-06-23, RAS 12485. ADAMS No. ML063120343.

regulation.[9] The Commission also found that the Commonwealth's rulemaking petition was the "appropriate way" to address the Commonwealth's substantive concerns about the environmental risks posed by the Pilgrim and Vermont Yankee spent fuel pools, including the risks posed by terrorist attacks.[10]

However, claiming it was "premature," the Commission refused the Commonwealth's request that the NRC apply or otherwise take account of the results of the rulemaking as part of the individual licensing proceedings, so that the Commonwealth's concerns regarding severe accidents at Pilgrim and Vermont Yankee can be considered in those cases as part of the licensing process.

> The Mass AG's rulemaking petition (at 3) asked the NRC to withhold final decisions in the *Vermont Yankee* and *Pilgrim* license renewal proceedings until the rulemaking petition is resolved. But final decisions in those proceedings are not expected for another year or more. Those proceedings involve many issues unrelated to the Mass AG's rulemaking petition. It is therefore premature to consider suspending proceedings or delaying final decisions.

*Id.* at 22.

**E. Initial Proceedings Before the First Circuit Court of Appeals**

On March 22, 2007, the Commonwealth filed petitions for review in the United States Court of Appeals for the First Circuit seeking review of the NRC's decisions in both the Pilgrim and Vermont Yankee license renewal cases. In its appeal, the

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[9] Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), and Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-07-03, 65 NRC 13 (2007) at 20.

[10] *Id.* at 20-21. ("It makes more sense for the NRC to study whether, as a technical matter, the agency should modify its requirements relating to spent fuel storage for all plants across the board rather than to litigate in particular adjudications whether generic findings in the GEIS are impeached by the Mass AG's claims of new information.")

Commonwealth argued that the NRC had taken final agency action with respect to the Commonwealth's contention, because the contention was denied and the Commonwealth had been dismissed as a party from the individual licensing proceedings for Pilgrim and Vermont Yankee, and because the NRC refused to ensure that its generic rulemaking decision would be applied back to the individual plants where the issue arose: Pilgrim and Vermont Yankee. As the Commonwealth requested:

> For the foregoing reasons, this Court should reverse and remand CLI-07-03 with directions that the Commission withhold any final decision in the individual license renewal proceedings for Pilgrim and Vermont Yankee **unless and until the Commission considers and rules upon the Commonwealth's new and significant information in accordance with NEPA and the AEA and any further rulings by the Court, and the Commission applies those considerations and rulings to the individual Pilgrim and Vermont Yankee relicensing proceedings**. (emphasis added)[11]

However, based on representations by the NRC to the Court that the Commonwealth would have the opportunity in the future to raise these issues as an Interested State and, as appropriate, to seek judicial review,[12] and while binding the agency to those representations, the First Circuit ruled that the NRC's decision to dismiss the Commonwealth from the individual proceedings was not a final order with respect to the Commonwealth's AEA, NEPA and related claims involving the new and significant information on the risk of severe SFP accidents.

> The Commonwealth argues separately that the NRC violated NEPA and acted arbitrarily and capriciously when it refused to ensure that the results of the rulemaking would apply to the Pilgrim and Vermont Yankee licensing proceedings...We cannot review the NRC's treatment of that petition [for

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11 Brief for Petitioner Commonwealth of Massachusetts at 43, *Massachusetts v. US Nuclear Regulatory Commission*, 522 F.3d 115 (1st Cir. 2008) Nos. 07-1482; 07-1483.
12 *Massachusetts v. US Nuclear Regulatory Commission*, 522 F3d 115, 132.

rulemaking], however, because the agency has not issued a final order regarding the rulemaking petition.[13]

Subsequently, the NRC issued its Rulemaking Decision to deny the Commonwealth's petition (PRM 51-10), as well as a parallel petition filed by the state of California (PRM 51-12).[14] The Pilgrim ASLB then issued its LBP-08-22 to resolve the remaining issues before it and approve a twenty year license extension for the Pilgrim nuclear plant.[15] The Pilgrim ASLB determined that, unless appealed, LBP-08-22 "shall become final action of the Commission," and terminated the Pilgrim relicensing proceeding.[16]

Therefore, but for this appeal, the individual Pilgrim licensing proceeding is concluded, and the NRC still has failed to ensure that the final judicial review on the NRC's Rulemaking Decision will be applied back to, made a condition of, or otherwise be taken due account of, as part of the Pilgrim license extension.

## III. The NRC Cannot Close Out the Pilgrim Relicensing While the Question of Whether It Complied with Statutory Preconditions to Relicensing Is Still Being Adjudicated in a Separate Pending Proceeding.

### A. NEPA's Statutory and Regulatory Framework

#### 1. NEPA's statutory purpose is to protect the environment

The National Environmental Policy Act of 1969 mandates that federal agencies consider the environmental impacts of major federal actions. "Congress has *direct(ed)*

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13 *Id.* at 132.
14 Denial of Petitions for Rulemaking PRM-51-10 and PRM-51-12. (2008)
15 Consistent with the First Circuit decision, the Commonwealth subsequently provided notice of its intent to participate as an interested State in the Pilgrim relicensing proceeding. *See* Commonwealth of Massachusetts' Notice of Intent to Participate as an Interested State, May 6, 2008. ADAMS No. ML081500531. *See also* 10 CFR § 2.315.
16 LBP-08-22 at 26.

that, *to the fullest extent possible*: (1) the policies, regulations, and public laws of the United States *shall* be interpreted and administered in accordance with the policies set forth in (NEPA)." *Silva v. Romney*, 473 F.2d 287, 292 (1st Cir. 1973)(quoting 42 U.S.C. § 4332 (1))(emphasis Court)).

NEPA is the "basic national charter for protection of the environment." 40 C.F.R. § 1500.1. Its fundamental purpose is to "help public officials make decisions that are based on understanding of environmental consequences, and take decisions that protect, restore and enhance the environment." *Id.* NEPA "insure[s] that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government." 40 C.F.R. § 1502.1.

Consistent with those policies, NEPA requires that an "agency take a 'hard look' at the environmental consequences before taking a major action." *Baltimore Gas and Elec. Co.*, 462 U.S. 87, 97. NEPA's duties "are not discretionary, but are specifically mandated by Congress, and are to be reflected in the procedural process by which agencies render their decisions." *Silva*, 473 F. 2d. at 292.

**2. NEPA review must be completed before taking major federal action**

NEPA requires an agency to consider the environmental impacts "*before* decisions are made and *before* actions are taken," 40 C.F.R. § 1500.1 (emphasis added), in order to ensure "that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson,* 490 U.S. at 349.

Whether an agency addresses NEPA's requirements through individual licensing proceedings or generic rulemaking can be determined by an agency. *Baltimore Gas Elec. Co.*, 462 U.S. at 100 ("NEPA does not require agencies to adopt any particular internal decision-making structure.") However, NEPA requires that, whether the process adopted by the agency is generic rulemaking or case specific, the agency must consider the environmental impacts of its decisions before taking the action in the particular proceeding.

> The key requirement of NEPA . . . is that the agency consider and disclose the actual environmental effects in a manner that will ensure that the overall process, including both the generic rulemaking and the individual proceedings, brings those effects to bear on decisions to take particular actions that significantly affect the environment.

*Id.* at 96.[17]

**B. The NRC's failure to "plug in" or otherwise take account of the final decision on SFP issues in the individual Pilgrim Relicensing Proceeding**

In CLI-07-03, the Commission rejected the Commonwealth's contentions and dismissed the Commonwealth from the Pilgrim and Vermont Yankee license renewal proceedings, on the procedural ground that it "makes more sense" to consider the concerns raised by the Commonwealth's contentions in a generic rulemaking. CLI-07-03, 65 NRC 13 (2007) at 20. However, once the Commonwealth complied with the NRC's suggestion and submitted an alternative rulemaking petition, the Commission then refused to ensure that it would, as required by NEPA, take a hard look at this new

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[17] NEPA's mandate applies "regardless of [the agency's] eventual assessment of the significance of this information." *Marsh,* 490 U.S. at 385 (1989). "[F]ailure to do so ignores the central role assigned by NEPA to public participation." *Natural Resources Defense Council v. Lujan,* 768 F.Supp. 870, 889 (D.C. Cir. 1991).

and significant information as part of the generic rulemaking process in a manner that would ensure that any final decision – as rendered by the Circuit Court of Appeals – will be applied back to, made a condition of, or otherwise be made a part of the individual Pilgrim licensing proceeding that gave rise to these same SFP concerns. Under the NRC regulations to address new and significant information, 10 C.F.R. § 51.53(c)(3)(iv), and the agency's regulations addressing SFP issues as part of the findings the agency must make to support relicensing, 10 C.F.R. Part 51, Appendix B, these SFP issues are material to the license extension requirements and Entergy must be required to comply with them, as finally interpreted and ordered by the court. "[T]he critical agency decision" must be made after the new information has been considered in good faith; otherwise, "the process becomes a useless ritual, defeating the purpose of NEPA, and rather making a mockery of it." *Natural Resources Defense Council v. Calloway*, 524 F. 2d 79, 92 (2nd Cir. 1975). Here the NRC has established a licensing process for Pilgrim that avoids any consideration of SFP issues – as may be finally determined by the Circuit Court -- prior to granting the plant a license extension for another twenty years.

While the NRC has discretion to select a generic rulemaking process to resolve environmental issues arising in an individual proceeding, it still must:

> consider and disclose the actual environmental effects in a manner that will ensure that the overall process, including both the generic rulemaking and the individual proceedings, brings those effects to bear on decisions to take particular actions that significantly affect the environment.

*Natural Resources Defense Council v. NRC*, 685 F. 2d 459, 482-483 (D.C. Cir. 1980), *rev'd on other grounds, Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 96 (1983) (Natural Resources Defense Council II).

In short, as the Supreme Court observed, the results of the generic rulemaking process are required to be "plugged into" the individual licensing decisions from which the rulemaking issues arose. *Baltimore Gas & Elec. Co.*, 462 U.S. at 101 ("[T]he Commission has the discretion to evaluate generically the environmental effects of the fuel cycle and require that these values be 'plugged into' individual licensing decisions."). Here, the NRC to date has refused to ensure, or otherwise take account of, the final judicial decision on the agency's denial of the Commonwealth's rulemaking petition on SFP issues and has refused to ensure that the decision will be "plugged into" the individual Pilgrim proceeding in which the issue arose. Given that the NRC's compliance with NEPA is still subject to pending litigation, it would be improper for the NRC to terminate the Pilgrim relicensing proceeding without accounting for this litigation. As set forth above, the NRC either should 1) defer concluding the relicensing until the litigation is completed and the court ruling is properly addressed in the relicensing or 2) expressly condition the Pilgrim license extension on compliance with the court ruling.

As the D.C. Circuit observed:

> In the course of such a generic rulemaking . . . , the agency [NRC] must consider and disclose the actual environmental effects it has assessed in a manner that will ensure that the overall process, including both generic rulemaking and the individual proceedings, brings those effects to bear on decisions to take particular actions that significantly affect the environment.

* * * *

> As we have emphasized above, NEPA requires an agency to consider the environmental risks of a proposed action in a manner that allows the existence of such risks to influence the agency's decision to take the action.

*Natural Resources Defense Council II*, 685 F. 2d at 482 – 483.

**B. APA Violation**

Moreover, it would be arbitrary and capricious for the NRC to decouple the merits of the Commonwealth's significant new information from the individual licensing proceedings, supposedly to address it in a "more appropriate" generic rulemaking, and then refuse to ensure it will in fact reconnect and "plug in" the final ruling from the Court on this issue. This process would violate the APA's requirement for reasoned decision making, see *Dubois v. U.S. Dept. of Agriculture,* 102 F.3d 1273, 1284 (1st Cir. 1996), citing 5 U.S.C. § 706(2)(A), and functionally would exempt Entergy from compliance with requirements for relicensing involving SFP risks, as determined by the Circuit Court of Appeals. *See Citizens Awareness Network v. NRC*, 59 F. 3d 284, 291 (1st Cir. 1995).

In *Citizens Awareness Network*, the First Circuit found that "the Commission's action in allowing [the licensee] to complete ninety percent of the decommissioning at a nuclear power plant prior to NEPA compliance lacked any rational basis, and was thus arbitrary and capricious." 59 F.3d at 293. The Court concluded that the NRC "essentially exempt[ed] a licensee from regulatory compliance," a practice the Court found to be 'skirt[ing]NEPA" and "manifestly arbitrary and capricious." *Id.*

### C. AEA and NRC Regulatory Violation

Finally, under the AEA, the Commonwealth has a right to a hearing on all material licensing issues, including the question of whether the NRC has complied with its NEPA duties. 42 U.S.C. § 2239(a), *Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1439 (D.C. Cir.1984), *cert. denied*, 469 U.S. 1132 (1985). Compliance with NEPA and NRC regulations to address new and significant information regarding SFP issues are requirements material to the NRC's regulatory relicensing process and must be satisfied as a condition of licensing.[18]

In this case, the Commission has failed to comply with the AEA's nondiscretionary hearing requirement and NRC licensing regulations because it has refused (a) to grant the Commonwealth's hearing request on SFP issues in the individual Pilgrim license renewal proceeding; or (b) to apply, condition, or otherwise take account of, in any license extension the final judicial decision on the NRC's SFP rulemaking process.

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18 *See* Brief for Petitioner Commonwealth of Massachusetts (August 22, 2007) at 23-30. *Massachusetts v. US Nuclear Regulatory Commission*, 522 F.3d 115 (1st Cir. 2008).

## III. Conclusion

The Commonwealth requests that its Petition for Review be granted and that the Commission grant the relief as requested herein.

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November 12, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| ENTERGY NUCLEAR GENERATION) | ) | Docket No. 50-293-LR |
| COMPANY AND ENTERGY NUCLEAR | ) | ASLBP No. 06-848-02-LR |
| OPERATIONS, INC. | ) | |
| | ) | |
| (Pilgrim Nuclear Power Station) | ) | |

## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Commonwealth of Massachusetts Petition for Review of LBP-08-22 have been served upon the following persons this 12th day of November 2008, by electronic mail and by deposit of paper copies in the U.S. mail, first class, except as noted.

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

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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| In the Matter of | ) | |
| | ) | |
| ENTERGY NUCLEAR GENERATION COMPANY AND ENTERGY NUCLEAR OPERATIONS, INC. | ) | Docket No. 50-293-LR<br>ASLBP No. 06-848-02-LR |
| (Pilgrim Nuclear Power Station) | ) | |

**COMMONWEALTH OF MASSACHUSETTS REPLY TO NRC STAFF'S ANSWER IN OPPOSITION TO THE COMMONWEALTH OF MASSACHUSETTS' PETITION FOR REVIEW OF LBP-08-22[1]**

The Commonwealth of Massachusetts (Commonwealth) hereby replies to the NRC Staff's Answer in Opposition to the Commonwealth of Massachusetts' Petition for Review of LBP-08-22 (NRC Answer) as follows:

1. **The NRC Staff Fails to Address the Primary Point in the Commonwealth's Petition that the NRC Must Comply With NEPA and "Plug In" or Otherwise Take Account of the Final Judicial Decision on Generic Spent Fuel Pool Issues in the Individual Pilgrim Relicensing Proceeding.**

In its Answer, the NRC Staff contests an issue not raised by the Commonwealth's Petition and fails to address the fundamental flaw in the Pilgrim licensing process which the Commonwealth has identified: that "[t]he NRC cannot close out the Pilgrim relicensing while the question of whether it complied with statutory preconditions to relicensing is still being adjudicated in a separate pending proceeding."[2] As the Petition

[1] In response to the Commonwealth's Petition, the applicant Entergy filed Entergy's Answer to Commonwealth of Massachusetts Petition for Review of LBP-08-22 (November 24, 2008). Since Entergy largely restates the arguments raised by NRC Staff, this Reply, unless otherwise noted, also addresses Entergy's Answer.

[2] Commonwealth of Massachusetts Petition for Review of LBP-08-22 (Commonwealth

makes clear, the agency must "ensure that the overall process, including both generic rulemaking and individual proceedings, brings those effects to bear on decisions to take particular actions that significantly affect the environment."[3] In this case, the NRC now seeks to close out the individual Pilgrim relicensing process without any consideration of the pending judicial appeal on the generic rulemaking issues involving the risks of spent fuel pool (SFP) storage – that first arose as part of the Pilgrim relicensing proceeding. Functionally, the NRC seeks to exempt the Pilgrim plant from compliance with SFP requirements, as finally determined by the Court.

Instead of addressing this primary error, the NRC Staff mischaracterizes the Commonwealth's Petition for Review as asserting "that the NRC has failed to take a 'hard look' at the consequences of a major federal action and failed to consider new and significant information." NRC Answer at 9. To the contrary, in this administrative appeal, the NRC's error is its failure to take account of the generic rulemaking process on SFP issues, as will be finally interpreted by the Court, in a manner that will inform and be made applicable to the individual Pilgrim relicensing decision. See Commonwealth Petition at 11 – 15.[4]

Therefore, since the NRC continues to ignore the SFP adjudication in its licensing

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Petition) at 11.

[3] Commonwealth Petition at 13-16 citing *Baltimore Gas and Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 96 (1983).

[4] The NRC Staff also confuses those issues now pending before the Court regarding the Commonwealth's Rulemaking Petition and the above issue raised by the present administrative appeal. The Commonwealth agrees that the NRC has failed to adequately consider or address the Commonwealth's new and significant information on the risks of spent fuel pools (SFPs), but the final decision on that issue now is the subject of the Commonwealth's judicial appeal pending in the Court of Appeals. This present appeal is to ensure that the NRC – whatever the final decision by the Court – takes account of it as part of the Pilgrim relicensing.

decision, and now has "terminated" the Pilgrim relicensing proceeding,[5] the NRC has violated the National Environmental Policy Act and other applicable law.[6] The NRC Commission therefore should disregard the Staff's position and grant the Commonwealth's Petition for Review.[7]

**2. The Commonwealth is not obligated to seek a stay to ensure that the NRC complies with NEPA in its Pilgrim relicensing decision.**

The NRC Staff also claims, inaccurately, that the Commonwealth's Petition "appears to be, in fact, a motion for a stay of the Board's decision." NRC Answer at 7. The Commonwealth makes no request for a stay in this case. Instead, it is up to the NRC to comply with NEPA – not for the Commonwealth to meet criteria for a stay before the agency satisfies the legal requirements for relicensing. For example, if the NRC had elected to address the Commonwealth's SFP issues as part of the individual relicensing for Pilgrim, instead of in a generic Rulemaking, the Commonwealth would simply have appealed any errors at the conclusion of the proceeding – and no stay would have been required since the current license does not expire until 2012. The fact that the NRC elected to use a different generic process does not shift the legal burden to the Commonwealth to seek a stay before the NRC must comply with NEPA. See 42 U.S.C. § 4332 (1)(to the fullest extent possible, agency regulations shall be interpreted and

[5] LBP-08-22 at 26.
[6] See Commonwealth Petition at 11 – 17.
[7] The NRC Staff also states that the Commonwealth's Petition does not meet the criteria set forth in 10 C.F.R. § 2.341(b). See NRC Staff Answer at 1 – 2. To the contrary, the Commonwealth's Petition presents a concise statement, with supporting authorities, that the NRC has failed to comply with NEPA and Supreme Court precedent, by disregarding the pending judicial proceedings on SFP issues. The NRC thereby is acting "contrary to established law," and the Petition presents "a substantial and important question of law, policy, or discretion," and reflects a process of "prejudicial procedural error." Section 2.341(b)(4)(ii – iv).

administered in accordance with NEPA.) How the NRC chooses to comply is up to the agency – but comply it must.[8]

Therefore, whether the NRC, in its own discretion, tables its ruling on the individual Pilgrim license to await a decision in the pending judicial appeal, alternatively conditions the license to comply with any court ruling on SFP issues, or selects another equally appropriate means, is up to the NRC. But its present and continuing failure to comply with the law and take account of the judicial appeal on SFP issues must be addressed before the Pilgrim nuclear power plant is granted a license extension for another twenty years.

3. **The Commission should avoid further litigation by ordering now that, as part of its license extension, the Pilgrim plant shall comply with any final order of the Court on the generic SFP issues.**

The Staff states that the Commonwealth "assumes without basis that the Commission will not comply with binding and applicable orders of the Court..." NRC Answer at FN 29. However, the Staff does not explain how the Court hearing the generic rulemaking would have jurisdiction over the individual Pilgrim license to make a "binding" court ruling on SFP issues for the individual plant. Regardless, the NRC Commission should disregard the Staff's suggestion for further litigation on this point – and potentially yet another appeal to the First Circuit – by ordering now that the Pilgrim license will conform to any final judicial decision on SFP issues. See also Entergy's Answer at 6 (citing Commission authority to make Pilgrim consistent with any court

[8] See *Massachusetts v. NRC*, 522 F. 3d 115, 127 (1st Cir. 2008)("NEPA does impose a requirement that the NRC consider any new and significant information regarding environmental impacts before renewing a nuclear power plant's operating license. However, 'NEPA does not require agencies to adopt any particular decisonmaking structure.") *Id.* citing *Balt Gas &Elec Co.* 462 U.S. at 100.

decision – but without urging that the Commission exercise that authority now to commit to that condition and avoid further litigation on the question.)

### 3. Conclusion

The Commonwealth requests that its Petition for Review be granted and that the Commission grant the relief as requested herein.

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December 1, 2008

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