

December 11, 2008 (2:46pm)

OFFICE OF SECRETARY
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December 11, 2008

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Commission

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

Docket No. 50-271-LR
ASLBP No. 06-849-03-LR

**ENTERGY'S ANSWER TO
COMMONWEALTH OF MASSACHUSETTS
PETITION FOR REVIEW OF LBP-08-25
AND REQUEST FOR CONSOLIDATED RULING**

I. INTRODUCTION

Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (collectively, "Entergy") hereby answer and oppose the Commonwealth of Massachusetts ("Commonwealth") Petition for Review of LBP-08-25 and Request for Consolidated Ruling (Dec. 2, 2008) ("Vermont Yankee Petition").

Procedurally, Entergy does not oppose the Commonwealth's request that the Vermont Yankee Petition be consolidated with its earlier November 12, 2008 Petition for Review of LBP-08-22 regarding the Pilgrim Nuclear Power Station license renewal proceeding,¹ which the Commonwealth adopts and incorporates by reference in support of its Vermont Yankee Petition. Vermont Yankee Petition at 2 n.3 & 3. Substantively, Entergy submits that the Vermont Yankee Petition should be denied for the same reasons stated in Entergy's Answer to the Pilgrim

¹ Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), Commonwealth of Massachusetts Petition for Review of LBP-08-22 (Nov. 12, 2008) ("Pilgrim Petition").

Petition, which is incorporated by reference herein.² The Vermont Yankee Petition is not a proper appeal of the Atomic Safety and Licensing Board's ("Board") Partial Initial Decision in this proceeding.³ It merely seeks a stay of the renewal of the Vermont Yankee Nuclear Power Station ("VY") license without making 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 VY. The Commonwealth petitioned to intervene in the 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 of information alleged to be new and significant.⁴ 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.⁵ On September 22, 2006, the 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-06-20, 64 N.R.C. 131, 209 (2006).

² Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), Entergy's Answer to Commonwealth of Massachusetts Petition for Review of LBP-08-22 (Nov. 12, 2008) ("Answer to Pilgrim Petition").

³ Partial Initial Decision (Ruling on Contentions 2A, 2B, 3 and 4), LBP-08-25, 68 NRC ____ (Nov. 24, 2008) ("LBP-08-25").

⁴ 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 and Petition for Backfit Order Requiring New Design Features to Protect Against Spent Fuel Pool Accidents (May 26, 2006) ("Petition").

⁵ 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 appeal by the Commonwealth, the Commission affirmed the 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 denied a request in the Commonwealth's rulemaking petition to defer any decision in the Vermont Yankee 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 that the Commonwealth could participate in this proceeding as an Interested State, which would enable the 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).

On judicial review, the U.S. Court of Appeals for the First Circuit upheld the Commission's decision. *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 November 24, 2008, the Board issued its Partial Initial Decision L BP-08-25 on the contentions of New England Coalition ("NEC"), the party whose remaining contentions were the subject of an evidentiary hearing in the proceeding. The Commonwealth did not participate in the hearing on these contentions.

The Commonwealth now petitions the Commission for review of LBP-08-25. The Commonwealth requests that the Commission reverse the Board's decision because the 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." Vermont Yankee Petition at 3. The Commonwealth also demands that the Commission "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 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 Vermont Yankee Petition advances the same arguments raised in its Pilgrim Petition. Accordingly, the Commonwealth has attached its Pilgrim Petition (as well as arguments made in reply to Entergy and the NRC Staff) to the Vermont Yankee Petition and has expressly "adopt[ed] and incorporate[d] [those documents] by reference . . . in support of" the Vermont Yankee Petition so as "[t]o avoid duplicative argument." Vermont Yankee Petition at 2 n.3. The Commonwealth also seeks to have both petitions consolidated. *Id.* at 3.

Entergy does not oppose the Commonwealth's request for the petitions to be consolidated, because the Commonwealth's arguments on review are identical in the two proceedings. Entergy hereby incorporates by reference the arguments raised in its Answer in opposition to the Pilgrim Petition.

In summary, the instant Petition should be denied because it is not a proper appeal of the Board's 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, the Commonwealth did not seek any stay of the Board's decision, and therefore has no grounds to challenge the Board's alleged failure to condition or stay its decision. Moreover, the Commonwealth does not challenge any portion of LBP-08-25 resolving the litigated contentions, nor otherwise identifies any error in that decision. Because the Commonwealth did not participate in the litigation of those contentions, it has no right to appeal the Board's decision with respect to them.

There is also no basis for the Commonwealth's request that the Commission review and/or correct its own alleged errors and omissions. The Commonwealth has already appealed

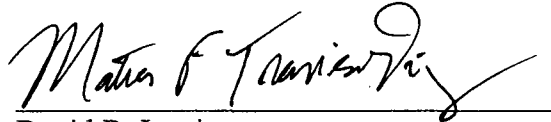
the Commission's ruling on its contention, and those rulings were upheld by the First Circuit. In sum, the Vermont Yankee Petition raises no grounds for review of LBP-08-25.

Rather, the Commonwealth's Petition is in effect a request that the Commission stay the VY proceeding pending judicial review of the Commission's rulemaking decision. But the Commonwealth has neither moved for a stay, nor addressed the standards in 10 C.F.R. § 2.342(e) for issuance of a stay, and should not be permitted to circumvent these requirements by characterizing its requests as an "appeal."

IV. CONCLUSION

For all of the foregoing reasons and those set forth in Entergy's Answer to Pilgrim Petition, the Commonwealth's Vermont Yankee Petition should be denied.

Respectfully Submitted,



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Dated: December 11, 2008

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

In the Matter of)	
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Entergy Nuclear Vermont Yankee, LLC)	Docket No. 50-271-LR
and Entergy Nuclear Operations, Inc.)	ASLBP No. 06-849-03-LR
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(Vermont Yankee Nuclear Power Station))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Entergy's Answer to Commonwealth of Massachusetts Petition for Review of LBP-08-25 and Request for Consolidated Ruling" 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 11th day of December, 2008.

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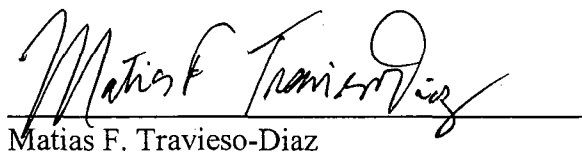
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