

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of)	
Entergy Nuclear Generation Co.)	Docket No. 50-293-LR
And Entergy Nuclear Operations, Inc.)	
(Pilgrim Nuclear Power Station))	May 19, 2011

**COMMONWEALTH OF MASSACHUSETTS REPLY TO NRC STAFF AND
ENTERGY OPPOSITIONS TO COMMONWEALTH MOTION TO HOLD
LICENSING DECISION IN ABEYANCE PENDING COMMISSION DECISION
WHETHER TO SUSPEND THE PILGRIM PROCEEDING TO REVIEW THE
LESSONS OF THE FUKUSHIMA ACCIDENT**

The Commonwealth of Massachusetts (Commonwealth) hereby submits this Reply to the NRC Staff's opposition¹ and Entergy's opposition² to the Commonwealth's Motion to Hold the Pilgrim licensing decision in abeyance pending consideration by the NRC of new and significant information related to the lessons of the Fukushima nuclear accident, including the risks of spent fuel pool accidents and applicable NRC regulations and policies (Motion).³

¹ NRC Staff's Answer in Opposition to Commonwealth of Massachusetts Motion to Hold Licensing Decision in Abeyance Pending Commission Decision Whether to Suspend the Pilgrim Proceeding to Review the Lessons of the Fukushima Accident (May 12, 2011) (Adams No. ML111320669) (Staff Opposition).

² Entergy's Answer Opposing Commonwealth's Motion to Hold Licensing proceeding in Abeyance (May 12, 2011)(Adams No. ML111320594) (Entergy Answer).

³ Commonwealth of Massachusetts Motion to Hold Licensing Decision in Abeyance Pending Commission Decision Whether to Suspend the Pilgrim Proceeding to Review the Lessons of the Fukushima Accident (May 2, 2011) (Adams No. ML111220326) (Commonwealth Response).

1. The Commonwealth Correctly Requested the Pilgrim ASLB, as the Initial Decision Maker on Relicensing, to Hold the Pilgrim Licensing Decision in Abeyance Pending Further Guidance from the Commission on the Lessons of Fukushima.

The Staff claims that the Commonwealth's Motion should be denied because the Commonwealth asks the Pilgrim Atomic Safety and Licensing Board (Pilgrim ASLB) to hold its licensing decision in abeyance pending the Nuclear Regulatory Commission's review of the lessons of Fukushima because, according to the Staff, the Director of Nuclear Reactor Regulation (NRR), not the Pilgrim ASLB, issues the license renewal. Staff Opposition at 5. However, the Pilgrim ASLB, not the NRR, is authorized to make the initial decision whether to relicense the Pilgrim plant for an additional twenty years. 10 C.F.R. §§ 2.319(o); 2.340(a); *cf.* § 2.1210(a). The Pilgrim ASLB also is charged with resolving all contested matters arising in the relicensing process. *Id.* Absent further order, the Pilgrim ASLB decision on relicensing will be immediately effective. 10 C.F.R. § 2.340(f); *cf.* § 2.1210(d). The Staff thereby confuses the responsibilities of the NRR and its activities "not within the scope of the initial decision of the presiding officer," §2.340(i)(1), with the Pilgrim ASLB's responsibility to resolve all matters in controversy in the relicensing proceeding – including the matters arising from the Fukushima accident which already are contested between the parties - and then make the initial decision whether to relicense the Pilgrim plant. 10 C.F.R. § 2.340(a) and (b). Therefore it is appropriate and consistent with NRC regulations for the Commonwealth to direct its request for a housekeeping stay, in the first instance, to the initial relicensing decision

maker – the Pilgrim ASLB – which is responsible for resolving the Fukushima related matters now in contention.⁴

2. The Commonwealth is not Required to Determine at this time how the Lessons of Fukushima may relate to matters now pending before the Pilgrim ASLB as a Condition for a Housekeeping Stay.

The Staff also argues that the Commonwealth's Motion should be denied because it does not explain how the matters pending before the Pilgrim ASLB relate to the Fukushima accident. Staff Opposition at 6. However, the Commonwealth is not legally obligated to do so. The purpose of the Motion is to ensure that the Pilgrim proceeding remains open – and the NRC defers any relicensing decision which otherwise could become final – until the NRC has taken a hard look at the lessons of Fukushima, including the risks of spent fuel pool accidents, consistent with the National Environmental Policy Act, 42 U.S.C. § 4321, before taking the major federal action to relicense the Pilgrim nuclear power plant for an additional twenty years. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 385 (1989) (“[R]egardless of its eventual assessment of the significance of the information, the [agency] ha[s] a duty to take a hard look at the proffered evidence.”). See also *United States v. Coalition for Buzzards Bay*, -- F.3d --, 2011 WL 1844221 (May 17, 2011)(1st Cir. 2011) at *10-11, (NEPA framework is designed to stimulate public participation in agency decision

⁴ If the Commission elects to address the Fukushima related matters by rulemaking, the rulemaking decision still must be included within the Pilgrim relicensing process. See Commonwealth of Massachusetts Response to Commission Order Regarding Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident, Joinder in Petition to Suspend the License Renewal Proceeding for the Pilgrim Nuclear Power Plant, and Request for Additional Relief (May 2, 2011)(Adams No. 111220353)(Commonwealth Response) at 9 citing *Baltimore Gas and Electric Co. Natural Resources Defense Council*, 462 U.S. 87, 96 (1983) (agency must ensure that overall process, both generic and site specific, is considered in decisions that significantly affect the environment).

making; failure to take hard look at environmental consequences raised in public comment prior to decision making is reversible error); *Silva v. Romney*, 473 F. 2d 287, 292 (1st Cir. 1973)(an agency's NEPA duties are "not discretionary, but are specifically mandated by Congress, and are to be reflected in the procedural process by which agencies render decisions."').⁵

Therefore, the NRC Staff's request that the Pilgrim ASLB proceed to resolve the limited number of remaining issues before it – and close out the relicensing process before the NRC completes its investigation into Fukushima – would violate the NRC's obligations under NEPA and the Atomic Energy Act to consider the lessons of Fukushima prior to relicensing.⁶

3. Conclusion

The Commonwealth of Massachusetts respectfully requests the Pilgrim ASLB, consistent with NEPA and the AEA, to grant a housekeeping stay pending further direction from the Commission on the NRC's Fukushima-related investigation and the pending petition to suspend relicensing proceedings at Pilgrim and other plants. This will allow for an orderly administrative process, and as a prudential matter, afford the

⁵ Entergy's claim that the Commonwealth must satisfy the standards for a stay before the NRC must consider the lessons of Fukushima prior to relicensing is legally erroneous. See Entergy Answer at 5 – 6. The mandate of NEPA is not subject to these discretionary stay standards. See *Silva v. Romney*, supra. Similarly, Entergy's complaint about a delay in the licensing schedule should be rejected: the NRC is legally obligated to comply with NEPA prior to licensing and none of the pre-Fukushima cases cited by Entergy state to the contrary. See Entergy Answer at 1 – 3.

⁶ See Commonwealth Response at 12 – 13 and n.17; see also Petitioners' Reply to Responses to Emergency Petition to Suspend All Reactor Licensing Decisions Pending Investigation of Lessons Learned From Fukushima Daiichi Nuclear Power Station Accident (May 6-9, 2011)(Adams No. ML111290165) at 8 – 14.

Commission a reasonable time to address these issues which may have a direct bearing on the Pilgrim relicensing process. Commonwealth Motion at 2 – 3 and cases cited.

Respectfully submitted,

/s/ Matthew Brock
Matthew Brock
Assistant Attorney General
Environmental Protection Division
Office of the Attorney General
One Ashburton Place, 18th Floor
Boston, Massachusetts 02108
Tel: (617) 727-2200
Fax: (617) 727-9665
matthew.brock@state.ma.us

Certificate of Counsel

On May 17, 2011, the Commonwealth notified all parties of record that the Commonwealth intended to file a Motion to allow Reply and Reply. Counsel for NRC Staff and Entergy have advised that they will oppose the Motion and Reply.

/s/Matthew Brock

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of)	
Entergy Nuclear Generation Co.)	Docket No. 50-293-LR
And Entergy Nuclear Operations, Inc.)	
(Pilgrim Nuclear Power Station))	May 19, 2011

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Commonwealth of Massachusetts Reply to NRC Staff and Entergy Oppositions to the Commonwealth of Massachusetts Motion to Hold Licensing Decision in Abeyance Pending Commission Decision Whether to Suspend the Pilgrim Proceeding to Review the Lessons of the Fukushima Accident in the above captioned proceeding have been served upon the following persons by electronic mail this date:

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
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

U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
Washington, DC 20555-0001

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

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

U.S. Nuclear Regulatory Commission
Office of the Secretary
Mail Stop: O-16C1
Washington, DC 20555-0001
HearingDocket@nrc.gov

U.S. Nuclear Regulatory Commission
Office of General Counsel
Mail Stop: O15 D21
Washington, D.C. 20555
OGCMailCenter.Resource@nrc.gov

Lisa Regner, Sr. Project Manager
Division of License Renewal
Lisa.regner@nrc.gov

Pillsbury, Winthrop, Shaw, Pittman LLP
2300 N Street, N.W.
Washington DC, 20037-1128

David R. Lewis, Esq.
David.lewis@pillsburylaw.com
Paul A. Gaukler, Esq.
Paul.gaulker@pillsburylaw.com
Jason B. Parker, Esq.
Jason.parker@pillsburylaw.com

Maria.webb@pillsburylaw.com

Duane Morris L.L.P.
505 9th Street, NW, Suite 1000
Washington, D.C. 20004-2166

Sheila Slocum Hollis, Esq.
SSHollis@duanemorris.com

U.S. Nuclear Regulatory Commission
Office of Nuclear Reactor Regulation
Mail Stop: O11-F1
Washington, D.C. 20555 -0001

Katherine Tucker, Law Clerk
Katie.tucker@nrc.gov

Edward Williamson
Edward.williamson@nrc.gov

Entergy Nuclear
1340 Echelon Parkway
Mail Stop M-ECH-62
Jackson, MS 39213

Terence A. Burke, Esq.
tburke@entergy.com

Susan L. Uttal, Esq.
susan.uttal@nrc.gov

Andrea Z. Jones, Esq.
axj4@nrc.gov

Beth N. Mizuno, Esq.
beth.mizuno@nrc.gov
Bnm1@nrc.gov

Brian G. Harris, Esq.
Brian.harris@nrc.gov
Brian Newell, Paralegal
Brian.newell@nrc.gov

Pilgrim Watch
Mary Lampert
148 Washington Street
Duxbury, MA 02332
Mary.Lampert@comcast.net

Kevin M. Nord, Chief
Duxbury Fire Department and Emergency
Management Agency
668 Tremont Street
Duxbury, MA 02332
nord@town.duxbury.ma.us

Town of Duxbury Nuclear Advisory
Committee
31 Deerpath Trl.
North Duxbury, MA 02332

Rebecca Chin, Vice Chair
rebeccajchin@hotmail.com

Town of Plymouth
Town Manager's Office
11 Lincoln Street
Plymouth, MA 02360

Melissa Arrighi, Acting Town Manager
marrighi@townhall.plymouth.ma.us

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

Laura Pinson
laura@nealgross.com

/s Matthew Brock

Matthew Brock