

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION**

In the Matter of
Entergy Corporation

Docket # 50-293-LR

Pilgrim Nuclear Power Station

License Renewal Application

June 2, 2011

**COMMONWEALTH OF MASSACHUSETTS' CONDITIONAL MOTION
TO SUSPEND PILGRIM NUCLEAR POWER PLANT LICENSE RENEWAL
PROCEEDING PENDING RESOLUTION OF PETITION FOR RULEMAKING
TO RESCIND SPENT FUEL POOL EXCLUSION REGULATIONS**

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.802(d), the Commonwealth of Massachusetts conditionally requests the Nuclear Regulatory Commission (NRC or Commission) to suspend the license renewal proceeding for the Pilgrim nuclear power plant (NPP), pending resolution of the Commonwealth's petition for rulemaking to rescind the U.S. Nuclear Regulatory Commission's (NRC's) regulations 10 C.F.R. § 51.71(d) and 10 C.F.R. Part 51 Subpart A, Appendix B (spent fuel pool exclusion regulations), which preclude consideration of spent fuel storage impacts in conducting environmental reviews for license renewal decisions. This motion is supported by the expert declaration and report of Dr. Gordon R. Thompson.¹

The Commonwealth's request to suspend the Pilgrim NPP license renewal proceeding is conditional upon the denial of a Waiver Petition the Commonwealth has submitted today to the Atomic Safety and Licensing Board (ASLB) that is presiding over

¹ Declaration of Dr. Gordon R. Thompson in Support of Commonwealth of Massachusetts Contention and Related Petitions and Motions (June 1 and 2, 2011); New and Significant Information From the Fukushima Daiichi Accident in the Context of Future Operation of the Pilgrim Nuclear Power Plant (June 1, 2011) (Thompson Report).

the Pilgrim NPP license renewal proceeding.² Pursuant to 10 C.F.R. § 2.335, the Commonwealth has asked the ASLB to approve and certify to the Commission a request to waive the spent fuel pool exclusion regulations, on a site specific basis, for purposes of considering the Commonwealth's new contention in the Pilgrim NPP license renewal proceeding. As discussed in the Waiver Petition, the Commonwealth seeks a waiver of the spent fuel pool exclusion regulations in order to permit full consideration of a new contention which seeks revision of the NRC's environmental impact analysis and severe accident mitigation alternatives (SAMA) analysis with respect to new and significant information revealed by the Fukushima Daiichi nuclear power plant accident about the increased risks of core-melt and spent fuel pool accidents.

However, in the alternative, if the ASLB denies the Waiver Petition, then pursuant to 10 C.F.R. § 2.802(d), the Commonwealth requests the Commission immediately to suspend the Pilgrim license renewal proceeding, in order to "protect its position" in the license renewal proceeding. *Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), CLI-03-07, 58 NRC 1, 7 (2003). In other words, it is necessary to suspend the Pilgrim licensing proceeding to allow sufficient time for the Commission to consider the Commonwealth's alternative petition for rulemaking, to rescind the spent fuel pool exclusion regulations on a generic basis, and ensure that the concerns raised by the Commonwealth's contention will be considered *before* the ASLB makes a final decision with respect to the proposed renewal of the Pilgrim NPP operating license. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (holding that

² Commonwealth of Massachusetts Petition for Waiver of 10 C.F.R. Part 51 Subpart A, Appendix B or, in the Alternative, Petition for Rulemaking to Rescind Regulations Excluding Consideration of Spent Fuel Storage Impacts From License Renewal Environmental Review (June 1, 2011).

NEPA requires federal agencies to examine the environmental consequences of their actions *before* taking those actions, 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.”)

II. FACTUAL BACKGROUND AND STATUTORY FRAMEWORK

To avoid undue repetition of the lengthy history of the NRC’s consideration of spent fuel storage environmental impacts in this proceeding and generically, the factual and procedural background have been set forth in a single pleading: the Commonwealth’s Waiver Petition filed today with the ASLB (a courtesy copy of which is also being filed with the Commission). *See* Waiver Petition, Section II. In addition, Section III of the Waiver Petition provides a description of the statutory and regulatory framework for the Commonwealth’s contention, waiver petition, and motion to rescind the spent fuel pool regulations. Sections II and III of the Waiver Petition are hereby incorporated by reference into this motion.

III. THE COMMONWEALTH SATISFIES THE NRC’S STANDARDS FOR RESCINDING THE SPENT FUEL POOL EXCLUSION REGULATIONS.

As provided by 10 C.F.R. § 2.802(d), a party who submits a rulemaking petition, including a petition to rescind a regulation, may also seek suspension of a pending licensing proceeding in which that regulation is applicable. As an Interested State, the Commonwealth is considered a party for purposes of § 2.802(d) and may seek relief under that provision. *Commonwealth of Massachusetts v. U.S. Nuclear Regulatory Commission*, 522 F.3d 115, 129-130 (1st Cir. 2008).

While § 2.802(d) does not contain a standard for the suspension of a licensing proceeding, the Commission has stated that a stay may be granted where it is necessary to

“protect [the] position” of the requester in a licensing proceeding. *Connecticut Yankee Atomic Power Co.*, 58 NRC at 7. The NRC has also applied the following test in past cases where parties sought the suspension of licensing proceedings pending the Commission’s review of the adequacy of its security regulations following the attacks of September 11, 2001:

[W]e consider whether moving forward with the adjudication will jeopardize the public health and safety, prove an obstacle to fair and efficient decisionmaking, or prevent appropriate implementation of any pertinent rule or policy changes that might emerge from our important ongoing evaluation of terrorism-related policies.³

The Commission also suggested that “other arguments” could be advanced to justify the issuance of a stay. *Id.*

The Commonwealth respectfully submits that it satisfies the standards set forth in *Connecticut Yankee Atomic Power Co.* and *Pacific Gas and Electric Co.* As set forth below, moving forward with the adjudication would injure the Commonwealth’s position in the Pilgrim NPP license renewal proceeding by depriving it of an opportunity to seek compliance with the National Environmental Policy Act’s (NEPA’s) requirement that new and significant information must be considered prior to the issuance of a licensing decision. In addition, rescission of the regulations is necessary to ensure that the Commonwealth receives a hearing on its NEPA claim regarding new and significant information, which is material to the Pilgrim NPP license renewal decision.

³ *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-03-04, 57 NRC 273, 277 (2003) (citing *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-02-23, 56 NRC 230, 238 (quoting *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 380 (2001); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-01-27, 54 NRC 385, 389-90 (2001); *Duke Cogema Stone and Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-28, 54 NRC 393, 399 (2001)).

A. The Fukushima Accident Raises New and Significant Information That Must be Considered in a Supplemental EIS.

As discussed in Section III.A.1 of the Commonwealth's Waiver Petition, the NRC's duty to consider new and significant information bearing on the outcome of its environmental analysis of a proposed action is non-discretionary. *Silva v. Romney*, 473 F. 2d 287, 292 (1st Cir. 1973). It is not necessary for the Commonwealth to prove, in its contention or this waiver petition, that the new and significant information would, as a matter of certainty, change the outcome of the environmental analysis; the Commonwealth need only show that -- "regardless of [the NRC's] eventual assessment of the significance of this information" -- there are "significant new circumstances or information relevant to the environmental concerns and bearing on the proposed action or its impacts."⁴

Here, as demonstrated in the Commonwealth's contention and the supporting Thompson 2011 Report, and consistent with *Marsh*, new and significant information revealed by the Fukushima accident shows fundamental errors or oversights in the key environmental analyses relied on by the NRC for its generic designation of spent fuel storage impacts as insignificant: the 1996 Generic Environmental Impact Statement for License Renewal (License Renewal GEIS) and the Rulemaking Denial. First, there is a substantial conditional probability of a pool fire during or following a reactor accident at the Pilgrim NPP. The probability of a pool fire is also increased by the fact that the likelihood of a precursor reactor core-melt accident at Pilgrim is substantially greater –

⁴ See Commonwealth of Massachusetts Reply to Entergy's Answer Opposing Commonwealth's Joinder in Petition to suspend the License Renewal Proceeding for the Pilgrim Nuclear Power Plant and Request for Additional Relief (May 19, 2011) at 2 – 3 quoting *Marsh v. Oregon Natural Resources Council*, 490 U.S. at 372, 385 (1989), and other cases cited).

i.e., by an order of magnitude -- than assumed in the SAMA analysis. This relationship between a pool fire and a core-melt accident is not addressed in the License Renewal GEIS or the Rulemaking Denial. Thompson 2011 Report at 17.

Second, the experience of the Fukushima accident fatally undermines two central conclusions of the Rulemaking Denial. While the Rulemaking Denial concluded that there would be a substantial opportunity to refill spent fuel pools when they lose water, 73 Fed. Reg. at 46,208, 46,212, the Fukushima accident showed that a substantial period of time may pass before water in fuel pools is restored. Moreover, the Fukushima accident dramatically illustrates the ineffectiveness of mitigative measures such as fire trucks, which were relied on in the Rulemaking Decision to affirm the insignificance of spent fuel pool storage impacts. See Section II.7, *supra*. The unreliability of these so-called “B.5.b” measures is compounded by the secrecy under which they were imposed, shielding them from criticisms which would have pointed out their deficiencies. By shrouding such measures in secrecy, the NRC also raises the risk that first-responders from the surrounding community, who may be called upon to assist in the implementation of B.5.b measures, will not have sufficient understanding of them to implement them effectively. Thompson 2011 Report at 21-23.

B. The Issuance of a Waiver is Necessary to Ensure Compliance With The Hearing Requirement of the Atomic Energy Act.

As set forth in the attached Motion to Admit New Contention,⁵ the Commonwealth has complied with all NRC procedural regulations that are relevant to the submission of contentions at this stage of the licensing proceeding. Therefore, the Commission should rescind the spent fuel pool exclusion regulations in order to provide the Commonwealth with the hearing to which it is entitled under the Atomic Energy Act (AEA) regarding the SAMA and spent fuel pool (SFP) issues raised in its Contention concerning the re-licensing of the Pilgrim NPP. Section 189a of the AEA requires the NRC to provide interested members of the public with an opportunity for a hearing on any decision regarding the issuance or amendment of a nuclear facility license. 42 U.S.C. § 2239(a)(1)(A). The NRC has indicated that a hearing should be granted in license renewal proceedings because renewal of an operating license “is essentially the granting of a license.” Proposed Rule, Nuclear Power Plant License Renewal, 55 Fed. Reg. 29,043, 29,052 (July 17, 1990). The scope of issues on which a petitioner may request a hearing includes all issues that are material to the NRC’s licensing decision. *Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1439 (D.C. Cir.1984), *cert.denied*, 469 U.S. 1132 (1985).

Because the NRC’s regulatory requirements involving the analyses of SAMAs, SFPs, and related environmental impacts are material to a decision by the NRC whether to relicense the Pilgrim plant, the Commonwealth is entitled to a hearing on its contention which challenges the licensee’s compliance with these requirements and demonstrates “a

⁵ Commonwealth Of Massachusetts’ Motion to Admit Contention and to Re-open Record Regarding New and Significant Information Revealed by Fukushima Accident (June 2, 2011).

genuine dispute exists with the applicant/licensee on a material issue of law or fact.” 10 C.F.R. § 2.309(f)(1)(i)-(vi).

Although NEPA permits the NRC to select either a rulemaking process, when the issues raised are generic, or an adjudicatory hearing when site specific, the NRC must provide the Commonwealth with a process that satisfies its hearing right under the AEA. See *Kelly v. Selin*, 42 F. 3d 1501, 1511 (6th Cir. 1995); Commonwealth Response (May 2, 2011) at 9 (quoting *Baltimore Gas & Elec. Co. v. NRC*, 462 U.S. 87, 100 (1983)). And because the NRC itself treats SAMA analysis as a site-specific requirement for relicensing, the NRC should grant the Commonwealth an adjudicatory hearing on its Contention, and waive its generic finding regarding SFP impacts as a Category 1 issue, because the environmental risks posed by the Pilgrim spent fuel pools are inextricably linked to the environmental risks of a core-melt accident and thereby to the NRC’s SAMA analysis for Pilgrim. However, in the event the ASLB denies the Commonwealth’s Waiver Petition, the Commission should proceed with a rulemaking to rescind the applicable regulations.

IV. CONCLUSION

For the foregoing reasons, in the event the ASLB denies the Commonwealth’s Waiver Petition, the Commission should grant the Commonwealth’s motion to suspend the Pilgrim Relicensing proceeding and proceed with a rulemaking to rescind, on a generic basis, the spent fuel pool exclusion regulations.

Respectfully submitted,

Signed (electronically) by
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Certificate of Counsel

On June 1, 2011, the Commonwealth notified all parties of record of its intent to make this filing. The NRC Staff has advised that it will object; no other party has responded.