

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

In the Matter of)	
Entergy Nuclear Generation Co.)	Docket No. 50-293-LR
And Entergy Nuclear Operations, Inc.)	
(Pilgrim Nuclear Power Station))	June 16, 2011

**COMMONWEALTH OF MASSACHUSETTS REPLY TO OPPOSITIONS OF
NRC STAFF AND ENTERGY TO COMMONWEALTH MOTION TO SUSPEND
PILGRIM LICENSE RENEWAL PROCEEDING**

The Commonwealth of Massachusetts (Commonwealth) hereby submits this Reply to the oppositions filed by the NRC Staff¹ and Entergy² to the Commonwealth's Conditional Motion to suspend the Pilgrim relicensing proceeding.³

1. Because the Commonwealth currently has a petition for rulemaking pending before the Commission, and otherwise has complied with NRC rules of practice under 10 C.F.R. § 2.802(d), the Commonwealth's motion to suspend the Pilgrim proceeding is timely and should be allowed.

The NRC Staff argues that the Commonwealth's Motion under § 2.802 (d) to suspend the Pilgrim relicensing proceeding should be denied as premature because the Commonwealth does not have an "active" petition for rulemaking pending before the Commission. Staff Opposition at 6. According to the Staff, the Commonwealth is barred from filing a § 2.802(d) motion now because the Commonwealth's Motion is conditioned

¹ NRC Staff's Answer in Opposition to 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 (June 13, 2011) (Staff Opposition).

² Entergy Answer Opposing Commonwealth of Massachusetts Conditional Motion to Suspend License Renewal Proceeding (June 13, 2011)(Entergy Opposition).

³ 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 (June 2, 2011) (Commonwealth Motion).

on a decision by the Atomic Safety and Licensing Board whether to grant the Commonwealth's alternative Waiver Petition.⁴ However, the requirement proposed by the Staff that a petition for rulemaking must be "active" before a § 2.802(d) motion can be submitted does not appear on the face of the regulation and the Staff cites no authority to support it. In fact, conditional motions are a common means for ensuring that appropriate relief will be available if and when it is needed.

Moreover, the Staff's claim that the Commonwealth's Motion is premature disregards the Commission's overriding discretion to structure a process that complies with the National Environmental Policy Act to consider the Commonwealth's new and significant information arising from the lessons of Fukushima: a site specific adjudicatory hearing, a generic rulemaking, or potentially even some hybrid process.⁵ Therefore, the Commonwealth, in recognition of the Commission's discretion to establish a procedure to comply with NEPA, has submitted alternative filings addressing both potential avenues that the Commission may pursue and, appropriately, has supported the alternative rulemaking process with a § 2.802(d) motion which now is pending before the Commission while the NRC decides which path it will follow. The Staff's claim that the Commonwealth's Motion should be denied now, and to require that it may be filed later,

⁴ 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 Pool Impacts from License Renewal Environmental Review (June 2, 2011) (Waiver Petition).

⁵ See Commonwealth Motion at 8 citing *Baltimore Gas & Electric Co. v. NRC*, 462 U.S. 87, 96 (1983) ("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.").

also should be rejected because that approach further balkanizes the review process, wastes resources, and is not supported by the plain meaning of the Rules.⁶

Similarly, Entergy spends the majority of its Opposition arguing against a position that the Commonwealth did not take in its Motion. Entergy claims that the Commonwealth insists that it is entitled to an “adjudicatory hearing” on its new and significant information arising from the Fukushima accident.⁷ Entergy’s Opposition thus materially misstates the Commonwealth’s position in its Motion, which recognizes the discretion of the Commission to craft an appropriate process – adjudicatory hearing or generic rulemaking -- to comply with NEPA and the AEA. Entergy apparently confuses the Commonwealth’s hearing right under the AEA on its Fukushima-related issues with the Commission’s discretion to select a process to address those issues, provided it is adequate to comply with the AEA and NEPA.⁸

⁶ The Commonwealth has suggested to both the Commission and the ASLB what it views as the best approach going forward: to have the ASLB address the Commonwealth’s Waiver Petition and then, if denied, the Commission may consider the alternative Rulemaking Petition. However, in the end it is up to the NRC to decide when and how it elects to proceed, provided that process complies with NEPA and the Commonwealth’s hearing right under the Atomic Energy Act. See Commonwealth Motion at 7.

⁷ “The primary focus of the Conditional Motion is the Commonwealth’s assertion that, in order for the Commission to meet the requirements of NEPA and the AEA, the Commission must...provide the Commonwealth with an adjudicatory hearing on its purportedly new and significant information.” Entergy Opposition at 5.

⁸ As the Commonwealth stated in its Motion, “[a]lthough NEPA permits the NRC to select either a rulemaking process, when the issues 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 Commonwealth Motion at 8 citing *Kelly v. Selin*, 42 F. 3d 1501, 1511 (6th Cir. 1995).

2. To comply with NEPA, the NRC should suspend the Pilgrim proceeding to ensure that it takes a hard look at the new and significant information arising from the Fukushima accident before making a final relicensing decision.

The Staff also argues that the Commonwealth’s Motion should be denied because the Commonwealth has not demonstrated that continuing the Pilgrim proceeding would “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.”⁹ The Staff thereby disregards the primary basis set forth in the Commonwealth’s Motion for suspension: that to comply with NEPA, the NRC must consider the Commonwealth’s new and significant information before making a final relicensing decision. Commonwealth Motion at 2 – 3 (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)). The Commonwealth has submitted information arising from the Fukushima accident, supported by expert testimony, that meets the Supreme Court’s standard for new and significant information and also is consistent with the above standard cited by the Staff in its Opposition for the Commission to suspend a proceeding in order to maintain a fair process in accordance with the rule of law.¹⁰

The Staff also speculates that, even if a suspension is denied, there will be ample time for the ASLB to consider all pending matters regarding the lessons of Fukushima. NRC Staff Opposition at 7. While the Commonwealth does not presume to know how

⁹ NRC Staff Opposition at 7 quoting In the Matter of Petition for Rulemaking to Amend 10 C.F.R. § 54.17(c), CLI-11-01, __NRC__ (slip op. at 4).

¹⁰ See Commonwealth Waiver Petition at 27 citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 372, 385 (1989) (Regardless of its eventual assessment of the information, the NRC is required to give that information a hard look prior to taking a major federal action (e.g. relicensing) if there are “significant new circumstances or information relevant to the environmental concerns and bearing on the proposed action or its impacts.”).

long the Pilgrim process otherwise would take, absent a suspension, it notes that the ASLB recently suggested, just prior to the Commonwealth's current June 2 filings that the Pilgrim proceeding may rapidly be drawing to a close. See ASLB Notice (June 2, 2011)(suggesting that the ASLB anticipated ruling on then pending filings in June or July, 2011). A suspension thus ensures that, as required by NEPA, there will be time for the NRC's mandatory hard look at the Commonwealth's new and significant information regarding the lessons of Fukushima prior to a relicensing decision.

3. The NRC Staff's suggested errors in the current NRC environmental documents, without more, support a suspension of the Pilgrim proceeding until these errors are corrected consistent with NEPA.

Finally, the NRC Staff asserts that, even if there are errors in the Staff's environmental documents that may violate NEPA, the Pilgrim proceeding may continue, without suspension, in reliance upon those erroneous documents to support relicensing:

Rather, Massachusetts argues that suspension is required to ensure full compliance with the procedural dictates of NEPA. While the NRC takes its obligations under NEPA seriously, *errors in the Staff's environmental documents* do not pose a substantial threat to the public health and safety. Therefore, this claim does not demonstrate an immediate threat to public health and safety.

Staff Opposition at 8 (emphasis added).

The Staff thus apparently asks the Commission to disregard errors in the Pilgrim record – in the NRC Staff's own documents -- that may mischaracterize the environmental impacts or other evidence of NEPA compliance, provided the errors do not demonstrate an immediate threat to public health and safety. This is contrary to the express mandate of the Supreme Court that the NRC cannot put on “blinders to adverse environmental effects” and must take a hard look at new and significant information before deciding whether to relicense the Pilgrim plant. Commonwealth Waiver Petition

at 23 – 24 quoting *Marsh*, 490 U.S. at 371 – 372. It is also speculative and legally unupportable for the Staff to reach conclusions on the magnitude of the environmental impacts of relicensing Pilgrim – based on erroneous documents submitted before the Fukushima accident occurred – where the Commission itself has not even released its preliminary findings on the accident (due July 19).

Finally, according to Entergy, the Commission’s standards, including standards for granting a waiver, are “similar” to NEPA’s standard to address new and significant information and that, by applying these standards, “the Commonwealth’s claims of new and significant information will presumably have been fully considered by the Licensing Board.” Entergy Opposition at 10. However, if the Commonwealth’s Waiver Petition is denied, the ASLB will not have considered all of the Commonwealth’s new and significant information, which presumably would be addressed through the Commission’s generic rulemaking process and, in any event, any “similar” standard applied by the ASLB to information it does consider may not necessarily fully comport with NEPA’s hard look standard.¹¹

¹¹ Entergy makes an additional argument that “unrelated matters pending before the Licensing Board” should be excluded from any relicensing suspension. Entergy Opposition at 4. Because the lessons of Fukushima continue to emerge, the Commonwealth will not speculate on the range of issues that may be impacted by the Fukushima accident, although clearly the concerns raised by the Commonwealth in its recent filings (May, June 2011) will be impacted and a suspension of the Pilgrim proceeding to allow time to consider these issues is warranted. Whether hypothetically other pre-Fukushima issues raised by other parties now pending before the ASLB could be resolved, consistent with NEPA, because they are “unrelated matters” to the lessons of Fukushima, is not an issue that the Commonwealth is able to determine at this time.

4. Conclusion.

The Commonwealth's Motion should be allowed.

Respectfully submitted,

Signed (electronically) by
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June 16, 2011

Certificate of Counsel:

On June 15, 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

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Commonwealth of Massachusetts' Reply to Oppositions of NRC Staff and Entergy to Commonwealth Motion to Suspend Pilgrim License Renewal Proceeding, in the above captioned proceeding, have been served upon the following persons by electronic mail this date:

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