

August 23, 2011

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

Before the Commission

In the Matter of	)	
	)	
Entergy Nuclear Generation Company and	)	Docket No. 50-293-LR
Entergy Nuclear Operations, Inc.	)	ASLBP No. 06-848-02-LR
	)	
(Pilgrim Nuclear Power Station)	)	

**APPLICANT’S MOTION FOR ISSUANCE OF RENEWED LICENSE**

Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (collectively “Entergy”) hereby move the Nuclear Regulatory Commission (“NRC” or “Commission”) to direct the NRC Staff to issue the renewed operating license for the Pilgrim Nuclear Power Station (“Pilgrim”) in accordance with the provisions of 10 C.F.R. §§ 2.340 and 2.1210(d) (collectively, the “immediate effectiveness rule”), or in the alternative, to authorize the NRC Staff to issue the renewed license. Entergy respectfully submits that where, as here, the Atomic Safety and Licensing Board (“Board”) has resolved all admitted contentions before it and the NRC Staff has completed its review and made the requisite findings on all other matters, the Commission’s immediate effectiveness rule requires prompt issuance of the renewed license, notwithstanding any petition for review pending before the Commission, or any motions to reopen the record or requests for hearings on new contentions pending before the Board.

Further, the only motions to reopen or requests for new hearings remaining before the Board are those that seek to inject issues related to the Fukushima Daiichi accident into this proceeding. The Commission has made it clear that the application of any lessons-learned from

its review of the Fukushima Daiichi accident will occur as part of the Commission's ongoing regulatory process, irrespective of and wholly apart from the license renewal process:

As with the post-TMI and post-9/11 regulatory enhancements, any "lessons learned" from the Fukushima Daiichi event will be applied generically to all reactors, . . . as appropriate to their location, design, construction, and operation.

Federal Respondents' Memorandum on the Events at the Fukushima Daiichi Nuclear Power Station, New Jersey Env'tl. Fed'n v. NRC, No. 09-2567 (3d Cir. Apr. 4, 2011) ("Federal Respondents' Memorandum") at 13.

NRC's comprehensive and ongoing oversight of licensed facilities will assure that useful data and "lessons learned" from Fukushima Daiichi disaster will be absorbed by changes in NRC rules, orders, and license amendments as needed, accompanied by the public participation required by statute and regulation. This process is distinct, however, from the disposition of specific contentions admitted for hearing (or proposed for admission) in a license renewal adjudication. . . .

Id. at 17-18. Further, the Commission has authorized issuance of multiple license renewals since the Fukushima Daiichi accident,<sup>1</sup> and Entergy respectfully submits that the Pilgrim license renewal should be treated no differently.

Prompt issuance of the renewed license is not only required by the NRC's immediate effectiveness rule but also clearly in order as a matter of policy and equity. The Commission's Statement of Policy on the Conduct of Adjudicatory Proceedings, CLI-98-12, 48 N.R.C. 18 (1998), recognizes that "applicants for a license are . . . entitled to a prompt resolution of disputes concerning their applications." Id. at 19. Here, the Pilgrim license renewal proceeding is now in its sixth year. Further, the continued delay in the completion of this proceeding and issuance of the renewed license is causing substantial harm to Pilgrim's ability to do business as a merchant plant; and is a detriment to employee retention, recruitment and morale.

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<sup>1</sup> Since the Fukushima Daiichi accident, the NRC has issued renewed operating licenses for the Hope Creek Nuclear Power Plant, Salem Nuclear Power Plant, Prairie Island Nuclear Power Plant, Palo Verde Nuclear Power Plant, and the Vermont Yankee Nuclear Power Plant.

## I. STATEMENT OF CASE

This proceeding involves the application submitted by Entergy in January 2006 seeking renewal of the operating license for Pilgrim (“Application”).<sup>2</sup> On May 25, 2006, Pilgrim Watch filed an intervention petition seeking the admission of five contentions.<sup>3</sup> The Commonwealth of Massachusetts (“Commonwealth”) also petitioned to intervene in this proceeding, and requested a hearing on a single contention concerning the environmental impacts of spent fuel pool fires.<sup>4</sup> The Board admitted two of the five contentions proffered by Pilgrim Watch – Contention 1 relating to buried piping, and Contention 3 challenging certain input data used in the Pilgrim SAMA analysis – and denied the Commonwealth’s hearing request as an impermissible challenge to a generic Category 1 determination codified in the NRC rules.<sup>5</sup>

The Commonwealth appealed the denial of its intervention petition, but the Commission affirmed the Licensing Board’s decision.<sup>6</sup> These decisions were in turn upheld on judicial review by the U.S. Court of Appeals for the First Circuit.<sup>7</sup> The Commonwealth also submitted a Petition for Rulemaking requesting that the Commission amend its regulations to revoke the 10 C.F.R. Part 51 provisions that codify its generic conclusion that the environmental impacts of spent fuel storage are small and exclude consideration of the environmental issues of spent fuel

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<sup>2</sup> See 71 Fed. Reg. 15,222 (Mar. 27, 2006).

<sup>3</sup> Request for Hearing and Petition to Intervene by Pilgrim Watch (May 25, 2006) (“Petition to Intervene”).

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

<sup>5</sup> Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), LBP-06-23, 64 N.R.C. 257, 288, 295-300, 349 (2006).

<sup>6</sup> Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station and Pilgrim Nuclear Power Station), CLI-07-3, 65 N.R.C. 13, reconsideration denied, CLI-07-13, 65 N.R.C. 211, 214-15 & n.16 (2007).

<sup>7</sup> Massachusetts v. United States, 522 F.3d 115 (1st Cir. 2008).

pool fires in individual licensing proceedings.<sup>8</sup> After careful consideration, the Commission issued a decision denying the Commonwealth's rulemaking petition.<sup>9</sup> This decision was upheld by the U.S. Court of Appeals for the Second Circuit.<sup>10</sup>

Meanwhile, the NRC Staff reviewed the Application and issued its final safety evaluation report ("SER") in June 2007,<sup>11</sup> and its final environmental impact statement ("FEIS") in July 2007.<sup>12</sup> In addition, on September 1, 2007, the Staff issued supplement 1 to the SER evaluating additional information on environmentally assisted fatigue.<sup>13</sup> The SER and Supplement 1 to the SER were later consolidated and published as NUREG-1891 in November 2007.<sup>14</sup>

Following summary disposition of Pilgrim Watch Contention 3,<sup>15</sup> the Board held a hearing on Pilgrim Watch Contention 1 and then issued a decision resolving that remaining contention in Entergy's favor.<sup>16</sup> Pilgrim Watch appealed this decision and a number of earlier rulings, including the summary disposition of Contention 3. In CLI-10-11, the Commission reversed the summary disposition of the portion of Contention 3 that raised meteorological modeling issues associated with the SAMA analysis and remanded the Contention to the Board

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<sup>8</sup> Massachusetts Attorney General's Petition for Rulemaking to Amend 10 C.F.R. Part 51 (Aug. 25, 2006) ("2006 Petition"); see also Massachusetts Attorney General; Receipt of Petition for Rulemaking, 71 Fed. Reg. 64,169 (Nov. 1, 2006).

<sup>9</sup> The Attorney General of Commonwealth of Massachusetts; the Attorney General of California; Denial of Petitions for Rulemaking, 73 Fed. Reg. 46,204, 46,209 (Aug. 8, 2008) ("Rulemaking Denial").

<sup>10</sup> New York v. NRC, 589 F.3d 551 (2d Cir. 2009).

<sup>11</sup> Safety Evaluation Report Related to the License Renewal of the Pilgrim Nuclear Power Station, Docket No. 50-293 (June 2007), available at NRC ADAMS Accession No. ML071410455.

<sup>12</sup> NUREG-1437, Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 29 Regarding Pilgrim Nuclear Power Station (July 2007) ("NUREG-1437 Supp. 29").

<sup>13</sup> Safety Evaluation Report Related to the License Renewal of the Pilgrim Nuclear Power Station, Supp. 1, Docket No. 50-293 (Sept. 2007), available at NRC ADAMS Accession No. ML072210487.

<sup>14</sup> NUREG-1891, Safety Evaluation Report Related to the License Renewal of Pilgrim Nuclear Power Station (Nov. 2007) ("NUREG-1891").

<sup>15</sup> Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), LBP-07-13, 66 N.R.C. 131 (2007).

<sup>16</sup> Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), LBP-08-22, 68 N.R.C. 590, 610 (2008).

for hearing on these limited issues.<sup>17</sup> In CLI-10-14, the Commission denied Pilgrim Watch's request for review of all other Licensing Board decisions that Pilgrim Watch had appealed.<sup>18</sup>

Following the remand, Pilgrim Watch sought repeated delays in the scheduling of the hearing on the remanded issues while it sought unsuccessfully to expand the scope of the remand to include issues never raised as part of its contention and issues that had already been resolved.

See, e.g., CLI-10-15<sup>19</sup> (denying Pilgrim Watch motion for reconsideration); CLI-10-28<sup>20</sup>

(denying Pilgrim Watch motion for clarification). Eventually, in CLI-10-28, the Commission stated:

We remanded contention 3 to the Board in March 2010. We expect the Board to make full use of its broad authority under our rules to establish and maintain a fair and disciplined hearing process, avoiding extensions of time absent good cause, unnecessary multiple rounds of briefs, or other unnecessary delay. We urge the Board and parties to work together to bring the proceeding to timely closure.

CLI-10-28 at 2.

Having been unsuccessful in its efforts to expand the remanded contention, Pilgrim Watch then commenced a campaign of requests for hearings on new contentions. To date, Pilgrim Watch has filed five such requests.<sup>21</sup> In each case, Pilgrim Watch has refused to address the Commission's standards for reopening to admit new contentions. Entergy and the NRC Staff

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<sup>17</sup> Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-11, 71 N.R.C. \_\_\_, slip op. at 14, 18 (Mar. 26, 2010) ("CLI-10-11").

<sup>18</sup> Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-14, 71 N.R.C. \_\_\_, slip op. at 3, 39 (June 17, 2010) ("CLI-10-14").

<sup>19</sup> Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-15, 71 N.R.C. \_\_\_, slip op. (June 17, 2010) ("CLI-10-15").

<sup>20</sup> Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-28, 71 N.R.C. \_\_\_, slip op. (November 5, 2010) ("CLI-10-28").

<sup>21</sup> Pilgrim Watch Request for a Hearing on a New Contention (Nov. 29, 2010); Pilgrim Watch Request for a Hearing on a New Contention: Inadequacy of Entergy's Aging Management of Non-Environmentally Qualified (EQ) Inaccessible Cables at Pilgrim Station (Dec. 13, 2010); Pilgrim Watch Request for Hearing on a New Contention: Inadequacy of Entergy's Aging Management Program of Non-Environmentally Qualified (Non-EQ) Inaccessible Cables (Splices) at Pilgrim Station (Jan. 20, 2011); Pilgrim Watch's Request for Hearing on Post Fukushima SAMA Contention (May 12, 2011); Pilgrim Watch Request For Hearing on A New Contention Regarding Inadequcy [sic] of Environmental Report, Post-Fukushima (June 1, 2011).

have opposed all five requests on this and other grounds. Pilgrim Watch has also filed six post-hearing memoranda attempting to expand the record on the remanded contention or supplement its requests for hearing on new contentions.<sup>22</sup>

The Commonwealth has also filed a motion to admit a new contention, along with a motion to reopen and petition for waiver, once more seeking to litigate the environmental impacts of spent fuel pool fires.<sup>23</sup> Entergy and the NRC Staff have opposed these motions and waiver request.<sup>24</sup> In addition, the Commonwealth has filed with the Commission a conditional motion to suspend the proceeding,<sup>25</sup> which Entergy and the NRC Staff have also opposed.<sup>26</sup>

On June 30, 2011, the NRC Staff issued its second supplemental SER, documenting the NRC Staff's review of additional commitments made by Entergy in response to Revision 2 to the

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<sup>22</sup> Pilgrim Watch Memorandum Regarding Fukushima (March 12, 2011); Pilgrim Watch's Post Hearing Memorandum (March 28, 2011); Pilgrim Watch Memorandum – Entergy's Incorrect and Misleading Information Regarding Proven Tests to Detect Cable Insulation Degradation (April 11, 2011); Pilgrim Watch Memorandum – Entergy's Incorrect and Misleading Information Regarding Proven Tests to Detect Cable Insulation Degradation – Video Supplement (April 12, 2011); Pilgrim Watch Memorandum – Submerged Cables (June 23, 2011); Pilgrim Watch Request for Leave to Supplement Pilgrim Watch Request for Hearing on the Inadequacy of Entergy's Aging Management Program of Non-Environmentally Qualified (EQ) Inaccessible Cables (Splices) at Pilgrim Station, filed on December 10, 2010 and January 20, 2011 (Aug. 8, 2011).

<sup>23</sup> Commonwealth of Massachusetts Contention Regarding New and Significant Information Revealed by the Fukushima Radiological Accident (June 2, 2011); Commonwealth of Massachusetts Motion to Admit Contention and, if Necessary, to Re-Open Record Regarding New and Significant Information Revealed by Fukushima Accident (June 2, 2011); 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 2, 2011). On August 11, 2011, the Commonwealth moved to supplement this contention. Commonwealth of Massachusetts Motion to Supplement Bases to Commonwealth Contention to Address NRC Task Force Report on Lessons Learned from the Radiological Accident at Fukushima (Aug. 11, 2011).

<sup>24</sup> Entergy's Answer Opposing Commonwealth Contention and Petition for Waiver Regarding New and Significant Information Based on Fukushima (June 27, 2011); NRC Staff's Response to Commonwealth of Massachusetts' Motion to Admit Contention and, If Necessary, Re-Open Record Regarding New and Significant Information Revealed by Fukushima Accident (June 27, 2011); NRC Staff's Response to the Commonwealth of Massachusetts' Petition for Waiver of 10 C.F.R. Part 51 Subpart A, Appendix B Or, in the Alternative, Petition for Rulemaking (June 27, 2011).

<sup>25</sup> 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) ("Conditional Motion").

<sup>26</sup> Entergy Answer Opposing Commonwealth of Massachusetts Conditional Motion to Suspend License Renewal Proceeding (June 13, 2011); 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).

GALL Report.<sup>27</sup> As a result, the NRC Staff's review is complete. As reflected in the SER, supplement 1, and supplement 2, the NRC Staff has found that the standards for license renewal in 10 C.F.R. § 54.29(a) have been met and all confirmatory items have been resolved. NUREG-1891 (which includes the initial SER and supplement 1) at 6-1; NUREG-1891 Supplement 2 at 6-1. Similarly, the NRC Staff has made the requisite environmental findings to support issuance of the renewed license. NUREG-1437 Supp. 29, at 9-8.

On July 19, 2011, the Board issued LBP-11-18,<sup>28</sup> which found in favor of Entergy on the remanded portion of Pilgrim Watch Contention 3, thus resolving the final contested issue in the proceeding. On August 11, 2011, the Board issued LBP-11-20,<sup>29</sup> rejecting all of Pilgrim Watch's requests for hearing on new contentions that predate and are unrelated to the Fukushima Daiichi accident. The three requests to litigate new contentions that remain pending before the Board (two from Pilgrim Watch and one from the Commonwealth) seek to have issues stemming from the Fukushima Daiichi accident considered in this license renewal proceeding. The Board has indicated that it will address those three pending requests in a forthcoming ruling (LBP-11-20 at 2-3), but has provided no timetable for doing so.

## **II. STATEMENT OF LAW**

The Commission's immediate effectiveness rule, at 10 C.F.R. § 2.340(a), provides that after the presiding officer<sup>30</sup> makes findings in any initial decision on matters in controversy in a

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<sup>27</sup> NUREG-1891, Supplement 2 (ADAMS Accession No. ML11147A034).

<sup>28</sup> Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), LBP-11-18, 73 N.R.C. \_\_\_, slip op. (July 19, 2011).

<sup>29</sup> Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), LBP-11-20, 73 N.R.C. \_\_\_, slip op. (Aug. 11, 2011) ("LBP-11-20").

<sup>30</sup> "Presiding officer" means "the Commission, an administrative law judge, an administrative judge, an Atomic Safety and Licensing Board, or other person designated in accordance with the provisions of this part, presiding over the conduct of a hearing conducted under the provisions of this part." 10 C.F.R. § 2.4. Where an Atomic Safety and Licensing Board has been appointed, that Board is the presiding officer. See 10 C.F.R. § 2.313(a).

contested proceeding on an application for an operating license (specifically including renewal of an operating license),<sup>31</sup> “the Commission, the Director, Office of Nuclear Reactor Regulation [“NRR”] or Director, Office of New Reactors [“NRO”], as appropriate, after making the requisite findings, will issue, deny or appropriately condition the license.” 10 C.F.R. § 2.340(a) (emphasis added). Both 10 C.F.R. § 2.340(f) and 10 C.F.R. § 2.1210(d) (the NRC’s informal hearing procedures, under which the Pilgrim license renewal proceeding was governed) make it clear that a presiding officer’s initial decision is immediately effective, notwithstanding any petition for review.

Pending review and final decision by the Commission, an initial decision resolving all issues before the presiding officer is immediately effective upon issuance, except . . . [if there is a stay order] . . . or as otherwise provided by this part (e.g. § 2.340) or by the Commission in special circumstances.

10 C.F.R. § 2.1210(d).

10 C.F.R. § 2.340(i) provides that the Commission, Director of NRR, or Director of NRO shall issue an operating license, within 10 days of the initial decision, if the Commission or appropriate Office Director has made the requisite findings on issues not within the scope of the initial decision, notwithstanding any petition for review. As the Commission has explained, this paragraph

authorizes the appropriate staff Office Director to issue the delineated license, permit, authorization or finding within 10 days from the issuance of an initial decision, if all other safety and environmental findings necessary for issuance of

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<sup>31</sup> See 10 C.F.R. § 2.340(a) (“In any initial decision in a contested proceeding on an application for an operating license (including . . . renewal of an operating license) . . .”). Thus, when the immediate effectiveness rule refers to proceedings for an operating license, it is specifically including license renewal proceedings. Moreover, the Commission renews operating licenses by issuing new licenses. See 10 C.F.R. § 54.31. See also 56 Fed. Reg. 64,943, 64,961-62 (Dec. 13, 1991). Therefore, any issuance of a renewed license is the issuance of an operating license. The NRC’s license renewal rules also contemplate that renewed licenses will be issued while an administrative appeal is pending. See 10 C.F.R. § 54.31 (“If a renewed license is subsequently set aside upon further administrative or judicial appeal, the operating license or combined license previously in effect will be reinstated unless its term has expired and the renewal application was not filed in a timely manner.”) (emphasis added).

the license, permit, authorization or finding have been made, notwithstanding the pendency of various petitions or motions for reconsideration, review or stay before the presiding officer or the Commission.

72 Fed. Reg. 49,352, 49,416 (Aug. 28, 2007) (emphasis added).

As the Commission made clear in the 2007 rulemaking proceeding amending the immediate effectiveness rule, the provisions in the current rule are intended both to “remove the regulatory requirement for direct Commission involvement in all production and utilization licensing proceedings” and to expedite the licensing process. 72 Fed. Reg. at 49,415-16 (emphasis added). In that 2007 rulemaking proceeding, the Commission eliminated automatic stay provisions that had been added in 1979 and modified in 1981, effectively suspending the immediate effectiveness rule after the Three Mile Island accident. Id. As the Commission explained,

While the NRC’s 1979 and 1981 rulemakings were justified in light of the circumstances at that time, other factors now lead the NRC to believe that the oversight provisions adopted in 1981 are no longer necessary or desirable. . . . Thus, the NRC believes its regulations may be revised to remove the regulatory requirement for direct Commission involvement in all production and utilization licensing proceedings.

Id. at 49,415.

By removing the “automatic stay” provisions . . . , the NRC’s administrative process will be completed in less time, thereby benefitting all parties from the reduction in litigation resources without compromising the fairness of the overall hearing process. . . . The NRC believes that Congress intends the Commission to conduct fair, but efficient, hearings with respect to licensing, and to remove unnecessary hearing procedures which do not contribute to such a hearing process.

Id. at 49,415-16.

While the NRC Staff has recognized that the immediate effectiveness rule provides that a renewed operating license may be issued notwithstanding the pendency of a petition for review, the NRC Staff has taken the position that

the Commission, as a matter of policy, has not allowed the Director of NRR to make the appropriate findings and renew operating licenses in contested proceedings without Commission authorization.

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), Docket No. 50-219-LR, NRC Staff's Response in Opposition to Citizens' Motion for Clarification at 2 (Mar. 4, 2008).<sup>32</sup>

The NRC Staff bases this position on SRM-SECY-02-0088 (see id.), in which the Commission authorized the Director of NRR to "issue all future uncontested operating license renewals without prior Commission authorization once the Director of NRR has made the appropriate findings."<sup>33</sup> The NRC Staff has interpreted this Staff Requirements Memorandum ("SRM") to mean that Commission policy does not allow the Director of NRR to issue renewed operating licenses in *contested* proceedings without Commission authorization. Id. Without addressing whether it is necessary or appropriate, the Commission too has referred to this policy. AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-07, 69 N.R.C. 235, 285 (2009) ("When a proceeding is contested, the Staff, as a matter of policy, seeks Commission approval to issue the license, even though issuance of the license is not stayed by the petition for review.").

Neither the Commission nor the Staff have addressed whether this policy continues to be valid in light of the 2007 amendments to the immediate effectiveness rule. SRM-SECY-02-0088 was issued in 2002, when initial decisions in contested proceedings were automatically stayed and direct Commission involvement was required.

Moreover, for unexplained reasons, the NRC Staff previously declined to seek Commission approval to issue the renewed operating license in this license renewal proceeding,

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<sup>32</sup> ADAMS Accession No. ML080670108.

<sup>33</sup> Memorandum from A. Vietti-Cook to W. Travers, Staff Requirements – SECY-02-0088 – Turkey Point Nuclear Plant, Units 3 and 4, Renewal of Full-Power Operating Licenses (June 5, 2002) (ADAMS Accession No. ML021560479) ("SRM-SECY-02-0088").

even though a favorable initial decision was issued in 2008.<sup>34</sup> As a result, the effectiveness of that decision was effectively stayed for 17 months. Similarly, for unexplained reasons, the NRC Staff did not seek Commission approval to issue the renewed license after a favorable initial decision in the Vermont Yankee license renewal proceeding in 2009,<sup>35</sup> resulting effectively in a 12-month stay of the effectiveness of that decision. Because of the extensive delay that this policy has caused and its apparent inconsistency with the NRC's rules, Entergy respectfully moves the Commission to either clarify that Commission approval is no longer required, or expeditiously grant such approval.

### **III. ARGUMENT**

The Commission should direct the NRC Staff to issue the renewed operating license for Pilgrim. The NRC Staff's apparent position that it is "not allowed" to issue the renewed license without Commission authorization is contrary to the immediate effectiveness rule. As the Commission clearly stated in the 2007 amendments to that rule, 10 C.F.R. § 2.340(i) "authorizes" the Staff to issue operating licenses for production and utilization facilities after issuance of an initial decision, if all other safety and environmental findings necessary for issuance of the license have been made, notwithstanding the pendency of any petition for review. 72 Fed. Reg. at 49,416. Indeed, 10 C.F.R. § 2.340(i) not only authorizes issuance of the license but in fact provides that the Staff or the Commission "shall issue an operating license, within 10 days of the initial decision." As 10 C.F.R. § 2.340(a) makes clear, this rule applies to issuance of renewed operating licenses.

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<sup>34</sup> Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), LBP-08-22, 68 N.R.C. 590, 610 (2008).

<sup>35</sup> Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-09-9, 70 N.R.C. 41 (2009).

Here, the Licensing Board has issued an initial decision resolving all matters placed in controversy. Further, the NRC Staff has completed both its technical and environmental reviews and has made all other safety and environmental findings necessary for issuance of the license. Consequently, the NRC's rules require the Staff or the Commission to now issue the renewed license.

Entergy respectfully submits that the Staff's apparent reliance on SRM-SECY-02-0088 is misplaced. That SRM was issued nine years ago, at a time when the immediate effectiveness of initial decisions was automatically stayed and direct Commission involvement was required. In light of the 2007 amendments eliminating the automatic stay, removing the requirement for direct Commission involvement and specifically authorizing license issuance, the SRM should no longer be given any effect.<sup>36</sup> Instead, both the Commission and NRC Staff should adhere to the NRC's current rules.<sup>37</sup>

Even if the policy of seeking Commission authorization could be reconciled somehow with the current immediate effectiveness rule (which it cannot), that policy should not be subverted into an automatic stay – the very action the 2007 amendments eliminated. The recent Staff practice in both this proceeding and the Vermont Yankee proceeding of not seeking such

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<sup>36</sup> Similarly, NRC Management Directive 9.27 ("MD 9.27"), which delegates authority to the Director of NRR to renew a license "except where the decision rests with an Administrative Law Judge, an Atomic Safety and Licensing Board, the Atomic Safety and Licensing Appeal Board, or the Commission, after a hearing pursuant to 10 CFR Part 2" (MD 9.27 at ¶ 032), was issued in 1989. Entergy does not view this delegation as preventing the NRC Staff from issuing a renewed license in a proceeding in which the Atomic Safety and Licensing Board has already issued a decision resolving all matters placed in dispute. Indeed, the Management Directive also delegates authority to the Director of NRR "to take necessary or appropriate action in accordance with decisions of an Administrative Judge, an Atomic Safety and Licensing Board, or the Commission after a hearing pursuant to 10 CFR Part 2." MD 9.27 at ¶ 036. Nevertheless, to the extent that these delegations of authority could be viewed as inconsistent with the 2007 amendments to the immediate effectiveness rule, the current rule should govern.

<sup>37</sup> An agency must follow its own rules until it changes them explicitly. Andershock's Fruitland Inc. v. Dep't of Agriculture, 151 F.3d 735, 736 (7<sup>th</sup> Cir. 1988); Bergamo v. Commodity Futures Trading Comm., 192 F.3d 78, 79 (2<sup>nd</sup> Cir. 1999) ("an agency is bound to follow procedures required its own regulations"). While an agency may modify a procedural rule on a case by case basis if it gives proper notice to all parties (National Whistleblower Center v. NRC, 208 F.3d 256, 262 (D.C. Cir. 2000)), the NRC certainly has not done so in this proceeding.

authorization (for 17 months and 12 months, respectively) essentially amounts to a de facto stay – and one made without any showing of good cause, without any notice to the applicant, and without any opportunity to respond.

Moreover, such inaction is inconsistent with the Commission’s long-standing commitment to the expeditious completion of adjudicatory proceedings. See, e.g., Statement of Policy on the Conduct of Adjudicatory Proceedings, CLI-98-12, 48 N.R.C. 18, 24 (1998). As the Commission stated, “applicants for a license are . . . entitled to a prompt resolution of disputes concerning their applications.” Id. at 19. More specifically, in contested license renewal proceedings, the Commission’s goal has been a hearing schedule allowing the issuance of a Commission decision in about two and one half years from the date that the application was received. Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant), CLI-98-14, 48 N.R.C. 39, 42 (1998); Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2 and 3), CLI-98-17, 48 N.R.C. 123, 126 (1998). The Pilgrim license renewal proceeding is now in its sixth year. Accordingly, issuance of the renewed license is long overdue.

Such inaction is not only inconsistent with NRC policy but also very injurious to Entergy. Apart from the significant financial costs (not only the litigation costs, but significant monthly capital carrying costs), the uncertainty in whether Entergy’s renewed license will be issued makes business and investment decisions extremely difficult. The uncertainty makes decisions on fuel procurement very difficult and is an impediment to Entergy’s ability to enter into contracts for the sale of the plant’s power beyond its current expiration date. Finally, the uncertainty is unfair to plant employees, who are left to guess at the prospects for continued employment beyond the next year. This uncertain environment makes hiring new employees and

retaining current ones increasingly difficult.<sup>38</sup> In addition, if the NRC's failure to act in a timely manner were to result in the shutdown of Pilgrim, substantial benefits from the plant's operation will be lost.

The pending requests for hearing on new contentions (which must satisfy the standards for a motion to reopen pursuant to 10 C.F.R. § 2.326(d)) do not alter the immediate effectiveness of the Licensing Board's decision. The plain language of the NRC rules makes the Board's decision immediately effective. See 10 C.F.R. § 2.340(a) (referring to an "initial decision" in which the Board has made findings "on the matters put in controversy by the parties") and 10 C.F.R. § 2.1210(d) (making immediately effective an "initial decision resolving all issues before the presiding officer"). Presumably, the phrase "all issues before the presiding officer" in Section 2.1210(c)(4) is synonymous with "matters put in controversy by the parties" in Section 2.340(a) – i.e., they both refer to admitted contentions. Otherwise, any opponent would be able to delay indefinitely the effectiveness of a Licensing Board decision resolving all admitted contentions merely by filing successive motions to reopen the record or litigate new contentions. See Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 554-55 (1978) ("there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening" if the "litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered"). Indeed, for just this reason, it has long been recognized that motions to reopen do not toll the finality of agency orders. See Provisioners Frozen Express, Inc. v. ICC, 536 F.2d 1303, 1305 (9th Cir. 1976) (a motion to reopen did not toll the sixty-day time limit set forth in the Hobbs Act because Petitioners could obtain judicial review of an agency's action "without

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<sup>38</sup> The timely renewal provision in 10 C.F.R. § 2.109(b) does not eliminate this harm.

restriction as to time by merely filing successive petitions to reopen for further hearing”); Cartersville Elevator, Inc. v. ICC, 724 F.2d 668, 672 (8th Cir. 1984) (“To allow a petition filed years after an initial decision to toll the 60-day period would allow parties to endlessly preserve judicial review”).

Further, issuance of the renewed license should not be delayed to await Licensing Board rulings on the remaining new hearing requests/motions to reopen (which Entergy fears could take months), because there is no reasonable likelihood that any of these requests will be granted. As noted above, Pilgrim Watch has steadfastly refused to address or satisfy the standards for reopening, arguing that such standards do not apply and are contrary to precedent which Pilgrim Watch argues gives it an absolute right to a hearing on any material issue. Pilgrim Watch’s claim that the standards for reopening are inapplicable is belied by the plain language of 10 C.F.R. § 2.326(d), and the argument that the standards for reopening violate hearing rights was recently expressly rejected in New Jersey Env’tl. Fed’n v. NRC, No. 09-2567, 2011 WL 1878642 at \*10-11 (3d Cir. May 18, 2011). Indeed, in LBP-11-20, the Board explicitly ruled that the standards for reopening apply to the hearing requests rejected therein. LBP-11-20 at 11-12. And because Pilgrim Watch has refused to address the Commission’s standards for reopening, its pending requests must also be denied. Similarly, the Commonwealth’s requests must be denied, because the Commonwealth has not made the affirmative showing required to reopen the record or support a waiver allowing litigation of the impacts of spent fuel pool fires. Consequently, there is no reason why these filings should be allowed to somehow trump the effectiveness rule, or for the Commission to brook further delay.

Moreover, the remaining motions to reopen or requests for hearing all seek to inject into this proceeding issues relating to the Fukushima Daiichi accident. As the Commission’s Near

Term Task Force has concluded that “continued operation and continued licensing activities do not pose an imminent risk to public health and safety”<sup>39</sup> and the Commission has clearly indicated that any lessons learned from this accident will be applied as appropriate irrespective of license renewal,<sup>40</sup> there is no safety reason why the immediate effectiveness rule should not be applied.

#### **IV. CONCLUSION**

For all the reasons discussed above, the Commission should (1) instruct the NRC Staff that, pursuant to the immediate effectiveness rule, the Staff is allowed to issue renewed operating licenses without further authorizations, and (2) direct the Staff’s prompt issuance of the renewed Pilgrim license in accordance with that rule. In the alternative, even if SRM-SECY-02-0088 is viewed as having some continuing effect, the Commission should immediately authorize the Staff to issue the renewed license in this proceeding in light of the Commission’s policy on prompt decision-making, the absence of any good cause for further delay, and the substantial harm to Entergy from such delay.

#### **CERTIFICATION**

As required by 10 C.F.R. § 2.323(b), Counsel for Entergy certifies that he consulted with the NRC Staff, the Commonwealth, and Pilgrim Watch and made a sincere effort to resolve the issues raised in this motion. The Commonwealth and Pilgrim Watch have indicated that they will oppose this motion. The NRC Staff has not yet stated its position.

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<sup>39</sup> Recommendations for Enhancing Reactor Safety in the 21<sup>st</sup> Century, The Near Term Task Force Review of Insights from the Fukushima Daiichi Accident (July 12, 2011) at vii, 18.

<sup>40</sup> Federal Respondents’ Memorandum at 13.

Respectfully Submitted,

/Signed electronically by David R. Lewis/

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David R. Lewis  
PILLSBURY WINTHROP SHAW PITTMAN LLP  
2300 N Street, NW  
Washington, DC 20037-1128  
Tel. (202) 663-8000  
Counsel for Entergy

Dated: August 23, 2011

August 23, 2011

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

Before the Commission

In the Matter of	)	
	)	
Entergy Nuclear Generation Company and	)	Docket No. 50-293-LR
Entergy Nuclear Operations, Inc.	)	
	)	ASLBP No. 06-848-02-LR
(Pilgrim Nuclear Power Station)	)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of Applicant's Motion for Issuance of Renewed License, dated August 23, 2011, was provided to the Electronic Information Exchange for service on the individuals below, this 23rd day of August, 2011.

Secretary  
Att'n: Rulemakings and Adjudications Staff  
Mail Stop O-16 C1  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
hearingdocket@nrc.gov

Office of Commission Appellate Adjudication  
Mail Stop O-16 C1  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
OCAEmail@nrc.gov

Administrative Judge  
Ann Marshall Young, Esq., Chair  
Atomic Safety and Licensing Board  
Mail Stop T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
Ann.Young@nrc.gov

Administrative Judge  
Dr. Paul B. Abramson  
Atomic Safety and Licensing Board  
Mail Stop T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
Paul.Abramson@nrc.gov

Administrative Judge  
Dr. Richard F. Cole  
Atomic Safety and Licensing Board  
Mail Stop T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
Richard.Cole@nrc.gov

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

Susan L. Uttal, Esq.  
Andrea Z. Jones, Esq.  
Brian Harris, Esq.  
Beth Mizuno, Esq.  
Office of the General Counsel  
Mail Stop O-15 D21  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
Susan.Uttal@nrc.gov; andrea.jones@nrc.gov;  
brian.harris@nrc.gov; beth.mizuno@nrc.gov

Ms. Mary Lampert  
148 Washington Street  
Duxbury, MA 02332  
mary.lampert@comcast.net

Mr. Mark D. Sylvia  
Town Manager  
Town of Plymouth  
11 Lincoln St.  
Plymouth, MA 02360  
msylvia@townhall.plymouth.ma.us

Chief Kevin M. Nord  
Fire Chief and Director, Duxbury Emergency  
Management Agency  
688 Tremont Street  
P.O. Box 2824  
Duxbury, MA 02331  
nord@town.duxbury.ma.us

Matthew Brock, Assistant Attorney General  
Commonwealth of Massachusetts  
Office of the Attorney General  
One Ashburton Place  
Boston, MA 02108  
Matthew.Brock@state.ma.us

Sheila Slocum Hollis, Esq.  
Duane Morris LLP  
505 9th Street, NW  
Suite 1000  
Washington, DC 20006  
sshollis@duanemorris.com

Richard R. MacDonald  
Town Manager  
878 Tremont Street  
Duxbury, MA 02332  
macdonald@town.duxbury.ma.us

Katherine Tucker, Esq.  
Law Clerk,  
Atomic Safety and Licensing Board Panel  
Mail Stop T3-E2a  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
Katie.Tucker@nrc.gov

/signed electronically by David R. Lewis/  
David R. Lewis