

September 6, 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
)
ENERGY NUCLEAR GENERATION)
COMPANY AND ENTERGY NUCLEAR) Docket No. 50-293-LR
OPERATIONS, INC.)
)
(Pilgrim Nuclear Generating Station))

NRC STAFF'S ANSWER TO APPLICANT'S
MOTION FOR ISSUANCE OF RENEWED LICENSE

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby responds to Applicant's Motion for Issuance of Renewed License (August 23, 2011) ("Motion"). In its Motion, Entergy Nuclear Generating Company and Entergy Nuclear Operations, Inc. ("Entergy" or "Applicant") request that the Commission direct the NRC staff to issue the renewed operating license for Pilgrim Nuclear Power Station ("Pilgrim") or, in the alternative, authorize the NRC staff to issue the renewed license. In response, the NRC staff submits that it has acted consistent with the Commission's regulations and policies, which provide the NRC with discretion in determining when it is appropriate to issue a renewed license. The Staff does not, however, take a position on whether the Commission should grant the relief requested by Entergy.

PROCEDURAL BACKGROUND

For purposes of this answer, the Staff generally agrees and adopts Entergy's recitation of the procedural history of this highly contested proceeding. See Motion 3-7. The Staff notes, however, that three petitions related to Entergy's license renewal application for Pilgrim are

pending before the Commission: (1) a petition to suspend all licensing decisions, including a decision on Entergy's Application,¹ (2) a petition for review of Atomic Safety and Licensing Board's (Board's) Partial Initial Decision (LBP-11-18),² and (3) a petition for review of the Board's decision LBP-11-20.³ Further, although the Board ruled upon the only remaining admitted contention in the proceeding in LBP-11-18,⁴ three requests to adjudicate new contentions based upon the events at Fukushima are pending before the Board.⁵ In addition, outside of the adjudicatory process, the NRC Staff has continued its review of Entergy's application, issuing most recently a second supplement to the safety evaluation report on Entergy's license renewal application on June 30, 2011.⁶

ARGUMENT

In support of its request, Entergy asserts it is entitled to a renewed license pursuant to the current version of 10 C.F.R. § 2.340⁷ and that contrary to that regulation, the NRC Staff has

¹ See Emergency Petition to Suspend All Pending Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned From Fukushima Daiichi Nuclear Power Station (Apr. 14, 2011) (Agencywide Document Access and Management System ("ADAMS") Accession No. ML111040587) ("Suspension Petition").

² See Pilgrim Watch's Request for Review of the Partial Initial Decision (Rejecting Upon Remand, Pilgrim Watch's Challenge to Meteorological Modeling in SAMA Analysis in Entergy's License Renewal Application) (Aug. 3, 2011) (ADAMS Accession No. ML11215A135).

³ Pilgrim Watch's Request for Review of Memorandum and Order (Denying Pilgrim Watch's Requests for Hearing on Certain Contentions) (Aug. 26, 2011) (ADAMS Accession No. ML11238A118).

⁴ *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station) LBP-11-18, 74 NRC ____ (July 19, 2011) (slip op.) ("Partial Initial Decision" or "LBP-11-18")

⁵ See Motion at 7.

⁶ See NUREG-1891, Supplement 2 (ADAMS Accession No. ML11147A034).

⁷ As discussed below, 10 C.F.R. § 2.340 was amended in 2007. See Licenses, Certifications, and Approvals for Nuclear Power Plants; Final Rule, 72 Fed. Reg. 49352, 49415 (Aug. 28, 2007).

adhered to the Commission policy established by SRM-SECY-02-0088,⁸ which requires the NRC Staff to request and obtain Commission approval before issuing a renewed license in a contested license renewal proceeding. Motion at 12. Entergy also argues that neither the Commission nor the Staff have considered the validity of the policy established by SRM-SECY-02-0088 since the 2007 amendments to § 2.340. Motion at 10-11. Entergy further argues that even if this policy could be reconciled with the regulations, it is tantamount to a stay (without a showing of good cause or an opportunity for the applicant to respond), and is inconsistent with the Commission's "long-standing commitment to expeditious completion of adjudicatory proceedings." Motion at 12-13.

In response to Entergy's arguments, the Staff submits the following. First, the Commission's policy requiring the Staff to obtain Commission authorization to issue a renewed license in contested cases is not inconsistent with 10 C.F.R. § 2.340 and the Staff's reliance on that policy is not misplaced. Second, Staff adherence to the policy of SECY-SRM-02-0088 is not equivalent to a stay. Third, Entergy's interpretation of § 2.340 could in future cases deprive the NRC of the discretion provided by the regulation.

I. The Commission's Policy is Not Inconsistent With 10 C.F.R. § 2.340

As explained below, the Commission policy established by SRM-SECY-02-0088 is not inconsistent with the 2007 changes to 10 C.F.R. § 2.340, and Staff reliance on the policy is not misplaced because since 2007 the Commission has twice indicated that the policy remains valid.

The Commission's policy on issuance of renewed operating licenses, both contested and uncontested, began with the issuance of the first renewed operating licenses in 2000.

⁸ Staff Requirements Memorandum ("SRM")-SECY-02-0088-Turkey Point Nuclear Plant, Units 3 & 4, Renewal of Full Power Operating Licenses (June 5, 2002) (ADAMS Accession No. ML021560479) ("SRM-SECY-02-0088"). This SRM-SECY will be discussed further below.

When the Staff completed its review of the first license renewal application, an application to renew the licenses for Calvert Cliffs, Units 1 and 2, the NRC Staff requested Commission authorization to issue the renewed licenses and requested that the Commission authorize the director of NRR to issue subsequent uncontested operating license renewals without prior Commission authorization.⁹ In response to SECY-00-0010, the Commission issued a staff requirements memorandum (“SRM”) authorizing issuance of the renewed license for Calvert Cliffs, but declining to authorize the Director of NRR to issue subsequent uncontested license renewals.¹⁰ Two years later, in response to the Staff’s request for authorization to make the appropriate findings and issue the renewed licenses to Turkey Point, Units 3 and 4, the Commission authorized the Director of NRR to issue all future *uncontested* operating license renewals without prior Commission authorization.¹¹ Prior to the Oyster Creek license renewal proceeding, discussed below, the NRC faced only one instance in which a license renewal proceeding was still contested at the time the Staff was prepared to issue that license. In 2003, the Staff requested, and the Commission granted, authorization to make the appropriate findings and grant renewed licenses to McGuire Nuclear Station, Units 1 and 2, and Catawba Nuclear Station, Units 1 and 2, notwithstanding the pendency of a petition for review of a Board decision denying admission of a contention related to severe accident mitigation analysis.¹²

⁹ See SECY-00-0010, “Calvert Cliffs Nuclear Power Plant, Units 1 and 2 - Renewal of Full-Power Operating License” (Jan. 14, 2000) (ADAMS Accession No. ML003672584).

¹⁰ See SRM-SECY-00-0010 “Calvert Cliffs Nuclear Power Plant, Units 1 and 2 - Renewal of Full-Power Operating License” (Mar. 23, 2000) (DAMS Accession No. ML003695231).

¹¹ SRM-SECY-02-0088.

¹² See SECY-03-0200 “Renewal of Full-Power Operating Licenses for McGuire Nuclear Station, Units 1 and 2, and Catawba Nuclear Station, Units 1 and 2 (Nov. 18, 2003) (ADAMS Accession No. ML033040164); SRM-SECY-03-0200 “Renewal of Full-Power Operating Licenses for McGuire Nuclear Station, Units 1 and 2, and Catawba Nuclear Station, Units 1 and 2” (Dec. 3, 2003) (ADAMS Accession No. ML033380860).

As Entergy states, the policy of SRM-SECY-02-0088 was established before changes to 10 C.F.R. § 2.340 were promulgated on August 28, 2007. The 2007 amendment to 10 C.F.R. § 2.340 removed the “automatic stay” on initial license board decisions in contested proceedings. The automatic stay provision had been added to the regulations after the accident at TMI.¹³ As a result of this change 10 C.F.R. § 2.340(a) now provides:

In any initial decision in a contested proceeding on an application for an operating license (including an amendment to or renewal of an operating license) Depending on the resolution of [any matters put into controversy by the parties and any issues certified by the presiding officer and approved by the Commission] the Commission, the Director of Nuclear Reactor Regulation, or the Director of New Reactors, as appropriate, after making the requisite findings, will issue, deny or appropriately condition the license.

In addition, 10 C.F.R. §§ 2.340(i) was added, which provides:

The Commission, the Director of New Reactors, or the Director of Nuclear Reactor Regulation, as appropriate shall issue . . . an operating license under part 50 of this chapter . . . within 10 days of from the date of issuance of the initial decision:

- (1) If the Commission or the appropriate Director has made all the findings necessary for issuance . . . not within the scope of the initial decision and
- (2) Notwithstanding the pendency of a petition for reconsideration under § 2.345, a petition for review under § 2.341, or a motion for stay under § 2.342, or the filing of a petition under § 2.206.”

These amendments to § 2.340 are not, however inconsistent with the policy established by SECY-SRM-02-0088. By virtue of SECY-SRM-02-0088, the Commission has only authorized the Director of Nuclear Reactor Regulation to issue renewed licenses in *uncontested* proceedings. Further, § 2.340 recognizes that the license will be issued by the Commission, the Director of Nuclear Reactor Regulation, or the Director of New Reactors, *as appropriate* if the necessary findings on uncontested matters can be made. Therefore, the rule text recognizes that the authority to issue a license may rest with the Commission or the appropriate office

¹³ 72 Fed. Reg. at 49415.

director. Although, as Entergy states, the purpose of this change was to “remove[] the regulatory requirement for direct Commission involvement in all production and utilization licensing proceedings,”¹⁴ this need not be construed as a repudiation of the policy established by SECY-SRM-02-0088. By removing the *requirement* for direct Commission involvement, the rule change gives the NRC greater flexibility. The rule change need not be interpreted as *prohibiting* direct Commission involvement. Also, the rule acknowledges that some licenses will be issued by Commission. The policy of SECY-SRM-02-0088, therefore, provides the flexibility allowed by the rule. Thus, the Commission policy that the Director of NRR must request authorization prior to issuance of a contested renewed license is not inconsistent with revised § 2.340.

Not only is SECY-SRM-02-0088 consistent with § 2.340, the Staff’s reliance on it is not misplaced. In adjudicatory decisions, the Commission has twice acknowledged the continued applicability of the Commission’s policy since the 2007 revision of § 2.340. Both decisions relate to Oyster Creek’s license renewal application. In the first instance, the Commission made statements about SECY-SRM-02-0088 when the Oyster Creek proceeding was in a procedural posture not unlike the instant case. In CLI-08-13, the Commission denied a request by the intervenor to stay a final decision on Oyster Creek’s license renewal application to allow it a reasonable time to decide whether to file a new contention based upon a newly identified metal fatigue issue brought to its attention by an NRC Staff notification to the Commission, Board, and parties.¹⁵ At the time of the Commission’s decision in CLI-08-13, the Final Safety Evaluation Report and Site-Specific Environmental Impact Statement had been issued, the record of the

¹⁴ 72 Fed. Reg. at 49415.

¹⁵ *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-13, 67 NRC 396, 398 (2008).

proceeding closed, and the Board's initial decision had resolved the sole admitted contention in favor of the applicant. In addition, a petition for Commission review of the Board's initial decision and a motion to reopen and add a new contention on the newly identified metal fatigue issue were pending.¹⁶ In denying the request for stay, the Commission stated that issuance of Oyster Creek's renewed license was not imminent because the Staff had not completed its review of the metal fatigue issue, "[a]nd the Staff has not requested our authorization to issue the license renewal." As the basis for this latter statement the Commission referred to SECY-SRM-02-088: "In accordance with established practice, the Staff will issue a renewed license in contested proceedings only after notice to and authorization by the Commission."¹⁷

In the second post 2007 instance, the Commission addressed SECY-SRM-02-0088 in ruling on all remaining Oyster Creek-related matters before it in CLI-09-07.¹⁸ Therein, the Commission addressed the intervenors' claim that the Staff's submission of a SECY paper requesting authorization to issue a renewed operating license to Oyster Creek was an unauthorized ex parte communication. The Commission stated that the Staff's submission was not only authorized but a submission "contemplated by Commission policy," i.e., SRM-SECY-

¹⁶ See *id.* at 398-99 (noting that Commission referred the motion to reopen to the Board). Although not noted by the Commission in CLI-08-13, a petition filed by various public interest groups including the intervenor in the Oyster Creek proceeding requesting suspension of review of the license renewal applications of Oyster Creek, Indian Point, Pilgrim, and Vermont Yankee was pending before the Commission. See *AmerGen Energy Co., LLC, (Oyster Creek Nuclear Generating Station) et al.*, CLI-08-23, 68 NRC 461 (2008). It should be noted that the pendency of a motion to reopen is not a legal barrier to issuance of a license. The Commission has authorized issuance of a full power operating license notwithstanding pending motions to reopen. *Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3)*, CLI-85-3, 21 NRC 471 (1985). The Commission's decision to issue the license notwithstanding the pending motions to reopen was specifically challenged and upheld on judicial review. *Oystershell Alliance v. NRC*, 800 F.2d 1201, 1204, 1206-07 (D.C. Cir. 1986).

¹⁷ *Id.* at 401 & n.18.

¹⁸ See *AmerGen Energy Co., LLC, (Oyster Creek Nuclear Generating Station)*, CLI-09-07, 69 NRC 235, 285

02-088, and was not ex parte because it was served on parties to the proceeding.¹⁹ Thus, the Commission is aware of the Staff's adherence to the policy of SRM-SECY-02-0088 and has approved the Staff's adherence to the policy since § 2.340 was amended in 2007.

Consequently, the Staff's reliance on SRM-SECY-02-088 is not misplaced.

II. Staff Adherence to the Policy of SECY-SRM-02-0088 Is Not Equivalent to a Stay

Entergy argues that Staff adherence to SECY-SRM-02-088 is tantamount to a stay, a stay imposed without the showing of good cause and without any notice to the applicant or an opportunity to respond. Motion at 13. Entergy claims that it is being harmed beyond the costs of litigation by the prolonged nature of this proceeding and that the Commission's timely renewal provision in 10 C.F.R. § 2.109(b) does not eliminate this harm. Motion at 13-14 & n.38.

Nevertheless, by virtue of § 2.109(b), Entergy has and can continue to operate Pilgrim until the NRC makes a final determination on its application, even if that determination comes after the current license expiration date of June 8, 2012. The purpose of such timely renewal provisions is to ensure that applicants are not harmed if agency action takes longer than expected. Even if Pilgrim's license were renewed as a result of this motion, all uncertainty of continued operations would not vanish because the license could still be set aside upon further administrative or judicial appeal. 10 C.F.R. § 54.31(c). Thus, since Pilgrim continues to operate, the uncertainty Entergy faces is not the result of the Commission's policy.

II. Entergy's Rigid Interpretation of § 2.340(i) Could Deprive the NRC of Discretion in Issuing Renewed Licenses

Without regard to the continued validity of SRM-SECY-02-088, Entergy's interpretation of § 2.340(i) is too rigid and, thus, could deprive the NRC of discretion in the deliberative process of determining whether the findings necessary for issuance of a license have been or

¹⁹ *Id.*

can be made. Entergy argues: “10 C.F.R. § 2.340(i) not only authorizes issuance of the license but in fact provides that the Staff or Commission ‘shall issue an operating license, within 10 days of the initial decision.’” Motion at 11 (emphasis in the original). In other words, Entergy believes that the NRC is compelled to issue a renewed license within 10 days of an initial decision if a final safety evaluation and a final site-specific environmental impact statement have been issued. *Id.* at 12. The Staff submits that this was not the Commission’s intent when it added § 2.340(i) in 2007. The statements of consideration for the rule explain that the purpose of new paragraphs (i), (j), and (k), is to authorize issuance of the license within 10 days of an initial decision on a contested matter if all other necessary safety and environmental findings on uncontested issues have been made.²⁰ Although these sections were new, they were written because § 2.340(c) of the former rule, which authorized issuance of certain delineated licenses within 10 days of an initial decision, “could be erroneously read as requiring the Director to issue a license following an initial decision on a contested matter even if other issues not contested had yet to be resolved by the NRC Staff.”²¹ Therefore § 2.340(i) should be read to *allow*, but not to *compel* issuance of the license within 10 days.²² This should be the case because there may be instances, in which the NRC, in its technical judgment, determines that a supplement to the final safety evaluation is needed,²³ or that “[t]here are new and significant circumstances or

²⁰ 72 Fed. Reg. at 49,416.

²¹ *Id.*

²² Note that § 2.340(a) is not as strongly worded as § 2.340(i), stating that based upon the initial decision, “the Commission, Director [of NRR] or Director of [NRO], as appropriate, *after* making the requisite findings *will* issue, deny or appropriately condition the license.”

²³ See, e.g., Safety Evaluation Report Related to the License Renewal of the Oyster Creek Nuclear Generating Station, Supplement 1 (Sept. 2008) (ADAMS Accession No. ML080230078) (documenting the Staff’s review of the applicant’s response to an RAI issued after the final Safety Evaluation Report and an initial decision on the sole remaining contention in *AmerGen Energy Co. LLC* (Oyster Creek Nuclear Generating Station), LBP-07-17, 66 NRC 327 (2007)).

information relevant to environmental concerns and bearing on the proposed action or its impacts”²⁴ necessitating a supplemental environmental impact statement. Interpreting § 2.340(i) to compel issuance of the license if a final safety evaluation report and a final environmental impact statement have been issued could, in future cases, prevent the NRC from exercising its technical judgment to ensure the necessary safety findings can be made or fulfilling its National Environmental Policy Act obligations.²⁵ The issuance of final safety and environmental documents is not the end all to the licensing decisions. Rather they serve as the record utilized and considered by the decisions maker as part of a rational and deliberative process. Section 2.340(i) can and should be read to preserve NRC discretion in determining whether the necessary findings for issuance of the license have been made. Furthermore, while Entergy argues that failure to promptly issue licenses is inconsistent with Commission’s commitment to “expeditious completion of adjudicatory proceedings,”²⁶ preserving NRC discretion in determining whether all necessary statutory and regulatory findings can be made should be of equal or, perhaps, greater import. Thus, Entergy’s strict reading of § 2.340 could deprive the NRC of the discretion in issuing licenses provided by the regulation.

CONCLUSION

As explained above, the Staff submits that the Commission policy established by SRM-SECY-02-088 is not inconsistent with 10 C.F.R. § 2.340 and that the Staff’s continued reliance on the policy of SRM-SECY-02-088 is not misplaced. The Staff further submits that Entergy’s rigid reading of § 2.340 could deprive the NRC of the discretion provided by the regulation in

²⁴ See 10 C.F.R. § 51.92 “Supplement to the final environmental impact statement.”

²⁵ The Staff is not suggesting that these considerations apply to Pilgrim.

²⁶ See Motion at 13 (citing Statement of Policy on the Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 24 (1998))

issuing licenses. The Staff does not, however, take a position on whether the Commission should grant the relief requested by Entergy in this proceeding.

Respectfully submitted,

/Electronically signed/

Susan Uttal

Counsel for NRC Staff

Dated at Rockville, Maryland
This 6th day of September, 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S ANSWER TO APPLICANT'S MOTION FOR ISSUANCE OF RENEWED LICENSE" have been served upon the following by the Electronic Information Exchange this 6th day of September, 2011:

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