

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S ANSWER TO COMMONWEALTH OF MASSACHUSETTS' REQUEST TO
STAY COMMISSION DECISION OR IN THE ALTERNATIVE TO STRIKE REFERENCE TO
MASSACHUSETTS' EXPERT

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October 11, 2011

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INTRODUCTION

On September 28, 2011, the Commonwealth of Massachusetts ("Massachusetts") filed its answer¹ to Pilgrim Watch's ("PW") petition for review of the Atomic Safety and Licensing Board's ("Board") memorandum and order denying its request for hearing on post-Fukushima contentions.² Contained in Massachusetts' Answer is a motion to stay ("Motion to Stay") the Commission's decision on PW's Appeal pending the Board's decision on Massachusetts' motion for admission of a new contention.³ Pursuant to 10 C.F.R. § 2.323(c), the NRC Staff ("Staff")

¹ Commonwealth of Massachusetts Answer to Pilgrim Watch Petition for Review, Request to Stay Commission Decision or in the Alternative to Strike Reference to Massachusetts' Expert (Sept. 28, 2011).

² Pilgrim Watch's Petition for Review of Memorandum and Order (Denying Pilgrim Watch's Request for Hearing on New Contentions relating to Fukushima Accident) (Sept. 23, 2011) ("PW's Appeal").

³ Commonwealth of Massachusetts Contention Regarding New and Significant Information Revealed by the Fukushima Radiological Accident (June 2, 2011) ("Massachusetts Contention Motion").

hereby files its response in opposition to the Motion to Stay. The Motion, although styled as a motion for a stay, is actually a motion to hold the Commission's action on PW's Appeal in abeyance. As such, it fails to demonstrate why resolution of PW's Appeal in this proceeding should be delayed. In the alternative, the motion fails to address the factors that must be considered in weighing whether a requested stay should be granted. Therefore, the Motion to Stay should be denied.

PROCEDURAL BACKGROUND

The history of this license renewal proceeding spans almost five years. It has been discussed in full in prior filings before the Commission.⁴ Accordingly, only those portions of the procedural history directly relevant to the discussion below will be addressed herein.

This proceeding had its genesis on January 27, 2006, when Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. ("applicant") submitted an application for renewal of Operating License No. DPR-35 for the Pilgrim Nuclear Power Station ("Pilgrim") for an additional 20 years.⁵ Pilgrim Watch applied for and was granted a hearing on two contentions.⁶ Both of the contentions were eventually disposed of by the Board, in separate hearings, in favor of the applicant.⁷ On a petition for review, the Commission affirmed the Board's decision on

⁴ See, e.g., NRC Staff's Answer To Pilgrim Watch's Request For Review of the Licensing Board's July 19, 2011 Partial Initial Decision (LBP-11-18), at 2 (Aug. 15, 2011); NRC Staff's Answer To Pilgrim Watch's Petition For Review of Memorandum and Order (Denying Pilgrim Watch's Requests For Hearing on New Contentions Related to Fukushima Accident), at 2 (Oct. 3, 2011).

⁵ Letter from Michael A. Balduzzi, Entergy Nuclear Operations, to U.S. NRC, Re: License Renewal Application (Jan. 25, 2006) (ADAMS Accession No. ML060300026).

⁶ *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 341 (2006).

⁷ See *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-07-13, 66 NRC 131 (2007); *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-08-22, 68 NRC 590 (2008); *Entergy Nuclear* (continued. . .)

Contention 1 in LBP-08-22.⁸ A petition for review of the decision on Contention 3 in LBP-11-18 is pending before the Commission.⁹

Late in this proceeding, PW also filed requests for hearing on five new contentions.¹⁰ These requests were denied by a Board majority in two separate orders.¹¹ PW's requests for Commission review of those two decisions are currently pending.¹²

Massachusetts entered this proceeding as an interested state pursuant 10 C.F.R. § 2.309(d)(2). It did not participate in the hearings on PW's Contentions 1 and 3.

Between April 14 and April 18, 2011, a number of entities filed a petition with the Commission, seeking suspension of twenty-three reactor licensing and reactor design certification proceedings, including the Pilgrim license renewal proceeding, until the Commission completes its review of technical and policy issues related to the event at the Fukushima Daiichi

(. . .continued)

Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), LBP-11-18, 74 NRC __ (July 19, 2011) (slip op.).

⁸ *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-14, 71 NRC __, __ (June 17, 2010) (slip op. at 39).

⁹ Pilgrim Watch 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 (July 19, 2011).

¹⁰ Pilgrim Watch Request for Hearing on a New Contention (Nov. 29, 2010); Pilgrim Watch Request for Hearing on a New Contention: Inadequacy of Entergy's Aging Management of Non-Environmentally Qualified (EQ) Inaccessible Cables (Splices) at Pilgrim Station (Dec. 13, 2010).

¹¹ See *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-11-20, 74 NRC __, __ (Aug. 11, 2011) (slip op at 3.); *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-11-23, 74 NRC __, __ (Sept. 8, 2011) (slip op. at 3).

¹² See Pilgrim Watch's Petition for Review of Memorandum and Order (Denying Pilgrim Watch's Requests for Hearing on Certain New Contentions) (Aug. 11, 2011); PW's Appeal.

reactors in Japan.¹³ Massachusetts was not among the petitioners who filed the Emergency Petition, but moved to join in the Petition, and also raised issues pertaining to “new and significant” information about spent fuel pools, related risks and regulatory requirements.¹⁴ On September 9, 2011, the Commission denied the Emergency Petition as to suspension of licensing decisions and denied Massachusetts’ request for relief.¹⁵ On June 2, 2011, Massachusetts filed a motion with the Board to admit a new contention and, if necessary, reopen the record.¹⁶ The Board has not ruled on Massachusetts’ Contention.

STATEMENT OF THE CASE

Pending before the Commission is a request for review of the Board decision denying two requests for hearing on new post Fukushima contentions proffered by PW.

The Recriticality Contention:¹⁷

The Environmental Report is inadequate post Fukushima Daiichi because Entergy’s SAMA analysis ignores new and significant lessons learned regarding the possible off-site radiological and economic consequences in a severe accident.

On June 1, 2011, PW submitted its proposed DTV Contention:¹⁸

¹³ Emergency Petition to Suspend All Pending Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident (“Emergency Petition”) (April 14 – 18, 2011).

¹⁴ *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.*, (Pilgrim Nuclear Power Station, et al) CLI-11-05, 74 NRC __, __ (Sept. 9, 2011) (slip op. at 36) (“CLI-11-05”).

¹⁵ *Id.* (slip op. at 41-42).

¹⁶ Massachusetts Contention Motion; Commonwealth of Massachusetts’ Contention Regarding New and Significant Information Revealed By the Fukushima Radiological Accident (“Massachusetts Contention”) (Jun. 2, 2011).

¹⁷ Pilgrim Watch Request for Hearing on Post Fukushima SAMA Contention (“Post Fukushima SAMA Contention”), at 1 (May 12, 2011).

¹⁸ Pilgrim Watch Request for Hearing on a New Contention Regarding Inadequacy of Environmental Report, Post Fukushima, at 1 (June 1, 2011).

Based on new and significant information from Fukushima, the Environmental Report is inadequate post Fukushima Daiichi. Entergy's SAMA analysis ignores new and significant issues raised by Fukushima regarding the probability of both containment failure, and subsequent larger off-site consequences due to failure of the direct torus vent (DTV) to operate.

Pending before the Board is Massachusetts' Contention Motion, which includes a request to reopen the proceeding to admit a new contention that alleges, in part:

The U.S. Nuclear Regulatory Commission's discussion of the environmental impacts of severe accidents in Supplement 29 of the Generic Environmental Impact Statement (GEIS) for License Renewal and the Severe Accident Mitigation Alternatives (SAMA) analysis are inadequate to satisfy the National Environmental Policy Act (NEPA) and NRC implementing regulations "because they do not address new and significant information revealed by the radiological accident at the Fukushima Daiichi nuclear power plant (NPP) complex in Japan."

According to the new contention, "[t]he new and significant information shows that both core-melt accidents and spent fuel pool accidents are more likely than estimated."¹⁹ The contention then lists the information considered to be new and significant.²⁰ The contention is supported by the affidavit of Gordon Thompson.²¹

The Motion for Stay requests that the Commission stay its decision on PW's Appeal because much of it coincides with Massachusetts Contention Motion, including the use of some

¹⁹ Massachusetts' Contention at 5.

²⁰ *Id.* at 6-7. The information alleged to be new and significant is said to show that: the estimate of core damage frequency is low by an order of magnitude; assumptions regarding operator's ability to mitigate an accident are "unrealistically optimistic."

²¹ Declaration of Dr. Gordon R. Thompson In Support of Commonwealth of Massachusetts' Contention and Related Petitions and Motions, at 1 (June 2, 2011).

of Gordon Thompson's supporting affidavit.²² In the alternative, Massachusetts has asked the Commission to strike or ignore Dr. Thompson's affidavit in deciding PW's request for review.

The Staff opposes the Motion for Stay because it is insufficient under the regulations as a motion to stay or a motion to hold in abeyance, and otherwise does not demonstrate why resolution of PW's contentions should be delayed.

DISCUSSION

Massachusetts' Motion is not a Motion to Stay

Massachusetts filed its motion as a motion to stay the Commission's action. However, it is not a motion to stay, but a motion requesting that the Commission hold its action in abeyance. The Commission's Regulations at 10 C.F.R. § 2.342 govern stay requests. The regulation is applicable to motions filed to stay the effectiveness of a decision or action pending the filing of a petition for review.²³ 10 C.F.R. § 2.342. The stay procedures do not apply where there is no outstanding order or action to stay.²⁴

If, in fact, this were a motion to stay, it does not meet the requirements for a stay. Massachusetts neither cites nor discusses the applicable criteria under 10 C.F.R. § 2.342 to support a motion.²⁵ The Commission has previously stated in license renewal proceedings that

²² PW's Request for Review makes two references to Dr. Thompson's affidavit at page 5, n.3, and at 20-21 (in text and n.15). The references are all to his calculation that the occurrence of five core-damage events (TMI, Chernobyl, and 3 reactors at Fukushima) raises the CDF a magnitude higher than calculated by Entergy. Both the Staff and Entergy have refuted this calculation. PW's Appeal at 5, 20-21.

²³ See e.g., *Long Island Lighting Co.*, (Shoreham Nuclear Power Station, Unit 1), CLI-91-8, 33 NRC 461, 468 (1991).

²⁴ *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 61 (1992) (citing *Shoreham*, CLI-91-8, 33 NRC 461).

²⁵ Under 10 C.F.R. § 2.342(e), the factors used to analyze whether a stay is appropriate are (1) whether the moving party has made a strong showing that it is likely to prevail on the merits, (2) whether the party would be irreparably injured absent the stay, (3) whether the granting of the stay would harm (continued. . .)

failing to address the stay criteria is enough to deny a motion without any further consideration.²⁶ Moreover, application of the criteria of 10 C.F.R. § 2.342(e) to Massachusetts' concerns does not favor a stay.

Massachusetts has not demonstrated that it is entitled to a stay. First, Massachusetts has not shown that it is likely to prevail on the merits or that it is likely that its contention will be admitted.²⁷ Second, Massachusetts has not shown any harm, much less irreparable harm, in the absence of a stay of Commission action in this matter. Refusing to grant the stay here will not harm Massachusetts because its contention motion will still be decided by the Board. Moreover, Massachusetts supplies no regulatory or legal authority for granting a stay under the circumstances presented in this matter. Finally, the other two factors — harm to other parties

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other parties, and (4) where the public interest lies. The most important factor is irreparable harm. *Sequoyah Fuels Corp. & General Atomics* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6 (1994). A party urging a stay must show that any irreparable harm is imminent, certain, and great. *Entergy Nuclear Vermont Yankee LLC & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 237-38 (2006) (quoting *Massachusetts Coalition of Citizens with Disabilities v. Civil Defense Agency*, 649 F.2d 71, 75 (1st Cir. 1981)). Absent any showing of irreparable harm, the moving party must make an overwhelming showing of the likelihood of success on the merits. Massachusetts has not done so. *Sequoyah Fuels Corp.*, CLI-94-9, 40 NRC at 6.

²⁶ In the Matter of Amergen Energy Co. LLC (Oyster Creek Nuclear Generating Station), CLI-08-13, 67 NRC 396, 399 (2008) citing *State of Illinois*, CLI-90-11, 32 NRC 333, 334 (1990).

²⁷ Massachusetts' contention asserts that the Staff must consider the events at Fukushima in its discussion of severe accidents in the SEIS for the renewal of Pilgrim's operating license. This assertion is very similar to PW's post-Fukushima contentions, which were denied admission by the Board. It is also very similar to the matters raised in the multi-proceeding suspension motions recently denied by the Commission. *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station, *et al.*) CLI-11-05, 72 NRC __ (Sept. 9, 2011) (slip op.). In that case, the Commission denied Massachusetts' request to suspend the Pilgrim proceeding pending Commission consideration of "new and significant" information from the Fukushima accident. *Id.* (slip op. at 36). The Commission also held that, as to claims under NEPA, the request that the NRC generically consider the information regarding Fukushima as "new and significant" is premature. *Id.* (slip op. at 30). Thus, the likelihood that Massachusetts' contention will be admitted has not been shown.

and consideration of the public interest — do not favor Massachusetts. The request for a stay would harm the other parties' and the public's interest in efficient and expeditious administrative proceedings because it would further delay final Commission action in this case and also lead to duplicative decisions by the Board and the Commission. Therefore, even if this were considered a stay motion, it is insufficient and should be denied.

The Commission's Decision Should not be Held in Abeyance

Massachusetts' instant motion requests that the Commission stay its decision on PW's Appeal because it is similar to Massachusetts' Contention Motion and includes references to statements made by Massachusetts' witness. In the alternative, Massachusetts has asked the Commission to strike or ignore the references in deciding PW's Appeal. The reasons given for the stay are: "To avoid piecemeal and duplicative litigation, and to promote efficient agency decision making."²⁸ The reasons given for striking and disregarding all references in PW's request for review to the opinions of Dr. Thompson are: "it would be premature and potentially prejudicial . . . to consider a portion of [Massachusetts'] filings and expert declarations" now pending before the Board, in ruling on PW's request for review.²⁹ Neither of these reasons supports a motion to hold the Commission's decision in abeyance, nor are Massachusetts' assertions supported by Commission precedent.

As the Commission explained in *Private Fuel Storage*, it weighs a number of factors in determining whether to hold a licensing proceeding in abeyance: 1) whether the issue presented must be addressed immediately; 2) how abeyance will affect expeditious decision making; and 3) whether the abeyance request is narrowly tailored so as to promote adjudicatory

²⁸ Motion to Stay at 1.

²⁹ *Id.* at 2.

efficiency.³⁰ None of those factors favors holding the proceeding in abeyance in this instance. There is no immediacy here; there is no need to address the issue immediately because Pilgrim's license does not expire for approximately another nine months. In addition, abeyance will not promote expeditious or efficient decision making; it will prevent it since it will delay final Commission action and lead unnecessary duplication of efforts by the board and the Commission. Massachusetts has cited no authority, no regulation, and no Commission case law to support its request. It has not sufficiently demonstrated that it will be harmed if the Commission proceeds. Its discussion of regulatory consistency is flawed.

Massachusetts states that if the Commission goes forward, it would lead to "duplicative and piecemeal" litigation. The Staff disagrees. If the Commission decision is issued before the Board acts on Massachusetts' motion, then the Board would be aware of the Commission's position on any overlapping issues, and such knowledge could inform the Board's decision. This would lead to a decision that is in conformance with the Commission's rulings and thus limit the appealable issues. If, however, the Commission proceeds in the manner requested by Massachusetts, then there is a possibility that the Board's order would be inconsistent with the Commission's decision and this would require the Commission to revisit issues that could have been resolved in the review of PW's Appeal. Thus, the goal of regulatory consistency and efficiency would be thwarted.

Similarly, Massachusetts' second basis for its motion, that it would be "premature and potentially prejudicial" to consider part of Massachusetts' filings and witness opinions in ruling on PW's Appeal, does not support holding the proceeding in abeyance. First, PW may not raise

³⁰ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 380-83 (2001).

new arguments to support a contention on appeal.³¹ The reference to Massachusetts' filing and expert opinion raise a new argument relating to accident frequency. New arguments or support for a contention cannot be introduced after the original contentions are due without meeting the late filing criteria of 10 C.F.R. § 2.309(c), (f)(2).³² Second, Massachusetts does not explain how the use of a small portion of its support for its contention in PW's appeal would be prejudicial to its matter before the Board. Its unsupported statements are insufficient to support a motion in abeyance. Therefore, the motion should be denied.

CONCLUSION

Based on the foregoing, Massachusetts' Motion to Stay Commission action on Pilgrim Watch's petition for review should be denied.

Respectfully submitted,

/Signed Electronically By/

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Dated at Rockville, Maryland
this 11th day of October 2011

³¹ See *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 122-23 (2009).

³² *AmerGen Energy Company, LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 261 (2009).

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER TO COMMONWEALTH OF MASSACHUSETTS' REQUEST TO STAY COMMISSION DECISION OR IN THE ALTERNATIVE TO STRIKE REFERENCE TO MASSACHUSETTS' EXPERT" have been served upon the following by the Electronic Information Exchange, this 11th day of October, 2011:

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