

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)

December 8, 2011

PILGRIM WATCH'S PETITION FOR REVIEW OF MEMORANDUM AND ORDER (DENYING COMMONWEALTH OF MASSACHUSETTS' REQUEST FOR STAY, MOTION FOR WAIVER, AND REQUEST FOR HEARING ON A NEW CONTENTION RELATING TO THE FUKUSHIMA ACCIDENT) NOV. 28, 2011

Respectfully submitted,

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. PETITION FOR REVIEW OF COMMONWEALTH'S REQUEST FOR HEARING 2

A. The Decision of which Review Is Sought 2

B. Why the Massachusetts Decision Is Erroneous..... 3

C. The Commission Should Review the Massachusetts Decision 3

III. ARGUMENT 4

A. The Record in this Proceeding is Not Closed..... 4

B. The Massachusetts Decision Does Not "Resolve" PW's New Contentions..... 6

IV. CONCLUSION..... 8

Pilgrim Watch's Petition For Review Of Memorandum And Order (Denying Commonwealth Of Massachusetts' Request For Stay, Motion For Waiver, And Request For Hearing On A New Contention Relating To The Fukushima Accident) Nov. 28, 2011

I. INTRODUCTION

The November 18, 2011 Memorandum and Order of a Majority of the Board (the "Massachusetts Decision") is largely directed to requests and motions filed by the Commonwealth of Massachusetts. Portions of it, however, directly affect Pilgrim Watch ("PW"), a party to this proceeding.

Pursuant to 10 C.F.R. § 2.341 PW, by and through its pro se representative Mary Lampert, hereby petitions the Nuclear Regulatory Commission ("NRC" or "Commission") to review and remand any aspect of the Massachusetts Decision that affect Pilgrim Watch, including the Massachusetts Decision's apparent holding that the Commonwealth was required to meet a "reopening requirement" (Massachusetts Decision, 69), and more particularly:

- a. The Majority's statements that
 - i. "We originally closed these proceedings by order issued June 4, 2008" (Massachusetts Decision, 3), and
 - ii. "[T]he evidentiary record in this proceeding remains closed" (Massachusetts Decision, 71); and
- b. The Majority's attempt to use the Massachusetts Decision to retroactively support its decisions of August 11, 2011 (referred to by the Majority as the "Pre-Fukushima Order") and September 8, 2011 (referred to by the Majority as the "Post Fukushima Order", these Orders are collectively referred to as the "Pilgrim Watch Decisions) that improperly rejected Requests for Hearing filed by PW, and Requests for Review of which have for some time been pending before the Commission:

[T]he status of this proceeding was, at the time this contention [of the Commonwealth of Massachusetts] was submitted, was to address the narrow portion of Pilgrim Watch's Contention 3 remanded to us ... and address five new contentions filed by Pilgrim Watch since the remand, all of which were previously resolved or are resolved by this Order." (Massachusetts Decision 64, fn 232, underlining added)

II. PETITION FOR REVIEW OF COMMONWEALTH'S REQUEST FOR HEARING

A. The Decision of Which Review Is Sought

Pilgrim Watch seeks review of aspects of the Massachusetts Decision that directly affect Pilgrim Watch. The matters of fact or law raised in PW's petition for review were previously raised by before the Board, and before the Commission.¹

¹**Before the Board - Cables Contention:** 2011/01/20-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; 2011/01/20-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; 2011/01/19-Affidavit of Paul M. Blanch; 2011/03/12-Pilgrim Watch Memorandum Regarding Fukushima; 2011/03/28-Pilgrim Watch Post-Hearing Memorandum; 2011/04/12-Pilgrim Watch Memorandum-Entergy's Incorrect and Misleading Information Regarding Proven Tests to Detect Cable Insulation Degradation-Video Supplement; 2011/04/11-Pilgrim Watch Memorandum-Entergy's Incorrect and Misleading Information Regarding Proven Tests to Detect Cable Insulation Degradation; 2011/04/24-Pilgrim Watch Response to Entergy's April 22, 2011 Filing Regarding Proven Tests to Detect Cable Insulation Degradation; 2011/06/23- Pilgrim Watch Memorandum Re Submerged Cables. **Cleanup Contention:** Pilgrim Watch Request For Hearing On A New Contention, Nov 29, 2011; Pilgrim Watch Reply to Entergy's and NRC Staff's Answers Opposing Pilgrim Watch Request for Hearing on a New Contention, Jan 7, 2011

Before the Commission -Cables & Cleanup Contentions: Pilgrim Watch's Petition For Review Of Memorandum And Order (Denying Pilgrim Watch's Requests For Hearing On Certain New Contentions) ASLB No. 06-848-02-LR, August 11, 2011 (August 26, 2011); Pilgrim Watch Reply To NRC Staff's Answer To Pilgrim Watch's Request For Review, Sept 12, 2011; Pilgrim Watch Reply To Entergy's Answer Opposing Pilgrim Watch's Request For Review, Sept 12, 2011. **Post Fukushima Contentions:** Pilgrim Watch's Petition For Review Of Memorandum And Order (Denying Pilgrim Watch's Requests For Hearing On New Contentions Relating To Fukushima Accident) Sept. 8, 2011(Sept 23, 2011); Pilgrim Watch Reply To Entergy's Answer To Pilgrim Watch's Petition For Review, October 11, 2011;); Pilgrim Watch Reply To NRC Staff's Answer To Pilgrim Watch's Petition For Review, October 11, 2011.

B. Why the Massachusetts Decision Is Erroneous

As discussed in more detail below, the Massachusetts Decision is erroneous for a number of different, but often interrelated, reasons. In this Request for Review, Pilgrim Watch addresses whether the Commonwealth here, and PW in its previously filed Requests for Hearing, was required to move to reopen under 10 CFR 2.326.

PW's Requests for Review now pending before the Commission plainly show that Rule 2.326 is not applicable for the simple reason that, at the time PW's Requests for Hearing were filed, the record in this proceeding was not closed.² It similarly was not closed, as the Majority admits (see the Massachusetts Decision, 64, fn 232) when the Commonwealth of Massachusetts filed its new contention. The Board cannot properly rewrite history to avoid this simple fact.

Also, the Board majority cannot properly use this November 2011 Massachusetts Decision to bolster its previous incorrect Pilgrim Watch Decisions that are already pending before the Commission. What the Board ruled in its earlier Pilgrim Watch Decisions was erroneous, and those erroneous conclusions are not "resolved by this [Massachusetts] Order."

C. The Commission Should Review the Massachusetts Decision

Fundamental principles and fairness require the Commission to review the Massachusetts Decision. Whether a new contention directed to a matter that has not previously been considered or decided must meet the requirements of 10 C.F.R. 2.326 (Motions to Reopen) raises substantial and important questions of law and policy that critically affect the public interest. The Majority's

² The legal and factual errors in the Board's Pilgrim Watch Decisions are spelled out in detail in numerous filings served on the Board in connection with PW's pending Requests for Review, and also in PW's November 18, 2011 contention cited by the Board at 6, fn 24 of the Massachusetts Decision. Except for its incorrect statement that this proceeding has been closed since June of 2008 (see p. 1, above), the Board Majority has not attempted to address them.

legal conclusions as to when a Motion to Reopen is required are in conflict with the Commission's rules and existing law, and its findings of fact in support of those conclusions are erroneous. (Standards for Review 10 C.F.R. 2.341(a)(1))

III. ARGUMENT

A. The Record in this Proceeding is Not Closed

The Board's assertion that "[w]e originally closed these proceedings by order issued June 4, 2008"³ (Massachusetts Decision, 3) is simply wrong. The unpublished memorandum and order cited by the Board refers only to Contention 1, and utterly fails to support the Majority's contention that any other aspect of "these proceedings" has been "closed."

We note in taking this approach that we have not prior to this date formally closed the record with regard to Contention 1. ... In light of these circumstances we consider the record with respect to Contention 1 is effectively closed, and to the extent necessary we here and now formally so close it. (Memorandum and Order of June 4, 2008, pp. 2-4, underlining added)

The Board Majority also asserted, in the very last sentence of its entire Massachusetts Opinion, that "the evidentiary record in this proceeding remains closed." (Massachusetts Decision, 71).

Here, the Board also ignores critical facts. As shown above, the "evidentiary record" was not closed when PW filed at least the first two of its new contentions, referred to as "Cables" and "Recriticality." The remand hearing before the Board on Contention 3 had not even taken place.

Additionally, 10 C.F.R. 2.326 says "reopen a closed record." It does not say "reopen if any evidentiary record has been closed." The record of a "proceeding" and the "evidentiary

³ LBP-068-22, June 4, 2004, cited in footnote 8 at page 3 of the Massachusetts Decision.

record" relating to a particular contention are not the same. A hearing before a Board on a contention, such as contention 1, creates an "evidentiary" record of that contention, but the "record" of a proceeding includes not only all "evidentiary" records that may have been created but also the record relating to any other timely raised issues, such as the contentions filed by PW and the Commonwealth. The record in this proceeding was not closed by the Board's Partial Initial Decisions on either Contention 1 or, more recently, Contention 3. ("A partial initial decision is a decision rendered after an evidentiary hearing on one or more contentions, but that does not dispose of the entire matter." NRC Practice Digest, Appeals 48, Pilgrim Nuclear Power Station, CLI-08-2, emphasis added.

The Administrative Safety Licensing Board (but apparently not this Board majority) knows the difference between closing the record as to a particular contention and closing the record of a proceeding. See, for example, the ASLB Orders in *Southern Nuclear Operating Co.*, LBP 10-21 ("Once the record of a proceeding is closed" and *Areva Enrichment Services, LLC*, Feb. 18, 2011 ("The Board hereby closes the record of this proceeding..."). After the hearing on Contention 1 had been completed, the Board here issued its June 4, 2008 Order closing "the record with regard to Contention 1." But the Board here has not closed the record in this proceeding, or with respect to any of the issues raised by the Commonwealth's, or PW's, new contentions; it has entered no like those in *Southern Nuclear* or *Areva*.

Unlike the majority, Chief Judge Young has correctly recognized that the record in this proceeding has not been closed: "The Board Majority's Initial Decision does not terminate this proceeding or constitute a final licensing decision." (LBP-11-18, Separate Statement p. 3) In concurring "in results only" of the Majority's Massachusetts Decision, Judge Young is again clear that the record in this proceeding - at least as to Fukushima issues - is not closed.

B. The Massachusetts Decision Does Not "Resolve" PW's New Contentions

The Board's statement that Massachusetts Decision "resolves" PW's five new contentions is wrong as a matter of both fact and law.

The "reopening" requirement of 2.326 applies only when the entire record of the proceeding before the Board has been closed (which is not the case here), or when (as in *Yankee Atomic*) the new contention is directed to something that the Board has already decided (which also is not the case here).

The Board Majority has admitted that PW's' new contentions raised new issues that do not "relat[e] to a previously admitted contention." (Pre-Fukushima Order, 14); and the same is true with respect to the new contention presented by the Commonwealth. When those new contentions were filed, no record related to any of them was "closed." In fact, no such record even existed

The reopening rule does not apply, and indeed makes no sense, when (as with PW's new contentions) the new Request for Hearing "raises new matters not heretofore raised in this proceeding," and does not seek to reopen any portion of any previous record or to change any previous result.

The Board Majority's Massachusetts Decision cites no authority for its apparent position that a motion to reopen is required if any aspect of the record in the proceeding, no matter how unrelated, has been closed. The Board Majority's Pre-Fukushima Pilgrim Watch Decision did cite five previous decisions and an extract from the 1986 Federal Register. (see Pre-Fukushima Decision, pp. 15-17) However, as PW showed in its Requests for Review of that decision and

the Board's Post-Fukushima Decision, neither the Federal Register extract nor a single case relied on the Board Majority supports its conclusion.⁴

In all five cases cited by the the Board in its Pre-Fukushima Decision, the new contention was directed to a matter as to which the record had been closed.⁵ In two of the five, whether a motion to reopen was required was not even at issue since such a motion had in fact been filed. No case cited by the Board involved a new contention directed to a matter that had not previously been heard or sought to reopen any portion of a record that had been closed. Properly understood, all five decisions support PW.

The 1986 Federal Register extract (generally contemporaneous with *Carolina Power and Long Island Lighting*) that the Board quotes (Pre-Fukushima Decision, p 15, fn 75) similarly supports PW and provides no support for the Board's position. That extract said, underlining added, that a "motion to reopen must be filed whenever a proponent seeks to add new

⁴ Cables & Cleanup Contentions: Pilgrim Watch's Petition For Review Of Memorandum And Order (Denying Pilgrim Watch's Requests For Hearing On Certain New Contentions) ASLB No. 06-848-02-LR, August 11, 2011 (August 26, 2011), pgs., 5-6; Pilgrim Watch Reply To NRC Staff's Answer To Pilgrim Watch's Request For Review, Sept 12, 2011, pgs., 1-3; Pilgrim Watch Reply To Entergy's Answer Opposing Pilgrim Watch's Request For Review, Sept 12, 2011, pgs., 3-7. Post Fukushima Contentions: Pilgrim Watch's Petition For Review Of Memorandum And Order (Denying Pilgrim Watch's Requests For Hearing On New Contentions Relating To Fukushima Accident) Sept. 8, 2011(Sept 23, 2011), pgs., 8-9; Pilgrim Watch Reply To Entergy's Answer To Pilgrim Watch's Petition For Review, October 11, 2011, pgs., 1-2; Pilgrim Watch Reply To NRC Staff's Answer To Pilgrim Watch's Petition For Review, October 11, 2011, pgs., 1-3.

⁵ (1) Oyster Creek: The Board had closed the entire record of the proceeding and issued its initial decision (CLI-08-12, 2); and Citizen's had filed a "motion to reopen the record." (CLI-08-28, pp 2, 3); (2) Private Fuel Storage, Utah sought to reopen a closed record. (CLI-05-12, pp 1, 6, 7); (3) Vermont Yankee - The "new contention" was essentially the same as other contentions previously decided and as to which the record was closed. "We agree with the Board that NEC has simply rehashed old arguments in Contention 2C". (CLI-10-17, 67); (4) Carolina Power & Light Co., ALAB-526 (1979) was decided before the present rules were adopted. The entire record before the board had been closed, the board had authorized issuance of permits, and jurisdiction over the entire proceeding had moved to the Commission. (5) Long Island Lighting, LBP-83-30 (1983) was also decided long before the present rules were adopted. The the petitioner sought to "supplement the record on a contention on which the evidentiary hearing has been completed" (pg 4). All issues as to which the Board had jurisdiction had been litigated. (pp 4-5); (6) In New Jersey Environmental, on which Entergy and the Staff have relied before the Commission, Citizens did not file its motion to reopen until after the administrative record had been closed and the Board had issued its Initial Decision.

information to a closed record, whether the information concerns a new contention or one which has already has been heard"). PW's new contentions do not seek to reopen or "to add new information to a closed record."

The Board Majority, Entergy and the NRC Staff all seem to wish that Rule 2.326(a) was not limited to "a motion to reopen a closed record." They also seek to read 2.326(3)(d) as if it said "A motion to reopen which relates to a contention not previously in controversy among the parties must also satisfy the requirements for nontimely contentions in § 2.309(c) whether or not it seeks to reopen any closed portion of the record."

Unfortunately, at least for the Board Majority, Entergy and the NRC Staff, Rule 2.326 is limited to motions to reopen a closed record, and the above underlined addition to 2.326(d)(3) does not exist.

All of this being so, the Board Majority's statement that the Massachusetts Decision "resolves" PW's five new contentions is simply wrong. To the extent that Board intended to use the Massachusetts Decision to "improve" its position in the Pilgrim Watch Decisions now before the Commission, that also is wrong. Those erroneous Decisions must stand on their own, and be reviewed on the basis of what has been said in the Decisions and papers that have already been filed with the Commission with respect to them.

IV. CONCLUSION

For the foregoing reasons, the Commission should review and reverse the Massachusetts Decision insofar as it is directed to the status of the record in this proceeding, or to the circumstances under which a Motion to Reopen is required.

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