

December 19, 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S ANSWER IN OPPOSITION TO PILGRIM
WATCH'S PETITION FOR REVIEW OF LBP-11-35

INTRODUCTION

Pursuant to 10 C.F.R. § 2.341(b)(3), the Staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby files its answer in opposition to Pilgrim Watch's ("PW") 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 ("New Petition for Review").¹ The New Petition for Review challenges the statement in the Board's Memorandum and Order Denying Commonwealth of Massachusetts' Request for Stay, Motion for Waiver, and Request for Hearing on a New Contention Relating to Fukushima Accident² that the record in the Pilgrim Nuclear Generating Station ("Pilgrim") relicensing proceeding has been closed.³ PW has made the same argument in two of its petitions for review previously filed and now pending before the Commission.⁴

¹ Pilgrim Watch's Petition for Review of Memorandum and Order (Denying Commonwealth for Massachusetts' Request for Stay, Motion for Waiver, and Request for Hearing on a New Contention Relating to the Fukushima Accident) Nov. 28, 2011 (Dec. 8, 2011) (Agencywide Documents Access and Management System ("ADAMS") Accession No. ML11342A223) ("New Petition for Review").

² *Entergy Nuclear Generating Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-11-35, 74 NRC __, __ (Nov. 28, 2011) (slip op. at 3).

³ New Petition for Review at 1.

⁴ Pilgrim Watch's Petition for Review of Memorandum and Order (Denying Pilgrim Watch's Requests for Hearing on Certain New Contentions) ASLBP No. 06-848-02-LR, August 11, 2011 at 3-6

PW's New Petition for Review should be denied because PW seeks only to bolster its arguments in Petition 1 and Petition 2 currently pending before the Commission, and does not attempt to address the actual findings or conclusions in the Board's Order on the Commonwealth's new contention under appeal here. Such appeals are not contemplated by the regulations. Therefore, the New Petition for Review should be dismissed.

PROCEDURAL BACKGROUND

Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. submitted a license renewal application for Pilgrim on January 25, 2006.⁵ The application has been opposed by both PW⁶ and the Commonwealth of Massachusetts ("Commonwealth").⁷ On May 2, 2011 the Commonwealth filed a request to stay the proceedings based on its concerns regarding the Fukushima accident.⁸ It requested that the Pilgrim relicensing proceeding be halted until the Commission had completed its studies of the Fukushima accident.⁹ The Commonwealth also filed, on June 2, 2011, a Waiver Request seeking permission to challenge

(Aug. 26, 2011) (ADAMS Accession No. ML11238A118) (Petition 1); 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 at 7-9 (Sept. 23, 2011) (ADAMS Accession No. ML11266A103) (Petition 2).

⁵ Entergy Nuclear Operations, Inc., License Renewal Application – Pilgrim Nuclear Power Station (January 25, 2006) (ADAMS Accession No. ML060300028).

⁶ Request for Hearing and Petition to Intervene by Pilgrim Watch (May 25, 2006) (ADAMS Accession No. ML061630125).

⁷ 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 30, 2006) (ADAMS Accession No. ML061630088). The request for hearing and petition to intervene were denied by the Board on October 16, 2006. *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station) LBP-06-23, 64 NRC 257 (2006). The Commonwealth reentered the proceeding as an interested state on May 6, 2008. Commonwealth of Massachusetts' Notice of Intent to Participate as an Interested State (May 6, 2008) (ADAMS Accession No. ML081500531).

⁸ Commonwealth of Massachusetts Motion to Hold Licensing Decision in Abeyance Pending Commission Decision Whether to Suspend the Pilgrim Proceeding to Review the Lessons of the Fukushima Accident (May 2, 2011) (ADAMS Accession No. ML111220326) ("Request for Stay").

⁹ *Id.*

the exclusion from consideration of spent fuel storage during relicensing proceedings.¹⁰ At the same time the Commonwealth filed a motion to admit a contention¹¹ accompanied by a new contention challenging the Staff's environmental considerations because the Staff's Final Supplemental Environmental Impact Statement did not consider alleged "new and significant" information revealed by the accident at Fukushima.¹²

On November 28, 2011, the Board issued a Memorandum and Order denying the Commonwealth's Request for Stay and Motion for Waiver, and dismissing the Fukushima Contention.¹³ PW filed its New Petition for Review on December 8, 2011. Also on December 8, 2011, the Commonwealth filed a notice of appeal of the Board's order.¹⁴ The Staff is addressing the Commonwealth's appeal in a separate pleading filed today.

DISCUSSION

PW's New Petition for Review should be denied because the substance of the New Petition for Review is outside the scope of the appealable issues contemplated by the regulations.

10 C.F.R. § 2.341 outlines the Commission's standards for granting review. The regulations state:

¹⁰ 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) (ADAMS Accession No. ML111530342) ("Waiver Request").

¹¹ 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) (ADAMS Accession No. ML111530340) ("Fukushima Contention").

¹² Commonwealth of Massachusetts' Contention Regarding New and Significant Information Revealed by the Fukushima Radiological Accident (June 2, 2011) (ADAMS Accession No. ML111530343).

¹³ *Entergy Nuclear Generating Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-11-35, 74 NRC __ (Nov. 28, 2011).

¹⁴ Commonwealth of Massachusetts' Notice of Appeal of LBP-11-35 (Dec. 8, 2011) (ADAMS Accession No. ML11342A168)

The petition for review may be granted in the discretion of the Commission, giving due weight to the existence of a substantial question with respect to the following considerations: (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding; (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law; (iii) A substantial and important question of law, policy, or discretion has been raised; (iv) The conduct of the proceeding involved a prejudicial procedural error; or (v) Any other consideration which the Commission may deem to be in the public interest.¹⁵

While the regulation leaves room for ancillary issues, the emphasis and intent of the regulation is to deal with those matters traditionally reviewed on appeal: erroneous findings of material fact, faulty legal conclusions, the resolution of a novel legal question, or prejudicial procedural errors – all relating to the decision on appeal¹⁶

PW's appeal, however, does not deal with any of those issues, but seeks only to bolster its arguments in previous appeals now pending before the Commission. As stated above, PW previously filed two petitions for review from Board orders dismissing its contentions for failure to, *inter alia*, move to reopen the record.¹⁷ In *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station) LBP-11-20, 74 NRC __ (Aug 11, 2011), the Board discussed the closing of the record and drew a legal conclusion, based on precedent and case law, that the record was closed and PW was required to file a motion to reopen.¹⁸ PW filed a petition for review challenging that conclusion.¹⁹ Similarly, in *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station) LBP-11-23, 74 NRC __ (Sept. 8, 2011), the Board restated its previous ruling that the record

¹⁵ 10 C.F.R. § 2.341(b)(4).

¹⁶ See *id.*

¹⁷ See Petition 1 at 2-6; Petition 2 at 2, 7-9.

¹⁸ *Entergy Nuclear Generating Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station) LBP-11-30, 74 NRC __, __ (Aug. 11, 2011) (slip op. at 13).

¹⁹ Petition 1 at 3-6.

was closed and that PW was required to file a motion to reopen.²⁰ PW once again filed a petition for review, wherein it stated that the “primary issue before the Commission is whether Pilgrim Watch must file a Motion to Reopen,” followed by a detailed challenge to the Board’s conclusion.²¹ In both situations, the Board articulated a legal conclusion which was subsequently challenged by PW.

In the New Petition for Review, PW’s challenges do not focus on legal conclusions or findings of fact and, therefore, do not meet the bases contemplated by the regulations for filing such a petition. The New Petition for Review focuses on brief statements made by the Board in its discussion of the pertinent background.²² These statements are not legal conclusions or findings of fact, but rather provide the procedural history of the proceeding. The Board does not discuss whether or not the record is closed.²³ It simply states: “We closed these proceedings by order issued June 4, 2008.”²⁴ PW takes issue with this and bases its petition around this statement.

Since PW’s argument is not within the scope of the appealable issues contemplated by the regulations, PW’s New Petition for Review should be denied. PW does not challenge the actual findings or conclusions of the Board, nor does it seek to advance the Massachusetts Attorney General’s arguments. Ironically, PW accuses the Board of “intend[ing] to use the Massachusetts Decision to ‘improve’ its position in the Pilgrim Watch Decisions now before the Commission.”²⁵ Yet, that is exactly what PW is attempting here. PW’s basic argument in the

²⁰ *Entergy Nuclear Generating Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station) LBP-11-23, 74 NRC __, __ (Sept. 8, 2011) (slip op. at 5-7).

²¹ Petition 2 at 7-9.

²² See New Petition for Review at 4, 6.

²³ *Pilgrim*, LBP-11-35, 74 NRC at __ (Nov. 28, 2011) (slip op. at 3).

²⁴ *Id.*

²⁵ New Petition for Review at 8.

New Petition for Review is the same argument made in its previous petitions.²⁶ It simply seeks to bolster that argument before the Commission, even though the Board did not discuss the issue in its Order.

CONCLUSION

Since PW's focus is purely on protecting its interests and bolstering its arguments in other appeals, PW's New Petition for Review is not relevant to the Board's Order and therefore not within the scope of the appealable issues contemplated by the regulations, and should therefore be denied.

Respectfully submitted,

/Signed (electronically) by/

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²⁶ See Petition 1 at 3-6; Petition 2 at 7-9.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC Staff's Answer in Opposition to Pilgrim Watch's Request for Hearing on A New Contention Regarding Inadequacy of Environmental Report, Post Fukushima " has been served upon the following by the Electronic Information Exchange, this 19th day of December, 2011:

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