

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Dale E. Klein, Chairman
Edward McGaffigan, Jr.
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DOCKETED 03/15/07
SERVED 03/15/07

In the Matter of)
)
ENERGY NUCLEAR VERMONT YANKEE LLC)
and)
ENERGY NUCLEAR OPERATIONS, INC.)
)
(Vermont Yankee Nuclear Power Station))
_____)

Docket No. 50-271-LR

In the Matter of)
)
ENERGY NUCLEAR GENERATION COMPANY)
and)
ENERGY NUCLEAR OPERATIONS, INC.)
)
(Pilgrim Nuclear Power Station))
_____)

Docket No. 50-293-LR

CLI-07-13

MEMORANDUM AND ORDER

Today we deny the Massachusetts Attorney General's (Mass AG's) Motion for Reconsideration of CLI-07-3.¹ In CLI-07-3 we rejected the Mass AG's appeal of decisions by two different Licensing Boards in proceedings to renew the operating license at the Vermont Yankee Power Station in Windam County, Vermont² and the Pilgrim Nuclear Power Station in Plymouth, Massachusetts.³

¹ CLI-07-3, 65 NRC __ (Jan. 22, 2007).

² LBP-06-20, 64 NRC 131 (2006).

³ LBP-06-23, 64 NRC __ (2006).

I. BACKGROUND

In CLI-07-3, we affirmed the Boards' rejection in each proceeding of a contention which disputed findings in the Generic Environmental Impact Statement for license renewal concerning the environmental consequences of spent fuel storage. The contention argued that recent evidence showed that high-density storage in spent fuel pools is more dangerous than previously believed. In our decision, we noted that the Mass AG had filed a petition for rulemaking raising even broader issues than the contention,⁴ and said that a petition for rulemaking is a more appropriate avenue for resolving generic concerns about spent fuel fires than a site-specific contention in an adjudication.⁵

The Mass AG argues that CLI-07-3 was ambiguous in terms of its finality and whether the Mass AG is considered a "party" to the ongoing license proceedings. Her motion asks that the Commission:

(a) confirm [that CLI-07-3] is a non-final decision with respect to the Attorney General, (b) clarify that the Attorney General continues to have party status in the individual license renewal proceedings until those proceedings are concluded, and (c) further clarify that the Attorney General has the right to seek judicial review, as necessary, to ensure the application of the final rulemaking to the individual license renewal proceedings for Pilgrim and Vermont Yankee.⁶

The Mass AG pointed to language in CLI-07-3 saying that it would be "premature" to consider staying the license renewal proceedings to await the outcome of the rulemaking petition because many issues unrelated to the Mass AG's rulemaking petition must also be resolved in

⁴ See Massachusetts Attorney General's Petition for Rulemaking to Amend 10 C.F.R. Part 51 (August 25, 2006), see 71 Fed. Reg. 64,169 (public notice).

⁵ CLI-07-3, 65 NRC ___, slip op. at 2.

⁶ See Massachusetts Attorney General's Motion for Reconsideration and Clarification of CLI-07-03, at 3 (Feb. 1, 2007).

those proceedings.⁷ The Mass AG contends that if it is premature to rule on her request to halt the license renewal proceedings, then her request is still pending and, therefore, CLI-07-3 is not in all respects a “final” decision.

The NRC Staff and Entergy⁸ oppose the Motion for Reconsideration.⁹ They say that the Mass AG’s motion has not shown any basis for us to reconsider the ruling, and the motion is more a request for clarification than a request for reconsideration. They also suggest that the Commission make clear that our previous ruling was final with respect to the Mass AG’s participation in the *Pilgrim* and *Vermont Yankee* license renewal proceedings.¹⁰

II. ANALYSIS

A. No Basis for Reconsideration

Despite its characterization as a motion for “reconsideration,” the Mass AG’s pleading gives us no reason to reconsider our decision in CLI-07-3. A motion for reconsideration must demonstrate “compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid.”¹¹ The Mass AG calls the decision “internally inconsistent, unclear, or potentially prejudicial” to her

⁷ See CLI-07-3, slip op. at 9 n.37.

⁸ Entergy Nuclear Operations, Inc., together with Entergy Nuclear Generation Company, holds the operating license for the Pilgrim Nuclear Power Station. Entergy Nuclear Operations, Inc. and Entergy Vermont Yankee, LLC, hold the license for the Vermont Yankee Nuclear Power Station. In today’s decision we refer to the license applicants collectively as “Entergy.”

⁹ See NRC Staff Answer to Massachusetts Attorney General Motion for leave to File and Motion for Reconsideration of CLI-07-03 (Feb. 16, 2007); Entergy’s Response to Massachusetts Attorney General’s Motion for Reconsideration and Clarification of CLI-07-03 (Feb. 16, 2007).

¹⁰ *Id.* at 5.

¹¹ 10 C.F.R. § 2.323(e).

claims,¹² but does not contend that it violates our regulations or NEPA. The whole of the Mass AG's argument goes to the supposed "ambiguity" concerning the decision's finality. She has not demonstrated a "clear and material error" in our affirming the two Board decisions we were reviewing.

B. Finality of Decision

Our decision in CLI-07-3 was final as to the Mass AG's only claims in the two license renewal proceedings. The Mass AG has no claim remaining in either adjudication. Thus, if she wants to pursue judicial review of our rejection of her contentions, she must do so now.¹³ It is true that the petition for rulemaking currently under consideration might possibly render judicial review moot. But the mere potential that an issue may become moot in the future due to a rulemaking does not affect the finality of the decision today.

To clarify an additional point, under NRC regulations, the Mass AG currently has no right to request that the final decisions in *Pilgrim* and *Vermont Yankee* license renewal proceedings be stayed until the rulemaking is resolved.¹⁴ As we indicated in CLI-07-3, only a "party" to the proceedings, or an interested governmental entity participating under 10 C.F.R. §2.315, may file a request to stay proceedings (pending a rulemaking) under 10 C.F.R. §2.802.¹⁵ The Mass AG is neither. Because she did not offer an admissible contention, she

¹² Massachusetts Attorney General's Motion for Reconsideration, at 2.

¹³ See *Environmental Law and Policy Ctr. v. NRC*, 470 F.3d 676, 681 (7th Cir. 2006). She also has the option of awaiting an NRC decision in her petition for rulemaking. Agency decisions on rulemaking petitions are judicially reviewable. See, e.g., *Bullcreek v. NRC*, 359 F.3d 536 (D.C.Cir. 2004).

¹⁴ The Mass AG's rulemaking petition requested such. CLI-07-3, slip op. at 9 n.37.

¹⁵ *Id.*

was never admitted to either of the two proceedings as a “party.”¹⁶

III. CONCLUSION

For the forgoing reasons, the Mass AG’s motion for reconsideration is denied. Our decision in CLI-07-3 is clarified as above.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-cook
Secretary of the Commission

Dated at Rockville, MD
This 15th day of March, 2007

¹⁶ A state may participate *either* as an interested governmental entity *or* as a party with its own contentions, but not both. *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619 626-27 (2004). Therefore, the Mass AG could not have sought “participation” status under section 2.315 while the appeal on the admissibility of her contention was still pending. But, as at least one contention has been admitted for hearing in each of the *Vermont Yankee* and *Pilgrim* proceedings, the Mass AG could seek participant status even now.