

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Commission

In the Matter of)	
Entergy Nuclear Generation Co.)	Docket No. 50-293-LR
And Entergy Nuclear Operations, Inc.)	
(Pilgrim Nuclear Power Station))	September 2, 2011

**COMMONWEALTH OF MASSACHUSETTS OPPOSITION TO APPLICANT’S
MOTION FOR ISSUANCE OF RENEWED LICENSE**

Pursuant to 10 C.F.R. § 2.323(c), the Commonwealth of Massachusetts hereby opposes Entergy’s Motion for issuance of the license extension for the Pilgrim Nuclear Power Plant.¹

I. Introduction

On August 23, 2011, Entergy filed a motion with the Commission claiming that, since the Pilgrim Atomic Safety and Licensing Board (ASLB) has “resolved all issues” before it,² the NRC’s “immediate effectiveness rule” requires the Commission promptly to issue the license renewal for the Pilgrim Nuclear Power Plant.³ However, the Pilgrim ASLB has expressly stated that it has not resolved all issues before it, and that further ASLB review is required to address the Commonwealth’s contention (and those by another party) regarding new and significant information involving the lessons learned from the Fukushima accident and their relevance to the Pilgrim plant.⁴ Therefore, the

¹ Applicant’s Motion for Issuance of Renewed License (August 23, 2011)(Entergy Motion).

² Entergy Motion at 8 *quoting* 10 C.F.R. § 2.1210(d).

³ Entergy Motion at 1 *citing* 10 C.F.R. §§ 2.340 and 2.212(d).

⁴ *See Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station)*, LBP-11-20, 73 N.R.C. ___, slip op. at 2 – 3 (Aug. 11, 2011) (“LBP-11-20”) (discussed *infra*).

Pilgrim ASLB has not yet issued a final partial initial decision (PID) for the Pilgrim relicensing proceeding and retains jurisdiction over this case. There is no final PID that triggers the NRC's immediate effectiveness rule, and the immediate effectiveness regulations relied upon by Entergy do not support the relief that it requests.

Entergy apparently filed this unauthorized Motion in an effort to circumvent ASLB jurisdiction over important Fukushima-related issues now pending before the Board,⁵ and to forum shop its complaints about the Pilgrim ASLB process prematurely and inappropriately to the Commission.⁶ The Commission should not condone Entergy's tactics to disregard established NRC procedures and ASLB jurisdiction. The Commission also should not accept Entergy's invitation to conduct a premature merits review, on an incomplete record, of the Pilgrim relicensing proceeding.

Finally, Entergy requests the Commission to disregard the new and significant information on the environmental impacts of relicensing the Pilgrim plant, based upon the lessons learned from Fukushima, and to grant the Pilgrim license extension now. However, to do so, the Commission would violate the National Environmental Policy Act and deny the Commonwealth its right under the Atomic Energy Act to a hearing on these material licensing issues. *Infra*.

Therefore Entergy's Motion should be denied.

⁵ Commonwealth of Massachusetts' Contention Regarding New and Significant Information Revealed by the Fukushima Radiological Accident (June 2, 2011); 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).

⁶ *Cf.* e.g. 10 C.F.R. § 2.333 (ASLB authority to regulate proceedings).

II. The NRC's immediate effectiveness rules presently do not apply to the Pilgrim relicensing proceeding because the ASLB has not resolved all issues before it, including the Commonwealth's contention on the new and significant information learned from the accident at Fukushima.

On July 19, 2011, the Pilgrim ASLB issued a PID on certain contentions submitted by another party (Pilgrim Watch) in this proceeding. In a separate statement, the Chairman of the ASLB addressed the Pilgrim Watch issues and, as relevant here, then stated:

Additionally, there have been matters raised, relating to how new information arising out of the Fukushima accident in Japan (which occurred only days after the March oral argument in this proceeding) should affect the environmental analysis (including the SAMA analysis) on the application under NEPA, as well as matters relating to the sought license renewal in certain other particulars...

Preliminarily, I would tend to find that some of these arguments do warrant greater scrutiny of the plant and application in light of Fukushima-related information prior to any decision whether to renew the license for another 20 years. **However, because the Board Majority's Initial Decision does not terminate this proceeding or constitute a final licensing decision, I will address the preceding matters in greater detail, as appropriate, in the context of later Board rulings on several pending new contentions and other filings submitted by Pilgrim Watch and the Commonwealth of Massachusetts.**⁷

On August 11, 2011, the ASLB, consistent with the Chairman's July 19th statement, stated:

The Board will address Pilgrim Watch's fourth and fifth contentions, which both concern information derived from the events at the Fukushima reactors, in a separate ruling...[T]hat separate ruling will address filings by the Commonwealth of Massachusetts that also concern information from the Fukushima events. The Commonwealth filed a motion before us on May 2, 2011 that amounts to a request for a stay of this proceeding, and submitted on June 2 both (a) a hearing request for a new contention challenging the Entergy SAMA analysis because of asserted new information regarding both Spent Fuel Pool (SFP) accidents and severe accident probabilities based upon the events at Fukushima and (b) a request to waive our regulation that SFP

⁷ *Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station)*, LBP-11-18, 73 N.R.C. ___, slip op. at 3 – 4 (July 19, 2011) (emphasis added).

issues are outside the scope of a license renewal proceeding such as this.⁸

The Pilgrim ASLB has not yet issued its ruling on the Commonwealth's filings, although the ASLB clearly has advised all parties that it intends to do so. The Pilgrim ASLB also has not yet completed its "findings of fact and conclusions of law on the matters put into controversy by the parties,"⁹ has not "direct[ed] the issuance" of a renewed license for the Pilgrim plant,¹⁰ and has not "resolv[ed] all issues before the presiding officer [ASLB]."¹¹ Therefore the ASLB has not yet satisfied the NRC's regulatory requirements to complete the Pilgrim relicensing proceeding and issue a final PID. The NRC's immediate effectiveness rules – given their plain meaning and the manifest intent of the ASLB – have no present application to this case. *Cf.* Entergy Motion at 12 ("[T]he Licensing Board has issued an initial decision resolving all matters placed in controversy.").

Entergy similarly mischaracterizes NRC regulations by arguing that the Commission should issue the Pilgrim license extension now, notwithstanding "the pendency of various petitions or motions for reconsideration, review or stay..."¹² However, the Commission statement cited by Entergy assumes a final PID has been issued by the ASLB and that parties are seeking reconsideration or a stay of that decision – a scenario that has not occurred in the Pilgrim proceeding. No party has filed a "motion for reconsideration, review, or stay" of the Pilgrim license extension because there is no final PID from the ASLB to issue it. Thus Entergy's argument to the Commission against allowing an "automatic stay" of the Pilgrim PID is irrelevant to the present Pilgrim case. *Cf.* Entergy Motion at 12.

⁸ LBP-11-20 at 2 – 3.

⁹ 10 C.F.R. § 2.340(b) (Initial decision in certain contested proceedings).

¹⁰ 10 C.F.R. § 2.340(f) (Immediate effectiveness of certain decisions).

¹¹ 10 C.F.R. § 2.1210(d).

¹² Entergy Motion at 9 *quoting* Commission guidance.

At bottom, Entergy has filed an unauthorized Motion without any credible factual or legal grounds to support it. Instead the Motion is simply a package of complaints about the Pilgrim relicensing process which Entergy is attempting to use to circumvent ASLB jurisdiction and to persuade the Commission to inject itself prematurely into the Pilgrim relicensing proceeding. These complaints include the ASLB's alleged delay in the licensing process;¹³ the NRC Staff's alleged refusal to expedite relicensing in a manner favorable to Entergy;¹⁴ and the Commonwealth's filing of a contention with the ASLB regarding the lessons learned from Fukushima which, according to Entergy, has "no reasonable likelihood...[to be] granted."¹⁵ The Commonwealth respectfully requests the Commission, consistent with NRC regulations, to allow the Pilgrim ASLB – not Entergy – to decide these issues in the first instance.

III. The NRC must take a hard look at the new and significant information from Fukushima now, consistent with NEPA and the AEA, before deciding whether to relicense the Pilgrim Nuclear Power Plant.¹⁶

The Commonwealth requests the Commission to deny Entergy's Motion given its multiple procedural failings, *supra*, and to decline to inject itself prematurely into

¹³ See Entergy Motion at 13.

¹⁴ *Id.*, at 10-11.

¹⁵ *Id.*, at 15.

¹⁶ These NEPA and AEA issues involving the Commonwealth's Fukushima-related contention have been briefed in voluminous filings by all parties to this proceeding, which are now pending for decision before the ASLB. LBP- 11-20 *quoted, supra*. Since it remains within the jurisdiction of the ASLB to make an initial decision on these matters – and Entergy has not provided any lawful basis to usurp that jurisdiction – the Commonwealth will not reargue all of these same points here before the Commission, although it continues to rely upon its expert supported contention, declarations and legal filings which it has presented on the record to the Pilgrim ASLB. Moreover, in this Opposition, the Commonwealth references those pleadings as appropriate and those filings remain available as part of the Pilgrim record for Commission review as it deems necessary.

the merits of the Pilgrim relicensing proceeding at this time. However, if the Commission elects to consider Entergy's substantive arguments as well, the Commonwealth responds further as follows:

In a final attempt to obtain premature Commission review, Entergy claims that, because the Commission has indicated it will address the lessons learned from Fukushima through "the Commission's ongoing regulatory process" in the future, the Commission may eliminate the Commonwealth's hearing right now on its Fukushima-related contention and grant the license extension. *See* Entergy Motion at 1-2. However, under NEPA, the NRC has a nondiscretionary duty to consider new and significant information arising from the accident at Fukushima – before taking the major federal action to grant a license extension for the Pilgrim plant – where, as here, there are "significant new circumstances or information relevant to the environmental concerns and bearing on the proposed action or its impacts." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 372 (1989). The First Circuit affirmed this legal principle in this same proceeding.¹⁷ The NRC cannot put on "blindfold to adverse environmental effects," *Marsh*, 490 U.S. at 371, and must take a hard look at this new and significant information before decisions are made and before actions are taken to ensure "that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989); *accord* *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87,

¹⁷ *See Commonwealth of Massachusetts v. NRC*, 522 F.3d 115, 127 (1st Cir. 2008) ("NEPA does impose a requirement that the NRC consider any new and significant information regarding environmental impacts before renewing a nuclear power plant's operating license."); *see also* Commonwealth Waiver Petition at 23, *cited* at fn.5.

96 (1983). NEPA's mandate applies "regardless of [the agency's] eventual assessment of the significance of this information." *Marsh*, 490 U.S. at 385.

Consistent with *Marsh*, the Commonwealth has filed an expert supported contention on the new and significant information from the Fukushima accident, and its relevance for the Pilgrim relicensing proceeding, which in part provides that Supplement 29 of the Generic Environmental Impact Statement (GEIS), and the Severe Accident Mitigation Alternatives (SAMA) analysis, for the Pilgrim relicensing proceeding are inadequate under NEPA because they fail to take account of new and significant information from Fukushima.¹⁸ More recently, the Commonwealth filed supplemental bases for its contention because the NRC's own Task Force issued its report that confirmed the significance of the information identified by the Commonwealth in its initial contention filings, including that the minimum level of safety should be increased for US Nuclear power plants.¹⁹ The NRC's Task Force Report provides additional support that the Pilgrim Supplemental GEIS and SAMA analysis must be changed, and additional mitigation measures implemented.²⁰

¹⁸ See Commonwealth Contention and Petition for Waiver, *cited, supra* at fn.5; see also Declaration of Dr. Gordon R. Thompson in Support of Commonwealth of Massachusetts' Contention and Related Petitions and Motions (June 1, 2011), and Declaration of Gordon R. Thompson in Reply to Entergy's Answer of June 27, 2011 and NRC Staff's Response of June 27, 2011 (July 5, 2011).

¹⁹ Recommendations for Enhancing Reactor Safety in the 21st Century, The Near Term Task Force Review of Insights from the Fukushima Dai-ichi Accident (July 12, 2011) at 18, ADAMS No. ML111861807. While the Task Force found that continued licensing would not be inconsistent with certain provisions of the Atomic Energy Act, *id.*, the Task Force did not address the NRC's separate obligation to consider new and significant information on the impacts of relicensing under NEPA, before making a final licensing decision. See Commonwealth of Massachusetts Motion to Supplement Bases (August 11, 2011) at 3 – 4 *citing* Task Force Report at 18.

²⁰ Commonwealth Motion to Supplement Bases at 4 – 6 (discussing lessons learned from Fukushima and the consistency between the Commonwealth's contention and the NRC's

Entergy's request for the Commission to grant a Pilgrim license extension now thus is contrary to NEPA and the findings of the NRC's own Task Force on the significance of the lessons learned from Fukushima.

Finally, regardless of whether the NRC will address the new and significant information from Fukushima in future regulatory proceedings, the Commonwealth is entitled to a hearing under the Atomic Energy Act on a material licensing issue: the environmental impacts of relicensing the Pilgrim plant, in light of the lessons learned from the Fukushima accident.²¹ The NRC's "late filed" contention standards cannot be applied in this case to deny the Commonwealth that hearing,²² and, in any event, it would be unreasonable to deny a hearing where the Commonwealth could not have raised the issue (Fukushima) previously in this proceeding and has done so even before the NRC itself issued its initial findings on Fukushima.²³ The Commonwealth recognizes that it is up to the NRC whether to address the concerns raised by the Commonwealth in the site specific Pilgrim proceeding or in a generic rulemaking, but in either case the NRC, as required by NEPA and the AEA, must take a hard look at

Task Force Report) and Declaration of Gordon R. Thompson Addressing New And Significant Information Provided by the NRC's Near-Term Task Force Report On The Fukushima Accident (Aug 11, 2011). ADAMS No. ML111861807.

²¹ Commonwealth of Massachusetts Reply to the Responses of the NRC Staff and Entergy to Commonwealth Waiver Petition and Motion to Admit Contention or in the Alternative for Rulemaking (July 5, 2011) at 6 *citing Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1443 – 1444 (D.C. Cir. 1984).

²² *Id.*, *citing Union of Concerned Scientists v. NRC*, 920 F.2d 50, 56 (D.C. Cir. 1990) (prohibiting NRC misapplication of rules to deny hearing right).

²³ *New Jersey Environmental Federation v. NRC*, 645 F.3d 220, 233 (3rd Cir. May 18, 2011) (reopen the record standard may be applied "so long as it is reasonable"). Entergy thus misstates the holding of *New Jersey Environmental Federation*. *Cf.* Entergy Motion at 15.

this new and significant information from Fukushima before making a final decision on whether to relicense the Pilgrim plant.²⁴

IV. Conclusion

Entergy's Motion should be denied.

Respectfully submitted,

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²⁴ Commonwealth of Massachusetts Petition for Waiver at 29 *citing Baltimore Gas & Electric Co.*, 462 U.S. at 100.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Commonwealth of Massachusetts**
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