January 3, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

ENTERGY'S ANSWER OPPOSING COMMONWEALTH OF MASSACHUSETTS' MOTION TO FILE A REPLY TO ENTERGY'S AND NRC STAFF'S ANSWERS

Pursuant to 10 C.F.R. § 2.323(c), Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (collectively "Entergy") respond in opposition to the Motion[1] and Proffered Reply[2] filed on December 23, 2011 by the Commonwealth of Massachusetts (the "Commonwealth"). On December 8, 2011, the Commonwealth filed its Appeal[3] of the Atomic Safety and Licensing Board's ("Board's") decision in LBP-11-35[4] under the interlocutory review provisions of 10 C.F.R. § 2.311, which provide for no reply. Having chosen to appeal under Section 2.311,[5] the Commonwealth now seeks leave to file a reply under 10 C.F.R. § 2.323(c), claiming

[1] Commonwealth of Massachusetts' Motion to Reply to NRC Staff and Entergy Oppositions to Commonwealth Appeal of LBP-11-35 ("Motion").

[2] Commonwealth of Massachusetts' Brief in Reply to NRC Staff and Entergy Oppositions to Commonwealth's Appeal of LBP-11-35 ("Proffered Reply").

[3] The Commonwealth's filings on appeal consist of: (1) the Commonwealth of Massachusetts' Notice of Appeal of LBP-11-35 (Dec. 8, 2011); and (2) the Commonwealth of Massachusetts' Brief on Appeal of LBP-11-35, Denying Admission of the Commonwealth's Contention, Hearing Request, Associated Waiver Petition, and Alternative Request for Rulemaking, on New and Significant Information Arising from the Accident at Fukushima and the Significance of that Information for the Pilgrim Relicensing Proceeding (Dec. 8, 2011) ("Commonwealth Brief"), which contains the Commonwealth's substantive arguments on appeal. The documents shall be referred to herein collectively as the "Appeal."

[4] Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), LBP-11-35, 74 N.R.C. __, slip op. (Nov. 28, 2011) ("LBP-11-35").

[5] As explained in Entergy's Answer Opposing the Commonwealth's Appeal of LBP-11-35 (Dec. 19, 2011) ("Entergy Answer"), the review provisions of 10 C.F.R. § 2.341(b) apply under this proceeding's current posture. Entergy Answer at 6 & n.27. While Section 2.341 permits replies, the Commonwealth ignores and violates the explicit page limitations imposed under Section 2.341.

that "compelling" circumstances exist in that it could not have reasonably anticipated certain arguments made by Entergy and the NRC Staff in their respective oppositions[6] to the Commonwealth's Appeal. Motion at 2. The Commission should deny the Motion and strike the Proffered Reply from the record for multiple reasons. First, the Proffered Reply runs afoul of the Commission's requirements governing page limitations for petitions for review of licensing board decisions, resulting in unfair advantage for the Commonwealth. Second, there are no circumstances (let alone compelling circumstances) warranting a reply from the Commonwealth under 10 C.F.R. § 2.323(c). Even a brief review of LBP-11-35 and Entergy's and the NRC Staff's filings before the Board opposing the Commonwealth's initial hearing request reveals that the Commonwealth should have anticipated the arguments that Entergy and the NRC Staff would make in opposing the Commonwealth's Appeal of LBP-11-35.

I. THE COMMONWEALTH'S REPLY CONTRAVENES THE COMMISSION'S PAGE LIMITATION REQUIREMENTS FOR PETITIONS FOR REVIEW

Acceptance of the Commonwealth's Motion and Proffered Reply would circumvent the Commission's explicit page limit requirements for petitions for review of licensing board decisions. Among other things, the Commission's page limit requirements are intended "to hold all parties to the same number of pages of argument."[7] Contrary to this intent, the Commonwealth seeks unfair advantage by filing a reply that either is not permitted at all under Section 2.311, or exceeds the prescribed page limitation for a reply permitted under Section 2.341(b).

The Commonwealth petitioned for review of LBP-11-35 under the interlocutory review provisions in 10 C.F.R. § 2.311. Commonwealth Brief at 1. Under Section 2.311, which references the format requirements of Section 2.341(c)(2), briefs are limited to 30 pages, and no reply

[6] Entergy Answer; NRC Staff's Answer to the Commonwealth of Massachusetts' Brief in Support of Appeal from LBP-11-35 (Dec. 19, 2011) ("NRC Staff Answer").

[7] Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 N.R.C. 370, 393 (2001) (citing Hydro Resources Inc. (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 N.R.C. 31, 46 (2001)).

is permitted. 10 C.F.R. §§ 2.311(b), 2.341(c)(2). Thus, under Section 2.311, the Commonwealth is not permitted to any reply[8] and, as discussed infra in Section II, has provided no legitimate justification warranting a reply.

Were the Commonwealth's Appeal reviewed under Section 2.341(b), any reply would be limited to five (5) pages. 10 C.F.R. § 2.341(b)(3). Here, the Commonwealth's Reply is eleven (11) pages long, six (6) pages over the limit. Further, the Commonwealth's initial Brief in support of its appeal was thirty (30) pages long, which exceeds the twenty-five (25) page limitation for Section 2.341 petitions for review by five (5) pages. Id.[9] Thus, acceptance of the Proffered Reply would result in over 40 pages of argument by the Commonwealth when only 30 pages of total briefing is allowed under 10 C.F.R. § 2.341(b).

Therefore, whether reviewed under Section 2.311 or Section 2.341, the Commonwealth's Proffered Reply violates the Commission's page limitations for petitions for review. Such disregard for the Commission's procedural requirements – and the corresponding disadvantage to Entergy and the NRC Staff – should not be countenanced.

II. THE COMMONWEALTH PROVIDES NO LEGITIMATE BASIS WARRANTING A REPLY

Furthermore, the Commonwealth provides no basis for filing a reply under Section 2.323(c). The Commonwealth's claim of "compelling" circumstances – that it could not have anticipated certain arguments made by Entergy and the NRC Staff in their respective oppositions to the Commonwealth's Appeal, Motion at 1-2 (citing 10 C.F.R. at § 2.323(c)) – is baseless. Even assuming an inability to anticipate arguments could provide an appropriate justification for

[8] A motion for leave to file a reply should be denied where the Commission's rules do not provide for a reply. U.S. Dep't of Energy (High-Level Waste Repository), CLI-08-12, 67 N.R.C. 386, 393 (2008).

[9] Entergy's and the NRC Staff's Answers in opposition to the Commonwealth's Appeal conformed to the twenty-five (25) page limitation set forth in Section 2.341(b)(3).

filing a reply (or one that exceeds the Commission's page limitations),[10] such circumstances do not exist here. As discussed below, each of the three Entergy and NRC Staff arguments made in their respective Answers opposing the Appeal identified in the Commonwealth's Motion could have been anticipated. Consequently, there are no circumstances, let alone compelling circumstances, justifying the Commonwealth's Proffered Reply.

First, there is no basis for the Commonwealth's assertion that it could not have anticipated that Entergy and the NRC Staff would argue that review of the Commonwealth's Contention against the reopening standards satisfies the Commission's NEPA obligation to take a hard look at proffered new and significant information. Motion at 1; Proffered Reply at 5-7. Entergy made this precise argument in initially opposing the Commonwealth's Contention. Entergy argued that (1) the Commission equates the standard for raising a significant environmental issue under Section 2.326 with the standard that governs whether supplementation of an environmental impact statement ("EIS") is required; and (2) a determination that the Commonwealth failed to raise a significant environmental issue fulfills the Commission's NEPA obligation to take a hard look at its purported new and significant information. Entergy Contention Answer[11] at 28, 67. Entergy also cited multiple judicial cases demonstrating that courts have allowed agencies to employ many different approaches to determining whether allegedly new and significant impacts are sufficiently significant to warrant supplemental analysis and formal supplementation of existing NEPA documents. Id. at 66 & nn.112-16. These are the same cases cited in Entergy's Answer opposing the Commonwealth's Appeal. Entergy Answer at 12 & nn.46-50.

[10] Section 2.323(c) provides that the proponent of a motion is not entitled to file a reply except upon demonstration of compelling circumstances, "such as where the moving party demonstrates that it could not reasonably have anticipated the arguments to which it seeks leave to reply." 10 C.F.R. § 2.323(c). The Commonwealth cites no case law suggesting that this provision – which on its face applies to motions – should apply to a petition for review of a licensing board decision.

[11] Entergy's Answer Opposing Commonwealth Contention and Petition for Waiver Regarding New and Significant Information Based on Fukushima (June 27, 2011) ("Entergy Contention Answer").

Citing Entergy's Contention Answer at 28, the Board majority agreed with Entergy that the "Commission has indeed expressed the standard[s] for when an environmental issue is 'significant' for the purposes of reopening a closed record," and that the Commission has "equat[ed] them to its standards for when an EIS is required to be supplemented – there must be new and significant information that will 'paint a 'seriously different picture of the environmental landscape.'"" LBP-11-35 at 56 & n.217. The Board majority then reviewed the Commonwealth's claims of significant information and determined that they did not paint a seriously different picture of the environmental landscape. Id. at 57.

Thus, the Commonwealth can hardly contend that it could not have anticipated the arguments made by Entergy and the NRC Staff in their oppositions to the Appeal. These arguments were first made in response to the Commonwealth's proffered Contention, and relied on in the Board majority's ruling. Thus, the Commonwealth demonstrates no compelling circumstances warranting a reply (or one that exceeds the Commission's page limitations).[12]

Second, the Commonwealth asserts that it could not have anticipated that Energy and the NRC Staff would argue that the Board majority correctly ruled that the Commonwealth failed to present evidence on the costs and benefits of a revised SAMA analysis, when such a finding is, allegedly, "clearly refuted by the record." Motion at 1-2; Proffered Reply at 8-10. By its very

[12] The unfair advantage that the Commonwealth would have should its Proffered Reply be accepted is plainly evident here. The Commonwealth seeks to argue that multiple federal court cases support its position, Proffered Reply at 6, without Entergy or the NRC Staff having a chance to respond. The Commonwealth could have made the same arguments and cited to the same cases not only in its Appeal, but in reply to Entergy's Contention Answer, which it did not. In any event, it appears that the cases cited by the Commonwealth do not support its position. For example, if, as the Commonwealth claims, courts consider whether an agency "'obtains opinions from its own experts [or] obtains opinions from experts outside the agency'" to determine whether an agency has taken a hard look at new information, Proffered Reply at 6 (quoting Southern Utah Wilderness Alliance v. Norton, 301 F.3d 1217, 1238-39), then that test is met here. Both Entergy and the NRC Staff submitted Declarations from expert witnesses in support of their oppositions to the Commonwealth's Contention. See Declaration of Joseph R. Lynch, Lori Ann Potts, and Dr. Kevin R. O'Kula in Support of Entergy's Answer Opposing Commonwealth of Massachusetts Contention Regarding New and Significant Information Revealed by the Fukushima Radiological Accident (June 26, 2011); Affidavit of Dr. S. Tina Ghosh in Support of the NRC Staff's Response to Massachusetts' Motions to Admit New Contention and Reopen to Admit New and Significant Information (June 27, 2011).

nature, this argument cannot demonstrate any legitimate basis (let alone "compelling" circumstances) given that both Entergy and the NRC Staff opposed the Commonwealth's Contention from the outset. As such, the Commonwealth should have expected that Entergy and the NRC Staff would oppose its Appeal and support the Board majority's ruling rejecting the Contention.

Moreover, both Entergy and the NRC Staff made similar arguments before the Board in their initial answers opposing the Commonwealth's Contention. See e.g., NRC Staff Contention Answer[13] at 22 ("there is no discussion of how the increased [core damage frequency ("CDF")] factors, based on all the plant experience throughout the world, would generically apply to an individual plant such as Pilgrim . . . . As a result, Dr. Thompson has not shown that an increased CDF would materially alter the Pilgrim SAMA analysis."); Entergy Contention Answer at 43-44 (Pilgrim's SAMA analysis considered the installation of a filtered direct torus vent and determined it to be not cost beneficial, and Dr. Thompson nowhere challenged the Pilgrim SAMA analysis's consideration of a filtered direct torus vent).

On appeal, the Commonwealth's claims that "Dr. Thompson . . . stated specifically that the benefits of filtered containment venting would rise by a factor of ten . . . (i.e. benefit would rise from $872,000 to $8,720,000)." Commonwealth Brief at 29 (emphasis added). Consistent with their oppositions to the proffered Contention, both Entergy and the NRC Staff disputed this claim because Dr. Thompson, in fact, nowhere made any such statement. See Entergy Answer at 23 n.72; NRC Staff Answer at 19 n.61. Thus, there simply is no merit to the Commonwealth's assertion that it could not have anticipated Entergy's and the NRC Staff's arguments on appeal.

The Commonwealth also seeks to expand its arguments opposing the Board majority's determination that the Commonwealth could have made its direct experience challenge to the

[13] NRC Staff's Response to Commonwealth of Massachusetts' Motion to Admit Contention and, If Necessary, Reopen Record Regarding New and Significant Information Revealed by Fukushima Accident (June 27, 2011) ("NRC Staff Contention Answer").

CDF assumed in Pilgrim's SAMA analysis at the outset of this proceeding. See Proffered Reply at 10-11. Again, there is no legitimate basis for the Commonwealth to argue that it could not have anticipated Entergy's and the NRC Staff's arguments on appeal supporting the Board majority. Entergy's response to the Commonwealth's Contention expressly argued that the Commonwealth could have made a direct experience challenge to Pilgrim's SAMA analysis at the outset of this proceeding, and therefore the Contention was not timely. Entergy Contention Answer at 22-27. The Board majority agreed with Entergy's argument, LBP-11-35 at 52-53, and Entergy argued that the Commission should uphold this determination on appeal, Entergy Answer at 18-19, as did the NRC Staff. NRC Staff Answer at 13-14. Thus, there is nothing here that the Commonwealth could not have anticipated, for the argument was expressly raised below.

Third, there is no merit to the Commonwealth's claim that it could not have anticipated arguments that "characterize the Commonwealth's appeal, in part, as an impermissible challenge to NRC regulations." Motion at 1. The Commonwealth's Brief on appeal erroneously asserted on multiple occasions that the Board majority – by applying the reopening standards – impermissibly imposed a heightened standard for contention admission, and that this heightened standard was contrary to the National Environmental Policy Act ("NEPA"). Commonwealth Brief at 23-28. The Commonwealth repeatedly argued that the Commission's Section 2.326 reopening standards should be supplanted with the Commission's more lenient standards for an admissible contention in Section 2.309(f)(1), and that failure to do so would violate NEPA. For example, the Commonwealth asserted that it should only be required "to provide the basic level of documentation and support that is appropriate at the contention-pleading stage." Commonwealth Brief at

24 (emphasis added).[14] See also id. at 26 ("The ASLB standard of review also goes far beyond what the NRC requires at the contention pleading stage") (emphasis added); id. at 27.

Both Entergy and the NRC Staff appropriately responded to these erroneous arguments in their Answers to the Appeal.[15] Moreover, the Entergy and the NRC Staff arguments made before the Commission mirror their arguments made before the Board. In opposition, both before the Board and on appeal before the Commission, Entergy and the NRC Staff argued that, at this very late stage of the proceeding, the Commission's stringent reopening standards clearly apply, that the reopening standards are consistent with the Commission's obligations under NEPA; and that the Commonwealth has failed to meet the Commission's reopening standards.[16]

In summary, neither Entergy nor the NRC Staff misinterpreted the Commonwealth's Appeal. Rather, Entergy's and the NRC Staff's oppositions to the Appeal directly responded to the arguments made by the Commonwealth that the heightened standard of review under the reopening standards violated NEPA with the same arguments that they made to the Board below. There is therefore no legitimate basis for the Commonwealth to claim that it could not have anticipated Entergy's and the NRC Staff's responses to its erroneous arguments.

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[14] The Commonwealth then immediately quoted from the Statement of Considerations supporting the 1989 rulemaking for the Commission's current contention admissibility standards contained in Section 2.309(f)(1): "'at the contention filing stage[,] the factual support necessary to show that a genuine dispute exists need not be in affidavit or formal evidentiary form and need not be of the quality necessary to withstand a summary disposition motion.'"). Id. at 24-25 (emphasis added) (quoting 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989)). Unlike the contention admissibility requirements in Section 2.309(f)(1), the reopening standards explicitly require that an expert witness affidavit accompany the motion to reopen, 10 C.F.R. § 2.326(b), and that the requirements of Section 2.326(a) be satisfied, including that the proponent for reopening a closed record "demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially." 10 C.F.R. § 2.326(a)(3) (emphasis added).

[15] See Entergy Answer at 7-15; NRC Staff Answer at 7-10, 14-17.

[16] Entergy Contention Answer at 18-44, 64-67; NRC Staff Contention Answer at 5-16.

III. CONCLUSION

For the foregoing reasons, the Motion should be denied and the Proffered Reply should be struck from the record.

Respectfully Submitted,

/signed electronically by Paul A. Gaukler/

David R. Lewis
Paul A. Gaukler
PILLSBURY WINTHROP SHAW PITTMAN LLP
2300 N Street, NW
Washington, DC 20037-1128
Tel. (202) 663-8000
E-mail: david.lewis@pillsburylaw.com
Counsel for Entergy

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CERTIFICATE OF SERVICE

I hereby certify that copies of Entergy's Answer Opposing Commonwealth of Massachusetts' Motion to file a Reply to Entergy's and NRC Staff's Answers, dated January 3, 2012, were provided to the Electronic Information Exchange for service on the individuals below, this 3rd day of January, 2012.

Secretary
Att'n: Rulemakings and Adjudications Staff
Mail Stop O-16 C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
hearingdocket@nrc.gov

Office of Commission Appellate Adjudication
Mail Stop O-16 C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
OCAAmail@nrc.gov

Administrative Judge
Ann Marshall Young, Esq., Chair
Atomic Safety and Licensing Board
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Ann.Young@nrc.gov

Atomic Safety and Licensing Board
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Dr. Richard F. Cole
Atomic Safety and Licensing Board
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Richard.Cole@nrc.gov

Administrative Judge
Dr. Paul B. Abramson
Atomic Safety and Licensing Board
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Paul.Abramson@nrc.gov

Susan L. Uttal, Esq.
Brian Harris, Esq.
Beth Mizuno, Esq.
Office of the General Counsel
Mail Stop O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Susan.Uttal@nrc.gov; brian.harris@nrc.gov;
beth.mizuno@nrc.gov

Matthew Brock, Assistant Attorney General
Commonwealth of Massachusetts
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
Martha.Coakley@state.ma.us
Matthew.Brock@state.ma.us

Ms. Mary Lampert
148 Washington Street
Duxbury, MA 02332
mary.lampert@comcast.net

Sheila Slocum Hollis, Esq.
Duane Morris LLP
505 9th Street, NW
Suite 1000
Washington, DC 20006
sshollis@duanemorris.com

Mr. Mark D. Sylvia
Town Manager
Town of Plymouth
11 Lincoln St.
Plymouth, MA 02360
msylvia@townhall.plymouth.ma.us

Richard R. MacDonald
Town Manager
878 Tremont Street
Duxbury, MA 02332
macdonald@town.duxbury.ma.us

Chief Kevin M. Nord
Fire Chief and Director, Duxbury Emergency
Management Agency
688 Tremont Street
P.O. Box 2824
Duxbury, MA 02331
nord@town.duxbury.ma.us

Katherine Tucker, Esq.
Law Clerk,
Atomic Safety and Licensing Board Panel
Mail Stop T3-E2a
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Katie.Tucker@nrc.gov

/signed electronically by Paul A. Gaukler/

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Paul A. Gaukler