

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 05/16/08
SERVED 05/16/08

COMMISSIONERS

Dale E. Klein, Chairman
Gregory B. Jaczko
Peter B. Lyons
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In the Matter of)
)
)

ENTERGY NUCLEAR GENERATION CO. and)
ENTERGY NUCLEAR OPERATIONS, INC.)
)

Pilgrim Nuclear Power Station)
_____)

Docket No. 50-293-LR

CLI-08-09

MEMORANDUM AND ORDER

On April 8 the United States Court of Appeals for the First Circuit issued a decision denying two petitions for review filed by the Commonwealth of Massachusetts challenging the dismissal of its sole contention in the Pilgrim and Vermont Yankee license renewal proceedings.¹ The Court also ordered a “stay [of] the close of hearings in both plant license renewal proceedings for fourteen days following the date of issuance of mandate in this case in order to afford the Commonwealth an opportunity to request participant status under 10 C.F.R. § 2.315(c), should it desire to do so.”² Today we address the effect of the court-ordered stay on the ongoing *Pilgrim* proceeding.

Under the Federal Rules of Appellate Procedure, the mandate must issue 7 calendar days after the time to request rehearing expires or a timely-filed rehearing petition is denied,

¹ *Massachusetts v. NRC*, Nos. 07-1482, 07-1483 (1st Cir. Apr. 8, 2008).

² *Id.*, slip op. at 31-32.

whichever is later.³ In cases where a Federal agency is a party, a request for rehearing may be requested within 45 days after entry of judgment.⁴ In this case, then, the court-ordered stay will remain in effect until at least June 13, 2008 (45-day rehearing period, plus the 7-day mandate period, plus 14 days, as ordered by the First Circuit).

An Atomic Safety and Licensing Board (the Board) held an evidentiary hearing on Pilgrim Watch Contention 1, the sole admitted contention in this proceeding, on April 10, just two days after the First Circuit decision. The First Circuit's stay order generated some confusion at the hearing as to what exactly the Court meant by the phrase "the close of hearings." Following the hearing, Entergy filed a "Request for Guidance on the First Circuit's Administrative Stay."⁵ On May 12 the Board issued a scheduling order that renders Entergy's concerns largely moot.⁶ But because the stay remains in effect, we find it appropriate to provide guidance on how to proceed in light of the stay.

Entergy argues that the Commission should "interpret the Court's order as staying only the termination of the adjudication, and not the closing of the evidentiary record and receipt of proposed findings."⁷ Pilgrim Watch filed a response opposing Entergy's proposed interpretation.⁸ Pilgrim Watch argues that "[e]nding the evidentiary hearing and closing the

³ Fed. R. App. P. 41.

⁴ Fed. R. App. P. 40.

⁵ *Entergy's Request for Guidance on the First Circuit's Administrative Stay* (April 17, 2008) (Request).

⁶ Order (Setting Deadlines for Provisional Proposed Findings and Conclusions on Contention 1, and for Pleadings Related to Pilgrim Watch's Recent Motion Regarding CUFs) (May 12, 2008) (unpublished).

⁷ Request at 3.

⁸ *Pilgrim Watch Response to Entergy's Request for Guidance on the First Circuit's Administrative Stay* (April 21, 2008) (Pilgrim Watch Response).

record would eviscerate the right to participate that the Court of Appeals granted the Commonwealth.”⁹

Entergy’s argument is persuasive. The First Circuit ordered the stay not out of any concerns about the evidentiary hearing on Pilgrim Watch’s contention, but to “afford the Commonwealth [of Massachusetts] an opportunity to request participant status under 10 C.F.R. § 2.315(c), should it desire to do so.”¹⁰ The Court explained that the reason Massachusetts might desire to seek participant status under section 2.315(c) was to “qualify to request a suspension of [license renewal] proceedings under § 2.802(d),”¹¹ a provision in our rules allowing rulemaking petitioners who are also “parties” to licensing proceedings to request a suspension of those proceedings pending the outcome of the rulemaking petition. Massachusetts has filed a license renewal-related rulemaking petition.¹²

The Court stated that it would “bind the NRC to its litigation position” (stated in the agency’s First Circuit brief) that these procedures would be available to Massachusetts in this proceeding.¹³ In other words, the Court ordered the stay so that during that period of time the Commission would not allow the adjudication to reach a point where it would no longer allow Massachusetts to seek participant status and request a suspension of the proceedings. Massachusetts recently took advantage of this opportunity by filing a notice of its intent to

⁹ Pilgrim Watch Response at 2.

¹⁰ *Massachusetts*, slip op. at 32.

¹¹ *Id.* at 31.

¹² *Id.* at 16-18.

¹³ *Id.* at 4; see also *id.* at 31. A prior Commission decision (CLI-07-13, 65 NRC 211, 215 n.16 (2007)) and the Commission’s court of appeals brief indicated that Massachusetts would be permitted to seek “interested state” status.

participate in this proceeding as an interested state.¹⁴ Massachusetts has not yet sought a suspension of the proceedings. Even though Massachusetts has now entered the case, the court-ordered stay, by its own terms, remains in effect.

The Court may have borrowed the phrase “close of hearings” from 10 C.F.R. § 2.1209, which requires parties to file proposed findings of fact and conclusions of law on the contentions addressed in the hearing “within thirty (30) days of the close of the hearing or at such other time as the presiding officer directs.”¹⁵ In that regulation, “the close of the hearing” refers to the closing of the evidentiary record. But the administrative record (and the hearing process) remains open — the Board’s initial decision, any petition for review thereof, and the Commission’s ultimate decision on review are all docketed and included in the administrative record following the closing of the Board’s evidentiary record. In this proceeding, the Commonwealth has already filed a notice of intent to participate as an interested state and may petition to suspend the proceedings under 10 C.F.R. § 2.802(d) after the Board closes the evidentiary record.

In short, we do not read the First Circuit’s phrase “the close of hearings” to refer to the ministerial act of closing the evidentiary record for Pilgrim Watch Contention 1 under 10 C.F.R. § 2.1209, but to refer instead to the proceeding as a whole. It is not necessary for the parties or the Board to suspend their work on findings of fact and conclusions of law for Pilgrim Watch Contention 1 to protect the right of Massachusetts to participate as ordered by the Court. Massachusetts’s concerns are entirely unrelated to Pilgrim Watch Contention 1.¹⁶ If

¹⁴ *Commonwealth of Massachusetts’ Notice of Intent to Participate as an Interested State* (May 6, 2008).

¹⁵ The First Circuit did not cite to that regulation in issuing the stay.

¹⁶ Massachusetts explained to the First Circuit that it has “expressed no interest” in the contentions of other parties and seeks only to address the issues raised in its original contention, issues currently pending before the Commission in Massachusetts’s rulemaking (continued. . .)

Massachusetts petitions the Commission to suspend the proceeding, that action will not affect the evidentiary hearing record on Contention 1, the parties' proposed findings and conclusions, or the Board's merits determination.

For this reason, we direct the Board to close the evidentiary record on Pilgrim Watch Contention 1, per its usual course, and proceed with its new schedule for the submission of proposed findings of fact and conclusions of law. The proceeding-at-large and the administrative record remain open in accordance with the Court's stay order. Contrary to Pilgrim Watch's characterization, this will not "eviscerate the right to participate that the Court of Appeals granted the Commonwealth" but instead will ensure that Massachusetts may participate in precisely the manner the First Circuit sought to protect.

IT IS SO ORDERED.

For the Commission

/RAI

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland
this 16th day of May, 2008.

(. . .continued)
petition. See *Reply Brief for Petitioner Commonwealth of Massachusetts* at 13 (Nov. 8, 2007).
A copy is available on the Agencywide Documents Access and Management System (ADAMS),
Accession No. ML073250351.