

November 1, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

Before the Atomic Safety and Licensing Board

November 1, 2004 (2:29PM)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of)	
)	
ENTERGY NUCLEAR VERMONT)	Docket No. 50-271
YANKEE, LLC and ENTERGY)	
NUCLEAR OPERATIONS, INC.)	ASLBP No. 04-832-02-OLA
(Vermont Yankee Nuclear Power Station))	(Operating License Amendment)
)	

ENTERGY'S ANSWER TO NEW ENGLAND COALITION'S MOTION TO DISMISS PROCEEDING DUE TO FAILURE TO PROVIDE PROPER NOTICE

Pursuant to 10 C.F.R. § 2.323(c), Applicants Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively "Entergy") hereby answer in opposition to New England Coalition's ("NEC") motion to dismiss this proceeding regarding Entergy's application to amend Facility Operating License DPR-28 for the Vermont Yankee Nuclear Power Station ("VY") to increase the maximum authorized power level.¹ The NEC Motion: (1) fails to meet the Commission's timeliness requirement for filing motions, and (2) is without legal support. Accordingly, the motion should be denied.

I. PROCEDURAL BACKGROUND

Entergy submitted its license amendment application ("Application") to increase the authorized VY power level from 1593 megawatts thermal ("MWt") to 1912 MWt on September 10, 2003.² Entergy included in its Application a description and justification for each proposed change to the VY operating license and Technical Specifications, a determination of no

¹ "New England Coalition's Motion to Dismiss Proceeding Due to Failure to Provide Proper Notice" (Oct. 20, 2004) ("NEC Motion").

² Letter from J. Thayer to U.S.N.R.C., "Vermont Yankee Nuclear Power Station License No. DPR-28 (Docket No. 50-271) Technical Specification Proposed Change No. 263 Extended Power Uprate" (Sep. 10, 2003) ("Application").

significant hazards consideration, and an assessment of environmental impacts associated with the license amendment request. Entergy supplemented its Application several times since its initial filing to, *inter alia*, reflect enhanced analyses, respond to Nuclear Regulatory Commission (“NRC”) Staff Requests for Additional Information (“RAIs”), and provide new or updated information. On February 20, 2004, the NRC Staff determined that Entergy had provided the information necessary for its review of the license amendment request. Entergy continues to supplement its Application as appropriate as the Staff’s review progresses.

A Notice of Consideration of Issuance of Amendment to Facility Operating License and Opportunity for a Hearing (“Notice”) was published in the Federal Register on July 1, 2004.³ On August 30, 2004, NEC gave notice of its intention to participate in this proceeding by filing a petition to intervene and request for hearing.⁴ On October 20, 2004, the afternoon before the start of the pre-hearing conference in this matter, NEC electronically served the Motion. NEC’s counsel subsequently handed out copies of the NEC Motion just prior to the start of the pre-hearing conference on October 21, 2004.

II. DISCUSSION

Entergy opposes the NEC Motion for two main reasons. First, it is untimely. Second, it is without legal basis. Each of these issues is discussed below.

A. The NEC Motion is Out of Time

NEC’s Motion disregards the Commission time requirement for filing motions. “A motion must be made no later than ten (10) days after the occurrence or circumstances from which the motion arises.” 10 C.F.R. § 2.323(a). The Commission explicitly adopted a ten day deadline for filing motions because “expeditious management of a hearing requires that motions

³ 69 Fed. Reg. 39,976 (2004).

⁴ “[NEC]’s Request for Hearing, Demonstration of Standing, Discussion of Scope of Proceeding and Contentions” (Aug. 30, 2004) (“Petition”).

be filed reasonably promptly after the underlying circumstances occur which engender a motion.” 69 Fed. Reg. 2,182, 2,207 (2004). NEC does not dispute that the Notice was published on July 1, 2004. NEC Memorandum,⁵ ¶ 1. NEC asserts that “the application was not complete at the time the Notice of Hearing was issued.” NEC Motion at 1. It is beyond dispute, therefore, that the “occurrence or circumstances” from which the NEC Motion arises occurred on July 1, 2004. NEC, therefore, was required to file its motion no later than 10 days after publication of the Notice. It did not do so, and its filing is clearly untimely.⁶

NEC has provided no explanation why it did not or could not have filed its motion within the time provided in 10 C.F.R. § 2.323; indeed, neither the NEC Motion nor the NEC Memorandum even mention 10 C.F.R. § 2.323(a). Thus, NEC has not only failed to comply with the Commission’s regulations, but has provided no basis for the Atomic Safety and Licensing Board (“Board”) to exercise any discretion it might have in applying the rule. The Motion, therefore, must be denied as untimely filed.⁷

B. The NEC Motion is Without Legal Basis

Even if the NEC Motion were timely, it would need to be denied because there is no legal basis for the relief NEC seeks. “In a case of an application on which a hearing is not required” by the Atomic Energy Act, such as an “amendment to an operating license,” NRC will “cause to be published in the Federal Register a notice of proposed action.” 10 C.F.R. § 2.105(a). That

⁵ “[NEC]’s Memorandum of Fact and Law Supporting Its Motion To Dismiss The Proceeding Due to Failure to Provide Proper Notice” (Oct. 20, 2004) (“NEC Memorandum”).

⁶ Even if the starting point for applying the ten-day rule in 10 C.F.R. § 2.323(a) were moved back to be the date a petitioner filed a petition to intervene and request for a hearing, NEC was required to submit its motion no later than September 9, 2004 (*i.e.*, ten days after its Petition was filed). It missed that deadline as well.

⁷ NEC’s retention of counsel on the eve of the pre-hearing conference does not justify its failure to follow the ten day requirement in 10 C.F.R. § 2.323(a). When an intervenor belatedly retains counsel, the intervenor and/or its new counsel must take the proceeding as they find it. *See, e.g., Nuclear Fuel Services, Inc.* (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 276 (1975); *Texas Utilities Generating Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-599, 12 NRC 3, 8-9 (1980). This is particularly true in this case for, as indicated by its representative at the hearing, NEC has a “long and proud history of participation” in NRC licensing proceedings, Transcript of Pre-Hearing Conference (Oct. 22, 2004) at 556, and must be charged with knowledge of the NRC regulations and the requirements they set on the deadline for filing of motions.

notice is to set forth among other information the nature of the action proposed. 10 C.F.R. § 2.105(b). The notice of proposed action in this matter was published pursuant to the Commission's rules on July 1, 2004, and explicitly described that the proposed action

would change the [VY] operating license to increase the maximum authorized power level from 1593 megawatts thermal (MWt) to 1912 MWt. This change represents an increase of approximately 20 percent above the current maximum authorized power level. The proposed amendment would also change the [VY] technical specifications to provide for implementing uprated power operation.

69 Fed. Reg. 39,976 (2004). The NEC Motion does not identify any change to the published description of the proposed action as a result of the supplemental information submitted by Entergy subsequent to the original application or the Notice. The statement in the July 1, 2004, Notice was accurate at the time it was published and remains accurate today.⁸ Nor has NEC identified any change in the scope of the Application as a result of the supplements that have been submitted, and in fact there has been no such change.

NEC has failed to cite in its motion any legal authority for its contention that any supplement to a license amendment application requires the issuance of a new notice of proposed action and another opportunity to request a hearing. There is no regulation requiring such a result and NEC cites to none. To the contrary, NRC case law is clear that the Commission's

regulations contemplate Staff determinations of the acceptability of license applications, together with continued Staff review and analysis after docketing. Such Staff review is part of a continuous licensing process, not a single discrete step which requires complete and final design and technical information when an application is tendered. . . . [T]he important question is not whether the application was sufficiently complete when filed

⁸ NEC's challenge to the scope of the Board's authority, NEC Memorandum at 3, is likewise without basis. The notice of the Board's establishment states that the proceeding over which the Board is to preside concerns a requested change in the VY operating license "to increase the maximum authorized power level from 1593 (MWt) to 1912 MWt," 69 Fed. Reg. 56,797, 56,798 (2004). The scope of the Board's authority is in no way modified by the supplemental information submitted by Entergy in support of its Application.

(which the Staff determines), but rather whether the Staff's analysis and evaluation is adequately supported by the evidence.

New England Power Co. (NEP, Units 1 and 2), LBP-78-9, 7 NRC 271, 281 (1978) (internal citations omitted). NEC does not identify any violation of 10 C.F.R. § 2.105(b) (*i.e.*, asserting that the application was not “acceptable”), only that “supplements to the application at issue have been added to the application.” NEC Memorandum ¶ 4. However, such supplements are a standard part of the processing of a license amendment application; *see Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 249 (1998) (“RAIs are a standard and ongoing part of NRC licensing reviews” and “the NRC Staff’s mere posing of questions does not suggest that the application was incomplete, or that it provided insufficient information to frame contentions”). There is no legal basis, therefore, upon which to assert that this proceeding was prematurely noticed and needs to be dismissed.

Moreover, even if the Application had been “incomplete” at the time of its filing, “none of the statutes or formal regulations binding the NRC is violated by its announced, long-standing practice of docketing incomplete applications.” *Concerned Citizens of Rhode Island v. NRC*, 430 F. Supp. 627, 633 (D.R.I. 1977). As the Court ruled in that case:

Furthermore, the regulatory guides and the regulations have been interpreted by the NRC to grant it the discretion to proceed to docket deficient applications and then to require, by means of detailed requests for further information, additional data required by statute or regulation. This interpretation is entitled to great weight. The Court cannot find that NRC has violated any clear, legal duty by proceeding first to docket [applicant's] application and thereafter to request additional information from [the applicant].

Id. at 633-34 (emphasis added) (footnotes omitted); *see also Boston Edison Co.* (Pilgrim Nuclear Generating Station, Units 2 and 3), LBP-74-62, 8 AEC 324, 326 (1974) (intervenor contention “at the prehearing conference that the entire application should be dismissed on the grounds that it was ‘an incomplete application’” would not “be given any further consideration” because the “Board did not have the authority to dismiss” the application “at this stage on the asserted

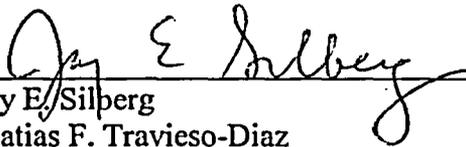
grounds of ‘incompleteness.’”). Neither Entergy or the NRC Staff has violated any legal duty by submitting or considering supplemental information in this proceeding without the issuance of notice in each instance. The NEC Motion should, therefore, be rejected.

Finally, NEC is not prejudiced in any way by the docketing of supplements to the Application. Commission regulations explicitly provide petitioners the opportunity to raise contentions as new information becomes available. *See generally* 10 C.F.R. § 2.309(c). “[N]ewly arising information has long been recognized as providing ‘good cause’ for acceptance of a late contention.” *Consumers Power Co.* (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 577 (1982); *see also, e.g., Indiana Michigan Electric Co.* (Donald C. Cook Nuclear Plant, Units 1 and 2), CLI-72-75, 5 AEC 13, 14 (1972); *Cincinnati Gas and Electric Co.* (William H. Zimmer Nuclear Station), LBP-80-14, 11 NRC 570, 574 (1980). “Good cause” has also been found based on “the late date on which the Staff provided the intervenors with needed documents.” *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-00-19, 52 NRC 85, 92 (2000). Filing of late-filed contentions is commonplace where new information becomes available. *See, e.g., Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-01-39, 54 NRC 497, 517-521 (2001) (admitting late-filed contention based on “Applicant’s having revised its calculations”). Thus, Commission regulations provide NEC the opportunity to submit late-filed contentions if any relevant “new” information is contained in the supplements to the original Application. That is, in fact, the procedure that NEC should follow if it finds that any amendments to Entergy’s Application raise new issues that support the filing of additional proposed contentions.

III. CONCLUSION

For the reasons stated above, NEC's motion should be denied.

Respectfully submitted,



Jay E. Silberg
Matias F. Travieso-Diaz
Douglas J. Rosinski
SHAW PITTMAN LLP
2300 N Street, N.W.
Washington, DC 20037-1128
Tel. (202) 663-8063

Counsel for Entergy Nuclear Vermont Yankee,
LLC and Entergy Nuclear Operations, Inc.

Dated: November 1, 2004

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Entergy's Answer to New England Coalition's Motion to Dismiss Proceeding Due to Failure to Provide Proper Notice" were served on the persons listed below by deposit in the U.S. Mail, first class, postage prepaid, and where indicated by an asterisk by electronic mail, this 1st day of November, 2004.

*Administrative Judge
Alex S. Karlin, Chair
Atomic Safety and Licensing Board Panel
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
ask2@nrc.gov

*Administrative Judge
Lester S. Rubenstein
Atomic Safety and Licensing Board Panel
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
lesrrr@msn.com

*Administrative Judge
Dr. Anthony J. Baratta
Atomic Safety and Licensing Board Panel
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
ajb5@nrc.gov

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

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

Office of Commission Appellate
Adjudication
Mail Stop O-16 C1
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

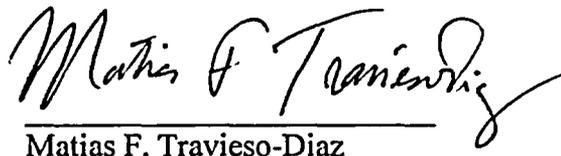
*Sarah Hofmann
Special Counsel
Department of Public Service
112 State Street – Drawer 20
Montpelier, VT 05620-2601
Sarah.Hofmann@state.vt.us

*Brooke Poole, Esq.
*Robert Weisman, Esq.
*Marisa Higgins, Esq.
Office of the General Counsel
Mail Stop O-15 D21
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
bdp@nrc.gov, rmv@nrc.gov,
mch5@nrc.gov

*Anthony Z. Roisman
National Legal Scholars Law Firm
84 East Thetford Rd.
Lyme, NH 03768
aroisman@valley.net

*Jonathan M. Block
94 Main Street
P.O. Box 566
Putney, VT 05346-0566
jonb@sover.net

*Raymond Shadis
New England Coalition
P.O. Box 98
Shadis Road
Edgecomb ME 04556
shadis@prexar.com


Matias F. Travieso-Diaz