

November 10, 2004

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

DOCKETED
USNRC

November 10, 2004 (10:40am)

In the Matter of)

ENTERGY NUCLEAR VERMONT)
YANKEE, LLC and ENTERGY)
NUCLEAR OPERATIONS, INC.)
(Vermont Yankee Nuclear Power Station))

Docket No. 50-271

ASLBP No. 04-832-02-OLA
(Operating License Amendment)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

**ENTERGY'S ANSWER TO VERMONT DEPARTMENT OF PUBLIC SERVICE
REQUEST FOR LEAVE TO FILE A NEW CONTENTION**

Pursuant to 10 C.F.R. § 2.309(h)(1) and the Atomic Safety and Licensing Board ("Board") oral Order of October 21, 2004,¹ Applicants Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively "Entergy") hereby provide this Answer in opposition to Vermont Department of Public Service's ("DPS") request for admission of a new contention² 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. The Board should reject the DPS request because the proposed contention: (1) fails to identify any genuine dispute for the Board to resolve; (2) is without factual or legal basis; and (3) would not in any event entitle DPS to relief.

¹ At the pre-hearing conference conducted in Vermont on October 21 and 22, 2004, the Board ordered that answers be filed no later than 25 days from the date that the Vermont Department of Public Service filed its request for leave to file a new contention. Transcript of Pre-Hearing Conference (Oct. 21, 2004) at 81.

² "Vermont Department of Public Service Request for Leave to File a New Contention" (Oct. 18, 2004) ("DPS Request").

I. PROCEDURAL BACKGROUND

Entergy submitted its license amendment application for an extended power uprate (“EPU”) on September 10, 2003.³ The NRC published a “Notice of Docketing and Opportunity for Hearing” on July 1, 2004. 69 Fed. Reg. 39,976 (2004). On August 30, 2004, DPS gave notice of its intention to participate in this proceeding by filing a petition to intervene and submitting five proposed contentions.⁴ Disposition of the five contentions initially tendered by DPS is pending.

On October 18, 2004, DPS submitted its request for leave to file a new contention. Proposed DPS Contention 6 reads:

The Application for Amendment, Including All Supplements Thereto, Fails to Comply With 10 CFR 50 Appendix R, Specific Requirements, Paragraph L(2)(b) Because It Does Not Verify The Assumption, Used For Purposes of the Safe Shutdown Capability Analysis (SSCA), that the Reactor Core Isolation Cooling (RCIC) System Can Be Made Operable In Sufficient Time To Permit The Operator To Perform the Required Actions Before Core Uncovery.

DPS Request at 1. DPS supports its proposed new contention by noting that 10 C.F.R. Part 50, Appendix R, requires a reactor coolant makeup function “capable of maintaining the reactor coolant level above the top of the core” and that operation at EPU will result in core uncover times approximately 15% less than currently expected. *Id.* at 1-2. DPS alleges that Entergy has “withdrawn the bases” for the assumption that “operator action could be taken in sufficient time to prevent core uncover” and “has modified the procedure upon which the previous assumption was based.” *Id.* at 2.

As discussed below, Entergy opposes admission of proposed DPS Contention 6 because it fails to meet the requirements for the admission of new contentions in NRC proceedings.

³ Letter from J. Thayer to NRC, “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”).

⁴ “Notice of Intention to Participate and Petition to Intervene” (Aug. 30, 2004).

II. STANDARDS FOR ADMISSIBILITY OF NEW CONTENTIONS

New contentions must satisfy the Commission's rules for submitting contentions after the initial filing, as well as the admissibility requirements applicable to all contentions.

A. A New Contention Must Satisfy 10 C.F.R. § 2.309(f)(2) Criteria

The Commission's rules explicitly state that "new contentions filed after the initial filing" can be admitted "only with leave of the presiding officer upon a showing" that:

- (i) The information upon which the new contention is based was not previously available;
- (ii) The information upon which the new contention is based is materially different than information previously available; and
- (iii) The new contention has been submitted in a timely fashion based on the availability of new information.

10 C.F.R. § 2.309(f)(2). The Commission has stated unequivocally that each of these criteria "must be satisfied for admission" of a new contention. 69 Fed. Reg. 2,182, 2,221. Thus, failure to satisfy any of the 10 C.F.R. § 2.309(f)(2) criteria must result in rejection of the proposed new contention.

B. A Contention Must Be Specific and Supported By a Basis Demonstrating a Genuine, Material Dispute

Moreover, any proposed contention must meet the Commission's requirements for admissibility specified in 10 C.F.R. § 2.309(f)(1).⁵ In particular, a contention is admissible only if it provides a "specific statement of the issue of law or fact to be raised or controverted," accompanied, *inter alia*, by

- A demonstration that "the issue raised in the contention is material to the findings the NRC must make to support the action involved in the proceeding" and

⁵ Entergy discussed the Commission's requirements for admissibility of contentions in its answer to the original DPS contentions. See "Entergy's Answer to [DPS] Notice of Intention to Participate and Petition to Intervene" (Sep. 29, 2004) at 6-11.

- “sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact,” which showing must include “the supporting reasons for each dispute.”

10 C.F.R. §§ 2.309(f)(1)(iv), (vi); *see also Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-3, 59 NRC 10, 13 (2004) (“As required by 10 C.F.R. § 2.309,” a contention must “show that a genuine dispute exists with the Applicant on a material issue.”). The failure of a contention to comply with any of the 10 C.F.R. § 2.309(f)(1) requirements is grounds for rejecting the contention. *See, e.g., Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991).

As the Commission reiterated in incorporating these standards into the revised 10 C.F.R. Part 2, “[t]he threshold standard is necessary to ensure that hearings cover only genuine and pertinent issues of concern and that issues are framed and supported concisely enough at the outset to ensure that the proceedings are effective and focused on real, concrete issues.” 69 Fed. Reg. 2,182, 2,189-90 (2004). Further, admissible contentions “must explain, with specificity, particular safety or legal reasons requiring rejection of the contested [application].” *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 359-60 (2001).

Therefore, under the Rules of Practice, a statement “that simply alleges that some matter ought to be considered” does not provide a basis for an admissible contention. *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 246 (1993), *review declined*, CLI-94-2, 39 NRC 91 (1994). Similarly, a mere reference to documents does not provide an adequate basis for a contention. *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 348 (1998).

C. A Contention For Which the Board Cannot Provide Relief Must be Rejected

It has been long-established by NRC case law that a “contention must be one that, if proven, would entitle the petitioner to relief.” *National Enrichment Facility*, CLI-04-3 at 14. In

“ruling on a contention a Licensing Board must refuse to admit a contention if, assuming the contention were proven, it would be of no consequence in the proceeding because it would not entitle the petitioner to specific relief.” *Duke Energy Corporation* (Catawba Nuclear Station, Units 1 and 2), LBP-04-10, 59 NRC 296, 309 (2004) (citing former 10 C.F.R. § 2.714(d)(2)(ii)).⁶ Failure to identify some relief to which a petitioner could be entitled by Board action, therefore, renders a contention inadmissible.

III. PROPOSED DPS CONTENTION 6 FAILS TO MEET THE REQUIREMENTS FOR ADMISSIBILITY OF CONTENTIONS

The Board should reject Proposed DPS Contention 6 for a number of reasons. First, the contention fails to raise any genuine dispute between the parties. Second, the contention is without factual or legal basis. Finally, the contention fails to identify any relief that may be granted by the Board. Thus, DPS has failed to submit an admissible contention and its Request should be denied.⁷

A. Proposed DPS Contention 6 Fails to Identify a Genuine Issue in Dispute

The entire foundation of proposed DPS Contention 6 rests on two sentences in an Entergy letter to the NRC responding to an NRC Staff Request for Additional Information with respect to one aspect of Supplement 17 to the Application.⁸ That letter references the fact that the VY safe shutdown analysis is based on the assumption that the Reactor Core Isolation Cooling (“RCIC”)

⁶ The requirement for relief is retained in the current regulations (effective February 13, 2004) although, as the Commission explained, an explicit statement that “a contention show that the petitioner is entitled to relief” was not included because “[s]uch a criterion overlaps” the requirement in the new 10 C.F.R. § 2.309(d)(1)(iv). 69 Fed. Reg. at 2,202.

⁷ The NRC Staff Response to Vermont Department of Public Service Request for Leave to File a New Contention, dated November 10, 2004, discusses the requirements for admitting late-filed contentions and determines they are satisfied in this instance (with which Entergy agrees) but fails to analyze whether the proposed contention raises issues of material fact that require adjudication or whether it seeks any relief that can be granted by the Board. Since, as set forth above, a contention must meet these standards (as well as the late-filing requirements), Entergy respectfully submits that the Staff’s failure to object to the proposed contention is not well founded.

⁸ Letter from R. Wanczyk, to NRC, “Vermont Yankee Nuclear Power Station Technical Specification Proposed Change No. 263 – Supplement No. 17 Extended Power Uprate – Response to Request for Additional Information related to the 10 CFR 50 Appendix R Timeline” (Sep. 30, 2004) (“Supplement 17”) (DPS Exh. 38).

system can be made operable in approximately 15 minutes, and states that “VY has revised the procedure governing operator actions [to meet that requirement] and is in the process of verifying this assumption. This verification as well as training of operations crews will be completed by December 1, 2004.” Supplement 17 (DPS Exh. 38) at 1.

Proposed DPS Contention 6 appears to allege that the Application is deficient because Entergy has revised the procedure for operator actions to make the RCIC system operable in approximately fifteen minutes but has yet to verify that the new procedure results in the RCIC becoming operable within the time allowed. In so alleging, DPS does not set forth a dispute. The “Bases” and “Supporting Evidence” of proposed DPS Contention 6 merely confirm that VY has already agreed to perform the verification and operator training actions DPS (apparently) seeks the Board to impose. DPS Request at 1-2. DPS does not dispute that the verification and training activities proposed by Entergy are appropriate or that there is any reason why the verification cannot be properly carried out. The contention “simply alleges that [the] matter ought to be considered,” which is not a sufficient basis for an admissible contention. *Rancho Seco*, LBP-93-23, 38 NRC at 246.

Moreover, VY is currently performing the very actions DPS appears to be requesting.⁹ Those actions are scheduled to be completed by December 1, 2004, *see* Supplement 17 (DPS Exh. 38) at 1, well before EPU approval. Thus, there is currently no dispute between the parties. The Board, having no dispute to resolve, should not admit the contention.

B. The Contention Lacks Factual and Legal Basis

DPS wrongly asserts that by submitting Supplement 17 to the Application, “Applicant has now withdrawn the bases upon which it assumed operator action could be taken to prevent core uncover.” DPS Request at 2. Contrary to DPS’ assertion, VY has neither withdrawn nor

⁹ DPS does not state in its Request that it is seeking any specific action or remedy.

changed anything in the Application as a result of Supplement 17 (DPS Exh. 38). The relevant portion of Entergy's letter states:

VY's EPU submittal documented that the time to core uncover as a result of EPU was changed from 25.3 minutes to 21.3 minutes and stated that there is sufficient time available for the operator to perform the required actions. This statement is based on the current Safe Shutdown Capability Analysis (SSCA) assumption that the Reactor Core Isolation Cooling (RCIC) system can be made operable in approximately 15 minutes. VY has revised the procedure governing operator actions and is in the process of verifying this assumption. This verification as well as training of operations crews will be completed by December 1, 2004.

This letter provides a commitment to verify the time assumed in the SSCA and complete operator training by December 1, 2004.

This supplement to the license amendment request provides additional information to update Entergy's application for a license amendment and does not change the scope or conclusions in the original application, nor does it change Entergy's determination of no significant hazards consideration.

Supplement 17 (DPS Exh. 38) at 1-2 (emphasis added). The very document cited by DPS unequivocally establishes that VY did not "withdraw" or "revise" its Application as asserted by DPS. Thus, the contention rests on an erroneous factual base.

Proposed DPS Contention 6 also fails to meet the requirement for admitting new contentions. For the Board to consider a new contention, there must be, *inter alia*, a showing that the information upon which the "new contention is based is materially different than information previously available." 10 C.F.R. § 2.309(f)(2)(ii) (emphasis added). As the letter emphasizes, there has been no material change to the Application, and DPS identifies none. The time to core uncover under EPU conditions was specified in the original Application and remains unchanged. As is clear from the document DPS cited, VY is only verifying that the operator actions under the revised procedures still meet the core uncover time assumption. Only if the verification process identifies a condition that would result a change to the

Application could there be a material change that would support a new contention. That situation does not exist now and DPS does not even allege that it does.

Moreover, nowhere does DPS “explain, with specificity, particular safety or legal reasons requiring rejection of the contested license amendments” solely because VY is verifying compliance with an operating parameter contained in the Application. *See Millstone*, CLI-01-24, 54 NRC at 359-60. Such verification is part of everyday engineering practice and is consistent with ensuring plant safety and compliance within the terms of the operating license, and cannot in itself be the basis for rejecting a license application. The contention, therefore, is inadmissible.

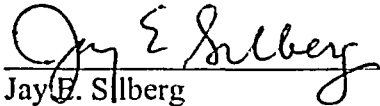
C. The Proposed Contention Would Not Entitle DPS to Any Relief

Even assuming, *arguendo*, that Proposed DPS Contention 6 had factual and legal bases, it does not require any action by the Board. As explicitly provided in Supplement 17 (DPS Exh. 38), Entergy has already committed to the NRC Staff to address the potential issue upon which the contention is founded. DPS’ proposed contention provides no new information and seeks no new VY action. Thus, even if DPS’ proposed contention could be construed as requesting any relief, that relief is already in place: a binding VY commitment to the NRC Staff. Thus, the proposed contention “would be of no consequence in the proceeding” because it would not entitle DPS to any legal relief. *See, e.g., Catawba*, LBP-04-10, 59 NRC at 309.

IV. CONCLUSION

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

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Jay E. Silberg", is written over a horizontal line.

Jay E. Silberg

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Dated: November 10, 2004

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Entergy's Answer to Vermont Department Of Public Service Request for Leave to File a New Contention" 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 10th day of November, 2004.

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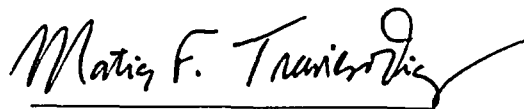
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