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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

SERVED 12/16/04

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Alex S. Karlin, Chairman
Dr. Anthony J. Baratta
Lester S. Rubenstein

In the Matter of ENTERGY NUCLEAR VERMONT YANKEE L.L.C. and ENTERGY NUCLEAR OPERATIONS, INC. (Vermont Yankee Nuclear Power Station)	Docket No. 50-271-OLA ASLBP No. 04-832-02-OLA December 16, 2004

MEMORANDUM AND ORDER
(Selection of Hearing Procedures and Ruling on State Statutory Claim)

On November 22, 2004, this Board granted the requests for hearing of two petitioners, the Department of Public Service of the State of Vermont (State) and the New England Coalition (NEC), challenging certain aspects of the application of Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (collectively, Entergy), for an amendment to the operating license for the Vermont Yankee Nuclear Power Station in Windham County, Vermont. LBP-04-28, 60 NRC __ (slip op. at 1) (Nov. 22, 2004). Entergy is applying for an increase in Vermont Yankee's maximum power level from 1593 megawatts thermal (MWt) to 1912 MWt and to modify associated technical specifications of the license. The Board found the State and NEC had each raised two contentions admissible under 10 C.F.R. § 2.309(f). Today's ruling addresses the appropriate procedures to use in conducting the hearing on these contentions.

Two issues, each of first impression, are raised. The first involves interpreting a new NRC regulation, 10 C.F.R. § 2.310, "Selection of hearing procedures," and applying it to the four admitted contentions.[1] The second issue involves the nature and extent of the State's right to present evidence and interrogate witnesses pursuant to section 274(l) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2021(l).

For the reasons set forth below, with regard to the first issue we conclude, pursuant to 10 C.F.R. § 2.310, that the informal hearing procedures of 10 C.F.R. Part 2, Subpart L "Informal Hearing Procedures for NRC Adjudications" are the most appropriate for the four contentions. With regard to the second issue, we hold, based on the finding in Citizens Awareness Network, Inc. v. United States, No. 04-1145, 2004 WL 2827697, at *8-9 (1st Cir. Dec. 10, 2004) [hereinafter CAN v. United States], that the opportunity for cross-examination under Subpart L is equivalent to the opportunity for cross-examination under the APA and that the opportunity for cross-examination under 10 C.F.R. § 2.1204(b)(3) is consistent with the State's "reasonable opportunity . . . to interrogate witnesses" under 42 U.S.C. § 2021(l).

I. BACKGROUND

In September 2003, Entergy submitted an extended power uprate (EPU) application to the Commission to amend Facility Operating License No. DPR-28, for operation of the Vermont Yankee Nuclear Power Station.[2] On July 1, 2004, the Commission issued a notice of consideration of issuance of the proposed amendment and opportunity for a hearing. 69 Fed. Reg. 39,976 (July 1, 2004).

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[1] NRC Changes to Adjudicatory Process, 69 Fed. Reg. 2,182 (Jan. 14, 2004).

[2] Letter from Jay K. Thayer, Site Vice President, to U.S. Nuclear Regulatory Commission, Document Control Desk, "Vermont Yankee Nuclear Power Station License No. DPR-28 (Docket No. 50-271) Technical Specification Proposed Change No. 263 Extended Power Uprate" (Sept. 10, 2003), ADAMS Accession No. ML032580089 [hereinafter Application]. Subsequently, Entergy supplemented and amended its application several times.

The State and NEC each filed a timely petition to intervene, asking to be admitted as a party to any proceeding conducted on the application.[3] The State submitted five contentions challenging certain aspects of Entergy's application. NEC proposed seven contentions.

Following the designation of this Board, 69 Fed. Reg. 56,797 (Sept. 22, 2004), both Entergy [4] and the NRC Staff[5] submitted answers to the petitioners' hearing requests. Each petitioner filed replies to the Entergy and Staff Answers.[6] In addition to discussing issues relating to standing and the admissibility of contentions, the pleadings addressed the proper interpretation and application of 10 C.F.R. § 2.310 and the State's rights under 42 U.S.C. § 2021(l). On October 21 and 22, 2004, the Board heard oral argument on these issues in Brattleboro, Vermont. Tr. at 61-558.

On November 22, 2004, the Board granted the petitioners' hearing requests and admitted four of the proposed contentions. We now must determine the procedures that will govern our adjudicatory hearing on each contention. The State and NEC, respectively, assert that each of their contentions should be adjudicated under Subpart G. State Petition at 5; NEC Petition at 9. Entergy and the Staff argue that none of the contentions meet the criteria for

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[3] [State] Notice of Intention to Participate and Petition to Intervene (Aug. 30, 2004) [hereinafter State Petition]; [NEC]'s Request for Hearing, Demonstration of Standing, Discussion of Scope of Proceeding and Contentions (Aug. 30, 2004) [hereinafter NEC Petition].

[4] Entergy's Answer to [State] Notice of Intention to Participate and Petition to Intervene (Sept. 29, 2004) [hereinafter Entergy Answer to State]; Entergy's Answer to the [NEC]'s Request for Hearing (Sept. 29, 2004) [hereinafter Entergy Answer to NEC].

[5] NRC Staff Answer to [State] Notice of Intention to Participate and Petition to Intervene (Sept. 29, 2004) [hereinafter Staff Answer to State]; NRC Staff Answer to Request for Hearing of [NEC] (Sept. 29, 2004) [hereinafter Staff Answer to NEC].

[6] [State] Reply to Answers of Applicant and NRC Staff to Notice of Intention to Participate and Petition to Intervene (Oct. 7, 2004) [hereinafter State Reply]; [NEC]'s Reply to Applicant and NRC Staff Answers to New England Coalition's Request for Hearing, Demonstration of Standing, Discussion of Scope of Proceeding and Contentions (Oct. 11, 2004) [hereinafter NEC Reply].

Subpart G and thus they should be adjudicated under Subpart L. Entergy Answer to State at 39; Entergy Answer to NEC at 48; Staff Answer to State at 27; Staff Answer to NEC at 24.

II. REGULATORY ANALYSIS OF APPROPRIATE HEARING PROCEDURE UNDER 10 C.F.R. PART 2

A. Three Step Analysis

Our regulatory analysis of the appropriate hearing procedures for the four admitted contentions involves three steps. First, we grapple with the basic interpretation of 10 C.F.R. § 2.310 and several generic issues concerning how to construe this new regulation. The second step is to apply 10 C.F.R. § 2.310(d) to each of the contentions and decide whether it mandates the use of Subpart G procedures. If Subpart G procedures are not required, then a third step is necessary where we decide which Subpart - L or G - to use for each contention.

B. Basic Analysis and Interpretation of 10 C.F.R. § 2.310

1. Overview

On January 14, 2004, the NRC substantially amended 10 C.F.R. Part 2, its rules of practice on adjudicatory hearings, "to make the NRC's hearing process more effective and efficient." 69 Fed. Reg. 2,182 (Jan. 14, 2004) (Adjudicatory Process Final Rule). In the final rule the Commission continued its efforts "to move away from the trial-type, adversarial format to resolve technical disputes" believing that "in most instances, the use of the full panoply of formal, trial-like adjudicatory procedures . . . is not essential to the development of an adequate hearing record." Id. Thus, the Adjudicatory Process Final Rule encourages, and in some situations requires, the use of the "informal" procedures specified in 10 C.F.R. Part 2, Subpart L, rather than the formal procedures of Subpart G, in proceedings involving the grant, renewal or amendment of licenses. See 10 C.F.R. § 2.310. Under Subpart L, (a) discovery is prohibited except for certain mandatory disclosures, (b) the parties file all direct and rebuttal testimony in written form, ©) the Board conducts oral hearings during which it interrogates the witnesses, and (d) cross-examination by the parties is permitted, on motion, if the Board deems it

necessary for the development of an adequate record. The formal adjudicatory procedures of Subpart G differ, in relevant part, by allowing the parties to propound interrogatories, to take depositions, and to cross-examine witnesses without leave of the Board.

The issue in this case is whether, under the Adjudicatory Process Final Rule, any of the four admitted contentions must or should be heard under Subpart G procedures. Since this case involves a "licensee-initiated amendment" to a license for a nuclear power reactor, the determination of the appropriate hearing procedures hinges on the interpretation and application of 10 C.F.R. § 2.310(a) and (d), which read, in pertinent part:

> § 2.310 Selection of hearing procedures.
>
> Upon a determination that a request for hearing/petition to intervene should be granted and a hearing held, the Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on the request/petition will determine and identify the specific hearing procedures to be used for the proceeding as follows–
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> (a) Except as determined through the application of paragraphs (b) through (h) of this section, proceedings for the grant, renewal, licensee-initiated amendment, or termination of licenses or permits subject to parts . . . 50 . . . of this chapter may be conducted under the procedures of subpart L of this part.
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> * * * * * * * *
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> (d) In proceedings for the grant, renewal, licensee-initiated amendment, or termination of licenses or permits for nuclear power reactors, where the presiding officer by order finds that resolution of the contention or contested matter necessitates resolution of issues of material fact relating to the occurrence of a past activity, where the credibility of an eyewitness may reasonably be expected to be at issue, and/or issues of motive or intent of the party or eyewitness material to the resolution of the contested matter, the hearing for resolution of that contention or contested matter will be conducted under subpart G of this part.

A petitioner requesting a Subpart G hearing pursuant to section 2.310(d) "must demonstrate, by reference to the contention and the bases provided and the specific procedures in subpart G of this part, that resolution of the contention necessitates resolution of material issues of fact which may be best determined through the use of the identified procedures." 10 C.F.R. § 2.309(g).

2. Regulatory Criteria

At the most fundamental level, the parties dispute the proper interpretation of 10 C.F.R. § 2.310(d). The State asserts that the regulation requires that a contention be heard under Subpart G procedures in three different circumstances. The Staff and Entergy argue that the regulation mandates Subpart G only in two situations. The key regulatory phrase mandates Subpart G procedures where the presiding officer finds that:

> resolution of the contention or contested matter necessitates resolution of issues of material fact relating to the occurrence of a past activity, where the credibility of an eyewitness may reasonably be expected to be at issue, and/or issues of motive or intent of the party or eyewitness material to the resolution of the contested matter . . .

10 C.F.R. § 2.310(d).

The State points to the comma between the words "activity" and "where" and argues that a Subpart G hearing must be provided if a contention involves either: (1) "issues of material fact relating to the occurrence of a past activity"; or (2) a situation "where the credibility of an eyewitness may reasonably be expected to be an issue"; or (3) "issues of motive or intent of the party or eyewitness may reasonably be expected to be at issue." State Petition at 44. The State asserts that 10 C.F.R. § 2.309(g) supports this interpretation because it only requires a petitioner to demonstrate that resolution of the contention necessitates the "resolution of material issues of fact."

Entergy and the Staff argue that the first two elements of 10 C.F.R. § 2.310(d) must be read in conjunction. In support, they cite the Statement of Considerations, where the Commission stated: "The first criterion contains two elements: The first is that there is a dispute of material fact concerning the occurrence of . . . a past activity. . . . The second element is that the credibility of the eyewitness may reasonably be expected to be an issue." 69 Fed. Reg. at 2,222. The Commission goes on to describe the third phrase in the regulation (motive or intent) as the "second alternative criterion." Id.

We conclude that 10 C.F.R. § 2.310(d) provides only two criteria entitling a petitioner to a Subpart G process and that the first criterion combines two elements, requiring that a contention necessitate resolution of "a dispute of material fact concerning the occurrence of a past activity" and that "the credibility of an eyewitness may reasonably be expected to be an issue" in resolving that dispute. This conclusion is based primarily on the parallel structure of the regulation, which specifies that Subpart G procedures will be used where resolution of the contention "necessitates resolution of issues of material fact relating to the occurrence of a past activity, where the credibility of an eyewitness may reasonably be expected to be at issue, and/or issues of motive or intent of the party or eyewitness material to the resolution of the contested matter." 10 C.F.R. § 2.310(d) (emphasis added). In addition, if the two elements of the first criterion were read as independent criteria, the scope of the section 2.310(d) could be so broadly expanded as to subsume most of the general rule. Recognizing that the regulation is not without ambiguity, any doubt about the validity of our interpretation is resolved by the Commission's contemporaneous interpretation in the Statement of Considerations quoted in the preceding paragraph. See 69 Fed. Reg. at 2,222.[7]

3. Other Generic Issues

The petitioners raise several other generic arguments as to why they should be entitled to a Subpart G hearing with full discovery and cross-examination. First, the petitioners declare that the complexity of the issues requires that a Subpart G process be used.[8] Second, NEC argues that it is entitled to a full and fair public hearing under section 189a of the AEA. NEC Petition at 6. Next, petitioners assert that there is a high degree of public interest in this

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[7] Contrary to the State's assertion, 10 C.F.R. § 2.309(g) simply specifies how to submit a request for a particular hearing procedure, but it does not expand or modify the criteria that must be met under 10 C.F.R. § 2.310(d).

[8] See State Petition at 43 ("issues involved are extremely complex"); State Petition at 46 ("complexity of issues"); State Reply at 51 ("numerous complex, substantive issues"); NEC Petition at 9 ("too serious and complex"); NEC Reply at 15 ("highly technical").

proceeding and that it is controversial and therefore that discovery and cross-examination are essential to assure that there will be public confidence in the Board's decision.[9] In this regard, NEC argues that in determining whether to use Subpart G or L procedures, the Board should look at "what will best accommodate the needs of ordinary citizens who are participants in this proceeding and who face extremely limited resources." Tr. at 511. Further, the State argues that granting it the right to discovery and cross-examination will expedite, not delay, the process. State Petition at 46. According to the State, the process established for oral examination of witnesses under Subpart L, whereby a party submits proposed questions to the Board and the Board conducts the questioning, is "extraordinarily convoluted" and less effective because "there is no way . . . to then tell the Board what the follow-up question should be" until the initial answer is heard. Tr. at 497. Next, the State and NEC argue that the Applicant may not rigorously obey the mandate of section 2.336(a) to disclose all documents that are relevant to the contentions and therefore that discovery is needed to "equalize" the situation and ensure a full and true disclosure of the facts. Tr. at 515; State Reply at 49. Finally, the State asserts that the position of the Staff -- that a Subpart G process should only be granted under the first criterion of 10 C.F.R. § 2.310(d) if credibility is an issue -- is "inconsistent with the official position taken by the NRC" in its brief in CAN v. United States[10] where the NRC represented that "factual disputes, regardless of whether the credibility of eyewitnesses are at issue, may form the basis for a right to cross-examine witnesses." State Reply at 44.[11]

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[9] The State argues that it has a "keen and continuing interest" in this matter, illustrated by its many years of involvement with the Vermont Yankee facility, State Petition at 42-43, that public confidence requires a Subpart G hearing, State Petition at 43. NEC argues that the matter is "highly controversial," NEC Reply at 15, that "public interest is extremely high" and that the "public will benefit" by using a higher level of due process. NEC Reply at 16.

[10] Brief for Federal Respondents, CAN v. United States, No. 04-1145 (1st Cir. 2004) (filed on July 14, 2004), State Reply, Exh. 37 [hereinafter Federal Brief in CAN v. United States].

[11] The State also argues that "deficiencies in the record and uncertainties over critical (continued...)

Most of the petitioners' generic arguments in favor of a mandatory Subpart G hearing were considered and rejected by the Commission in the comments and debate leading to the promulgation of the Adjudicatory Process Final Rule. The remaining arguments are essentially attacks on the Commission regulations and are not appropriate in this adjudicatory proceeding. See 10 C.F.R. § 2.335(a).

Viewed in this light, we turn to each of the generic arguments. With regard to complexity, plainly there is no regulatory language in 10 C.F.R. § 2.310(d) that supports the argument that the complexity of the issues dictates that a contention be heard under Subpart G. Although the NRC's proposed rule on adjudicatory proceedings included complexity as one of the criteria that would require a Subpart G proceeding, 66 Fed. Reg. 19,610, 19,637 (Apr. 16, 2001), the Commission deleted this factor from the final rule, stating:

> [C]omplexity and number of issues in nuclear power plant licensing proceedings may not, per se, lead ineluctably to the conclusion that cross-examination is necessary to ensure a fair and adequate hearing on the contested matters. Rather, it is the nature of the disputed matters themselves that most directly and significantly bears on whether the techniques of formal hearings such as cross-examination are appropriate.

69 Fed. Reg. at 2,196. The complexity of an issue thus does not automatically trigger a Subpart G hearing under 10 C.F.R. § 2.310(d).[12]

Next, we address the argument that section 189a of the AEA , 42 U.S.C. § 2239(a), entitles petitioners to conduct discovery and cross-examination in this proceeding. Indeed, NRC and its predecessor the Atomic Energy Commission, originally concluded that on-the-record hearings, with discovery and cross-examination, were required under section 189a. 69 Fed. Reg. at 2,183. NRC now rejects this interpretation and discussed the evolution of its

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[11](...continued)
issues ultimately disadvantages the party with the burden of proof [which in this case] is the Applicant." State Petition at 46. Since the disadvantaged party, the Applicant, is not complaining and instead opposes the State's argument, we will not consider this issue further.

[12] As explained infra, Part III.B, complexity may be a factor in determining whether cross-examination is needed to ensure the development of an adequate record under 10 C.F.R. § 2.1204(b)(3).

thinking and reversal of its position at substantial length in the Statement of Consideration to the Adjudicatory Process Final Rule. 69 Fed. Reg. at 2,182-85, 2,191-92, 2,195-96. In CAN v. United States, No. 04-1145, 2004 WL 2827697, at *6 (1st Cir. Dec. 10, 2004), the First Circuit declined to resolve this issue "Because the new rules adopted by the Commission meet the requirements of the APA, it does not matter what type of hearing the NRC is required to conduct in reactor licensing cases." On this basis, and pursuant to 10 C.F.R. § 2.335(a), we need not rule on this issue.

We next turn to the argument that there is a high degree of public interest in this proceeding, that it is controversial, and therefore that discovery and cross-examination are required to assure public confidence in the proceeding and its decisions. The short answer is that there is nothing in the plain language of 10 C.F.R. § 2.310(d) to support that position.[13] The Commission heard and rejected these arguments when it promulgated the Adjudicatory Process Final Rule. 69 Fed. Reg. at 2,192. These policy choices, embodied in the final regulation, are not subject to attack in an adjudicatory proceeding. 10 C.F.R. § 2.335(a).

Further, we believe that at least some elements of the Subpart L procedures, may serve to assist, not hinder, petitioners. The three administrative judges on each Board, usually including two scientific experts in fields relevant to the proceeding, bring substantial experience and expertise to each contested matter. Given that the Board has the primary responsibility to examine witnesses in Subpart L proceedings, its three judges must be active inquisitors of the factual, technical, and scientific evidence relevant to resolving contested issues. 69 Fed. Reg. at 2,188. This active and inquisitorial role of the Boards in Subpart L proceedings may serve to reduce the burdens that ordinary citizens with limited resources might otherwise face in a full

[13] This proposed criterion is administratively impractical, as all petitioners would likely assert that their nuclear power plant licensing proceeding is of high public interest, and this Board is neither suited nor inclined to attempt to assess the quantum of public interest.

adversarial Subpart G proceeding and help to "level the playing field" in a way that may enhance public confidence in the proceeding.

Turning next to the assertion that Subpart L proceedings will be "extraordinarily convoluted" and that Subpart G proceedings will be faster and more efficient, we reject this as speculative. The Commission has stated that using an expert Board as the primary interrogator of witnesses, and reducing the amount of cross-examination and discovery by the parties, will "avoid needless delay and unproductive litigation." 69 Fed. Reg. at 2,188. Convoluted or not, this Board will do its best to manage and administer the hearing procedures (be they Subpart G, L or whatever) in an fair and efficient manner. Only time will tell whether the new Subpart L procedures expedite proceedings. In any event, we reject the petitioners "efficiency" argument simply because it is not a criterion under 10 C.F.R. § 2.310(d).

Petitioners' next argument -- that Entergy may not fully comply with its duty to disclose documents under 10 C.F.R. § 2.336(a) and therefore the petitioners should be granted a Subpart G process where they can take depositions and ask interrogatories, to "equalize" the field - is rejected. First, we will not presume that a party will not comply with its duty to disclose "all documents . . . relevant to the contentions." 10 C.F.R. § 2.336(a)(2)(I).[14] Second, if there is an unexcused failure to make a full disclosure, the Board will not hesitate to impose sanctions, including the use of depositions and interrogatories, against the offending party. 10 C.F.R. § 2.336(e).[15]

Addressing the petitioners' final generic argument, we see no inconsistency between the Staff's position here and the Commission's statements to the Court of Appeals in CAN v. United States. Here, the Staff argues that the contentions do not meet the criteria of 10 C.F.R.

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[14] Similar obligations are imposed on the Staff. See 10 C.F.R. §§ 2.1203 and 2.336(b).

[15] The First Circuit recently concluded that there is no explicit right to discovery under the APA, 5 U.S.C. § 556, that the new mandatory disclosure rules in Subpart L provide meaningful access to information, and thus that the Subpart L rules do not conflict with the APA. CAN v. United States, 2004 WL 2827697, at *7-8.

§ 2.310(d) for a Subpart G formal adjudicatory hearing. In CAN v. United States, the Commission represented to the Court that

> [T]he new Subpart L permits such cross-examination as is 'necessary to ensure development of an adequate record for decision.' 10 C.F.R. 2.1204(b). This is equivalent to the APA's provision for such cross-examination 'as may be required for a full and true disclosure of the facts.' 5 U.S.C. §556(d).[16]

We see no inconsistency between saying that factual disputes alone are insufficient to trigger Subpart G procedures under 10 C.F.R. § 2.310(d), and saying that factual disputes, even where eyewitness credibility is not an issue, may justify cross-examination under 10 C.F.R. § 2.1204(b)(3).

C. Application of 10 C.F.R. § 2.310(d) to Admitted Contentions

Based on the foregoing interpretation of 10 C.F.R. § 2.310(d), we must now examine each contention to determine if the petitioner has demonstrated that it meets the first criterion of 10 C.F.R. § 2.310(d), i.e., "necessitates resolution of issues of material fact relating to the occurrence of a past activity, where the credibility of an eyewitness may reasonably be expected to be an issue."[17] If so, the contention must be heard under Subpart G.

1. **State Contention 1**: Entergy has claimed credit for containment overpressure in demonstrating the adequacy of ECCS pumps for plant events including a loss of coolant accident in violation of draft General Design Criteria 44 and 52 and therefore Entergy has failed to demonstrate that the proposed uprate will provide adequate protection for public health and safety as required by 10 C.F.R. § 50.57(a)(3).

This contention focuses on relatively technical issues such as whether Entergy has demonstrated that, in the event of a loss of coolant accident (LOCA), the emergency core cooling system (ECCS) pumps will function adequately if containment overpressure is factored

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[16] Federal Brief in CAN v. United States at 18-19, State Reply, Exh. 37.

[17] Except for the generic issues associated with interpreting 10 C.F.R. § 2.310(d) discussed above, the petitioners focus on credibility issues and offer no serious argument that their contentions meet the second criterion of the regulation - "issues of motive or intent of the party or eyewitness material to the resolution of the contested matter." The State expressly acknowledges that motive is not an issue here. Tr. at 507.

into the equation, and whether this part of the application satisfies Draft GDC 44 and 52 and 10 C.F.R. § 50.57(a)(3). The State argues that resolution of this issue will require resolution of material factual disagreements relating to past activities such as "does defense in depth . . . prohibit allowing failure of one physical barrier, in this case the reactor containment, to result in the failure of the ECCS pump function which in term [sic] will fail a second barrier, the fuel cladding . . ." State Petition at 44.[18] The State then asserts that the "Answer filed by Applicant uses tactics designed to conceal, not reveal facts," State Reply at 48; that "Applicant misrepresented the facts by asserting that Mr. Sherman's opinion was without support when the Applicant knew there was evidence to support that opinion," State Reply at 49; and that the Applicant's "less revealing tactic," State Reply at 49, and "half truths," Tr. at 505, make cross-examination essential. State Reply at 49. The State gives the following example:

> [I]f a witness testifies that it is conservative to use the assumptions for calculating NPSH following a LOCA which appear in Regulatory Guide 1.82, Rev. 3, even though the underlying experimental bases for those assumptions have been unable, in many instances . . . to bound or otherwise quantify the uncertainties, only carefully crafted cross-examination will be able to test the bases and reasoning of the witness against the specific experimental studies to understand whether the witness's reasoning and basis stand up.

State Reply at 50; see Tr. at 508.

The Board concludes that the State has failed to demonstrate that resolution of State Contention 1 meets the requirements of 10 C.F.R. § 2.310(d). Based on the State's arguments, it appears that State Contention 1 will present disputes such as the proper assumptions to be used in calculating NPSH, the validity of these assumptions, and the nature, extent and certainty with which technical and safety conclusions can be drawn from these

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[18] State arguments about material fact disagreements relating to past activities concerning the adequacy of the ACRS review of Reg. Guide 1.82 and the adequacy of evidence concerning the necessity of containment overpressure credit and the impracticability of other options, State Reply at 44-45, are disregarded here, as these bases for Contention 1 were rejected in our November 22, 2004 ruling. See LBP-04-28, 60 NRC and (slip op. at 12 and 15.

assumptions and calculations. The parties will likely submit the written testimony of witnesses relating to the assumptions they used and the calculations they performed. But even if such witnesses are deemed "eyewitnesses" to their own calculations, and even if such calculations are deemed "past activities," we see no demonstration that the truthfulness or credibility of any of these eyewitnesses "may reasonably be expected to be at issue." Likewise, expert witnesses may testify as to the validity of the various technical assumptions and calculations, but they are not eyewitnesses. Although we "reasonably may expect" battles over the opinions of the opposing experts and disputes about their professional qualifications, unless they are also testifying as fact eyewitnesses with first hand knowledge of a material and disputed past activity, Subpart G procedures are not dictated under 10 C.F.R. § 2.310(d). 69 Fed. Reg. at 2,222. To hold otherwise would allow the exception to swallow the rule.

We also conclude that generalized aspersions on the tactics or motives of the parties, their employees, members, lawyers, or pro se representatives do not satisfy the "credibility" or "motive" elements of either criterion of 10 C.F.R. § 2.310(d). Certainly we expect and require truthfulness from all parties in all aspects of our proceedings. However, the fact that a party's initial pleading at the contention admissibility stage emphasizes those facts supporting its position and minimizes the relevance of opposing facts, does not shock us, nor does it require a Subpart G hearing under either criterion of 10 C.F.R. § 2.310(d). Similarly, the fact that each party is naturally motivated to prevail in its legal position and that lawyers are ethically bound to zealously represent their respective clients, does not trigger Subpart G procedures. And the fact that a witness may be a paid employee or dedicated member of a party, does not, per se, create any presumption that his or her credibility or motives are in such doubt that a Subpart G proceeding is required pursuant to 10 C.F.R. § 2.310(d).

2. **State Contention 2:** Because of the current level of uncertainty of the calculation which the Applicant uses to demonstrate the adequacy of ECCS pumps, the Applicant has not demonstrated that the use of containment overpressure to provide the necessary net positive suction head for ECCS

pumps will provide adequate protection for the public health and safety as required by 10 C.F.R. § 50.57(a)(3).

In addition to the generic arguments discussed above, the State asserts that this issue raises a number of material fact disagreements related to past activities. These include (a) how did Entergy calculate post-accident conditions and were these calculations appropriate, (b) did the testing on ECCS pumps relating to the impact of a potential LOCA leave large areas of uncertainty, and ©) is the level of uncertainty sufficiently high to make reliance on probabilistic risk assessment unacceptable. State Petition at 44-45. The State's example quoted in the preceding section, dealing with alleged uncertainties and challenges to the conservatisms in the NPSH calculations, covers State Contention 2 as well as State Contention 1.

For the reasons set forth with regard to State Contention 1, we conclude that the State has failed to demonstrate that resolution of State Contention 2 meets the criteria of 10 C.F.R. § 2.310(d). The credibility of eyewitnesses does not appear to be an issue with regard to the States alleged uncertainties and challenged conservatisms in Entergy's calculations. If these are the issues in dispute, there is no reason to think that Subpart G procedures are required.

3. NEC Contention 3: The license amendment should not be approved unless Large Transient Testing is a condition of the Extended Power Uprate.

Without focusing on any of its specific contentions or the regulatory language of 10 C.F.R. § 2.310(d), NEC alleges that there are issues of credibility concerning Entergy that warrant granting NEC the right to cross-examine witnesses and obtain discovery. NEC points to a "series of incidents in which [Entergy's] potential witnesses in this proceeding were shown to be of questionable veracity under oath." NEC Reply at 16. NEC quotes a June 13, 2003 Vermont Public Services Board order regarding the production of documents by Entergy to the effect that it was "disingenuous in its reading of the rule" and engaged in "selective quotation suggest[ing] a willingness to be less than forthright with this Board." NEC Petition at 8. NEC also alleges that on October 7, 2003, the Vermont Public Services Board stated that Entergy

has a "corrosive and bullying attitude that threatens an otherwise fair and open process" and ordered Entergy to reimburse NEC $ 51,000 in costs incurred in discovery. NEC Petition at 8. NEC further alleges that on September 18, 2000, the NRC Office of Investigation issued a notice of violation (NOV) to Entergy's predecessor at Vermont Yankee and that the notice makes clear that the offending "VY manager was untruthful with investigators." NEC Petition at 8. Yet when asked to name an individual eyewitness in this proceeding whose credibility reasonably may be an issue, NEC named only Jay Thayer, the Entergy official who signed its license amendment application. Tr. at 514. NEC did not provide us with an example of a past activity where the credibility of Mr. Thayer's eyewitness testimony reasonably may be expected to be an issue in this proceeding.

Entergy responds to NEC's allegations by arguing that "[a]lleged discovery misconduct in another proceeding before another agency [i.e., the Vermont Public Services Board] has absolutely nothing to do with the 'credibility of an eyewitness' . . . and has no bearing in determining the appropriate hearing procedures in the NRC proceeding." Entergy Answer to NEC at 49 n. 55. Entergy cites Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 366 (2001), as support for the proposition that issues relating to the credibility of a witness "cannot be historical" but must instead be "something that he may be accused of doing here and now that affects his credibility as a witness here." Tr. at 528. It also declares that the 2000 NRC NOV was issued to the "previous VY licensee" and is irrelevant to the current proceeding. Entergy Answer to NEC at 49-50. Entergy asserts that allegations as to the overall credibility of a party are not sufficient to require holding formal hearings. Entergy Answer to NEC at 50.

This situation demonstrates the difficulty the petitioner faces under the new rules in demonstrating, in its initial request for hearing, that a specific contention raises reasonable concerns about the credibility of an eyewitness to a material past activity. See 10 C.F.R. §§

2.309(g) and 2.310(d). At this stage, the petitioners do not even know the identity of the witnesses that Entergy may call.

Under these circumstances, we reject the notion that the demonstration of questions about an eyewitness's credibility "cannot be historical." At this early juncture in the proceeding, historical information is one of the few bases upon which a petitioner can argue, and this Board assess, the credibility of a potential eyewitness. Certainly, allegations of a witness's prior untruthfulness or dissembling that are reasonably related to issues in contention may suffice. This is true regardless of whether the allegations arise in a similar or related prior proceeding, so long as it is probative of whether a witnesses' credibility "reasonably may be expected to be at issue" in the current proceeding. 10 C.F.R. § 2.310(d).

Here, NEC has made some relatively specific allegations about the behavior of unnamed Entergy managers and about the activities of the predecessor licensee of Vermont Yankee. As to Entergy's predecessor, unless the allegations concern an individual who continues to work for Entergy and is identified as an eyewitness here, we cannot conclude that 10 C.F.R. § 2.310(d) has been satisfied. The prior licensee and Entergy are different corporate entities and the credibility of employees of the former will not be assumed to be the same as the credibility of different individuals employed by the latter. As to NEC's allegations of problems that have occurred after Entergy became the licensee, NEC has made no showing that the unnamed individuals in question will likely be eyewitnesses in this proceeding, or how the alleged prior credibility problems relate to this case. Likewise, NEC has made no showing that we have any reason to suspect that Mr. Jay Thayer, the one current Entergy employee named by NEC, may not be credible or truthful.

Accordingly, at this early point, NEC having failed to demonstrate that the credibility of an eyewitness reasonably may be expected to be an issue in litigating NEC Contention 3, we have no basis for concluding that a Subpart G hearing is mandated under 10 C.F.R. § 2.310(d).

4. NEC Contention 4: The license amendment should not be approved because Entergy cannot assure seismic and structural integrity of the cooling towers under uprate conditions, in particular the Alternate Cooling System cell. At present the minimum appropriate structural analyses have apparently not been done.

As outlined above, NEC's arguments relating to the credibility of Entergy and its employees and witnesses are not tied to any specific contention and it raises nothing new or particular on this issue with regard to NEC Contention 4. Accordingly, for the reasons set forth above, we rule that NEC has not shown, at this time, that under 10 C.F.R. § 2.310(d) NEC Contention 4 must be heard under Subpart G.

5. Conclusion

Based on the foregoing analysis, the Board concludes that, at this point, the petitioners have not demonstrated that any of the admitted contentions meet the criteria of 10 C.F.R. § 2.310(d), so as to mandate the use of Subpart G procedures. If however, at some later stage in this proceeding (e.g., when the identity of witnesses is known) a party submits a motion pursuant to 10 C.F.R. § 2.310(d), arguing that the credibility of an eyewitness as to a material past activity reasonably may be expected to be in issue, we may revisit the matter at that time.[19]

D. Determination of Appropriate Hearing Procedure

Having concluded that the petitioners have not demonstrated that any of the four admitted contentions must be heard under Subpart G pursuant to 10 C.F.R. § 2.310(d), the Board must now determine which set of procedures to use. Entergy and the Staff assert that, in

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[19] This is consistent with the Commission's statement that "a requestor/petitioner who fails to address the hearing procedure issue would not later be heard to complain in any appeal of the hearing procedure selection ruling." 69 Fed. Reg. at 2,221. Certainly a petitioner who knows the identity of an opposing party's eyewitnesses and has information raising questions about their credibility must present such arguments when it submits its initial request for hearing, or be barred. If however, the petitioner shows that the identity of the eyewitnesses of opposing parties, or information regarding their lack of credibility on issues material to this proceeding, was not previously available and submits a motion in a timely fashion, it may be considered. This approach is somewhat analogous to 10 C.F.R. § 2.309(f)(2)(I) and (iii).

this circumstance, Subpart L procedures are mandatory. Entergy argues "the revised rules . . . are specifically intended to eliminate the use of such formal procedures except in exceptional cases and instead [requires the Board to] conduct licensing hearings under the informal procedures of Subpart L." Entergy Answer to State at 39. The Staff also contends that "a proceeding involving a license amendment must ordinarily follow procedures for an informal hearing set forth in 10 C.F.R. Part 2, Subpart L." Staff Answer to State at 27. Indeed, this position finds support in the Statement of Considerations to the Adjudicatory Process Final Rule, stating that "Section 2.310(a) . . . applies the hearing procedures of the new Subpart L to all other proceedings not specifically named" and "Subpart L procedures would be used in nuclear power plant licensing proceedings for the resolution of contentions which do not meet the criteria set forth in section 2.310(d) for use of Subpart G hearing procedures." 69 Fed. Reg. at 2,205-06.

We disagree with the position of Entergy and the Staff.

The plain language of 10 C.F.R. § 2.310(a), which uses the term "may," clearly does not dictate the use of Subpart L if a petitioner fails to demonstrate that Subpart G procedures are mandatory. Section 2.310(a) states: "Except as determined through the application of paragraphs (b) through (h) of this section, proceedings . . . may be conducted under the procedures of subpart L of this part." 10 C.F.R. § 2.310(a) (emphasis added). The term "may" is discretionary. This result is consistent with the thrust of the new regulations, which vest substantial responsibility and discretion in the Boards, which are closest and most knowledgeable about the proceeding and its efficient management. Cf. 69 Fed. Reg. at 2,196 ("While the Commission acknowledges that this approach places greater emphasis and responsibility on the presiding officer to oversee the development of a full and complete record, the Commission concludes this approach will result in the fair but expeditious development of an adequate record for a final decision.").

The structure of 10 C.F.R. § 2.310 also supports the conclusion that Subpart L procedures are not automatic if a contention does not meet the criteria of the exceptions in each of the subsections (b) through (g). Each of these subsections use the mandatory language of "must," "will," or "shall," in specifying the procedures that apply, whereas 10 C.F.R. § 2.310(a) uses permissive language of "may" in referring to Subpart L. It is a fundamental rule of regulatory construction that "may," when contrasted with "must" or "will," is permissive. See Crockett Telephone Co. v. FCC, 963 F.2d 1564, 1570 (D.C. Cir. 1992) (use of words "may" and "shall" in same provision shows them to have their usual, different meanings); International Union, UAW v. Dole, 919 F.2d 753, 756 (D.C. Cir. 1990) ("the usual presumption that 'may' confers discretion, while 'shall' imposes an obligation to act").[20]

Because the plain language of the 10 C.F.R. § 2.310(a) is unambiguous, the Board need not examine the regulatory history. When "the meaning of the regulation is clear and obvious, the regulatory language is conclusive" and a Board is "not free to go outside the express terms of an unambiguous regulation to extrinsic aids such as regulatory history." Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Unit 1), LBP-95-17, 42 NRC 137, 145 (1995).[21] Nonetheless, even the regulatory history of section 2.310, supports our interpretation. For example, the Commission noted that "[u]nless otherwise provided in § 2.310, proceedings . . . must ordinarily use Subpart L procedures." 69 Fed. Reg. at 2,222 (emphasis

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[20]See also Haig v. Agee, 453 U.S. 280, 294 n. 26 (1981) (holding that the language "may" is discretionary); Southern Railway Co. v. Seaboard Allied Milling Corp., 442 U.S. 444, 455 (1979) (stating that "the Commission may . . . order a hearing" can only be construed as discretionary).

[21]See also Chevron U.S.A. Inc., v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 288 (1988) ("Although administrative history and other available guidance may be consulted for background information and the resolution of ambiguities in a regulation's language, its interpretation may not conflict with the plain meaning of the wording used in that regulation.").

added). The use of the word "ordinarily" confirms that Subpart L procedures are not mandatory.

Accordingly, we hold that Subpart L procedures are not mandatory for a contention that does not meet the criteria of 10 C.F.R. § 2.310(d). In such a circumstance, the Board, in its sound discretion, must determine the type of hearing procedures most appropriate for the specific contentions before it.

In applying our discretion to the four contentions admitted here, we heed the Commission's statement that unless otherwise provided in 10 C.F.R. § 2.310, Subpart L proceedings should "ordinarily" be used. 69 Fed. Reg. at 2,222. Against this, we weigh some of the generic factors argued by the petitioners. Certainly the admitted contentions raise some complex technical issues. But many nuclear reactor licensing proceedings do the same, and the issues here do not appear extraordinarily technical or beyond the grasp of this Board, duly assisted by questions suggested to us by the parties, and possibly by cross-examination by the parties if needed for a fair decision and an adequate record. Further, we note the long and active involvement of the State of Vermont in NRC licensing proceedings relating to Vermont Yankee. This, plus the fact that counsel for the State and Entergy each have at least 30 years of experience in practicing before the NRC, indicate that a Subpart G proceeding, if granted, would be as efficient and productive as possible and entail no unnecessary delay. The necessity for discovery, which is not available under Subpart L, might also be a factor. But, at this point, we see no particular reason why the additional discovery mechanisms of Subpart G are necessary for the full and fair disclosure of the facts. Finally, as this is the first case to arise under the new 10 C.F.R. § 2.310, we are loathe to conclude that the new Subpart L procedures, so preferred by the Commission, should not be applied here.

Weighing these factors and the information submitted to date, we conclude that the procedures of Subpart L, are appropriate for the four admitted contentions.

III. STATUTORY ANALYSIS OF STATE'S RIGHT TO INTERROGATE WITNESSES UNDER 42 U.S.C. § 2021(l)

We now turn to the argument that section 274(l) of the AEA, 42 U.S.C. § 2021(l) gives the State the right to cross-examination of witnesses in a Subpart L proceeding, regardless of 10 C.F.R. § 2.310.[22] The statute states, in pertinent part, "the Commission shall . . . afford reasonable opportunity for the State representatives to offer evidence, interrogate witnesses, and advise the Commission as to the application without requiring such representatives to take a position for or against the granting of the application." 42 U.S.C. § 2021(l).

A. Effect of State Contentions on its 42 U.S.C. § 2021(l) Claim

As a preliminary matter, Entergy and the Staff argue that by filing proposed contentions the State has elected to participate as a party rather than as an "interested State" and thus is somehow barred from asserting its claim under 42 U.S.C. § 2021(l). Entergy Answer to State at 3-4; Staff Answer to State at 2-3. They assert that the State cannot participate as both a party and an interested State. Tr. at 117, 120, 129-132. They point to 10 C.F.R. § 2.315©), which reads, in pertinent part, "The presiding officer will afford an interested State . . . which has not been admitted as a party under § 2.309, a reasonable opportunity to participate in a hearing," (emphasis added) as dictating that a State that has been admitted as a party loses the rights given to an interested State.[23] In support of this proposition they cite Louisiana Energy Services, L.P. (National Enrichment Facility), Licensing Board Memorandum and Order (Clarification Requests Ruling and Commission Referral), (Sept. 14, 2004) (unpublished), which states "on its face, this [underlined] language precludes participation under section 2.315©) by

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[22] Entergy's license amendment application for a 20% increase in maximum power clearly falls within the scope of 42 U.S.C. § 2021(l) as an "application for Commission license authorizing an activity as to which the Commission's authority is continued pursuant to [42 U.S.C. § 2021(c)]."

[23] The phrase "which has not been admitted as a party under § 2.309" was not in the current rule's predecessor, see 10 C.F.R. § 2.715(c) (2004), nor in the proposed version of the current rule. See 66 Fed. Reg. 19,610, 19,639 (Apr. 16, 2001).

an interested governmental entity that has been admitted as a section 2.309 party to a proceeding." Id. at 3.[24]

While we disagree with the Licensing Board's logic,[25] the issue is moot because subsequent to the briefing in this proceeding the Commission resolved this matter by affirming Louisiana Energy Services L.P. The Commission ruled that the "plain terms of Section 2.315©) [allow] government entities to claim 'interested state' participation only if they are not already admitted parties." Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-35, 60 NRC __, (slip op. at 11) (Dec. 8, 2004). Accordingly, we hold that, the State of Vermont, having requested a hearing and submitted two admissible contentions, is a party to this proceeding and cannot participate as an interested State.[26]

This case presents a different issue - whether 42 U.S.C. § 2021(l) gives the State the right to discovery and cross-examination of witnesses, i.e., a right to a Subpart G proceeding, regardless of the Board's 10 C.F.R. §§ 2.310 decision. Neither the Commission or the Board addressed the impact of section 2021(l) in Louisiana Energy Services L.P. because the issue never arose. And nothing in the statute makes the State's right to a "reasonable opportunity . . . to interrogate witnesses" dependent on its status under 10 C.F.R. § 2.315©) as an interested

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[24] The Board referred its ruling in Louisiana Energy Services, L.P. to the Commission.

[25] The statement that a State which has not been admitted as a party may participate as an interested State, does not mandate the converse - that a State which has been admitted as a party may not. Imposing such a Hobson's choice on the State runs counter to the basic purpose of the regulation, which is to give the State additional rights.

[26] The State raises the novel argument that it need not decide whether to participate as an interested State or a party "until the Board has ruled as to whether there's going to be a hearing and has decided what the contentions are." Tr. at 104. They cite no regulatory support for this proposition, and we reject it. However, the Adjudicatory Process Final Rule provides the option for petitioners, such as the State, to "adopt" other petitioners' contentions, thus providing the State with an avenue of participation in them. 10 C.F.R. § 2.309(f)(3).

State or a party.[27] Thus, Louisiana Energy Services, L.P. provides no answer to the State's arguments under 42 U.S.C. § 2021(l).

B. Consistency of 10 C.F.R. § 2.1204(b) and 42 U.S.C. § 2021(l).

Accordingly, we consider the merits of whether 42 U.S.C. § 2021(l) entitles the State to a Subpart G hearing with cross-examination.[28] The State argues that the statute guarantees it such rights. State Petition at 3; State Reply at 3-4.

Entergy and the Staff respond that the Adjudicatory Process Final Rule represents, inter alia, the Commission's reasonable interpretation of 42 U.S.C. § 2021(l), and that 10 C.F.R. § 2.1204(b)(3) affords the State a "reasonable opportunity" to interrogate witnesses and thus satisfies the statute. Tr. at 522-523 (Entergy); Tr. at 132, 540-543 (Staff).

The statutory language is our lodestar. It states that "the Commission . . . shall afford reasonable opportunity for State representatives to offer evidence, interrogate witnesses, and advise the Commission." 42 U.S.C. § 2021(l). For reasons set forth below, we conclude this language is consistent with the new Adjudicatory Process Final Rule.

First, we note that Commission never discussed the issue of the State's rights under 42 U.S.C. 2021(l) in the Statements of Considerations (totaling 70+ pages) to the proposed or final revisions to 10 C.F.R. Part 2. See 66 Fed. Reg. 19,610-71 and 69 Fed. Reg. 2,182-2,282.

At first blush, 10 C.F.R. § 2.1204(b)(3) appears to be at odds with the State's "reasonable opportunity" to interrogate witnesses under 42 U.S.C. § 2021(l). Under Subpart L, the presiding officer "shall allow cross-examination by the parties only if the presiding officer

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[27] Questions as to whether 10 C.F.R. § 2.315(c), particularly its new phrase, "where cross-examination by the parties is permitted," fully implements the State's rights under 42 U.S.C. § 2021(l) are moot under Louisiana Energy Services L.P.

[28] The State's argument that it is entitled to discovery under 42 U.S.C. § 2021(l) is rejected because the statute does not explicitly mention discovery, nor is it necessarily implicit in the other granted rights. See CAN v. United States, 2004 WL 2827697, at *7-8.

determines that cross-examination by the parties is necessary to ensure the development of an adequate record for decision. 10 C.F.R. § 2.1204(b)(3) (emphasis added). Certainly, the rationale of Subpart L proceedings is to assign primary responsibility to the Board, not the parties, for the interrogation of witnesses and development of an adequate record. As the Commission explained:

> In such cases, questioning of witnesses by the presiding officer, after consideration of questions for witnesses propounded by the parties, has the potential to be the better approach for assuring the expeditious, controlled and deliberate development of an adequate record for decision. The presiding officer is ultimately responsible for the preparation of an initial decision on the contention/contested matter; it would follow that the presiding officer is best able to assess the record information as the hearing progresses, and determine where the record requires further clarification or explanation in order to provide a basis for the presiding officer's (future) decision.

69 Fed. Reg. at 2,196.

But the Commission goes on to say that, cross-examination by the parties is indeed available under 10 C.F.R. § 2.1204(b)(3):

> If there are circumstances in any proceeding where the presiding officer believes that cross-examination by the parties is needed to develop an adequate record, the presiding officer may authorize cross-examination by the parties.

69 Fed. Reg. at 2,196.[29]

The recent decision in CAN v. United States, No. 04-1145, 2004 WL 2827697 (1st Cir. Dec. 10, 2004), supports the view that a reasonable opportunity for cross-examination, in appropriate circumstances, must be afforded to any party under 10 C.F.R. § 1204(b)(3). In that case, the Commission represented to the court that the availability of cross examination under

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[29] The Statement of Considerations includes suggestions that the parties will need to conduct cross-examination in Subpart L proceedings "only in rare circumstances." 69 Fed. Reg. at 2,196. While we acknowledge that the Boards must take the laboring oar on any examination of the witnesses, we are not so confident that Subpart L effectively banishes cross-examination by the parties. Certainly, this was not the position of the Commission in CAN v. United States. Setting predictions aside, CAN v. United States teaches that each Board must exercise its discretion and answer the question: is the requested cross-examination needed for a full and true disclosure of the facts and to ensure a the development of an adequate record for a sound decision? This will be a case-by-case determination.

10 C.F.R. § 2.1204(b)(3) "is equivalent to the APA's provision for such cross examination 'as may be required for a full and true disclosure of the facts,' for on-the-record adjudicatory hearings under 5 U.S.C. § 556(d)." Federal Brief in CAN v. United States at 19, State Reply, Exh. 37 (emphasis added).[30] The Commission went on to state that "Subpart L, though using somewhat different language, provides as much access to cross-examination as the APA." Id. at 46.

On this basis, the First Circuit held that the Subpart L regulations did not violate a petitioner's right to cross-examine witnesses under the APA and were valid:

> The Commission represents that, despite the difference in language, it interprets the standard for allowing cross-examination under the new rules to be equivalent to the APA standard. . . . Given the Commission's stated interpretation, the new rules on cross-examination cannot be termed inconsistent with the dictates of the APA. [Accordingly] we find that the new rules meet the APA requirements for on-the-record adjudications [and] we hold that their promulgation does not exceed the Commission's authority.

CAN v. United States, 2004 WL 2827697, at *8.

With regard to the discretion of the presiding officer/Board to determine whether cross-examination is needed, the court stated:

> [W]e cannot say that it is arbitrary and capricious for the Commission to leave the determination of whether cross-examination will further the truth-seeking process in a particular proceeding to the discretion of the individual hearing officer.
>
> We do, however, add a caveat. The APA does require that cross-examination be available when "required for a full and true disclosure of the facts." [5 U.S.C. § 556(d)]. If the new procedures are to comply in practice with the APA, cross-examination must be allowed in appropriate instances. Should the agency's administration of the new rules contradict its present representations or otherwise flout this principle, nothing in this opinion will inoculate the rules against further challenges.

Id. at *11-12 (emphasis added).

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[30] See also the Statement of Considerations to the Adjudicatory Process Final Rule where the Commission stated that the opportunity for cross-examination under Subpart L is "consistent with" the availability of cross-examination under 5 U.S.C. § 556(d). 69 Fed. Reg. at 2,188.

Our task is slightly different than the issue that confronted the court in CAN v. United States, because here the State raises a different statutory issue - whether the opportunity for cross-examination under Subpart L is consistent with 42 U.S.C. § 2021(l). Nevertheless, we hold, based on the finding in CAN v. United States that the opportunity for cross-examination under Subpart L is equivalent to the opportunity for cross-examination under the APA, that the opportunity for cross-examination under 10 C.F.R. § 2.1204(b)(3) is likewise consistent with the State's "reasonable opportunity . . . to interrogate witnesses" under 42 U.S.C. § 2021(l). We do so in firm recognition of the First Circuit's caveat that "the APA [requires] that cross-examination be available when 'required for a full and true disclosure of the facts'" and that the continuing validity of the Subpart L regulation depends on us administering this regulation with fidelity to this requirement. Id. at *12.

Applying CAN v. United States, to this case, it is clear that cross-examination under 10 C.F.R. § 2.1204(b)(3) is not restricted to those situations described in 10 C.F.R. § 2.310(d), e.g., issues concerning a past activity where the credibility of an eyewitness may reasonably be expected to be at issue.[31] Where needed for a full and true disclosure of the facts, cross-examination under Subpart L can encompass any issue that is relevant to the findings of fact that a Board or presiding officer must make in order to render a decision. This includes, for example, the cross-examination of experts and their opinions, where it is needed to establish an adequate record to resolve a conflict in expert opinions and/or to determine whether a party is able to carry its burden of proof because our decisions often hinge upon our evaluation of competing expert opinions, technical and scientific facts,[32] which become central elements of

[31] The purposes of 10 C.F.R. §§ 2.310(d) and 2.1204(b)(3) are entirely different. The former helps determine which type of proceeding should be used. The latter assumes that Subpart L rules apply and allows the presiding officer to authorize cross-examination where needed.

[32] The regulations recognize that expert opinions are evidence and that "scientific fact" can be key to the resolution of Part 2 proceedings. See 10 C.F.R. §§ 2.337 (f) and (j). See (continued...)

our findings of fact. Although the Board includes technical experts, we are not experts in all disciplines nor as well versed in the nuances of some issues as some of the litigants. Therefore, supplemental cross-examination by the parties is clearly allowed under 10 C.F.R. § 2.1204(b)(3) and 5 U.S.C. § 556(d) when it is required for a full and fair disclosure and adequate record of competing technical and scientific evidence and testimony. It is on this basis that we conclude that using Subpart L rules for this proceeding is consistent with State's statutory right under 42 U.S.C. § 2021(l).

IV. RELIEF

For the foregoing reasons, the Board denies the requests of the petitioners, the Department of Public Services of the State of Vermont and the New England Coalition, that their admitted contentions be heard pursuant to the procedures of 10 C.F.R. Part 2 Subpart G. The Board rules that the procedures of Subpart L shall be used for these contentions. The State shall participate in the hearing as a party, with the rights and responsibilities of a party. Within 15 days of the issuance of this order, the Staff shall notify the Board whether they desire to participate in this proceeding as a party. The parties shall make their initial disclosures

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[32](...continued)
also 69 Fed. Reg. at 2,182 (recognizing that the presiding officer must be the finder of "technical fact[s]").

pursuant to 10 C.F.R. § 2.336(a) and the Staff shall file the hearing file pursuant to 10 C.F.R. § 2.1203 within 30 days of the issuance of this ruling.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD[33]

/RA/

Alex S. Karlin, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Anthony J. Baratta
ADMINISTRATIVE JUDGE

/RA/

Lester S. Rubenstein
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 16, 2004

[33] Copies of this order were sent this date by Internet e-mail transmission to counsel for (1) licensees Entergy Nuclear Vermont Yankee L.L.C. and Entergy Nuclear Operations, Inc.; (2) petitioners Vermont Department of Public Service and New England Coalition of Brattleboro, Vermont; and (3) the Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (SELECTION OF HEARING PROCEDURES AND RULING ON STATE STATUTORY CLAIM) (LBP-04-31) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 16th day of December 2004