

**RAS 9025**

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

**DOCKETED 12/21/04**

**SERVED 12/21/04**

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 21, 2004

ORDER

(Denying Intervenor's Motion for Procedural Protections Due to Unavailability of ADAMS)

Before the Board is a motion by the New England Coalition (NEC) seeking certain procedural protections in a proceeding related to the application of Entergy Nuclear Vermont Yankee, L.L.C. 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. For the reasons stated below, we deny NEC's motion.

On October 25, 2004, the NRC Staff (Staff) notified the Board that the Commission had blocked public access to the NRC's Agencywide Documents Access and Management System (ADAMS) in order to conduct a security review of all documents, including those related to this case.<sup>1</sup> The following day, NEC filed a motion seeking "procedural protections" until public access to ADAMS is restored, claiming that the suspension of ADAMS prejudices NEC and

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<sup>1</sup>Letter from Brooke D. Poole, Counsel for NRC Staff, to Administrative Judges (Oct. 25, 2004), ADAMS Accession No. ML043010095.

denies NEC of meaningful participation in this proceeding.<sup>2</sup> Specifically, NEC asks the Board to order: (1) Entergy to provide NEC with copies of all correspondence with the NRC related to all aspects of the EPU at Vermont Yankee; (2) the Staff to provide NEC with copies of all correspondence with Entergy related to all aspects of the EPU at Vermont Yankee; (3) Entergy to provide NEC with four complete sets of all non-confidential EPU application documents, supplements, and any other EPU related matter to NEC; (4) the Staff to provide NEC with a copy of all generic correspondence, reports, or announcements related to EPU's issues at all nuclear reactors; and (5) that all filing deadlines in the case be extended by thirty days from the date ADAMS is placed back on line. NEC Motion at 3-4.

Both Entergy and the Staff oppose NEC's motion.<sup>3</sup> Entergy asserts: (1) NEC failed to comply with 10 C.F.R. § 2.323(b), which requires a party to certify that it has consulted the other parties before filing a motion with the Board; (2) the remedies provided in the NRC contention regulation, 10 C.F.R. § 2.309(f), are sufficient; and (3) there is no legal basis for the relief NEC seeks. Entergy Answer at 4-6. The Staff makes similar arguments, pointing out that NEC did not comply with 10 C.F.R. § 2.323(b) and that 10 C.F.R. § 2.309 provides NEC with sufficient procedural protections. Staff Answer at 2-4. Additionally, the Staff asserts that NEC's requests are unnecessary because NEC is already on the NRC distribution list for non-sensitive NRC/Entergy correspondence and overbroad because requiring "all generic correspondence" is more than 10 C.F.R. §§ 2.336 and 2.1203 require. Staff Answer at 2-3.

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<sup>2</sup>New England Coalition's Motion and Memorandum for Procedural Protections and Proposed Order (Oct. 26, 2004) at 1, 3 [hereinafter NEC Motion].

<sup>3</sup>Entergy's Answer to New England Coalition's Motion and Memorandum for Procedural Protections and Proposed Order (Nov. 5, 2004) [hereinafter Entergy Answer]; NRC Staff Answer to New England Coalition's Motion and Memorandum for Procedural Protections and Proposed Order (Nov. 5, 2004) [hereinafter Staff Answer].

Subsequent to the briefing on this motion several relevant events have occurred. First, the Board admitted two of NEC's seven contentions. LBP-04-28, 60 NRC \_\_ (Nov. 22, 2004). Second, the Board found that Subpart L hearing procedures are most appropriate in this proceeding. LBP-04-31, 60 NRC \_\_ (Dec. 16, 2004). Third, the public Citrix-based version of ADAMS Publicly Available Records System (PARS) was partially restored on December 7, 2004.<sup>4</sup>

NEC's motion is denied for several reasons.

First, granting the motion is unnecessary because the Commission's regulations have procedural protections built in to deal with the unavailability of information. Should NEC determine that information that became available after October 25, 2004 could have provided the basis for filing additional contentions, NEC may be able to take advantage of 10 C.F.R. § 2.309(c) and (f). These provisions take into consideration the unavailability of information upon which a late, new, or amended contention may be based.

Second, the Board finds NEC's motion substantially moot. The Board's order finding Subpart L procedures most appropriate for NEC's two admitted contentions, LBP-04-31, 60 NRC \_\_ (Dec. 16, 2004), triggers mandatory disclosures among the parties and requires the Staff to create a hearing file. See 10 C.F.R. §§ 2.336 and 2.1203. This will provide NEC with access to relevant materials. Under section 2.336, both Entergy and the Staff must make mandatory disclosures to NEC. Specifically, Entergy is required, within thirty days of the Board's LBP-04-31 order, to "disclose and provide" NEC with, among other items, a "copy, or a description by category and location, of all documents and data compilations in the possession, custody, or control of the party that are relevant to the contentions." 10 C.F.R. § 2.336(a)(2)(I). In addition, the Staff is required to provide NEC with the application, all NRC/Entergy

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<sup>4</sup>Letter from Brooke D. Poole, Counsel for NRC Staff, to Administrative Judges (Dec. 7, 2004), ADAMS Accession No. ML043430181.

communications related to the EPU, and all documents supporting the NRC Staff's review of the application. 10 C.F.R. § 2.336(b). Within those same thirty days, pursuant to section 2.1203, the Staff must create a hearing file which will consist of the application, application amendments, and relevant NRC/Entergy correspondence. The hearing file must be made available to the parties in this proceeding. Additionally, NEC should now be able to access the documents contained in the docket for this proceeding from PARS. Therefore, the Board finds it unnecessary to grant NEC's motion because NEC will have access to the materials it is entitled to via the mandatory disclosures, the hearing file, and PARS.

Third, the Board denies the motion based on NEC's failure to comply with 10 C.F.R. § 2.323(b). Under section 2.323(b), "A motion must be rejected if it does not include a certification by the attorney or representative of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant's efforts to resolve the issue(s) have been unsuccessful." This requirement is intended to avoid burdening the parties and the Board with motions that could have been resolved by discussion and negotiation among the parties. NEC did not attempt to contact the Staff or Entergy prior to filing this motion and the motion does not contain the necessary certification. Staff Answer at 2; Entergy Answer at 4. Because the certification requirement is new, see 69 Fed. Reg. 2,182, 2,244 (Jan. 14, 2004), the Board, in this instance, examined the merits of NEC's motion despite its procedural defect. In the future, however, the Board will not hesitate to summarily deny any motion where the movant fails first to make a sincere effort to contact the other parties to resolve the issues, and to so certify in the motion.

Finally, regarding NEC's request that all filing deadlines in the case be extended by thirty days from the date ADAMS is placed back online, the Board notes that if, at a future date, NEC is able to demonstrate that the unavailability of ADAMS actually disrupted its preparation

in this proceeding, the Board will take the ADAMS restrictions into consideration when entertaining a motion for an extension of time. Should NEC learn that the unavailability of relevant documents impeded its preparation, NEC should identify with specificity the relevant documents and the actual delays caused by unavailability.

It is so ORDERED.

FOR THE ATOMIC SAFETY  
AND LICENSING BOARD<sup>5</sup>

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Alex S. Karlin, Chairman  
ADMINISTRATIVE JUDGE

Rockville, Maryland

December 21, 2004

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<sup>5</sup> 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) intervenors 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 )  
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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 ORDER (DENYING INTERVENOR'S MOTION FOR PROCEDURAL PROTECTIONS DUE TO UNAVAILABILITY OF ADAMS) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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[Original signed by Evangeline S. Ngbea]

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
this 21<sup>st</sup> day of December 2004