LBP-04-33
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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 ASLBP No. 04-832-02-OLA December 27, 2004

MEMORANDUM AND ORDER
(Denying Motion for Dismissal and Re-Notice of Hearing)

Before the Board is a motion by the New England Coalition (NEC), a petitioner herein, to dismiss this proceeding and to require that notice of opportunity for hearing in this matter be reissued only after a "completed application" is filed with the NRC. For the reasons set forth below, we deny NEC's motion.

On July 1, 2004, the Commission published a notice of opportunity to request a hearing on an application by Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc., (collectively, Entergy) for an extended power uprate (EPU) to Facility Operating License No. DPR-28 for operation of the Vermont Yankee Nuclear Power Station in Windham County, Vermont. 69 Fed. Reg. 39,976 (July 1, 2004). NEC filed a timely request for

hearing and seven proposed contentions.[1] Then, on October 20, 2004, NEC filed this motion to dismiss and a supporting memorandum.[2] Following a brief discussion of this motion at the October 21, 2004 prehearing conference, the Board declined to delay the proceeding. Tr. at 85-92. We indicated that we would rule on the matter only after Entergy and the NRC Staff had the opportunity to file their responses. Id. at 91. The responses were filed on November 1, 2004.[3]

I. ARGUMENT OF THE PARTIES

NEC argues that dismissal and re-noticing of the hearing in this case is required because Entergy's application was incomplete as of July 1, 2004, and thus the notice was fatally defective. NEC Memorandum at 2-3. NEC asserts that, as of October 19, Entergy had filed at least 20 supplements to the application, many of which were filed after July 1, 2004. Id. at 2. NEC declares that these supplements resulted in a "large transformation" of Entergy's original license amendment application, and that even now the application is "still being completed." Id.

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[1] On November 22, 2004, this Board ruled that NEC had standing and that two of its contentions were admissible under 10 C.F.R. § 2.309(f). LBP-04-28, 60 NRC __ (slip op. at 1) (Nov. 22, 2004). That decision also found that another petitioner, the Department of Public Services of the State of Vermont, had standing and had raised two admissible contentions.

[2] [NEC's] Motion to Dismiss Proceeding Due to Failure to Provide Proper Notice (Oct. 20, 2004) [hereinafter NEC Motion]; [NEC's] Memorandum of Fact and Law Supporting Its Motion to Dismiss the Proceeding Due to Failure to Provide Proper Notice (Oct. 20, 2004) [hereinafter NEC Memorandum]. NEC filed its motion electronically and then distributed paper copies of it to the participants and the Board at the outset of our October 21, 2004 prehearing conference in Brattleboro, Vermont. The State did not join or participate in the instant motion.

[3] Entergy's Answer to [NEC's] Motion to Dismiss Proceeding Due to Failure to Provide Proper Notice (Nov. 1, 2004) [hereinafter Entergy Answer]; NRC Staff Answer to [NEC's] Motion to Dismiss Proceeding Due to Failure to Provide Proper Notice (Nov. 1, 2004) [hereinafter Staff Answer].

On this basis, NEC argues several legal points. First, NEC declares that the notice does not meet the requirements of due process because it fails to provide "persons of average intelligence" with reasonable notice of the "subject matter of the license amendment at issue." Id. at 3. Next, NEC asserts that the Board's authority and jurisdiction is limited to the matters set forth in the notice, and since the notice "referred only to the portions of the application referenced in [it]," the Board lacks jurisdiction and authority to consider the subsequent supplements. Id. Accordingly, NEC asks the Board to dismiss and re-notice this matter. Id. at 4.

Entergy and the Staff oppose the motion. First, both argue that the July 1, 2004 notice is adequate and that NEC has failed to identify any change to the nature or scope of the proceeding as a result of the supplements to Entergy's license amendment application. Entergy Answer at 4; Staff Answer at 4. In this regard, they note that 10 C.F.R. § 2.309(c) and (f) provide petitioners the opportunity to file new or amended contentions if material new information becomes available via these supplements. Entergy Answer at 6; Staff Answer at 4. Second, in response to NEC's claim that the supplements fall outside the Licensing Board's jurisdiction, both Entergy and the Staff take the position that because the September 22, 2004 notice establishing the Licensing Board encompasses the entire proceeding, the claim is without merit. Entergy Answer at 4 n. 8; Staff Answer at 5. Third, both assert that NEC has neglected to offer any legal authority for the proposition that supplements to an application require the issuance of a new notice, or that the Board possesses the authority to reissue the notice or to order the Staff to do so. Entergy Answer at 4; Staff Answer at 5 n. 8.

In addition, Entergy also claims that NEC's motion was not timely. It notes that 10 C.F.R. § 2.323(a) requires that a motion be made within 10 days of the "occurrence or circumstance" from which it arises. Entergy asserts that since the motion complains about the

inadequacy of the July 1, 2004 notice, NEC's failure to submit its motion within ten days of that date requires its rejection. Entergy Answer at 2-3.

II. ANALYSIS

A. Due Process

NRC regulations require that the NRC publish a notice of proposed action in the Federal Register in the event that an application for an amendment to an operating license for a facility is filed. 10 C.F.R. § 2.105(a). Among other things, the notice must set forth the nature of the proposed action and indicate, to persons whose interests may be affected by the proceeding, the existence of an opportunity to file a request for hearing or a petition for leave to intervene. 10 C.F.R. § 2.105(b) and (d). Due process requires that such notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). The purpose of the notice is to "apprise the affected individual of, and permit adequate preparation for, an impending 'hearing.'" Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 14 (1978). "The operative test is that 'the notice as published must reasonably apprise any interested person of the issues involved in the proceeding.'" North Alabama Express, Inc. v. United States, 585 F.2d 783, 787 (5th Cir. 1978) (quoting Buckner Trucking, Inc. v. United States, 354 F.Supp. 1210, 1219 (S.D. Tex. 1973)).

The notice published on July 1, 2004 stated that the proposed action is to change Entergy's operating license "to increase the maximum authorized power level . . . to 1912 MWt" and to alter "the VYNPS technical specifications to provide for implementing uprated power operation." 69 Fed. Reg. at 39,976. In addition, the notice reflected that seven supplements to the Entergy application had been filed as of July 1, 2004. Id. at 39,977. Subsequent to that date and prior to the date of NEC's motion, thirteen additional supplements were filed.

Upon examination of the thirteen supplements filed after July 1, 2004, we do not see how the application has sustained a "large transformation." Nine of the supplements were submitted in response to various requests for additional information (RAIs) by the Staff. The remaining four were to update, correct, or clarify previously-filed materials. These types of RAIs, responses, and updating/clarification submissions are a "standard and ongoing part of NRC licensing reviews." Baltimore Gas & Electric Company (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 349 (1998).[4] NEC has not pointed to any change in the basic nature or the scope of the proceeding that has occurred as a result of the filing of the supplemental information.

Nor do post-docketing RAIs necessarily indicate that an application was too incomplete to launch this proceeding or that it must be dismissed. An application may be "sufficiently complete for purposes of docketing, and for starting the adjudicatory process" even though the Staff subsequently asks for additional information from the applicant. Baltimore Gas & Electric Company, CLI-98-25, 48 NRC at 350. Further, allowing an application to be modified or improved as the Commission's review moves forward is consistent with "the dynamic licensing process followed in Commission licensing proceedings." The Curators of the University of Missouri, CLI-95-8, 41 NRC 386, 395 (1995).

In this instance, because the supplements have not changed the nature of the proceeding from that which was noticed on July 1, we believe that NEC's right to due process has not been violated. The notice explicitly states that the proceeding relates to the license amendment sought by Entergy to increase the maximum power level of the plant to 1912 MWt

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[4] This is not to say that the subject matter of an RAI cannot be adjudicated. Rather, if a party believes that the RAI or the applicant's response to the RAI raises a legitimate issue related to the adequacy of the application, the petitioner may submit that issue in the form of a new or amended contention. Id. at 350.

and to modify certain technical specifications of the license to support the requested power increase. 69 Fed. Reg. at 39,976. The fact that the notice reflects that seven supplements had already been filed, served to reasonably inform the public that further refinement or supplementation of the application might be expected. In addition, the notice indicates how an interested party can access and review documents and other materials related to the application, either at the NRC's public document room or via the ADAMS Public Electronic Reading Room on the Internet. Id. at 39,977. Certainly, the July 1 notice has served to "apprise interested parties of the pendency" of the proposed 20% uprate in the Vermont Yankee station license and has given all interested parties "the opportunity to present their objections." Mullane, 339 U.S. at 314.[5]

Nor is there any showing that NEC, or any other person, may have been prejudiced in any way by the filing of supplements to Entergy's application.[6] As noted, a participant in a proceeding has the ability to file new, amended, or late-filed contentions when additional documentation becomes available. 10 C.F.R. §§ 2.309(c) and (f)(2). Newly available material information has long been held to provide good cause to file a new contention. Consumers Power Company (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 577 (1982). With

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[5] We find somewhat analogous the "logical outgrowth" test used in the context of administrative rulemaking. Where a final regulation is a logical outgrowth of the proposed rule originally noticed in the Federal Register, the notice provisions of the Administrative Procedures Act are satisfied, and challenges related to the adequacy of the notice must fail. Shell Oil Company v. EPA, 950 F.2d 741, 759 (D.C. Cir. 1992). In the situation before us today, the supplements to the Entergy application are essentially clarifications and responses to Staff questions that do not change the nature or scope of the proceeding and are, at most, simply a logical outgrowth of the application noticed on July 1, 2004.

[6] The Board also questions whether NEC has standing to raise a due process complaint in this situation. It is clear that NEC is aware of NRC's normal RAI process that triggers applicants to file supplementary information, and has actual knowledge of the publicly available contents of the supplements to the Entergy application. Thus, we are not aware of any "injury in fact" that NEC has suffered or will suffer based upon these additions to the application.

these existing procedures available to all participants, we believe that NEC has adequate means by which to address all newly-docketed supplements to the Entergy application.

B. Jurisdiction over Supplemental Material

NEC also claims that these supplements to the application have expanded the scope of the proceeding beyond that which was noticed in the Federal Register, and thus has placed those issues outside the Board's jurisdiction. This Licensing Board was established to preside over the "proceeding" concerning Entergy's request to "change the operating license for the Vermont Yankee Nuclear Power Station to increase the maximum authorized power level from 1593 megawatts thermal (MWt) to 1912 MWt." 69 Fed. Reg. 56,797, 56,798 (Sept. 22, 2004). Since the thirteen additional supplements are essentially clarifications and updates submitted in response to Staff questions, we see no "large transformation" of the application or the scope of this proceeding, and we conclude that they clearly fall within this Board's jurisdiction. This aspect of NEC's challenge is without merit.

C. Authority to Renotice

Given that we have rejected NEC's substantive arguments, we need not address the question of a Board's authority to reissue the notice, or to order the Staff to do so.

D. Timeliness of the Motion

We reject Entergy's argument that NEC's motion necessarily was untimely under 10 C.F.R. § 2.323(a) because it was not filed within 10 days of July 1, 2004. To the contrary, we conclude that the ten-day deadline is logically triggered not on the date of the notice, but on the date when the "transforming" supplement (which allegedly renders the original notice inadequate) becomes available to the public. Here, NEC claims that at least one supplement (Supplement 16) was first made available to the public on October 19, 2004, one day prior to

the filing of the NEC motion. Thus, whatever its other defects, the motion was not necessarily untimely.

III. CONCLUSION

In light of that discussed above, we see no reason to dismiss or to renotice this proceeding. NEC's motion seeking these actions is thus DENIED.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD[7]

/RA/

Alex S. Karlin, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland

December 27, 2004

[7] Copies of this memorandum and 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 (DENYING MOTION FOR DISMISSAL AND RE-NOTICE OF HEARING) (LBP-04-33) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Docket No. 50-271-OLA
LB MEMORANDUM AND ORDER (DENYING MOTION
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(LBP-04-33)

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 27th day of December 2004