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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-OLA ASLBP No. 04-832-02-OLA January 11, 2005

MEMORANDUM AND ORDER
(Admitting Intervenor's New Contention)

Before the Board is a request by the Vermont Department of Public Service (State) for leave to file a new contention.[1] For reasons stated below, the Board grants the request and finds the contention admissible under 10 C.F.R. § 2.309(f).

I. POSITIONS OF THE PARTIES

The State's newly proffered contention reads as follows:

> The application for amendment, including all supplements thereto, fails to comply with 10 CFR 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.

State Request at 1. This contention is based on a September 30, 2004 letter from Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations Inc. (collectively "Entergy") to the NRC Staff. Id. at 2. In the letter, Entergy submitted additional information to support its

[1] Vermont Department of Public Service Request for Leave to File a New Contention (Oct. 18, 2004) [hereinafter State Request].

application for an extended power uprate (EPU) to its Vermont Yankee Nuclear Power Station, to NRC, stating:

> VY's EPU submittal documented that the time to core uncovery 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 [10 C.F.R. Part 50 Appendix R] 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.

State Exh. 38. The State received the letter on October 11, 2004, and filed its request for leave to file its new contention pursuant to 10 C.F.R. § 2.309(f)(2) seven days later.

Entergy opposes the State's request.[2] Entergy asserts that the proposed contention is inadmissible under 10 C.F.R. § 2.309(f)(1) because it (a) fails to identify any genuine dispute, (b) is without factual or legal basis, and (c) would not entitle the State to any relief. Entergy Answer at 5. Entergy does not argue that the State's proposed contention was untimely. Entergy Answer at 3.

The Staff does not oppose the admission of the State's new contention.[3] The Staff characterizes the proposed contention as "late-filed," but agrees, after balancing the eight factors for "nontimely filings" specified in 10 C.F.R. § 2.309(c), that the request should be granted. Staff Answer at 6. The Staff also acknowledges that the proposed contention meets the requirements for "new contentions" specified in 10 C.F.R. § 2.309(f)(2) and the substantive criteria for admissibility specified in 10 C.F.R. § 2.309(f)(1). Staff Answer at 6.

II. ANALYSIS

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[2] Entergy's Answer to Vermont Department of Public Service Request for Leave to File a New Contention (Nov. 10, 2004) [hereinafter Entergy Answer].

[3] NRC Staff Response to Vermont Department of Public Service Request for Leave to File a New Contention (Nov. 10, 2004) [hereinafter Staff Answer].

Under Commission regulations, requests for hearing and proposed contentions must be filed within specified time frames, e.g., 60 days after publication of notice in the Federal Register. 10 C.F.R. § 2.309(b)(3)(iii). A request that should have been filed within the notice period, but was not, is deemed "nontimely." 10 C.F.R. § 2.309(c). Nontimely requests will not be entertained absent a determination by the presiding officer, after considering and balancing eight factors specified in 10 C.F.R. § 2.309(c)(i)-(viii), that the request should be granted.

As a separate matter, the regulations provide that a "new contention" may be filed upon a showing that:

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

10 C.F.R. § 2.309(f)(2)(i)-(iii). This regulatory provision was added in 2004. 69 Fed. Reg. 2182, 2240 (Jan. 14, 2004). Of course, in addition to fulfilling these timing requirements, a petitioner must also show that each contention, whether initial, nontimely, or new, meets the standard admissibility requirements of 10 C.F.R. § 2.309(f)(1)(i)-(vi). The petitioner may also address the selection of the appropriate hearing procedures for each contention. 10 C.F.R. § 2.309(g).

At the outset, it is clear that the State's proposed contention satisfies the three criteria for new contentions specified in 10 C.F.R. § 2.309(f)(2). It was filed in a "timely fashion," 10 C.F.R. § 2.309(f)(2)(iii) - seven days after the State received a copy of Entergy's September 30, 2004 letter. The information in the letter, stating that Entergy's compliance with the regulatory requirements of 10 C.F.R. Part 50, Appendix R is dependent on an assumption that had not yet been tested or verified, was "not previously available" and was certainly "materially different" than information previously available.

The Staff asserts that the proposed new contention must also pass the eight factor balancing test specified for "nontimely filings" in 10 C.F.R. § 2.309(c), including a showing of "good cause . . . for the failure to file on time." Staff Answer at 1-2.[4] Not even Entergy, which opposed the admission of this contention, argued this position, except in a last minute footnote inserted after reading the Staff's brief. Entergy Answer at 5, n. 7. Arguing that the State must "show good cause . . . for the failure to file on time," 10 C.F.R. § 2.309(c)(1)(I), is inconsistent with the conclusion, that the Staff itself accepted, that the State's new contention was "timely" under 10 C.F.R. § 2.309(f)(2)(iii).[5]

Assuming arguendo that the Staff is correct, we conclude, after balancing the eight factors, that State's proposed contention should be admitted. The Staff agrees. Staff Answer at 6. For example, the State certainly satisfied the first factor under 10 C.F.R. § 2.309(c)(1)(i) ("good cause, if any, for the failure to file on time") by the plain impossibility of it having filed this contention "on time" (i.e., by August 31, 2004, the deadline in the July 1, 2004 Federal Register notice). Instead, the proposed new contention was filed in a "timely fashion" - within 7 days

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[4] Contrast 10 C.F.R. § 2.1022(a)(1), which requires amended contentions to meet the eight factor balancing test of section 2.309(c) in Subpart J proceedings, with 10 C.F.R. § 2.309(f)(2), which does not.

[5] It is inaccurate to characterize the State's request as "nontimely" or "late," and nothing in the regulations requires this result. To the contrary, the State's new contention was submitted in a timely fashion - within seven days. Further, there could be no "failure to file on time," as specified by 10 C.F.R. § 2.309(c)(1)(i), because it was literally impossible for this new contention to have been filed by August 31, 2004 (the 60 day deadline specified in the Commission's July 1, 2004 notice). Stated another way, it is inconsistent to assert simultaneously that the request was "submitted in a timely fashion," 10 C.F.R. § 2.309(f)(2)(iii), and that the State must show good cause why it "fail[ed] to file [the request] on time." 10 C.F.R. § 2.309(c)(1)(i). Setting aside logic and the plain regulatory language, it does not seem sensible to impose eleven hurdles to the filing of a new contention, where there was no deadline and the requestor was not at fault, (i.e., to add the eight balancing factors of 10 C.F.R. § 2.309(c) onto the three requirements of 10 C.F.R. § 2.309(f)(2)), while imposing only eight hurdles to the filing of truly untimely contentions, where the requestor actually missed a deadline.

after the State obtained the relevant information. This first factor is entitled to the most weight. State of New Jersey (Dep't of Law & Public Safety), CLI-93-25, 38 NRC 289, 296 (1993). The fact that the State is already a party herein, with standing and admitted contentions, counsels that factors 10 C.F.R. § 2.309(c)(1)(ii) (nature of State's right to be made a party); (iii) (nature of the State's interest in the proceeding); (v) (non-availability of other means to protect the State's interest); and (vi) (State is an existing party), support the grant of this new contention. The other factors in the regulation either support the admission of the new contention or are essentially neutral. Accordingly, based on a balancing of the factors, we conclude that the request for leave to file the proposed new contention should be granted.

We now turn to the substance of the proposed contention and an evaluation as to whether it satisfies the basic contention admissibility standards of 10 C.F.R. § 2.309(f)(1). We apply these regulatory criteria in accordance with the principles set forth in our ruling on the petitioners' original requests for hearing and proposed contentions. LBP-04-28, 60 NRC __ (slip op. at 6-11) (Nov. 22, 2004). For the reasons explained below, we conclude that the State's proposed new contention meets these requirements and is admissible.

First, the State has provided us with a "specific statement of the issue of law or fact to be raised or controverted." 10 C.F.R. § 2.309(f)(1)(i). In short, the State challenges the application, alleging that it fails to comply with the relevant regulation (10 C.F.R. Part 50 Appendix R paragraph III.L.2.b) because it assumes, without verification, that the RCIC system can be made operable in sufficient time to permit the operator to perform the required actions before core uncovery. The State explains (a) that the regulation requires that the reactor coolant makeup function be capable of maintaining the coolant level above the top of the core for boiling water reactors, (b) that the proposed EPU would reduce the time from an initiating event to core uncovery by 15%, and (c) that the applicant's September 30, 2004 submission shows that it has modified the relevant procedure and has substituted a new approach that has

not yet been verified. This explanation satisfies 10 C.F.R. § 2.309(f)(1)(ii). There is no doubt that this issue is within the scope of the proceeding, 10 C.F.R. § 2.309(f)(1)(iii), and that it is material to the findings that NRC must make if it were to grant the EPU application, 10 C.F.R. § 2.309(f)(1)(iv). Further, the State's citation to Entergy's September 30, 2004 letter to NRC and relevant sections of NEDC-33090, Revision 0, September 2003, Safety Analysis Report for Vermont Yankee Nuclear Power Station provide the "concise statement of the alleged facts" required by 10 C.F.R. § 2.309(f)(1)(v).

Entergy's most substantive challenge to this contention is that it presents us with no genuine dispute, as required by 10 C.F.R. § 2.309(f)(1)(vi). Entergy Answer at 6. Entergy reasons that since it admits that it is necessary to verify its new assumption, and has promised to perform such a verification, there is no dispute. Id. at 6-7.

The State responds:

> Applicant contends that there is no real dispute, because Applicant has promised it will verify that it meets the regulatory time frames for taking certain actions, and thus no dispute exists. Applicant equates a commitment to perform verification with actually fulfilling the regulatory requirement.[6]

We agree with the State that the regulations call for a showing or verification that safe shutdown will occur, not merely a promise to perform such a verification. Thus, until the promised verification is actually performed and submitted, there is a real dispute as to whether the application should be granted.

A similar argument arose with regard to New England Coalition (NEC) proposed contention 4. In that situation NEC asserted that a new seismic and structural analysis should be performed to qualify the Vermont Yankee cooling towers for the additional loads. Entergy responded that, since it intended to perform such an analysis, there was no genuine dispute.

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[6][State] Reply to Answer of Applicant to the Department's Request for Leave to File a New Contention at 3 (Nov. 17, 2004) [hereinafter State Repy].

We rejected that defense and admitted the contention, stating "the fact that Entergy may intend to conduct such an analysis does not eliminate this genuine dispute, because Entergy could change its intent at any time unless . . . it is required to perform the analysis." LBP-04-28, 60 NRC __ (slip op. at 31) (Nov. 22, 2004). The same reasoning applies here.

In admitting the State's contention and rejecting Entergy's "no dispute" argument, we note that the contention is narrow. The contention reads that the application "fails to comply . . . because it does not verify the assumption used," State Request at 1, and the dispute concerns whether the application can or should be granted absent the completion of the promised verification. If and when Entergy performs the verifications showing compliance, and duly submits them to NRC, this contention will be moot. We reject the State's attempt to expand the scope of this contention to include whether the "verification process was properly conducted." State Reply at 4. The contention challenges the absence of the verification, not its quality. At this time, concerns about the sufficiency or accuracy of the verification are entirely conjectural and speculative, and are not part of the admitted contention.

We also reject Entergy's remaining objections to the State contention. The information submitted by Entergy in its September 30, 2004 letter (Supplement 17) materially changed a significant element of the EPU application.[7] In essence, Entergy, to its credit, realized that certain assumptions contained in its original application were inappropriate and so advised the NRC, promising to correct the problem and verify its correction.

Further, Entergy's argument that the State's proposed contention is inadmissible because it would not entitle the State to any relief is both legally and factually incorrect. A

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[7] We are not persuaded by the fact that the letter includes the statement that "this supplement . . . does not change the scope or conclusions in the original application." This self-serving boilerplate appeared in virtually all of the 13 supplements filed by Entergy from July 1, 2004 to October 21, 2004. Nor is it particularly relevant whether supplemental information submitted by Entergy in its September 30, 2004 letter is characterized as a "withdrawal" of prior information, or a "revision."

showing of entitlement to relief, formerly required for admissible contentions, see 10 C.F.R. § 2.714(d)(2)(ii) (2004), was specifically deleted from the requirements of 10 C.F.R. § 2.309(f)(1), 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).[8] And if Entergy failed to verify and demonstrate that it complied with the regulatory requirement that the RCIC can be made operable in sufficient time to permit the operator to perform the required actions before core uncovery, we are confident that this Board could fashion some appropriate relief.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD[9]

/RA/

Alex S. Karlin, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Anthony J. Baratta
ADMINISTRATIVE JUDGE

/RA/

Lester S. Rubenstein
ADMINISTRATIVE JUDGE

Rockville, Maryland
January 11, 2004

[8] In deleting the requirement for entitlement to relief, the Commission noted that it "overlaps" with one of the necessary elements of standing,10 C.F.R. § 2.309(d)(1)(iv). But standing is not an issue here, because "a State . . . that wishes to be a party in a proceeding for a facility located within its boundaries need not address the standing requirement." 10 C.F.R. § 2.309(d)(2).

[9] 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	)	
	)	
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 (ADMITTING INTERVENOR'S NEW CONTENTION) 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 (ADMITTING
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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 11th day of January 2005