

February 7, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
ENERGY NUCLEAR VERMONT YANKEE)	Docket No. 50-271-OLA
LLC and ENERGY NUCLEAR)	
OPERATIONS, INC.)	ASLBP No. 04-832-02-OLA
)	
(Vermont Yankee Nuclear Power Station))	

NRC STAFF ANSWER TO NEW ENGLAND COALITION'S MOTION TO RECOGNIZE NEW ENGLAND COALITION'S INCORPORATION BY REFERENCE OF THE VERMONT DEPARTMENT OF PUBLIC SERVICE CONTENTIONS AND ITS RIGHT TO RECEIVE DISCOVERY DISCLOSURE FROM ENTERGY ON THE DPS CONTENTIONS

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the staff of the Nuclear Regulatory Commission ("Staff") herein responds to the motion of the New England Coalition ("NEC") to (1) "recognize NEC's incorporation by reference of the DPS contentions within NEC's contentions" and (2) direct applicants Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively, "Entergy" or "Applicant") to produce to NEC the mandatory disclosures produced to intervenor Vermont Department of Public Service ("DPS") pursuant to 10 C.F.R. § 2.336(a).¹ For the reasons set forth below, to the extent that this is a motion to adopt DPS's admitted contentions, the Staff opposes the request as impermissibly late. However, the Staff does not oppose NEC's request to receive all mandatory disclosures in this proceeding.

¹ See "New England Coalition's Motion to Recognize New England Coalition's Incorporation by Reference of the Vermont Department of Public Service [DPS] Contentions and Its Right to Receive Discovery Disclosure From Entergy on the DPS Contentions," dated January 25, 2005 ("Motion").

BACKGROUND

During a telephone conference in this proceeding on January 21, 2005, counsel for NEC requested that Entergy provide to it the mandatory disclosures pertinent to DPS's admitted contentions. (Tr. at 672-73.) Entergy stated that it had provided disclosures to each party for its contentions. (*Id.* at 673.) Licensing Board Chairman Karlin then directed that all parties give copies of their mandatory disclosures to all other parties. (*Id.*) In discussing this issue, a question arose as to whether NEC had, to date, moved to adopt DPS's contentions. The Licensing Board directed NEC to file the instant motion, which it did, on January 26, 2005.²

DISCUSSION

A. Motion to Incorporate DPS Contentions by Reference

In its Motion, NEC requests that the Licensing Board, pursuant to 10 C.F.R. § 2.319,³ recognize "incorporation by reference" of the DPS contentions within NEC's contentions, to the extent that NEC's earlier motion was not "specifically recognized by the Board at the time recalled by the Board chair." Motion at 1-2.

The Staff has reviewed the record in this proceeding, including pleadings filed by NEC and its statements at the prehearing conference on October 21 and 22, 2004. The Staff has identified two instances in which NEC specifically incorporated the arguments of DPS. In particular, in its October 11, reply to the Applicant's and the Staff's answers to its request for hearing, NEC stated:

New England Coalition incorporates by reference herein, to the extent they do not contradict the arguments advanced below, the legal and factual argument of the Vermont Department of Public Service [DEP]

² Counsel for NEC sent an electronic mail message transmitting the Motion on January 25, 2005. However, that message did not attach the Motion. A corrected message, including the Motion, was transmitted on January 26, 2005. Pursuant to 10 C.F.R. § 2.305(e)(3), the Staff considers service of the Motion to be complete on January 26, 2005.

³ Section 2.319 identifies the authority and powers of the presiding officer, and permits the presiding officer discretion to "take appropriate action to control the prehearing and hearing process, to avoid delay and to maintain order."

concerning the defects, inadequacies, and legal maneuvers of the attorneys for [Entergy] and the NRC Staff in their answers to DEP and, as herein incorporated, New England Coalition.⁴

In addition, at page 4 of its Reply, NEC states:

New England Coalition agrees with, and has incorporated by reference herein above, the DEP's position on Entergy's attorneys employing rewriting contentions both to create straw-men to more easily dispose of than the substance of the actual contention and to ridicule New England Coalition's pro se representative for not letting them rewrite New England Coalition's contentions.

Neither of these discussions purports to incorporate by reference all or part of DPS's then-proposed contentions. Indeed, in its Motion, NEC does not cite to *any* location in the record in which it requested to adopt – or incorporate by reference – all or part of DPS's proffered contentions.

The rules are clear that if a petitioner wishes to participate with respect to another petitioner's contention, it must adopt the contention pursuant to 10 C.F.R. § 2.309(f)(3). That section provides, in pertinent part:

If a requestor/petitioner seeks to adopt the contention of another sponsoring requestor/petition, the requestor/petitioner who seeks to adopt the contention must either agree that the sponsoring requestor/petitioner shall act as the representative with respect to that contention, or jointly designate with the sponsoring requestor/petitioner a representative who shall have the authority to act for the requestors/petitioners with respect to that contention.

The rule expressly addresses adoption of contentions by a "*requestor/petitioner*," thus requiring, by its terms, that a petitioner seeking to adopt contentions do so while the request for hearing and/or petition for leave to intervene is pending before the presiding officer. NEC plainly did not do this,

⁴ See "New England Coalition'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," dated October 11, 2004, at 1 ("Reply").

despite ample opportunity to do so.⁵ Rather, NEC appears to have stated its intention to adopt the contentions for the first time at the January 21, 2005 teleconference.

To raise the issue at this late date – more than four months after submission of the contentions in question – NRC case law dictates that NEC must satisfy the late-filing criteria in 10 C.F.R. § 2.309(c) in order to adopt the contentions.⁶ See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 182 (1998) (denying an intervenor's request to incorporate by reference other petitioners' contentions where that request was submitted well after the deadline for filing contentions, and the intervenor did not address the late-filing factors); *reconsideration granted in part and denied in part on other grounds*, LBP-98-10, 47 NRC 288, *aff'd on other grounds*, CLI-98-13, 48 NRC 26 (1998). Cf. *Houston Lighting & Power Co.* (South Texas Project, Units 1 & 2), ALAB-799, 21 NRC 360, 381-383 (1985); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-6, 49 NRC 114 (1999); *Gulf States Utils. Co.* (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760, 795-98 (1977) (cases applying the late-filing factors where a petitioner or party sought to adopt the contentions of an intervenor withdrawing from a proceeding).

NEC has not done so here. Its failure to address the late-filing standards precludes further consideration of the issue. See *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-00-12, 51 NRC 247, 280-81 (2000), *aff'd*, CLI-01-11, 53 NRC 370, 391-92 (2001);

⁵ The statements of consideration for Section 2.309(f)(3) suggest that the Commission might have intended the rule to apply to adoption of admitted contentions, as well. See Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 col. 3 (January 14, 2004) (“One commenter suggested that the Commission adopt a new § 2.309(f)(3) to specify, where a petitioner adopts an *admitted* contention of another party, that the presiding officer or Licensing Board must require one of the petitioners to act as lead. The Commission agrees that a new § 2.309(f)(3) should be adopted to include such a requirement . . .”) (Emphasis added.) In the final rule, the Commission nonetheless provided only that a *requestor* or *petitioner* may so adopt another's contention.

⁶ Because the contentions are not newly advanced, the Staff does not believe that the late-filing provisions of 10 C.F.R. § 2.309(f)(2) would apply.

Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 465-68 (1985). For this reason, its Motion should be denied.

Even considering the late-filing factors, it does not appear to the Staff that NEC should be permitted to adopt the DPS contentions at this late date. Under Section 2.309(c), the following factors must be considered:

- (i) good cause, if any, for the failure to file on time;
- (ii) the nature of the requestor's/petitioner's right under the Atomic Energy Act to be made a party to the proceeding;
- (iii) the nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;
- (iv) the possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;
- (v) the availability of other means whereby the requestor's/petitioner's interests will be protected;
- (vi) the extent to which the requestor's/petitioner's interests will be represented by existing parties;
- (vii) the extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and
- (viii) the extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

The "good cause" factor is accorded the most weight when considering the late-filing factors. See *State of New Jersey* (Department of Law & Public Safety), CLI-93-25, 38 NRC 289, 296 (1993). NEC had ample opportunity to adopt the DPS contentions in a timely fashion – indeed, NEC's proposed Contention 6 raised similar issues to admitted DPS Contentions 1 and 2 – and NEC did incorporate certain of the legal and factual arguments set forth in DPS's request for hearing. Had NEC sought to adopt the contentions, it should have done so at that time. The Staff has not identified any reason for NEC's lateness – let alone one establishing good cause for not filing an earlier request.

Where no showing of good cause for lateness is tendered, “petitioner’s demonstration on the other factors must be particularly strong.” *Texas Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 73 (1992) (quoting *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2, & 3), ALAB-431, 6 NRC 460, 462 (1977)). The Staff has weighed these additional factors and concludes that such a balancing does not support justification of late filing, even though some factors would weigh in NEC’s favor. Because NEC is already a party to the proceeding, factors (ii), (iii) and (iv) weigh in NEC’s favor. Factor (v) also weighs in favor of NEC, as no other participant is representing NEC’s interests in this proceeding. Factor (vii) also weighs in favor of NEC, as the contentions in question are already admitted. Additional participation with respect to those contentions would not be expected to broaden the issues or delay the proceeding.

However, factor (vi) weighs against NEC. Although, as noted above with respect to factor (v), DPS and NEC do not necessarily share a common interest in this proceeding, it is expected that DPS will fully litigate its admitted contentions, and that all safety issues associated with those contentions will be resolved in this proceeding irrespective of NEC’s participation on those contentions. Moreover, factor (viii) also weighs against NEC, as it is not clear how NEC will assist in developing a sound record on the DPS contentions. On balance, the Staff does not find that the seven additional factors weigh particularly strongly in favor of NEC.

For all of these reasons, NEC’s request to incorporate by reference the DPS contentions should be denied.

B. Request to Receive Mandatory Disclosures as of Right

In its Motion, NEC also requests that the Licensing Board direct Entergy to produce to NEC the mandatory disclosures produced to DPS pursuant to 10 C.F.R. § 2.336(a). In the absence of adoption, an intervenor does not ordinarily participate in a proceeding with respect to contentions it does not sponsor. As such, it is not at all clear that NEC would, as it claims, *have a right* to receive the mandatory disclosures produced with respect to DPS’s contentions. However, in view

of the Licensing Board's direction that all parties produce their mandatory disclosures to all other parties,⁷ the Staff does not oppose NEC's request to receive Entergy's mandatory disclosures to DPS in this instance.

CONCLUSION

For the reasons set forth above, the Staff submits that NEC has not demonstrated that it should be permitted to adopt DPS's admitted contentions in this proceeding. However, the Staff does not object to NEC receiving the mandatory disclosures relevant to the contentions sponsored by DPS.

Respectfully submitted,

/RA/

Brooke D. Poole
Counsel for NRC Staff

Dated in Rockville, Maryland
this 7th day of February 2005

⁷ (Tr. at 673.) It should be noted that all parties receive identical mandatory disclosures from the Staff. The rules governing the Staff's hearing file and mandatory disclosures require production of materials associated with the application, rather than with the contentions. *Compare* 10 C.F.R. § 2.336(b); 2.1203 *with* 10 C.F.R. § 2.336(a).

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF ANSWER TO NEW ENGLAND COALITION'S MOTION TO RECOGNIZE NEW ENGLAND COALITION'S INCORPORATION BY REFERENCE OF THE VERMONT DEPARTMENT OF PUBLIC SERVICE CONTENTIONS AND ITS RIGHT TO RECEIVE DISCOVERY DISCLOSURE FROM ENTERGY ON THE DPS CONTENTIONS" in the captioned proceeding have been served on the following by deposit in the United States mail, first class; or as indicated by an asterisk (*), by deposit in the Nuclear Regulatory Commission's internal mail system; and by e-mail as indicated by a double asterisk (**), this 7th day of February, 2005.

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Respectfully submitted,

/RA/

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