

RAS 9346

February 4, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

Before the Atomic Safety and Licensing Board

February 4, 2005 (2:27pm)

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

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

**ENTERGY'S RESPONSE TO NEW ENGLAND COALITION'S MOTION TO
RECOGNIZE INCORPORATION BY REFERENCE OF THE DPS CONTENTIONS
AND NEC'S RIGHT TO RECEIVE DISCOVERY ON DPS CONTENTIONS**

Applicants Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively "Entergy") hereby respond to the New England Coalition's ("NEC") "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 from Entergy on the DPS Contentions" ("Motion"), dated January 25, 2005.¹ NEC's motion must be denied because (1) NEC in fact never sought to adopt either the contentions initially proposed by the Department of Public Services ("DPS") or the DPS contentions admitted by the Atomic Safety and Licensing Board ("Board"), (2) NEC has provided no basis in support of its belated attempt to adopt the DPS contentions, and (3) NEC is not entitled to discovery on contentions it has not raised.

BACKGROUND

Near the end of the telephone prehearing conference held by the Board and the parties on January 21, 2005, counsel for NEC requested that Entergy give NEC copies of the documents that Entergy has provided to DPS in its initial discovery production on the DPS contentions

¹ Although the e-mail message from NEC counsel that should have enclosed the motion was sent on January 25, 2005, NEC did not actually serve the Motion electronically until the following day.

admitted by the Board in this proceeding. Tr. 672-73. Counsel for Entergy responded to the NEC's request by pointing out that an intervenor is only entitled to discovery on its contentions. Tr. 673. The Board Chairman then stated his recollection that NEC had already sought to join in the DPS contentions. *Id.* at 673-74. When Entergy and the NRC Staff indicated that they did not recall NEC ever making such a request, counsel for NEC replied that NEC's initial contention filings included adopting DPS' contentions. *Id.* The Board then directed NEC to file a motion to adopt DPS' contentions, if it had not yet done so. *Id.* at 675. The Motion followed.

I. NEC HAS NOT PREVIOUSLY SOUGHT TO ADOPT THE DPS CONTENTIONS

It is important to point out at the outset that the NEC Motion conveys the inaccurate impression that NEC moved earlier in this proceeding to be permitted to incorporate by reference the DPS contentions as its own and that "such incorporation by reference was not duly noted and specifically recognized by the Board." Motion at 1-2. This attempt to incorporate DPS' contentions by NEC in fact never happened. NEC cites nothing in the record to support that it did. Neither in its original filing,² nor in its reply to Entergy's response to NEC's motion to intervene,³ nor in the course of the October 21-22, 2004 prehearing conference,⁴ nor in any other NEC pleading, has there been any mention by NEC of its desire to adopt DPS' contentions, let alone a motion to that effect. To the contrary, the NEC Reply referred explicitly to the DPS contentions in the following terms: "The State of Vermont has requested a hearing and permission to intervene in this proceeding, raising significant contentions of its own." NEC

² New England Coalition's Request for Hearing, Demonstration of Standing, Discussion of Scope of Proceeding and Contentions (Aug. 30, 2004).

³ 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 (Oct. 11, 2004) ("NEC Reply").

⁴ See Tr. 61-557.

Reply at 15. NEC thus treated the DPS contentions as separate claims sponsored solely by DPS, and manifested no desire to join in them.⁵

It was only during the course of the telephone conference on January 21, 2005, in response to the Chairman's recollection that such a motion may have already been filed, that NEC expressed an interest in adopting DPS' contentions, and then only for the purpose of overcoming Entergy's objections to providing NEC copies of the discovery documents on the DPS contentions. There can thus be no doubt that the January 25, 2005 Motion is NEC's first attempt to adopt the DPS contentions in this proceeding, and that NEC's suggestion to the contrary in its Motion is inconsistent with NEC's obligations under 10 C.F.R. § 2.323(d) to ensure the factual accuracy of its arguments.

II. THE NEC MOTION IS UNJUSTIFIEDLY UNTIMELY

NEC's attempt to adopt the DPS Contentions via the Motion is unjustifiably belated. To be timely, a motion to adopt DPS' contentions should have been filed within ten days of DPS' initial filing on August 30, 2004, since a motion in an NRC licensing proceeding must made "no later than ten (10) days after the occurrence or circumstance from which the motion arises." 10 C.F.R. § 2.323(a). Thus, NEC's Motion is at least four months late, and NEC has made no attempt to justify its untimeliness. For that reason alone, NEC's Motion should be denied, since it fails to comply with the express Commission policy of expeditious management of licensing proceedings, which requires that motions be filed reasonably promptly after the underlying circumstances occur which engender the motion. *See Changes to Adjudicatory Process*, 69 Fed. Reg. 2,182, 2,207 (Jan. 14, 2004).

⁵ In that pleading, NEC indicated that it "incorporates by reference . . . the legal and factual argument of the Vermont Department of Public Service [DEP] concerning the defects, inadequacies and legal maneuvers of the attorneys for ENVY and the NRC Staff in their answers." NEC Reply at 1; *see also id.* at 5. Thus, while NEC endorsed DPS' criticism of the alleged "maneuvers" in the responses by Entergy and the NRC Staff to the DPS and NEC contentions, at no point did NEC seek to embrace the DPS contentions.

III. NEC HAS FAILED TO ADDRESS THE FACTORS THAT MUST BE BALANCED IN DECIDING WHETHER TO ALLOW A PARTY TO ADOPT ANOTHER PARTY'S CONTENTIONS, AND THOSE FACTORS STRONGLY WEIGH AGAINST AUTHORIZING SUCH AN ADOPTION

NRC case law establishes that in an untimely motion to adopt another party's contention, the moving party must address the factors that a licensing board must balance in deciding whether to admit a late-filed contention. *Houston Lighting & Power Co.* (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 381-82 (1985) (applying the five part test set forth in former 10 C.F.R. § 2.714(a)(1)); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-6, 49 NRC 114, 118 (1999) (*id.*). The corresponding factors under current NRC regulations are specified in 10 C.F.R. § 2.309(c)(1), as follows:

Nontimely requests and/or petitions and contentions will not be entertained absent a determination by the Commission, the presiding officer or the Atomic Safety and Licensing Board designated to rule on the request and/or petition and contentions that the request and/or petition should be granted and/or the contentions should be admitted based upon a balancing of the following factors to the extent that they apply to the particular nontimely filing:

- (i) Good cause, if any, for the failure to file on time;
- (ii) The nature of the requestor's/petitioner's right under the 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 interest 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 Motion fails to address these factors or even to recognize their existence. The sole support that NEC advances for its Motion is the observation that granting the Motion would be "within the Board's discretion, pursuant to 10 CFR § 2.319, to manage and control the proceedings." Motion at 2. Thus, NEC provides no argument whatsoever as to why it should be allowed to adopt the DPS contentions. NEC's failure to address the factors listed in 10 C.F.R. § 2.309(c)(1) requires that its motion be denied. *See* 10 C.F.R. § 2.309(c)(2); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 182 (1998).

Wholly apart from the NEC's failure to meet its obligation to address the factors of 10 C.F.R. § 2.309(c)(1), an examination of these factors demonstrates that NEC's request to adopt the DPS contentions should be denied. The first factor, "good cause, if any, for the failure to file on time," is clearly not met here. There is no justification for NEC's failure to seek to adopt the DPS contentions within a reasonable period after their filing on August 30, 2004, and NEC has offered none. This is the foremost factor in the appraisal of whether to admit a late-filed contention (or in this case a motion to adopt another party's contentions). *See Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI 86-8, 23 NRC 241, 244 (1986). It clearly militates against granting NEC's motion.

In the absence of good cause for the motion's untimeliness, a compelling showing in favor of the motion must be made as to the remaining factors. *See, e.g., Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 347-48 (1998); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-29, 48 NRC 286, 292-94 (1998); *Cincinnati Gas and Electric Co.* (William H. Zimmer Nuclear Power Station, Unit 1), LBP-83-58, 18 NRC 640, 663 (1983). No such showing can be made here. With respect to the second factor in 10 C.F.R. § 2.309 (c) (1) (the nature of the movant's

right to be made a party to the proceeding), NEC is already a party, thus denial of its motion will not exclude NEC from the proceeding. Likewise, the third factor (the nature and extent of the moving party's interest in the proceeding) is also unavailing to NEC, since it is already a party.

The fourth factor in 10 C.F.R. § 2.309 (c)(1) (the possible effect of any order that may be entered in this proceeding on movant's interest) provides no comfort to NEC, since an order relating to the DPS contentions would not affect NEC's interest in having its own contentions adjudicated, and as discussed below NEC has demonstrated no particular interest in the DPS contentions. The fifth and sixth factors, the availability of other means whereby NEC's interest will be protected and the extent to which NEC's interest in the DPS contentions will be represented by existing parties, clearly argue for denial of NEC's Motion. The contentions NEC seeks to adopt are well represented by DPS. DPS has expressed great interest in this proceeding, is represented by able counsel, and is expected to participate vigorously in the adjudication of its admitted contentions.

The seventh factor in 10 C.F.R. § 2.309 (c)(1), the extent to which granting of the motion will broaden the issues or delay the proceeding, also argues against allowing NEC to adopt DPS's contentions. Although the impact of such an adoption cannot be fully assessed at this time, at a minimum NEC's adoption of the DPS contentions will expand discovery and will require coordination between NEC and DPS pursuant to 10 C.F.R. § 2.309 (f)(3) to minimize repetition and redundancy during the hearings.⁶ In addition, if – as may be the case – NEC is seeking the DPS discovery documents in search of potential new contentions to assert, allowing such a “fishing expedition” may well result in the broadening of the issues in this proceeding and potential delays while any such new contentions are addressed.

⁶ NEC has also failed to comply with the requirements of 10 C.F.R. § 2.309(f)(3), which directs that “[i]f a requestor/petitioner seeks to adopt the contention of another sponsoring requestor/petitioner, 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.” None of these matters is addressed in the NEC Motion.

The last factor in 10 C.F.R. § 2.309(c)(1), the extent to which NEC’s participation in the litigation of the DPS contentions may reasonably be expected to assist in developing a sound record, clearly argues against allowing NEC to adopt the DPS contentions. NEC has previously expressed no interest in the DPS contentions, has asserted no expertise or relevant experience regarding the issues raised in the DPS contentions, and has provided no indication of how its participation would assist in developing the record on any of DPS’ contentions. In a similar situation, a motion by a party to adopt the contentions of a withdrawing party has been rejected as not meeting the balancing test provided by the Commission regulations. *South Texas Project*, *supra*, ALAB-799, 21 NRC at 384-85.

IV. NEC IS NOT ENTITLED TO DISCOVERY ON THE DPS CONTENTIONS

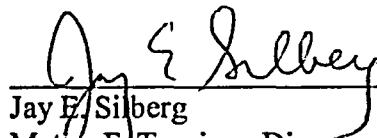
The title of NEC’s Motion and the relief NEC seeks (i.e., recognition that it is “entitled to receive Entergy’s 10 CFR §2.336 disclosure materials on the DPS contentions” and direction to Entergy “to provide said materials forthwith”) clearly show that NEC’s belated attempt to adopt the DPS contentions is mainly, if not solely, driven by its desire to secure the documents being provided by Entergy to DPS in discovery. This also appears clear from the context in which NEC raised this issue at the January 21, 2005 prehearing conference. Tr. 672-73. However, absent NEC’s adoption of the DPS contentions, NRC case law establishes that NEC is not entitled to such discovery. In multi-party proceedings, a party will not be allowed to engage in discovery unless its request is relevant to admitted contentions it sponsored or adopted. *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, Memorandum and Order (Denying Motion to Compel), 1999 WL 1123750 at *1 n.1 ((N.R.C. Dec. 3, 1999)). Thus, while the adoption of a contention, if authorized after balancing the factors discussed above, entitles the adopting party to obtain discovery relating to the contention, the converse is not true: a desire to obtain discovery not relevant to a party’s admitted contentions is not a basis justifying the party’s adoption of another party’s contentions. Otherwise, adoption of another party

contentions could be used as a tool – as is apparently the case here – for engaging in fishing expeditions that can only broaden, delay and unnecessarily complicate the proceeding.

V. CONCLUSION

For the reasons stated above, NEC's Motion should be denied and NEC should not be allowed to adopt the admitted contentions of DPS, nor should it be granted discovery of the documents relevant to the DPS contentions.

Respectfully submitted,



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Dated: February 4, 2005

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Entergy's Response to New England Coalition's Motion to Recognize Incorporation by Reference of the DPS Contentions and NEC's Right to Receive Discovery on DPS Contentions" were served on the persons listed below by deposit in the U.S. Mail, first class, postage prepaid, and where indicated by an asterisk by electronic mail, this 4th day of February, 2005.

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