

RAS 9366

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

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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

February 16, 2005

MEMORANDUM AND ORDER

(Denying Incorporation by Reference and Additional Discovery Disclosure)

On January 26, 2005, the New England Coalition (NEC) filed a 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 (NEC Motion). Entergy filed its answer on February 4, 2005 opposing the motion.¹ The NRC Staff filed its answer on February 7, 2005 opposing NEC's motion to adopt the State's contentions but not opposing NEC's request to receive the mandatory disclosures in this proceeding.² For the reasons set forth below, the motion is DENIED.

¹ 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 (Feb. 4, 2005) [Entergy Answer].

² 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 (Feb. 7, 2005) [Staff Answer].

I. Background

During a January 21, 2005 pre-hearing telephone conference in this proceeding, intervenor NEC requested that Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations Inc. (collectively, Entergy) provide NEC with a copy of the documents that Entergy was disclosing, pursuant to 10 C.F.R. § 2.336(a)(2), to the other intervenor herein, the Department of Public Service of the State of Vermont (State). Tr. at 672-73. The Board chairman stated that he recollected that NEC had already asked to adopt the State's contentions and, on this basis, initially indicated such documents should be provided to NEC. Id. at 673. However, the Board directed NEC's counsel to determine whether NEC had in fact previously sought to incorporate or adopt the State's contentions, id., and, if that was NEC's intent, to file a written motion to that effect. Id. at 675. Accordingly, NEC filed the instant motion.

Upon review of the record, it is clear that prior to January 26, 2005, NEC never sought to incorporate or adopt the contentions filed by the State. As Entergy and the Staff point out, there is nothing in the prior pleadings or transcripts of this proceeding whereby NEC indicated any intent to adopt or incorporate the State's contentions. Entergy Answer at 2-3; Staff Answer at 2-3.³

II. Analysis

A. Incorporation by Reference

The Board treats NEC's request to allow NEC to incorporate the State's contentions by reference as a motion to adopt the State's contentions and, for the reasons set forth below, denies it. First, the basic premise of the NEC Motion, i.e., that NEC had previously sought to

³ At most, at one point NEC incorporated certain legal arguments that had been made by the State. 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 (Oct. 11, 2004) at 1 and 5.

adopt or incorporate the State's contentions, is factually incorrect.

Second, the motion is denied because it is untimely under 10 C.F.R. § 2.323(a), which requires that motions be made no later than 10 days after the occurrence or circumstance from which the motion arises. Under this rule, the motion to adopt the State's contentions should have been filed within 10 days of August 30, 2004, the date the State filed its contentions, or, at the latest, within 10 days of November 22, 2004, the date the Board admitted the State's contentions. NEC makes no effort to explain its delay. Entergy asserts that an untimely motion to adopt another party's contention must address the same balancing factors that apply to untimely contentions under 10 C.F.R. § 2.309(c), citing Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), ALAB-799, 21 NRC 360, 381-82 (1985) and Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-99-6, 49 NRC 114, 118 (1999). Without deciding the validity of this legal proposition, the Board concludes that NEC's failure to even attempt to explain the delay is fatal.

Third, NEC's motion is rejected because it fails to comply with 10 C.F.R. § 2.309(f)(3), which states:

If 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.

As required by this rule, NEC should have consulted with the State and advised the Board regarding (a) whether the State concurred in the motion, and (b) who would serve as the lead on the State's contentions. NEC ignored these requirements.

B. Document Disclosure

We now turn to NEC's request that Entergy be compelled to provide it with a copy of the documents Entergy is disclosing to the State pursuant to 10 C.F.R. § 2.336(a)(2). NEC

provides no legal argument or support for this portion of its motion. Instead, NEC relies solely on the assumption that if it adopts the State's contentions, then it is entitled to receive the same documents that Entergy disclosed to the State. The abstract logic is valid, but since NEC was denied the right to adopt the State's contentions, NEC's argument fails.

Meanwhile, Entergy presents slightly different argument, i.e., that "absent NEC's adoption of [the State's] contentions, NRC case law establishes that NEC is not entitled to such discovery." Entergy Answer at 7. In essence, Entergy is arguing that contention adoption is the only grounds for allowing NEC to obtain copies of documents relevant to the State's contentions. The only support that Entergy cites for this proposition is Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), Licensing Board Memorandum and Order (Denying Motion to Compel) (Dec. 3, 1999) (unpublished).

Private Fuel Storage was decided long before 10 C.F.R. § 2.336 was promulgated⁴ and we find it neither persuasive nor controlling in this case. In Private Fuel Storage, the Board denied an intervenor's motion to compel responses to two interrogatories and six document requests stating "in the context of this multi-party proceeding in which there are contention-related limitations on the number and timing of discovery requests, we see no basis for allowing a party to engage in discovery unless its request has some relevance to admitted contentions it sponsored or adopted." Private Fuel Storage at 2-3 n.1. But Private Fuel Storage never states the broad proposition that contention adoption is the necessary prerequisite to document discovery. Further, Private Fuel Storage was decided on practical considerations that distinguish it from the present case. In Private Fuel Storage, the intervenor sought discovery on financial and organizational matters totally unrelated to its sole contention, which dealt with environmental justice. Here, the contentions of NEC and the State are on technical and safety

⁴ The regulation was issued in 2004. See 69 Fed. Reg. 2182 (Jan. 14, 2004)

issues that are reasonably related. Also, in Private Fuel Storage, the intervenor sought active discovery (interrogatories and document production) that would have imposed additional burdens on the responding party. In the instant case, there would be virtually no burden in requiring Entergy to make an extra electronic copy of the documents it is already providing to the State. In addition, Private Fuel Storage involved Subpart G discovery procedures, with the prospect that the inquisitive intervenor, having once obtained the relevant documents, might seek additional discovery or depositions thereon. Here, there is no further discovery allowed, see 10 C.F.R. § 2.336(f). Based on this limited precedent, we are not prepared to accept Entergy's broad assertion that contention adoption is the only possible basis for allowing NEC to obtain copies of the documents Entergy is disclosing to the State pursuant to 10 C.F.R. § 2.336.

Nevertheless, the Board concludes that NEC has failed to establish either (a) that it is legally entitled to receive copies of the documents that are relevant to the State's contentions and that Entergy is disclosing to the State, or (b) that there are any special circumstances that warrant an order from the Board requiring Entergy to provide the documents to NEC. The regulation requires that Entergy provide NEC with access to all documents (other than privileged or protected status documents) that are relevant to NEC's contentions. 10 C.F.R. § 2.336(a)(2). This includes documents that are also relevant to the State's contentions, but it does not include those that are not relevant NEC's contentions. We see no reason why NEC needs more.

III. Conclusion

For the foregoing reasons, the Board denies NEC's motion.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD⁵

/RA/

Alex S. Karlin, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Anthony J. Baratta
ADMINISTRATIVE JUDGE

/RA/

Lester S. Rubenstein
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 16, 2005

⁵ 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.

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NUCLEAR REGULATORY COMMISSION

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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 MEMORANDUM AND ORDER (DENYING INCORPORATION BY REFERENCE AND ADDITIONAL DISCOVERY DISCLOSURE) 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
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INCORPORATION BY REFERENCE AND
ADDITIONAL DISCOVERY DISCLOSURE)

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Dated at Rockville, Maryland,
this 16th day of February 2005