

February 22, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF ANSWER SUPPORTING ENTERGY'S MOTION
FOR PARTIAL RECONSIDERATION OF INITIAL SCHEDULING ORDER,
OR, IN THE ALTERNATIVE, FOR CERTIFICATION

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the staff of the Nuclear Regulatory Commission ("Staff") herein answers the motion of Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively, "Applicant" or "Entergy")¹ requesting that the Atomic Safety and Licensing Board ("Licensing Board") reconsider that portion of its Initial Scheduling Order² providing for a second opportunity to request the use of 10 C.F.R. Part 2, Subpart G procedures in this proceeding. For the reasons set forth below, the Staff agrees with the Applicant that an opportunity to request Subpart G procedures at this juncture in the proceeding is neither necessary nor consistent with the intent of the revised Part 2 rules.

BACKGROUND

In their requests for hearing and petitions for leave to intervene, both the Vermont Department of Public Service ("DPS") and the New England Coalition ("NEC") requested that this

¹ See "Entergy's Motion for Reconsideration of Initial Scheduling Order, or in the Alternative, for Certification," dated February 10, 2005 ("Motion").

² See *Entergy Nuclear Vermont Yankee LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), Initial Scheduling Order, slip op. February 1, 2005.

proceeding be conducted pursuant to 10 C.F.R. Part 2, Subpart G procedures.³ In its December 16, 2004 Memorandum and Order, the Licensing Board held that the informal procedures of 10 C.F.R. Part 2, Subpart L were “the most appropriate” for the four admitted contentions. *Entergy Nuclear Vermont Yankee LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-04-31, 60 NRC __ (Dec. 16, 2004) slip op. at 2.

In so holding, the Licensing Board further stated:

If however, at some later stage in this proceeding (*e.g.*, when the identity of witnesses is known) a party submits a motion pursuant to 10 C.F.R. § 2.310(d), arguing that the credibility of an eyewitness as to a material past activity reasonably may be expected to be in issue, we may revisit the matter at that time.¹⁹

¹⁹This is consistent with the Commission’s statement that “a requestor/petitioner who fails to address the hearing procedure issue would not later be heard to complain in any appeal of the hearing procedure selection ruling.” 69 Fed. Reg. at 2,221. Certainly a petitioner who knows the identity of an opposing party’s eyewitnesses and has information raising questions about their credibility must present such arguments when it submits its initial request for hearing, or be barred. If however, the petitioner shows that the identity of the eyewitnesses of opposing parties, or information regarding their lack of credibility on issues material to this proceeding, was not previously available and submits a motion in a timely fashion, it may be considered. This approach is somewhat analogous to 10 C.F.R. § 2.309(f)(2)(i) and (iii).

Id., slip op. at 18. Thereafter, in its Initial Hearing Order, the Licensing Board provided as follows:

2. Any request, pursuant to 10 C.F.R. § 2.310(d), that is based on a challenge to the credibility of an eyewitness, that a contention or contested matter be handled pursuant to Subpart G procedures, shall be filed as follows:

³ See “Vermont Department of Public Service Notice of Intention to Participate and Petition to Intervene,” dated August 30, 2004, at 42-47; “Vermont Department of Public Service Reply to Answers of Applicant and NRC Staff to Notice of Intention to Participate and Petition to Intervene,” dated October 7, 2004, at 43-51; “New England Coalition’s Request for Hearing, Demonstration of Standing, Discussion of Scope of Proceeding and Contentions,” dated August 30, 2004, at 7-9; and “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 15-16. See *also* Tr. at 496-517.

- a. For witnesses previously listed or identified by a party pursuant to 10 C.F.R. § 2.336, within 30 days of the issuance of this order; and
- b. For additional witnesses subsequently listed or identified by a party, within 20 days of such listing or within 10 days after service of the final witness list specified in paragraph 5 below, whichever is earlier.

Initial Hearing Order, slip op. at 3. Entergy filed the instant Motion on February 10, 2005.

DISCUSSION

While the Staff agrees generally with the arguments set forth by Entergy in its Motion, and will not repeat them here, the Staff believes that two points merit additional discussion. First, the Initial Scheduling Order permits a request for a Subpart G proceeding for a particular narrow circumstance: the credibility of an eyewitness. In LBP-04-31, the Licensing Board stated:

Where needed for a full and true disclosure of the facts, cross-examination under Subpart L can encompass any issue that is relevant to the findings of fact that a Board or presiding officer must make in order to render a decision. This includes, for example, the cross-examination of experts and their opinions, where it is needed to establish an adequate record to resolve a conflict in expert opinions and/or to determine whether a party is able to carry its burden of proof because our decisions often hinge upon our evaluation of competing expert opinions, technical and scientific facts [citation omitted] which become central elements of our findings of fact.

LBP-04-31, slip op. at 27-28 (emphasis added). The Staff submits that the provisions of 10 C.F.R. § 2.1204(b) are intended, *inter alia*, for circumstances in which credibility of a certain eyewitness may be at issue. Section 2.1204(b) specifically provides, among other things, that a party may file a motion to permit cross-examination by the parties on particular admitted contentions or issues, if the Presiding Officer determines that cross-examination is necessary to ensure the development of an adequate record for decision. Eyewitness credibility on a particular issue or contention might form a basis for such a motion under appropriate circumstances. The Presiding Officer selects hearing procedures pursuant to 10 C.F.R. § 2.309(g) with respect to a

particular *contention*, not a particular *witness*. To allow a switch to Subpart G procedures based on an allegation that the credibility of a single eyewitness may reasonably be at issue with respect to the resolution of an admitted contention in a proceeding, seems to render Section 2.1204(b) a nullity.

Second, a primary purpose of the revised Part 2 rules is to make the NRC's hearing process more effective and efficient. See Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2182 col. 1 (Jan. 14, 2004). In determining the governing hearing track at the outset of a proceeding, all parties can plan and prepare for a certain type of proceeding. Allowing a hearing track to be switched to Subpart G mid-stream, even late, in a proceeding, increases the burden on all parties, contrary to the intent of the revised rules of practice.

In sum, the Staff agrees with Entergy's alternative proposal setting a deadline for requests for cross-examination or other procedural modification relating to the presentation of testimony or evidence.⁴ The Staff believes that the existing Subpart L procedures provide sufficient procedural protections for all parties, without resorting to a Subpart G proceeding at a later date.

⁴ On February 7, 2005, Intervenor Blue Ridge Environmental Defense League, Nuclear Information and Resource Service and Public Citizen filed an answer to the Motion, in which they stated that they did not oppose Dominion's request modification as it applies to EC 3.3.2 only. See "Intervenors' Response to Dominion's Motion for Reconsideration," dated February 7, 2005. In this vein, the Staff notes that, should any late-filed contention be admitted in this proceeding, the Licensing Board will determine the hearing track to be followed for such a contention at the time of its admission. See 10 C.F.R. § 2.310.

CONCLUSION

For the reasons set forth above, the Staff agrees that the Licensing Board should reconsider the portion of the Initial Scheduling Order discussed herein or, in the alternative, certify its ruling to the Commission for further review.

Respectfully submitted,

/RA/

Brooke D. Poole
Counsel for NRC Staff

Dated at Rockville, Maryland
this 22nd day of February, 2005

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF ANSWER SUPPORTING ENTERGY'S MOTION FOR PARTIAL RECONSIDERATION OF INITIAL SCHEDULING ORDER, OR, IN THE ALTERNATIVE, FOR CERTIFICATION" 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 22nd day of February, 2005.

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Respectfully submitted,

/RA/

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