



service of the final witness list specified in paragraph 5 below, whichever is earlier.<sup>1</sup>

Entergy respectfully submits that this portion of the Initial Scheduling Order is inconsistent with both the wording and the intent of the new Commission Rules of Practice, which require that applicable hearing procedures be established at the outset of a proceeding and not be subject to subsequent modification. In addition, switching an entire contention to the formal discovery procedures in subpart G as late as within 10 days after service of the final witness list (as contemplated in the Initial Scheduling Order) would significantly delay and disrupt this proceeding. If the Board denies this motion for reconsideration, Entergy requests that the Board certify this novel question to the Commission for interlocutory review.

#### GROUNDS FOR RECONSIDERATION

Under the Rules of Practice adopted by the Commission last year,<sup>2</sup> a party seeking to intervene in a licensing proceeding and desiring that the procedures of Subpart G of 10 C.F.R. Part 2 apply to one or more of the contentions it proposes, must demonstrate in its petition to intervene that Subpart G procedures are appropriate. The regulations provide:

*If a request/petition relies upon § 2.310(d) [governing use of Subpart G procedures in reactor licensing proceedings], the request/petition must demonstrate by reference to the contention and bases provided and the specific procedures in subpart G of this part, that resolution of the contentions necessitates resolution of material issues of fact which may be best determined through the use of the identified procedures.*

10 C.F.R. § 2.309(g) (emphasis added). In promulgating this provision, the Commission explained:

Section 2.309(g) requires that the request for hearing/petition to intervene address the question of the type of hearing procedures (e.g., formal hearing under Subpart G, informal hearings under Subpart L, "fast track" informal procedures under

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<sup>1</sup> Initial Scheduling Order at 3.

<sup>2</sup> *Changes to Adjudicatory Process*, 69 Fed. Reg. 2,182 (Jan. 14, 2004).

Subpart N) that should be used for the proceeding. This is not a requirement for admission as a party to a proceeding, but 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. *In addition, the final rule requires that if the requestor/petitioner asks for a formal hearing on the basis of § 2.310(d), the request for hearing/petition to intervene must demonstrate, by reference to the contentions and the bases provided and the specific procedures in Subpart G, that resolution of the contention necessitates resolution of material issues of fact which may best be determined through use of the identified procedures.*

69 Fed. Reg. at 2,221, emphasis added. *See also id.* at 2,202-03. Thus, the regulations require that a petition to intervene must address the potential use of Subpart G procedures as a threshold matter, and that it do so “by reference to the contention and bases.”

Likewise, at the time a Licensing Board determines that a petition to intervene should be granted and a hearing held, the Board is required to “determine and identify the hearing procedures to be used for the proceeding.” 10 C.F.R. § 2.310. Proceedings on applications for a license amendment are to be conducted under the procedures of Subpart L, *see* 10 C.F.R.

§ 2.310(a), unless the Board

by order finds that resolution of the contention or contested matter necessitates resolution of issues of material fact relating to the occurrence of a past activity, where the credibility of an eyewitness may reasonably be expected to be at issue, and/or issues of motive or intent of the party or eyewitness material to the resolution of the contested matter, the hearing for the resolution of that contention or contested matter will be conducted under subpart G of this part.

10 C.F.R. § 2.310(d).

Three conclusions are inevitably drawn from the provisions of 10 C.F.R. §§ 2.309(g) and 2.310(d). *First*, the selection of hearing procedures is to be made by the Board at the time it admits an intervenor’s contentions into the licensing proceeding. *Second*, this determination – particularly as it pertains to whether resolution of a contention or contested matter necessitates use of Subpart G procedures – is to be “based upon the materials submitted in the request for

hearing/petition to intervene under § 2.309.” 69 Fed. Reg. at 2,222. *Third*, the determination is to be made solely “by reference to the contention and the bases provided and the specific procedures in subpart G of this part.” 10 C.F.R. § 2.309(g). Except perhaps in exceptional cases, the identity of potential witnesses should play no role in the determination that the Board must make, at the time a contention is admitted, on what hearing procedures shall apply.

Up to the time of issuance of the Initial Scheduling Order, the process for selecting hearing procedures in this proceeding had followed exactly the steps outlined above. Both petitioners herein, the Department of Public Service (“DPS”) and the New England Coalition (“NEC”) vigorously argued, both in their petitions to intervene and at the October 21-22, 2004 Prehearing Conference, that hearings on their proposed contentions should be conducted under Subpart G procedures.<sup>3</sup> In its December 16, 2004 Memorandum and Order on the selection of hearing procedures, the Board ruled that “pursuant to 10 C.F.R. § 2.310, that the informal hearing procedures of 10 C.F.R. Part 2, Subpart L ‘Informal Hearing Procedures for NRC Adjudications’ are the most appropriate for the four contentions” it had admitted earlier for adjudication in this proceeding.<sup>4</sup> Memorandum and Order (Selection of Hearing Procedures and Ruling on State Statutory Claim), LBP-04-31, 60 NRC \_\_ (Dec. 16, 2004), slip op. at 1. The Board concluded that none of the four admitted contentions or their proffered bases met the criteria for applicability of Subpart G procedures, and thus the hearing on those contentions would be held in accordance with the procedures of Subpart L. *Id.* at 18. In so doing, the Board

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<sup>3</sup> Vermont Department of Public Service Notice of Intention to Participate and Petition to Intervene (Aug. 30, 2004) at 42-47; New England Coalition’s Request for Hearing, Demonstration of Standing, Discussion of Scope of Proceeding and Contentions (Aug. 30, 2004) at 7-9; Vermont Department of Public Service Reply to Answers of Applicant and NRC Staff to Notice of Intention to Participate and Petition to Intervene (Oct. 7, 2004) at 43-51; 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 15-16; Tr. 496-517.

<sup>4</sup> See Memorandum and Order (Ruling on Standing, Contentions, and State Reservation of Rights), LBP-04-28, 60 NRC \_\_ (Nov. 22, 2004).

rejected a variety of arguments tendered by DPS and NEC, including the alleged complexity of the issues to be litigated, the right to a hearing conferred by Section 189a of the Atomic Energy Act, the high degree of public interest in the proceeding, the allegedly convoluted nature of the Subpart L hearing procedures, and the possibility that Entergy may not make full discovery disclosures. *Id.* at 8-12. With respect to each of the admitted contentions tendered by DPS and NEC, the Board ruled that the issues raised by the contention were of a technical nature and that generalized allegations relating to the credibility of Entergy and its employees and witnesses did not create issues warranting use of Subpart G procedures. *Id.* at 12-18.

The Board left open the possibility that if “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.” *Id.* The Board did not rule, however, that the identification of witnesses would automatically provide parties with a “second bite at the apple,” that is, a renewed opportunity to argue that the Subpart G procedures should apply to a contention.

The Initial Scheduling Order goes beyond the rulings of LBP-04-31 and the Commission’s regulations by explicitly providing an opportunity for parties to “request, pursuant to 10 C.F.R. § 2.310(d), that . . . based on a challenge to the credibility of an eyewitness, . . . a contention or contested matter be handled pursuant to Subpart G procedures,” and specifying a schedule for making such a request. Initial Scheduling Order at 3. The regulations, however, do not provide for such requests except in an initial intervention petition. Moreover, the Board apparently interprets the outcome of such a request as potentially causing an entire contention to

be subject, after the fact, to Subpart G requirements even if only the credibility of a single witness with respect to a portion of the contention is at issue.<sup>5</sup>

These rulings could seriously disrupt and delay this proceeding. Subpart G discovery alone – with its panoply of interrogatories, documents requests, requests for admission, and depositions – would add many months to the schedule, and would delay a hearing well into next year. Instead of preparing for a hearing after the Staff issues its Safety Evaluation Report, the parties could be just starting to engage in protracted discovery. The identification of a single witness whose credibility might be at issue on a contention could result in discovery against all other witnesses, including experts. Likewise, the hearing on that contention would revert to the Subpart G procedures, eliminating all the efficiency gains that the Commission sought to achieve in enacting the new rules.

The regulations do not envision such a result, and in fact provide for an alternative that allows for issues of credibility to be explored at a Subpart L hearing without needing to upset the framework that has been carefully devised by the Commission. As the Board has recognized, cross-examination by the parties may be allowed in such a hearing upon request by a party under 10 C.F.R. § 2.1204(b). Such examination may be warranted, not only with respect to issues concerning a past activity where the credibility of an eyewitness may reasonably be expected to be at issue, but more generally where needed for a full and true disclosure of the facts, and “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.” LBP-04-31, *supra*, slip op. at 27. Because of the

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<sup>5</sup> See Tr. 607-08.

flexibility allowed by Subpart L, resorting to Subpart G midway through a proceeding is not only inconsistent with the regulations but unnecessary as well.<sup>6</sup>

For the above reasons, Entergy requests that the Board reconsider and amend its Initial Scheduling Order so that numbered section 2 on page 3 reads:

2. Any request, based on a challenge to the credibility of an eyewitness, that cross-examination by the parties of that witness at the hearing be authorized pursuant to 10 C.F.R. § 2.1204(b), or for any other procedural modification relating to the presentation of testimony or evidence, shall be filed as follows:
  - 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.

#### **REQUEST FOR CERTIFICATION AND REFERRAL TO COMMISSION**

In the event that the Board denies its motion for reconsideration, Entergy requests that the Board refer its ruling to the Commission and certify for Commission review at the earliest possible opportunity the following issue:

**Do the Commission's regulations allow for the utilization of Subpart G procedures after an initial ruling has been made that Subpart L procedures should apply to an admitted contention, and if so should the Subpart G procedures apply only to testimony that may raise issues under 10 C.F.R. § 2.310(d), or should they apply to the entire contention?**

Pursuant to 10 C.F.R. §§ 2.319(l) and 2.323(f), certification of this issue to the Commission and referral of the Board's ruling on it is appropriate, because it raises significant and novel legal and policy issues that merit Commission review at the earliest opportunity, the

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<sup>6</sup> The Board also has authority to permit additional discovery where warranted such as, for example, in the case of a witness whose credibility has become an issue. *See* 10 C.F.R. § 2.336(a).

resolution of which would materially advance the orderly disposition of this proceeding. *See* 10 C.F.R. § 2.341(f). The provisions for selecting hearing procedures are new, and there is no case law authority or express Commission guidance on how they should be applied. Thus, the Board's ruling on this issue sets a precedent that may affect the conduct of future proceedings.

The potential need to initiate, in midstream, subpart G discovery on a contention could add many months to the duration of this proceeding. Therefore, early review by the Commission of the Board's ruling would provide clarification of this issue on a schedule consistent with the orderly and expeditious completion of the proceeding.

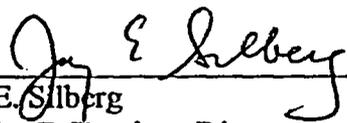
#### **CERTIFICATION**

In accordance with 10 C.F.R. § 2.323(b), counsel for Entergy has discussed this motion with counsel for the other parties in this proceeding in an attempt to resolve this issue.

#### **CONCLUSION**

For all of the above stated reasons, the Board should reconsider its Initial Scheduling Order, or in the alternative, certify its ruling to requests for Subpart G proceedings to the Commission for immediate review.

Respectfully submitted,

  
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Dated: February 10, 2005

February 10, 2005

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

In the Matter of )

ENTERGY NUCLEAR VERMONT )  
YANKEE, LLC and ENTERGY )  
NUCLEAR OPERATIONS, INC. )  
(Vermont Yankee Nuclear Power Station) )

) Docket No. 50-271

) ASLBP No. 04-832-02-OLA  
) (Operating License Amendment)

CERTIFICATE OF SERVICE

I hereby certify that copies of "Entergy's Motion for Reconsideration of Initial Scheduling Order, or in the Alternative, for Certification" 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 10th day of February, 2005.

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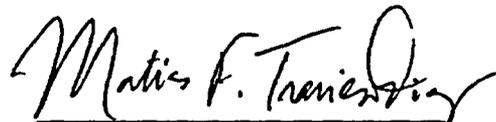
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