

March 3, 2005

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 TO ENTERGY'S MOTION TO DISMISS AS MOOT, OR IN THE
ALTERNATIVE, FOR SUMMARY DISPOSITION OF DEPARTMENT OF PUBLIC SERVICE
CONTENTION 6

INTRODUCTION

On February 11, 2005, Applicants Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively "Entergy") filed a motion to dismiss Vermont Department of Public Service's ("DPS") Contention 6 as moot, or, in the alternative, for summary disposition of the contention.¹ Contention 6, which was admitted as a late filed contention by the Atomic Safety and Licensing Board ("Board") on January 11, 2005,² concerns whether Entergy's application for an extended power uprate ("EPU") may be granted absent a verification of the time in which Entergy's reactor core isolation cooling ("RCIC") system can be made operable. Pursuant to 10 C.F.R. §§ 2.323(c) and 2.1202(b)(3), and the Board's Order dated February 16, 2005, the Staff of the Nuclear Regulatory Commission ("NRC") herein answers Entergy's Motion to Dismiss. The Staff agrees that Contention 6 should be dismissed as moot, or, in the alternative, should be dismissed as a matter of law because there is no genuine issue as to a material fact.

¹ Entergy's Motion to Dismiss as Moot, or in the Alternative, For Summary Disposition of Department of Public Service Contention 6 (Feb. 11, 2005) [hereinafter "Entergy's Motion to Dismiss"].

² Memorandum and Order Admitting Intervenor's New Contention (Jan. 11, 2005) [hereinafter "Order"].

BACKGROUND

On September 30, 2004, Entergy filed Supplement 17 of its application for an EPU, in response to NRC questions regarding the ability to mitigate a 10 C.F.R. Part 50 Appendix R fire at the Vermont Yankee Nuclear Power Station.³ Supplement 17 states that, under EPU conditions, the time to core uncover “changed from 25.3 minutes to 21.3 minutes,” but that “there was sufficient time available for the operator to perform the required actions.” *Id.* That statement was based on the assumption that the RCIC system could be made operable in approximately 15 minutes. *Id.* Supplement 17 also included a commitment to verify that assumption and to complete revised operator training by December 1, 2004. *Id.*

Shortly thereafter, DPS requested admittance of a late filed contention, stating:

The application for amendment, including all supplements thereto, fails to comply with 10 CFR 50 Appendix R, specific requirements, paragraph L(2)(b) because it does not verify the assumption, used for purposes of the safe shutdown capability analysis (SSCA), that the reactor core isolation cooling (RCIC) system can be made operable in sufficient time to permit the operator to perform the required actions before core uncover.⁴

This Board admitted DPS Contention 6 on January 11, 2005. Order at 7. In accepting the contention, however, the Board noted that the contention was “narrow,” as the dispute concerned only whether the application “can and should be granted absent the completion of the promised verification.” *Id.* The Board further noted that, “If and when Entergy performs the verifications showing compliance, and duly submits them to NRC, this contention will be moot.” *Id.*

³ Letter from Robert J. Wanczyk, Director, Nuclear Safety Assurance, Vermont Yankee Nuclear Power Station, to NRC, “Vermont Yankee Nuclear Power Station, Technical Specification Proposed Change No. 263 - Supplement No. 17, Extended Power Uprate - Response to Request for Additional Information related to the 10 CFR 50 Appendix R Timeline” (Sept. 30, 2004) ADAMS Accession No. ML042820142.

⁴ Vermont Department of Public Service Request for Leave to File a New Contention (Oct. 18, 2004).

Entergy reported, in Supplement 22 of its application for an EPU, that all six operating crews were retrained and tested by December 1, 2004.⁵ The average time for the crews to initiate RCIC was 13 minutes and 32 seconds. *Id.* Based on the results of this testing, Entergy reasserted its assumption that the RCIC system can be made operable in approximately 15 minutes. *Id.*

DISCUSSION

A. Legal Standards for Dismissal of Contentions

The Commission has determined that there is a “difference between contentions that merely allege an ‘omission’ of information and those that challenge substantively and specifically how particular information has been discussed in a license application.” *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 382-83 (2002); *see also* 10 C.F.R. § 2.309(f)(1)(vi) (stating, as a requirement for an admissible contention, that a proposed contention must provide sufficient information to show that a genuine dispute exists either by information that references specific portions of an application, or if the application fails to contain information, the identification of each failure).

“Where a contention alleges the omission of particular information or an issue from an application, and the information is later supplied by the applicant . . . the contention is moot.” *McGuire*, CLI-02-28, 56 NRC at 383 (citations omitted); *see also Duke Energy Corp.* (Catawba Nuclear Station, Units 1 & 2), LBP-04-7, 59 NRC 259 (2004) (holding that because the applicant’s response addressed the alleged omission which was the subject of the contention, albeit “minimally,” the motion was granted).

⁵ Letter from Jay K. Thayer, Site Vice President, Vermont Yankee Nuclear Power Station, to NRC, “Vermont Yankee Nuclear Power Station, Technical Specification Proposed Change No. 263 - Supplement No. 22, Extended Power Uprate - 10 CFR 50 Appendix R Timeline Verification” (Dec. 8, 2004) ADAMS Accession No. ML043510227 [hereinafter “Supplement 22”].

B. Legal Standards for Summary Disposition

A moving party is entitled to summary disposition of a contention as a matter of law if the filings in the proceeding, together with the statements of the parties and the affidavits, demonstrate that there is no genuine issue as to any material fact. See 10 C.F.R. §§ 2.1205 and 2.710(d)(2); see also *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 384 (2001); *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio), CLI-93-22, 38 NRC 98, 102-03 (1993). When evaluating summary disposition motions, the Commission has used Rule 56 of the Federal Rules of Civil Procedure as guidance.⁶ See *Advanced Medical Systems*, CLI-93-22, 38 NRC at 102; *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-04, slip op. at 8 (Feb. 2, 2005). As such, the party seeking summary disposition bears the burden of demonstrating the lack of a genuine issue of material fact and the evidence submitted must be construed in favor of the non-moving party. See *Sequoyah Fuels Corp. and General Atomics Corp.* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-17, 39 NRC 359, 361, *aff'd*, CLI-94-11, 40 NRC 55 (1994). For a finding that there is a genuine issue of material fact, “the factual record, considered in its entirety, must be enough in doubt so that there is a reason to hold a hearing to resolve the issue.” *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 & 2), LBP-83-46, 18 NRC 218, 223 (1983).

C. Contention 6

Contention 6 is a contention of omission, as it challenges the absence of the verification that the RCIC system can be made operable in sufficient time. See, e.g., Order at 7 (“the dispute concerns whether the application can or should be granted absent the completion of the promised

⁶ In pertinent part, this rule states, “The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” FED. R. CIV. P. 56(c).

verification”). When accepting Contention 6, the Board stated, “If and when Entergy performs the verifications showing compliance, and duly submits them to NRC, this contention will be moot.” *Id.* Entergy performed such verification, and duly submitted it to NRC on December 8, 2004. See Supplement 22. Contention 6 is therefore moot, and Entergy’s motion to dismiss should be granted.

In the alternative, Entergy has demonstrated that there is no genuine issue as to a material fact as the verifications which validate the assumption that the RCIC system can be made operable in approximately 15 minutes have been performed. See Supplement 22; see *also* Entergy’s Motion to Dismiss, attached statement of material facts. As there is no genuine issue regarding Entergy’s verification, Entergy is entitled to summary disposition of Contention 6.⁷

CONCLUSION

Based upon the foregoing discussion, the Staff agrees that Entergy’s motion to dismiss Contention 6 as moot should be granted, or, in the alternative, that Contention 6 be dismissed as a matter of law as it has been demonstrated that no genuine issue remains as to any material fact.

Respectfully submitted,

/RA/

Marisa C. Higgins
Counsel for NRC Staff

Dated at Rockville, Maryland
this 3rd day of March, 2005

⁷ Although the Board specifically rejected DPS’ attempt to expand the scope of Contention 6 to include whether the verification process was properly conducted, the NRC has committed to inspecting the verification during the week of March 21, 2005. Letter from Wayne D. Lanning, Director, Division of Reactor Safety, NRC, to Commissioner David O’Brien, Vermont Department of Public Service, “NRC Inspection of Corrective Actions at Vermont Yankee Nuclear Power Station” (Feb. 16, 2005) ADAMS Accession No. ML050480531.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF ANSWER TO ENTERGY'S MOTION TO DISMISS AS MOOT, OR IN THE ALTERNATIVE, FOR SUMMARY DISPOSITION OF DEPARTMENT OF PUBLIC SERVICE CONTENTION 6" 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 3rd day of March, 2005.

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