

RAS 9548

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 03/15/05

ATOMIC SAFETY AND LICENSING BOARD

SERVED 03/15/05

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

March 15, 2005

MEMORANDUM AND ORDER
(Granting Motion to Dismiss State Contention 6)

Before the Board is a request by Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc. (collectively, Entergy) seeking to dismiss or summarily dispose of Vermont Department of Public Service (State) Contention 6.¹ For the reasons stated below, the Board grants the request and dismisses State Contention 6 as moot.

I. BACKGROUND

A. Procedural History

On October 18, 2004, the State submitted a motion seeking to file a new contention in this proceeding,² based upon a September 30, 2004 letter from Entergy to the NRC Staff, in

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) [Entergy Motion].

² Vermont Department of Public Service Request for Leave to File a New Contention (Oct. 18, 2004) [State Request]. Although this motion was filed prior to the October 21, 2004 prehearing conference conducted in Brattleboro, Vermont, the Board did not entertain oral argument related to Contention 6 at that time in order to allow Entergy and the Staff the opportunity to file responses to the motion. Tr. 80-81.

which Entergy submitted additional information in support of its extended power uprate (EPU) application. The letter indicated that, although the time to core uncover under EPU conditions would be reduced from 25.3 to 21.3 minutes, sufficient time remained available for an operator to perform required actions, based upon the Safe Shutdown Capability Analysis (SSCA) assumption that the Reactor Core Isolation Cooling (RCIC) system could be made operable in approximately 15 minutes.³ In addition, the letter stated that verification of this assumption and the related training of operations crews would be complete as of December 1, 2004. Id. The State obtained a copy of this letter on October 11, 2004 and timely-submitted its motion to file the new contention seven days later.

On January 11, 2005, the Board admitted State Contention 6.⁴ In so doing, the Board indicated that the contention was to be construed narrowly, noting that it “challenges the absence of the verification, not its quality.” Admission Order at 7. The Board expressly rejected an attempt by the State to expand the scope of Contention 6 to include the proper conduct of the verification, stating “concerns about the sufficiency or accuracy of the verification are entirely conjectural and speculative, and are not part of the admitted contention.” Id. Further, the Board noted that the contention would be moot if Entergy performed and submitted to the NRC the verifications showing compliance. Id.

One month later, on February 11, 2004, Entergy filed its motion to dismiss State Contention 6 as moot, or alternatively, for summary disposition, on the grounds that no genuine issue as to any material fact remains. Entergy Motion at 1. As grounds for dismissal, Entergy indicated that it had completed the verification that was the basis for State Contention 6 and

³ Letter from Robert J. Wancyzk, Director, Vermont Yankee Nuclear Power Station to U.S. Nuclear Regulatory Commission (Sept. 30, 2004) [September 30 Letter].

⁴ Licensing Board Memorandum and Order (Admitting Intervenor’s New Contention) (Jan. 11, 2005) (unpublished) [Admission Order].

reported its compliance to the NRC on December 8, 2004. Id. at 3.

The Staff submitted its answer in support of the Entergy motion on March 3, 2005.⁵ The State opposed the motion in its March 7, 2005 answer, arguing that the standards for summary disposition should be applied by the Board, and that Contention 6 should not be dismissed because a dispute related to the verification performed by Entergy still remains.⁶

B. Entergy's Verification

The documents submitted in support of the Entergy Motion show that Entergy, as promised in its September 30 letter, conducted the verification process during the months of October and November, 2004. Specifically, Entergy developed a training program guide to be used to instruct plant operators on the revised procedures⁷ for shutdown.⁸ Each of Vermont Yankee's six crews of licensed operators then received such training between the dates of October 18 and November 24, 2004.⁹ Following the completion of training, each of the six crews participated in a timed walkthrough of the new procedures, demonstrating the ability of each to bring the RCIC system into service within approximately 15 minutes.¹⁰ Thereafter,

⁵ 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 (Mar. 3, 2005).

⁶ Vermont Department of Public Service Opposition to Entergy's Motion to Dismiss as Moot, or in the Alternative, for Summary Disposition of Department of Public Service Contention 6 (Mar. 7, 2005) [State Opposition].

⁷ Entergy Motion, Exh. 2, Vermont Yankee Nuclear Power Station Operating Procedure, OP 3126, Rev. 17, "Shutdown Using Alternate Shutdown Methods" (Sept. 30, 2004) [OP 3126].

⁸ Entergy Motion, Exh. 3, Vermont Yankee Licensed Operator Requal Training Program Instructor Guide, LOR-24-405, Rev. 0 (Oct. 2004).

⁹ Entergy Motion, Exh. 4, Daily Attendance Records, Activity No. LOR-24-405-2, Review of OP 3126 (dated Oct. 18, 2004 through Nov. 24, 2004).

¹⁰ Entergy Motion, Exh. 5, OP 3126 Timelines for Crews A-F (dated Oct. 20, 2004 through Nov. 22, 2004); Exh. 6, Memo from John Twarog to Chris Wamser, Re: Response to BVM 04-107 "Additional Information Related to the 10 CFR 50 Appendix R Timeline" (Dec. 7, 2004).

Entergy submitted a letter indicating its compliance to the NRC on December 8, 2004, with an additional copy of the correspondence going to the State.¹¹

II. ANALYSIS

The Commission has stated that “[w]here 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.” Duke Energy Corporation (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 383 (2002). In order to raise specific challenges to the new information, an intervenor must “timely file a new or amended contention that addresses the factors in section [2.309].” Id. Without such a requirement, contentions of omission “could readily be transformed – without basis or support – into a broad series of disparate new claims,” effectively circumventing the purposes of the rules governing contention admission: (1) providing notice of the issues to be litigated; (2) ensuring the existence of at least minimal factual and legal foundation for the alleged claims; and (3) ensuring there exists an actual genuine dispute on a material issue of law or fact. Id.

By its very language, State Contention 6 is one of omission. As admitted, the contention asserts:

The application for amendment, including all supplements thereto, fails to comply with 10 CFR Appendix R, specific requirements, paragraph L(2)(b) because it does not verify the assumption, used for the 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.

State Request at 1. Stated another way, this contention alleges only that, because Entergy failed to verify its assumption related to the amount of time it takes to make the RCIC system operable, the amendment application is not in conformance with NRC regulations. It follows,

¹¹ Entergy Motion, Exh. 7, Letter from Jay K. Thayer, Site Vice President, Vermont Yankee Nuclear Power Station, to U.S. Nuclear Regulatory Commission (Dec. 8, 2004) [Entergy Verification Letter].

then, that at such time when Entergy performs and submits its verification, this contention will be rendered moot. Duke, CLI-02-28, 56 NRC at 383.

In our Admission Order, this Board stressed that State Contention 6 was narrow, having only to do with the lack of verification, rather than the “sufficiency or accuracy” of such an analysis of the Entergy assumption. That being the case, the sole question becomes whether Entergy conducted the verification and submitted to the NRC that it was in compliance with the applicable regulations on this matter.

Based on the information this Board now has before it, we find that Entergy has cured the omission from its application that gave rise to State Contention 6. In the two months preceding the submission of its verification letter to the NRC, Entergy devised a training program for its operating crews, implemented the program, and documented the results of the walkthrough exercises performed by the crews following training. It then forwarded its results demonstrating compliance with the regulations to the NRC for review. These were the only actions required of Entergy in order for it to cure the omission that gave rise to the State’s contention. As this Board stated when admitting Contention 6 to this proceeding, “[i]f and when Entergy performs the verifications showing compliance, and duly submits them to the NRC, this contention will be moot.” Admission Order at 7. State Contention 6 is thus moot, and is therefore dismissed.¹²

We reject the arguments presented by the State in its March 7 filing, as further attempts to alter the scope of Contention 6.¹³ The State asserts that, while “a” verification was

¹² The Board does not reach the summary disposition issue, because those procedures are unnecessary to resolve the issue now before us. The State’s attempts to paint this situation as one only resolved by means of summary disposition are unconvincing.

¹³ In our order admitting State Contention 6, the Board refused the State’s attempt to use its reply brief as a mechanism to broaden the new contention, stating, “[w]e reject the State’s attempt to expand the scope of this contention to include whether the ‘verification process was properly conducted.’” Admission Order at 7 (quoting [State] Reply to Answer of

completed, it was not necessarily “*the*” verification that was required of Entergy under the regulations. State Opposition at 2. Additionally, the State claims that the NRC has yet to confirm that the verification submitted by Entergy satisfies the commitment that Entergy had made in its September 30 letter, and until such confirmation exists, Contention 6 remains unresolved. *Id.* at 4.¹⁴ Particularly, the State wishes for the contention to remain a live issue until the NRC is able to determine (1) whether the results submitted by Entergy on December 8 verify “operator capability” rather than “mere[] evidence that the operators passed their training course;” and (2) whether compliance with the modified operating procedures “satisfies [the Staff’s] concerns with Appendix R compliance under uprate conditions.” *Id.* at 5-6.

It is clear that these assertions call into question the quality of the verification – something that we expressly noted was not within the scope of the State Contention 6 on January 11 (“[c]oncerns about the sufficiency or accuracy of the verification . . . are not part of the admitted contention”). As such, the claims are not relevant to this analysis and thus do not alter our determination.¹⁵

Applicant to the [State’s] Request for Leave to File a New Contention (Nov. 17, 2004) at 4).

¹⁴ The State indicates that the NRC Staff review of Entergy’s verification submittal will be completed by the week of March 21, 2005. State Opposition at 4; Affidavit of William K. Sherman (Mar. 4, 2005) ¶ 4. Our ruling is not dependent on the Staff review.

¹⁵ Our ruling does not leave the State without remedy. Should the State wish to challenge the verification process by attempting to demonstrate deficiencies in either the procedures used or the conclusions reached by Entergy, it may do so by promptly filing a new, amended, or late contention. See 10 C.F.R. § 2.309(f)(2).

III. CONCLUSION

For the foregoing reasons, State Contention 6 is dismissed, as moot.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD¹⁶

/RA/

Alex S. Karlin, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Anthony J. Baratta
ADMINISTRATIVE JUDGE

/RA/ Paul Bollwerk, III for:

Lester S. Rubenstein
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 15, 2005

¹⁶ 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.

UNITED STATES OF AMERICA
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 (GRANTING MOTION TO DISMISS STATE CONTENTION 6) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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LB MEMORANDUM AND ORDER (GRANTING
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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 15th day of March 2005