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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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 17, 2005

MEMORANDUM AND ORDER
(Denying Motion for Reconsideration or Certification)

This matter comes before us on a motion by applicants Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively, Entergy) for reconsideration of a portion of our February 1, 2005 initial scheduling order, or, in the alternative, for certification of the issue to the Commission. Specifically, Entergy objects to the portion of the order that set deadlines for the filing of motions for requesting a Subpart G hearing pursuant to 10 C.F.R. § 2.310(d). As explained below, we deny the motion because it is untimely and decline to certify it to the Commission.

I. Background

This case involves an application by Entergy for an amendment to its operating license for the Vermont Yankee Nuclear Power Station in Windham County, Vermont to allow the station to increase its maximum power level from 1593 to 1912 megawatts thermal. The Department of Public Service of the State of Vermont (State) and the New England Coalition

(NEC) each filed a timely petition to intervene. On November 22, 2004, the Board granted their hearing requests and admitted a total of four contentions (two for each intervenor). LBP-04-28, 60 NRC 548 (2004). In that ruling, the Board indicated that it would select the appropriate hearing procedure for each admitted contention at a later date. Id. at 578.

On December 16, 2004, the Board addressed the issue of selecting the appropriate hearing procedures for each admitted contention under 10 C.F.R. § 2.310(d). LBP-04-31, 60 NRC 686 (2004). That regulation specifies, in pertinent part, that an intervenor is entitled to a Subpart G hearing:

> [W]here the presiding officer 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 . . .

10 C.F.R. § 2.310(d) (emphasis added).[1]

In support of their requests for Subpart G procedures, the intervenors alleged a "series of incidents in which [Entergy's] potential witnesses in this proceeding were shown to be of questionable veracity under oath." LBP-04-31, 60 NRC at 701 (citation omitted). But the intervenors failed to connect any alleged credibility problem with any particular probable eyewitness. Accordingly, we ruled that "generic aspersions" against the credibility of a party or unnamed individuals were insufficient to trigger a Subpart G hearing under the first criterion of 10 C.F.R. § 2.310(d), and that instead the intervenors needed to show that the resolution of a contention involved the credibility of a person likely to be an eyewitness in this proceeding.[2]

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[1] This is the first criterion of 10 C.F.R. § 2.310(d).

[2] As we explained: "unless the allegations concern an individual who continues to work for Entergy and is identified as an eyewitness here, we cannot conclude that 10 C.F.R. § 2.310(d) has been satisfied. . . . As to NEC's allegations of problems that have occurred after Entergy became the licensee, NEC has made no showing that the unnamed individuals in question will likely be eyewitnesses in this proceeding." LBP-04-31, 60 NRC at 702-03 (emphasis added).

However, the Board noted that "[t]his situation demonstrates the difficultly the petitioner faces under the new rules in demonstrating, in its initial request for hearing, that a specific contention raises reasonable concerns about the credibility of an eyewitness [because] [a]t this stage, the Petitioners do not even know the identity of the witnesses that Entergy may call." Id. at 702. The Board concluded that "at this point" the petitioners had not demonstrated that any of the admitted contentions met the criteria of 10 C.F.R. § 2.310(d), but stated that "[i]f, 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." Id. at 703.

On January 21, 2005, the Board held a pre-hearing telephonic conference for the purpose of setting deadlines and establishing a schedule for the proceeding. During that conference, the Board Chairman polled the parties as to establishing the "deadline for filing a motion for Subpart G proceedings." Tr. at 592.[3] The State and NEC urged that the deadline for filing such motions be after each party identified its witnesses and the subject matter of their testimony. Id. at 598 and 605. The Staff agreed. Id. at 605-06.

Entergy, however, objected to the very idea of setting a deadline for the filing of a motion for Subpart G proceedings, arguing that the Board's December 16, 2004 ruling - - that the intervenors had not shown they were entitled to a Subpart G hearing - - was immutable and

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[3] The Board Chairman stated: "The next issue I would like to have you all help us with and address is the deadline for filing a motion for Subpart G proceedings. As you may remember from our December 16th ruling on the selection of hearings at page 18, we recognize that the entitlement to a Subpart G proceeding was dependent upon an intervenor or whoever raising a point that the credibility of an eyewitness as to a past factual event may be an issue, and we noted that since no one has revealed the names of their witnesses yet, this may be difficult for any party to carry that burden. Therefore, once the names of the witnesses are available, it might be possible for a party to file a motion . . . for a Subpart G hearing." Tr. at 592.

that "under no circumstances" could it be revisited. Id. at 593-94. Entergy challenged the Board's reading of its December 16, 2004 ruling several times and at each point the Board rejected the challenges. Id. at 595, 597, 609. The State aptly pointed out that the ruling was the law of the case and that the time for Entergy to file a motion for reconsideration had long passed. Id. at 598.

On February 1, 2005, the Board issued its initial scheduling order. As discussed in the January 21, 2005 conference call, the order imposed deadlines for the filing of any motions for a Subpart G hearing, as follows:

> 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:
>
> 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 scheduling order, paragraphs II.2.(a) and (b).

On February 10, 2005, Entergy filed its Motion for Reconsideration of Initial Scheduling Order, or in the Alternative, for Certification (Entergy Motion), challenging paragraphs II.2.(a) and (b) on the same grounds it raised during the January 21, 2005 conference call.

II. Analysis

A. Untimeliness and Procedural Deficiency of Motion

Entergy's motion is rejected as untimely on three separate and individually sufficient grounds.

First, the Board's December 16, 2004 ruling made it absolutely clear that we could "revisit" the selection of the appropriate hearing procedures under 10 C.F.R. § 2.310(d) "at

some later stage in this proceeding (e.g., when the identity of witnesses is known)." LBP-04-31, 60 NRC at 703. This was an explicitly highlighted "Conclusion" contained in its own section of that decision. Any objection to this conclusion should have been filed within ten days, i.e., by December 27, 2004. 10 C.F.R. § 2.323(a) ("A motion must be made no later than ten (10) days after the occurrence or circumstance from which the motion arises.").

Second, if Entergy had any doubt about the meaning of the December 16, 2004 ruling, it was laid to rest during the January 21, 2005 conference call. The Board's presentation of the question was clear (supra, n. 3). Tr. at 592, 595, 596-97. During the conference call, all other parties, including the Staff, demonstrated that they understood, and did not object to, the Board's December ruling. Id. 598, 604-06. Entergy, struggling to overcome its failure to object in December 2004, should at least have filed its motion within 10 days of the conference call, i.e., by January 31, 2005. This it failed to do.[4]

Third, the initial scheduling order was a prehearing conference order, issued pursuant to the January 21, 2005 prehearing conference call, and as such "[a]ny objections to the order must be filed by a party within five (5) days after service." 10 C.F.R. § 2.329(e). Even if we ignore all other defects in Entergy's motion, it should have been filed no later than February 7, 2005.[5]

Finally, we also note that the regulations mandate that a motion for reconsideration "may not be filed except upon leave of the presiding officer . . . upon a showing of compelling circumstances." 10 C.F.R. § 2.323(e). Entergy failed to seek leave to file its motion. Entergy

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[4] Entergy argues that 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 [file motions] pursuant to 10 C.F.R. § 2.310(d)." Entergy Motion at 5. To the contrary, the order limits the LBP-04-31 ruling by imposing deadlines on a party's right to file such motions. Thus, the order favors Entergy because without it, the intervenors might file such motions at any time.

[5] The initial scheduling order was issued February 1, 2005 and served the same day.

likewise never attempted to show compelling circumstances.[6]

In sum, we will not allow Entergy to use the February 1, 2005 initial scheduling order as a bootstrap to raise an untimely challenge to our rulings in November and December 2004. Those rulings made clear that motions for Subpart G procedures under 10 C.F.R. § 2.310(d) would be available until after Entergy disclosed the identity of its eyewitnesses. The initial scheduling order did not create this opening, it closed it, by setting the deadlines for any such motion. Entergy's current motion is untimely and procedurally defective, and is therefore denied.

B. Certification

Certification of this matter to the Commission for early consideration is not warranted. Requests for certification are to be granted only if the "resolution of the issues would materially advance the orderly disposition of the proceeding." 10 C.F.R. § 2.341(f). Entergy's untimely request plainly fails to make any such showing.

Entergy makes dire predictions that the December 16, 2004 ruling "could seriously disrupt and delay this proceeding." Entergy Motion at 6. We reject this argument on both legal and practical grounds.

First, the new rules establish that each case can involve multiple "parallel proceedings," with some contentions being handled under Subpart G procedures and some contentions being handled under Subpart L procedures. Tr. at 545; 69 Fed. Reg. 2182, 2222 (Jan. 14, 2004). Allegations that such parallel proceedings are inefficient or might cause delay does not

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[6] There is a fourth reason why Entergy's motion is untimely. A key part of Entergy's argument is that "the selection of hearing procedures is to be made by the Board <u>at the time it admits an intervenor's contentions</u> into the licensing proceeding." Entergy Motion at 3 (emphasis added). The Board rejected that interpretation on November 22, 2004, when we admitted four contentions and specified that we would <u>not</u> rule on the selection of hearing procedures until a later date. LBP-04-28, 60 NRC at 578. Any objection to this approach should have been raised within 10 days, <u>i.e.</u>, no later than December 2, 2004. 10 C.F.R. § 2.323(a).

authorize us to disregard the regulatory criteria.[7]

Second, there is no practical prospect that the December 16, 2004 ruling, as limited by the February 1, 2005 order, will "seriously disrupt and delay this proceeding." The order sets deadlines for filing any motion under 10 C.F.R. § 2.310(d) that are entirely within Entergy's control, i.e., determined by Entergy's identification of the identity of its witnesses. The first deadline expired on March 3, 2005, and no motions for Subpart G proceedings were filed.[8] Further, it seems likely that all of Entergy's witnesses should have already been identified under 10 C.F.R. § 2.336(a)(1).[9] If not, Entergy can quickly remedy this situation by listing any and all additional witnesses in its regular and mandatory supplemental disclosures under 10 C.F.R. § 2.336(d).[10] As a final measure, the initial scheduling order requires all parties to submit their final list of witnesses within 10 days of the Staff issuance of the Final Safety Evaluation Report (FSER).[11] Under the initial scheduling order that deadline is at least 115 days before any evidentiary hearing. Thus, even if Entergy identifies a new eyewitness at the last moment, there is still ample time within which to address the issue.

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[7] See LBP-04-31, 60 NRC at 697.

[8] "For witnesses previously listed or identified by a party pursuant to 10 C.F.R. § 2.336," the deadline for filing a motion was "within 30 days of the issuance of this order." Initial scheduling order, paragraph II.2.(a).

[9] During the prehearing conference call, the State and NEC took the position that any deadline for filing a motion under 10 C.F.R. § 2.310(d) must occur after Entergy (a) identified its witnesses and (b) specified the "subject matter on which that witness is going to offer testimony." Tr. at 598 and 605. The Board rejected this approach and instead set the deadline solely upon identification of the witnesses.

[10] We advise Entergy to use 10 C.F.R. § 2.336(a)(1) as an opportunity to list all potential witnesses. Entergy need not specify which of these witnesses are eyewitnesses. If an intervenor seeks a Subpart G proceeding for a particular contention based on a challenge to the credibility of any one of these witnesses, the intervenor should (a) contact Entergy under 10 C.F.R. § 2.323(b) to assess whether the person is an eyewitness, and, if so, (b) promptly file a motion under paragraph II.2.(b) of the initial scheduling order.

[11] Initial scheduling order, paragraph II.5.

Third, under any of these scenarios, the Board possesses sufficient authority to manage any motion under 10 C.F.R. § 2.310(d) so that the proceeding can be conducted and concluded in a fair, efficient, and appropriate manner. For example, the Board has the inherent power under 10 C.F.R. § 2.319 to limit the number of interrogatories and the number and length of any depositions that might be allowed.

Finally, we note that this proceeding is being delayed and is essentially in abeyance, due to the Applicant's continued delay in submitting necessary application supplements.[12] Under these circumstances, we reject the notion that we should request an immediate ruling from the Commission.

In sum, there has been no showing that certification of this issue would materially advance the orderly disposition of the proceeding, as required by 10 C.F.R. § 2.341(f). At this point in this proceeding there is no Subpart G motion pending, we have no reason to speculate that there will be, and Entergy, acting responsibly, can cut off any such motions immediately. Accordingly, we decline to trouble the Commission with this issue.

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[12] NRC Staff's Initial Status Report on Review Schedule (Mar. 15, 2005) at 1 ("In short, the Staff is currently unable to provide a projected schedule for issuance of the SE, EA, and ACRS Report due to continued delays in the submission of necessary application supplements.").

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III. Conclusion

In conclusion, Entergy's motion for reconsideration of our February 1, 2005 initial scheduling order, or in the alternative, for certification, is denied.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD[13]

/RA/

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Alex S. Karlin, Chairman
ADMINISTRATIVE JUDGE

/RA/

____
Dr. Anthony J. Baratta
ADMINISTRATIVE JUDGE

/RA by A. Karlin for:/

____
Lester S. Rubenstein
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 17, 2005

[13] 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

In the Matter of)
)
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 MOTION FOR RECONSIDERATION OR CERTIFICATION) 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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[Original signed by Evangeline S. Ngbea]

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Dated at Rockville, Maryland,
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