

July 25, 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'S ANSWER TO ENTERGY'S MOTION TO DISMISS AS MOOT,
OR IN THE ALTERNATIVE, FOR SUMMARY DISPOSITION,
OF NEW ENGLAND COALITION CONTENTION 4

INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.323(c) and 2.1205(b), the Staff of the Nuclear Regulatory Commission ("NRC" or "Commission") herein answers the July 13, 2005, motion of Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively, "Entergy") to dismiss as moot or, in the alternative, resolve on summary disposition, New England Coalition ("NEC") Contention 4.¹ As discussed below, the Staff agrees that Contention 4 should be dismissed as moot. As further discussed below, in the alternative, the Staff agrees that Entergy has shown that there is no genuine issue as to any material fact and that it is entitled to a decision as a matter of law.

BACKGROUND

A. NEC Contention 4

In its request for hearing, NEC proffered, among others, the following proposed Contention 4:

¹ See "Entergy's Motion to Dismiss as Moot, or in the Alternative, for Summary Disposition of New England Coalition Contention 4," dated July 13, 2005 ("Motion").

The license amendment should not be approved. Entergy cannot assure seismic and structural integrity of the cooling towers under uprate conditions, in particular the Alternate Cooling System cell. At present the minimum appropriate structural analyses have apparently not been done.²

This Licensing Board admitted NEC Contention 4 on November 22, 2004, as restated in Appendix 1 to the Licensing Board's order. The admitted, restated contention is as follows:

The license amendment should not be approved because Entergy cannot assure the seismic and structural integrity of the cooling towers under uprate conditions, in particular the Alternate Cooling System cell. At present the minimum appropriate structural analyses have apparently not been done.

See Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-04-28, 60 NRC 548, 580 (2004). In admitting the contention, the Licensing Board stated, "The gist of this contention is that a new seismic and structural analysis should be performed to qualify the Vermont Entergy cooling towers for the additional loads that will result from increasing the maximum power by 20%." *Id.* at 573.

B. The Seismic Evaluation

On May 25, 2005, Entergy transmitted to Staff counsel an update to its mandatory disclosures, consisting of a compact disk containing two calculations, including Calculation No. 1356711-C-001, "Cooling Tower Seismic Evaluation" (the "Seismic Evaluation"), dated April 5, 2005, performed by Entergy's contractor, ABS Consulting.³ Entergy stated in its Motion that the Seismic Evaluation presents a "new structural and seismic analysis of the cooling towers under EPU [extended power uprate] conditions that takes into account the cooling tower modifications performed as part of the upgrade for EPU operation." Motion at 3.

² See "New England Coalition's Request for Hearing, Demonstration of Standing, Discussion of Scope of Proceeding and Contentions," dated August 30, 2004.

³ Entergy's transmittal letter to the Staff represented that these disclosures were concurrently provided to NEC. The Seismic Evaluation is appended to Entergy's Motion as Exhibit 2 and Exhibit 3 to the Affidavit of George S. Thomas.

According to the Seismic Evaluation, the Vermont Yankee Alternate Cooling System (“ACS”) is a safety-related system with the safety function of providing an alternate means of cooling in the event the plant’s service water pumps become inoperable. Seismic Evaluation, Bates no. EPU 538324. The ACS uses the north end cell (cooling tower cell CT2-1) of the west eleven-cell cooling tower (Cooling Tower No. 2) for service water heat removal. *Id.* Both CT2-1 and the adjoining cell, CT2-2, are seismic Class I structures. *Id.* The remaining cells 3 through 11 are non-safety-related Class II structures. *Id.* The Seismic Evaluation goes on to state:

Modifications to the cooling towers are required as part of the power uprate. The modifications consist of removing and replacing the existing fans, motors and gearboxes and adding new cable trays. The replacement components weigh more than the original components, and the thrust loads from the replacement fans are greater than the original thrust loads. The cooling towers require re-analysis to verify the adequacy of the modifications.

Id. The Seismic Evaluation was performed to “evaluate the main structural framing members of the modified cooling tower cells CT2-1 and CT2-2 for dead load and seismic loading conditions,” including “additional weights and loads from the power uprate modifications.” *Id.*⁴ Entergy’s consultant concluded that the results of the seismic analysis demonstrate that cooling tower cells CT2-1 and CT2-2 are seismically adequate for the applied loading conditions. *Id.*, Bates no. EPU 538497.

On July 13, 2005, Entergy filed the instant Motion.

DISCUSSION

A. Legal Standards for Dismissal of Contentions as Moot

The Commission has held:

There is, in short, a difference between contentions that merely

⁴ The Seismic Evaluation states that the non-safety-related cells (3 through 11) are separated from CT2-1 and CT2-2 by break-away joints and are not addressed in the calculation. While only CT2-1 is required to be operational following an earthquake, CT2-2 is included in the analysis in order to account for its effect on CT2-1. *Id.*

allege an "omission" of information and those that challenge substantively and specifically how particular information has been discussed in a license application. 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.

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 Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-04-9, 59 NRC 286 (2004)(finding contentions moot where the applicant provided information that addressed the omissions asserted in those contentions); *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 & 2), LBP-04-7, 59 NRC 259 (2004)(same); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-02-2, 55 NRC 20 (2002)(same). Further, the Licensing Board in this proceeding recently dismissed the Vermont Department of Public Service's Contention 6 pursuant to this doctrine. *See Entergy Nuclear Vermont Yankee L.L.C. and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), Memorandum and Order (Granting Motion to Dismiss State Contention 6), slip op. Mar. 15, 2005.

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 Sys., Inc.* (One Factory Row, Geneva, Ohio), CLI-93-22, 38 NRC 98, 102-03 (1993).

The Commission's summary disposition procedures have been analogized to Rule 56 of

the Federal Rules of Civil Procedure.⁵ See *Advanced Medical Sys.*, CLI-93-22, 38 NRC at 102; *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-4, 61 NRC 71, 79 (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. & Gen. 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. NEC Contention 4

NEC Contention 4 is a contention of omission, as it challenges a lack of information regarding seismic and structural analysis in support of the EPU application. As stated by the Licensing Board, “The contention focuses on the alleged need for Entergy to perform a seismic and structural analysis of the cooling towers under the proposed uprated conditions . . .” LBP-04-28, 60 NRC at 573. Entergy has cured its omission by performing the heretofore missing evaluation. NEC Contention 4 is therefore now moot, and Entergy’s request to dismiss the contention should be granted.

In the alternative, the Staff agrees that Entergy has demonstrated that no factual dispute remains as to NEC Contention 4. As stated above, the factual dispute in NEC Contention 4 is whether Entergy has performed a structural evaluation of the cooling towers generally, and the ACS in particular. As demonstrated in its Motion, Entergy has now performed such analysis.

⁵ 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).

As a result, no genuine dispute of fact remains as to NEC Contention 4, and the contention should be dismissed as a matter of law.⁶

CONCLUSION

Based upon the foregoing discussion, the Staff agrees that NEC Contention 4 should be dismissed as moot. In the alternative, Entergy's motion for summary disposition of NEC Contention 4 should be granted as a matter of law.

Respectfully submitted,

/RA/

Brooke D. Poole
Counsel for NRC Staff

Dated at Rockville, Maryland
this 25th day of July, 2005

⁶ The adequacy of the Seismic Evaluation is not within the scope of NEC Contention 4. A late-filed or amended contention on the adequacy of the analysis would be subject to the late filing standards of 10 C.F.R. § 2.309(c). See *Catawba/McGuire*, CLI-02-28, 56 NRC at 383.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER TO ENTERGY'S MOTION TO DISMISS AS MOOT, OR IN THE ALTERNATIVE, FOR SUMMARY DISPOSITION, OF NEW ENGLAND COALITION CONTENTION 4" 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 25th day of July, 2005.

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