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DOCKETED 09/01/05

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

SERVED 09/01/05

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

September 1, 2005

MEMORANDUM AND ORDER
(Granting Motion to Dismiss NEC Contention 4)

Before the Board is a motion by Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc. (collectively, Entergy) seeking to dismiss as moot New England Coalition's (NEC) Contention 4, or in the alternative for summary disposition.¹ For the reasons stated below, the Board dismisses NEC Contention 4 as moot.

I. BACKGROUND

As admitted by the Board, NEC Contention 4 reads as follows:

The license amendment should not be approved because 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.

LBP-04-28, 60 NRC 548, 580 (2004). In admitting the contention, we explained that the

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

“contention focuses on the alleged need for Entergy to perform a seismic and structural analysis of the cooling towers under the proposed uprated conditions” and that “the fact that Entergy may intend to conduct such an analysis does not eliminate this genuine dispute, because Entergy could change its intent at any time unless, as NEC argues, it is required to perform the analysis.” Id. at 573.

In early 2005, after NEC Contention 4 was admitted, Entergy performed a structural and seismic analysis of the cooling towers and the Alternate Cooling System (ACS) that takes into account the cooling tower upgrades associated with the proposed extended power uprate (EPU).² The cooling tower and ACS structures were evaluated by creating a model of the main structural framing members as beam elements and applying the deadweight and mass of the tower internals at member intersections, accounting for dead load, snow and ice load, and seismic loading conditions. Id. ¶ 10. Based on the results from these calculations, Entergy concluded that there is no need for structural modifications to the ACS cell or the adjacent cell. Id. ¶ 11.

Entergy’s current motion asserts that its recent structural and seismic analysis of the cooling towers and ACS under EPU conditions cures the alleged omission and renders NEC Contention 4 moot. Entergy Motion at 3-4. Entergy also argues, in the alternative, that summary disposition on NEC Contention 4 is appropriate because there is no genuine issue of material fact remaining to litigate and Entergy is entitled to a decision as a matter of law. Id. at 4-6. The NRC Staff supports Entergy’s motion to dismiss, or in the alternative, for summary disposition.³ NEC opposes Entergy’s motion, arguing the contention is not moot and Entergy is not entitled

² Entergy Motion, Declaration of George S. Thomas (July 10, 2005) ¶ 9 [hereinafter Thomas Decl.].

³ 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 (July 25, 2005) at 1 [hereinafter NRC Answer].

to summary disposition because the analysis that Entergy has provided contains a number of serious flaws.⁴

II. ANALYSIS

In our earlier dismissal of State Contention 6, we discussed the standard for handling contentions of omission, observing:

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.⁵

Like State Contention 6, NEC Contention 4 is a contention of omission. In admitting NEC Contention 4, we stated that “[t]he 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%.” LBP-04-28, 60 NRC at 573 (emphasis added). We noted that the focus of the contention is “on the alleged need for Entergy to perform a seismic and structural analysis of the cooling towers under the proposed updated conditions.” Id. At oral argument on the initial admissibility of NEC

⁴ New England Coalition’s Answer Opposing Entergy’s Motion to Dismiss as Moot, or in the Alternative, for Summary Disposition of New England Coalition’s Contention 4 (Aug. 2, 2005) at 5-12 [hereinafter NEC Answer].

⁵ Licensing Board Memorandum and Order (Granting Motion to Dismiss State Contention 6) (Mar. 15, 2005) at 4 (unpublished) [hereinafter Order Dismissing State Contention 6].

Contention 4, its counsel essentially acknowledged that it is a contention of omission.⁶ It was specifically on this basis that the Staff did not oppose the admission of NEC Contention 4.⁷

The analysis that NEC Contention 4 alleged “should be performed” has now been performed. Thomas Decl. ¶¶ 9; NRC Answer at 2. That analysis evaluated the cooling tower structure, taking dead load, snow and ice load, and seismic loading conditions into account, and served as the basis on which Entergy concluded that there is no need for structural modifications to the ACS cell or the adjacent cell. Thomas Decl. ¶¶ 10-11. Given that the contention was based on the “need for Entergy to perform a seismic and structural analysis,” now that Entergy has performed this analysis, the contention is moot. See Duke, CLI-02-28, 56 NRC at 383.

Admittedly, some of the language in NEC Contention 4 seems to support the proposition that it is not solely a contention of omission. For example, the first sentence of the contention alleges, in pertinent part, that: “Entergy cannot assure seismic and structural integrity of the cooling towers under uprate conditions.” LBP-04-28, 60 NRC at 580. But this phrase, read alone, is a broad and very unfocused complaint. Even the second sentence of NEC Contention 4 has certain qualitative aspects: “At present the minimum appropriate structural analyses have apparently not been done.” Id. (emphasis added). Nevertheless, in context, it is clear that NEC Contention 4 focused on the omission, not the quality, of any seismic and structural analysis of the cooling system under EPU conditions. This was inevitable, because at the time there was no such analysis, and therefore no way that NEC could review or challenge its adequacy.

Now however, NEC raises a number of alleged flaws in Entergy’s seismic and structural

⁶ “Judge Rubenstein: Is this an omission of analysis issue? Mr. Block: Yes.” Tr. at 338.

⁷ The Staff agreed that, “[t]o the extent that [NEC’s Contention 4] provides a basis to support NEC’s assertion of a specific omission from the Application, the Staff does not oppose admission of this contention.” NRC Staff Answer to Request for Hearing of New England Coalition (Sept. 29, 2004) at 17.

analysis, claiming that they fall within the umbrella of NEC Contention 4. NEC Answer at 6-10. This is an effort to “transform” an admitted contention of omission into a broad series of disparate new claims and is not conducive to the fair and efficient management of this proceeding.⁸ Expanding NEC Contention 4 to cover NEC’s broad and conclusory criticisms of Entergy’s seismic and structural analysis would leave this proceeding on vague and uncertain ground as to the scope and focus of NEC’s complaint and the specific issues to be litigated. In addition, it would fail to ensure that there is at least some factual and legal foundation for the alleged claims, or to ensure that there is a genuine dispute on a material issue of law or fact. For these reasons, we accept NEC’s own characterization of this contention as one of omission, and dismiss it as moot.⁹

To the extent that NEC has specific complaints regarding Entergy’s new seismic and structural analysis that are within the scope of the EPU application¹⁰ and that satisfy the contention requirements of 10 C.F.R. § 2.309, NEC may now seek leave to file new contentions. The Board slightly reformulated NEC Contention 4 when it was admitted, and its qualitative language provided some support for NEC’s position that its remained viable even after Entergy submitted its seismic and structural analysis. Now that the contention is dismissed, if NEC moves for leave to file new or amended contentions challenging the adequacy of Entergy’s seismic and structural analysis within 20 days of the date of this order, then the motion and contentions will be deemed timely for purposes of 10 C.F.R. § 2.309(f)(2)(iii). Any such motion must address the remaining factors in 10 C.F.R. § 2.309(f)(2),

⁸ See Order Dismissing State Contention 6 at 4.

⁹ The Board finds it unnecessary to reach the summary disposition issue.

¹⁰ See LBP-04-28, 60 NRC at 573 n. 30 (“Whether Entergy’s prior seismic or structural analyses of the cooling towers, basins or fans are compliant with its current licensing basis is not relevant to this proceeding unless there is a clear and direct relationship to the alleged need for an analysis of these structures and systems under the proposed uprate conditions.”).

and, as is the case with all contentions, must also show that the contention meets the standard admissibility requirements of section 2.309(f)(1)(i)-(vi).¹¹

III. CONCLUSION

For the foregoing reasons, NEC Contention 4 is dismissed, as moot.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD¹²

/RA/

Alex S. Karlin, Chairman
ADMINISTRATIVE JUDGE

/RA by G. Paul Bollwerk for:/

Dr. Anthony J. Baratta
ADMINISTRATIVE JUDGE

/RA by G. Paul Bollwerk for:/

Lester S. Rubenstein
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 1, 2005

¹¹ We do not rule here whether a new contention, meeting the requirements of 10 C.F.R. § 2.309(f)(2)(i)-(iii), must also meet the requirements of section 2.309(c). Certainly there is case law supporting that interpretation of the pre-January 2004 version of the regulations. We discussed this issue at Licensing Board Memorandum and Order (Admitting New Contention) (Jan. 11, 2005) at 4. We do rule however that, if filed within the Board's prescribed 20-day period, a motion for leave to file a new contention on Entergy's analysis will be deemed to satisfy 10 C.F.R. § 2.309(c)(1)(i).

¹² 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 NEC CONTENTION 4) (LBP-05-24) 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
LB MEMORANDUM AND ORDER (GRANTING MOTION
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Dated at Rockville, Maryland,
this 1st day of September 2005