

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LBP-06-06

RAS 11123

ATOMIC SAFETY AND LICENSING BOARD

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Before Administrative Judges:

Alex S. Karlin, Chairman
Dr. Anthony J. Baratta
Lester S. Rubenstein

In the Matter of

ENERGY NUCLEAR VERMONT YANKEE
L.L.C.
and
ENERGY NUCLEAR OPERATIONS, INC.

(Vermont Yankee Nuclear Power Station)

Docket No. 50-271-OLA

ASLBP No. 04-832-02-OLA

January 31, 2006

MEMORANDUM AND ORDER

(Denying Motion for Summary Disposition of New England Coalition Contention 3)

Before the Board is a motion by Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc. (collectively, Entergy) for summary disposition of New England Coalition (NEC) Contention 3.¹ The Board denies the motion because Entergy failed to show that there are no genuine issues of material fact in dispute, as required by 10 C.F.R. §§ 2.1205(c) and 2.710(d)(2).

I. BACKGROUND

A. Procedural Posture

On September 10, 2003, Entergy submitted an application for an extended power uprate (EPU) for the Vermont Yankee Nuclear Power Station (Vermont Yankee) in Windham County, Vermont. Specifically, Entergy seeks a license amendment authorizing it to increase the maximum power level of the plant by twenty percent, from 1593 megawatts thermal (Mwt) to

¹ Entergy's Motion for Summary Disposition of New England Coalition Contention 3 (Dec. 2, 2005) [Entergy Motion].

1912 Mwt, and to modify associated technical specifications of the license. After receiving Entergy's EPU request, the Commission published a notice of opportunity for hearing, 69 Fed. Reg. 39,976 (July 1, 2004), and the Department of Public Service of the State of Vermont and NEC filed petitions to intervene. On November 22, 2004, we granted the petitioners' hearing requests and admitted four of the proposed contentions. LBP-04-28, 60 NRC 548 (2004). One of those contentions, NEC Contention 3, is the subject of this summary disposition motion. NEC Contention 3 challenges Entergy's request for an exception from performing large transient testing (LTT). As admitted by the Board, that contention states: "The license amendment should not be approved unless Large Transient Testing is a condition of the Extended Power Uprate." Id. at 580.

On December 2, 2005, pursuant to 10 C.F.R. § 2.1205, Entergy filed the instant motion for summary disposition of NEC Contention 3, claiming that there is no genuine issue as to any material fact relevant to the contention and that it is entitled to a favorable decision as a matter of law. Entergy Motion at 1. Entergy's filing, which exceeds 150 pages, includes a statement of forty-one material facts on which it asserts no genuine dispute exists² and a declaration from Craig J. Nicholas, Entergy's EPU Project Manager, which is supported by twenty exhibits.³ The essence of Entergy's claim is that the facts and opinions expressed by NEC's expert, Mr. Arnold Gundersen, in support of the admissibility of its contentions "are refuted by conclusive technical evidence" and thus do not warrant a hearing. Entergy Motion at 3. Entergy presents facts and technical evidence, which it asserts are undisputed and which can be divided into four basic statements:

² Entergy Motion, Statement of Material Facts Regarding NEC Contention 3 on Which No Genuine Dispute Exists (Dec. 2, 2005) [Entergy Statement of Material Facts].

³ Entergy Motion, Declaration of Craig J. Nichols (Dec. 2, 2005) [Nichols Decl.].

- (1) The analytical tools used by Entergy will accurately predict plant performance in large transient events under EPU conditions;
- (2) Operational experience in the United States and abroad justifies the granting of the exception;
- (3) The Vermont Yankee operational experience justifies the requested exception;
- (4) Component testing at Vermont Yankee provides assurance that the plant's safety systems will operate as intended during transient conditions.

Id. at 5-12.

NEC submitted its answer opposing Entergy's motion on December 23, 2005.⁴ NEC's answer is supported by a statement of material facts alleged to be in dispute⁵ and a declaration from Dr. Joram Hopenfeld.⁶ NEC asserts that Entergy failed to demonstrate that no genuine material dispute exists and points to a number of factual disputes related to Entergy's four assertions. NEC Answer at 9-11. NEC also makes two procedural arguments, arguing that Entergy's motion should be denied because it is untimely and because Entergy failed to comply with the consultation requirement of 10 C.F.R. § 2.323(b). Id. at 6-7.

⁴ New England Coalition's Answer to Entergy's Motion for Summary Disposition of New England Coalition Contention 3 (Dec. 23, 2005) [NEC Answer]. NEC also submitted a request for extension of time to file its answer because the NRC record retrieval system, ADAMS, was down for service for two days during the week before NEC's motion was due, which prevented NEC from meeting the December 22, 2005 filing deadline. See New England Coalition's Request for Extension of Time (Dec. 23, 2005). That request is hereby granted.

⁵ NEC Answer, New England Coalition's Answer to Entergy's Statement of Material Facts Regarding NEC Contention 3 (Dec. 22, 2005) [NEC Material Facts Answer].

⁶ NEC Answer, Exh. 1, Declaration of Dr. Joram Hopenfeld Supporting New England Coalition's Response to ENVY's Motion for Summary Disposition (Dec. 21, 2005) [Hopenfeld Decl.].

The NRC Staff (Staff) submitted its answer, along with the affidavit of Richard B. Ennis, Steven R. Jones, Robert L. Pettis, Jr., and George Thomas on December 22, 2005.⁷ The Staff supports Entergy's motion. NRC Staff Answer at 1, 5. The essence of the Staff's position seems to be that there is no genuine dispute of material fact because the Staff agrees with Entergy's position on each of the factual and technical issues raised by NEC Contention 3 and therefore these factual disputes "have been resolved."⁸ Because the Staff's views differ from Entergy's on only a few minor points, the Staff's answer is discussed only where it raises significant additional points.

B. Legal Standard for Summary Disposition

In a Subpart L proceeding, such as this one, the Board must apply the summary disposition standard set forth in Subpart G. 10 C.F.R. § 2.1205(c). In general, the Commission applies the same standard that the federal courts apply when ruling on motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993).⁹ Under the

⁷ NRC Staff's Answer to Entergy's Motion for Summary Disposition of New England Coalition Contention 3 (Dec. 22, 2005) [NRC Staff Answer]; Id., Affidavit of Richard B. Ennis, Steven R. Jones, Robert L. Pettis, Jr., and George Thomas (Dec. 21, 2005) [Ennis et. al Aff.].

⁸ NRC Staff Answer at 1, 5. "[T]he Staff submits that each of the issues raised by NEC in Contention 3 and its supporting basis statements have been resolved, and there is no genuine dispute of material fact with respect to this contention." Id. at 1 (emphasis added). "[T]he Staff concluded, inter alia, that the Applicant's justifications for not conducting large transient testing were adequate." Id. at 5 (emphasis added). "[T]he Staff agrees with the Applicant . . . that each of the issues raised in NEC Contention 3 have been resolved." Id. (emphasis added). "[T]he Draft SE concluded that the Applicant had provided adequate justification for not conducting post-uprate large transient testing." Id. at 7 (emphasis added). "[T]he Staff has concluded that the Applicant's Statement of Material Facts is correct, except in certain limited respects." Id. at 8 (emphasis added).

⁹ Advanced Medical Systems construes the prior version of the summary disposition regulation, 10 C.F.R. § 2.749 (2004). The current regulations, 10 C.F.R. §§ 2.1205 and 2.710, are substantially similar.)

Subpart G standard, summary disposition is proper “if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and 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 decision as a matter of law.” 10 C.F.R. § 2.710(d)(2).

Summary disposition “is not a tool for trying to convince a Licensing Board to decide, on written submissions, genuine issues of material fact that warrant resolution at a hearing.” Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-39, 54 NRC 497, 509 (2001) (emphasis removed).

The moving party bears the burden of demonstrating that there is no genuine issue as to any material fact. 10 C.F.R. § 2.325; Advanced Medical, CLI-93-22, 38 NRC at 102.

Summary disposition may be granted only if the truth is clear. Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 467 (1962). Any doubt as to the existence of a genuine issue of material fact is resolved against the moving party. Advanced Medical, CLI-93-22, 38 NRC at 102.

Because the burden is on the moving party, the Board must examine the record in the light most favorable to the non-moving party and give the non-moving party the benefit of all favorable inferences that can be drawn from the evidence. Id.

The moving party fails to meet its burden when the filings demonstrate the existence of a genuine material fact, when the evidence introduced does not show that the non-moving party’s position is a sham, when the matters presented fail to foreclose the possibility of a factual dispute, or when there is an issue as to the credibility of the moving party’s evidentiary material. 10A Charles Alan Wright et al., Federal Practice & Procedure § 2727 (3d ed. 1998). If the moving party has satisfied its initial burden, the party opposing the motion may not rest upon “mere allegations or denials,” but must submit rebutting evidence setting forth “specific facts showing that there is a genuine issue of fact” to be tried. 10 C.F.R. § 2.710(b); Advanced

Medical, CLI-93-22, 38 NRC at 102.

In addition to these generally applicable principles, it must be noted that when conflicting expert opinions are involved, summary disposition is rarely appropriate. See, e.g., Phillips v. Cohen, 400 F.3d 388, 399 (6th Cir. 2005) (“competing expert opinions present the ‘classic battle of the experts’ and it [is] up to [the finder of fact] to evaluate what weight and credibility each expert opinion deserves”). “[D]ifferences among experts may occur at different factual levels: either about disputed baseline observations, or about the ultimate facts or inferences to be drawn even where baseline facts may be uncontested.” PFS, LBP-01-39, 54 NRC at 509. Regardless of the level of the dispute, at the summary disposition stage, it is not proper for a Board “to untangle the expert affidavits and decide ‘which experts are more correct.’” Id. at 510 (citation omitted). Factual disputes of this nature are to be resolved at an evidentiary hearing, where the Board has the opportunity to examine witnesses, probe the documents, and weigh the evidence.

II. ANALYSIS

The pleadings raise three main issues. First, was the motion for summary disposition timely, i.e., filed within thirty days of the issuance of the Draft Safety Evaluation Report (SER)? Second, did Entergy “show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law” as required by 10 C.F.R. §§ 2.1205(c) and 2.710(d)(2)? Third, did Entergy, before filing the motion, comply with the requirement that it make a “sincere effort to . . . resolve the issue(s) raised in the motion” as required by 10 C.F.R. § 2.323(b)? We address each issue in turn.

A. Timeliness

NEC first asserts that the Board should deny Entergy’s motion, without reaching the merits of the summary disposition issue, because Entergy filed the motion more than thirty days

after Entergy actually received the Draft SER and thus the motion was untimely:

[Entergy] filed its Motion for Summary Disposition of December 2, 2005; counting thirty days from the posting of the non-proprietary version of the DSER on ADAMS, November 2, 2005. However [Entergy] received (issuance of) the full (proprietary) version of the DSER thirteen days earlier on October 21, 2005.

NEC Answer at 6. NEC cites our Initial Scheduling Order (ISO) for the proposition that all motions for summary disposition must be filed no later than thirty days after the “issuance” of the Draft SER. See Licensing Board Initial Scheduling Order (Feb. 1, 2005) at 3 (unpublished). NEC equates receipt with issuance. See NEC Answer at 6. Entergy made no effort to rebut the allegation that it actually received the proprietary version of the Draft SER on October 21, 2005.¹⁰ The Staff states that it “issued” the Draft SER to the Advisory Committee on Reactor Safety on October 21, 2005 and to the public on November 2, 2005. NRC Staff Answer at 4-5.

The problem is created by the fact that we failed to define the term “issuance” in the ISO. We intended merely a plain-meaning interpretation of the term – that “issuance” means the release of the document to the public (e.g., posting on ADAMS). This, we assumed, would provide all parties with basically the same amount of time (thirty days) within which to file motions for summary disposition. Here, however, for apparently legitimate reasons related to the vetting of the Draft SER for proprietary and confidential information, it was shared with Entergy somewhat prior to its release to the public.

Although our initial assumption was incorrect, we do not believe, in the circumstances presented here, that Entergy’s motion should be denied as untimely. Entergy’s interpretation of the term “issuance” was reasonable. Given that all parties have, in essence, had ten months

¹⁰ Although Entergy has no right to reply to an answer to a motion for summary disposition, if NEC’s allegation was plainly and factually incorrect, Entergy could have requested the opportunity to respond and to correct the record. See 10 C.F.R. § 2.323(c).

within which to draft and file their final motions for summary disposition,¹¹ we see little or no harm caused by the fact that Entergy saw the Draft SER for an additional thirteen days. The substance of the Draft SER is of little or no consequence to the content of the instant motion for summary disposition of NEC Contention 3. Accordingly, we hold that the Draft SER was “issued” when it was posted on ADAMS on November 2, 2005 and that Entergy’s December 2, 2005 motion was timely.¹²

B. Genuine Issues of Material Fact

With the principles discussed in Section I.B in mind, we turn to whether Entergy’s motion for summary disposition on NEC Contention 3 meets the substantive requirements of 10 C.F.R. §§ 2.1205(c) and 2.710(d). First, has Entergy shown that there are no genuine issues of material fact in dispute relating to the contention? Second, if so, is Entergy entitled to a favorable decision as a matter of law? We find that Entergy’s motion fails at the first hurdle, because NEC Contention 3 involves numerous factual and technical issues that are genuinely and hotly disputed. This is apparent almost from the beginning, when Entergy states that the statements and declaration of NEC’s expert in support of the admissibility of the contention are “refuted by conclusive technical evidence.” Entergy Motion at 3. This immediately informs us that there is a serious and substantial dispute over the evidence. But Entergy urges that the dispute is not “genuine” because Entergy’s technical and factual evidence is so overwhelmingly

¹¹ The ISO was issued on February 1, 2005. The deadline for motions for summary disposition was December 2, 2005.

¹² During our January 24, 2006 pre-hearing conference call, the Board ruled that, with regard to the Final SER, the term “issuance” as used in the ISO, and the phrase “issued and delivered” as used in LBP-06-03, 63 NRC __, __ (slip op. at 13) (Jan. 17, 2006), are deemed to mean the day after the Staff sends a hard copy of the Final SER to all parties for next day delivery. Tr. at 762-63. The Staff has committed to send all such hard copies simultaneously and to immediately notify the Board and the parties that it has done so. Tr. at 763.

superior that the contention “do[es] not warrant the holding of a hearing.” Id. Entergy pursues this logic by submitting a substantial amount of evidence attacking the factual and technical support that NEC provided when it was merely attempting to get the contention admitted.

Our review of Entergy’s submissions and NEC’s response shows various genuine issues that exist with regard to NEC Contention 3, ranging from the differing opinions over the appropriateness of various assumptions that support Entergy’s analyses, to the strongly opposing expert opinions relating to ultimate technical judgments and conclusions. The fact that the Staff may agree with Entergy’s factual or technical positions, either informally or in a formal document such as an SER, does not “resolve” the dispute or mean that there is no genuine issue of material fact in dispute.

Positing that there is a substantial dispute over these issues, Entergy is asking us “to untangle the expert affidavits and decide ‘which experts are more correct.’” See PFS, LBP-01-39, 54 NRC at 510.¹³ This is not appropriate at the summary disposition stage.

The following are some brief examples of the genuine disputes that exist for each of Entergy’s four assertions.

1. Analytical Tools to Accurately Predict Plant Performance in Large Transient Events

Entergy asserts that its transient analyses accurately predict Vermont Yankee’s response to large transient events and thus there is no need to perform LTT. These analyses were performed using the ODYN code, which Entergy alleges is approved by the NRC.

Entergy Motion at 5; Nichols Decl. ¶ 16. The analyses modeled the performance of the secondary side of the plant and potential interactions between primary and secondary systems

¹³ This rule, however, would not apply if an expert asserts a factual and technical position that is so patently incorrect or absurd (e.g., that the world is flat) that a presiding officer must reject that position as constituting a genuine dispute. Obviously, this is not the case here. Summary disposition motions are not appropriate if a weighing of facts, evidence, or expert opinion is required to resolve the matter. PFS, LBP-01-39, 54 NRC at 510.

during a transient event based on operational configurations and component and system failures that bound the transients that would occur under EPU operations. Entergy Motion at 5; Nichols Decl. ¶ 17. Based on the results of these analyses and the conclusion that the EPU will not introduce new thermal-hydraulic phenomena or new system interactions, Entergy's expert concludes the analyses accurately predict the plant response to large transient events and eliminates the need to actually perform LTT. Entergy Motion at 6; Nichols Decl. ¶¶ 18-20.

NEC argues that there is a genuine factual dispute about whether Entergy's analyses can accurately predict Vermont Yankee's response to large transient events under EPU conditions. Although NEC does not dispute that Entergy used the ODYN code, NEC's expert has presented a reasoned critique of whether the code was properly benchmarked in this instance. NEC Material Facts Answer ¶ 12; Hopenfeld Decl. ¶ 9.c. NEC also contests whether Entergy's analyses assume the full range of likely transients, suggesting that more extreme transients may in fact more accurately reflect Vermont Yankee and industry experience. NEC Material Facts Answer ¶ 16. Finally, based on all of these challenges to the assumptions behind Entergy's analyses, NEC disputes Entergy's ultimate conclusion that the Entergy analyses can accurately predict the Vermont Yankee response to large transients without the need to perform LTT. Id. ¶ 19; Hopenfeld Decl. ¶ 9.

Given the foregoing, it is obvious that Entergy has failed to show that there is no genuine issue of material fact as to whether Entergy's analyses can accurately predict the Vermont Yankee response to large transient events under EPU conditions without the need to perform LTT. NEC has raised a number of material factual issues challenging the methodology and the assumptions behind Entergy's analyses. Based on these disputed factual issues, NEC also calls into question whether the analyses provide a reasonable basis to predict the Vermont Yankee response to a large transient event. At the summary disposition stage, we may not

weigh these competing positions or decide whether Entergy's assumptions are truly reasonable. Likewise, we need not determine whether these analyses justify Entergy's requested exception. An evidentiary hearing is the proper venue for evaluating whether NEC's critique of the analyses raises legitimate concerns and weighs against granting an exception.

2. Operational Experience in the United States and Abroad

Entergy lists thirteen boiling water reactors (BWR) located in the United States and one foreign BWR that have implemented EPU's without increased operating pressure, four of which have experienced at least one or more unplanned large transients from the uprated levels. Entergy Motion at 6-8. Entergy claims that the large transients experienced at these four plants matched analytical predictions and exhibited no new phenomena. *Id.* at 9; Entergy Statement of Material Facts ¶¶ 21. Because these plants allegedly used the same analytical tools as Vermont Yankee, Entergy concludes that the operational experience in the United States and abroad supports its exception from LTT. Entergy Motion at 9.

NEC agrees that these plants are analogous to Vermont Yankee, but points out that analogous does not mean identical. NEC Material Facts Answer ¶¶ 21. Only one of these plants went through a twenty percent EPU, as Vermont Yankee proposes to do. *Id.* ¶¶ 20. Further, the only evidence about the performance at these plants is license event reports, which NEC argues presents only a snapshot of the true plant performance and excludes relevant but less obvious impacts. *Id.* ¶¶ 22. Based on these facts, NEC concludes that the operational experience at other plants does not provide a strong or conclusive basis for granting an exception from LTT. NEC Answer at 10-11.

We find that the degree of significance and relevance of the experience at these other plants presents a genuine disputed issue of material fact.

3. Vermont Yankee Operational Experience

Entergy asserts that the operating experience at Vermont Yankee supports the granting of an exception from LTT. Entergy Motion at 10-11. In support, Entergy states that Vermont Yankee performed as expected in response to all transients and that no significant anomalies were seen in the plant's response. Entergy Statement of Material Facts ¶¶ 32. Further, Entergy states that the performance during transients was within the bounds of the analyzed transient responses and, because no systems have been added or changed that deal with mitigating the consequences of large transients, there is no basis for treating transient performances under EPU conditions as outside of the plant's prior experience. Id. ¶¶ 33-35.

NEC argues that there are genuine disputes over material issues of fact related to the relevance of Vermont Yankee's prior operating experience in predicting performance under EPU conditions. NEC points to inadequacies in the analysis of a 2004 SCRAM¹⁴ in which it claims that EPU modifications may have caused a short in the iso-phase duct resulting in a generator trip. NEC Material Facts Answer ¶¶ 32. NEC also notes that components have been added or changed that "have a role in a new or increased consequences accident" if they lose their integrity during a transient, making analysis of pre-EPU operational experience less meaningful. Id. ¶¶ 34-35.

We find that the these factual issues present genuinely disputed issues of material fact regarding the Vermont Yankee operational experience and its relevance to granting an exception to LTT.

¹⁴ The term "SCRAM" means "the sudden shutting down of a nuclear reactor, usually by rapid insertion of control rods, either automatically or manually by the reactor operator. May also be called a reactor trip. It is actually an acronym for "safety control rod axe man," the worker assigned to insert the emergency rod on the first reactor (the Chicago Pile) in the U.S." See <http://www.nrc.gov/reading-rm/basic-ref/glossary/scram.html>.

4. Component Testing to Assure Systems Will Operate During Transient Conditions

Entergy states that steady-state testing of systems and components at Vermont Yankee provides further assurance that LTT is unnecessary. Entergy Motion at 12. According to Entergy's expert, testing during normal plant operations, including testing systems, structures, and components, for transient performance confirms the previously discussed analyses. Id. These tests, along with the additional condensate and feedwater system transient testing Entergy has already agreed to conduct, provide adequate assurance of plant performance during large transients and make LTT unnecessary. Id. at 12-13.

NEC does not dispute that the systems, structures, and components at Vermont Yankee are regularly tested, but instead points out that examination of the individual pieces at the plant is not a substitute for, or proof that, each piece will work in unison during a large transient event. NEC Material Facts Answer ¶¶ 37-39. NEC also notes that the declining and adverse performance trends for individual component testing at Vermont Yankee weighs against an exception from LTT. Id.

Again, Entergy has failed to show that there is no genuine issue of material fact as to whether component testing is an adequate substitute for LTT.

In conclusion, the foregoing examples clearly demonstrate that summary disposition is inappropriate here and thus that Entergy's motion must be denied. It seems clear that the basic foundation for a motion for summary disposition – the absence of any genuine issue of material fact – is absent.¹⁵ It is apparent that NEC Contention 3 involves “competing expert opinions

¹⁵ Recognizing that our rules require that the opponent of a motion for summary disposition respond to each of the “material facts” listed by the movant (here Entergy listed forty-one), admitting or denying each of them, and must set forth specific facts, by affidavit or otherwise, showing that there are genuine issues of fact, see 10 C.F.R. § 2.710(a)-(b), we note that it is an abuse of the adjudicatory process to use a motion for summary disposition as a subterfuge for the filing of interrogatories, requests for admission, or other discovery (which are
(continued...)

[that] present the ‘classic battle of the experts,’” Phillips, 400 F.3d at 399, and thus is not suitable for summary disposition.

C. Consultation: Sincere Effort to Resolve Issues

NEC’s third significant argument is that the motion for summary disposition should be denied because Entergy failed to comply with the consultation requirement of 10 C.F.R. § 2.323(b). NEC Answer at 6-7. That section states:

A motion must be rejected if it does not include a certification by the attorney or representative of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant’s efforts to resolve the issue(s) have been unsuccessful.

10 C.F.R. § 2.323(b). We note that Entergy’s motion does contain a certification of compliance with section 2.323(b). But NEC alleges that, in fact, Entergy’s counsel made only a short perfunctory call to NEC on December 2, 2005, wherein Entergy informed NEC that it was filing a motion for summary disposition on NEC Contention 3 on that same day and asking, in effect, if NEC wanted to capitulate. NEC Answer at 6-7. NEC argues that this did not constitute a “sincere effort to . . . resolve the issues raised in the motion” as required by 10 C.F.R. § 2.323(b). NEC’s pro se representative, Mr. Raymond Shadis, submitted a formal declaration summarizing the consultation as follows:

On or about December 2, 2005, Jay Silber [sic], counsel for [Entergy] telephoned me at my home-office. . . . He informed me that [Entergy] thought that December 2nd was the last day they could be filing a motion for summary disposition and that he thought that they would probably file one regarding [NEC’s] Contention on Full Transient testing. He couched a single question on approval in the negative; something on the order of, I don’t suppose you would want to go along

¹⁵(...continued)

generally not permitted in Subpart L proceedings); as a mechanism for exhausting an impecunious litigant; or for any other extraneous purpose. If a party believes that stipulations or admissions would materially expedite or facilitate the proceeding, the party is encouraged to propose such a course to us directly, and the Board will act accordingly. See 10 C.F.R. § 2.319.

with it? I answered . . . that it was not likely and further that my office was quite busy; and that I really didn't have time at that point to contemplate it. I told him that I guessed I would have a look at it when it was filed. Mr. Silberg made no attempt to describe, [Entergy's] perspective on full transient testing (subject of Contention 3) and any new information regarding the issue to me. He made no further offer to engage in any discussion of this issue.¹⁶

Mr. Silberg does not challenge the basics of Mr. Shadis' account of the conversation. Tr. at 755-57. Mr. Silberg agrees that the call occurred on December 2, 2005, Tr. at 766-67, that he advised Mr. Shadis that Entergy planned to file a motion for summary disposition on NEC Contention 3, Tr. at 755, and that he asked Mr. Shadis if NEC wanted to withdraw the contention. Tr. at 755. Although the call was short, it appears that both participants were courteous and professional.

The question raised by NEC is whether, in the circumstances of this case, the telephone call constituted a "sincere effort to . . . resolve the issue(s)" as required by 10 C.F.R. § 2.323(b). There appears to be no legislative history or case law that helps us interpret and apply the requirement that the moving party make a "sincere effort to . . . resolve the issue(s)." This phrase was added when the Part 2 regulations were revised in 2004. 69 Fed. Reg. 2,182 (Jan. 14, 2004). The Statements of Consideration preceding the final and proposed, 66 Fed. Reg. 19,610 (Apr. 16, 2001), regulations are silent as to the meaning of this phrase. The prior regulations did not contain this language, see 10 C.F.R. § 2.730 (2004), and we have found no NRC case law on point.¹⁷

As an initial matter, we believe that compliance with the 10 C.F.R. § 2.323(b)

¹⁶ Declaration of New England Coalition Pro Se Representative Regarding ENVY's Treatment Compliance with 10 CFR §2.323(b) With Respect to ENVY's Motion of December 2, 2005 (Dec. 22, 2005) ¶¶ 3-6.

¹⁷ In certain narrow circumstances, the Federal Rules of Civil Procedure impose similar requirements. See Fed. R. Civ. P. 26(c) (motion for protective order) and Fed. R. Civ. P. 37(a)(2)(A) (motion for sanctions).

requirement that a movant make a “sincere effort to contact other parties in the proceeding and to resolve the issues raised in the motion” can only be determined from the objective reasonableness of the movant’s efforts, as shown by all the facts and circumstances, not by his or her subjective intent. Applying the objective reasonableness test here, it does not appear that a sincere effort was made. The last-minute timing of the telephone call, on the same day that the motion had to be filed, strongly indicates that there was little or no meaningful effort, and no realistic opportunity, to resolve the issues before the motion had to be filed. This is particularly true here, where Entergy had ten months within which to prepare this motion, not just the ten days commonly available under 10 C.F.R. § 2.323(a).¹⁸ In addition, the substance of the call indicates no real effort at resolving the issues. Announcing, in essence, that “we are filing a motion today, do you want to surrender?” does not indicate a reasonable effort to resolve the issues in dispute.¹⁹

Even if Entergy thought that the effort might be futile (i.e., that there would be little or no chance that NEC would agree to abandon its contention), some reasonable effort is required by the regulation. Nor do we know that such a discussion would be futile. Since the absence of a

¹⁸ In the more common scenario, where a movant must (a) identify the “occurrence or circumstance” triggering the need for a motion, (b) research and draft the motion and brief, and (c) make a sincere effort to contact the opposing party and resolve the issues, the ten days prescribed by 10 C.F.R. § 2.323(a) is quite short and it may be understandable if the “sincere effort” does not occur until the last few days. Here, however, the ISO was issued on February 1, 2005 and the deadline it established for motions for summary disposition turned out to be December 2, 2005 – ten months later.

¹⁹ The last-minute and perfunctory call from Entergy is not excused by the imperfect reaction by NEC’s pro se representative, who, when told that the motion for summary disposition would be filed today and asked if he would “want to go along with it” answered that “it was not likely,” and that he “didn’t have time at that point to contemplate” the matter and “would have a look at it when it was filed.” In context (a call, after ten months, on the very deadline for filing the motion), Mr. Shadis’ reaction was not surprising, and in any event does not relieve the movant of its duty to, in the first instance, make a sincere effort to resolve the issues.

genuine factual dispute is an essential prerequisite to any summary disposition, the movant could have used the required consultation to discuss whether the opponent agrees that this necessary prerequisite exists, and, if not, at least to ask the opponent to stipulate to certain basic facts, which would narrow the issues and pave the way to a more efficient briefing of the pertinent legal issues. Perhaps, rather than convincing NEC to surrender, a reasonable effort to discuss the situation with NEC would lead Entergy to recognize that the “genuine issues of material fact” indeed still exist, thus causing Entergy not to pursue or file a motion for summary disposition and to save its time, money, and effort for the evidentiary hearing. Both scenarios are realistic, and both would have the beneficial effect contemplated by 10 C.F.R. § 2.323(b), i.e., avoiding or minimizing the burden of unnecessary litigation.

Under these circumstances, we are inclined to view Entergy’s last minute telephone call, on the very day that the motion was due, advising NEC that Entergy was about to file a motion for summary disposition and asking if NEC wanted to agree to drop its contention, as not satisfying the requirement of 10 C.F.R. § 2.323(b) that the motion be preceded by a “sincere effort to . . . resolve the issue(s).” The regulation is, however, entirely new and untested. And we have already denied the motion for summary disposition on more substantive grounds. Accordingly, we find it unnecessary to rule on this procedural aspect of NEC’s motion.

III. CONCLUSION

For the foregoing reasons, Entergy's motion for summary disposition of NEC Contention 3 is denied.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD²⁰

/RA/

Alex S. Karlin, Chairman
ADMINISTRATIVE JUDGE

/RA/

Anthony J. Baratta
ADMINISTRATIVE JUDGE

/RA by G. P. Bollwerk for/

Lester S. Rubenstein
ADMINISTRATIVE JUDGE

Rockville, Maryland

January 31, 2006

²⁰ Copies of this memorandum and 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 NRC 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))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (DENYING MOTION FOR SUMMARY DISPOSITION OF NEW ENGLAND COALITION CONTENTION 3) (LBP-06-06) 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 (DENYING MOTION
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COALITION CONTENTION 3) (LBP-06-06)

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 31st day of January 2006