UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Commissioners:

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield
Gregory B. Jaczko
Peter B. Lyons

DOCKETED 03/03/2006

SERVED 03/03/2006

In the Matter of	)	
	)	
ENTERGY NUCLEAR VERMONT YANKEE LLC	)	Docket No. 50-271-OLA
and	)	
ENTERGY NUCLEAR OPERATIONS, INC	)	
	)	
(Vermont Yankee Nuclear Power Station)	)	
	)	

CLI-06-08

MEMORANDUM AND ORDER

By this order, we deny a request by the New England Coalition ("NEC") – submitted in the form of a letter – that we prevent or stay issuance of an operating license amendment to Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (together, "Entergy"). NEC believes the license amendment should not be allowed to take effect until after completion of a pending adjudication before our Atomic Safety and Licensing Board. The amendment has in fact now issued (on March 2, 2006). It allows an increase in the maximum power at Entergy's Vermont Yankee Nuclear Power Station in Windham County, Vermont. NEC is an intervenor in the power uprate adjudication. The Licensing Board has not yet held a hearing on NEC's contentions.

NEC's request asks the Commission itself to "abstain" from issuing the license amendment until the Licensing Board finishes its adjudication. But it is the NRC Staff, not the Commission, that considers applications for license amendments. Indeed, our regulations expressly instruct the Staff not to let pending hearings delay licensing decisions: the Staff is "to

issue its approval or denial of the application promptly" once it completes its own review of the application, notwithstanding the "pendency of any hearing."[1] And the Staff action on a licensing application is "effective upon issuance," except (in the case of power reactor license amendments) where there are "significant hazards considerations."[2] Here, following publishing of its proposed findings for public comment, the Staff made a "no significant hazards consideration" finding, and issued the power uprate amendment, on March 2, 2006, just two days after we received NEC's letter asking "the Commission" to abstain from issuing the license.

The NEC's argument is extremely general and it does not invoke any NRC regulation or case precedent. NEC says only that it will be denied "effective redress and due process" if the license amendment is granted now, because first there should be a full hearing on its contention that Vermont Yankee may not withstand natural phenomena, such as earthquakes, when operating under increased power.

Even if we were to give NEC's request a generous construction and treat it as a request for invocation of our discretionary supervisory authority over the NRC Staff to stay the Staff's issuance of the power uprate amendment, it would still be deficient.[3] To obtain a stay, a party must meet four familiar standards: likelihood of success on the merits; irreparable harm; absence of harm to others; and the public interest.[4] Irreparable harm is the most important of

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[1] *See* 10 C.F.R. § 2.1202(a).

[2] *Id.*

[3] *See Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-7, 53 NRC 113, 118 (2001).

[4] *See* 10 C.F.R. § 2.342(e) (standards for considering whether to stay presiding officer decisions). While technically not applicable to a request for a stay of NRC Staff action, the section 2.342(e) standards simply restate commonplace principles of equity universally followed when judicial (or quasi-judicial) bodies consider stays or other forms of temporary injunctive relief. *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-3,

the four standards – the *sine qua non* of obtaining a stay.[5] A party seeking a stay must show it faces imminent, irreparable harm that is both "certain and great."[6] NEC's unproved speculation does not equate to irreparable harm. "Merely raising the specter of a nuclear accident" does not demonstrate irreparable harm.[7] And, contrary to NEC's view, an NRC Staff decision to grant Vermont Yankee's power uprate license amendment does not leave NEC without "effective redress." If the Board determines after full adjudication that the license amendment should not have been granted, it may be revoked (or conditioned).

NEC appears to believe that granting the license amendment prior to a Board decision bypasses NEC's right to a hearing. But the Atomic Energy Act expressly authorizes the NRC to grant license amendments, and to make them immediately effective "in advance of the holding and completion of any required hearing," so long as the NRC determines that the amendment involves "no significant hazards consideration:"

> The Commission may issue and make immediately effective any amendment to an operation license ... upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person. Such amendment may be issued and made immediately effective in advance of the holding and completion of any required hearing. [8]

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31 NRC 219, 257 (1990).

[5] *See USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1295 (2d Cir. 1995). *Accord U.S. Department of Energy* (High-Level Waste Repository), CLI-05-27, 62 NRC 715, 718 (2005).

[6] *See, e.g., Cuomo v. NRC*, 772 F.2d 972, 976 (D.C. Cir. 1985), *quoting Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C.Cir. 1985).

[7] *Massachusetts Coalition of Citizens with Disabilities v. Civil Defense Agency*, 649 F.2d 71, 75 (1st Cir. 1981). *Accord Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 259 (1990); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-84-5,19 NRC 953, 964 (1984).

[8] *See* Atomic Energy Act, §189a(2)(A), 42 U.S.C. § 2239a(2)(A). *See also* 10 C.F.R. § 2.1202(a); 10 C.F.R. § 50.58(b)(6); 10 C.F.R. § 50.92.

The other factors governing the grant or denial of stays also do not favor NEC's request. A party seeking a stay must show that it is likely to prevail on the merits of the dispute. NEC has not even addressed the substance of its merits claims in the adjudication, let alone shown it is likely to prevail. The final two factors are whether the relief would harm the other parties and where the public interest lies. NEC does not address these factors either. On the face of things, though, it would appear that delaying the license amendment, as NEC requests, would harm Entergy without any obvious benefit to the public interest.

NEC's request is denied.[9]

IT IS SO ORDERED.

For the Commission[10]

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, MD
This 3rd day of March, 2006

Concurring opinion by Commissioner Gregory B. Jaczko:

My approval of today's decision should not be construed as agreement with the determination that this license amendment should be immediately effective. My concerns regarding this

[9] Nothing in today's decision should be understood as expressing our views on the validity of the amendment at issue here, as we may have to review it in our adjudicatory capacity after completion of Licensing Board proceedings.

[10] Chairman Diaz was not present when this item was affirmed. Accordingly the formal vote of the Commission was 4-0 in favor of the decision. Chairman Diaz, however, had previously voted to approve this Order and had he been present he would have affirmed his prior vote.

license amendment being immediately effective are being addressed in another forum.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-06-08) have been served upon the following persons by electronic mail this date, followed by deposit of paper copies in the U.S. mail, first class, and NRC internal mail.

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(CLI-06-08)

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[Original signed by R. L. Giitter]
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Dated at Rockville, Maryland,
this 3rd day of March 2006