

May 22, 2006

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 RESPONSE TO THE ATOMIC SAFETY
AND LICENSING BOARD'S ORDER OF MAY 10, 2006

INTRODUCTION

On May 10, 2006, the Atomic Safety and Licensing Board issued its "Order (Granting Joint Motion to Suspend Certain Filing and Discovery Obligations and Setting Certain Deadlines)," regarding the "Amended Notice of Withdrawal" and "Request for Dismissal of Contentions" filed by the State of Vermont Department of Public Service ("State") on May 8, 2006. In its Order, the Licensing Board invited the parties to comment upon the State's Amended Notice of Withdrawal "and/or the proposed settlement" between the State and Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations Inc. (collectively referred to herein as "Applicant" or "Entergy"). Order at 1. In particular, the Licensing Board directed that such comments "shall focus on the 'public interest' as specified in 10 C.F.R. § 2.338(l)." *Id.* at 1-2.

In accordance with the Licensing Board's Order, the NRC Staff ("Staff") herewith provides its comments on the State's Amended Notice of Withdrawal ("Amended Notice") and its settlement with the Applicant. As set forth below, the Staff submits that the State's Amended Notice and its settlement with the Applicant are wholly in the public interest, and the State's two contentions should be dismissed with prejudice.

DISCUSSION

In its Amended Notice, the State indicates that “voluntarily withdraws from this proceeding and requests the dismissal with prejudice of the State’s contentions.” Amended Notice at 1. The State describes the events that have occurred which led to its decision to withdraw from this proceeding, including the facts that:

(1) the State and Applicant “have agreed to a mutually satisfactory resolution of the issues raised by the State in this proceeding, as evidenced by the Memorandum of Understanding and the Addendum . . . attached as Exhibit A” to the Amended Notice, *Id.* at 1;

(2) the Staff performed an independent engineering assessment at Vermont Yankee, as requested by the State, in which the State’s Nuclear Engineer participated, *Id.* at 2;

(3) the Staff performed independent calculations to verify the computer-model calculations associated with containment overpressure credit, and the discussion in the Staff’s Final Safety Evaluation regarding this matter “giv[es] the State confidence in the conservatism claimed by Entergy in its containment overpressure request,” *Id.*;

(4) the Staff submitted numerous requests for additional information (“RAIs”) to the Applicant, regarding, *inter alia*, the request for containment overpressure credit, and (as a result of the State’s review of the Applicant’s supplements in response to those RAIs, and its review of the Staff’s “review and thinking” on this issue “through the Advisory Committee on Reactor Safeguards (ACRS) process as well as the Staff’s Draft and final SERs”), “[t]he State is satisfied that the issue raised in the State’s contentions was thoroughly reviewed, *Id.*; and

(5) the State “actively participated” in the ACRS’ review of the generic issue of containment overpressure credit and the site-specific review of the Vermont Yankee EPU (including “four formal presentations” to the full ACRS or the ACRS subcommittee) and was present during much of the Applicant’s and Staff’s presentations, after which the ACRS “determined that the overall risk associated with [the EPU] is small, and that the change in risk

resulting from allowing the requested containment overpressure credit is small” – and the State is “satisfied with the level of the review and the time spent on this issue of import,” *Id.* at 2.

The Staff’s review of the State’s Amended Notice leads it to conclude that the State – which has been represented throughout this proceeding by highly qualified and able Counsel, with active participation and expert advice from the State’s Nuclear Engineer – has now reasonably concluded that the issues raised in the State’s contentions have been resolved to its satisfaction. The State’s determination that these issues have been satisfactorily resolved has appropriately led the State to withdraw from the proceeding and to request the dismissal of its contentions, based on its determination that there is no longer any need for the State to continue to litigate those contentions or to expend any additional resources in this proceeding.

The Staff submits that the State’s Amended Notice unequivocally states its satisfaction with the manner in which its contentions have been addressed, its intention to withdraw as a party in this proceeding, and its desire to withdraw its two contentions. Further, the Amended Notice and the modified settlement agreement attached thereto demonstrate that the State has given careful thought to this matter, and that it has independently determined that the concerns identified in its contentions have been satisfactorily addressed and any continued litigation of those contentions would be of no benefit.

The State’s determination to withdraw and to request the dismissal of its contentions with prejudice represents a well-considered decision that is clearly in the public interest. As the sole sponsor of its two contentions concerning containment overpressure credit,¹ the State formulated contentions which assembled all of its concerns and the bases therefor, presented

¹ The Licensing Board has previously rejected the New England Coalition’s attempt to “incorporate by reference” and thereby adopt the State’s contentions. See *Entergy Nuclear Vermont Yankee L.L.C. and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), “Memorandum and Order (Denying Incorporation by Reference and Additional Discovery Disclosure),” unpublished (Feb. 16, 2005), slip op. at 2-3.

expert opinion in support of the contentions' admission, and sought to have its concerns addressed by the Commission. The Staff and ACRS have given careful review of the State's concerns, to the State's satisfaction. As the State notes, the Staff's review of these issues has involved substantial time and effort, as has the consideration afforded these issues by the ACRS. The State's Amended Notice describes the careful review that has been given to its concerns by the Applicant, Staff, and the ACRS. On the basis of that review – in which the State was often an active participant – the State has now concluded that the concerns set forth in its contentions have now been satisfactorily resolved. As the sponsor and drafter of its two contentions, the State is in the best position to determine whether its concerns have been satisfactorily resolved. The State's conclusion that the concerns raised in its contentions have been resolved is determinative.

The Staff has reviewed the settlement agreement executed by the State and Applicant on May 2, 2006, as modified on May 9, 2006, and has not identified any provision in that settlement agreement which would appear to be contrary to the public interest. To the contrary, the settlement agreement appears to be fair and reasonable; it does not jeopardize public health and safety; and it affords the State an opportunity for continued meaningful participation in matters concerning containment integrity, as it imposes an ongoing duty upon the Applicant to provide information to the State concerning, *inter alia*, containment leak rate testing, nitrogen readings, and containment inspections at Vermont Yankee.² The State's Amended Notice

² In an enforcement context, the Commission has evaluated whether the public interest favors a proposed settlement by considering:

- (1) whether, in view of the agency's original order and the risks and benefits of further litigation, the settlement result appears unreasonable;
- (2) whether the terms of the settlement appear incapable of effective implementation and enforcement;
- (3) whether the settlement jeopardizes the public health and safety; and
- (4) whether the settlement approval process deprives interested parties of meaningful participation.

(continued...)

confirms that the public interest has been served as a result of the careful attention given to its contentions by the Applicant, the Staff and the ACRS, and by the Applicant's ongoing commitment to provide information to the State. Further, the State's Amended Notice confirms that the public interest would be served by the dismissal of its contentions, as there is no longer any need for the parties, the Licensing Board or the Commission to expend valuable resources addressing matters which the contentions' own sponsor has determined are now resolved.

Finally, the Staff submits that the proposed settlement agreement is consistent with the Commission's oft-stated interest in eliminating unnecessary litigation. Thus, the Commission has emphasized that "Commission policy strongly favors settlement of adjudicatory proceedings." *Rockwell International Corp.* (Rocketdyne Division), CLI-90-05, 31 NRC 337, 340 (1990); *cf. Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-05-29, 62 NRC 635, 699 (2005) ("Commission policy strongly favors settlements").³ The proposed settlement agreement between Entergy and the State is consistent with this well-established Commission policy and, in light of the State's determination that its concerns have been resolved to its satisfaction, the proposed settlement agreement should be approved as

²(...continued)
Sequoyah Fuels Corp. (Gore, OK Site Decontamination and Decommissioning Funding), CLI-97-13, 46 NRC 195, 209 (1997).

³ See also *Private Fuel Storage L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-1, 61 NRC 160, 167-68 (2005), in which the Commission cited "the important role settlements play in our adjudicatory program" under (former) § 2.759, which stated:

The Commission recognizes that the public interest may be served through settlement of particular issues in a proceeding or the entire proceeding. Therefore, to the extent it is not inconsistent with hearing requirements in section 189 of the [Atomic Energy] Act, (42 U.S.C. [§] 2239), the fair and reasonable settlement of contested initial licensing proceedings is encouraged. It is expected that the presiding officer and all the parties to those proceedings will take appropriate steps to carry out this purpose.

being in the public interest, and the State's request for withdrawal of its contentions should be granted.⁴

CONCLUSION

The State's Amended Notice clearly indicates that the State has withdrawn as a party in this proceeding based upon its determination that the concerns raised in its contentions have been satisfactorily resolved. The State's proposed settlement agreement, as modified, is in the public interest and should be approved, and the State's request for dismissal of its contentions should be granted.

Respectfully submitted,

/RA/

Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 22nd day of May, 2006

⁴ See, e.g., *Louisiana Energy Services, L.P.* (National Enrichment Facility), 2005 NRC LEXIS 138 (Aug. 12, 2005); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station LTP), 2005 NRC LEXIS 128 (July 21, 2005); *United Evaluation Services, Inc.* (Beachwood, NJ), LBP-02-17, 56 NRC 99 (2002) (enforcement proceeding); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-24 (2001) (Subpart G proceeding); *PFS*, LBP-99-26, 50 NRC 42 (1999); *Lourdes T. Boschuk* (Order Prohibiting Involvement in NRC-Licensed Activities) LBP-98-16, 48 NRC 63 (1998) (enforcement proceeding).

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO THE ATOMIC SAFETY AND LICENSING BOARD'S ORDER OF MAY 10, 2006" in the above-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 22nd day of May, 2006.

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