LBP-06-18

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 11857 **DOCKETED 06/23/06**

ATOMIC SAFETY AND LICENSING BOARD

SERVED 06/23/06

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 June 23, 2006

MEMORANDUM AND ORDER
(Approving Settlement Agreement, Granting Dismissal of Contentions, and Accepting Withdrawal of Vermont Department of Public Service)

Before the Board is a submission by intervenor Department of Public Service of the State of Vermont (State) requesting dismissal of its two contentions, noticing its withdrawal as a party, and providing the Board with a memorandum of understanding and addendum, signed by the State and the applicants Entergy Nuclear Vermont Yankee L.L.C. and Entergy Nuclear Operations, Inc. (collectively, Entergy). Finding that the State's submission is a settlement agreement that satisfies the requirements of 10 C.F.R. § 2.338 and that the public interest does not require the adjudication of the State's contentions, the Board approves the settlement agreement, dismisses State Contentions 1 and 2, and accepts the withdrawal of the State from this proceeding. In addition, we deny New England Coalition's (NEC's) request that we act sua sponte and continue the litigation on the State's contentions.

I. BACKGROUND

On May 2, 2006, the State filed a notice of withdrawal and request for dismissal of its contentions.[1] Attached to the Notice was an agreement or "memorandum of understanding" (MOU), signed by the State and Entergy, which included eleven points of agreement or stipulations.[2]

In response, the Board convened a conference call on May 3, 2006, and expressed both its encouragement of the settlement and its concern that 10 C.F.R. § 2.338(g) and (h) seemed to impose certain form and content requirements on such settlement agreements. Tr. at 916-17. During the conference call, the State acknowledged that it was not aware of the requirements of 10 C.F.R. § 2.338, Tr. at 919, but stated that it did not believe it would be problematic to amend the MOU to satisfy these requirements, Tr. at 936. Entergy maintained that section 2.338 was not applicable, asserting that the regulation applies only to settlements reached via alternative dispute resolution facilitated by third-party neutrals and that the Board may not stand in the way of a party that wishes to withdraw from a proceeding. Tr. at 917-19, 930-32. The NRC Staff tentatively agreed with Entergy's assertion that section 2.338 applies only to settlements reached through the assistance of a third-party neutral, but seemed to suggest that the Board must nonetheless approve a settlement reached without the assistance of a third-party neutral. Tr. at 929-30. NEC expressed the opinion that, by its own terms, section 2.338 appeared to apply to all settlement agreements regardless of the manner in which they were reached.[3] Tr. at 939.

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[1] Notice of Withdrawal and Request for Dismissal of Contentions of the Vermont Department of Public Service (May 2, 2006) (Notice).

[2] Notice, Exh. A, Memorandum of Understanding (May 2, 2006) (MOU).

[3] The Board had previously rejected NEC's proposal to adopt State Contentions 1 and 2 as not conforming to the requirements of 10 C.F.R. § 2.309(f)(3). Licensing Board

Recognizing that the parties had not previously considered these issues, the Board gave the State and Entergy two options. First, the parties could submit briefs addressing three issues related to the applicability of 10 C.F.R. § 2.338. Alternatively, the State and Entergy could revise and resubmit the Notice and MOU so that they would comply with the requirements of section 2.338(h). The latter option was made with the understanding that the Board's subsequent ruling would not serve as binding precedent or as the law of the case in this proceeding and that the parties would not be waiving their positions on this issue. Tr. at 942-48.

On May 9, 2006, the State and Entergy chose to submit an Amended Notice intended to satisfy 10 C.F.R. § 2.338.[4] The State's submission was essentially identical to its filing on May 2, 2006, except that the Amended Notice included an addendum to the original MOU that supplemented the MOU's eleven stipulations with four additional stipulations aimed at satisfying the content requirements of section 2.338(h).[5]

On May 10, 2006, the Board issued an order setting May 22, 2006, as the deadline for any comments from the public supporting or objecting to the Amended Notice and MOU Addendum.[6] On that date, Entergy and the NRC Staff filed comments supporting the proposed resolution and withdrawal of the State's contentions based on the fact that the agreement was

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Memorandum and Order (Denying Incorporation by Reference and Additional Discovery Disclosure) (Feb. 16, 2005) (unpublished).

[4] See Amended Notice of Withdrawal and Request for Dismissal of Contentions of the [State] (May 9, 2006) (Amended Notice).

[5] Amended Notice, Exh. A, Memorandum of Understanding (May 2, 2006); Exh. B. Addendum to MOU (May 9, 2006) (collectively, the MOU and the addendum thereto are referred to herein as the MOU Addendum).

[6] Licensing Board Order (Granting Joint Motion to Suspend Certain Filing and Discovery Obligations and Setting Certain Deadlines) (May 10, 2006) (unpublished).

in the public interest.[7] NEC objected, arguing that the public interest requires that the Board take up State Contentions 1 and 2 sua sponte.[8] Contrary to our instructions of May 3, 2006, either to submit a revised agreement or to brief the issues, Entergy went on to brief the legal issues. Entergy argued that the MOU Addendum is not a settlement within the meaning of section 2.338 because that section is intended to apply only to settlement agreements that are intended to be binding in the proceeding and that are facilitated by third-party neutrals or supervised by the Board. Entergy Response at 5-9. Therefore, according to Entergy, the State's withdrawal of its contentions and from the proceeding requires no further action by the Board. Id. at 10-13.[9]

During the May 23, 2006 prehearing conference call, the Board informed the parties that it granted the withdrawal and approved the settlement of State Contentions 1 and 2 and that a written ruling would be forthcoming. Tr. at 984. Because Entergy chose to brief the legal issues, however, we find it appropriate to set out the legal analysis we use in reaching our decision regarding the application of 10 C.F.R. § 2.338 and our approval of this Amended Notice and MOU Addendum.[10]

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[7] Entergy's Response to Board's May 10, 2006 Order Regarding DPS's Amended Notice of Withdrawal (May 22, 2006) at 13-16 (Entergy Response); NRC Staff's Response to the Atomic Safety and Licensing Board's Order of May 10, 2006 (May 22, 2006) at 1.

[8] [NEC]'s Comments Regarding a Proposed Settlement of [State] Contentions and [NEC]'s Request for a Determination that Continued Adjudication of the Issues Raised in the [State]'s Contentions is in the Public Interest (May 22, 2006) at 5 (NEC Comments).

[9] Entergy requested that, if the Board decided not to dismiss the State's contentions, then we should certify the matter to the Commission for resolution. Id. at 15-16.

[10] Because no one else briefed these issues, and in light of our May 3, 2006 statement, our ruling on the applicability of section 2.338 will not be binding if another withdrawal or settlement arises herein.

II. FRAMEWORK FOR SETTLEMENTS

The Commission has a long history of encouraging the fair and reasonable settlement of contested licensing proceedings.[11] This policy is now expressed in 10 C.F.R. § 2.338, adopted in 2004, which states that "[t]he fair and reasonable settlement and resolution of issues proposed for litigation in proceedings subject to this part is encouraged."[12] In relevant part, section 2.338 further states:

> (a) Availability. The parties shall have the opportunity to submit a proposed settlement of some or all issues to the Commission or presiding officer, as appropriate, or submit a request for alternative dispute resolution under paragraph (b) of this section.
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> . . . .
>
> (e) Imposition of additional requirements. The presiding officer (or Settlement Judge) may impose on the parties and persons having an interest in the outcome of the adjudication additional requirements as the presiding officer (or Settlement Judge) finds necessary for the fair and efficient resolution of the case.
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> . . . .
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> (g) Form. A settlement must be in the form of a proposed settlement agreement, a consent order, and a motion for its entry that includes the reasons why it should be accepted. It must be signed by the consenting parties or their authorized representatives.
>
> (h) Content of settlement agreement. The proposed settlement agreement must contain the following:
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> (1) An admission of all jurisdictional facts;
> (2) An express waiver of further procedural steps before the presiding officer, of any right to challenge or contest the validity of the order entered into in accordance with the agreement, and of all rights to seek judicial review or otherwise to contest the validity of the

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[11] Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 19 (1998); Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 455-56 (1981).

[12] Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2249-50 (Jan. 14, 2004). Although section 2.338 is a "new provision" that was added in 2004, the Statement of Considerations for these changes makes clear that it "consolidates and amplifies the previous rules pertaining to settlement (10 CFR 2.203, 2.759, 2.1241)." 69 Fed. Reg. at 2225.

> consent order;
> (3) A statement that the order has the same force and effect as an order made after full hearing; and
> (4) A statement that matters identified in the agreement, required to be adjudicated have been resolved by the proposed settlement agreement and consent order.
>
> (l) Approval of settlement agreement. Following issuance of a notice of hearing, a settlement must be approved by the presiding officer or the Commission as appropriate in order to be binding in the proceeding. The presiding officer or Commission may order the adjudication of the issues that the presiding officer or Commission finds is required in the public interest to dispose of the proceeding. . . .

In short, 10 C.F.R. § 2.338 provides that parties may submit a proposed settlement to the Board (paragraph a), authorizes the Board to impose additional requirements as part of a settlement (paragraph e), mandates certain form requirements for a settlement agreement (paragraph g), and mandates certain content requirements for a settlement agreement (paragraph h). Assuming these form and content requirements are met, 10 C.F.R. § 2.338(l) provides the standards for approval of a settlement.[13]

When paragraphs (e) and (l) are read together, it becomes clear that the Board has several options when it comes to reviewing a settlement. A Board may approve the settlement

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[13] An examination of the Commission's regulations prior to the 2004 changes reveals that paragraph (a) (except for the references to the new provisions on ADR) and paragraph (l) were already essentially codified under the old rules. See 10 C.F.R. § 2.203 (2003) (stating that a "stipulation or compromise" in an enforcement proceeding "shall be subject to approval by the designated presiding officer," that the "presiding officer . . . may order such adjudication of the issues as he may deem to be required in the public interest," and "[i]f approved, the terms of the settlement or compromise shall be embodied in a decision or order settling and discontinuing the proceeding"); 10 C.F.R. § 2.759 (2003) (stating that the "Commission recognizes that the public interest may be served through settlement of particular issues in a proceeding or the entire proceeding"); 10 C.F.R. § 2.1241 (2003) (stating that a settlement in an informal proceeding "must be approved by the presiding officer or the Commission as appropriate in order to be binding in the proceeding"). Paragraphs (g) and (h), the form and content requirements, however, are new requirements for which there was no parallel provision in the old rules. The 2004 amendment also created paragraph (b), which allows the parties by joint motion to request the appointment of a settlement judge to conduct settlement negotiations or to refer the proceeding to ADR.

as is, it may impose additional requirements on the settlement, or it may reject the settlement and order an adjudication. Given the Commission's policy of encouraging settlement, this Board does not prefer the last option. Commission case law holds that the opponents of a settlement "may not simply object to settlement in order to block it, but must show some substantial basis for disapproving the settlement or the existence of some material issue that requires resolution."[14] The burden is on the opponent of a settlement to come forward and show that the public interest requires the rejection of the settlement and the adjudication of the issues. This is aptly expressed in the current formulation of the rule, which states that the presiding officer "may order the adjudication of the issues [if it is] required in the public interest." 10 C.F.R. § 2.338(I).

Although the regulations are silent as to what factors are to be considered in making this public interest determination, the Commission has set forth factors which are to consider when evaluating a settlement in an enforcement proceeding. See Sequoyah Fuels Corp. (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 209-23 (1997). The Commission divided the public interest question into four parts: (1) whether, in view of 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. Id. at 209.

Although these factors were adopted by the Commission in an enforcement context, the Commission derived these factors from an array of federal court settlement approval decisions that dealt with settlements ranging from public school desegregation class actions to antitrust

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[14] Sequoyah Fuels Corp. (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71 n.10 (1994). See also Sequoyah Fuels Corp. (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 208 (1997) ("Only if the settlements' opponents show some 'substantial' public interest reason to overcome that presumption will we undo the settlements.").

enforcement suits.[15] Given the diversity of these cases and the fact that we find these factors to be useful in determining whether there is some substantial public interest reason to reject the settlement in a licensing proceeding, we adopt the Sequoyah Fuels factors for the purpose of deciding the issues currently before us.

The regulations do not specify what process, if any, boards should use in determining whether the adjudication of the contention is "required in the public interest." 10 C.F.R. § 2.338(l). Should the board give the public the opportunity to comment? For example, it is the policy of the U.S. Department of Justice to allow thirty days for public comment prior to the settlement of most environmental enforcement cases. See 28 C.F.R. § 50.7. Likewise, in some types of Federal litigation, public comment is statutorily required.[16] Alternatively, the board could allow comment only from the parties (who, if they are all settling, will always urge approval) or could take no comment at all, and simply decide the public interest according to the board's own best lights.

The silence of 10 C.F.R. § 2.338(l) as to the process for determining whether a proposed settlement is in the "public interest" indicates that the Commission intended to leave it to the discretion of the Board to determine how to make this determination. Here we considered the nature of the contentions, the identity of the proposed settlers, and the degree of media and public concern in the case, in determining whether to invite public or party comment on the proposed settlement. We believe that the process used here, whereby the

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[15] See id. at 209 n.11 (citing Massachusetts Sch. of Law at Andover v. United States, 118 F.3d 776 (D.C. Cir. 1997) (antitrust enforcement); United States v. Microsoft, 56 F.3d 1148 (D.C. Cir. 1995) (antitrust enforcement); Armstrong v. Bd. of Sch. Dir., 616 F.2d 305 (7th Cir. 1980) (public school desegregation class action); Girsh v. Jepson, 521 F.2d 153 (3d Cir. 1975) (SEC class and derivative actions); City of Detroit v. Grinnell, 495 F.2d 448 (2d Cir. 1974) (private antitrust class action)).

[16] See, e.g., 42 U.S.C. § 9622(l)(1) (requiring public notice and comment for administrative settlements under the Comprehensive Environmental Response, Compensation, and Liability Act).

public was given the opportunity to submit written comments relating to the settlement, assisted the Board in making the "public interest" determination under section 2.338(l).

III. ANALYSIS OF THE AGREEMENT BETWEEN THE STATE AND ENTERGY

We now turn to the State's submissions, whereby the State withdraws from this proceeding with prejudice (the Amended Notice) and submits into the docket herein the full agreement between the State and Entergy, including all of the terms thereof (the MOU Addendum). We analyze State's submissions in three steps. First, we determine whether they constitute a "settlement agreement." Second, we examine whether the Amended Notice and MOU Addendum are subject to the requirements of 10 C.F.R. § 2.338. Third, we determine whether the Amended Notice and MOU Addendum meet the requirements of section 2.338.

A. Settlement Agreement

First, in order to ascertain whether the Commission's settlement regulations may apply, we examine whether the filing before the Board is indeed a settlement agreement. "A 'settlement agreement' is an agreement to terminate, by means of mutual concessions, a claim which is disputed in good faith or unliquidated." 15A Am. Jur. 2d Compromise and Settlement § 1 (2005). The Amended Notice states that the State and Entergy "have agreed to mutually satisfactory resolution of the issues raised by the State in this proceeding, as evidenced by the Memorandum of Understanding and the Addendum to the Memorandum of Understanding." Amended Notice ¶ 1. The MOU Addendum is an agreement whereby Entergy is required to perform certain tests and to make certain information available to the State, MOU Addendum ¶¶ 1-6, and the State is required to withdraw from this proceeding and ensure that its contentions are dismissed with prejudice, MOU Addendum ¶ 7. Such a quid pro quo arrangement clearly constitutes a settlement agreement because Entergy has agreed to perform activities that it would otherwise not need to perform and, in exchange, the State has agreed to the final resolution of all contested issues between it and Entergy in this uprate

proceeding.[17] The labels on the documents, i.e., "Amended Notice" and a "MOU Addendum," are not determinative. Instead, we look at the substance of what the parties have filed in this proceeding to determine what it is. Any other approach would improperly elevate form over substance. We conclude that the Amended Notice and the accompanying MOU Addendum constitute a settlement agreement.

B. Applicability of 10 C.F.R. § 2.338

Second, we turn to the question of whether the proposed settlement agreement is subject to 10 C.F.R. § 2.338. We have no difficulty in concluding that it is. First, we reject Entergy's argument that the form, content, and Board approval provisions of 10 C.F.R. § 2.338 apply only to settlement agreements achieved via alternative dispute resolution (ADR). The plain language of 10 C.F.R. § 2.338(a), (g), (h), and (I) simply uses the terms "settlement" or "settlement agreement" and makes no reference or suggestion that these provisions and requirements are limited to that small subset of settlements achieved via ADR. While section 2.338 also establishes a mechanism for the use of ADR, the regulation is not restricted to the subject of ADR. At the outset, the regulation gives the parties two options, either (1) submit a proposed settlement to the Board or (2) submit a request for ADR to the Board. 10 C.F.R. § 2.338(a). Nothing in the language or regulatory history of the regulation suggests that the application of 10 C.F.R. § 2.338(c)-(I) is limited to settlement agreements reached via a settlement judge or ADR.[18] In fact, the regulatory history supports the view that section 2.338 is

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[17] We recognize that there are agreements on lesser matters (e.g., scope of a contention, resolution of evidentiary objections, withdrawal of a particular argument), that do not rise to the level of settlement agreements subject to the requirements of 10 C.F.R. § 2.338. Here however, the proposed agreement is major and fundamental, calling for the complete withdrawal of the State of Vermont (a heretofore important party to this litigation), the dismissal with prejudice of the State's admitted contentions, and the termination of litigation for the State.

[18] The semicolon in title of the regulation ("Settlement of issues; alternative dispute resolution") is, at most, equivocal.

a regulation of general applicability, which, through paragraph (b), also provides the opportunity to reach a settlement through certain specific methods of dispute resolution. The Statement of Considerations indicates that "Section 2.338 is a new provision that consolidates and amplifies the previous rules pertaining to settlement (10 CFR 2.203, 2.759, 2.1241)." 69 Fed. Reg. at 2225. Nothing in these previous regulations limited their application to settlement agreements reached through a third-party neutral.[19]

Entergy correctly observes that, under the pre-2004 regulations, there is a line of cases that holds that the withdrawal of a party from a proceeding results in the removal of the withdrawing party's contentions from litigation.[20] However, we do not read those cases as standing for the proposition that a party's request to withdraw from a proceeding automatically results in dismissal of that party's contentions. Rather, we read those cases as holding that when a party withdraws from a proceeding, its contentions do not necessarily continue as important safety issues requiring litigation under a Board's sua sponte authority.[21] For example, in South Texas, the Appeal Board held that the initial admission of a contention does not

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[19] There was no mention of settlement judges or ADR in these old rules because prior to 2004, the Commission's endorsement of such forms of conflict resolution was found in case law rather than the regulations. Id. at 2210 (citing Rockwell International Corp., CLI-90-05, 31 NRC 337 (1990)). Because the Commission was only "consolidating" and "amplifying" its previous regulations in most of section 2.338, it is logical that discussion of these already established rules was unnecessary. However, because paragraph (b), which deals with settlement judges and ADR, was a "new" provision, it is sensible that the Commission would find it necessary to discuss this addition at length. An examination of the Statement of Considerations reveals exactly this course of events. Id. at 2209-10, 2225.

[20] See, e.g., Houston Lighting & Power Co. (South Texas Projects, Units 1 and 2), ALAB-799, 21 NRC 360, 382-83 (1985); Power Authority of the State of New York (James A. FitzPatrick Nuclear Power Plant, Indian Point Nuclear Generating, Unit 3), LBP-00-34, 52 NRC 361, 363 (2000).

[21] In 2004 the Commission amended the regulations allowing a Board to examine an issue sua sponte "only where . . . the Commission approves such examination and decision upon referral of the question" to the Commission. 10 C.F.R. § 2.340(a); 69 Fed. Reg. at 2250. The pre-2004 regulations had no such requirement. See 10 C.F.R. § 2.760a (2003).

automatically establish the existence of a serious environmental or safety issue for purposes of a board exercising its authority to raise an issue sua sponte. South Texas, ALAB-799, 21 NRC at 382. That Appeal Board also made clear that a party that had not previously adopted the withdrawing party's contention may replace the withdrawing party upon a favorable balancing of the nontimely factors. Id. at 381-84. Neither of those circumstances exist here, as we are satisfied that the settlement of the State's contentions does not jeopardize public health and safety and because NEC has failed to demonstrate that 10 C.F.R. § 2.309(c) factors weighs in its favor. See Section IV. infra.

As Entergy points out, there are licensing board cases that state that a board need not review and approve a settlement agreement. These cases are neither binding precedent nor supported by the new regulation, which states "[f]ollowing issuance of a notice of hearing, a settlement must be approved by the presiding officer or Commission as appropriate in order to be binding in the proceeding." 10 C.F.R. § 2.338(l) (emphasis added). It may be that the settlements cited by Entergy occurred before the notice of hearing was issued.[22] It may be that the settlement agreement was not submitted to a board or filed on the formal record, or was not binding on the proceeding, such as where a party simply withdraws without notifying a board of its reasons. This is not the course that the State and Entergy took in this instance, for the Board in this case was given the reasons why the State wished to withdraw and was given the settlement agreement and associated withdrawal.

It is also clear that this settlement agreement is "binding in the proceeding." 10 C.F.R. § 2.338(l). Prior to the Amended Notice and MOU Addendum, the State was a party with two contentions which were to be litigated and decided by the Board. Now, at the State's behest

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[22] The notice of hearing was issued in this case on April 10, 2006. See Notice of Hearing and of Opportunity To Make Oral or Written Limited Appearance Statements Concerning Proposed Uprate, 71 Fed. Reg. 19,549 (Apr. 14, 2006).

and as required by the settlement agreement, the State has been dismissed with prejudice (i.e., with no opportunity to refile or renew its contentions herein), and the merits of its contentions will not be litigated in public or decided by the Board. The dismissal with prejudice is (if the settlement agreement is approved by this Board) binding herein.

Finally, we can conceive of no logic or policy reason why the form, content, and approval requirements of 10 C.F.R. § 2.338 would apply only to settlement agreements reached via ADR. This would be contrary to all prior regulations and practice and would exclude the vast majority of settlements, which are reached without ADR. And if so excluded (and recognizing that prior sections 2.203, 2.759 and 2.1241 are deleted), non-ADR settlements would seem to be exempt from all authority of the presiding officer or Commission.

C. Application of 10 C.F.R. § 2.338

Third, having found that the Amended Notice and MOU Addendum constitute a settlement agreement and that 10 C.F.R. § 2.338 is applicable to it, we now determine whether it satisfies the pertinent parts of the regulation. Specifically, we focus on section 2.338(g) and (h), the form and content requirements, and then on whether the settlement may be approved or whether the adjudication of these contentions is "required in the public interest" pursuant to section 2.338(I).

1. 10 C.F.R. § 2.338(g) and (h): Form and Content

Section 2.338(g) requires that a settlement "be in the form of a proposed settlement agreement, a consent order, and a motion for its entry that includes the reasons why it should be accepted." Although the State's submission does not use the exact phrases suggested in paragraph (g), we find those requirements are satisfied because the Amended Notice and MOU Addendum constitute a written agreement between the State and Entergy that was submitted for the Board's imprimatur. Furthermore, the filing clearly explains the reasons why the State's two admitted contentions should be dismissed.

Additionally, section 2.338(g) requires that a settlement "be signed by the consenting parties or their authorized representatives." The Withdrawal and MOU Addendum meet this requirement, as the MOU Addendum is signed by David O'Brien, Commissioner of the Vermont Department of Public Service, and Jay K. Thayer, Vice President of Operation and a duly authorized agent for Entergy.[23]

The requirements of paragraph (h) are satisfied by the MOU Addendum, which concedes that the Board has jurisdiction over the parties and over the subject matter of the MOU Addendum and waives all further procedural steps before the Board, all rights to challenge or contest the validity of this order, and all rights to seek judicial review or otherwise contest the validity of this order. MOU Addendum ¶¶ 12-13. Further the MOU Addendum states that this order has the same force and effect as an order made after full hearing and that matters identified in the agreement, required to be adjudicated have been resolved by the proposed settlement agreement and this order. MOU Addendum ¶¶ 14-15.

2. 10 C.F.R. § 2.338(I): Public Interest Determination

As previously discussed in Section II. supra, in order to be binding in the proceeding, a settlement proposal must be approved of by the presiding officer. 10 C.F.R. § 2.338(I). The presiding officer may order the adjudication of the issues agreed upon in the proposed settlement agreement upon a finding that the public interest requires such an adjudication. 10 C.F.R. § 2.338(I). Applying the four factors set forth in Sequoyah Fuels, we find that the public interest does not require adjudication of the State's contentions, and thus, approve the proposed settlement agreement.

First, considering the risks in future litigation, the settlement agreement appears

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[23] MOU Addendum at 4 (Exh. A). See also MOU Addendum at 2 (Exh. B) (signed by Sarah Hofmann, Director of Public Advocacy for the State, and Jay E. Silberg, counsel for Entergy).

reasonable. As a result of the settlement, the MOU Addendum requires that Entergy perform testing and inspections and provide the State with data and documentation related to the State's containment concerns. MOU Addendum ¶¶ 1-6. If the proceeding on the State's containment contentions were to move forward, there is the chance that the State might not prevail on the merits and thus, would be denied all relief. Therefore, based on the risks of moving forward and litigating the contentions, we find that the settlement agreement is reasonable.

Second, the terms of the settlement agreement appear capable of being enforced and no party has suggested otherwise.[24] Furthermore, the NRC Staff stated that the enforcement of the terms of the MOU in court would not impinge upon the NRC's authority as a regulator. Tr. at 983. Therefore, we find that the terms of the settlement appear capable of effective implementation and enforcement.

Third, the settlement agreement does not jeopardize public health and safety. The NRC Staff and the Advisory Committee on Reactor Safeguards have both reviewed the State's concerns and determinated that the overall risks associated with the uprate and the risks associated with the requested credit for containment overpressure are both small.[25] We find it particularly persuasive that the settling party is the State of Vermont, an independent governmental entity that is responsible for the health and safety of the public and is well represented in this proceeding. See Amended Notice ¶ 5. Further, the MOU Addendum appears to add to (not detract from) the public health and safety because it requires additional inspection activities. Therefore, we find that the settlement agreement does not jeopardize public health and safety.

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[24] The MOU Addendum is governed by Vermont law. MOU Addendum ¶ 10.

[25] See Notice of Issuance of Amendment to Facility Operating License and Final Determination of No Significant Hazards Consideration, 71 Fed Reg. 11,682 (Mar. 8, 2006).

Fourth, the settlement does not deprive other interested parties of meaningful participation. NEC, the remaining intervenor in this proceeding, and the only entity to object to the settlement, had the opportunity earlier in this proceeding to adopt the State's contentions, but failed to do so.[26]

IV. SUA SPONTE CONTINUATION OF STATE CONTENTIONS

We reject NEC's request that we take up sua sponte the issues raised in State Contentions 1 and 2. "Matters not put into controversy by the parties will be examined and decided by the presiding officer only where he or she determines that a serious safety, environmental, or common defense and security matter exists, and the Commission approves such an examination and decision upon referral of the question by the presiding officer." 10 C.F.R. § 2.340(a). Having found that the adjudication of the State's contentions is not "required in the public interest," we also conclude that its settlement does not raise serious safety, environmental, or common defense and security concerns warranting sua sponte review.

Although NEC specifically noted that it was not seeking to adopt the State's contentions, NEC asks for leave to file "a new (late) contention based on new information in the MOU and its Addendum; subject to all of the criteria for late-filed contentions." NEC Comments at 5. Despite this request, NEC failed to address the 10 C.F.R. § 2.309(c) factors. Thus, NEC fails to explain why there is good cause for failing to offer containment overpressure contentions in 2004 (when the State had enough information to submit two admissible contentions on the topic), or why there is good cause for its failure to follow the simple procedures available to adopt the State's contentions. Therefore, we deny NEC's request to file late contentions.

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[26] For example, NEC, as the proposed adopter, failed to acknowledge that "the sponsoring requestor/petitioner shall act as the representative with respect to that contention." 10 C.F.R. § 2.309(f)(3). See Licensing Board Memorandum and Order (Denying Incorporation by Reference and Additional Discovery Disclosure) (Feb. 16, 2005) (unpublished).

V. CONCLUSION

For the foregoing reasons, it is ORDERED, that:

1. The May 9, 2006 amended notice of withdrawal and request for dismissal of the State is granted and the May 2, 2006 memorandum of understanding between the State and Entergy and the May 9, 2006 addendum thereto, a copy of which is attached to and incorporated by reference in this memorandum and order, is approved pursuant to 10 C.F.R. § 2.338.

2. State Contention 1 and State Contention 2, are dismissed with prejudice.

3. The request by NEC for the Board's sua sponte continuation of the litigation on State Contention 1 and State Contention 2 is denied.

THE ATOMIC SAFETY
AND LICENSING BOARD[27]

/RA/

Alex S. Karlin, Chairman
ADMINISTRATIVE JUDGE

/RA/

Anthony J. Baratta
ADMINISTRATIVE JUDGE

/RA by G. Paul Bollwerk, III for:/

Lester S. Rubenstein
ADMINISTRATIVE JUDGE

Rockville, Maryland

June 23, 2006

[27] Copies of this memorandum and order were sent this date by Internet e-mail transmission to representatives 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 (APPROVING SETTLEMENT AGREEMENT, GRANTING DISMISSAL OF CONTENTIONS, AND ACCEPTING WITHDRAWAL OF VERMONT DEPARTMENT OF PUBLIC SERVICE) (LBP-06-18) 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
(APPROVING SETTLEMENT AGREEMENT,
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AND ACCEPTING WITHDRAWAL OF
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(LBP-06-18)

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[Original signed by Adria T. Byrdsong]
Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 23rd day of June 2006