

July 3, 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-LR
LLC, and ENTERGY NUCLEAR)	
OPERATIONS, INC.)	ASLBP No. 06-849-03-LR
)	
(Vermont Yankee Nuclear Power Station))	

NRC STAFF ANSWER OPPOSING NEC'S MOTION FOR LEAVE TO FILE REPLIES

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the Staff of the Nuclear Regulatory Commission ("Staff") hereby answers the New England Coalition's ("NEC") "Motion for Leave to File a Reply to NRC Staff Answer to NEC's Notice and Motion to Adopt Contentions; to Entergy's Answer to NEC's Notice and Motion to Adopt Contentions; and to Entergy's Answer to Vermont Department of Public Service's Notice and Motion to Adopt Contentions" ("Motion"), dated June 22, 2006. Because NEC failed to demonstrate compelling circumstances, its request for leave to file replies should be denied. See 10 C.F.R. § 2.323(c).

BACKGROUND

By letter dated January 25, 2006, as supplemented March 15 and May 15, 2006, Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively, "Entergy" or "Applicant") submitted an application, under 10 C.F.R. Part 54, to renew Operating License No. DPR-28 for the Vermont Yankee Nuclear Power Station ("VYNPS").¹ On March 27, 2006, the NRC published in the *Federal Register* a notice of acceptance for docketing and

¹ See Letter from William F. Maguire, Entergy, to the NRC Document Control Desk, "Vermont Yankee Nuclear Power Station, License No. DPR-28 (Docket No. 50-271), License Renewal Application," dated January 25, 2006 (Agencywide Documents Access and Management System ("ADAMS") Accession Nos. ML060300082, ML060300085, ML060300086).

opportunity for a hearing.² In response to this notice, NEC timely filed its Petition on May 26, 2006.³ Three governmental entities, the Vermont Department of Public Service (“DPS”), the Attorney General of the Commonwealth of Massachusetts, and the Selectboard of the Town of Marlboro, Vermont, also submitted petitions requesting a hearing on this matter.⁴ On June 8, 2006, this Atomic Safety and Licensing Board (“Licensing Board”) was established to preside over the proceeding.⁵

Both NEC and DPS filed motions seeking to adopt the contentions of other parties. See NEC’s “Notice of Adoption of Contentions, or, in the Alternative Motion to Adopt Contentions” (“NEC’s Notice and Motion”), dated June 5, 2006; DPS’s “Notice of Intent to Adopt Contentions and Motion for Leave to Do So” (“DPS’s Notice and Motion”), dated June 5, 2006. On June 15, 2006, the Staff filed an answer to NEC’s Notice and Motion, and Entergy filed an answer to DPS’s Notice and Motion. On June 20, Entergy filed an answer to NEC’s Notice and Motion. On June 21, 2006, the Staff filed an answer to DPS’s Notice and Motion.

On June 22, 2006, NEC filed the instant motion for leave to file replies to both the Staff’s and Entergy’s answers to its Notice and Motion, as well as to Entergy’s answer to DPS’s Notice and Motion. For the reasons set forth below, NEC’s motion should be denied.

² See Entergy Nuclear Operations, Inc., Vermont Yankee Nuclear Power Station; Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License No. DPR-28 for an Additional 20-Year Period, 71 Fed. Reg. 15,220 (March 27, 2006).

³ Pursuant to the Licensing Board’s oral order of June 19, 2006, the deadline for filing this Answer is June 22, 2006.

⁴ See “New England Coalition’s Petition for Leave to Intervene, Request for Hearing, and Contentions,” dated May 26, 2006; “Massachusetts Attorney General’s Request for a Hearing and Petition for Leave to Intervene with Respect to Entergy Nuclear Operations Inc.’s Application for Renewal of the Vermont Yankee Nuclear Power Plant Operating License,” dated May 26, 2006; “Town of Marlboro Selectboard’s “Request for Hearing in Entergy Vermont Yankee License Extension Proceeding,” dated April 27, 2006.

⁵ See “Establishment of Atomic Safety and Licensing Board,” dated June 8, 2006. 71 Fed. Reg. 34,397 (June 14, 2006).

DISCUSSION

Pursuant to 10 C.F.R. § 2.323(c), the moving party has no right to reply to an answer to its motion, except as permitted upon a showing of compelling circumstances, such as where the moving party demonstrates that it could not reasonably have anticipated the arguments to which it seeks leave to reply. NEC asserts that it could not reasonably have anticipated either the Staff's or Entergy's positions on adoption because "both Entergy and the Staff put forth arguments without apparent support in the governing regulations or in [NRC] precedent." Motion at 3-4. However, both Entergy's and the Staff's position rely explicitly on NRC caselaw. Anticipation of an argument does not become unreasonable simply because a party disagrees with the argument's interpretation of precedent.

The Staff's position, that NEC must first be admitted as a party to the proceeding, based upon its initial pleading, before being allowed to adopt the contentions of another petitioner, is taken from Commission precedent. See *Consolidated Edison Co. of New York & Entergy Nuclear Indian Point 2 LLC and Entergy Nuclear Operations, Inc.* (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 131-33 (2001). It is apparent from *Indian Point* that the Commission will not allow adoption of contentions by a petitioner that has not itself presented an admissible contention. *Id.* at 133 ("[W]e would not accept incorporation by reference of another petitioner's issues in an instance where the petitioner has not independently established compliance with our requirements for admission as a party in its own pleadings by submitting at least one admissible issue of its own"). It is not unreasonable to expect NEC to anticipate arguments based upon recent, binding Commission precedent.

NEC's argument regarding the difficulty of anticipating Entergy's argument is even less persuasive in light of the fact that Entergy made a similar argument against an NEC adoption request in the Vermont Yankee uprate proceeding and even relied on the same case as precedent. See *Entergy Nuclear Vermont Yankee, LLC, Entergy Nuclear Operations, Inc.*,

(Vermont Yankee Nuclear Power Station) (unpublished order), (Feb. 16, 2005). In that case, Entergy relied on an Appeal Board decision concerning the South Texas Project for the proposition that participants seeking to adopt contentions must address the Commission's late-filed contention standards. See *Id.* at 3 (citing *Houston Lighting & Power Co.* (South Texas Project, Units 1 & 2), ALAB-799, 21 NRC 360, 381-82 (1985)). The Licensing Board denied NEC's adoption request without having to address Entergy's argument and specifically declined to rule on Entergy's argument.⁶ See *Id.* This is the same argument, relying on the same case, made now by Entergy in its answers to the NEC and DPS adoption motions. Regardless of whether this Licensing Board ultimately agrees with the argument set forth by Entergy, it is certainly not unreasonable to expect NEC to anticipate it making the same argument in this case that it made against NEC less than two years ago.

Additionally, 10 C.F.R. § 2.323(c) only provides for replies by the moving party. Replies by other parties are not contemplated by the rule. There is no procedural mechanism by which NEC may reply to answers filed in response to a DPS Motion. NEC acknowledges this fact, but argues that an exception should be made due to its "strong interest in DPS' participation." See Motion at 4. If truly compelling circumstances existed, DPS, which is represented by able counsel, would no doubt seek leave to reply on its own, and represent its own interests.

⁶ Therefore, NEC's description of the Licensing Board's holding in the Vermont Yankee uprate case is incorrect and misleading. The Licensing Board did not hold that any adoption motion filed within ten days is *per se* timely. It simply held that NEC's adoption request, made several months after the filing of the original contentions was not timely. See Memorandum and Order, slip op. at 3.

CONCLUSION

NEC has failed to provide compelling circumstances to reply to answers filed by the Staff and Entergy. Accordingly, NEC's Motion for Leave to File Replies should be denied.

Respectfully submitted,

/RA/

Steven C. Hamrick
Counsel for NRC Staff

Dated at Rockville, Maryland
this 3rd day of July, 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-LR
LLC, and ENTERGY NUCLEAR)	
OPERATIONS, INC.)	ASLBP No. 06-849-03-LR
)	
(Vermont Yankee Nuclear Power Station))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF ANSWER TO NEC'S MOTION FOR LEAVE TO FILE REPLIES" in the above-captioned proceeding have been served on the following by electronic mail with copies by deposit in the NRC's internal mail system or, as indicated by an asterisk, by electronic mail with copies by U.S. mail, first class, this 3rd day of July 2006.

Administrative Judge
Alex S. Karlin, Chair
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: ask2@nrc.gov

Administrative Judge
Richard E. Wardwell
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: rew@nrc.gov

Administrative Judge
Thomas S. Elleman*
Atomic Safety and Licensing Board Panel
5207 Creedmoor Road, #101
Raleigh, NC 27612
E-mail: elleman@eos.ncsu.edu

Office of the Secretary
Attn: Rulemaking and Adjudications Staff
Mail Stop: O-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: hearingdocket@nrc.gov

Office of Commission Appellate
Adjudication
Mail Stop: O-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: OCAAmal@nrc.gov

Sarah Hofmann, Esq.*
Director of Public Advocacy
Department of Public Service
112 State Street - Drawer 20
Montpelier, VT 05620-2601
E-mail: sarah.hofmann@state.vt.us

Diane Curran, Esq.*
Harmon, Curran, Spielberg
& Eisenberg, L.L.P.
1726 M Street, NW., Suite 600
Washington, DC 20036
E-mail: dcurran@harmoncurran.com

Ronald A. Shems, Esq.*
Karen Tyler, Esq.
Shems Dunkiel Kassel & Saunders, PLLC
91 College Street
Burlington, VT 05401
E-mail: rshems@sdkslaw.com
Ktyler@sdkslaw.com

Callie B. Newton, Chair
Gail MacArthur
Lucy Gratwick
Marcia Hamilton
Town of Marlboro
Selectboard
P.O. Box 518
Marlboro, VT 05344
E-mail: cbnewton@sover.net
marcialynn@ev1.net

Marcia Carpentier, Esq.
Jonathan M. Rund, Esq.
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: mxc7@nrc.gov
Jmr3@nrc.gov

Anthony Z. Roisman, Esq.*
National Legal Scholars Law Firm
84 East Thetford Rd.
Lyme, NH 03768
E-mail: aroisman@nationallegalscholars.com

Matthew Brock, Esq.*
Assistant Attorney General
Office of the Massachusetts Attorney
General
Environmental Protection Division
One Ashburton Place, Room 1813
Boston, MA 02108-1598
E-mail: matthew.brock@ago.state.ma.us

Dan MacArthur, Director
Town of Marlboro
Emergency Management
P.O. Box Box 30
Marlboro, VT 05344
E-mail: dmacarthur@igc.org

David R. Lewis, Esq.*
Matias F. Travieso-Diaz
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, NW
Washington, DC 20037-1128
E-mail: david.lewis@pillsburylaw.com
matias.travieso-diaz@pillsburylaw.com

/RA/

Steven C. Hamrick
Counsel for NRC Staff

Dated at Rockville, Maryland,
this 3rd day of July 2006