

RAS 12046

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 07/28/06

ATOMIC SAFETY AND LICENSING BOARD

SERVED 07/28/06

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

July 28, 2006

MEMORANDUM AND ORDER
(Ruling on Motions in Limine)

Pending before the Board are three motions in limine filed by New England Coalition (NEC) on June 23, 2006.¹ NEC has moved that the Board (1) “exclu[de] . . . the testimony of Entergy Nuclear Vermont Yankee’s [Entergy’s] witness, Mr. Craig Nichols, in all areas pertaining to [NEC] Contention 3 except for those questions having to do with electrical engineering or nuclear power plant technical personnel management”; (2) “order . . . that Entergy provide to [NEC], as promptly as practicable, non-proprietary versions of all documents upon which Entergy intends to rely at hearing”; and (3) “consider extending the schedule for filing additional supporting information until [August] 1, 2006. Id. Entergy and the NRC Staff filed their answers on July 7, 2006.² On July 18, 2006, the Board held a prehearing conference

¹ New England Coalition’s Motions in Limine (June 23, 2006) (NEC Motion).

² Entergy’s Answer to New England Coalition’s Motions in Limine (July 7, 2006) (Entergy Answer); NRC Staff’s Answer to “New England Coalition’s Motions in Limine” (July 7, 2006) (NRC Staff Answer).

call in this proceeding and ruled on the three motions. This order confirms and restates those rulings.

I. TESTIMONY OF CRAIG J. NICHOLS

Entergy filed the Testimony of Craig J. Nichols and José L. Casillas on NEC Contention 3 (Testimony) on May 17, 2006, and the Rebuttal Testimony of Craig J. Nichols and José L. Casillas on NEC Contention 3 (Rebuttal) on June 14, 2006. NEC seeks to exclude Mr. Nichols' testimony in all areas except those relating to electrical engineering and nuclear power plant technical personnel management, on the grounds that he is not qualified in "thermal-hydraulics ("T-H"), strength of materials, T-H code design or any of the other highly specialized disciplines necessary to determine appropriate substitution for full transient testing." NEC Motion at 1-2. Entergy opposes the motion because Mr. Nichols' professional experience qualifies him as an expert in more areas than those to which NEC would restrict him and because he is not offered as an expert in the specific technical areas about which NEC expresses concern. Entergy Answer at 2-3. The NRC Staff also opposes the NEC Motion, saying that it is "vague and unsubstantiated." NRC Staff Answer at 2-3.

As we noted on July 18, 2006, the Federal Rules of Evidence (FRE) and Commission case law support admission of expert testimony when such testimony can help the trier of fact decide on matters at issue. Tr. at 1026-27 (July 18, 2006). FRE 702 provides that "a witness qualified as an expert by knowledge, skill, experience, training, or education" may offer opinions and other testimony in a proceeding. The Commission has stated that "presiding officers and Licensing Boards have always looked to the Federal Rules for guidance in appropriate

circumstances,”³ and NRC cases have made reference to the FRE related to expert witnesses in such circumstances.⁴

This Board therefore denies NEC’s motion and will admit the testimony in question on the grounds that Mr. Nichols is reasonably qualified to speak on the subjects on which he testified. Mr. Nichols has a B.S. degree in Electrical Engineering and more than twenty years’ experience working in various technical and managerial capacities at Vermont Yankee. Most recently, Mr. Nichols has spent the last four years as Entergy’s Project Manager for the Vermont Yankee extended power uprate (EPU) and as such has managed all activities relating to the implementation of the EPU, including oversight of the plant modifications needed to implement the upgrade and the performance of technical evaluations and analyses required to demonstrate the plant’s ability to operate safely under EPU conditions. This experience, combined with his degree in Electrical Engineering, demonstrates that Mr. Nichols has sufficient technical knowledge to assist the Board in making the necessary determinations regarding NEC Contention 3.

Although his testimony is admitted, the Board recognizes that Mr. Nichols’ knowledge and experience is general in some respects and thus will weigh his testimony accordingly. For example, Mr. Nichols may have only general knowledge and experience regarding thermal-hydraulics. The Commission has stated that “‘broad, general experience’ may be useful” as a qualification for an expert witness, and that “[g]aps in specific knowledge may go to the ‘weight’ of the expert testimony rather than to its admissibility.” Catawba, CLI-04-21, 60 NRC at 29

³ Final Rule: Changes to the Adjudicatory Process, 69 Fed. Reg. 2182, 2187 (Jan. 14, 2004).

⁴ See, e.g., Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), CLI-04-21, 60 NRC 21, 27 (2004); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-01-09, 53 NRC 239, 250 (2001); Duke Power Co. (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-668, 15 NRC 450, 475 (1982).

(citations omitted). The Board may therefore give only limited weight to any opinion Mr. Nichols offers regarding new thermal-hydraulic phenomena that may (or may not) occur as a result of the changes at Vermont Yankee.

II. PRODUCTION OF REDACTED PROPRIETARY DOCUMENTS

NEC's motion for production of redacted versions of proprietary documents relates to a series of events that began early in 2005. On March 1, 2005, this Board issued a Protective Order (PO) allowing parties to obtain access to unredacted proprietary documents upon the signing of a Confidentiality and Non-Disclosure Agreement.⁵ The PO established a procedure whereby parties could see the entire proprietary document and therefore did not require the production of redacted proprietary documents. During a prehearing conference call on May 23, 2006, the pro se representative of NEC indicated that he and the NEC experts would be signing the Confidentiality and Non-Disclosure Agreement soon. Tr. at 977-98. At that conference, the Board instructed NEC to submit such signed documents by June 2, 2006. Id. at 979. During a subsequent prehearing conference call, the representative of NEC stated that he and NEC's witnesses would not sign the Confidentiality and Non-Disclosure Agreement. Tr. at 1007 (June 20, 2006). Therefore, NEC has not received any proprietary documents.

Although Entergy's direct and rebuttal filings herein include no proprietary documents, the Board, in preparation for the hearing, sought to review several such documents. Accordingly, in our June 5, 2006, Supplemental Submission Order (SSO),⁶ we ordered Entergy to supplement its written direct testimony by submitting several documents referenced in the testimony of its witnesses. The SSO specifically required that Entergy produce redacted

⁵ Licensing Board Order (Protective Order Governing Non-Disclosure of Proprietary Information) (Mar. 1, 2005) (unpublished).

⁶ Licensing Board Order (Regarding Submission of Supplemental Documents) (June 5, 2006) (unpublished).

versions of proprietary documents for the Board and parties that have not executed the Confidentiality and Non-Disclosure Agreement. SSO at 3. On June 19, 2006, Entergy supplemented its testimony on the NEC contentions but did not provide redacted versions of all of its proprietary documents, instead providing non-proprietary summaries for seven proprietary documents requested by the Board.

The following day, during a prehearing conference call with the parties, NEC raised the issue of the redaction of the supplemental documents. Tr. at 1004-05 (June 20, 2006). Entergy justified providing only summaries for some of the documents by claiming (1) it would be unduly burdensome and expensive to produce redacted versions; and (2) it would be relatively easy for NEC to sign the Confidentiality and Non-Disclosure agreement and comply with the PO. Id. at 1005-07. Rather than rule on the proprietary document redaction issue during the conference call, the Board stated that NEC could file a motion in limine if it found that the non-proprietary summaries of Entergy's supplemental documents were inadequate. Id. at 1007-08.

NEC's filing of June 23, 2006, includes such a motion. NEC Motion at 2. Entergy opposes the motion, claiming that it is under no legal obligation to produce redacted versions and that it does not intend to rely on the documents at hearing. Entergy Answer at 5-7.

This Board denies NEC's motion. NEC has failed to demonstrate, or even argue, that the summaries provided by Entergy are inadequate, as required by the Board in the June 20 teleconference, noting only that redacted versions of the proprietary documents should be provided "as a matter of fairness." NEC Motion at 2. The Board further notes that the documents in question are not exhibits in the proceeding, but were merely referenced in the prefiled testimony and subsequently requested by the Board. Tr. at 1028 (July 18, 2006). Additionally, NEC can obtain access to these documents simply by signing the Confidentiality

and Non-Disclosure Agreement. PO at 1. Because of these facts, and because providing redacted versions of the documents at this late date would delay the proceeding significantly, the Board denies NEC's motion. In fairness, if NEC was dissatisfied with the March 1, 2005, Protective Order, NEC should have presented this issue to us long ago.

III. EXTENSION OF DEADLINE FOR FILING ADDITIONAL INFORMATION

Finally, NEC moves to extend the schedule for filing additional material in this proceeding until August 1, 2006. NEC Motion at 3. Citing the Vermont Department of Public Service's withdrawal from the proceeding, NEC claims that "a more lenient schedule may be adopted without any new or added burden." *Id.* Entergy opposes the motion, arguing that NRC regulations "contemplate two, and only two, pre-hearing submittals by the parties: direct testimony and rebuttal testimony." Entergy Answer at 8. These submittals have already been made, says Entergy, and "[t]here is neither provision nor need for more at this stage in the proceeding." *Id.*

The Board denies NEC's motion.⁷ The deadlines for filing direct and rebuttal testimony in this proceeding, May 17 and June 14, 2006, respectively, were set on April 13, 2006.⁸ NEC has neither provided any reason to extend these deadlines nor identified any supplemental information it wishes to file. Furthermore, the hearing schedule requires parties to submit their proposed questions to the Board on August 4, 2006. *Id.* at 4. An August 1 deadline for additional information would have the cascading effect of triggering another deadline for filing rebuttal information, then additional time for motions in limine challenging this additional

⁷ This is not NEC's first request for leave to file additional testimony. When NEC filed its initial statement of position and direct testimony on May 17, 2006, it requested the opportunity to file supplemental direct information. New England Coalition's Statement of Position (May 17, 2006) at 7. The Board denied this request on May 23, 2006. Tr. at 987.

⁸ Licensing Board Order (Revised Scheduling Order) (Apr. 13, 2006) at 3 (unpublished).

testimony or exhibits, and then still more time for the filing of proposed direct examination questions and motions for leave to conduct cross examination. The evidentiary hearing is scheduled to begin on September 12, 2006. The motion is denied.

For the foregoing reasons, NEC's three motions in limine are denied.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD⁹

/RA/

Alex S. Karlin
ADMINISTRATIVE JUDGE

Rockville, Maryland

July 28, 2006

⁹ Copies of this 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) intervenor New England Coalition of Brattleboro, Vermont; and (3) the NRC Staff.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON MOTIONS IN LIMINE) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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LB MEMORANDUM AND ORDER
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[Original signed by R. L. Giitter]
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Dated at Rockville, Maryland,
this 28th day of July 2006