

October 3, 2006 (7:55am)

**UNITED STATES
NUCLEAR REGULATORY COMMISSION**

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

**In Re: Entergy Nuclear Vermont Yankee)
 LLC and Entergy Nuclear)
 Operations, Inc.)
(Vermont Yankee Nuclear Power Station))**

**Docket No. 50-271
ASLBP No. 06-849-03-LR**

**DEPARTMENT OF PUBLIC SERVICE
MOTION FOR LEAVE TO FILE FOR RECONSIDERATION
OF MEMORANDUM AND ORDER (9/22/06)**

INTRODUCTION

This Motion is filed pursuant to 10 C.F.R. § 2.323(e). In its September 22, 2006 Memorandum and Order Ruling on Standing, Contentions, Hearing Procedures, State Statutory Claim, and Contention Adoption (Order), the Board held, *inter alia*, that Vermont Department of Public Service (DPS) Contention 2 (Environmental) was inadmissible even though NRC regulations "require[] an applicant to include any new and significant information concerning Category 1 issues that it is aware of". The basis for the ruling was that "the failure of an applicant to do so [submit new and significant information] is simply not litigable, absent a waiver under 10 C.F.R. § 2.335". Order at 40. DPS seeks reconsideration of this ruling because:

- 1) even if the underlying issue of whether new and significant information warrants a modification of the NRC's classification of land use impacts from on-site spent fuel storage can only be raised pursuant to 10 C.F.R. § 2.335;
- 2) and even if the issue of whether the information, once submitted, is "new and significant" is not litigable before the Board;
- 3) DPS is entitled to enforce the Applicant's obligation to disclose such new and significant information in its Environmental Report (ER) in order to enable DPS to best

present a request for waiver under 10 C.F.R. § 2.335 and to assure that the Staff has available to it the information it will need to prepare a proper SEIS and seek, if warranted, modification to the GEIS on the issue of land impacts from spent fuel storage. Because DPS raised this argument, but the Board did not directly address it in the ruling, DPS respectfully requests the Board reconsider its ruling and admit DPS Contention 2.

ARGUMENT

The principal bases for the Board's ruling on the admissibility of Contention 2 appear in its analysis of the Contention submitted by Massachusetts Attorney General. Order at 21-26. This analysis rests principally on the decision in Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 6-13 (2001) and several additional materials, including a colloquy between Commissioner Curtiss and the Deputy General Counsel for Licensing and Regulation, Martin Malsch. These authorities stand for the proposition, not disputed for purposes of this Motion, that once information has been produced, the Board is not to determine whether the information is "new and significant". Rather, the remedy for a party that believes that "new and significant" information exists that would warrant suspending or amending a Commission regulation or generic finding, is to either file a rule-making petition, file for a waiver of the rule under 10 C.F.R. § 2.335 or alert the Staff to the information so it can be incorporated into the Staff analysis of the proposed action.

With due respect, these authorities do not address the issue presented by DPS Contention 2. DPS repeatedly indicated that the Contention is limited to requiring the Applicant to produce information which, based upon Entergy's participation as the Plaintiff in Entergy Nuclear Generating Co. v. U.S., 64 Fed.Cl. 336 (2005), we know is in Entergy's possession and that is

“relevant to” (10 C.F.R. § 2.336(a)(2)(i)) the issue of whether “new and significant” information exists. Turkey Point says nothing more than that challenges to the rules and generic findings must not be allowed to be made in licensing proceedings without explicit authorization from the Commission after following very specific procedures. It does not address the question of whether there is any remedy to enforce the obligation created by NRC regulations that “new and significant” information must be included in the ER. Similarly, the regulatory history of 10 C.F.R. § 51.53(c)(3) says nothing about enforcing the Applicant’s obligation to include “new and significant” information in the ER. Finally, the colloquy between Commissioner Curtiss and Mr. Malsch, actually supports the DPS view. Commissioner Curtiss begins his inquiry, and Mr. Malsch answers the inquiry, by assuming that the information at issue is already before the Board and the dispute is over whether it is “new and significant”. That question could not arise if the information remained buried in the Applicant’s files and no one was made aware of it.

If the Applicant can never be compelled to produce information relevant to the issue of whether “new and significant” information exists, neither a party nor the Staff will have a complete basis to use the procedures that the Commission has established to present the issue of whether “new and significant” information exists. The Staff argument, adopted by the Board, that if a party can litigate whether the Applicant has produced all “new and significant” information, it will never choose to use the procedures outlined by the Commission in Turkey Point, is inapposite. The argument assumes DPS intends to litigate whether information produced by Entergy is “new and significant” this Contention. That is in wrong. Getting all the information is a prerequisite to using the procedures, not a substitute for them.

As noted previously by DPS, the logical progression of events, if the contention is

admitted, are these:

- 1) Pursuant to 10 C.F.R. § 2.336(a) Applicant will be required to produce all information “relevant to the contention”, which would include the information in its possession that formed the basis for Entergy’s claims in Entergy Nuclear Generating Co. v. U.S.;
- 2) Having produced all of the information “relevant to the contention”, none of which Entergy will agree is “new and significant”, Entergy will be able to move for summary judgment or to dismiss as moot the contention since it will have fulfilled its ER obligations under 10 C.F.R. § 51.53(c)(3);
- 3) Pursuant to the portion of the Order not challenged here, DPS will then have to either file a request for rulemaking or seek a waiver pursuant to 10 C.F.R. § 2.335, based on the information it already possesses and the new information provided by Applicant. DPS will argue that there is “new and significant” information and that this warrants either a generic or site specific modification to the impacts associated with the storage of spent fuel generated during the proposed license extension.

Thus, admitting Contention 2 does not interfere with the Commission’s procedures for dealing with Category 1 impacts. Rather it facilitates full and fair use of those procedures.

If the Contention is admitted, the anomalous result alluded to in the Board’s Order, of having creating an obligation of an Applicant which is unenforceable, will not arise. The Board found, correctly, that:

What if there is "new and significant" information regarding a Category 1 issue? Must the ER include it? The answer, provided by the Commission, is clearly yes.

In construing 10 C.F.R. § 51.53(c)(3) the Commission has stated: "even where the GEIS has found that a particular impact applies generically (Category 1), the applicant

must still provide additional analysis in its Environmental Report if new and significant information may bear on the applicability of the Category 1 finding at its particular plant." Turkey Point, CLI-01-17, 54 NRC at 11 (emphasis added). Likewise, "the applicant must provide additional analysis of even a Category 1 issue if new and significant information has surfaced." Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 290 (2002). Both Entergy, Tr. at 95, and the NRC Staff, Tr. at 113-114 and 168, acknowledge that the ER must include any new and significant information (that the applicant is aware of) regarding the environmental impacts of Category 1 issues.

Order at 22. But the Board went on to rule that no party can enforce the obligation.

This apparent anomalous result arises only because the Board assumed DPS Contention 2 would necessarily compel it to have to decide whether "new and significant" information exists, an issue which it is prohibited from considering. However, as noted above, the Board will not have to address the question of whether "new and significant" information exists in ruling on the merits of the contention. In the unlikely event Applicant produces no new information, the Board will have to rule that by failing to comply with its obligations under 10 C.F.R. §51.53(c)(3) Entergy cannot receive its license extension. At no time will the Board be deciding whether "new and significant" information actually exists, only that Entergy has failed to produce the relevant information from which such a determination can be reached.

In addition, the rules contemplate that at some point the Board can be called upon to make preliminary findings on the issue of whether "new and significant" information exists. If DPS seeks a waiver pursuant to 10 C.F.R. 2.335, the Board will have to make preliminary findings on whether:

the petitioning party has [or has] not made a *prima facie* showing that the application of the specific Commission rule or regulation (or provision thereof) to a particular aspect or aspects of the subject matter of the proceeding would not serve the purposes for which the rule or regulation was adopted and that application of the rule or regulation should be waived or an exception granted.

10 C.F.R. §§ 2.335(c) and (d). The real question is not will the Board ever have to make findings on whether "new and significant" information exists, but whether at the time it is asked to apply 10 C.F.R. §2.335 will it have the benefit of information Applicant was required to produce?

What would be truly anomalous would be that the Commission would impose the obligation on the Applicant under 10 C.F.R. § 51.53(c)(3), in direct response to concerns by the President's Council on Environmental Quality and others (Order at 24) about the need to be able to modify generic findings based on "new and significant" information, and then deliberately foreclose any party from seeking to compel the Applicant to comply with the obligation. Such an outcome would defeat the purpose behind the regulation and interfere with intervenor and Staff efforts to create a full record for decision.

CONCLUSION

For the reasons stated above and in our initial filings and oral argument, we respectfully request the Board reconsider its September 22, 2006 Order and admit DPS Contention 2.

Respectfully submitted,



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Dated this 2nd day of October, 2006 at Montpelier, Vermont.

UNITED STATES
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	Docket No. 50-271-LR
ENTERGY NUCLEAR VERMONT)	ASLBP No. 06-849-03-LR
YANKEE LLC AND ENTERGY NUCLEAR)	
OPERATIONS, INC.)	
(Vermont Yankee Nuclear Power Station))	

CERTIFICATION OF COUNSEL

Pursuant to 10 CFR §2.323(b) the undersigned counsel certifies that she has made a sincere effort to contact the other parties and resolve the issues raised in the Motion for Leave to File for Reconsideration of the ASLB Memorandum and Order dated 9/22/06 ("Motion"). The issues have not been resolved. Entergy, the New England Coalition, and the NRC Staff have consented to the filing of the Motion. Consent to the filing of the Motion in this context should not be construed as agreement that the standards for granting reconsideration have been met.



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October 2, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
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ENTERGY NUCLEAR VERMONT) Docket No. 50-271-LR
YANKEE LLC AND ENTERGY NUCLEAR) ASLBP No. 06-849-03-LR
OPERATIONS, INC.)
(Vermont Yankee Nuclear Power Station))

CERTIFICATE OF SERVICE

I hereby certify that copies of the Department of Public Service Motion for Leave to File for Reconsideration of Memorandum and Order (9/22/06) and Certification of Counsel were served on the persons listed below by deposit in the U.S. Mail, first class, postage prepaid, on the 2nd day of October, 2006, and by electronic mail and where indicated by an asterisk on this 2nd day of October, 2006.

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