October 13, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF RESPONSE TO VERMONT DEPARTMENT OF PUBLIC SERVICE'S MOTION FOR RECONSIDERATION

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the Staff of the Nuclear Regulatory Commission ("Staff") hereby answers the Vermont Department of Public Service's ("DPS") "Motion For Leave to File For Reconsideration of Memorandum and Order (9/22/06)," dated October 2, 2006 ("Motion"). For the reasons set forth below, the Staff respectfully submits that the Board's ruling is correct and DPS's motion fails to provide an adequate basis for reconsideration.

BACKGROUND

By letter dated January 26, 2006, Entergy 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"). The proposed renewal would authorize the Applicant to operate VYNPS for an additional 20 years beyond the current expiration date of March 21, 2012. In response to the notice of acceptance for docketing and opportunity for hearing published in the

Federal Register,[1] the New England Coalition ("NEC"), the Massachusetts Attorney General, the Town of Marlboro, Vermont, and DPS timely filed intervention petitions.[2]

On June 8, 2006, this Atomic Safety and Licensing Board was established to preside over the proceeding.[3] On June 22, 2006, Entergy and the NRC Staff filed answers opposing DPS's hearing request.[4] On June 20, 2006, DPS filed a reply.[5] Following oral argument on the petitioners' proffered contentions on August 1, 2006, the Licensing Board issued an order on September 22, 2006, granting the DPS hearing request, admitting DPS contention 1, and denying admission of DPS Contentions 2 and 3.[6] LBP-06-20, Memorandum and Order (Ruling on Standing, Contentions, Hearing Procedures, State Statutory Claim, and Contention Adoption). On October 2, DPS filed a motion for reconsideration.

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[1] *See* "Entergy Nuclear Operations, Inc.; [VYNPS]: Notice of Acceptance of 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. 15220 (Mar. 27, 2006)

[2] *See* [NEC] 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 Operation and Petition for Backfit Order Requiring New Design Features to Protect Against Spent Fuel Accidents, dated May 26, 2006; Vermont Department of Public Service Notice of Intention to Participate and Petition to Intervene, dated May 26, 2006; Letter from Town of Marlboro Selectboard and Emergency Management Director, dated April 27, 2006.

[3] *See* "Establishment of Atomic Safety and Licensing Board," 71 Fed. Reg. 34397 (June 14, 2006).

[4] *See* NRC Staff Answer to Vermont Department of Public Service Notice of Intention to Participate and Petition to Intervene (June 22, 2006) (Staff Answer); Entergy's Answer to Vermont Department of Public Service Notice of Intention to Participate and Petition to Intervene (June 22, 2006) (Entergy Answer).

[5] *See* Vermont Department of Public Service Reply to Answers of Applicant and NRC Staff to Notice of Intention to Participate and Petition to Intervene (Reply) (June 30, 2006).

[6] The Licensing Board also granted the hearing request of NEC, admitting four of NEC's six contentions, and denied the hearing requests of the Massachusetts Attorney General and the Town of Marlboro.

DISCUSSION

I. DPS Contention 2

DPS Contention 2 argued that Entergy had "failed to comply with the requirements of 10 C.F.R. § 51.53(c)(3)(iv) by failing to include new and significant information regarding the substantial likelihood that spent fuel will have to be stored at the Vermont Yankee site longer than evaluated in the [Generic Environmental Impact Statement ("GEIS")] and perhaps indefinitely." Petition at 12. In its Petition, DPS identified information it claimed to be new and significant to support its argument that "the likelihood that a permanent high level waste repository will be in place by 2062 is slight due to unanticipated technical problems uncovered at Yucca Mountain site coupled with changes in national policy." *Id.* at 14. For instance, the Petition cited comments from Sen. Pete Domenici (*id.* at 16), changes in Department of Energy ("DOE") cask design (*id*. at 17), the opinions of Sen. Harry Reid and the Western Governor's Association (*id*. at 17-18), the attacks of September 11, 2001 (*id*. at 18), the statutory storage limit for Yucca Mountain (*id*. at 18-19), and the testimony of Dr. Ernest Moniz (*id*. at 20).

Entergy opposed the admission of DPS Contention 2, arguing that it is barred by the Waste Confidence Rule. 10 C.F.R. § 51.23(b) states that license renewal ERs need not contain a discussion of any environmental impact of spent fuel storage for the period following the term of the operating license. Entergy Answer at 14-15. Additionally, Entergy argued that onsite storage of spent fuel is identified as a Category 1 issue in Appendix B to 10 C.F.R. Part 51. Pursuant to 10 C.F.R. § 51.53(c)(3)(i), an applicant's site-specific Environmental Report ("ER") need not discuss Category 1 issues. Entergy Answer at 15. Entergy cited Commission precedent holding that in the hearing process, petitioners may not litigate Category 1 issues without first seeking a waiver of the Category 1 determination or petitioning for a change to the rule. Entergy Answer at 17 (citing *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 12 (2001)).

The Staff also opposed admission of the contention, arguing that the contention represented a direct challenge to the Waste Confidence Rule. Staff Answer at 17. The Staff argued that, pursuant to 10 C.F.R. § 2.335, DPS must first petition for and receive a waiver of the Waste Confidence Rule before its contention could be admissible. *Id*. n.18.

In its Reply, DPS again identified information it believed to be new and significant, including the discovery of groundwater at Yucca Mountain (Reply at 29), the creation of the Global Nuclear Energy Partnership ("GNEP") (*id*. at 31), statements of Senators Domenici and Reid (*id*. at 32), and the statutory storage limit for Yucca Mountain (*id*. at 32).

In LBP-06-20, the Licensing Board found DPS contention 2 inadmissible for two reasons. First, it found that the onsite storage of spent fuel is a Category 1 issue, and absent a waiver under 10 C.F.R. § 2.335, the alleged failure of an applicant to provide new and significant information is not litigable. LBP-06-20, slip op. at 40. Second, the Board held that issues related to the onsite storage of spent fuel after the license renewal term are outside the scope of a license renewal proceeding by operation of the Waste Confidence Rule. *Id*. at 40-41.

II. Legal Standards Governing Motions for Reconsideration

A motion for reconsideration may not be filed except with leave of the Licensing Board, "upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not reasonably have been anticipated, that renders the decision invalid."[7] 10 C.F.R. § 2.323(e). In promulgating changes to Part 2, the Commission explained that this standard was meant to replace the standard that had evolved under previous Commission and Licensing Board case law:

[7] When discussing findings of fact, the Commission has described "clear error" as a finding "that is not even plausible in light of the record viewed in its entirety." *Private Fuel Storage L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-19, 62 NRC 403, 411 (2005).

> The Commission requested public comment on whether this "compelling circumstances" standard in the proposed rule should be adopted or eliminated from the final rule . . . The existing standard allows for motions requesting the presiding officer to reexamine existing evidence that may have been misunderstood or overlooked, or to clarify a ruling on a matter. The Commission has decided that the "compelling circumstances" standard should be utilized for motions for reconsideration. This standard, which is a higher standard than the existing case law, is intended to permit reconsideration only where manifest injustice would occur in the absence of reconsideration, and the claim could not have been raised earlier. In the Commission's view, reconsideration should not be used as an opportunity to reargue facts and rationales which were (or should have been) discussed earlier.

Final Rule: "Changes to Adjudicatory Process," 69 Fed. Reg. 2182, 2199 (Jan. 14, 2004); *see also Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC, 619, 622, n.12 (2004).

A successful reconsideration motion "cannot simply 'republish' prior arguments, but must give the Commission [or Licensing Board] a good reason to change its mind." *Louisiana Energy Services*, 60 NRC at 622, n.13. At the same time, as the Commission reaffirmed in its statement of consideration for the Part 2 amendments, a motion for reconsideration may not rely on an entirely new thesis or include new arguments, unless they relate to a Board concern that could not reasonably have been anticipated. 69 Fed. Reg. at 2199; *see also Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), LBP-04-22, 60 NRC 379, 380-81 (2004). *Accord Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility) CLI-02-2, 55 NRC 5, 7 (2002) (reconsideration motions are an opportunity to correct an error by refining an argument or by pointing out a factual misapprehension or a controlling decision or law). As explained below, DPS's Motion fails to demonstrate compelling circumstances that require the Board to revisit its ruling, and should be denied.

III. DPS's Motion for Reconsideration Should Be Denied

DPS's Motion should be denied for a number of reasons. First, while the Motion indicates that it was filed pursuant to 10 C.F.R. § 2.323(e), it fails to mention the standard for reconsideration found in that regulation, the movant's obligation to demonstrate compelling circumstances, such as the existence of a clear and material error in a decision, which could not reasonably have been anticipated, that renders the decision invalid. DPS never argues the existence of compelling circumstances, never argues clear and material error, and never argues the Board's decision is invalid. *See* Motion at 1-6. Therefore, DPS's motion does not demonstrate the Board should reconsider its decision.

Second, the Motion focuses solely on the Board's discussion of *Turkey Point* and the obligation of petitioners to seek a waiver of the Category 1 determination. *See* Motion at 1. The Motion fails to discuss the second, independent rationale for the Board's decision, "that issues related to the environmental impact of onsite spent fuel storage after the license renewal term are outside the scope of a license renewal proceeding because contentions may not challenge the NRC's Waste Confidence Rule." LBP-06-20, slip op. at 40 (citing *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 344-45 (1999). By focusing its argument on only one of the decision's two legal bases, and failing to even mention the other, the Motion fails to demonstrate that the Board's decision was erroneous.

Third, the Motion improperly raises new arguments. In fact, DPS, in its motion has rendered its original contention almost unrecognizable. As originally filed, the contention argued that new and significant information existed and Entergy failed to include it in its ER. Petition at 12-13. The Petition was straightforward in asserting that DPS already possessed new and significant information and provided a litany of such information, as described above. *Id.* at 14-20. Now, DPS is arguing that it believes new and significant information exists, but it

cannot demonstrate as much to the Commission until it receives information from Entergy's mandatory disclosures. Motion at 5-6.

DPS never argued in either its Petition or its Reply that its contention should be admitted in order to help DPS make its case for waiver of the rule. In its Reply, DPS did discuss Entergy's obligation to disclose relevant information under 10 C.F.R. § 2.336. *See* DPS Reply at 38. However, DPS did not argue that it would rely upon these disclosures to support a waiver argument. *Id.* In fact, DPS stated clearly that it would not need to rely on such additional information. *Id.* at 39 ("In addition, even if a §2.335(b) petition were required, the contention as filed, with the supporting affidavit of William Sherman, meets the requirements of the regulation").[8] This new argument is inappropriate for a motion for reconsideration, and therefore, fails to support reconsideration of the decision. *See Millstone*, 60 NRC at 380-81.

Fourth, the new argument raised by DPS is incorrect as a matter of law. DPS makes the somewhat circular argument that, if its contention is admitted, it will be entitled to receive relevant information from Entergy under 10 C.F.R. 2.336, which it can then use to in an effort to obtain a waiver of the Category 1 determination. Motion at 4. According to this reasoning, DPS can get a contention admitted, even though it is barred by regulation, in order to obtain information through mandatory disclosures that would allow it to make a case for waiving the regulation that bars the contention in the first place. This novel argument ignores the Commission's statement in *Turkey Point*, that "generic, Category 1 events [are] not suitable for case-by-case adjudication." CLI-01-17, 54 NRC at 22.

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[8] At oral argument, counsel for DPS did incompletely allude to this notion during his rebuttal period. Tr. 175, Ln. 17-21 ("So our point is if we're to make a waiver argument we should have the benefit of the environmental report -- to be fully completed."). However, it is unclear whether this is the same argument set forth in DPS's Motion. Further, this statement was made at a time when neither Entergy nor the Staff would have an opportunity to respond.

DPS's Motion also argues that the Board's decision held that "no party can enforce the obligation," to provide new and significant information, and "foreclose[s] any party from seeking to compel the Applicant to comply with the obligation." Motion at 5-6. DPS misstates the Board's decision, which merely held that "a petitioner may not challenge an ER's failure to consider new and significant information for a Category 1 environmental impact without first seeking a waiver of the generic rule." LBP-06-20, slip op. at 26. Enforcement of the obligation to provide new and significant information is not foreclosed by this decision. A petitioner seeking to enforce this obligation may simply seek a waiver of the rule under 10 C.F.R. § 2.335. Once a Category 1 determination is waived for a particular proceeding, there is no regulatory bar to a challenge asserting the failure to provide new and significant information, aside from considerations of timeliness.[9]

Finally, DPS makes the incredible assertion that, in ruling on the merits of the contention, the Board will not have to determine whether new and significant information actually exists. Motion at 5. This claim is difficult to understand in light of the text of DPS's contention, which alleges that Entergy has failed to provide new and significant information regarding the substantial likelihood that spent fuel will have to be stored onsite longer than evaluated in the GEIS. Petition at 12. DPS fails to explain how the Board could possibly rule on the merits of this contention without deciding whether new and significant exists. DPS's Motion fails to make a the required showing for reconsideration. Therefore, the Board should not reconsider its ruling.

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[9] This argument holds for Category 1 issues in general. For this particular issue, of course, even if the Category 1 determination were waived, the Waste Confidence Rule would still bar the contention.

CONCLUSION

For the foregoing reasons, the Board should deny DPS's motion for reconsideration.

Respectfully submitted,

/RA/

Steven C. Hamrick
Counsel for NRC Staff

Dated at Rockville, Maryland
this 13th day of October 2006

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF RESPONSE TO VERMONT DEPARTMENT OF PUBLIC SERVICE'S MOTION FOR RECONSIDERATION" 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 13th day of October 2006.

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