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	)	Docket No. 50-271-LR
and ENTERGY NUCLEAR OPERATIONS, INC	)	
	)	
(Vermont Yankee Nuclear Power Station)	)	

NRC STAFF RESPONSE TO NEW ENGLAND COALITION, INC.'S
MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(e), the staff of the Nuclear Regulatory Commission ("Staff") hereby answers[1] the "New England Coalition, Inc.'s ("NEC") Motion for Leave to File Motion for Reconsideration," dated October 2, 2006. ("Motion"). For the reasons discussed below, the Motion fails to satisfy the requirements of 10 C.F.R. § 2.323(e) in that it does not identify a clear and material error in a decision or other compelling circumstances, which could not have been reasonably anticipated, that render the decision invalid. Therefore, the Motion should be denied.

BACKGROUND

In response to a March 27, 2006, *Federal Register* notice, NEC timely filed an intervention petition proffering six contentions concerning the Entergy Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively, "Entergy") application under 10 C.F.R. Part 54 to renew Operating License No. DPR-28 for the Vermont Yankee Nuclear Power Station ("VYNPS"). *See* Petition for Leave to Intervene, Request for Hearing, and Contentions

[1] Because NEC's filing was received by email after 5 p.m on October 2, 2006, the Staff's response is being filed 11 days after that service date in accordance with 10 C.F.R. § 2.306.

(May 26, 2006) ("Petition"). Entergy and the NRC Staff subsequently filed answers and NEC replied. *See* Entergy's Answer to [NEC's] Petition for Leave to Intervene (June 22, 2006) ("Entergy Answer"); NRC Staff Answer to Request for Hearing of [NEC] (June 22, 2006) ("Staff Answer"); [NEC's] Reply to Entergy and NRC Staff Answers to Petition for Leave to Intervene, Request for Hearing and Contentions (June 29, 2006) ("Reply").

On September 22, 2006, the Atomic Safety and Licensing Board ("Board") issued a Memorandum and Order, which, *inter alia,* found Contention 1, in part, and Contention 5 inadmissible. *See* LBP-06-20, 63 NRC __ (September 22, 2006) ("Order"), slip op at 57, 75-79. NEC now seeks reconsideration of the portions of the Order that denied NEC's Contention 5, and denied in part NEC's Contention 1. *See* Motion at 1-6. NEC argues that the Board misapprehended or misapplied either factual information or controlling legal principle in denying admission of NEC's Contention 5 and the Clean Water Act § 401 certification component of Contention 1. *Id.* at 1. For the reasons stated below, the Motion should be denied.

DISCUSSION

NEC's Motion should be denied. First, the Motion does not address the legal standard for granting a motion for reconsideration in that it does not show the existence of a clear and material error in a decision or other compelling circumstances, which could not have been reasonably anticipated, that renders that decision invalid. *See* 10 C.F.R. § 2.323(e). Second, NEC's request to reconsider Contention 5 both repeats arguments previously raised without refinement and improperly introduces new theories. Finally, NEC's argument to reconsider Contention 1 fails to point out any errors in the Board's ruling and attempts to circumvent Commission pleading requirements. Therefore, the Motion should be denied.

A. Legal Standard for a Motion for Reconsideration

A motion for reconsideration may not be filed except with leave of the 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."[2] 10 C.F.R. § 2.323(e). In 2004, the Commission heightened the reconsideration standard stating that reconsideration is "an extraordinary action and should not be used as an opportunity to reargue facts and rationales which were (or should have been) discussed earlier." *See* "Changes to Adjudicatory Process," 69 Fed. Reg. 2182, 2207 (Jan. 14, 2004). The Commission made it clear that this new 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." *Id*.[3] To be successful, a reconsideration motion cannot merely repeat prior arguments, but must provide a good reason for the adjudicator to change its mind. *Louisiana Energy Servs., L.P.* (National Enrichment Facility), CLI-04-03, 60 NRC 619, 622 n.13 (2004)[4] (citing *Ahmed v. Ashcroft*, 388 F.2d 247 (7th Cir. 2004)). A motion for reconsideration is not an opportunity to present new arguments or evidence, or a "new thesis" unless the moving party can show that the new material's availability could not reasonably have been anticipated and its consideration

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[2] The Commission has indicated with respect to factual findings that the "clear error" standard is quite high and that a "clearly erroneous" finding is one that is not 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) (citing *Private Fuel Storage*, CLI-03-08, 58 NRC 11, 25-26 (2003); *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit; Sequoyah Nuclear Plant, Units 1 & 2; Browns Ferry Nuclear Plant, Units 1, 2 & 3), CLI-04-24, 60 NRC 160, 189 (2004)).

[3] The Commission stated that "[t]he existing standard allows for motions requesting the presiding officer to reexamine existing evidence that may have been misunderstood or overlooked to clarify a ruling on a matter." 69 Fed. Reg. at 2207.

[4] The Commission has noted that 10 C.F.R. § 2.323(e) is intended as a catch-all provision for reconsideration of orders in general. CLI-04-03, 60 NRC at 622 n.12.

demonstrates compelling circumstances, such as a clear and material error that renders the decision invalid. *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), LBP-04-22, 60 NRC 379, 380-81, *affirmed*, CLI-04-36, 60 NRC 631, 641 (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).

B. NEC Fails to Address the Proper Standard for Reconsideration, Repeats Previous Arguments and Tries to Raise New Arguments

NEC's Motion fails to address or satisfy the proper standard for a motion for reconsideration. Indeed, NEC's only case citation is to a licensing board decision issued before the promulgation of the new 10 C.F.R. Part 2. *See* Motion at 1 (citing *Private Fuel Storage,* LBP-00-31, 52 NRC 340, 342 (2000) (movants must identify errors or deficiencies indicating that the questioned ruling overlooked or misapprehended either factual information or a controlling legal principle). NEC however, does not identify any legal principle or fact misapprehended. Additionally, NEC does not explain how its arguments constitute "compelling circumstances" as required by 10 C.F.R. § 2.323(e). Therefore, the Motion should be denied.

NEC fails to identify compelling circumstances to invalidate the Board's Ruling with respect to Contention 5. As the Board made clear, NEC's petition failed to allege how a broken condenser, could not perform its limited post-accident, plate-out function. *See* Order at 77-78. Without this information, the Board concluded that Contention 5 remains outside the scope of the renewal proceeding, and the contention is not "material to the findings NRC must make to support" a license renewal decision. Order at 78 (citing 10 C.F.R. §§ 2.309(f)(1)(iii) and (iv)).

NEC argues that the "Board's Order gives inappropriate weight to the factual merits of NEC's Contention 5." Motion at 5. NEC never specifically points out what portion of the Order

is in error. Instead, NEC generally states that the Board's decision "depends substantially upon it's apparent acceptance of Entergy's unsupported arguments." Motion at 5. The Order does not place improper weight on any facts, but merely points out that NEC has failed to satisfy the pleading requirements of 10 C.F.R. § 2.309. *See* Order at 78 ("The Board concludes that NEC contention 5 is not admissible because NEC has failed to show that the issue raised – the integrity of the condenser – is 'within the scope' or 'material to the findings NRC must make to support' a license renewal decision.") (internal citations omitted). The Order further states that "NEC as not provided any supporting information as to how the failure of the condenser would negatively affect its ability to perform its limited post-accident function." *Id*. The Board clearly held that NEC's contention is procedurally deficient, and did not place inappropriate weight on Entergy's arguments. NEC fails to identify compelling circumstances such as a clear and material error in the Board's decision or other compelling circumstances, which could not reasonably have been anticipated; therefore, the Motion should be denied.

NEC next impermissibly reargues that Contention 5 is within the scope of this license renewal citing 10 C.F.R. §§ 54.4 and 54.21. *See* Motion at 2-3. This issue has already been raised and decided by the Board. *See* Order at 78. NEC points to no clear error in the Board's decision; instead, it states that the Board "does not address" these sections. *See* Motion at 2, 3. NEC, however did not cite these sections in its Petition or Reply when addressing this issue. *See* Petition at 19-20; Reply at 28-31. It is impermissible in a motion for reconsideration to reargue a rationale which had been or should have been discussed. *See* 69 Fed. Reg. at 2207. Consequently, this claim is an impermissible reargument and should be denied.

NEC next tries to bolster Contention 5 by drawing an inference from the testimony of its expert Arnold Gunderson. *See* Motion at 4 ("The obvious *inference* is that no credible aging management program can be developed without establishing a baseline."); *See also* Declaration of Arnold Gunderson Supporting New England Coalition's Petition for Leave to

Intervene, Petition at Exhibit 8 (May 26, 2006). A motion to reconsider must be based on an "elaboration or refinement of an argument already made." *Dominion Nuclear Connecticut, Inc.*, (Millstone Nuclear Power Station, Units 2 and 3), CLI-02-01, 55 NRC 1, 2 (2002). This inference is an impermissible new argument, not an elaboration or refinement. Further, it does not identify any errors in the Board's decision; therefore, it is outside the scope of a motion for reconsideration.

Additionally, NEC argues that "it is common knowledge among all participants in this proceeding that significant early offsite dose contributors in reactors are isotopes of noble gasses . . . These gases do not plate out." Motion at 4-5 (emphasis in original). This argument introduces new information and a completely new theory and is impermissible. *Dominion Nuclear Connecticut, Inc.*, LBP-04-22, 60 NRC at 380-81. If the failure of noble gasses to plate-out truly is "common knowledge" (a point the Staff does not concede), then NEC should have raised this point in its Petition. The introduction of this argument in a motion for reconsideration, without an explanation of how it constitutes "compelling circumstances, such as the existence of a clear and material error . . . that renders the decision invalid," is impermissible. 10 C.F.R. § 2.323(e).

Because NEC introduces a new argument, and fails to identify a clear and material error in the Board's decision or other compelling circumstances, which could not reasonably have been anticipated, its Motion should be denied. 10 C.F.R. § 2.323(e).

C. The Board Correctly Rejected NEC's Contention 1 Argument that a Section 401 Certification is Required.

NEC finally argues that Entergy is required to obtain a § 401 Clean Water Act Certification. Motion at 5. NEC claims that the Board erred in not requiring Entergy to obtain this certification before license renewal. Motion at 5-6. However, NEC fails to identify any clear and material error in the Board's decision concerning Contention 1. 10 C.F.R. § 2.323(e).

NEC asserts that the Clean Water Act applies to the NRC, and that "all parties were at least on constructive notice of its requirements." Motion at 6. Constructive notice does not satisfy NEC's burden as an intervention petitioner to plead an admissible contention. In order for a contention to be admissible it must, *inter alia*, "provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of fact." 10 C.F.R. § 2.309(f)(1)(vi). NEC failed to plead this argument in its Petition, and the Board correctly held that "NEC's attempt to introduce an entirely new argument regarding the alleged need for a Section 401 certification is not permissible in a reply." *See* Order at 57; *see also Louisiana Energy Servs., L.P.,* CLI-04-03, 60 NRC at 224. NEC offers no basis to conclude that the Board erred in rejecting late-filed attempts to supplement its contention. *See* Order at 57. Therefore, the Motion should be denied.

CONCLUSION

NEC's Motion fails to identify clear and material error in the Board's decision or demonstrate other compelling circumstances, which could not have been reasonably anticipated, that invalidate the Board's decision. Therefore, the Motion should be denied.

Respectfully submitted,

/RA/

Mitzi A. Young
Counsel for NRC Staff

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

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF RESPONSE TO NEW ENGLAND COALITION, INC'S MOTION FOR LEAVE TO FILE 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 by electronic mail, with copies by U.S. mail, first class, as indicated by an asterisk, this 13th day of October, 2006.

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