

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

NRC STAFF RESPONSE TO ENTERGY’S MOTION FOR LEAVE
TO FILE MOTION, AND MOTION, FOR RECONSIDERATION OF
DECISION TO ADMIT NEW ENGLAND COALITION CONTENTION 3

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(e), the Staff of the U.S. Nuclear Regulatory Commission (“Staff”) hereby answers the Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively “Entergy”) motion seeking reconsideration of the Licensing Board’s ruling admitting New England Coalition’s Contention 3. Entergy’s Motion for Reconsideration of the Board’s Decision to Admit New England Coalition’s Contention 3,” dated October 2, 2006 (Motion).¹ For the reasons stated below, the Motion fails to satisfy the requirements of 10 C.F.R. § 2.323(e) and should be denied.

BACKGROUND

On September 22, 2006, the Board, *inter alia*, granted the intervention petition filed by NEC, admitting NEC Contentions 1-4 and rejecting Contentions 5 and 6. *Vermont Yankee*, LBP-06-20, 63 NRC ____, slip op. at 47-82. Contention 3 alleged that Entergy’s license renewal

¹ The Motion was accompanied by an Entergy motion seeking leave to file for reconsideration. See Entergy’s Motion for Leave to File Motion for Reconsideration of the Board’s Decision to Admit New England Coalition’s Contention 3,” dated October 2, 2006 (Leave Motion). Because Entergy’s filings were 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.

application does not include an adequate plan to monitor and manage aging of the steam dryer during the period of extended operation. See *id.* at 64 (citing [NEC] Petition for Leave to Intervene, Request for Hearing, and Contentions, dated May 26, 2006, at 17). Subsequently, Entergy filed the instant Motion, claiming that the contention does not challenge Entergy's specific program for managing the aging of the Vermont Yankee steam dryer (a program that NEC's counsel and consultant did not review), raises concerns inapplicable to Entergy's aging management program, and thus, fails to raise a genuine dispute on a material issue of law or fact regarding the license renewal application. See Motion at 1. For the reasons discussed below, the Motion should be denied.

DISCUSSION

A. Standards for Motions for Reconsideration

Under the Commission's rules of practice, a motion for reconsideration may not be filed except upon leave of the presiding officer if there is "a showing of compelling circumstances such as the existence of a clear and material error in a decision, which could not have been reasonably 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,

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)).

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 Services, L.P.* (National Enrichment Facility), CLI-04-03, 60 NRC 619, 622 (2004) (a party must plead decisive new information or demonstrate the adjudicator has a fundamental misunderstanding of a key point)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 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, 645 (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).

In short, a motion for reconsideration must be denied where it merely reargues facts or rationales that either were (or should have been) raised or fails to show the adjudicator fundamentally misunderstood a key point that renders the decision invalid.⁵

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. *LES*, CLI-04-03, 60 NRC at 622 n.12.

⁵ Entergy asserts that a motion for reconsideration is an opportunity for a Board to correct an error such as a factual misapprehension that was overlooked in the Board’s decision. See Motion at 9 (citing *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-2, 55 NRC 5, 7 (2002); *Private Fuel Storage L.L.C.* (Independent Spent Fuel Installation), CLI-00-21, 52 NRC 261, 264 (2000). These cases, however, were decided before the Commission adopted 10 C.F.R. § 2.323(e) and
(continued...)

B. Reconsideration Should Be Denied

Entergy argues that the reconsideration should be granted because there was a clear and material error in the Board's admission of Contention 3 which could not have been anticipated and which renders the decision to admit that contention invalid. See Leave Motion at 1. Specifically, Entergy asserts that the Board erred in concluding that Dr. Hopenfeld's statements demonstrated a genuine dispute per 10 C.F.R. § 2.309(f)(1)(vi) because Dr. Hopenfeld's opinion was based on demonstrably incorrect information and, therefore, NEC failed to raise a genuine dispute that warrants litigation. See Motion at 2-3 (citing LBP-06-20, slip op. at 67). Entergy argues that Dr. Hopenfeld's allegations have no basis in fact because its monitoring program for license renewal does not depend on theoretical calculations using computer models. See Motion at 4-5.⁶

Entergy points out that its aging management plan for the steam dryer provides that cracking due to flow-induced vibration is managed by the BWR Vessel Internals Program (BWR VIP), which currently incorporates the guidance of General Electric Services Information Letter 644 (GE-SIL-644), Revision 1, and that Entergy will either include BWR VIP-139 recommendations, if Staff-approved, in its program or identify any exceptions to the document. See Motion at 6-7 (citing License Renewal Application, § 3.1.2.2.11 [page 3.1-7]). Entergy further states that GE-SIL-644 contains no reference to the use of computer models, but recommends visual inspections and plant monitoring. See Motion at 4 n.3, 7-9 & Attachment 2

⁵(...continued)
do not reflect the higher standard for motions for reconsideration.

⁶ Entergy notes that during the August 2, 2006 prehearing conference, NEC counsel indicated that Dr. Hopenfeld has not read the publicly available guidance document that forms the basis of Entergy's steam dryer monitoring program. See Motion at 3 (citing Tr. 333 (Tyler)). This statement, if true, demonstrates that Staff and Energy arguments that the contention lacked a basis were well founded. See LBP-06-20, slip op. at 77-78.

(GE-SIL-644).⁷ Entergy asserts that this information demonstrates that the contention fails to identify any deficiency in the renewal application, fails to demonstrate any genuine dispute on a material issue regarding the application, and thus fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iv). See Motion at 10. Thus, Contention 3 should have been rejected. *Id.*

It is apparent that Entergy has now proffered information (and attached pertinent documents) that indicate there is a clear and material error in the Board's decision -- the assumption that Entergy's aging management program for the steam dryer is based on theoretical calculations of two computer models -- which renders the Board's decision to admit the contention invalid. Nevertheless, Entergy does not claim that this information is "new" and has not addressed why this information could not have been raised earlier or why a "manifest injustice" will result if reconsideration is not granted. Entergy did not discuss the provisions of GE-SIL-644 in its answer to NEC's intervention petition. Instead, Entergy insisted that the contention lacked a basis and did not raise a genuine dispute on a material issue by describing its uprate monitoring program and referencing statements in an Advisory Committee on Reactor Safeguards letter, Entergy's extended power uprate (EPU) application and the Staff's EPU Safety Evaluation. See Entergy Answer at 26-30. Entergy specifically stated that its monitoring program was "not just based on 'the predictions of the two computer models.'" See *id.* at 27.

Although Entergy's recent filing provides information indicating that Contention 3 is a candidate for summary disposition, Entergy has not met the high threshold for reconsideration of the Board's decision since the information is not new and could have been disclosed earlier. See *LES*, CLI-04-03, 60 NRC at 622; *Dominion Nuclear Connecticut, Inc.*, LBP-04-22, 60 NRC

⁷ Entergy also argues that conditions imposed in the EPU Amendment (and discussed during the August 2, 2006 prehearing conference) also demonstrate that computer modeling is not the basis of its program. See Motion at 5-6 (citing portions of License Condition 2.M [sic: 3.M]).

at 380-81. The Board did not commit a clear error if salient information was not presented before its ruling. Consequently, the Motion should be denied.

CONCLUSION

Entergy's has proffered information that was previously available, but not presented to the Board, that indicates that NEC Contention 3 failed to raise a genuine dispute with regard to a material issue of fact concerning the Application. Because this information is not new (and could have been reasonably anticipated), Entergy's Motion fails to satisfy the requirements of 10 C.F.R. § 2.323(e) and 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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LLC, and ENTERGY NUCLEAR)
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(Vermont Yankee Nuclear Power Station))

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF RESPONSE TO ENTERGY'S MOTION FOR LEAVE TO FILE MOTION, AND MOTION, FOR RECONSIDERATION OF DECISION TO ADMIT NEW ENGLAND COALITION CONTENTION 3" 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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