

October 12, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

Before the Atomic Safety and Licensing Board

October 12, 2006 (10:15am)

In the Matter of)
)
Entergy Nuclear Vermont Yankee, LLC)
and Entergy Nuclear Operations, Inc.)
)
(Vermont Yankee Nuclear Power Station))

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

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

ENERGY'S ANSWER TO NEW ENGLAND COALITION'S MOTION FOR RECONSIDERATION OF BOARD RULINGS ON NEC CONTENTIONS 1 AND 5

Pursuant to 10 C.F.R. §2.323(e), Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (hereinafter collectively referred to as "Entergy") hereby answer and oppose New England Coalition's ("NEC") "Motion for Leave to File Motion for Reconsideration" dated October 2, 2006 ("Motion"). The Motion asks the Atomic Safety and Licensing Board ("Board") to reconsider the portions of the Board's Memorandum and Order (Ruling on Standing, Contentions, Hearing Procedures, State Statutory Claim, and Contention Adoption), LBP-06-20, 63 N.R.C. ___ (September 22, 2006) ("LBP-06-20") that (1) struck an argument, raised for the first time in NEC's Reply to Entergy's Answer to NEC's Petition to intervene, with respect to NEC Contention 1, and (2) held that NEC Contention 5 fails to meet the admissibility requirements of 10 C.F.R. § 2.309(f)(1). See LBP-06-20, slip op. at 57, 75-79. As discussed below, the Motion should be denied because it falls way short of showing compelling circumstances that would warrant the revisiting of the Board's decision on those matters.

I. PROCEDURAL BACKGROUND

On May 26, 2006, NEC filed a “Petition for Leave to Intervene, Request for Hearing, and Contentions” (the “Petition”) in this proceeding. The Petition was supported, inter alia, by the Declaration of Arnold Gundersen Supporting New England Coalition’s Petition for Leave to Intervene, Request for Hearing, and Contentions, dated May 26, 2006, Petition Exhibit 8 (“Gundersen Declaration”).

One of the contentions submitted by NEC, Contention 1, alleges that “Entergy failed to assess impacts to water quality” (Petition at 10). The Board found NEC Contention 1 admissible. LBP-06-20, slip op. at 51-52.¹ Nonetheless, NEC asks the Board (Motion at 5-6) to reconsider the aspect of its decision that granted Entergy’s motion to strike a portion of NEC’s “Reply to Entergy and NRC Staff Answers to Petition for Leave to Intervene, Request for Hearing, and Contentions” dated June 29, 2006 (“NEC’s Reply”). LBP-06-20, slip op. at 57.

Another NEC contention, Contention 5, asserts that Entergy’s license renewal application (“Application”) for the Vermont Yankee Nuclear Power Station (“VY”) “does not state an adequate plan to manage and monitor aging of the Condenser.” Petition at 18. The Board ruled that NEC Contention 5 is not admissible. LBP-06-20, slip op. at 78. NEC is asking the Board to reconsider its dismissal of the contention. Motion at 1-4.

II. ARGUMENT

A. Applicable Legal Standards

The Commission’s revised rules of practice promulgated in January 2004 provide that:

¹ Entergy has filed with a petition for interlocutory Commission review of the Board’s decision to admit NEC Contention 1. Entergy’s Petition for Interlocutory Review of the Licensing Board’s Split Decision Admitting New England Coalition’s Contention 1, dated October 10, 2006.

Motions for reconsideration may not be filed except upon leave of the presiding officer or Commission, upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid.

10 C.F.R. § 2.323(e). The compelling circumstances standard for granting leave to file a motion for reconsideration “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.” 69 Fed. Reg. 2,182, 2,207 (Jan. 14, 2004). Thus, while a motion for reconsideration is available to “address the correction of an erroneous decision that resulted from the misapprehension or disregard of a critical fact or controlling legal principle or decision,” it is not “an opportunity to present new arguments or evidence or a ‘new thesis.’” Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), LBP-04-22, 60 N.R.C. 379, 380-81, affirmed, CLI-04-36, 60 N.R.C. 631, 641 (2004).

B. The FWPCA Section 401 Argument in NEC Contention 1 was Properly Stricken

NEC seeks reconsideration of a Board ruling that granted Entergy’s motion to strike a portion of the “New England Coalition, Inc.’s Reply to Entergy and NRC Staff Answers to Petition for Leave to Intervene, Request for Hearing, and Contentions” (“NEC’s Reply”) dated June 29, 2006. The stricken portion was the argument, raised for the first time in NEC’s Reply, that Entergy’s operating license may not be renewed absent a State water quality certification under § 401 of the Clean Water Act. NEC’s Reply at 3, 6, 14. The Board ruled that the § 401 claim was newly raised in NEC’s Reply, was unrelated to NEC Contention 1, and warranted being stricken. LBP-06-20, slip op. at 57.

In its Motion, NEC does not allege any error in the Board’s ruling; indeed, NEC does not even discuss the Board’s decision. Instead, NEC asserts that the need for a § 401 certification is “jurisdictional” and “imposes an independent obligation on Entergy and the NRC, regardless of

whether the need for certification is raised as a contention.” Motion at 5. Whatever legal effect § 401 may have, it is irrelevant to whether this issue was properly raised in a reply. The Motion, therefore, provides no grounds for reconsideration.

NEC argues that all parties (presumably including the Board) “were at least on constructive notice of [§ 401]’s requirements.” Even assuming that such is the case, “constructive notice” of a statute does not make the statute’s applicability an appropriate part of a reply. The original Contention 1 simply had nothing to do with whether § 401 certification is needed. Because NEC’s assertions regarding § 401 certification were not “narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer” to NEC Contention 1, those assertions were not appropriately raised in a reply. Louisiana Energy Serv., L.P. (National Enrichment Facility), CLI-04-25, 60 N.R.C. 223, 225 (2004).

C. There was no Error in the Board’s Dismissal of NEC Contention 5

NEC Contention 5, which alleged that the Application does not state an adequate plan to manage and monitor aging of VY’s main condenser, is based entirely on the claims that the aging management plan presented by Entergy in its Application does not address the actual, deteriorated condition of the condenser (Petition at 19-20) and that Entergy should be required to take measures to ensure condenser integrity during the license renewal period. Id. at 20.

Entergy’s answer to this proposed contention pointed out that whether leakage from the condenser would occur is irrelevant to the condenser’s post-accident function. Entergy’s Answer to New England Coalition’s Petition for Leave to Intervene, Request for Hearing, and Contentions (June 22, 2006) (“Entergy’s Answer”) at 37. That function – to provide holdup volume and plate-out surface – does not require the condenser to be leak tight. Id. Normal plant

operation continuously confirms that the condenser has sufficient integrity to perform its limited post-accident function. Id.

The Board ruled that Contention 5 is inadmissible because

NEC has 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 – the hold-up and plate-out of some gases and solid daughter fission products. For example, even if the condenser cracked or broke into pieces at the same time a LOCA or other accident occurred, NEC has not given us facts, evidence, or any reason to think that the condenser surfaces would not be equally able to retard the flow of, or absorb, gases that may leak through the [main steam isolation valves].

LBP-06-20, slip op. at 78.

NEC's motion for reconsideration of the dismissal of NEC Contention 5 makes three arguments: (1) that the Board "overlooked the plain language of the NRC rules defining the scope of relicensing proceedings;" (2) that the Board misapprehended factual information in the Gundersen Declaration; and (3) that the Board gave more weight to the factual merits of the contention than is allowed at the admissions stage of the proceeding. Motion at 2. None of the arguments has merit.

NEC's first argument suggests that the Board treated the condenser as outside the scope of this proceeding, and asserts that 10 C.F.R. § 54.21(a)(3) requires an aging management plan for any component within scope. Motion at 3. This argument, however, fails for two reasons.

First, nowhere in LBP-06-20 does the Board assert that the condenser is outside the scope of license renewal.² Second, 10 C.F.R. § 54.21(a)(3) requires only that the application

² Entergy's Application treats the condenser as being within the scope of license renewal. It addresses the condenser in Section 3, the section that "describes the results of aging management reviews of mechanical, electrical and structural components requiring aging management review." Application at i and Table 3.4-21. The results of Entergy's aging management review of the condenser are that there are no aging effects requiring

“demonstrate that the effects of aging will be adequately managed so that the intended function(s) will be maintained consistent with the [current licensing basis]” Here, as Entergy pointed out and the Board agreed, “the fact that the condenser works properly during normal operations is sufficient to demonstrate that it remains capable of performing the limited functions required of it during an accident.” LBP-06-20, slip op. at 77, citing Entergy’s Answer at 38-39. Thus, the ability of the condenser to perform its post-accident function is properly addressed in both the Application and the Board’s decision. NEC’s allegation has no basis.

NEC’s second argument in seeking reconsideration is that the Board allegedly failed to address Mr. Gundersen’s claim (not stated by Mr. Gundersen, but “inferred” by NEC) that “no credible aging management can be developed without developing a baseline.” Motion at 4. Neither Mr. Gundersen nor NEC had raised this claim before, and a motion for reconsideration is not the place to advance new claims. Millstone, supra; LES, CLI-04-25, 60 N.R.C. at 224-25. In addition, the claim is just another attempt to argue with the Application’s determination that the ability of the condenser to perform its limited post-accident function is confirmed every day by its ability to support normal plant operations.

Equally novel is NEC’s claim that “[t]he Board has no basis in assuming *de minimis* condenser leakage, or condenser internals by-pass, without requiring and then assessing quantification from Entergy.” Motion at 4. In addition to constituting a new, impermissible theory asserted for the first time in a motion for reconsideration, this claim ignores the statements in the Application that a leak-tight condenser is not required for the condenser to perform its function, and that the post-accident conditions in the condenser will be essentially atmospheric.

management because “[c]ondenser integrity required to perform the post-accident intended function (holdup and plateau of MSIV leakage) is continuously confirmed by normal plant operation.” Table 3.4-21, Note 401.

Entergy's Answer at 37; Application at 3.4-26, Table 3.4.2-1. All that is required is a buildup volume and plate-out surfaces.

Another aspect of NEC's second argument is the claim that

it is common knowledge among all the participants in this proceeding that significant early dose contributors in reactor accidents are isotopes of noble gases – Krypton and Xenon [sic]. These gases do not plate out. They do not combine with other elements to form other compounds; that is why they are called noble gases. Entergy and the Board failed to make this elemental distinction.

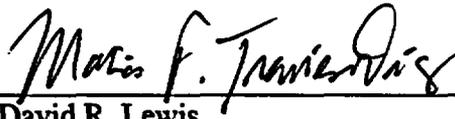
Motion at 4-5, emphasis in original. This fanciful claim suffers from multiple infirmities, including: (a) being raised for the first time in the Motion, (b) lacking any factual support, even from Mr. Gundersen; (c) not reviewing the alternative source term ("AST") analysis (where credit is taken for the condenser's hold-up and plate-out of gases that might be released in the event of a loss-of-coolant accident ("LOCA")) to see if Krypton and Xenon are among the gases released in a LOCA for which credit is taken for condenser hold-up and plate-out; (d) asserting that there is a heretofore unidentified alleged deficiency in the current design basis of VY – a claim surely outside the scope of a license renewal proceeding; and (e) asserting (again, for the first time and without factual basis) that "a large-scale failure of the steam condenser boundary would result in an increase in accident consequences."

NEC's last argument in support of reconsideration of the dismissal of Contention 5 is that the Board accepted Entergy's argument that the condenser could never break at a time when it was needed to perform its accident mitigation function. Motion at 5. In reality, what the Board found was that NEC had totally failed to raise a litigable claim regarding the condenser's ability to perform its post-accident function. LBP-06-20 at 78. It is not Entergy's arguments that are at fault, but NEC's failure to provide any support for its contention demonstrating a genuine material dispute.

III. CONCLUSION

The compelling circumstances that must exist for entertaining a motion for reconsideration are conspicuously absent from NEC's motion. The Board's rulings for which NEC seeks re-examination were correct and the claims raised by NEC in its Motion are both new (and consequently inappropriate) and erroneous. Therefore, the Motion should be denied.

Respectfully submitted,



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Dated: October 12, 2006

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Entergy's Response to New England Coalition's Motion for Reconsideration of Board Rulings on NEC Contentions 1 and 5" dated October 12, 2006, were served on the persons listed below by deposit in the U.S. Mail, first class, postage prepaid, or with respect to Judge Elleman by overnight mail, and where indicated by an asterisk by electronic mail, this 12th day October, 2006.

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