RAS 12394

October 12, 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.	)	ASLBP No. 06-849-03-LR
	)	
(Vermont Yankee Nuclear Power Station)	)	

ENTERGY'S ANSWER TO VERMONT DEPARTMENT OF PUBLIC SERVICE MOTION FOR LEAVE TO FILE FOR RECONSIDERATION OF THE LICENSING BOARD'S MEMORANDUM AND ORDER OF SEPTEMBER 22, 2006

Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (hereinafter collectively referred to as "Entergy") hereby answer and oppose the Vermont Department of Public Service ("DPS") "Motion for Leave to File for Reconsideration of Memorandum and Order (9/22/06)" dated October 2, 2006 ("Motion"), in which DPS seeks leave of the Atomic Safety and Licensing Board ("Licensing Board" or "Board") to file a motion for reconsideration of 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. ___ (Sept. 22, 2006) ("LBP-06-20"). The Motion asks that the Board reconsider under 10 C.F.R. § 2.323(e) of the Commission's rules its dismissal of DPS Contention 2, which alleged that Entergy's Environmental Report ("ER") failed to provide "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"). The Motion should be denied because DPS has established no compelling circumstances as required by 10 C.F.R. § 2.323(e), raises arguments and theses not previously articulated by DPS, and makes arguments that lack merit.

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I. PROCEDURAL BACKGROUND

On May 26, 2006, the DPS filed a "Notice of Intention to Participate and Petition to Intervene" ("Petition") in this licensing proceeding. On June 22, 2006, Entergy and the NRC Staff filed Answers to the DPS Petition.[1] On June 30, 2006, DPS filed its Reply to Entergy's and the Staff's Answers.[2]

One of the contentions submitted by DPS, Contention 2, asserted:

> The Application must be denied because Applicant has 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 GEIS and perhaps indefinitely and thus has failed to provide the necessary environmental information with regard to onsite land use in accordance with 10 C.F.R. § 54.23 such that the Commission cannot find that the applicable requirements of Subpart A of 10 C.F.R. Part 50 have been satisfied (10 C.F.R. § 54.29(b)).

Petition at 12-13. The Board ruled that DPS Contention 2 is not admissible because it sought to raise a Category 1 issue that is not litigable under 10 C.F.R. § 2.335 and constituted an impermissible attack on the NRC's Waste Confidence Rule. LBP-06-20, slip op. at 40-41. DPS's Motion asks the Board to reconsider this ruling.

II. RECONSIDERATION REQUIRES COMPELLING CIRCUMSTANCES

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

> Motions for reconsideration may not be filed except upon leave of the presiding officer or the 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.

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

[2] Vermont Department of Public Service Reply to Answers of Applicant and NRC Staff to Notice of Intention to Participate and Petition to Intervene (June 30, 2006) ("DPS Reply"). On July 6, 2006, the DPS filed a corrected copy of its Reply. The citations in this Answer will be to the corrected copy of the Reply.

10 C.F.R. § 2.323(e). This "compelling circumstances" standard "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 in compelling circumstances 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'" that could and should have been presented previously. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), LBP-04-22, 60 N.R.C. 379, 380-81, aff'd, CLI-04-36, 60 N.R.C. 631, 641 (2004) (footnotes omitted).

III. THE MOTION FAILS TO ESTABLISH COMPELLING CIRCUMSTANCES

DPS fails to meet the compelling circumstances standard of 10 C.F.R. § 2.323(e). Indeed, DPS makes no effort whatsoever to show that the Motion complies with the requirements of the regulation. Rather, under the guise of arguing that the Board failed to "address the issue presented by DPS Contention 2" (Motion at 2), DPS completely recasts Contention 2 to raise an entirely "new thesis" nowhere to be found in the Contention. Furthermore, DPS's new thesis would completely rewrite 10 C.F.R. § 51.53(c)(3)(iv) of the regulations – altering its fundamental intent and scope – and would additionally authorize unparalleled discovery unrelated to any issue litigable in this licensing proceeding, contrary to long standing Commission precedent.

In its Motion, DPS claims that it had previously "repeatedly indicated" that Contention 2 is "limited to requiring the Applicant to produce information . . . that is 'relevant to' (10 C.F.R. § 2.336(a)(2)(i)) the issue of whether 'new and significant' information exists" and that it does not seek "to litigate whether information produced by Entergy is 'new and significant.'" Motion at 2-3 (emphasis added). This claim, however, misstates the clear premise and scope of Contention

2 as articulated by DPS in its Petition. The Contention clearly asserts that Entergy was required to identify and analyze in the ER specific information set forth in the Contention as "new and significant" information, and that this information, if properly evaluated, would change the GEIS conclusions regarding onsite land use impacts from SMALL to "a MODERATE or LARGE impact."[3] Further, the Petition specifically requests "adjudication" of these issues "in the instant proceeding,"[4] a point clearly reiterated in DPS's Reply,[5] and Contention 2 itself expressly asserts that the "Application must be denied" for "failing to include" and evaluate this asserted "new and significant information."[6] Thus, Contention 2 does not focus on, and is not limited to, the production of relevant documents as DPS now suggests. Rather, Contention 2 clearly seeks the inclusion of specific information in the ER (and subsequently the EIS) as "new and significant" information that would alter the NEPA environmental analysis. Accordingly, DPS's claim (Motion at 4) that upon "[h]aving produced all the information 'relevant to the contention'" Entergy would "moot the contention" completely rewrites Contention 2.

Moreover, DPS's rescripted Contention 2 would completely rewrite 10 C.F.R. § 51.53(c)(3)(iv). This provision only requires the ER to "contain any new and significant information regarding the environmental impacts of license renewal of which the applicant is aware." (Emphasis added). It does not require an applicant to provide in the ER all "relevant" information so that some other party can determine whether anything is new and significant. Indeed, that

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[3] "There is new and significant information which the Applicant should have identified and described in its Environmental Report. If this information had been provided and evaluated properly, it would have changed the GEIS conclusions regarding onsite land use impacts." Petition at 15 (emphasis added).

[4] Petition at 31.

[5] DPS Reply at 36-37 ("If Applicant . . . chooses to deny that there is any new and significant information, as it does here, then there is clear issue of disputed fact that the Board is required to resolve") (emphasis added) (citation omitted). See also id. at 39 ("whether there is new and significant information that would warrant modification of the environmental impacts . . . is an appropriate issue for resolution in this proceeding").

[6] Petition at 12.

would be an impossible task and the NRC has established other mechanisms to serve that function (e.g., allowing the members of the public to provide comments and to bring to the NRC's attention any information that they believe is new and significant). Nor does the regulation require an applicant to produce documents relevant to an asserted claim of new and significant information. 10 C.F.R. § 2.336(a)(2), which DPS cites (Motion at 3), applies only to admitted contentions. Indeed, Contention 2 as rescripted by DPS is nothing more than a discovery fishing expedition of the type the Commission has repeatedly given short shrift.[7] The Motion provides no basis for such unprecedented discovery unrelated to any admitted contention.

DPS's claim that such unprecedented discovery is necessary here to avoid "the anomalous result" of "creating an obligation . . . which is unenforceable" (Motion at 4) is meritless. No such anomalous result attains here because recognized mechanisms exist to enforce the obligation. Foremost, DPS could have sought to enforce this requirement by filing a petition for waiver demonstrating the existence of new and significant information as allowed under the Commission's rules. As the Licensing Board held, this is the approach contemplated by the Commission. It is the approach that balances the NRC's interest in finality against the need for supplementation in appropriate circumstances. DPS may also bring any alleged new and significant information to the NRC's attention as a comment on the Draft Environmental Impact Statement, which the NRC Staff would then consider.

Furthermore, it is well established and required by NRC regulation that "[i]nformation provided to the Commission by an applicant for a license" must be "complete and accurate in all

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[7] See, e.g., Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 N.R.C. 325, 352 (1998) (NRC rules preclude "using discovery . . . as a fishing expedition which might produce relevant supporting facts"); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-88-25, 28 N.R.C. 394, 396 (1988) (the use of "discovery" as "a fishing expedition to uncover possible problems . . . is impermissible under NRC regulations and precedents").

material respects." 10 C.F.R. § 50.9(a). Failure of an applicant to do so can result in significant fines and sanctions.[8] Additionally, (a) it is not to be assumed that an applicant or licensee would act contrary to NRC requirements,[9] as presumed by DPS throughout its Motion, and (b) an applicant's license renewal application is subject to extensive review and audit by the NRC Staff. In this latter respect, the Staff can also consider whether there is new and significant information that might mandate requesting that the Commission waive or suspend a rule.

Thus, DPS's claim that an applicant's obligation to provide new and significant information of which it is aware is unenforceable is without merit. The fact that a potential intervenor must obtain a waiver to litigate new and significant information would alter Category 1 issues does not make the obligation unenforceable.

Second, as correctly held by the Board, the inability of a potential intervenor to litigate new and significant information related to Category 1 issues stems from the fact that the Commission's determinations regarding Category 1 issues are embodied in Commission regulations. Thus, as correctly recognized by the Board, in order to consider asserted new and significant information, the regulations must either be amended or their application waived for the proceeding in question.[10] The Commission has well established mechanisms by which a potential intervenor

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[8] See, e.g., Virginia Electric & Power Co. (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 N.R.C. 480 (1976), aff'd, 571 F.2d 1289 (4th Cir. 1978); 52 Fed. Reg. 49,362 (Dec. 1987) (Completeness and Accuracy of Information; Final Rule and Statement of Policy).

[9] See, e.g., Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-99-25, 50 N.R.C. 25, 34 (1999) citing General Public Utilities Corp. (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 N.R.C. 143, 164 (1996).

[10] The Board did suggest that the inability to adjudicate in a licensing proceeding new and significant information related to a Category 1 issue, based on the Commission's holding in Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 N.R.C. 3, 10 (2004), "seems inconsistent" with the Commission's statement in Turkey Point that adjudicatory hearings in license renewal proceedings share the same scope of issues as the NRC's Staff's review. LBP-06-20, slip op. at 26-27 n. 32. There is, however, no inconsistency. As reflected in SECY-93-032, 10 C.F.R. Part 51 Rulemaking on Environmental Review for Renewal of Nuclear Power Plant Operating Licenses (Feb. 9, 1993) at 3-4, should the NRC Staff in its review determine that new and significant information exists with respect to a Category 1 issue, the Staff is to go to the Commission "to

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can seek waiver of a rule (10 C.F.R. § 2.335) or petition for rulemaking (10 C.F.R. § 2.802). DPS's claimed need for extensive, unprecedented discovery to invoke these mechanisms (e.g., Motion at 3) would again completely rewrite the Commission's regulations. Neither 10 C.F.R. § 2.335 nor 10 C.F.R. § 2.802 provide for the unparalleled discovery sought by DPS.

Third, DPS's asserted need for unheralded discovery is a red herring. As set forth above, Contention 2 does not seek to discover information, as now claimed by DPS, but instead seeks to include clearly identified specific information in the ER (and subsequently the EIS) as "new and significant" information that DPS claims would alter the NEPA environmental analysis. The information relied upon by DPS is laid out in Contention 2, and DPS's asserted need for discovery is nothing more than an after the fact attempt to avoid the clearly correct ruling of the Board in LBP-06-20.

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seek Commission approval to either suspend the application of the rule . . . or to delay granting the renewal application . . . until the rule can be amended." Thus, the scope of the Staff's review function with respect to Category 1 issues is the same as that for adjudicatory hearings. In neither case can new and significant information be considered and incorporated into the EIS absent prior Commission approval because in both instances the generic determination embodied in the Commission's rules must be waived or amended in order to do so. In contrast, SECY-93-032 provides that for unbounded Category 2 and Category 3 issues (now Category 2), the Staff can directly address new and significant information in the EIS without first seeking Commission approval. Id. at 3.

IV. CONCLUSION

The compelling circumstances that must exist for entertaining a motion for reconsideration are absent from DPS's Motion. The Board's ruling for which DPS requests re-examination was correct and the claims raised by DPS 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 Answer to Vermont Department of Public Service Motion for Leave to File for Reconsideration of the Licensing Board's Memorandum and Order of September 22, 2006" dated October 12, 2006, were served on the persons listed below by deposit in the U.S. Mail, first class, postage prepaid, and where indicated by an asterisk by electronic mail, this 12th day of October, 2006.

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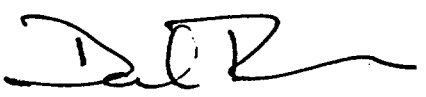

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