

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 12440

ATOMIC SAFETY AND LICENSING BOARD

DOCKETED 10/30/06

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Before Administrative Judges:

Alex S. Karlin, Chairman
Dr. Richard E. Wardwell
Dr. Thomas S. Elleman

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

October 30, 2006

MEMORANDUM AND ORDER

(Denying New England Coalition's Motion to Amend Contention 1
and Motion For Reconsideration of Contention 1)

Before the Licensing Board is a motion by the New England Coalition (NEC), a non-profit organization that is a petitioner herein, requesting the admission of a late contention or, alternatively, requesting leave to amend NEC Contention 1.¹ In addition, NEC has filed a motion for reconsideration of part of our admission of NEC original Contention 1.² For the reasons set forth below, these motions are denied.

I. BACKGROUND

This proceeding concerns the application of Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (collectively, Entergy), to renew the operating license for the Vermont Yankee Nuclear Power Station in Windham County, Vermont.³ Entergy seeks to

¹ NEC's Late Contention or, Alternatively, Request for Leave to Amend or File a New Contention (Aug. 7, 2006) [NEC Motion to Amend].

² [NEC]'s Motion for Leave to File Motion for Reconsideration (Oct. 2, 2006).

³ Vermont Yankee Nuclear Power Station License Renewal Application (Jan. 25, 2006), ADAMS Accession No. ML060300085 [Application].

extend its license for an additional twenty years beyond the current expiration date of March 21, 2012. On March 27, 2006, the Commission published a notice of docketing of the Entergy renewal application and a notice of opportunity to request a hearing on the application. 71 Fed. Reg. 15,220 (Mar. 27, 2006). Several entities, including NEC, filed timely hearing requests challenging Entergy's license renewal and asking to be admitted as parties to any proceeding conducted on the application. Before we could rule on the original hearing requests and petitions, NEC filed its motion to amend its Contention 1.

On September 22, 2006, the Board ruled, inter alia, that NEC had standing to challenge Entergy's license renewal application and had presented four contentions that met the admissibility criteria of 10 C.F.R. § 2.309(f)(1). Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station) LBP-06-20, 64 NRC ___ (2006). Specifically, we admitted NEC's original Contention 1⁴ and reserved ruling on NEC's instant motion to amend it. Id. at 57 n.59.

For purposes of this ruling, the following pleadings are most relevant. First, there were the pleadings relevant to the admission of NEC's original Contention 1. On May 26, 2006, NEC filed its hearing request and petition to intervene, including its original Contention 1.⁵ On June 22, 2006, Entergy and the NRC Staff filed their respective answers to the NEC Petition.⁶ On June 29, 2006, NEC filed its reply to the Entergy and NRC Staff answers,⁷ and on July 10,

⁴ Judge Wardwell dissented from the majority's opinion to admit this contention.

⁵ Petition for Leave to Intervene, Request for Hearing, and Contentions (May 26, 2006) [NEC Petition].

⁶ Entergy's Answer to [NEC's] Petition for Leave to Intervene, Request for Hearing, and Contentions (June 22, 2006) [Entergy's Answer to Petition]; NRC Staff Answer to Request for Hearing of [NEC] (June 22, 2006) [Staff Answer to Petition].

⁷ [NEC]'s Reply to Entergy and NRC Staff Answers to Petition for Leave to Intervene, Request for Hearing, and Contentions (June 29, 2006) [NEC's Original Reply].

2006, Entergy moved to strike portions of the NEC reply.⁸

While the admissibility of NEC's original Contention 1 was still pending, NEC filed its instant motion to amend. NEC characterized its pleading as a request, pursuant to 10 C.F.R. § 2.309(c) and (f)(2), respectively, either for the admission of a late contention, or alternatively for leave to amend Contention 1 or to file a new contention. NEC Motion to Amend at 1. NEC stated its "late, amended, or new" contention as follows: "Entergy's environmental report does not sufficiently assess the impacts of increased thermal discharges over the requested 20-year license extension." Id. at 1-2.

NEC stated that the basis for this amended contention was Entergy's July 28, 2006, amendment to its environmental report (Amendment 6) wherein Entergy references a National Pollutant Discharge Elimination System (NPDES) permit issued to the Vermont Yankee facility by the State of Vermont on March 30, 2006. Id. at 2. NEC alleged that in Amendment 6 Entergy "claims that the NPDES permit amendment is a Clean Water Act (CWA) § 316 variance or determination and fulfills Entergy's obligations under 10 C.F.R. § 51.53(c)(3)(A) [sic]." Id. NEC asserted that there were numerous problems with Entergy's position, including that the NPDES permit had expired, that it is not a "complete" section 316 determination, and that further study of the thermal impacts was required. Id. at 2-4. NEC added, as a "further basis" for admitting the amended contention, the fact that "Entergy's amended environmental report makes no mention of any effort to seek and obtain a [CWA] § 401 [water quality] certification." Id. at 5. NEC argued that "Entergy's reliance on its amended NPDES permit to meet NEPA obligations" and "the fact that Entergy is characterizing the NPDES permit amendments as a CWA § 316 variance or determination" constitutes "new information" that was "not previously available," thus making the new or amended contention timely and acceptable

⁸ Entergy's Motion to Strike Portions of [NEC]'s Reply (July 10, 2006) [Entergy Motion to Strike].

under 10 C.F.R. § 2.309(f)(2). Id. at 7. Alternatively, NEC argued that this new information “constitutes good cause for a late-filed contention” under 10 C.F.R. § 2.309(c)(1)(i). Id. at 8. NEC’s motion attached a March 31, 2006, Fact Sheet issued by the Agency of Natural Resources, Department of Environmental Conservation of the State of Vermont (VANR) related to the NPDES permit, and a March 17, 2006, letter from the U.S. Fish and Wildlife Service to VANR. Id. at 3-4.

On August 17, 2006, Entergy filed its answer to NEC’s motion, arguing that it is untimely under 10 C.F.R. § 2.309(f)(2), and that it should not be admitted under the eight-factor balancing test of 10 C.F.R. § 2.309(f)(c)(1).⁹ Entergy asserted that NEC’s claim that Amendment 6 to the environmental report constituted new information was “demonstrably wrong” because all of the facts, including the existence of the new NPDES permit, the fact that the State of Vermont had certain questions about the thermal impacts, and the fact that Entergy was relying on the NPDES permit as a CWA § 316 variance or determination satisfying 10 C.F.R. § 51.53(c)(3)(ii)(B), were known to NEC at least as early as June 22, 2006, when Entergy filed its original answer. Id. at 6. As to NEC’s attempt to add the CWA § 401 certification basis to the contention, Entergy responded that NEC had tried the same tack in its original reply (which Entergy had moved to strike) and that “[w]hether a 401 certification is required is . . . simply irrelevant to NEC’s contention that Entergy failed to assess impacts to water quality.” Id. at 7. Entergy also raised a number of arguments going to the merits of the proposed amended contention. Id. at 9-17.

The NRC Staff agreed with Entergy.¹⁰ For the same reasons as cited by Entergy (e.g.,

⁹ Entergy’s Answer to [NEC]’s Late Contention (Aug. 17, 2006) at 5, 8-9 [Entergy Answer].

¹⁰ NRC Staff Answer Opposing NEC’s Late Contention, or Alternatively, Request for Leave to Amend or File a New Contention (Aug. 17, 2006) at 1 [Staff Answer].

the availability of the NPDES permit on March 30, 2006, and the fact that Entergy's June 22, 2006, original answer indicated that Entergy was relying on the NPDES permit to satisfy 10 C.F.R. § 51.53(c)(3)(ii)(B)), the Staff argued that Entergy's reliance on the NPDES permit in its July 28, 2006, amended environmental report was not new information and thus that NEC's amended contention is not timely under 10 C.F.R. § 2.309(f)(2). Id. at 8-11. Further, the Staff concluded that NEC had not demonstrated that the contention should be admitted as a nontimely filing under § 2.309(c)(1). Id. at 11-12. The Staff also raised a number of arguments that appear to go to the merits of the proposed amended contention. Id. at 12-17.

On August 25, 2006, NEC filed its reply, arguing, inter alia, that permission to amend should be liberally granted and that the amendment would not delay the proceeding.¹¹ Finally, on August 29, 2006, NEC filed a motion to file supplemental and new authority, attaching as Exhibit A a copy of an August 28, 2006, ruling by the Vermont Environmental Court granting a stay of the March 30, 2006, NPDES permit.¹²

II. ANALYSIS

Our analysis of NEC's motion to amend starts with the observation that NEC's original Contention 1, as admitted by this Board on September 22, 2006, is essentially identical to the wording of the new/amended contention that was proposed by NEC on August 7, 2006. In the first sentence of our discussion of NEC original Contention 1 we summarized it as follows:

NEC asserts that Entergy's environmental report (ER) failed to 'sufficiently assess[]' the environmental impacts of the license renewal, specifically the impacts of increased thermal discharges into the Connecticut River over the twenty-year license extension period.

¹¹ [NEC]'s Reply to Entergy and NRC Staff Answers to NEC's Late Contention, or Alternatively, Request for Leave to Amend or File a New Contention (Aug. 25, 2006) at 3-4 [NEC Reply].

¹² [NEC]'s Motion to File Supplemental and New Authority re: NEC's Contention 1 and Request for Leave to Amend Contention 1 or File a New Contention (Aug. 29, 2006).

Vermont Yankee, LBP-06-20, 64 NRC at ___ (slip op. at 47) (citing NEC Petition at 10, 13).

(Although the title to that section of the NEC Petition was more narrowly stated, the above-stated quote from our ruling is taken from first sentence of the NEC Petition, and is the contention that we admitted on September 22, 2006. Id. at 52.) The originally admitted contention is virtually identical to NEC's "late, new, amended" contention, which reads:

"Energy's environmental report does not sufficiently assess the impacts of increased thermal discharges over the requested 20-year license extension." NEC Motion to Amend at 1-2. We see no difference between NEC Contention 1, as admitted, and the proposed amended contention and therefore conclude that NEC's motion to amend its contention is moot.

Although our mootness ruling is dispositive of the matter, we believe that it is also appropriate to address briefly the two bases discussed in NEC's Motion to Amend. The first is NEC's challenge to Entergy's claim that the NPDES permit amendment is a CWA § 316(a) variance or determination that is dispositive of Entergy's obligations (with reference to assessing the thermal impacts of the proposed renewal) under 10 C.F.R. Part 51. The second is NEC's complaint that Amendment 6 to Entergy's environmental report makes no mention of any effort to seek and obtain a CWA § 401 water quality certification.

Before addressing these two bases, we note a fundamental point: it is contentions, not their bases, that are admitted or denied under 10 C.F.R. § 2.309. A petitioner need only submit "one admissible contention." 10 C.F.R. § 2.309(a) (emphasis added). The regulations state that "[f]or each contention" the petition must meet six criteria. 10 C.F.R. § 2.309(f)(1) (emphasis added). And although the petitioner must provide "a brief explanation of the basis for the contention," 10 C.F.R. § 2.309(f)(1)(ii), and the "reach of a contention necessarily hinges upon its terms coupled with its stated bases," Public Serv. Co. Of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988), aff'd sub nom. Massachusetts v.

NRC, 924 F.2d 311 (D.C. Cir. 1991), the contention pleading requirements do not require a petitioner “to provide an exhaustive list of possible bases, but simply to provide sufficient alleged factual or legal bases to support the contention.” Louisiana Energy Serv., L.P. (National Enrichment Facility), CLI-04-35, 60 NRC 619, 623 (2004). Thus, there should be no such thing as a motion for leave to file a “late, amended, or new” basis. In short, contentions, not bases, are admitted.

Turning to the two bases proffered in support of NEC’s amended (and, as we have noted, already admitted) contention, we conclude that the first basis was part of the original contention and provides nothing new. Our September 22, 2006, ruling recognizes that NEC’s original Contention 1 involves questions such as the status of Entergy’s NPDES permit, whether the NPDES is a CWA § 316 variance or determination, and, if so, whether such a variance fully satisfies an applicant’s duties under 10 C.F.R. Part 51. Vermont Yankee, LBP-06-20, 64 NRC at ___ (slip op. at 49-50, 55-56). Without reiterating or expanding upon our earlier ruling, it is sufficient to note that the NPDES CWA § 316 basis proffered in the NEC Motion to Amend is already part of the “brief explanation” underlying NEC Contention 1.

With regard to the second basis suggested in the NEC Motion to Amend – the alleged need for Entergy to obtain a CWA § 401 water quality certification – this also is not entirely new. In our September 22, 2006, ruling we rejected this CWA § 401 argument, not on the merits, but because NEC first raised it in its reply brief, thus not giving Entergy a fair opportunity to respond. Id. at 57. NEC filed its “amended” contention 1 on August 7, 2006, and Entergy and the Staff now complain the CWA § 401 arguments are too late. We do not agree.

More to the point, Entergy argues that the need for a CWA § 401 certification is “simply irrelevant to NEC’s contention that Entergy failed to assess impacts to water quality.” Entergy Answer at 7. Here, we do agree with Entergy. A CWA § 401 certification is a document issued

by the State certifying that a proposed discharge satisfies the State's water quality standards and criteria. But a CWA § 401 certification is simply an independent statutory requirement, and neither NEPA nor 10 C.F.R. Part 51 incorporates or requires it. Meanwhile, NEC Contention 1 focuses on the alleged insufficiency of Entergy's environmental report in assessing the impacts of increased thermal discharges over the proposed 20-year license extension, and we fail to see how the existence, or not, of a certification from the State is relevant to the adequacy of Entergy's environmental assessment.

In sum, we deny NEC's Motion to Amend on the ground that it is moot because the proposed "late, amended, or new" contention has already been admitted as NEC original Contention 1.¹³ Neither basis proffered in the Motion to Amend is new. The first, dealing with the status of the NPDES permit, CWA § 316(a), as satisfying the Part 51 requirements, is already accepted a part of the arguments to be considered under NEC Contention 1. The second, the existence of a CWA § 401 certification, is not relevant.¹⁴

III. NEC MOTION FOR RECONSIDERATION OF CONTENTION 1

On October 2, 2006, NEC filed a motion for leave to file a motion for reconsideration regarding, inter alia, our September 22, 2006, ruling declining to consider NEC's Contention 1 argument that Entergy is required to obtain a CWA § 401 certification.¹⁵ Entergy and the NRC Staff have responded to this motion.¹⁶ Even assuming *arguendo* that NEC's motion for

¹³ On October 10, 2006, Entergy filed a petition for "interlocutory review" of our decision admitting NEC's original Contention 1. Entergy's Petition for Interlocutory Review of LBP-06-20 Admitting [NEC]'s Contention 1 (Oct. 10, 2006).

¹⁴ Although NEC's Motion to Amend makes some cryptic closing remarks about NEC original contention 2 related to "environmentally assisted metal fatigue," in the end NEC "finds it unnecessary to amend Contention 2" and accordingly, we take no action with reference to it.

¹⁵ [NEC]'s Motion for Leave to File Motion for Reconsideration (Oct. 2, 2006).

¹⁶ Entergy's Answer to [NEC]'s Motion for Reconsideration of Board Rulings on NEC Contentions 1 and 5 (Oct. 12, 2006); NRC Staff Response to [NEC]'s Motion for Leave to File Motion for Reconsideration (Oct. 13, 2006).

reconsideration satisfied the other criteria of 10 C.F.R. § 2.323(e), for the reasons stated above we conclude that the CWA § 401 certification issue has not been shown to be relevant.

Accordingly, we deny the portion of NEC's motion for reconsideration concerning NEC original Contention 1.¹⁷

IV. CONCLUSION

For the reasons set forth above, NEC's motion requesting the admission of a late contention or alternatively, requesting leave to amend NEC Contention1 and its motion for reconsideration of part of our admission of NEC original Contention 1 are denied.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD¹⁸

/RA/

Alex S. Karlin, Chairman
ADMINISTRATIVE JUDGE

/RA/

Richard E. Wardwell¹⁹
ADMINISTRATIVE JUDGE

/RA/

Thomas S. Elleman
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 30, 2006

¹⁷ We will be dealing separately with the remainder of NEC's motion for reconsideration as well as the motions for reconsideration filed by Entergy and by the Department of Public Service of the State of Vermont.

¹⁸ Copies of this order were sent this date by Internet e-mail transmission to counsel or a representative for (1) applicant Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.; (2) petitioners Vermont Department of Public Service and the New England Coalition; and (3) the NRC Staff.

¹⁹ While Judge Wardwell dissented on the original decision admitting this contention, he agrees with all the conclusions related to NEC's requests presented herein.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (DENYING NEW ENGLAND COALITION'S MOTION TO AMEND CONTENTION 1 AND MOTION FOR RECONSIDERATION OF CONTENTION 1) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Docket No. 50-271-LR
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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 30th day of October 2006