

RAS 12543

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

DOCKETED 11/17/06

SERVED 11/17/06

Before Administrative Judges:

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

In the Matter of

ENTERGY NUCLEAR VERMONT YANKEE,
L.L.C.,
and
ENTERGY NUCLEAR OPERATIONS, INC.

(Vermont Yankee Nuclear Power Station)

Docket No. 50-271-LR

ASLBP No. 06-849-03-LR

November 17, 2006

INITIAL SCHEDULING ORDER

This proceeding concerns the Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc. (collectively, Entergy) application for a 20-year renewal of their operating license for the Vermont Yankee Nuclear Power Station (Vermont Yankee Station) in Windham County, Vermont. This initial scheduling order, issued pursuant to 10 C.F.R. § 2.332(a), sets forth limits for filing of motions and testimony and time frames for certain other activities in this proceeding.

I. Background

On January 25, 2006, Entergy filed an application pursuant to 10 C.F.R. Part 54 to renew Operating License No. DPR-28 for the Vermont Yankee Station. Entergy seeks to extend the license, which expires on March 21, 2012, for an additional twenty years. On March 27, 2006, the Commission published a notice of opportunity to request a hearing on the

application. 71 Fed. Reg. 15,220 (Mar. 27, 2006). Four entities filed timely hearing requests challenging Entergy's proposed license renewal and asking to be admitted as parties to any proceeding conducted on the application. On September 22, 2006, the Board ruled, inter alia, that two of the petitioners, the New England Coalition (a non-profit environmental group) (NEC) and the Department of Public Service of the State of Vermont (DPS), had standing to challenge Entergy's license renewal application and had each presented at least one contention that met the admissibility criteria of 10 C.F.R. § 2.309(f)(1). Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station) LBP-06-20, 64 NRC __ (2006). The Board granted the NEC and DPS hearing requests and admitted four NEC contentions and one DPS contention. At the same time the Board ruled, based on the information available at the contention admission stage, that the 10 C.F.R. Part 2, Subpart L procedures were appropriate for each of the five contentions. Id.

On October 11, 2006, the Board issued an order scheduling a prehearing conference call, pursuant to 10 C.F.R. §§ 2.329 and 2.332, for the purpose of developing a scheduling order to govern the conduct of this proceeding.¹ The PHCC Order stated that the conference call would cover, inter alia, seventeen items related to the schedule and management of the case. In addition, the PHCC Order instructed the NRC Staff to submit a written estimate of its projected schedule for completion of its safety and environmental evaluation reports. Accordingly, on October 25, 2006, the NRC Staff filed its estimate that the Staff would issue its Final Safety Evaluation Report (FSER) on the proposed license renewal application on August 1, 2007, and its Final Supplemental Environmental Impact Statement (FSEIS) on August 3,

¹ Licensing Board Order (Scheduling Prehearing Conference Call) (Oct. 11, 2006) [PHCC Order].

2007.² The following week, on October 30, 2006, the State of New Hampshire filed a notice of intent to participate in this proceeding as an interested State pursuant to 10 C.F.R. § 2.315(c).³

On November 1, 2006, the Board held the pre-hearing conference call with the parties to hear their positions with regard to the scheduling of the evidentiary hearing in this matter. The parties stated their views regarding the seventeen items listed in the PHCC Order, as well as their views on certain other matters that arose. Based on that input, the NRC Staff's projected schedule, and the Board's analysis of the regulations and the nature and circumstances of this case, the Board now issues this initial scheduling order.

II. Schedule

In addition to the general deadlines and time frames applicable to Subpart L proceedings pursuant to 10 C.F.R. Part 2, the Board establishes the following initial schedule for this matter.

1. Updating of Mandatory Disclosures and Hearing File.⁴ Pursuant to 10 C.F.R. § 2.336(d), the parties⁵ and NRC Staff have a duty to update their mandatory disclosures. Likewise, 10 C.F.R. § 2.1203(c) requires the NRC Staff to update the hearing file. The parties and NRC Staff shall update these mandatory disclosures and hearing file in accordance with the following schedule.

² NRC Staff Estimate of Projected Schedule for Completion of Safety and Environmental Review (Oct. 25, 2006) [NRC Staff Estimate].

³ State of New Hampshire's Notice of Intent to Participate as Interested State (Oct. 30, 2006) [New Hampshire Notice]. By a separate order issued today, the State of New Hampshire will be participating as an interested State.

⁴ Except where otherwise specified herein, the term "mandatory disclosures" includes the witness lists and privilege logs required under 10 C.F.R. § 2.336.

⁵ Pursuant to 10 C.F.R. § 2.1202(b)(2), the NRC Staff notified the Board that it will participate as a party on all admitted contentions. Letter from Steven C. Hamrick, Counsel for NRC Staff (Oct. 2, 2006).

- A. Commencing on December 7, 2006, the parties shall update the mandatory disclosures, and the NRC Staff shall update the hearing file.⁶ Thereafter, this shall be done monthly, on the first Thursday of each month.
 - B. The NRC Staff shall notify the Board on the date(s) that it makes a copy of the FSEIR and FSEIS available to the parties. Fourteen (14) days after the Staff notice for the latter of the FSEIR and FSEIS (the Staff's Second Notice), the parties and NRC Staff shall update the mandatory disclosures and hearing file, and shall continue to do so bi-weekly. This shall be in lieu of the monthly updating specified in the preceding paragraph.
 - C. The parties shall file their final list of witnesses ten (10) days after the Staff's Second Notice.
 - D. The duty to update mandatory disclosures and the hearing file shall terminate at the close of the evidentiary hearing.
2. Monthly Status Report. Commencing on December 7, 2006, the NRC Staff shall submit a short report specifying its best estimates of the dates when it expects to issue the draft and final version of the SER and SEIS, and the dates when it understands that the Advisory Committee on Reactor Safety and its relevant subcommittee are expecting to issue their respective letters or reports concerning Entergy's proposed license renewal. Thereafter, the Staff shall update this status report on the first Thursday of each month.

⁶ Except for the privilege logs, the parties and NRC Staff need not and should not submit the mandatory disclosures and hearing file to the Board.

3. Proposed Protective Order, Privilege Logs, Privilege Disputes.⁷

- A. On or before December 8, 2006, the parties shall confer with one another for the purpose of discussing and developing a joint proposed protective order and nondisclosure agreement dealing with the handling (and redaction) of documents that are claimed to contain privileged, proprietary or otherwise protected information.
- B. On or before December 20, 2006, the parties and NRC Staff shall submit to the Board either (i) a unanimously agreed proposed protective order and nondisclosure agreement, or (ii) individually or jointly proposed protective orders and nondisclosure agreements. In either event, the proposals may be accompanied by a short brief, not to exceed five pages, explaining the proposal and submission.
- C. If, and only if, the parties and NRC Staff are unable to submit a unanimously agreed proposed protective order and nondisclosure agreement, then, on or before January 4, 2007, the parties and NRC Staff may each file a single brief, responding to any points previously raised by the other parties.
- D. On or before January 16, 2007, the parties and NRC Staff shall file any motions to compel or challenges regarding any of the privilege claims or privilege logs filed herein prior to that date (including the updates to the privilege logs filed in December and January). Thereafter, any such motion to compel or challenge

⁷ 10 C.F.R. § 2.366(a)(3) and (b)(5) oblige each party and the NRC Staff to provide a privilege log covering all documents for which a claim of privilege or protected status is being made. On October 20, 2006, the Board granted a joint motion by all parties and the NRC Staff to waive the requirement that the privilege logs include certain documents claimed to be covered by the attorney-client communication privilege and the attorney work-product privilege. Order Granting Joint Motion on Privilege Log and Disclosure (Oct. 20, 2006). Privilege logs are required for documents for which any other claim of privilege or protected status is being made, including any documents that may be covered by any proposed protective order.

shall be filed within ten (10) days after service of the privilege log, in accordance with 10 C.F.R. § 2.323(a).⁸

4. Requests Based on Disclosures of Eyewitnesses. Any request, pursuant to 10 C.F.R. § 2.310(d), that a contention or contested matter be handled pursuant to Subpart G procedures based on a challenge to the credibility of an eyewitness, shall be filed as follows:

- A. For witnesses previously listed or identified by a party pursuant to 10 C.F.R. § 2.336, within twenty (20) days of the issuance of this order; and
- B. For additional witnesses subsequently listed or identified by an opposing party, within twenty (20) days of such listing or identification.

5. Additional Contentions.

- A. Consolidated Briefing. If a party seeks to file a motion or request for leave to file a new or amended, timely or untimely, contention, then it shall file such motion and the substance of the proposed contention simultaneously. The pleading shall include a motion for leave to file a timely new or amended contention under 10 C.F.R. §2.309(f)(2), and/or a motion for leave to file an untimely new or amended contention under 10 C.F.R. § 2.309(c), and the support for the proposed new or amended contention showing that it satisfies 10 C.F.R. § 2.309(f)(1). Within twenty-five (25) days after service of the motion and proposed contention, any other party may file an answer, responding to all elements of the motion and contention. Within seven (7) days of service of the

⁸ If they believe that it will facilitate the amicable resolution of privilege claim disputes without the intervention of the Board, the parties and/or NRC Staff may propose a modification to the ten-day rule and/or other dispute resolution mechanisms.

answer, the movant may file a reply.⁹

- B. Timeliness. A motion and proposed contention specified in the preceding paragraph shall be deemed timely under 10 C.F.R. § 2.309(f)(2)(iii), if it is filed within thirty (30) days of the date when the new and material information on which it is based first becomes available. If filed thereafter, the motion and proposed contention shall be deemed nontimely under 10 C.F.R. § 2.309(c).
 - C. Adoption. A notice of adoption of a new or amended contention under 10 C.F.R. § 2.309(f)(3) shall be filed within ten (10) days of the admission of the contention.
 - D. Interested State Notice. The representative of the State of New Hampshire shall, pursuant to 10 C.F.R. § 2.315(c), notify the Board whether it intends to participate in any new or amended contention within ten (10) days of its admission.
6. Motions for Summary Disposition. No motion for summary disposition shall be filed after June 15, 2007.¹⁰ Any answer or opposing motion shall be filed within twenty (20) days after service of the motion. If it appears from the affidavits of a party opposing a motion for summary disposition that the party cannot present by affidavit facts essential to justify the party's opposition, the Board may refuse the application for summary disposition or may order a continuance as may be necessary or just. See Rule 56(f) of the Federal Rules of Civil Procedure.

⁹ This procedure consolidates several steps and eliminates the need for the parties to brief the initial motion for leave to file the additional contention, await a ruling from the Board on the motion for leave to file, and then to brief the proposed new contention (new contention, answer and reply), and await a separate ruling on it.

¹⁰ This date is based upon the Staff's current estimate that it will issue the FSER and FSEIS at the beginning of August 2007.

7. Clarification, Simplification, and Amendment of the Pleadings. During the November 1, 2006, prehearing conference call, the parties and NRC Staff stated that it was their consensus that it is premature to address the issues raised in paragraphs 10 - 13 of the PHCC Order. Tr. at 505-06. These items included (i) the clarification, simplification or specification of the issues, (ii) the necessity or desirability of amending the pleadings, (iii) opportunities to develop stipulations or admissions of fact, and (iv) opportunities for the settlement of issues or contentions. The Board encourages the parties and NRC Staff to continue to consider and pursue such measures and will revisit this issue at a later stage in the proceeding. If, at any time, it appears that stipulations or admissions of fact can narrow or eliminate factual or legal disputes, the parties are encouraged to file motions for leave to request and pursue same.
8. Consultation Prior to Motions. In accordance with 10 C.F.R. § 2.323(b), motions (including requests of any kind) will be rejected if they do not include a certification by the attorney or representative of the movant that, prior to filing the motion or request, he or she has made a “sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion” or request. Although in general the movant has only ten (10) days within which to file its motion under 10 C.F.R. § 2.323(a), the Board believes that in order to be sincere, the effort should not be initiated at the last minute and should be made sufficiently in advance to provide at least some reasonable time for the possible resolution of the matter or issues in question.¹¹ In the case of a motion for summary disposition, the Board suggests that the “sincere effort” should include

¹¹ See Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station) LBP-06-5, 63 NRC 116, 128 (2006). If the initial consultation is initiated at a reasonable time, and the parties believe that all or part of the matter may be resolved amicably if additional time for filing the motion were provided, the parties are encouraged to file a joint motion requesting an extension of time.

informing the opposing party or parties, prior to filing the motion, of the material facts about which the movant believes there is no genuine dispute. Likewise, the opposing party must be prepared to respond very promptly, advising whether it agrees that there is no genuine dispute concerning those facts.

9. Motions for Extension or Modification of Schedule. A motion, opposed or unopposed, for extension of time or for modification of this schedule shall be filed as soon as the movant knows or should have known of the facts, circumstances, or grounds for the motion, and in no event later than 11 AM Eastern Time on the day preceding the applicable deadline. The motion shall inform the Board of the position of the other parties regarding the requested extension. A motion for extension or modification filed after the applicable deadline will be summarily denied unless it is accompanied by a sworn declaration or affidavit from the counsel or representative of the party that describes very extraordinary circumstances explaining why the motion was not filed earlier, and otherwise justifies the requested extension. Opposed motions for extension or modification shall address the factors specified in 10 C.F.R. § 2.332(b).
10. Evidentiary Hearing Filings.
 - A. Declaration of Position. Fifteen (15) days after Staff's Second Notice, the NRC Staff is requested, with respect to each contention, to file a brief declaration as whether it currently supports the position of the Intervenor(s) or the Applicant. Thereafter, the NRC Staff submissions on each contention shall be filed at the same time as those of the party it supports.¹² If the NRC Staff declines to

¹² Pursuant to 10 C.F.R. § 2.315(c), the State of New Hampshire, as an interested State, is not required to take a position with respect to an issue or contention. While proposing or adopting a contention might jeopardize the State's position as an interested State, see Louisiana Energy Services, L.P. (National Enrichment Facility) CLI-04-35, 60 NRC 619, 626-27 (2004), taking a position on an issue or contention does not. If the State of New Hampshire declines to take a position, its filings under paragraph 10 shall be made within the deadlines applicable to the Applicant.

declare its position, its filings under paragraph 10 shall be made within the deadlines applicable to the Applicant.

B. Intervenor's Initial Statements of Position, Testimony, Affidavits, and Exhibits.

Sixty (60) days after the Staff's Second Notice, each Intervenor shall file its initial written statements of position, written testimony with supporting affidavits, and exhibits, on a contention-by-contention basis, pursuant to 10 C.F.R. § 2.1207(a)(1). The initial written statement should be in the nature of a trial brief that provides a precise road map of the party's case, setting out affirmative arguments and applicable legal standards, identifying witnesses and evidence, and specifying the purpose of witnesses and evidence (i.e., stating with particularity how the witness, exhibit, or evidence supports a factual or legal position). The written testimony shall be under oath or by an affidavit so that it is suitable for being received into evidence directly, in exhibit form, in accordance with 10 C.F.R. § 2.1207(b)(2). The exhibits shall include all documents that the party or its witnesses, refer to, use, or are relying upon for their statements or position.

C. Applicant's Initial Statements of Position, Testimony, Affidavits, and Exhibits. No

later than ten (10) days after service of the materials submitted under paragraph 10.B, the Applicant shall file its initial written statements of position, written testimony with supporting affidavits, and exhibits, on a contention-by-contention basis, pursuant to 10 C.F.R. § 2.1207(a)(1). The initial written statement should be in the nature of a trial brief that provides a precise road map of the party's case, setting out affirmative arguments and applicable legal standards, identifying witnesses and evidence, and specifying the purpose of witnesses and evidence (i.e., stating with particularity how the witness, exhibit, or evidence

supports a factual or legal position). The written testimony shall be under oath or by an affidavit so that it is suitable for being received into evidence directly, in exhibit form, in accordance with 10 C.F.R. § 2.1207(b)(2). The exhibits shall include all documents that the party or its witnesses, refer to, use, or are relying upon for their statements or position.

- D. Rebuttal Statements of Position, Testimony, Affidavits, and Exhibits. No later than twenty (20) days after service of the materials submitted under paragraph 10.C, parties, shall file their written responses, rebuttal testimony with supporting affidavits, and rebuttal exhibits, on a contention-by-contention basis, pursuant to 10 C.F.R. § 2.1207(a)(2). The written response should be in the nature of a response brief that identifies the legal and factual weaknesses in an opponent's position, identifies rebuttal witnesses and evidence, and specifies the precise purpose of rebuttal witnesses and evidence. The rebuttal testimony shall be under oath or by an affidavit so that it is suitable for being received into evidence directly, in exhibit form, in accordance with 10 C.F.R. § 2.1207(b)(2). The exhibits shall include all documents that the party or its witnesses, refer to, use, or are relying upon for their statements or position. Being in the nature of rebuttal, the response, rebuttal testimony and rebuttal exhibits are not to advance any new affirmative claims or arguments that should have been, but were not, included in the party's previously-filed initial written statement.
- E. Motions In Limine. Not later than ten (10) days after service of the materials submitted under paragraph 10.D, parties shall file their motions in limine regarding the materials submitted under paragraphs 10.B through 10.D. Answers shall be filed no later than seven (7) days after service of such motions.

- F. Proposed Direct Examination Questions for Board to Ask. No later than forty (40) days after service of the materials submitted under paragraph 10.D, all parties shall file proposed questions for the Board to consider propounding to the direct or rebuttal witnesses, pursuant to 10 C.F.R. § 2.1207(a)(3)(i) and (ii). The direct examination plan should contain a brief description of the issue or issues which the party contends need further examination, the objective of the examination, and the proposed line of questioning (including specific questions) that may logically lead to achieving the objective. The proposed direct examination questions need not be filed with any other party.
 - G. Motions for Cross-Examination. No later than forty (40) days after service of the materials submitted under paragraph 10.D, all parties shall file any motions or requests to permit that party to conduct cross-examination of a specified witness or witnesses, together with the associated cross-examination plan(s), pursuant to 10 C.F.R. § 2.1204(b). The motion for cross-examination shall be filed with all parties, but the cross-examination plan itself need not be filed with any other party.
 - H. Evidentiary Hearing. The time and date for the evidentiary hearing on each contention will be determined at a later time. Assuming that an oral hearing is held and unless the Board expressly provides otherwise, each party (including the Staff) will, at its own expense and effort, assure that each person for whom it submitted written direct or rebuttal testimony personally attends the oral evidentiary hearing and is available to testify and respond to questions.
11. Interested State Participation. Within thirty (30) days of this order, the State of New Hampshire shall designate an official who is its single representative for this proceeding.

This representative may be represented by counsel.¹³ Pursuant to 42 U.S.C. § 2021(l) and 10 C.F.R. § 2.315(c), the representative, through his or her counsel, shall be permitted to introduce evidence, to interrogate witnesses where cross-examination by the parties is permitted, to advise the Board without being required to take a position with respect to the issue, to file proposed findings in this proceeding, and to petition for review by the Commission.

12. Failure to meet the deadlines and schedules specified herein may result in sanctions, including but not limited to default, under 10 C.F.R. § 2.320.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD¹⁴

/RA/

Alex S. Karlin, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 17, 2006

¹³ Jennifer J. Patterson, Esq. has entered an appearance on behalf of the State of New Hampshire and has filed a pleading designating herself as the appropriate party on whom service may be made. New Hampshire Notice, Attachment 1. As we see it, 10 C.F.R. § 2.315(c) requires more. We need the name of the State Official who is Ms. Patterson's immediate client (e.g., the Attorney General, the Director of the Department of Public Service, etc.) and who is the "single representative" or principal for the State.

¹⁴ Copies of this order were sent this date by Internet e-mail transmission to counsel for (1) licensees Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc.; (2) intervenors Vermont Department of Public Service and New England Coalition of Brattleboro, Vermont; and (3) the NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB ORDER (INITIAL SCHEDULING ORDER) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Alex S. Karlin, Chair
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Richard E. Wardwell
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Thomas S. Elleman
Atomic Safety and Licensing Board Panel
5207 Creedmoor Rd., #101
Raleigh, NC 27612

Mitzi A. Young, Esq.
Steven C. Hamrick, Esq.
David E. Roth, Esq.
Office of the General Counsel
Mail Stop - O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Ronald A. Shems, Esq.
Karen Tyler, Esq.
Shems Dunkiel Kassel & Saunders, PLLC
91 College Street
Burlington, VT 05401

Docket No. 50-271-LR
LB ORDER (INITIAL SCHEDULING ORDER)

Sarah Hofmann, Esq.
Director for Public Advocacy
Department of Public Service
112 State Street - Drawer 20
Montpelier, VT 05620-2601

Anthony Z. Roisman, Esq.
National Legal Scholars Law Firm
84 East Thetford Rd.
Lyme, NH 03768

Matthew Brock, Esq.
Assistant Attorney General
Office of the Massachusetts Attorney General
Environmental Protection Division
One Ashburton Place, Room 1813
Boston, MA 02108-1598

Diane Curran, Esq.
Harmon, Curran, Spielberg,
& Eisenberg, L.L.P.
1726 M Street, NW, Suite 600
Washington, DC 20036

Callie B. Newton, Chair
Gail MacArthur
Lucy Gratwick
Town of Marlboro
SelectBoard
P.O. Box 518
Marlboro, VT 05344

Dan MacArthur, Director
Town of Marlboro
Emergency Management
P.O. Box 30
Marlboro, VT 05344

David R. Lewis, Esq.
Matias F. Travieso-Diaz, Esq.
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, NW
Washington, DC 20037-1128

Jennifer J. Patterson, Esq.
Office of the New Hampshire
Attorney General
33 Capitol Street
Concord, NH 03301

[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 17th day of November 2006