

RAS 12669

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

DOCKETED 12/13/06

SERVED 12/13/06

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

December 13, 2006

MEMORANDUM AND ORDER

(Denying DPS Motion for Leave to File Motion for Reconsideration of DPS Contention 2)

Before the Licensing Board is a motion by the Department of Public Service of the State of Vermont (DPS) for reconsideration of the Board's ruling on the second contention submitted as part of the DPS petition to intervene in this proceeding.¹ For the reasons set forth below, this motion is denied.

I. BACKGROUND

This proceeding concerns the application by 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.² Entergy seeks to 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

¹ [DPS] Motion for Leave to File for Reconsideration of Memorandum and Order 9/22/06) (Oct. 2, 2006) [DPS Motion].

² Vermont Yankee Nuclear Power Station License Renewal Application (Jan. 25, 2006), ADAMS Accession No. ML060300085 [Application].

renewal application and a notice of opportunity to request a hearing on the application. 71 Fed. Reg. 15,220 (Mar. 27, 2006). On May 26, 2006, DPS filed its hearing request and petition to intervene, which included DPS Contention 2.³ As submitted, the contention read:

The Application must be denied because Applicant has failed to comply with the requirements of 10 CFR §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)).

Id. at 12-13. On June 22, 2006, Entergy and the NRC Staff filed their respective answers to the NEC Petition,⁴ and on June 30, 2006, DPS filed its reply.⁵

On September 22, 2006, the Board ruled, inter alia, that DPS had standing to challenge Entergy's license renewal application and had presented one contention 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). However, the Board rejected DPS Contention 2 on two distinct legal grounds. First, the Board said, "[w]hile 10 C.F.R. § 51.53(c)(3)(iv) requires an applicant to include any new and significant information concerning Category 1 issues that it is aware of, the failure of an applicant to do so is simply not litigable, absent a waiver under 10 C.F.R. § 2.335." Id. (slip op. at 40). Second, the Board concluded, "issues related to the environmental impact of onsite spent fuel storage after the license renewal term are outside the scope of a license renewal

³ Vermont [DPS] Notice of Intention to Participate and Petition to Intervene (May 26, 2006) [DPS Petition].

⁴ Entergy's Answer to Vermont [DPS] Notice of Intention to Participate and Petition to Intervene (June 22, 2006); NRC Staff Answer to Vermont [DPS] Notice of Intention to Participate and Petition to Intervene (June 22, 2006).

⁵ Vermont [DPS] Reply to Answers of Applicant and NRC Staff to Notice of Intention to Participate and Petition to Intervene (June 30, 2006) [DPS Reply].

proceeding because contentions may not challenge the NRC's Waste Confidence Rule." Id.

On October 2, 2006, DPS filed the motion for leave to file a motion for reconsideration that is now before the Board. In its motion, DPS argues for reconsideration of the Board's ruling on DPS Contention 2 on the grounds that

- 1) even if the underlying issue of whether new and significant information warrants a modification of the NRC's classification of land use impacts from on-site spent fuel storage can only be raised pursuant to 10 C.F.R. § 2.335;
- 2) and even if the issue of whether the information, once submitted, is "new and significant" is not litigable before the Board;
- 3) DPS is entitled to enforce the Applicant's obligation to disclose such new and significant information in its Environmental Report (ER) in order to enable DPS to best present a request for waiver under 10 C.F.R. § 2.335 and to assure that the Staff has available to it the information it will need to prepare a proper SEIS and seek, if warranted, modification to the GEIS on the issue of land impacts from spent fuel storage.

Id. at 1-2. DPS further alleges that it raised this argument in its initial pleadings on the contention, but that the Board did not address the argument in its contention admissibility ruling. Id. at 2. DPS alleges that it "repeatedly indicated" that Contention 2 is "limited to requiring the Applicant to produce information which . . . we know is Entergy's possession and that is 'relevant to' the issue of whether 'new and significant' information exists." Id. at 2-3 (citations omitted). DPS does not directly challenge the Board's determination that "a petitioner may not challenge an ER's failure to consider new and significant information for a Category 1 environmental impact without first seeking a waiver of the generic rule." Vermont Yankee, LBP-06-20, 64 NRC at ___ (slip op. at 26). Rather, DPS argues that "[g]etting all the information is a prerequisite to using the procedures, not a substitute for them." DPS Motion at 3.

Entergy opposes the DPS motion for reconsideration on the ground that it fails to comply with the regulatory requirements for motions for reconsideration contained in 10 C.F.R. § 2.323(e), in particular by failing to demonstrate "compelling circumstances" that

would “render[] the decision invalid.” Entergy Answer at 2-3. Entergy further argues that the motion “misstates the clear premise and scope of Contention 2,” which Entergy takes to be an assertion “that Entery was required to identify and analyze specific information set forth in the Contention . . . and that this information, if properly evaluated, would change the GEIS conclusions regarding onsite land use.” Id. at 3-4. Entergy, characterizes DPS’s motion as an attempt to recast Contention 2 into a “discovery fishing expedition.” Id. at 5.

The NRC Staff also opposes the DPS motion on the ground that DPS does not even address the regulatory standard governing motions for reconsideration. Staff Answer at 6. Further, the Staff points out that the motion addresses only one of the legal bases for the Board’s decision – the obligation to obtain a waiver under 10 C.F.R. § 2.335 before attempting to litigate a Category 1 issue – and fails to address the Board’s independent conclusion that DPS Contention 2 is outside the scope of a license renewal proceeding because it challenges NRC’s Waste Confidence Rule. Id. In addition, the Staff argues, the motion raises new arguments that bear little resemblance to those submitted when the contention was first proposed. Id. According to the Staff, the original DPS petition to intervene “was straightforward in asserting that DPS already possessed new and significant information and provided a litany of such information.” Id. Now, says the Staff, “DPS is arguing that it believes new and significant information exists, but it cannot demonstrate as much to the Commission until it receives information from Entergy’s mandatory disclosures.” Id. at 6-7. DPS never indicated previously that it would rely on such information to support a waiver application, according to the Staff, and this new argument is therefore “inappropriate for a motion for reconsideration.” Id. at 7.

II. ANALYSIS

The legal standard governing motions for reconsideration can be found in 10 C.F.R. § 2.323(e), which states that such motions may be filed upon leave of the presiding officer “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.” As the NRC Staff correctly notes, this is a new standard put in place as part of the 2004 amendments to 10 C.F.R. Part 2 and designed to “permit reconsideration only where manifest injustice would occur in the absence of reconsideration.”⁶ Motions for reconsideration will be entertained only if a party “brings decisive new information” to the attention of the decision-maker or “demonstrates a fundamental . . . misunderstanding of a key point.” Louisiana Energy Serv., L.P. (National Enrichment Facility), CLI-04-03, 60 NRC 619, 622 (2004).

The DPS motion fails to satisfy this standard. As a preliminary matter, we note that DPS has ignored, to its detriment, this Board’s previous request that parties in this proceeding cite and address the relevant regulatory sections in their pleadings. See Vermont Yankee, LBP-06-20, 64 NRC at ___ (slip op. at 60 n.62). Because it does not address the legal standard directly, DPS misses any opportunity to argue the existence of “compelling circumstances,” “manifest injustice,” or “decisive new information.” Rather, the thrust of DPS’s argument appears to be to demonstrate the Board’s alleged “misunderstanding of a key point.” We find this presentation unpersuasive, for the reasons described below.

First, given our unchallenged conclusion that the failure of an applicant to include new and significant information concerning a Category 1 issue in its environmental report is not litigable absent a waiver under 10 C.F.R. § 2.335, id. (slip op. at 40), we find DPS’s logic to be deficient and circular. DPS seems to be arguing that even though the failure to include the

⁶ Final Rule, “Changes to the Adjudicatory Process,” 69 Fed. Reg. 2182, 2207 (Jan. 14, 2004). See also Staff Answer at 5.

new and significant information is not litigable (absent a waiver), we should allow DPS to litigate it (i.e., admit the contention) so that DPS can obtain information (under 10 C.F.R. § 2.336(b)(2)(i)) that will enable DPS to obtain a waiver and thus render the contention admissible. As the Staff presents this point, DPS argues that “DPS can get a contention admitted, even though it is barred by regulation, in order to obtain information through mandatory disclosures that would allow it to make a case for waiving the regulation that bars the contention in the first place.” Staff Answer at 7. This form of argument is not persuasive.

Second, we agree with Entergy and the NRC Staff that the DPS motion raises new arguments that were not present in the initial pleadings related to Contention 2. Specifically, the argument that “DPS is entitled to enforce the Applicant’s obligation to disclose such new and significant information in its [ER] in order to enable DPS to best present a request for waiver,” DPS Motion at 2, appears nowhere in either the initial petition to intervene or the reply filed by DPS as part of the briefing related to contention admissibility. Rather, the DPS affirmatively presents such (alleged) “new and significant information,” DPS Petition at 14-30, DPS Reply at 21-33, and argues that this shows that the application is deficient and that the findings in the Generic Environmental Impact Statement (GEIS) need to be reconsidered. In no event did DPS argue, in the briefing on the original contention, that it needs Entergy to provide the information so that DPS can prepare a waiver application.

As the Commission has stated, motions for reconsideration “should not be used as an opportunity to reargue facts and rationales which were (or should have been) discussed earlier.” 69 Fed. Reg. at 2207. The new DPS rationale for Contention 2 is something that should have been presented, at least as an alternative argument, at the time contentions were first proposed and not after the Board’s ruling on contention admissibility.

Third, the Board rejects DPS’s attempt to rely on the mandatory disclosure provisions of

10 C.F.R. § 2.336(a)(2)(i) in order to obtain access to information that it alleges is “relevant” to the question of whether new and significant information exists. DPS Motion at 2-3. This regulation applies only to admitted contentions and does not mandate pre-admission discovery or disclosures.

III. CONCLUSION

For the reasons set forth above, the DPS’s motion for leave to file a motion for reconsideration is denied.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD⁷
/RA/

Alex S. Karlin, Chairman
ADMINISTRATIVE JUDGE
/RA/

Richard E. Wardwell
ADMINISTRATIVE JUDGE
/RA/

Thomas S. Elleman
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 13, 2006

⁷ 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 the Department of Public Service of the State of Vermont and the New England Coalition; and (3) the NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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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 MEMORANDUM AND ORDER (DENYING DPS MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION OF DPS CONTENTION 2) 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 MEMORANDUM AND ORDER (DENYING DPS MOTION
FOR LEAVE TO FILE MOTION FOR RECONSIDERATION
OF DPS CONTENTION 2)

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 13th day of December 2006