

September 21, 2007 (8:50am)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

ATOMIC SAFETY AND LICENSING BOARD

BEFORE THE SECRETARY

In the Matter of:)	September 20, 2007
)	
Entergy Nuclear Operations Inc.)	Docket Nos. 50-293
(Application for Order Approving Indirect)	50-003
Transfer of Control of Licenses))	50-247
)	50-286
)	50-333 & 72-12
)	50-271
)	50-255 & 72-7
)	50-155 & 72-43

ENTERGY NUCLEAR OPERATIONS INC. ANSWER OPPOSING
INTERVENTION PETITION OF LOCAL 369,
UTILITY WORKERS UNION OF AMERICA, AFL-CIO

I. INTRODUCTION

Pursuant to 10 CFR § 2.309(h), Entergy Nuclear Operations Inc. acting on behalf of itself and Entergy Nuclear Generation Company, Entergy Nuclear FitzPatrick, LLC, Entergy Nuclear Vermont Yankee, LLC, Entergy Nuclear Indian Point 2 LLC, Entergy Nuclear Indian Point 3 LLC, and Entergy Nuclear Palisades LLC, (together, "Entergy") provides its Answer Opposing the Petition of Local 369, Utility Workers Union of America, AFL-CIO for Leave to Intervene and Request for Initiation of Hearing Procedures ("Petition") dated September 18, 2007.

As Entergy demonstrates below, Local 369's Petition is premature, because there is no pending proceeding in which a petitioner might seek to intervene. The NRC Staff has not yet published in the Federal Register its notice of receipt of Entergy's application in the

above-captioned matter, which would identify the proposed actions under consideration and thereby define the scope of any proceeding, and which would provide the opportunity to request a hearing.

Therefore, in accordance with the Commission's rules and precedent, Entergy requests that the Secretary of the Commission promptly return the Petition to Local 369 with no further action.

II. BACKGROUND

On July 30, 2007, Entergy submitted its Application for Order Approving Indirect Transfer of Control of Licenses ("Application") to the U.S. Nuclear Regulatory Commission (NRC). *See* Letter from Mr. Michael R. Kansler, President and Chief Executive Officer, Entergy Nuclear Operations, to James. E. Dyer, Director, Office of Nuclear Reactor Regulation, ADAMS Accession No. ML072220219 (Jul. 30, 2007). In its Application, Entergy requested NRC approval of the indirect transfer of control of the NRC licenses associated with the above-captioned docket numbers. *See id.* ENO stated that the request for transfer of control was due, *inter alia*, to certain restructuring transactions that "will involve the creation of new intermediary holding companies and/or changes in the intermediary holding companies for the ownership structure for the corporate entities that hold the NRC licenses for the Pilgrim, Indian Point 1, 2, and 3, FitzPatrick, Vermont Yankee, Palisades, and Big Rock Point." *See id.*

On September 18, 2007, Local 369 filed its Petition seeking "leave to intervene on behalf of itself and its members in the instant proceedings." Petition at 1-2. In its Petition, Local 369 generally averred that the indirect transfer would result in unspecified safety impacts and could result in "harm to [members of Local 369's] career prospects."¹ *Id.* at 5.

¹ Because the Petition is premature and should be rejected, ENO does not address the substantive issues of standing and contention admissibility in its present Answer.

At the time that Local 369 filed its Petition, the NRC had not yet published in the Federal Register a notice of receipt of Entergy's Application ("Notice") as required by 10 CFR § 2.1301(b), and no such Notice has yet been published.²

III. PETITION HAS BEEN FILED PREMATURELY AND SHOULD BE REJECTED

A. Applicable Legal Standards

1. Requirement for Federal Register Notice to Commence Proceeding

The Commission will publish in the Federal Register a notice of receipt of an application for approval of a license transfer involving 10 CFR part 50 and part 52 licenses, major fuel cycle facility licenses issued under part 70, or part 72 licenses. 10 CFR § 2.1301(b). This notice of receipt of the application constitutes the notice required by § 2.105³ with respect to all matters related to the application requiring NRC approval. *See id.* Because 10 CFR § 2.1301(b) satisfies the notice requirements of § 2.105, the notice of receipt of the application constitutes notice to any person whose interest may be affected by the license transfer proceeding and gives such persons leave to file a request for a hearing. *See* 10 CFR §§ 2.1301(b) & 2.105(d)(2).

A license transfer proceeding commences when the Staff publishes its notice of receipt of the application in the Federal Register in accordance with 10 CFR § 2.1301(b). *See* 10 CFR § 2.318(a) ("A proceeding commences when a notice of hearing or a notice of proposed action under § 2.105 is issued"); 10 CFR § 2.1301(b) ("[notice given under 10 CFR § 2.1301(b)] constitutes the notice required by § 2.105 with respect to all matters related to the application requiring NRC approval").

² A list of notices of ownership change is provided on the NRC's website at www.nrc.gov/about-nrc/regulatory/adjudicatory/hearing-license-applications.html#change.

³ 10 CFR § 2.105 provides, *inter alia*, the formal requirements for the content and form of notices.

In summary, there is no proceeding in a license transfer action until the NRC publishes a notice of receipt of the application for the transfer in the Federal Register.

2. Requirement for a Proceeding to Exist as a Prerequisite to Intervention

As the Commission has previously established, “[i]t is axiomatic that a person cannot intervene in a proceeding before the proceeding actually exists.” *See Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), Memorandum and Order, CLI-04-12, 59 NRC 237, 239 (2004). The Commission has stated that if persons were allowed to intervene before the notice of hearing was published, petitions to intervene could be filed in proceedings that may – or may not – occur years in advance of the applicant or licensee seeking the action sought to be challenged. *Id.* Issuance of a “notice of hearing” or a “notice of proposed action” is a prerequisite to the initiation of a “proceeding.” *Id.* Thus, if the NRC has not yet issued a notice in the Federal Register, there is no “proceeding” in existence in which to intervene. *See id.* A petition to intervene filed in such circumstances is clearly premature and should be rejected. *See id.*

Moreover, the hearing notice serves not only to notify potentially interested persons of the proposed action, but it also defines the scope of the proceeding. *See Duke Power Company* (Catawba Nuclear Station, Units 1 and 2) ALAB-825, 22 NRC 785 (1985) (“The various hearing notices are the means by which the Commission identifies the subject matters of the hearings . . .”). Thus, when reviewing a petition to intervene the Presiding Officer looks to the hearing notice to ascertain its subject matter jurisdiction and to define the scope of the proceeding. *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), LBP-04-15, 61 NRC 81 (2004).

In summary, a person can not intervene in a proceeding that does not exist.

B. Local 369's Petition is Premature and Should be Rejected

On September 18, 2007, Local 369 filed its Petition seeking “leave to intervene on behalf of itself and its members in the instant proceedings.” Petition at 1-2. However, as of that date, the Staff had not yet issued its notice of receipt of Entergy’s Application pursuant to 10 CFR § 2.1301(b). As discussed above, a license transfer proceeding clearly starts when the NRC publishes its notice of receipt of the application in the Federal Register. Here, no Notice has been published, and therefore, there is no “instant proceeding” in which Local 369 may intervene. In *Millstone*, the Commission confirmed that the Secretary of the Commission acted properly when, under comparable circumstances, the Secretary simply returned a premature petition to the petitioner. CLI-04-12, 59 NRC at 240 (the petition “was clearly premature and was correctly rejected by the Secretary”).

Furthermore, the Federal Register notice sets forth the scope of proposed actions that would be the subject of any proceeding and thereby identifies “the findings that the NRC must make to support the action that is involved in the proceeding.” 10 CFR § 2.309(f)(1)(iv). Without this information, there is no basis for concluding whether or not a proffered contention is material to the findings that must be made, as required by NRC’s rules. *Id.* To proceed with a hearing, as requested by Local 369, would cause unnecessary inefficiencies as the parties would be required to argue, and the Commission adjudicate, the metes and bounds of the scope of the proceeding.

Finally, Local 369 will not be prejudiced by the requested relief, because it will be free to file its Petition once the NRC publishes a Notice of consideration of the pending application and provides an opportunity for interested parties to request a hearing. *See, e.g.*, 72 FR 32685 (June 13, 2007) (notice regarding proposed indirect transfer of Comanche Peak licenses). Also, should Local 369 choose to file its Petition at the appropriate time (*i.e.*, after the Notice is

published), all interested parties would have the benefit of the proposed actions under consideration and the defined scope of the proceeding.

For all of these reasons, Entergy requests that the Secretary find that Local 369's Petition is premature, and return it to Local 369 with no further action.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John E. Matthews, Esq.", with a stylized flourish below it.

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COUNSEL FOR
ENTERGY NUCLEAR OPERATIONS INC.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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_____)	

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with 10 CFR § 2.314(b), the following information is provided:

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Admissions: District of Columbia Court of Appeals

Name of Party: Entergy Nuclear Operations Inc.

Respectfully submitted,



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Counsel for Entergy Nuclear Operations Inc.

Dated: 20 September 2007

