RAS H-126



July 7, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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| 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 RESPONSE TO VERMONT DEPARTMENT OF PUBLIC SERVICE MOTION FOR MODIFICATION OF THE SCHEDULING ORDER TO FACILITATE FULL COMPLIANCE WITH 10 C.F.R. § 2.323(b)**

Pursuant to 10 C.F.R. § 2.323(c), Applicants Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively "Entergy") oppose the "Vermont Department of Public Service Motion for Modification of the Scheduling Order to Facilitate Full Compliance with 10 C.F.R. § 2.323(b)" ("DPS Motion"). The DPS Motion requests that the following three sentences be added at the end of Paragraph 8 of the Initial Scheduling Order[1] issued by the Board on November 17, 2006:

> A "sincere effort" to resolve the issues to be raised in a motion must include at least providing an outline of the points to be made in the motion and the basis for them. If any party believes that a meaningful consultation with other parties on a proposed motion cannot occur within the time available under this Paragraph, the party shall file with the Board a statement to that effect and the time to file the motion will automatically be extended by 5 days to allow for adequate consultation. Failure to file such a request by any party shall constitute a certification by all parties that adequate time was available for meaningful consultation and such meaningful consultation was attempted.

[1] Initial Scheduling Order (Nov. 17, 2006) (unpublished).

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DPS Motion at 3, footnote omitted. For the reasons discussed below, the DPS Motion is not necessary at this time, and proposes overly rigid procedures that could adversely impact this proceeding and its schedule. Accordingly, the DPS Motion should be denied.

## I. THE RELIEF SOUGHT BY THE DPS MOTION IS NOT NECESSARY

### A. THE INITIAL SCHEDULING ORDER MAKES ADEQUATE PROVISION FOR EXPANDING THE CONSULTATION TIME PRIOR TO FILING A MOTION, IF SUCH EXPANSION IS WARRANTED

Paragraph 8 of the Initial Scheduling Order reads as follows:

> 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 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.
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> [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.

Initial Scheduling Order at 8.

Footnote 11 to Paragraph 8 explicitly provides that the consultation time on a prospective motion may be extended if the parties agree that an extension may allow for amicable resolution of the issue. Since the Initial Scheduling Order already provides a mechanism to extend the consultation time where the parties demonstrate that an extension is warranted, the relief

requested by DPS is not necessary. Additional time for discussions among the parties is available, if needed.

B. THERE HAS BEEN ADEQUATE CONSULTATION PRIOR TO THE FILING OF MOTIONS

The DPS Motion asserts that in recent weeks "motions have been filed by all parties that have not adhered to either the letter or the spirit of this directive [to make sincere effort to contact other parties and resolve the issues raised in the motion]. Often consultations have been sought within 24 hours of the time when the motion will be filed. The substance of the motion has not been provided in sufficient detail for a party 'consulted' to adequately assess the merits of the motion." DPS Motion at 2.

DPS states that it "does not intend by [its] Motion to make any assertion regarding the good faith of any party." DPS Motion at 3. Entergy agrees, and in fact, so do the parties to this proceeding. To date, none of the parties directly affected by the motion practice – Entergy, the NRC Staff, and NEC – have voiced an objection that there has been inadequate consultation before a motion was filed. DPS, which is represented by NEC as the lead intervenor and which is submitting no evidence of its own, has not been a party against whom motions have been brought during the period upon which the DPS Motion is based.

To be clear, Entergy has engaged in a "sincere effort" to resolve disputes by advising other parties of the reasons for and the scope of the motions it has filed to the greatest extent possible and warranted under the circumstances. For example, before filing its motion in limine seeking the exclusion of portions of the testimony and exhibits proffered by NEC,[2] Entergy provided to NEC and the other parties a marked up copy of NEC's filings showing the specific portions that Entergy would move to exclude, and invited parties to comment on the proposed

[2] Entergy's Motion in Limine (June 12, 2008).

motion. None of the parties chose to comment on Entergy's proposed motion. Entergy also engaged in consultations by electronic mail with NEC and the other parties prior to filing its summary disposition motions on NEC Contentions 3 and 4 in 2007. For example, approximately two weeks before filing its summary disposition motion on NEC Contention 3, Entergy provided a statement of material facts concerning which Entergy believed were not in dispute and requesting NEC's position regarding those facts and whether NEC believed other facts to be in dispute related to NEC Contention 3. A similar process took place with respect to the motion for summary disposition on NEC Contention 4.

There are circumstances, however, where even a "sincere effort" on the parties' behalf will not resolve a dispute. The motions filed over the past several weeks, upon which the DPS Motion is based, primarily consisted of motions in limine. For example, Entergy made the judgment that protracted discussion would not cause a party to concede to withdrawing its witness's testimony in its entirety in response to Entergy's motion to exclude that witness because the witness was not adequately qualified as an expert.[3] Although certain motions in limine may "contain seeds of objections that on opposing party might be willing to concede," DPS Motion at 2, Entergy did not believe its motion to exclude a witness's testimony in its entirety could be resolved if Entergy "were to withhold filing the motion as to other more controversial issues," after extensive discourse with opposing counsel, id. In other words, the extent to which extensive consultations are likely to be fruitful depends largely on the subject and scope of the motion.

[3] See, e.g., Entergy's Motion in Limine to Exclude Rebuttal Testimony of Ulrich Witte (June 23, 2008).

### C. A MODIFICATION OF THE INITIAL SCHEDULING ORDER'S PROVISIONS REGARDING MOTIONS IS UNNECESSARY GIVEN THE LATE STAGE OF THIS PROCEEDING

The current status of this proceeding also makes the additional time for consultations proposed by the DPS unnecessary. Evidentiary hearings are only two weeks away. The prehearing motions contemplated in the Initial Scheduling Order have either been made already (e.g., motions in limine)[4] or the time in which they could have been made has passed (e.g., motions to conduct cross-examination at the hearing).[5] There is, in fact, little occasion left for additional motions to be filed prior to adjudication of the issues. The added procedures sought by DPS thus come far too late in this process to be constructive. They would likely be invoked rarely if at all in the balance of the case.

## II. THE CHANGES PROPOSED BY THE DPS MOTION WOULD ADVERSELY IMPACT THIS PROCEEDING

The addition proposed by DPS to Paragraph 8 of the Initial Scheduling Order would make three changes to the process of consultation prior to the filing of motions: (1) it would require the movant in every instance to provide "at least . . . an outline of the points to be made in the motion and the basis for them"; (2) it would give "any party" who believes that meaningful consultation with other parties on a proposed motion cannot occur within the time provided in the Initial Scheduling Order and the regulations[6] the "right to file with the Board a statement to that effect and the time to file the motion will automatically be extended by 5 days to allow for adequate consultation" – even if the motion seeks no relief against that party; and (3) the failure of any party to file such a statement would create a presumptive "certification by

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[4] Initial Scheduling Order, para. 10.E.

[5] Id., para. 10.G.

[6] 10 C.F.R. § 2.323(a) provides that "[a] motion must be made no later than ten (10) days after the occurrence or circumstance from which the motion arises."

all parties that adequate time was available for meaningful consultation and such meaningful consultation was attempted." DPS Motion at 3.

As to the first change, the actions needed for a party to make a "sincere effort" to resolve the issues raised in the motion must by necessity depend on the nature of the motion and the facts it involved. Requiring the movant to file a full outline of points to be made by the motion makes undue work that may not lead to a successful resolution of the motion. For example, a motion to strike an untimely pleading should require much less discussion and information exchange than a motion for summary disposition of a contention. DPS's proposed first change does not recognize the substantive difference between the two motions.

The second change would grant the party against whom the motion would be directed an unfair advantage by allowing it five extra days to prepare its response. This change would modify de facto the provisions of 10 C.F.R. § 2.323(c) setting forth the time in which a party must respond to a motion[7] at the will of any party, even a party who was not the party against whom the motion was made. This change could delay the overall schedule of the proceeding unnecessarily.

The third change would result in the automatic waiver of the ability of a party against whom a motion is made to argue that there was inadequate consultation with respect to the motion. This issue preclusion may be unfair in some instances.

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[7] 10 C.F.R. § 2.323(c) provides in relevant part: "Within ten (10) days after service of a written motion, or other period as determined by the . . . presiding officer, a party may file an answer in support of or in opposition to the motion, accompanied by affidavits or other evidence."

## III. CONCLUSION

For the above stated reasons, Entergy respectfully submits that the DPS Motion should be denied.

Respectfully Submitted,

David R. Lewis
Matias F. Travieso-Diaz
Blake J. Nelson
PILLSBURY WINTHROP SHAW PITTMAN LLP
2300 N Street, NW
Washington, DC 20037-1122
Tel. (202) 663-8000
Counsel for Entergy

Dated: July 7, 2008

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## CERTIFICATE OF SERVICE

I hereby certify that copies of "Entergy's Response to Vermont Department of Public Service Motion for Modification of the Scheduling Order to Facilitate Full Compliance with 10 C.F.R. § 2.323(B)" 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 7th day of July, 2008.

*Administrative Judge
Alex S. Karlin, Esq., Chairman
Atomic Safety and Licensing Board
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
ask2@nrc.gov

*Administrative Judge
Dr. Richard E. Wardwell
Atomic Safety and Licensing Board
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
rew@nrc.gov

*Administrative Judge
William H. Reed
1819 Edgewood Lane
Charlottesville, VA 22902
whrcville@embarqmail.com

*Secretary
Att'n: Rulemakings and Adjudications Staff
Mail Stop O-16 C1
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
secy@nrc.gov, hearingdocket@nrc.gov

*Office of Commission Appellate Adjudication
Mail Stop O-16 C1
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
OCAAmail@nrc.gov

Atomic Safety and Licensing Board
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

*Lloyd Subin, Esq.
*Mary Baty, Esq.
* Jessica A. Bielecki, Esq.
*Susan L. Uttal, Esq.
Office of the General Counsel
Mail Stop O-15-D21
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
LBS3@nrc.gov; mcb1@nrc.gov;
jessica.bielecki@nrc.gov; susan.uttal@nrc.gov

*Sarah Hofmann, Esq.
Director of Public Advocacy
Department of Public Service
112 State Street – Drawer 20
Montpelier, VT 05620-2601
Sarah.hofmann@state.vt.us

*Anthony Z. Roisman, Esq.
National Legal Scholars Law Firm
84 East Thetford Road
Lyme, NH 03768
aroisman@nationallegalscholars.com

*Ronald A. Shems, Esq.
*Karen Tyler, Esq.
Shems, Dunkiel, Kassel & Saunders, PLLC
9 College Street
Burlington, VT 05401
rshems@sdkslaw.com
ktyler@sdkslaw.com

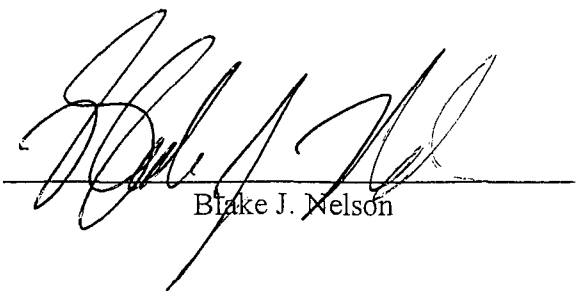
*Peter L. Roth, Esq.
Office of the New Hampshire Attorney General
33 Capitol Street
Concord, NH 03301
Peter.roth@doj.nh.gov

*Marcia Carpenter, Esq.
Atomic Safety and Licensing Board Panel
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
mxc7@nrc.gov

*Lauren Bregman, Law Clerk
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555-0001
Lauren.Bregman@nrc.gov

*Diane Curran, Esq.
Harmon, Curran, Spielberg, & Eisenberg, L.L.P.
1726 M Street N.W., Suite 600
Washington, D.C. 20036
dcurran@harmoncurran.com

* Matthew Brock
Assistant Attorney General
Office of the Attorney General
One Ashburton Place, 18th Floor
Boston, MA 02108
Matthew.Brock@state.ma.us



Blake J. Nelson