

December 4, 2008 (12:36pm)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

December 4, 2008

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

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 OPPOSITION TO NEW ENGLAND COALITION'S MOTION TO
EXTEND TIME TO FILE MOTION FOR RECONSIDERATION**

Pursuant to 10 C.F.R. § 2.323(c), Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively "Entergy") hereby oppose the "New England Coalition, Inc.'s (NEC) Motion to Extend Time to File Motions for Reconsideration," dated December 3, 2008 ("NEC Motion"). The NEC Motion requests that the Atomic Safety and Licensing Board ("Board") extend the deadline for NEC to file "its intended Motion for Reconsideration" of the Board's Partial Initial Decision ("Decision") from December 4, 2008, to December 15, 2008, and to extend the period for answers to the motion for reconsideration to January 5, 2009. NEC Motion at 1. NEC's Motion should be denied because it is not supported by the requisite good cause (see 10 C.F.R. § 2.307) and would significantly and unjustifiably delay the completion of this proceeding. The Commission's policy mandates that applicants are entitled to a prompt resolution of disputes concerning their applications. Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 N.R.C. 18, 19 (1998). The Commission's rules set out specific deadlines for review following a Board decision. These NEC Motion lacks the good cause required to set aside these deadlines.

Template Aug 037

DS-03

NEC's primary justification – that its counsel is withdrawing from this representation and needs time “for transfer of the case files and for pro-se counsel to come up to speed” (NEC Motion at 2) – provides no good cause for an extension. The switch in NEC counsel at this late date is an unilateral decision by the intervenor and such a switch could have been planned and implemented in the five months since the close of the evidentiary hearing.¹ In any event, it is well established that a pro se participant in an NRC licensing proceeding has to meet the same scheduling requirements as other parties: “The right of participation accorded pro se representatives carries with it the corresponding responsibilities to comply with and be bound by the same agency procedures as all other parties, even where a party is hampered by limited resources.” Entergy Nuclear Vermont Yankee, L.L.C. And Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), Order (Granting Motion for Enlargement of Time Related to NEC Contention 4 and Granting Enlargement of Time, Subject to Sanction, Related to NEC Contention 3) (Mar. 23, 2006) at 2-3, quoting Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 N.R.C. 1193, 1247 (1984).

The other reasons offered by NEC are equally unpersuasive. The vacation of NEC counsel Ms. Tyler does not excuse NEC from fulfilling its obligations. Mr. Shems, of Ms. Tyler's office, is also counsel to NEC and was served with the Board's decision on November 24, 2008. Either he or Mr. Raubvogel could have taken the necessary steps to prepare a timely motion in Ms. Tyler's absence. And, since the Board's rulings are based on the record of this

¹ Although NEC has not disclosed the identity of its “pro-se counsel,” it may well be Mr. Raymond Shadis, who was NEC's pro-se representative in the earlier VY power uprate proceeding. Mr. Shadis attended the license renewal hearings in July, listened in on several pre-hearing conferences during the course of the proceeding, and has made a number of statements to the press commenting on the hearing and its results. Mr. Shadis is therefore intimately familiar with the proceeding. If Mr. Shadis is NEC's proposed “pro-se counsel,” NEC's argument supporting this Motion has even less merit.

proceeding and are described in detail in the Decision, no assistance from NEC's technical experts would have been required to prepare such a motion.

Further, NEC offers no explanation of the substantive issues in the Decision for which it seeks reconsideration that warrant extending the proceeding by nearly a month. Indeed, when Entergy's counsel inquired "[w]hat portion of the Board's decision will NEC ask the Board to reconsider," NEC's counsel responded "[t]hey haven't let me know yet." Subsequently, NEC's counsel advised that "NEC's incoming pro-se representative hasn't let me know specifically what the Motion for Reconsideration will address, but I think it will be quite broad, requesting the Board's reconsideration of multiple factual findings with respect to Contentions 3 and 4, and possibly 2A and 2B as well."

NEC must meet stringent requirements to file a motion for reconsideration. Pursuant to 10 C.F.R. § 2.323(e), a motion for reconsideration may only be filed with the leave of the presiding officer upon a showing of compelling circumstances, such as the existence of a clear error in a decision, which could not reasonably have been anticipated, and which renders the decision invalid. In light of this high standard, Entergy submits that a motion for an extension should not be granted without some showing that the standards for reconsideration will be met. Here, that showing is entirely absent.

Indeed, the statements by NEC's counsel in fact indicate that its motion for reconsideration will not meet applicable standards. NEC counsel's assertion that the motion will be broad and address multiple factual findings implies either that (1) NEC will be claiming multiple clear material errors on every contention – an unreasonable position which the Board should not countenance, or (2) that NEC is seeks to quarrel with the Board's findings of fact and

weighing of the evidence – an implication inconsistent with the standards for reconsideration.²

Thus, it seems that NEC intends to use a motion for reconsideration to raise issues more appropriate for an appeal. In so doing, NEC is seeking to give itself an extension of its appeal deadline, and is also trying to take two bites at the apple.

Finally, NEC's motion would create a deadline for its reconsideration motion that conflicts with the deadline for petitions for Commission review. Under 10 C.F.R. § 2.341(b)(1), a petition for review of the Board's Partial Initial Decision is due 15 days after service of the decision – i.e., by December 9, 2008. Once an appeal is filed, jurisdiction is transferred to the Commission.³ It is therefore not clear how the Board could entertain a motion for reconsideration a week later. Perhaps NEC is assuming that the extended deadline for a motion for reconsideration will automatically toll its deadline for a petition for review.⁴ However, it has long been held that a licensing board may not vary or extend the appeal periods provided in the regulations. Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-310, 3 N.R.C. 33 (1976); Consolidated Edison Co. (Indian Point Station, Unit No.3), ALAB-281, 2 N.R.C. 6 (1975). In seeking the requested extension, NEC appears to be asking the Board to do indirectly what established NRC case law says it may not.

² As held earlier by the Board in this proceeding, “a reconsideration motion cannot merely repeat prior arguments, but must provide a good reason for the adjudicator to change its mind.” Memorandum and Order (Denying NEC Motion for Leave to File Motion for Reconsideration of Contention 5) (Dec. 13, 2006) at 5 (citing Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-35, 60 N.R.C. 619, 622 n.13 (2004)).

³ See Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), ALAB-859, 25 N.R.C. 23, 27 (1987) (once a Licensing Board issues its decision disposing of an issue and appeals are filed, the appeal board [now the Commission] has jurisdiction over new matters raised in connection with such issue.). Under the NRC rules, only one presiding officer at a time will have jurisdiction over a particular matter. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-25, 17 N.R.C. 681, 688 (1983); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), LBP-82-86, 16 N.R.C. 1190, 1193 (1982).

⁴ 10 C.F.R. § 2.341(b)(6) states that a “petition for review will not be granted as to issues raised before the presiding officer on a pending motion for reconsideration.” (Emphasis added). While this provision may toll the deadline for a petition for review where a motion for reconsideration has been filed and is therefore “pending” before such deadline, nothing in the NRC rules allows a motion for reconsideration after the deadline for appeals to the Commission.

Finally, a denial of NEC's extension request will not harm NEC. NEC may seek review from the Commission and still has until next week to do so. In sum, rather than injecting a month or more into the completion of this proceeding, if NEC believes that there are errors in the Board's findings, it should pursue review in accordance with the timeframes established by the NRC rules. The orderly conduct of this proceeding, and an applicant's entitlement to a timely completion of an adjudication, demand nothing less.

CONCLUSION

For all of the above stated reasons, the NEC 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: December 4, 2008

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

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))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Entergy's Opposition to New England Coalition's Motion to Extend Time to File Motion for Reconsideration" 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 4th day of December, 2008.

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

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

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

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

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

Atomic Safety and Licensing Board
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 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, DC 20555-0001
LBS3@nrc.gov; mcb1@nrc.gov;
jessica.bielecki@nrc.gov; susan.uttal@nrc.gov

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

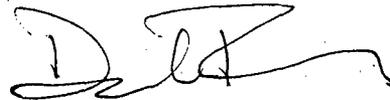
*Peter L. Roth, Esq.
Office of the New Hampshire Attorney General
33 Capitol Street
Concord, NH 03301
Peter.roth@doj.nh.gov

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

*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

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

*Zachary Kahn, Esq.
Atomic Safety and Licensing Board Panel
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
zachary.kahn@nrc.gov



David R. Lewis