

December 29, 2008 (11:45am)

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December 29, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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 ANSWER OPPOSING MOTION BY NEW YORK ET AL.
FOR LEAVE TO SUBMIT BRIEF AMICI CURIAE**

Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively "Entergy") hereby oppose the motion filed by the States of New York and Connecticut and certain intervenors from other license renewal proceedings to file a brief *amici curiae* in the Vermont Yankee license renewal proceeding.¹ This Motion should be denied because the filing of an *amicus* brief is not permitted under the NRC Rules of Practice unless and until the Commission grants a petition for review.

The ability of person who is not a party to file an *amicus* brief in a proceeding is governed by 10 C.F.R. § 2.315(d), which provides:

If a matter is taken up by the Commission under § 2.341 or *sua sponte*, a person who is not a party may, in the discretion of the Commission, be permitted to file a brief "*amicus curiae*."

10 C.F.R. § 2.315(d) (emphasis added). As this rule makes clear, an *amicus* brief is only permissible if and when the Commission has taken up a matter on review. This has not yet

¹ Motion for Leave By the States of New York and Connecticut, Hudson Riverkeeper, Inc., Hudson River Sloop Clearwater, Inc., and the Prairie Island Indian Community to Submit Brief *Amici Curiae* (Dec. 19, 2009) ("Motion").

occurred in this proceeding. The NRC Staff's petition requesting that the Commission take up certain issues on review is currently before the Commission, but the Commission has not yet taken up the matter. The NRC rules do not provide for *amicus* briefs supporting or opposing petitions for review. Louisiana Energy Services (Claiborne Enrichment Center), CLI-97-07, 45 N.R.C. 437, 438-39 (1997).

New York and the other movants attempt to circumvent this rule by arguing that an *amicus* brief is appropriate at this juncture because the Commission retains the authority to address the arguments raised in the NRC Staff's petition for review without seeking any additional briefing. Motion at 4. This argument is an attack on the sufficiency of the NRC rule governing submittal of *amicus* briefs, and 10 C.F.R. § 2.335 prohibits NRC rules from being challenged in any adjudicatory proceeding except by petition for waiver upon a showing of special circumstances. The argument also ignores the fact that "[i]f a petition for review is granted, the Commission will issue an order specifying the issues to be reviewed." 10 C.F.R. § 2.341(c)(1). This Order would provide appropriate notice that a matter has been taken up, allowing any appropriate requests to submit an *amicus* brief at that juncture. New York and the other movants seek to submit a brief when even the parties are not yet permitted to do so.

Moreover, whether a petition for review should be granted is not an appropriate topic to be argued or briefed by persons who are not parties to the proceeding. Parties to a proceeding have the right under 10 C.F.R. § 2.341 to request Commission review of errors in a Licensing Board's decision, or to seek NRC guidance on important questions. It is inappropriate for non-participants to interfere with such requests, or seek to prevent parties from obtaining Commission guidance that may avoid needless litigation.

The impermissibility of the Motion aside, Entergy submits that the expressions of interest and opposition by New York, Connecticut and three other intervenors from other proceedings in fact underscores the existence of substantial and important questions of law and policy warranting Commission review. 10 C.F.R. § 2.314(b)(4)(iii). As the NRC Staff observed in its Petition for Review, "The Board's conclusion in this case regarding Contentions 2, 2A and 2B is likely to affect other pending and future license renewal proceedings." NRC Staff's Petition for Review of Licensing Board's Partial Initial Decision, LBP-08-25 (Dec. 9, 2008) at 23. The vehement arguments of the movants, and their attempt to prevent this issue from being taken up on review, indicate that the NRC Staff's observation is correct – and that Commission guidance is necessary not only to correct the errors in the Licensing Board's decision in the Vermont Yankee proceeding but also to prevent such errors from being perpetuated in other proceedings. The interests and protestation of these intervenors from other proceedings strongly militate in favor of Commission review.

For all of these reasons, the Motion should be denied.

Respectfully Submitted,



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Dated: December 29, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of)
)
Dominion Nuclear Connecticut, Inc.) Docket No. 50-426-OLA
)
(Millstone Nuclear Power Station, Unit 3)) ASLB No. 08-862-01-OLA
)

CERTIFICATE OF SERVICE

I hereby certify that copies of "Entergy's Answer Opposing Motion by New York et al. for Leave to Submit Brief *Amici Curiae*" were served on the persons listed below by first class mail, and, where indicated by an asterisk, by e-mail, this 29th day of December, 2008.

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