

January 26, 2009

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))	

NRC STAFF'S ANSWER IN OPPOSITION TO NEC'S MOTION FOR LEAVE TO REPLY

Pursuant to 10 C.F.R. § 2.323(c), the staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby responds to "New England Coalition's [NEC] Motion for Leave to Reply to NRC Staff and Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc.'s Answers to [NEC's] Motion for Reconsideration of the Licensing Board's Partial Initial Decision" ("Motion") (Jan. 14, 2009).¹ For the reasons set forth below NEC has not demonstrated that it has met the criterion set forth in 10 C.F.R. § 2.323(c) for filing a reply. Consequently, NEC's Motion should be denied and the Reply not considered.

BACKGROUND

On December 17 and 19, 2008, NEC filed a motion for reconsideration of the Atomic Safety and Licensing Board's ("Board") Partial Initial Decision (Ruling on Contentions 2A, 2B, 3 and 4), LBP-08-25, 68 NRC ____ (Nov. 24, 2008) (slip op.) ("Decision" or "LBP-08-25").² On

¹ Attached to the Motion were "New England Coalition's Reply to NRC Staff and Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc.'s Answers to England Coalition's Motion for Reconsideration of the Licensing Board's Partial Initial Decision" ("Reply") (Jan 14, 2008) and "NEC Reply Exhibit 1-VDPS Transcript 6812" (Jan. 14, 2004).

² New England Coalition's Motion for Reconsideration of the Licensing Board's Partial Initial Decision ("Motion for Reconsideration"). Attached to the Motion for Reconsideration were the following declarations and exhibits: Exhibit ("Exh.") A, Letter from Ted A. Sullivan, Vermont Yankee Site Vice (continued. . .)

January 7, 2009, in accordance with the Board's Order (Granting NEC's [Second] Motion to Extend Time) (Dec. 15, 2008), the Staff and Entergy filed answers to NEC's Motion for Reconsideration.³ On January 14, 2009, NEC filed, pursuant to 10 C.F.R. § 2.323, the instant Motion for Leave to Reply, Reply, and exhibit. In the instant Motion, NEC asserts that the Staff and Entergy "misconstrue, misinterpret, and misrepresent NEC's Motion for Reconsideration to such an extreme degree that NEC could have in no way anticipated the arguments to which it seeks to reply" Motion at 2. For the reasons set forth below, NEC's Motion fails to demonstrate compelling circumstances that would justify a reply.

DISCUSSION

A. Legal Standard Governing Motions for Leave to Reply

Section 2.323(c) of the Commission's regulations provides that there is no right to reply to answers to motions, but that permission to file a reply may be granted "only in *compelling*

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President to USNRC Re: Deviation from BWRVIP-130 (Mar. 31, 2008); Exh. B, Operating Data Report (Apr. 2008); Exh. C: Operating Data Report (June 2008); Exh. D, Susan Smallheer, *Yankee Set to Return to Full Power*, RUTLAND HERALD, Apr. 4, 2008; Exh JH MR1, Declaration of Dr. Joram Hopenfeld In Support of New England Coalition's Motion for Reconsideration (Dec. 15, 2008) (attaching Exh. JH MR2, Letter from Gary L. Stevens, Structural Integrity Associates, to Chief, Rulemaking, Directives, and Editing Branch, USNRC Re: Comments on Proposed Generic Communication, "Fatigue Analysis of Nuclear Power Plant Components" (June 16, 2008)); Exh. RH MR1, Discussion of the ASLB Decision with Regards to Contention 4 the Distinction Between Flow Assisted Corrosion and Erosion Corrosion (Dec. 3, 2008); Exh. RH MR 2 Declaration of Rudolf H. Hausler In Response to ASLB Partial Initial Decision Dated November 24, 2008 (Ruling on Contention 2A, 2B, 3 and 4); Declaration of Ulrich K. Witte In Response to ASLB Partial Initial Decision, Dated November 24, 2008 (Ruling on Contentions 2A, 2B, 3, and 4) (Dec. 18, 2008); Memorandum of Ulrich K. Witte (undated) ("Witte Memo"); Declaration of Ulrich K. Witte In Response to ASLB Partial Initial Decision, Dated November 24, 2008 (Ruling on Contentions 2A, 2B, 3, and 4) (Dec. 2, 2008); NEC Motion for Reconsideration-No 1 ("NEC MR1"), Slide Presentation by Steve Gosselin, Pacific Northwest National Laboratory, "Fatigue in Operating Nuclear Power Plants Components After 60 Years" (Feb. 2008); NEC-Motion for Reconsideration-No. 2 ("NEC MR2"), "Inservice Inspection (ISI) and Inservice Testing (IST)" (no author) (no date); NEC-Motion for Reconsideration-No. 3 ("NEC MR3") "Vermont Yankee Cornerstone Rollup of Flow Accelerated Corrosion Program" (July 7, 2008).

³ See Entergy's Opposition to New England Coalition's Motion for Reconsideration of the Licensing Board's Partial Initial Decision (Jan. 7, 2009); NRC Staff's Answer in Opposition to NEC Motion for Reconsideration of LBP-08-25 (Jan. 7, 2009).

circumstances, such as where the moving party *demonstrates* that it could not have reasonably anticipated the arguments to which it seeks leave to reply” (emphasis added). In 2004, the Commission added the “compelling circumstances” standard to its rules governing motions for leave to file replies to answers (10 C.F.R. § 2.323(c)) and motions for reconsideration (§ 2.323(e), § 2.345(b)).⁴ See Changes to Adjudicatory Process (Final Rule), 69 Fed. Reg. 2182, 2207, 2224 (Jan. 14, 2004). In so doing, the Commission stated that it was raising the standard for motions for reconsideration “to permit reconsideration only where manifest injustice would occur in the absence of reconsideration, and the claim could not have been raised earlier.” *Id.* Similarly then, a demonstration of compelling circumstances in a motion for leave to reply should show that manifest injustice would occur in the absence of a reply and that the arguments raised in the reply could not have been raised earlier.

B. NEC’s Motion Does Not Meet the Legal Standard Governing Motions for Leave to Reply

NEC’s assertions that the Staff and Entergy misinterpret, misconstrue, and misrepresent NEC’s Motion for Reconsideration do not demonstrate compelling circumstances. As the moving party, it was incumbent on NEC to *clearly* articulate in its Motion for Reconsideration why and how the standards set by 10 C.F.R. § 2.323(e)⁵ and Commission case law were satisfied, as well as precisely *which* aspects of LBP-08-25 NEC wants the Board to reconsider.

⁴ Sections 2.345 and 2.323(e) requires “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.”

⁵ NEC filed its Motion for Reconsideration pursuant to 10 C.F.R. § 2.345, “Petition for Reconsideration.” See Motion for Reconsideration at 1. Section 2.345, however, applies only to petitions for reconsideration of a “final decision.” Section 2.344 defines the term “final decision.” The Board’s Partial Initial Decision in LBP-08-25 is not a “final decision.” Therefore, NEC’s Motion for Reconsideration should have been filed under 10 C.F.R. § 2.323(e). Although the timing and standard for reconsideration is the same in both § 2.323 and § 2.345, i.e., “compelling circumstances,” § 2.323 is clear that replies to answers to motions are prohibited without leave of the presiding officer upon a showing a compelling circumstances, whereas § 2.345 is silent as to whether replies to petitions are permissible.

It was also incumbent upon NEC to identify all applicable rules and case precedents and explain in its Motion for Reconsideration why those rules and precedents were met.

In addition, NEC requested and the Board granted NEC a substantial extension of time to file a request for reconsideration beyond the ten days provided for by 10 C.F.R. § 2.323(e).⁶ Although NEC's Motion alleges that the Staff and Entergy misinterpreted, misconstrued, misrepresented or ignored aspects of NEC's Motion for Reconsideration, NEC fails to demonstrate why each alleged misinterpretation, misconception, misrepresentation, or ignored aspect of its Motion for Reconsideration could not have been anticipated and thus constitutes (either individually or in sum) compelling circumstances. Moreover, it was incumbent upon NEC to submit a clear, complete, and accurate Motion for Reconsideration that would avoid the alleged subsequent need to clarify their request.

Instead of demonstrating compelling circumstances that NEC could not have reasonably anticipated, NEC's Motion attempts to supplement NEC's Motion for Reconsideration by correcting "inadvertent omissions,"⁷ clarifying arguments and the purpose of exhibits,⁸ offering belated arguments why information could not have been provided sooner,⁹ and otherwise

⁶ Order (Granting NEC's Motion to Extend Time) (Dec. 4, 2008); [NEC]'s Motion for a Second Extension of Time in Which to File Motion for Reconsideration (Dec. 15, 2008); Order (Granting NEC's [Second] Motion to Extend Time) (Dec. 15, 2008).

⁷ See Motion at 4 (stating that the Staff incorrectly focused on NEC's "inadvertent" omission of Contentions 3 and 4 in two places in its motion).

⁸ See Motion at 5-6 (stating that the Staff "misconstrues NEC's intent" and explaining that exhibits JH MR-2 and NEC MFR 1, 2 were offered for purposes of "clarification" not to show a specific error in the Board's decision). See *also* Motion at 5 (stating that the purpose of exhibits NEC A-D was not to demonstrate a single error by the Board that renders the LBP-08-25 invalid, but to illustrate that the Board generally failed to "competently and fairly arrive at its findings and conclusions").

⁹ See Motion at 4-5 (indicating that it could not have provided exhibit NEC A (dated May 31, 2008) sooner because it was not "disclosed" to NEC. See *also* Motion at 6 (stating that exhibit JH MR-2 was disclosed by Entergy just two weeks before the evidentiary hearing and exhibit MFR3 was "never provided by Entergy). These belated explanations fail to demonstrate either that NEC could not have (continued. . .)

responding to arguments presented in the Staff's and Entergy's answer to its Motion for Reconsideration.¹⁰

In addition to asserting that the Staff and Entergy "misconstrue, misinterpret, and misrepresent" NEC's Motion for Reconsideration, the instant Motion alleges that the Staff's statements regarding NEC's compliance with Commission procedures are incorrect. See Motion at 2-3. However, NEC fails to demonstrate that the Staff's statements are incorrect and instead attempts to minimize their non-compliance with the Commissions' procedures. Thus, NEC's Motion should be denied and the Reply not considered.

CONCLUSION

For the reasons set forth above, NEC has not demonstrated that it has met the criterion set forth in 10 C.F.R. § 2.323(c) for filing a reply. NEC's Motion should be denied and the Reply not considered.

Respectfully submitted,

/RA by Mary C. Baty/

Lloyd B. Subin
Mary C. Baty
Counsel for NRC Staff

Dated at Rockville, Maryland
this 26th day of January, 2009

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reasonably anticipated arguments that the "new evidence" attached to NEC's Motion for Reconsideration fails to satisfy the requirements for introduction of new material in support of a motion for reconsideration or that the "new evidence meets" that standard. See *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 & 3), LBP-04-22, 60 NRC 379, 380-81 (2004), *aff'd* CLI-04-36, 60 NRC 631, 641 (2004) (stating that new material will not be consideration on reconsideration "unless the moving party can demonstrate that the new material's availability could not reasonably have been anticipated and its consideration demonstrates compelling circumstances, such as a clear and material error that renders the decision invalid").

¹⁰ See, e.g., Motion at 4 (responding to Entergy's argument that NEC confused Vermont Yankee's service water and circulating water systems).

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(Vermont Yankee Nuclear Power Station))	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER IN OPPOSITION TO NEC'S MOTION FOR LEAVE TO REPLY" in the above-captioned proceeding have been served on the following by electronic mail with copies by deposit in the NRC's internal mail system or, as indicated by an asterisk, by electronic mail, with copies by U.S. mail, first class, this 26th day of January, 2009.

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