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ADJUDICATIONS STAFF

**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 FOR LEAVE TO REPLY**

Pursuant to 10 C.F.R. §2.323(c), Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. ("Entergy") hereby oppose 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 New England Coalition's Motion for Reconsideration of the Licensing Board's Partial Initial Decision" (Dec. 14, 2009) ("Motion"). The Motion asks the Board to allow NEC to file a reply to Entergy's and the NRC Staff's answers in opposition to NEC's "Motion for Reconsideration of the Licensing Board's Partial Initial Decision" filed on December 17, 2008 ("Motion for Reconsideration").¹ The Motion should be denied because: (1) it does not meet the "compelling circumstances" standard for granting motions for leave to reply, and (2) NEC failed to comply with the consultation requirements of 10 C.F.R. § 2.323(b).

I. APPLICABLE LEGAL STANDARDS

The Commission's regulations provide that:

¹ The Motion attaches a proposed Reply to Entergy's and the Staff's answers to the Motion for Reconsideration. The Reply is virtually identical to the Motion.

The moving party has no right to reply, except as permitted by the . . . Presiding Officer. Permission may be granted only in compelling circumstances, such as where the moving party demonstrates that it could not reasonably have anticipated the arguments to which it seeks leave to reply.

10 C.F.R. § 2.323(c). The “compelling circumstances” standard for granting leave to file a reply is the same applied by the Commission with respect to motions for reconsideration, and “is intended to permit reconsideration only where manifest injustice would occur in the absence of reconsideration, and the claim could not have been raised earlier.” Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,207 (Jan. 14, 2004).

The Commission’s regulations also require that:

A motion must be rejected if it does not include a certification by the attorney or representative of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant’s efforts to resolve the issue(s) have been unsuccessful.

10 C.F.R. § 2.323(b).

II. NEC HAS NOT DEMONSTRATED COMPELLING CIRCUMSTANCES THAT WOULD WARRANT LEAVE TO REPLY

NEC seeks leave to reply based on its assertion that:

NRC Staff and Entergy Answers and Opposition 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 leave to reply and thus provide compelling circumstances under which the Board should grant leave to reply.

Motion at 2. This conclusory assertion is the only statement of “compelling circumstances” included in the Motion. NEC’s Motion does not cite any legal arguments that Entergy or the NRC Staff raised in responding to the Motion for Reconsideration that NEC could not reasonably have anticipated. Nor can NEC cite to any unexpected factual assertions in the filings by Entergy and the Staff. Entergy argued that, for each issue raised in its Motion for

Reconsideration, NEC failed to demonstrate the compelling circumstances that would warrant the Board granting a motion for reconsideration.² NEC should have been able to anticipate such an argument because 10 C.F.R. § 2.323(e) sets forth the high standards that must be met for a motion for reconsideration to be granted. NEC cannot claim that it could not anticipate that Entergy would argue that NEC's Motion for Reconsideration does not meet those standards.

NEC alleges that Entergy and the Staff improperly described its two electronic filings of December 17 and 19, 2008 on its Motion for Reconsideration, and that Entergy and the Staff mischaracterized the scope and contents of that motion. Motion at 2-4. Those claims, even if correct (which they are not) do not rise to the level of materiality that would meet the "compelling circumstances" standards for allowing replies to be filed.

The other area that NEC raises as involving "compelling circumstances" is that of the service water system leak about which Entergy's witness Mr. Fitzpatrick was questioned at the end of the evidentiary hearing. NEC alleges that Entergy's Answer erroneously charges that NEC appears to confuse the service water system and the circulating water system. NEC insists that it "does not confuse these systems." Motion at 5.³ The argument is simply irrelevant. Equally irrelevant is NEC's claim that the Staff referred to a "2004" service water leak whereas the leak NEC was referring to occurred in 2008. Motion at 5. Likewise, NEC's assertion that exhibits JH MR-2 and MFR 1 and 2 to its Motion for Reconsideration were offered only "for

² Entergy's Opposition to New England Coalition's Motion for Reconsideration of the Licensing Board's Partial Initial Decision (Jan. 7, 2009) ("Entergy's Answer") at 3-9.

³ NEC attaches an excerpt of testimony in a State of Vermont proceeding that purportedly shows that NEC does not confuse the two systems. The inclusion of new, extraneous materials in a reply is impermissible. Louisiana Energy Serv., L.P. (National Enrichment Facility), CLI-04-25, 60 NRC 223, 224-25 (2004); Memorandum and Order (Ruling on Standing, Contentions, Hearing Procedures, State Statutory Claim, and Contention Adoption), LBP-06-20, 64 N.R.C. 131, 191, 198-99 (2006).

purposes of clarification” (Motion at 6) provides no basis for allowing NEC to reply to Entergy’s and the NRC Staff’s answers.

In short, NEC’s Motion focuses on individual, non-material statements in the NRC Staff and Entergy answers to which NEC takes exception. However, even in those instances, NEC does not explain how it could not have anticipated the statements to which it takes exception or how compelling circumstances exist that necessitate a reply.

Finally, the Motion criticizes the Board for its alleged failure to weigh the evidence appropriately. NEC charges that “the Board moved to determine the facts [] in a highly biased and prejudicial way,” Motion at 4, and that “the Board did not competently and fairly arrive at its findings and conclusions. Accepting off-the-cuff, dissembling, and less-than-honest testimony as dispositive of an issue, as the Board did in this instance is but one example in a glacier of cumulative errors, failures to probe, and demonstrated biases which invalidate the bases (findings of fact and conclusions) for the Board’s decision.” *Id.* at 5. These arguments are not new, but repeat those made in the Motion for Reconsideration. A motion for leave to reply is not a vehicle to reargue claims already made in the initial motion.

In summary, NEC has not pointed to any compelling circumstances justifying a reply, thus its Motion must be denied.

III. NEC FAILED TO COMPLY WITH 10 C.F.R. § 2.323(b)

On January 12, 2009, NEC sent an e-mail to the parties stating:

New England Coalition would like to file a Motion for Leave to Reply to NRC Staff and Entergy Answers to NEC’s Motion for Reconsideration; together with a brief Reply. Our Reply will address what we believe to be some confusion over the intent and content of our Motion for Reconsideration as it is expressed in NRC Staff and Entergy Answers. We would like to know if you will agree or object to this Motion ASAP as we hope to file it at dawn tomorrow or soon thereafter.

NEC acknowledges in its Motion that:

NRC Staff offered that it would require more precise detail of what NEC saw as Staff's confusion over the intent and content of NEC's motion for reconsideration. In the absence of additional detail on the content of the motion and the reply, the staff has stated it will oppose.

Motion at 7. Despite the Staff's request for additional details as to why NEC deemed it necessary to file a reply, NEC did not provide any more information and went ahead with filing its Motion without further contacts with the other parties.

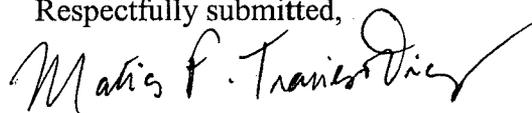
NEC's conduct is not consistent with the requirement that it make a "sincere effort to . . . resolve the issue(s)" as mandated by 10 C.F.R. § 2.323(b) prior to filing a motion. It has been ruled that a determination whether a "sincere effort to . . . resolve the issue(s)" was made is subject to an "objective reasonableness test." Entergy Nuclear Vermont Yankee, L.L.C., & Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), Memorandum and Order (Denying Motion for Summary Disposition of New England Coalition Contention 3), LBP-06-5, 63 N.R.C. 116, 129 (2006). The test involves two factors: (1) the last-minute timing of the effort, and (2) whether the substance of the communication indicates a real effort at resolving the issues. Id. at 129-30. In both respects, NEC's conduct demonstrates that it did not make a sincere effort to resolve the issues. Accordingly, NEC's Motion should be denied.

IV. CONCLUSION

The compelling circumstances that must exist for entertaining a motion for leave to reply are absent from NEC's Motion. NEC does not demonstrate that Entergy or the NRC Staff raised any legal or factual arguments that NEC could not have anticipated. NEC cites no compelling circumstances demonstrating that it should be allowed to file a reply. Moreover, NEC has failed

to comply with the consultation requirements in 10 C.F.R. § 2.323(b). Therefore, the Motion should be denied.

Respectfully submitted,



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Dated: January 23, 2009

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Entergy's Opposition to New England Coalition's Motion for Leave to Reply" dated January 23, 2009, were served on the persons listed below by deposit in the U.S. Mail, first class, postage prepaid, or with respect to Judge Elleman by overnight mail, and where indicated by an asterisk by electronic mail, this 23rd day January, 2009.

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