

April 30, 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 MOTION TO HOLD IN ABEYANCE
ACTION ON PROPOSED CONTENTION UNTIL
ISSUANCE OF NRC STAFF SUPPLEMENTAL SAFETY EVALUATION REPORT

Pursuant to 10 C.F.R. § 2.323(c), the staff of the U.S. Nuclear Regulatory Commission ("NRC Staff") hereby responds to New England Coalition's ("NEC") "Motion to Hold in Abeyance Action on this Proposed Contention Until Issuance of NRC Staff Supplemental Safety Evaluation Report" filed April 24, 2009. For the reasons set forth below, NEC has not demonstrated a legal basis for delaying action on the proposed new contention because the Supplemental Safety Evaluation Report ("SSER") is irrelevant to the question of whether NEC's proposed new contention is admissible. Consequently, NEC's Motion to Hold in Abeyance and the relief requested therein should be denied.

BACKGROUND

On January 25, 2006, Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (collectively "Entergy") filed an application to renew the operating license for Vermont Yankee Nuclear Power Station ("Vermont Yankee").¹ On May 26, 2006, NEC filed a

¹ Vermont Yankee Nuclear Power Station License Renewal Application (Jan. 25, 2006) (ADAMS (continued. . .))

petition for leave to intervene, request for hearing, and contentions.² During the week of July 21, 2008, the Atomic Safety and Licensing Board ("Board") held an evidentiary hearing on NEC Contentions 2A, 2B, 3, and 4.³ Prior to the hearing, and in accordance with 10 C.F.R. § 2.1207 and the Board's "Initial Scheduling Order" (Nov. 17, 2006) (unpublished) ("Scheduling Order") at 9-12, the parties submitted pre-filed testimony, exhibits, and proposed questions for the Board, in its discretion, to ask witnesses.⁴ The parties also had the opportunity to file motions in limine and to strike.⁵ Following the hearing, in accordance with 10 C.F.R. § 2.1209 and the Scheduling Order, the parties filed proposed findings of fact and conclusions of law.⁶

On November 24, 2008, the Board issued a partial initial decision, LBP-08-25. In LBP-08-25 the Board: 1) resolved contentions 2A and 2B in favor of NEC;⁷ 2) held open the record on contentions 2A and 2B until 45 days after Entergy discloses environmentally adjusted cumulative usage factor ("CUFen") calculations for the core spray ("CS") and reactor

(. . .continued)

Accession No. ML060300085). Entergy has since supplemented and amended its application several times.

² Petition for Leave to Intervene, Request for Hearing, and Contentions (May 26, 2006). For complete background on NEC's contentions, *See Entergy Vermont Yankee* (Vermont Yankee Nuclear Power Station) LBP-08-25, 68 NRC ___, (Nov. 24, 2008)(slip op. at 1-7).

³ *See* LBP-08-25, 68 NRC ___, slip op. at 1-2, 4-5 (setting forth NEC's contentions).

⁴ *See id.* at 6-7; Memorandum (Submission of Proposed Questions into the Official Record) (Dec. 3, 2008) (unpublished). *See also* § 2.1207.

⁵ *See* LBP-08-25, 68 NRC ___, slip op. at 7 (referencing the parties motions and the Board's Order ruling on those motions).

⁶ *See* New England Coalition, Inc.'s Proposed Findings of Fact and Conclusions of Law (Aug. 25, 2008) ("NEC Proposed Findings"); Entergy's Proposed Findings of Fact and Conclusions of Law on New England Coalition Contentions (Aug. 25, 2008); NRC Staff's Proposed Findings of Fact and Conclusions of Law, and Order in the Form of an Initial Decision (Aug. 25, 2008).

⁷ LBP-08-25, 68 NRC at ___, slip op. at 153.

recirculation ("RR") nozzles to the parties in order provide an opportunity for contentions challenging those calculations;⁸ and 3) resolved contentions 3 and 4 in favor of Entergy.⁹ On March 9, 2009, the Board issued an order clarifying when the 45 day period to file new contentions began.¹⁰ The next day, Entergy submitted its final CUFen calculations for the CS and RR nozzles.¹¹

On April 24, 2009, NEC moved for leave to file a new contention challenging the CUFen calculations for the CS and RR nozzles. At that time, NEC also incorporated a "Motion to Hold in Abeyance Action on this Proposed Contention Until Issuance of NRC Staff Supplemental Safety Evaluation Report" ("Motion"), which is the subject of this answer.¹² The NRC Staff intends to separately respond to NEC's proposed new contention in a subsequent Answer to that part of NEC's submission.¹³

⁸ *Id.* at 151-52; 67-68 (stating that in the event Entergy "chooses to proceed under the [Aging Management Program] route NEC may revitalize dormant Contention 2").

⁹ *Id.* at 153.

¹⁰ *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), (Mar. 9, 2009)(slip op.) (ADAMS Accession No. ML090680620). The Order clarified that the 45 day period began when Entergy disclosed the calculations, not when the NRC Staff finished analyzing the calculations. *Id.* at 3.

¹¹ Letter from Matias F. Travieso-Diaz, Counsel for Entergy to Atomic Safety and Licensing Board (Mar. 10, 2009) (ADAMS Accession No. ML090840422).

¹² New England Coalition, Inc.'s Motion for Leave to File a Timely New Contention and Motion to Hold in Abeyance Action on this Proposed Contention Until Issuance of NRC Staff Supplemental Safety Evaluation Report (April 24, 2009).

¹³ The Motion for Leave to File a Timely New Contention is without merit and, contrary to the Board's November 24, 2008 order, appears to rehash old arguments upon which the Board has already ruled. LBP-08-25, 68 NRC ___, slip op. at 67 n.95.

DISCUSSION

I. The SSER is Irrelevant to the Issue of Whether the Board Should Admit NEC's Proposed New Contention.

NEC asks the Board to delay acting on its contention until the NRC Staff issues the SSER. Specifically, NEC asserts that the SSER “will be helpful in both building a record in this docket and helpful to the Board and the parties in evaluating the merits of NEC’s proposed contention.” Motion at 7. However, under well-established Commission precedent, the SSER is not the focus regarding admissibility of NEC’s new contention.

The NRC’s regulations indicate that “the proper focus of any contention should be the application.” *Detroit Edison Co.* (Fermi Unit 3), CLI-09-04, 69 NRC ___, (Feb. 17, 2009)(slip op. at 4) *citing* 10 C.F.R. § 2.309(f)(1)(vi). The Commission has stated time and again that “it is the license application, not the NRC staff review, that is at issue in [NRC] adjudications.” *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 350 (1998); *see also* *Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit 3), CLI-08-17, 68 NRC ___, (Aug. 13, 2008)(slip op. at 8)); *Pa’ina Hawaii, LLC* (Materials License Application), CLI-08-03, 67 NRC ___, (Mar. 27, 2008)(slip op. at 22 n.73). Recently, the Commission reaffirmed these principles within the context of license renewal proceedings. *AmerGen Energy Co. LLC* (Oyster Creek Nuclear Generating Station) et al., CLI-08-23, 68 NRC ___, (Oct. 6, 2008)(slip op. at 18). Specifically, the Commission stated, “[t]he purpose and scope of a licensing proceeding is to allow interested persons the right to challenge the sufficiency of the application. The NRC has not, and will not, litigate claims about the adequacy of the Staff’s safety review in licensing adjudications.” *Id.*

Thus, in deciding whether to admit NEC’s proposed new contention, the Board should determine whether the contention disputes specific portions of the application or identifies a relevant omission in the application. 10 C.F.R. § 2.309(f)(1)(vi). As a result, NEC has failed to

establish a valid reason for the Board to delay ruling on the admissibility of NEC's new contention until the NRC Staff issues the SSER.¹⁴

II. The Authorities NEC Cites Do Not Establish that the Board Must Wait for the SSER

NEC cites several authorities to support its argument that the Board should hold further action on NEC's new contention in abeyance until the NRC Staff issues the SSER. A review of these decisions indicates that not one addresses a situation analogous to the instant case. Consequently, these citations do not contravene the general principle that the NRC Staff's review is unrelated to a contention's admissibility.

First, NEC notes that, with certain exceptions, the Commission has stated that "any evidentiary hearing should not commence before completion of the staff's Safety Evaluation Report (SER) or Final Environmental Statement (FES) regarding an application." Policy on Conduct of Adjudicatory Proceedings; Policy Statement, 63 Fed. Reg. 41,872, 41,874 (Aug. 5, 1998). But, the scope of an evidentiary hearing is not the issue before the Board. Rather, before holding an evidentiary hearing on NEC's proposed new contention, the Board must first rule on its admissibility. As discussed above, that determination is unrelated to the NRC Staff's review, including the SSER. Consequently, this policy statement does not advance NEC's argument.

NEC's second cited authority, *Duke Power Co. (McGuire Nuclear Station, Units 1 and 2)*, LBP -77-20, 5 NRC 680, 681 (1977) ("*McGuire*"), states, "The Staff Safety Evaluation Report (SER) and the opinion of the Advisory Committee on Reactor Safety (ACRS Report) have not been issued. Accordingly, these two matters involving safety issues are not appropriate for

¹⁴ The NRC Staff recognizes that it may issue the SSER prior to the Board's ruling on the new contention, however, issuance of the SSER should not be the triggering event for the Board's ruling.

summary disposition at this time.” The *McGuire* case concerns summary disposition, not contention admission, which is the issue before the Board.

Since *McGuire*, the Commission has changed its policy on when parties may file motions for summary disposition on several occasions. See Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,177 (Aug. 11, 1989); Rules of Practice for Domestic Licensing Proceedings; Expediting the NRC Hearing Process, 46 Fed. Reg. 30,328, 30,330 (June 8, 1981). Most recently, the Commission has limited motions for summary disposition to 45 days before the commencement of a hearing in Subpart L proceedings or within 20 days of the close of discovery in Subpart G proceedings. Changes to Adjudicatory Process; Final Rule, 69 Fed. Reg. 2182, 2262, 2268 (Jan. 14, 2004). However, the Commission promulgated these regulations to avoid delay in proceedings, *id.* at 2211, not give presiding officers an opportunity to peruse SERs. Indeed, delaying resolution of a motion for summary disposition until the NRC Staff issued an SER would contravene the Commission’s expressed policy that motions for summary disposition not unnecessarily delay the proceedings. In addition, the Board previously considered, and rejected, a motion for summary disposition before the NRC Staff issued the SER. *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), 66 NRC ___, (Aug. 10, 2007)(slip op.) (ADAMS Accession No. ML072220410). Thus, NEC’s reliance on *McGuire* to establish this proposition is misplaced.

NEC also cites the *Carolina Power and Light Company* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4) decision to support their claim that “staff review of an application is a vital aid (at the Commission level) in reaching an informed judgment on the need for a hearing in the public interest.” Motion at 7 (*citing* ALAB-581, 11 NRC 233, 235 (1980), *modified by* CLI-80-12, 11 NRC 514 (1980)). However, in that case the Staff was directed to provide input on

whether an applicant possessed the technical qualification to operate a plant, not input relating to the initial determination on contention admission. 11 NRC at 235, 11 NRC at 517.

Consequently, this case does not address an analogous situation to the present case.

Lastly, these cases may establish a general principle that NRC Staff input is helpful to the Board and Commission. However, this does not require the Board to await the issuance of the SSER to rule on the admissibility of NEC's new contention. As demonstrated above, the SSER is unrelated to the Board's decision on whether the new contention meets the admissibility requirements.

III. The Board Recognized these Principles in its Earlier Order.

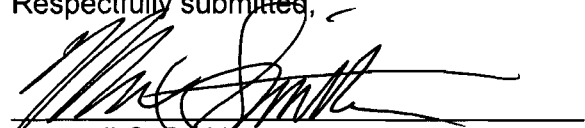
In a March 9, 2009 order, clarifying its earlier order, the Board stated that "the 45 day time period [in which NEC could file new contentions] specified in the PID [partial initial decision] is triggered by a specific event – Entergy's service on NEC and Vermont of its confirmatory CUFen analyses for the CS and RR nozzles." *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), 69 NRC ___, (Mar. 9, 2009)(slip op. at 3). The Board's choice to begin the 45 day period upon Entergy's service of the updated analyses, as opposed to the NRC Staff completing the SSER, confirms that the Board understood that Entergy's submittal, not the SSER, should form the bases for any new contention NEC wished to file.¹⁵ As discussed above, this understanding is well supported by Commission precedent.

¹⁵ The Board further limited NEC's ability to file new contentions in the PID. Specifically, the Board stated that if Entergy recalculated the CUFen analyses for the CS and RR outlet nozzles in conformity with applicable regulatory guidance, submitted them to the NRC Staff and other parties to this proceeding, did not use significantly different technical or scientific judgments, and determined that the results of those calculations were less than unity (as required by NRC regulation), then the proceeding would terminate. LBP-08-25, 68 NRC ___, slip op. at 67. Otherwise, the Board found NEC could file a new or amended contention. *Id.* Because the new CUFen analyses for the CS and RR outlet nozzles meets the requirements set by the Board, the Board should not delay decision on whether or not to admit (continued. . .)

CONCLUSION

For the reasons set forth above, the Motion and the requested relief should be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Maxwell C. Smith', is written over a horizontal line.

Maxwell C. Smith
Lloyd B. Subin
Counsel for NRC Staff

Dated at Rockville, Maryland
this 30th day of April, 2009

(. . .continued)

NEC's proposed new contention.

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LLC, and ENTERGY NUCLEAR)	
OPERATIONS, INC.)	ASLBP No. 06-849-03-LR
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(Vermont Yankee Nuclear Power Station))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S ANSWER IN OPPOSITION TO NEC MOTION TO HOLD IN ABEYANCE ACTION ON PROPOSED CONTENTION UNTIL ISSUANCE OF NRC STAFF SUPPLEMENTAL SAFETY EVALUATION REPORT" 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 30th day of April, 2009.

Alex S. Karlin, Chair
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: ask2@nrc.gov

Office of the Secretary
Attn: Rulemakings and Adjudications Staff
Mail Stop: O-16G4
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: hearingdocket@nrc.gov

William H. Reed*
Administrative Judge
Atomic Safety and Licensing Board
1819 Edgewood Lane
Charlottesville, VA 22902
E-mail: whrcville@embarqmail.com

Zachary Kahn, Law Clerk
Atomic Safety and Licensing Board
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: zachary.kahn@nrc.gov

Richard E. Wardwell
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: rew@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
E-mail: lauren.bregman@nrc.gov

Office of Commission Appellate
Adjudication
Mail Stop: O-16G4
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: OCAAmail@nrc.gov

Peter C.L. Roth, Esq*
Office of the Attorney General
33 Capitol Street
Concord, NH 3301
E-mail: peter.roth@doj.nh.gov

Raymond Shadis*
37 Shadis Road
PO Box 98
Edgecomb, ME 04556
E-mail: shadis@prexar.com

Anthony Z. Roisman, Esq.*
National Legal Scholars Law Firm
84 East Thetford Rd.
Lyme, NH 03768
E-mail: aroisman@nationallegalscholars.com

David R. Lewis, Esq.*
Matias F. Travieso-Diaz, Esq
Elina Teplinsky, Esq
Blake J. Nelson, Esq
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, NW
Washington, DC 20037-1128
E-mail: david.lewis@pillsburylaw.com
matias.travieso-diaz@pillsburylaw.com
elina.teplinsky@pillsburylaw.com
blake.nelson@pillsburylaw.com

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

Matthew Brock*
Assistant Attorney General, Chief
Environmental Protection Division
Office of the Attorney General
One Ashburton Place, 18th Floor
Boston, MA 02108
E-mail: matthew.brock@state.ma.us

Callie B. Newton, Chair*
Gail MacArthur
Lucy Gratwick
Town of Marlboro Selectboard
Dan MacArthur, Director
Town of Marlboro Emergency Management
P.O. Box 518
Marlboro, VT 05344
Email : cbnewton@sover.net
dmacarthur@igc.org

Alan A. Pemberton, Esq.*
Derron J. Blakely, Esq.
Covington & Burling LLP
1201 Pennsylvania Avenue, N.W.
Washington, DC 20004-2401
Email: apemberton@cov.com
dblakely@cov.com

A handwritten signature in black ink, appearing to read 'Max Smith', with a long horizontal line extending to the right.

Maxwell C. Smith
Counsel for NRC Staff