

June 10, 2009 (2:15m)

June 10, 2009

OFFICE OF SECRETARY
RULEMAKINGS AND
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 NEC'S REQUEST FOR AN EX-POST-FACTO
EXTENSION OF TIME TO FILE A REPLY TO THE NRC STAFF AND ENTERGY'S
OPPOSITIONS TO NEC'S MOTION TO FILE A TIMELY NEW CONTENTION**

I. INTRODUCTION

Applicants Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively "Entergy") submit this opposition, pursuant to 10 C.F.R. § 2.323(c), to New England Coalition, Inc.'s ("NEC") ex-post facto request for an extension of time in which to file a reply to the NRC Staff and Entergy's Oppositions to NEC's Motion For Leave to File a Timely New Contention ("NEC Request").¹ The NEC Request, filed only after Entergy had moved to strike NEC's reply² as untimely, has no factual support and is inconsistent with the NRC regulations and the Board rulings in this proceeding. Consequently, it should be denied.

II. DISCUSSION

The relevant facts relating to the NEC Request are not in dispute. NEC concedes that it did not serve its Reply electronically until the morning of May 27, 2009, even though the Reply

¹ The NEC Request is part of an NEC filing entitled "New England Coalition's Opposition to Entergy's Motion to Strike New England Coalition's Reply to NRC Staff and Entergy's Oppositions to NEC's Motion to File a Timely New Contention," dated June 8, 2009. The NEC Request is both discussed in the main filing and presented separately starting on p. 11 of the filing.

² Reply to NRC Staff and Entergy Oppositions to NEC's Motion for Leave to File a Timely New Contention, dated May 26, 2007 ("Reply").

was required to be filed no later than May 26, 2009, see NEC Request at 12. NEC also admits that it failed to mail copies of its Reply until May 27, 2009, although the Certificate of Service accompanying the Reply attests to service of the Reply on May 26, 2009, see id. at 12-13. Further, NEC admits that it failed to serve Entergy an electronic copy of its Reply at all, see id. at 14. Finally, NEC admits that it was aware that May 26, 2009 was the filing deadline and knew that it was going to be occupied with another proceeding that would interfere with that deadline, but chose not to file a timely request for an extension of time despite the admonition in the Board's Initial Scheduling Order that a party must file a motion for an extension of time as soon as it knows or should have known of the facts, circumstances, or grounds for the motion, and in no event later than 11 AM Eastern Time on the day preceding the applicable deadline. Initial Scheduling Order (Nov. 17, 2006), at 9.

The Initial Scheduling Order provides that a motion for an extension of time "filed after the applicable deadline will be summarily denied unless it is accompanied by a sworn declaration or affidavit from the counsel or representative of the party that describes very extraordinary circumstances explaining why the motion was not filed earlier, and otherwise justifies the requested extension." Id. NEC has not provided such a sworn declaration. Moreover, NEC has not cited "very extraordinary circumstances" that would justify a belated extension of time.

NEC acknowledges that it has been misrepresenting the mailing date in its certificates of service because "NEC has been operating on the assumption that it was tacitly understood that filings would go out in the very next mail." NEC Response at 13. NEC admits that its practice has been to backdate its certificates of service throughout this proceeding and that it is only

acknowledging the practice now because “this is the first time that anyone complained.” Id. NEC provides no justification for its disregard of the rules regarding service.³

With respect to its failure to timely serve electronic copies of its Reply, and its complete failure to serve counsel for Entergy, NEC recites a complex tale of electronic misfortune (NEC Response at 3-4), culminating in the mysterious “clipping off” of Entergy’s counsel from the list of addressees. Id. at 4. Regardless, it was NEC’s obligation to serve its filing on time, and its failure to do so is unjustifiable.⁴

Finally, regarding its time commitments in another proceeding, NEC admits it was aware of those commitments, id. at 2, and was also aware of the 130 pages of filings by Entergy and the NRC Staff, “densely laden with technical information,” that required its attention. Id. at 3. NEC was well apprised of all attending circumstances and could have filed a motion for an extension of time but deliberately chose not to do so. Id. There are no “very extraordinary circumstances” that would justify its untimely extension of time request.⁵

III. CONCLUSION

NEC’s admittedly untimely Reply cannot be cured by an after the fact motion for an extension of time. Such a motion is unsupported and should be summarily denied, and

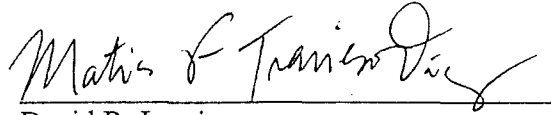
³ See 10 C.F.R. § 2.305(c)(4). NEC’s conduct does not appear consistent with the standards of practice for counsel and party representatives set in 10 C.F.R. § 2.314(a).

⁴ NEC seeks to brush aside the fact that in its Certificate of Service does not include an asterisk (*) next to the name of Entergy counsel, signifying electronic service, by stating: “[s]urely, with more than 900 lawyers on staff, Entergy’s representing law firm has more than one surplus asterisk with which to be concerned.” NEC Request at 7. NEC does not explain how, if NEC intended to serve Entergy electronically, it managed to “lose” the asterisk.

⁵ This is not the first time that NEC has attempted to file motions for extension of time after the deadline to which the motion referred had passed. In Entergy Nuclear Vermont Yankee, L.L.C., & 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) NEC was admonished about its “cavalier disregard for the schedule” in filing motions for extension of time after the filing deadline had elapsed. The Board noted: “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.” Order, slip op. at 2-3, citing Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1247 (1984).

Entergy's motion to strike the Reply on the grounds, inter alia, of untimeliness, should be granted.

Respectfully Submitted,

A handwritten signature in cursive script, reading "Matias F. Travieso-Diaz", written over a horizontal line.

David R. Lewis

Matias F. Travieso-Diaz

Blake J. Nelson

PILLSBURY WINTHROP SHAW PITTMAN LLP

2300 N Street, NW

Washington, DC 20037-1128

Tel. (202) 663-8000

Counsel for Entergy

Dated: June 10, 2009

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NUCLEAR REGULATORY COMMISSION**

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Entergy Nuclear Vermont Yankee, LLC)	Docket No. 50-271-LR
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Entergy's Opposition to NEC's Request for an Ex-Post-Facto Extension of Time to File a Reply to the NRC Staff and Entergy's Oppositions To NEC's Motion To File A Timely New Contention" 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 10th day of June 2009.

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

*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
hearingdocket@nrc.gov

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

Atomic Safety and Licensing Board
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

*Lloyd Subin, Esq.
*Susan L. Uttal, Esq.
*Maxwell C. Smith, Esq.
Office of the General Counsel
Mail Stop O-15-D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
LBS3@nrc.gov; susan.uttal@nrc.gov;
maxwell.smith@nrc.gov

*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

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

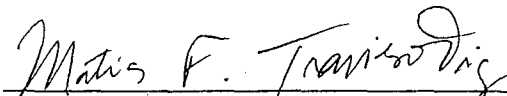
* Matthew Brock
Assistant Attorney General
Office of the Attorney General
One Ashburton Place, 18th Floor
Boston, MA 02108
Matthew.Brock@state.ma.us

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

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

Raymond Shadis
New England Coalition Pro Se Representative
Post Office Box 98
Edgecomb, ME 04556
shadis@prexar.com

* Lauren Bregman
Atomic Safety and Licensing Board Panel
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
lauren.bregman@nrc.gov


Matias F. Travieso-Diaz