

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS

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Dale E. Klein, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield
Gregory B. Jaczko
Peter B. Lyons

In the Matter of)
)
ENTERGY NUCLEAR VERMONT YANKEE) , LLC,)
& ENTERGY NUCLEAR OPERATIONS, INC.) Docket No. 50-271-LR
)
(Vermont Yankee Nuclear Power Station))
)

CLI-07-01

MEMORANDUM AND ORDER

Licensees Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (collectively "Entergy") seek interlocutory review of the Atomic Safety and Licensing Board's Memorandum and Order, LBP-06-20¹ in this license renewal proceeding regarding the Vermont Yankee Nuclear Power Station.² The Board admitted for adjudication several contentions, but on appeal Entergy challenges only intervenor New England Coalition's ("the Coalition") Contention 1.³ That contention claims that Entergy's Environmental Report does not adequately

¹ 64 NRC 131 (Sept. 22, 2006), *reconsid'n denied*, unpublished decision (Oct. 30, 2006), ADAMS Accession No. ML063030484. (ADAMS is the acronym for the NRC's Agencywide Documents Access and Management System -- a computerized storage and retrieval system for NRC documents, publicly accessible through the NRC's web page at <http://www.nrc.gov>.)

² Entergy's Petition for Interlocutory Review of LBP-06-20 Admitting New England Coalition's Contention 1 (Oct. 10, 2006). Licensees seek a 20-year extension of the facility's licenses until March 21, 2032.

³ The Board split 2-1 on Contention 1. Judges Karlin and Elleman joined in the majority (continued...)

address the impacts of increased thermal discharges into the Connecticut River during the 20-year license renewal period.

On appeal, Entergy asserts that the Board's admission of Contention 1 constitutes legal error,⁴ raises substantial issues of law and policy,⁵ threatens Entergy with immediate and serious irreparable harm that cannot later be rectified,⁶ and will affect the proceeding in a pervasive and unusual manner.⁷ Consequently, Entergy asks us to review the Board's admission of Contention 1, pursuant to the standards for discretionary interlocutory review set forth in 10 C.F.R. § 2.341(f)(2), and then to reverse the Board's ruling. We deny interlocutory review but take *sua sponte* review of the Board order.⁸

We customarily do not entertain interlocutory appeals of this kind, due in large part to our "general unwillingness to engage in 'piecemeal interference in ongoing Licensing Board proceedings.'"⁹ Our rules set a high bar for interlocutory review petitions, *viz.*, a petitioner must demonstrate that the licensing board's ruling at issue either "threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could

³(...continued)
opinion admitting the contention. Judge Wardwell filed a dissent (64 NRC at ___ - ___). The Board was unanimous on its other contention-admissibility rulings.

⁴ Petition at 1, 9-19.

⁵ *Id.* at 19.

⁶ *Id.* at 1, 19-21.

⁷ *Id.* at 1, 21-22.

⁸ Separately, we will address an appeal by the Massachusetts Attorney General, who challenges the Board's rejection of his contention raising assertedly new and significant information concerning the potential for fires in the spent fuel pool.

⁹ *Exelon Generation Co., LLC* (Early Site Permit for the Clinton ESP Site), CLI-04-31, 60 NRC 461, 466 (2004), quoting *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205, 213 (2002).

not be alleviated through a petition for review of the presiding officer's final decision; or . . . affects the basic structure of the proceeding in a pervasive or unusual manner.”¹⁰ Entergy's interlocutory appeal falls well outside this standard.

However, we will occasionally take review of an issue on our own motion, or *sua sponte*, where that issue is not otherwise before us on appeal. This “*sua sponte* review” provides an avenue for us to take various kinds of adjudicatory action. For instance, we have used *sua sponte* review as a vehicle to address unappealed issues¹¹ or orders,¹² to set a specific timetable¹³ or otherwise customize our procedures for individual adjudications,¹⁴ to suspend a proceeding,¹⁵ to vacate an unreviewed board order after withdrawal of the challenged

¹⁰ 10 C.F.R. § 2.341(f)(2)(i)-(ii). Outside the context of petitions for interlocutory review, the Commission may also take interlocutory review of questions or rulings that a licensing board either refers or certifies to the Commission under 10 C.F.R. §§ 2.319(l) or 2.323(f), respectively. See 10 C.F.R. § 2.341(f)(1). There has been no referral or certification here.

¹¹ See, e.g., *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-5, 57 NRC 279, 284 (2003); *Kansas Gas & Electric Co.* (Wolf Creek Generating Station, Unit 1), CLI-99-5, 49 NRC 199, 200 (1999).

¹² See, e.g., *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 67, 74 (2004); *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-99-1, 49 NRC 1, 2 (1999); *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-98-18, 48 NRC 129, 130 (1998); *Niagara Mohawk Power Corp.* (Nine Mile Point, Unit No. 2), CLI-73-28, 6 AEC 995 (1973).

¹³ *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-13, 53 NRC 478, 484-86 (2001); *Hydro Resources*, CLI-99-1, 49 NRC at 2; *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-15, 48 NRC 45, 52 (1998) (and cited authority), *aff'd sub nom. National Whistleblower Center v. NRC*, 208 F.3d 256 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 9-11 (1996); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-88-9, 28 NRC 567, 569-71 (1988).

¹⁴ *Savannah River*, CLI-01-13, 53 NRC at 480; *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-99-18, 49 NRC 411, 412 (1999).

¹⁵ *Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1), CLI-91-15, 34 NRC 269, 271
(continued...)

application,¹⁶ to decide whether to disqualify a presiding officer,¹⁷ to address an issue of wide implication,¹⁸ and to provide guidance to a licensing board.¹⁹ These last two reasons motivate us here to exercise our *sua sponte* review authority.

The sharply differing views of the majority and dissenting member of the Board on the regulatory requirements for environmental assessment of the impact of thermal discharge from a once-through cooling system raise significant issues of potentially broad impact and may well recur in the likely license renewal proceedings²⁰ for other plants that use such a cooling system

¹⁵(...continued)
(1991), *reconsid'n denied*, CLI-92-6, 35 NRC 86, 88 (1992).

¹⁶ *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-99-24, 50 NRC 219, 222 (1999).

¹⁷ *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-9, 47 NRC 326, 332 (1998).

¹⁸ *Seabrook*, CLI-98-18, 48 NRC at 130; *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 516-17 (1977), *aff'd sub nom. New England Coalition on Nuclear Pollution v. NRC*, 582 F.2d 87, 95-96 (1st Cir.1978); *U.S. Energy Research and Development Administration* (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67, 76 (1976). See generally 10 C.F.R. § 2.341(f)(1), authorizing presiding officers to certify to us "novel issue[s]."

¹⁹ See, e.g., *Clinton ESP Site*, CLI-06-20, 64 NRC at 21; *Catawba*, CLI-04-6, 59 NRC at 74; *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 210 (1998); *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-16, 48 NRC 119, 120 (1998); *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-14, 48 NRC 39, *passim*, *motion to vacate denied*, CLI-98-15, 48 NRC 45, 51 (1998), *aff'd sub nom. National Whistleblower Center v. NRC*, 208 F.3d 256 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001).

²⁰ "The industry fully expects all U.S. [nuclear] plants to apply for . . . [20-year] extensions as their original license periods expire." James A. Lake (associate laboratory director for the nuclear program at the Idaho National Laboratory, and president of the American Nuclear Society in 2000-2001), "The Renaissance of Nuclear Energy," eJournalUSA, <http://usinfo.state.gov/journals/ites/0706/ijee/lake.htm> (last visited July 11, 2006).

but whose operating licenses have not been renewed.²¹ Moreover, we announced in our 1998 *Policy Statement on Conduct of Adjudicatory Proceedings* that we would, where appropriate, exercise our authority to instruct the board to certify novel license-renewal issues to us.²² Our taking *sua sponte* review yields essentially the same result.

In sum, given the important questions regarding the regulatory requirements at play in the analysis of the thermal discharge issue, and our policy of providing guidance to the licensing boards on such issues, we take *sua sponte* review of the Board's decision to admit the Coalition's Contention 1 for adjudication. To assist us in our review, we direct the parties to file briefs pursuant to the following schedule:

Within 14 days of this order, all parties are to submit briefs supporting their positions on the admissibility of the Coalition's Contention 1.

Within 7 days thereafter, all parties are to submit reply briefs.

The Commission and the parties are to *receive* the briefs on the due date.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 11th day of January, 2007.

²¹ The other plants using this kind of cooling system are identified in NUREG-1437, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants" at Appendix A (May 1996).

²² 48 NRC 18, 23 (1998).

Commissioner Peter B. Lyons, With Whom

Commissioner Gregory B. Jaczko Joins, Respectfully Dissenting

Entergy's interlocutory review Petition seeks Commission review of the Board's admission of only one of several contentions the Board admitted for litigation. Entergy asks that the Commission review the admissibility of the contention pursuant to either the discretionary interlocutory review standards of § 2.341(f)(2), which the majority decision refuses to do, or pursuant to the Commission's inherent supervisory authority over adjudications, which the majority decision does. We would deny the Petition.

We agree with the majority decision that Entergy's interlocutory appeal made pursuant to § 2.341(f)(2) "falls well outside" of the standards set forth in that regulation. There is a high bar for interlocutory review petitions, which must show "immediate and serious irreparable impact" or a "pervasive or unusual" impact on "the basic structure" of the proceeding. Entergy's claim of Board legal error and assertion of an increase in litigation burden caused by the admission of the contention do not rise to this level.

We disagree with the majority decision to grant Entergy's request to have the Commission exercise our inherent supervisory authority over the admissibility of this one contention. The Commission's supervisory authority does not constitute grounds for a *party's own request* for appellate review.²³ Were it otherwise, there would be no limit to the kinds of arguments parties could legitimately present on appeal, and particularly on *interlocutory* appeal - a result at odds with the Commission's oft-expressed intent to limit the availability of such

²³ See *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-00-11, 51 NRC 297, 299 (2000) ("And the Commission itself may exercise its discretion to review a licensing board's interlocutory order if the *Commission* wants to address a novel or important issue However, the Commission's decision to do so in any particular proceeding stems from its inherent supervisory authority over adjudications and in no way implies that parties have a right to seek interlocutory review on that same ground.") (emphasis in original).

appeals.²⁴ Thus, the exercise of this authority at the request of a party undercuts the integrity of the Commission's procedures.

In addition, the exercise of the Commission's inherent supervisory authority is not warranted in this instance. The majority decision implies that the issue of the impact of thermal discharge from a once-through cooling system is a new issue before the Commission and suggests that since industry expects all plants will seek license renewal, this issue "may well recur" in the "likely" license renewal proceedings. First, according to the NRC license renewal website, the NRC has completed its review on no less than 23 plant applications. Had this matter been indeed of substantial significance, it likely would have surfaced before. It hardly seems a worthwhile exercise of the Commission's supervisory authority to resolve a routine contention admissibility dispute.

With respect to the possible future litigation of this matter, a comparison of NUREG-1437, Appendix A (listing plants and their cooling systems) and the NRC website shows that there are 10 plants that have not been renewed that have once-through cooling systems, of which less than half have been identified in letters of intent to seek renewal in the future, and, most importantly, of those, only 1 has the potential to reach the contention admissibility stage of a hearing before the conclusion of this proceeding. Consequently, this is not a novel issue of "wide application" or one with broad impacts. With one possible exception, the Commission will have already decided this question, if it is raised on appeal at the end of the case, and its decision is to be applied, as a matter of *stare decisis*, to all other instances in which this question is raised in litigation.

²⁴ See *Entergy Nuclear Operation, Inc.* (Pilgrim Nuclear Power Station), CLI-07-____, 64 NRC ____ (Jan. ____, 2007), slip op. at 1 (rejecting interlocutory appeal by license renewal intervenor); *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111 (Sept. 6, 2006), slip op. at 8.

We note that the Board has set a schedule, which includes a deadline of June 15, 2007, for the filing of motions for summary disposition. See "Initial Scheduling Order," dated November 17, 2006 at 7 (ML063210212). Entergy's Petition raises arguments that would seem to make this contention a prime candidate for the use of this procedure.²⁵ Review on this question, as well as the other contentions admitted for adjudication, should abide the end of the case. However, now that the Commission has decided to take up this matter, we will participate in that process as if the appeal had come before the Commission in the proper course.

Commissioner Jeffrey S. Merrifield, With Whom

Commissioner Edward McGaffigan, Jr. Joins, Concurring

We agree with the majority decision to take review of this thermal impacts contention. We write separately to emphasize why, in our view, the Commission is exercising its inherent supervisory authority and taking review of the admissibility of this contention.

While we appreciate the views of our dissenting colleagues, and their desire to preserve our interlocutory review standards, we respectfully disagree with them. We agree with the dissent that the Commission's inherent supervisory authority does not constitute grounds for a party's review. However, in a situation that merits Commission review, the refusal to take review because a party asked us to would elevate form over substance. We would, in effect, be saying

²⁵ In response to Commissioner Merrifield's separate views, we recognize that to be granted summary disposition, a party must show that there is "no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law." 10 CFR § 2.710(d)(2). A factual dispute adequate to support the admission of a contention, however, may not necessarily stand up under the rigor of summary disposition and, in any event, may be irrelevant to the legal theory propounded on summary disposition.

that if the Commission had noticed this issue on our own we would take review, but because one of our stakeholders called it to our attention, we will not take review. In our view, while we may agree or disagree with a particular matter, we nonetheless appreciate any stakeholder bringing something to the Commission's attention that merits Commission review. This is further reinforced by the fact that our staff has raised the same concern. If we refused review in this situation we would place parties in adjudications in the untenable position of witnessing conduct before a licensing board that is clearly inconsistent with Commission policy, yet being unable to alert us for fear that by raising the issue, their chances of Commission action will be reduced. This would create a chilling effect that we believe is an unintended outgrowth of the position contained in the dissent.

Thus far, the Commission has done an excellent job at ensuring its license renewal process is effective, efficient, realistic and timely. Part of the reason for this is the careful differentiation between Category 1 and Category 2 impacts in license renewal. Category 1 issues have been generically determined for all plants in the Generic Environmental Impact Statement (GEIS), NUREG-1427. Category 2 issues require a plant-specific analysis. The admission of this contention appears to require additional analysis of a Category 1 issue. In our 1998 policy statement on the conduct of adjudicatory proceedings we specifically emphasized that for a license renewal proceeding the review of environmental issues is limited by rule by the generic findings in the GEIS. Since, on its face, the admission of this contention appears to require analysis of findings that were generically determined, its admission is inconsistent with the policy statement. If we are not willing to enforce our policy statements, the statements become meaningless.

We disagree with our dissenting colleagues that the summary judgment procedure could resolve this dispute. While we agree that, as a theoretical matter, presumably a contention that

was inadmissible from the outset should be dismissed on summary disposition, it appears that the licensing board has a different view and would benefit from further guidance. Summary disposition is a procedure used when there are no genuine issues as to any material fact and the party is entitled to a decision as a matter of law. See 10 C.F.R. § 2.710, 2.1205. The Board decision admitting the contention asserts that “questions of both law and fact are sharply disputed.” See *LBP-06-20* at 52. The Board decision suggests that in litigating this contention it will explore such issues as “are the general ER (environmental report) requirements found at 10 C.F.R. § 51.45(c) and 51.53(c) displaced, or instead merely supplemented, by the more narrow 10 C.F.R. § 51.53(c)(3)(ii)(B)?” See *Id.* at 56. The Board further suggests that the question of whether a national pollutant discharge elimination system permit (NPDES) that expires before the license renewal period is complete satisfies the National Environmental Policy Act (NEPA) is a factual dispute that supports admission of the contention. See *Id.* at 56-57.

In our view, further exploration of either of the areas suggested by the Board may well be a completely unnecessary exercise and inconsistent with our longstanding goal of ensuring that agency proceedings are conducted efficiently and focus on issues germane to the proposed actions under consideration. The Commission stated in its 1998 policy statement that it intended to “monitor its proceedings to ensure that they are being concluded in a fair and timely fashion.” We further stated that we would “take action in individual proceedings, as appropriate, to provide guidance to the boards and parties and to decide issues in the interest of a prompt and effective resolution of the matters set for adjudication.” Taking review of this contention is clearly in keeping with our adjudicatory policy statement. It is for these reasons that we have joined in the majority decision to take review and respectfully disagree with our dissenting colleagues.