

October 17, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
NUCLEAR MANAGEMENT)	Docket No. 50-263
COMPANY, LLC)	
)	
(Monticello Nuclear Generating Plant))	ASLBP No. 05-841-02-LR

NRC STAFF ANSWER TO THE MOTION OF THE NORTH
AMERICAN WATER OFFICE TO FIND THE LICENSE RENEWAL
APPLICATION FOR THE MONTICELLO NUCLEAR GENERATION PLANT INCOMPLETE

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the U.S. Nuclear Regulatory Commission staff (“Staff”) hereby answers the Motion by the North American Water Office (“NAWO”), dated September 30, 2005.¹ As set forth below, NAWO has failed to adhere to the procedural prerequisites for the filing of motions, and has failed to demonstrate adequate grounds for relief. Therefore, the Motion should be denied.

BACKGROUND

¹ See Motion of [NAWO] to Find the Application for Re-licensing the Monticello Nuclear Generating Plant Incomplete and Request for Information (Sept. 30, 2005) (“Motion”). Although the Staff is prepared to answer the Motion, the Staff notes that NAWO totally failed to serve its Motion upon the Staff. NAWO did send a copy of the Motion by mail, without a service list or certification of service, to the Resident Inspector at the Monticello Nuclear Generating Plant, who forwarded Staff Counsel a copy on October 6, 2005. Nonetheless, NAWO failed to follow the basic requirements for service of documents of the Commission’s Rules of Practice. 10 C.F.R. § 2.323(a) provides that “[a]ll written motions must be . . . served on all parties to the proceeding.” 10 C.F.R. § 2.305(f)(1) requires that “[s]ervice shall be made upon the NRC staff of all papers and documents required to be filed with parties and the presiding office in all proceedings[.]” 10 C.F.R. § 2.305(b) further mandates that “[w]hen a party has appeared by attorney, service must be made upon the attorney of record.” Counsel for the Staff filed a Notice of Appearance in this proceeding on August 3, 2005, and served this document upon NAWO. See Notice of Appearance for Michael A. Woods (Aug. 3, 2005). NAWO should have known to serve Staff Counsel with a copy of the Motion based on the filings served upon NAWO by Staff Counsel in this proceeding alone.

As recounted in previous filings before the Board, Nuclear Management Company, LLC (“NMC”) submitted an application on March 16, 2005, for renewal of its license for the Monticello Nuclear Generating Plant.² NMC’s license renewal application is the subject of NAWO’s pending hearing request and associated answers filed by the Staff and NMC in this proceeding.³

NAWO has now filed a Motion in which it requests that the Board “declare the re-licensing application in the above referenced matter to be incomplete, to order said application to be withdrawn and the proceeding stayed until such time as a complete application has been prepared, resubmitted and approved as complete.” Motion at 1. NAWO asserts that the application is incomplete “because it fails to identify numerous components that experience aging deterioration as being part of the aging management review,” citing Requests for Additional Information (“RAIs”) issued by the Staff to NMC dated September 15 and 16, 2005,⁴ as a basis for this claim. See *id.* at 2. According to NAWO, the failure of NMC’s application as docketed to contain information concerning the “more than 30 components” that are the subject of the Staff’s RAIs demonstrates “firm, uncontroversial, and sufficient evidence that the Application is not complete.” *Id.* Consequently, NAWO argues that the application “must be found to be incomplete and the present proceeding stayed[.]” *Id.* at 3.

² See Letter from Thomas J. Palmisano, Site Vice President, Monticello Nuclear Generating Plant, [NMC], to U.S. NRC (Mar. 16, 2005) (ADAMS Accession No. ML050880241).

³ See Request for a Hearing and Petition for Leave to Intervene by [NAWO] (July 9, 2005) (“Petition”); [Staff] Answer to Petition to Intervene and Request for Hearing of [NAWO] (Aug. 3, 2005) (“Staff Answer”); [NMC’s] Answer to Request for Hearing and Petition to Intervene by [NAWO] (Aug. 3, 2005) (“NMC Answer”).

⁴ See Letter to Mr. John T. Conway, Site Vice President, [NMC], from Daniel J. Merzke, Project Manager, NRC (Sept. 15, 2005) (ADAMS Accession No. ML052620622); Letter to Mr. John T. Conway, Site Vice President, [NMC], from Daniel J. Merzke, Project Manager, NRC (Sept. 16, 2005) (ML052620609).

DISCUSSION

A. The Motion Should be Denied Pursuant to 10 C.F.R. § 2.323

As an initial matter, NAWO's Motion is improper for failing to comply with the procedural requirements attendant to the filing of Motions in Commission adjudicatory practice. Therefore, the Motion should be given no consideration by the Board.

Pursuant to 10 C.F.R. § 2.323(a), "[a] motion must be made no later than ten (10) days after the occurrence or circumstance from which the motion arises."⁵ NAWO alleges that NMC's license renewal application is deficient based on the RAIs issued on September 15 and 16, 2005. See Motion at 2. Under section 2.323(a), NAWO was required to file any motion relating to the RAIs within 10 days of their issuance, by September 25 and 26, 2005, respectively. The Motion, dated September 30, 2005, was untimely under this provision. Consequently, the Motion should be denied.

Further, 10 C.F.R. § 2.323(b) states that (emphasis added): "[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." A Licensing Board has previously denied a motion based on a party's failure to comply with this provision. See *Entergy Nuclear Vt. Yankee L.L.C.* (Vt. Yankee Nuclear Power Station), Docket No. 50-271-OLA, at 4 (ASLBP No. 04-832-02-OLA Dec. 21, 2004) (unpublished) (ADAMS Accession No. ML043640420) (noting that "[t]his requirement is intended to avoid burdening the parties and the Board with motions that could have been resolved by discussion and negotiation among the parties."). Despite this clear command,

⁵ See *also* Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,207 (Jan. 14, 2004) ("The Commission has decided that expeditious management of a hearing requires that motions be filed reasonably promptly after the underlying circumstances occur which engender a motion. Accordingly, a ten (10) day limit for filing motions is included[.]").

NAWO did not contact counsel for the Staff and try to resolve this matter without the need for a motion.

NAWO is well aware of the procedural requirement of 10 C.F.R. § 2.323(b). The Staff included the certification required by section 2.323(b) in a motion to strike that it served on NAWO on August 19, 2005.⁶ Antecedent to the Staff's August 19th filing, the Staff contacted NAWO by telephone, explained the procedural requirement of section 2.323(b), and informed NAWO that the purpose of the telephone call was to comply with that section's requirement that a party make an effort to contact the other parties in the proceeding regarding the issues raised in a contemplated motion. As NAWO acknowledged in the account of this telephone call that it related in its August 29, 2005, reply comment on the Staff's motion to strike, NAWO was conscious of both the existence of 10 C.F.R. § 2.323(b) and what it requires.⁷ Despite this knowledge, NAWO failed to comply with this requirement. Therefore, the Motion must be rejected.

B. The Motion Should be Denied for Failing to Establish Adequate Grounds for Relief

The Motion should also be denied because it fails to demonstrate that NAWO is entitled to any relief. 10 C.F.R. § 2.323(b) states that a motion "must be in writing, state with particularity the grounds and the relief sought, [and] be accompanied by any affidavits or other evidence relied on[.]" For failing to establish adequate grounds for relief, the Motion should be denied.

NAWO notes that the Staff issued RAIs to NMC on September 15 and 16, 2005, regarding certain plant systems and components. See Motion at 2-3. NAWO contends that the

⁶ See NRC Staff Motion to Strike Comment of [NAWO], at 1 n.2 (Aug. 19, 2005).

⁷ See Reply of [NAWO] to the NRC Staff Motion to Strike Comment of [NAWO], at 2-3 (Aug. 29, 2005) ("10 CFR § 2.323(b) requires the moving party to make 'a sincere effort to . . . resolve the issue(s) raised in the motion.' . . . NAWO receive [sic] a phone call from Staff on August 17, 2005 . . . because of a procedural requirement.").

issuance of the RAIs signifies that NMC's application is deficient and should be withdrawn. *Id.* NAWO's claim is without any basis.

In a notice published in the *Federal Register*, the Staff stated that it had determined that NMC's license renewal application contained sufficient information to warrant acceptance for docketing, and further noted that "[t]he docketing of the renewal application does not preclude requesting additional information as the review proceeds[.]"⁸ The regulations expressly allow the Staff to request additional information from an applicant. See 10 C.F.R. § 2.102(a) ("During review of an application by the staff, an applicant may be required to supply additional information.").

The Commission has thus soundly rejected the proposition that the issuance of RAIs by the Staff suggests in any way that a license application is deficient. See *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2 & 3), CLI-99-11, 49 NRC 328, 336-37 (1999); *Balt. Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 349-50 (1998). As the Commission has explained, "RAIs are a standard and ongoing part of NRC licensing reviews[.]" and "are a routine means for our staff to request clarification or further discussion of particular items in the application." *Calvert Cliffs*, CLI-98-25, 48 NRC at 349; *Oconee*, CLI-99-11, 49 NRC at 336. "[T]he NRC staff's mere posing of questions does not suggest that the application [is] incomplete[.]" *Calvert Cliffs*, CLI-98-25, 48 NRC at 349. Contrary to NAWO's position that the application is incomplete, and the resulting implication that the Staff should not have accepted it for docketing, the Federal courts have also held that the NRC does not "violate[] any clear legal duty by proceeding first to docket [an application] and thereafter to request additional information."

⁸ See [NMC], Monticello Nuclear Generating Plant; Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License No. DPR-22 for an Additional 20-Year Period, 70 Fed. Reg. 25,117 (May 12, 2005).

Concerned Citizens of R.I. v. NRC, 430 F. Supp. 627, 634 (D. R.I. 1977). Therefore, the existence of RAIs does not establish grounds for any relief, as the license application, not the Staff's review, is at issue in a proceeding on that application. See *Calvert Cliffs*, CLI-98-25, 48 NRC at 350.

Moreover, the Staff notes that NAWO has failed to support the claims raised in the Motion with any affidavits or other evidence demonstrating grounds for relief. See 10 C.F.R. § 2.323(b). Other than referring generally to the Staff's RAIs, which NAWO alleges are "firm, uncontroversial, and sufficient evidence that the Application is incomplete[.]" NAWO offers no other specific facts or expert opinion to demonstrate that the application is so deficient that it must be withdrawn. See Motion at 2-3. The Commission has held that "[p]etitioners must do more than attach a list of RAIs and declare an application 'incomplete.'" *Oconee*, CLI-99-11, 49 NRC at 337. The Motion, by resting on the mere existence of RAIs, accordingly fails to establish the existence of any deficiency in the application. Therefore, the Motion should be denied.

CONCLUSION

For the foregoing reasons, NAWO's Motion should be denied for failing to follow the procedural requirements governing the filing of motions, and for failing to establish any grounds for relief.

Respectfully submitted,

/RA/

Michael A. Woods
Counsel for NRC Staff

Dated at Rockville, Maryland
this 17th day of October, 2005

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF ANSWER TO THE MOTION OF THE NORTH AMERICAN WATER OFFICE TO FIND THE LICENSE RENEWAL APPLICATION FOR THE MONTICELLO NUCLEAR GENERATION PLANT INCOMPLETE," in the above-captioned proceeding have been served on the following through deposit in the NRC's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by U.S. mail, first class, as indicated by double asterisk, with copies by electronic mail this 17th day of October, 2005:

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