

RAS 11888

UNITED STATES
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

DOCKETED
USNRC

June 22, 2006 (3:44pm)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of

ENTERGY NUCLEAR VERMONT YANKEE, LLC
and ENTERGY NUCLEAR OPERATIONS, INC.

)Docket No.50-271-LR
)ASLB No. 06-849-03-LR

(Vermont Yankee Nuclear Power Station)

**NEC's MOTION FOR LEAVE TO FILE A REPLY TO NRC STAFF ANSWER
TO NEW ENGLAND COALITION'S NOTICE AND MOTION TO ADOPT
CONTENTIONS; TO ENTERGY'S ANSWER TO NEW ENGLAND
COALITION'S NOTICE AND MOTION TO ADOPT CONTENTIONS; AND TO
ENTERGY'S ANSWER TO VERMONT DEPARTMENT OF PUBLIC
SERVICE'S NOTICE AND MOTION TO ADOPT CONTENTIONS**

Pursuant to 10 C.F.R. § 2.323(c), New England Coalition, Inc. (NEC) hereby moves for leave to reply to the NRC Staff Answer to NEC's Notice of Adoption of Contentions or Alternative Motion to Adopt Contentions, dated June 15, 2006; to Entergy's Answer to New England Coalition's Notice and Motion to Adopt Contentions, dated June 20, 2006; and to Entergy's Answer to the Vermont Department of Public Service Notice and Motion to Adopt Contentions, dated June 15, 2006. This memorandum both discusses the basis upon which the Atomic Safety and Licensing Board ("the Board") may grant NEC leave to reply, and sets forth the substance of the reply NEC requests that the Board consider.

The Board may grant leave to file a reply where the moving party demonstrates that it could not reasonably have anticipated the arguments to which it seeks leave to reply. In this instance, Entergy argues that adoption of contentions after the deadline for filing a petition for leave to intervene constitutes late filing of contentions. The NRC

Staff argue that a petitioner may adopt a contention only if admitted as a party to the proceeding based on its initial petition. These purported requirements for adoption have no apparent support in Nuclear Regulatory Commission (NRC) regulations or precedent, and NEC could not for this reason have anticipated them. Leave to reply is therefore merited.

I. BACKGROUND

On May 26, 2006, NEC, the State of Vermont, and the State of Massachusetts each filed a Request for Hearing and Petition for Leave to Intervene in proceedings concerning the Vermont Yankee Nuclear Power Station license renewal. Each of these parties submitted one or more contentions pursuant to the requirements of 10 C.F.R. § 2.309.

On June 5, 2006, the State of Vermont Department of Public Service ("DPS") filed a Notice and Motion to Adopt the contentions filed by both NEC and the State of Massachusetts. That same day, NEC filed a Notice of Adoption or Alternative Motion to Adopt the contentions filed by both the State of Vermont and the State of Massachusetts.

On June 15, 2006, the NRC staff ("the Staff") filed an answer to NEC's notice/motion to adopt contentions, stating that the Staff does not object to NEC's adoption of Vermont and Massachusetts' contentions provided that NEC is admitted as a party to these proceedings based on its initial petition, and, if Vermont or Massachusetts is not admitted or withdraws from the proceeding, NEC then demonstrates an independent ability to litigate any adopted contentions. NRC Staff Answer at 1. The Staff further noted that NEC's Notice of Adoption or Alternative Motion to Adopt is

procedurally defective because NEC certifies that it consulted with Vermont and Massachusetts regarding its motion, but did not consult with Entergy or the Staff.

On June 15, 2006, Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. ("Entergy") filed an answer to the DPS motion to adopt contentions. Entergy argues that the Board should deny the DPS motion to adopt NEC's contentions on the grounds that adoption would constitute untimely filing of contentions without the sufficient justification required by 10 C.F.R. § 2.309(f)(2). Entergy apparently does not object to DPS' adoption of Massachusetts' contention.

On June 20, 2006, Entergy filed an answer to NEC's Notice and Motion to Adopt Contentions, objecting to NEC's adoption of the DPS contentions. Entergy apparently has no objection to NEC's adoption of Massachusetts' contention. Entergy again argues that adoption would constitute untimely filing of contentions without the sufficient justification required by 10 C.F.R. § 2.309(f)(2). Entergy further argues that NEC should not be permitted to adopt the DPS contentions because NEC has no good cause for not having proffered these contentions itself; NEC has not asserted relevant expertise or experience; and NEC has not shown that DPS sponsorship is insufficient to protect NEC's interests.

II. BASIS FOR LEAVE TO FILE REPLY

Section 2.323(c), 10 C.F.R. § 2.323(c), provides that the moving party may be granted leave to file a reply "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). As discussed in Part III, below, in this instance, both Entergy and the Staff put forth arguments without apparent support in the

governing regulations or in Nuclear Regulatory Commission (NRC) precedent. NEC could not reasonably have anticipated such arguments, and leave to file a reply is therefore appropriate.

NEC acknowledges that section 2.323(c) contemplates a reply by the moving party. NEC is not the moving party with respect to the DPS motion to adopt NEC's contentions, but requests leave to reply to Entergy's answer due to NEC's strong interest in DPS' participation and support in bringing forward the concerns NEC has raised in its contentions.

III. REPLY

A. NEC Reply to Entergy's Answers to New England Coalition's Notice and Motion to Adopt Contentions, and to Vermont Department of Public Service Notice and Motion to Adopt Contentions.

There is no basis in the Commission regulations or the precedent cited in Entergy's answers for the argument that adoption of contentions after the deadline for filing a petition for intervention constitutes a late filing of contentions.

The Commission regulations address adoption of contentions in only one section, which allows that a "requestor/petitioner" may adopt a contention, but must consult with the sponsoring requestor/petitioner to designate a representative to act for both parties with respect to the contention. This section in its entirety reads as follows:

If two or more requestors/petitioners seek to co-sponsor a contention, the requestor/petitioners shall jointly designate a representative who shall have authority to act for the requestors/petitioners with respect to that contention. If a requestor/petitioner seeks to adopt the contention of another sponsoring requestor/petitioner, the requestor/petitioner who seeks to adopt the contention must either agree that the sponsoring requestor/petitioner shall act as the representative with respect to that contention, or jointly designate with the sponsoring

requestor/petitioner a representative who shall have the authority to act for the requestors/petitioners with respect to that contention.

10 C.F.R. § 2.309(f)(3).

This section addresses neither the timing nor the process for adoption, but use of the term “requestor/petitioner”, as opposed to “party”, suggests that contention adoption is timely if made prior to the Board’s decision regarding admissibility. Moreover, the Board has held that a motion to adopt contentions is timely if filed within 10 days of the date the contentions were filed, or at the latest, within 10 days after the Board admitted the contentions. *In the Matter of Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), ASLBP No. 04-832-02-OLA (February 16, 2005) at 3. Both NEC and DPS filed timely notice/motions to adopt within ten days of May 26, 2006, the date both NEC and DPS filed petitions to intervene.

The decision Entergy cites for the proposition that adoption of contentions is subject to the late filing criteria stated in 10 C.F.R. § 2.309(f)(3) is inapposite. This decision addresses an untimely attempt to adopt contentions more than ten days after their admission by the Board. It does not concern the process or requirements for timely adoption of contentions. *In the Matter of Houston Lighting & Power Company, et al.* (*South Texas Project, Units 1 and 2*), ALAB-799, 21 NRC 360, 381-82 (1985).

Entergy cites no basis for its claim that a requestor/petitioner seeking to adopt contentions must show good cause for not having initially proffered such contentions itself, and demonstrate that sponsorship by another requestor/petitioner is inadequate to protect its interests. These requirements are not to be found in the regulations or precedent.

Finally, Entergy alleges that NEC has not asserted expertise or relevant experience sufficient to sponsor the DPS contentions. NEC has in fact amply demonstrated such expertise and experience. *See* New England Coalition's Notice of Adoption of Contentions, or in the Alternative, Motion to Adopt Contentions at ¶ 4; NEC Petition for Leave to Intervene, Request for Hearing, and Contentions at Part I. Moreover, Commission precedent indicates that, while an adopting requestor/petitioner must demonstrate its independent ability to litigate the contention, this showing must be made only upon the original sponsor's departure from the proceeding. Adoption is provisionally permitted, conditioned upon this showing of independent ability should the need arise. *See, Consolidated Edison Co. of New York & Entergy Nuclear Indian Point 2 LLC and Entergy Nuclear Operations, Inc.* (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 131-133 (2001).

B. Reply to NRC Staff Answer to New England Coalition Notice/ Motion to Adopt Contentions

There is no basis for the Staff's argument that only a requestor/petitioner that is admitted as a party to the proceeding based on its initial petition (i.e., a requestor/petitioner that initially sponsors a contention that is admitted) may adopt a contention of another requestor/petitioner. Rather, the NRC regulations together with the NRC precedent cited in the Staff's Answer, *Consolidated Edison Co. of New York & Entergy Nuclear Indian Point 2 LLC and Entergy Nuclear Operations, Inc.* (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 131-133 (2001), establish only five requirements for adoption of a contention: (1) the adopting entity must be a "requestor/petitioner", and therefore must have *submitted* a petition for intervention; (2)

the adopting requestor/petitioner must have standing to participate in the proceeding; (3) the initial sponsor and the adopting requestor/petitioner must jointly designate a representative to act with respect to the adopted contention; (4) adoption must be timely; and (5) if the original sponsor withdraws, the adopting requestor/petitioner must then demonstrate its independent ability to litigate the contention.

The NRC regulations address adoption of contentions in only one section, which allows that a "requestor/petitioner" may adopt a contention, but must consult with the sponsoring requestor/petitioner to designate a representative to act for both parties with respect to the contention. This section in its entirety reads as follows:

If two or more requestors/petitioners seek to co-sponsor a contention, the requestor/petitioners shall jointly designate a representative who shall have authority to act for the requestors/petitioners with respect to that contention. If a requestor/petitioner seeks to adopt the contention of another sponsoring requestor/petitioner, the requestor/petitioner who seeks to adopt the contention must either agree that the sponsoring requestor/petitioner shall act as the representative with respect to that contention, or jointly designate with the sponsoring requestor/petitioner a representative who shall have the authority to act for the requestors/petitioners with respect to that contention.

10 C.F.R. § 2.309(f)(3).

This section does not require that only those requestor/petitioners who submit admissible contentions in their initial petitions may adopt other contentions. On the contrary, the use of the term "requestor/petitioner", as opposed to "party", suggests that adoption of contentions may take place before the Board decides which contentions are in fact admissible.

In the authority the NRC staff cites in its answer to NEC, the Board's decision to allow adoption of contentions did not hinge on the adopting petitioner's submission of an

admissible contention, because the Board had already decided the issue of admissibility at the time it considered adoption. Rather, the “provisional” aspect of the decision related to the necessity that the adopting party later demonstrates its independent ability to litigate the contention upon the withdrawal of the original sponsor. *Consolidated Edison Co. of New York & Entergy Nuclear Indian Point 2 LLC and Entergy Nuclear Operations, Inc.* (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 131-133 (2001).

Section 2.309(f)(3) does not address the timing of adoption, but, again, use of the term “requestor/petitioner”, as opposed to “party”, suggests that contention adoption is timely if made prior to the Board’s decision regarding admissibility. *See*, Staff Answer at 3 (“The Commission’s regulations do not appear to specify how or when a request to adopt a contention may be raised. The use of terms such as adoption of contentions of ‘another . . . requestor/petitioner,’ however, implies that a contention adoption request would be timely if made prior to any ruling on contentions.” (citation omitted)). In addition, the Board has previously held that a motion to adopt contentions should be filed within 10 days of the date the contentions were filed, or at the latest, within 10 days after the Board admitted the contentions. *In the Matter of Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), ASLBP No. 04-832-02-OLA (February 16, 2005) at 3.

Once a petitioner seeking to adopt a contention has established satisfaction of the first four above-stated requirements for adoption – i.e. that it has submitted a petition for intervention, has standing, has filed a timely notice of adoption or motion to adopt, and has consulted with the contention’s original sponsor regarding designation of a representative -- adoption should be approved, conditioned only upon the petitioner’s

later demonstration of independent ability to litigate the contention in the event of its original sponsor's withdrawal. To interpret the rules otherwise could lead to the odd result that a Petitioner with a contention admitted in some narrow area of technical expertise could adopt an environment or health contention of another Petitioner, but a Petitioner that has submitted a related environmental contention that was not accepted would not be able to adopt the other contention – regardless of his background or expertise on the topic.

NEC is a “petitioner” in these proceedings and has established standing, *See* NEC Petition for Leave to Intervene (May 26, 2006); timely filed its Notice of Adoption of Contentions, or in the Alternative, Motion to Adopt Contentions within ten days of the date Vermont and Massachusetts filed the contentions; consulted with both Vermont and Massachusetts, as required pursuant to 10 C.F.R. § 2.309(f)(3); and has attested that it has the breadth and depth of experience and expertise to independently litigate Vermont and Massachusetts’ contentions should either state withdraw.¹ The Board should therefore approve NEC’s adoption of Vermont’s contentions, regardless of whether any of NEC’s contentions set forth in its Petition for Leave to Intervene are admitted.

Finally, regarding the Staff’s argument that NEC’s Notice of Adoption of Contentions, or in the Alternative, Motion to Adopt Contentions is procedurally defective due to NEC’s failure to consult with the Staff and Entergy pursuant to 10 C.F.R. § 2.323(a), NEC notes that the process for adoption of contentions is not at all clear in the Commission regulations. *See* Staff Answer at 3 (“The Commission’s regulations do not

¹ While an adopting requestor/petitioner must demonstrate its independent ability to litigate the contention, this showing must be made only upon the original sponsor’s departure from the proceeding. Adoption is provisionally permitted, conditioned upon this showing of independent ability should the need arise. *Consolidated Edison Co. of New York & Entergy Nuclear Indian Point 2 LLC and Entergy Nuclear Operations, Inc. (Indian Point, Units 1 and 2), Supra.*

appear to specify how or when a request to adopt a contention may be raised.”). It is not clear that NEC was required to “move” for adoption of the contentions, and thus to comply with Commission rules governing “motions.” NEC notes that it did satisfy consultation requirements of the Commission regulation specifically addressing adoption, 10 C.F.R. § 2.309(f)(3), by consulting with both Vermont and Massachusetts.

IV. NEC HAS CONSULTED ALL PARTIES

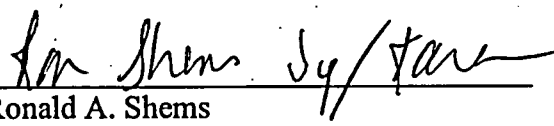

Pursuant to 10 C.F.R. § 2.323(a), NEC has consulted or attempted to consult with all parties to this proceeding concerning this motion. Vermont and Massachusetts have no objection. The Town of Marlboro has no objection to NEC’s Reply to the NRC Staff Answer to New England Coalition’s Notice and Motion to Adopt Contentions, or to Entergy’s Answer to Vermont Department of Public Service’s Notice and Motion to Adopt Contentions. The Town of Marlboro did not respond to Counsel’s inquiry regarding NEC’s proposed Reply to Entergy’s Answer to New England Coalition’s Notice and Motion to Adopt Contentions. Entergy and the NRC Staff object on the grounds that, pursuant to 10 CFR 2.323, the moving party has no right to file a reply, except as permitted by the presiding officer when compelling circumstances have been shown. Entergy also objects to the filing of a reply by any person other than the moving party.

V. CONCLUSION

NEC’s Motion for Leave to Reply should be granted. NEC’s adoption of Vermont and Massachusetts’ contentions should be approved. Vermont’s adoption of NEC’s contentions should be approved.

June 22, 2006

New England Coalition

by:  
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June 22, 2006

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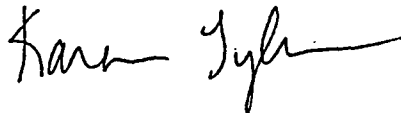
Re: In the Matter of Energy Nuclear Vermont Yankee, LLC and Entergy
Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station),
Docket No. 50-271-LR, ASLBP No. 06-849-03-LR

Dear Sir or Madam:

Please find enclosed for filing in the above stated matter New England Coalition's (NEC) Motion for Leave to File a Reply to NRC Staff's Answer to NEC's Notice and Motion to Adopt Contentions, to Entergy's Answer to NEC's Notice and Motion to Adopt Contentions, and to Entergy's Answer to Vermont Department of Public Service's Notice and Motion to Adopt Contentions.

Thank you for your attention to this matter.

Sincerely,



Karen Tyler
SHEMS DUNKIEL KASSEL & SAUNDERS PLLC

Cc: attached service list
Enclosures (3)

**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))	

CERTIFICATE OF SERVICE

I, Ron Shems, hereby certify that copies of the NEC's Motion for Leave to File A Reply to NRC Staff Answer to New England Coalition's Notice and Motion to Adopt Contentions; to Entergy's Answer to New England Coalition's Notice and Motion to Adopt Contentions; and to Entergy's Answer to Vermont Department of Public Service's Notice and Motion to Adopt Contentions in the above-captioned proceeding were served on the persons listed below, by U.S. Mail, first class, postage prepaid, and, where indicated by an e-mail address below, by electronic mail, on the 22nd day of June, 2006.

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