

**RAS 10529**

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**DOCKETED 09/30/05**

**SERVED 09/30/05**

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Alex S. Karlin, Chairman  
Anthony J. Baratta  
Lester S. Rubenstein

In the Matter of

ENTERGY NUCLEAR VERMONT YANKEE  
L.L.C.  
and  
ENTERGY NUCLEAR OPERATIONS, INC.  
  
(Vermont Yankee Nuclear Power Station)

Docket No. 50-271-OLA

ASLBP No. 04-832-02-OLA

September 30, 2005

ORDER

(Regarding State of Vermont's Motion of Aug. 31, 2005)

On August 31, 2005, the Department of Public Service of the State of Vermont (State) filed a motion to compel the production of three e-mails that the NRC Staff had listed on its July 27, 2005 deliberative process privilege log.<sup>1</sup> On September 12, 2005, the NRC Staff filed its opposition to the motion.<sup>2</sup> Subsequently, the State requested oral argument on the motion, or alternatively, the opportunity to file a request for leave to file a reply brief,<sup>3</sup> and the NRC Staff

---

<sup>1</sup> Vermont Department of Public Service Motion to Compel Production of Certain NRC Staff Documents (undated, but filed August 31, 2005) at 1. The e-mails are listed on the NRC Staff's privilege log as ML051940095, ML051990237, & ML052060072. See NRC Privilege Log-Deliberative Process, (July 27, 2005).

<sup>2</sup> NRC Staff's Answer to [State] Motion to Compel (Sept. 12, 2005).

<sup>3</sup> [State] Request for Oral Argument or, Alternatively, for Leave to File a Request to File a Reply Brief (Sept. 15, 2005).

answered and opposed that motion.<sup>4</sup> On September 29, 2005, the State filed another motion for leave to file a reply brief.<sup>5</sup>

The Board will hold the State's motions for oral argument or a reply brief in abeyance pending receipt of the answers and briefing specified herein.<sup>6</sup>

Initially, the NRC Staff, as the privilege claimant, has the burden of establishing a prima facie case that these three documents qualify for the deliberative process privilege.<sup>7</sup> While the parties have addressed two aspects of the deliberative process privilege (i.e., whether the document is predecisional and deliberative), there is no showing of the apparent third requirement - that a high ranking agency official personally reviewed the document and made the decision to invoke the deliberative process privilege.<sup>8</sup> Rather than granting the motion on

---

<sup>4</sup> NRC Staff's Answer to [State's] Request for Oral Argument or, Alternatively, for Leave to File a Request to File a Reply Brief (Sept. 21, 2005).

<sup>5</sup> [State] Motion for Leave to File a Reply Brief in Support of its Motion to Compel (Sept. 29, 2005).

<sup>6</sup> The Board notes that the State has filed a second motion to compel concerning 25 additional documents on the NRC Staff's September 6, 2005 deliberative process privilege log. [State] Motion to Compel Production of Certain NRC Staff Documents (II) (Sept. 29, 2005). Similar issues may be presented.

<sup>7</sup> See Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 198 (1994) ("the government agency - here the NRC Staff - bears the initial burden of showing that the privilege should be invoked") (emphasis added); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1341 (1984) ("the government agency bears the burden of demonstrating that the privilege is properly invoked") (emphasis added); Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 868 (D.C. Cir. 1980) ("the agency has the burden of establishing what deliberative process is involved"). See also 10 C.F.R. § 2.336(b)(5).

<sup>8</sup> See Kerr-McGee Chemical Corporation (West Chicago Rare Earths Facility), LBP 85-38, 22 NRC 604, 627 (1985) (requiring an affidavit from the head of the relevant agency of the State of Illinois); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP 83-72, 18 NRC 1221, 1223 (1983) (requiring an affidavit from the head of the Federal Emergency Management Agency), rev'd on other grounds, ALAB-773, 19 NRC 1333 (1984). See also NRC Staff Response to Issues Identified at First Case Management Conference at 8-10 (May 12, 2005), and Second Case Management Order, Appendix C, element 8 (July 8, 2005) (unpublished), both in U.S. Dep't of Energy (High Level Waste Repository: Pre-License

this basis, the Board believes it is appropriate to allow the NRC Staff to address it, and the State to respond. Accordingly, we direct them to proceed as follows:

1. On October 12, 2005, the NRC Staff shall submit the following:

A. A brief factual statement, covering each of the three documents, specifying the name, title, and organizational position (as of the date of his or her review and decision) of the highest ranking NRC official who, on or before the documents were listed on the NRC's July 27, 2005 deliberative process privilege log, personally reviewed and made the decision to invoke the deliberative process privilege for that document. If, after July 27, 2005, a second and higher ranking NRC official also personally reviewed and decided to invoke the privilege, the NRC Staff may also provide the same information concerning that person, and the date when it happened. The statement may also include a description of the process whereby the document was reviewed and the decision to assert the privilege was made.

B. A brief, limited to the presentation of the NRC Staff's position and arguments, if any, as to application of the third element of the deliberative process privilege in NRC adjudicatory proceedings and the adequacy of the rank of the NRC individual(s) who personally reviewed and made the decision to invoke the deliberative process privilege for the three documents.<sup>9</sup>

C. A brief factual statement specifying the name, title and organizational position (as of the date of the document) of the author and addressee(s) of each of the three documents.<sup>10</sup>

D. The statements and brief shall be combined and shall not exceed 12 pages,

---

Application Matters), Docket No. PAPO-00, ASLBP No. 04-839-01-PAPO.

<sup>9</sup> If the NRC Staff and the State agree that the individuals who personally reviewed the documents and made the decision to invoke the privilege meet the relevant legal requirements, then they should file a joint statement to that effect, and matter need not be briefed. The requirements of paragraphs 1.A, 1.C, and 2 still apply.

<sup>10</sup> This information may assist the Board in assessing whether and how the documents were deliberative.

excluding any attached organizational charts (which are requested).

2. On October 12, 2005, the NRC Staff shall file copies of the three documents in question with the Board for its in camera review. No copies shall be sent to any other party. Any objection to this in camera review shall be filed by October 6, 2006.

3. On October 19, 2005, the State shall file an answer to the NRC Staff's brief, which shall be limited to the issues specified in paragraph 1.B. The answer shall be limited to 10 pages.

It is so ORDERED.

FOR THE ATOMIC SAFETY  
AND LICENSING BOARD<sup>11</sup>

[Original signed by:]

---

Alex S. Karlin, Chairman  
Administrative Judge

Rockville, Maryland  
September 30, 2005

---

<sup>11</sup> Copies of this Memorandum and Order were sent this date by Internet e-mail, if available, to all participants or counsel for participants.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
ENTERGY NUCLEAR VERMONT YANKEE L.L.C.	)	Docket No. 50-271-OLA
and ENTERGY NUCLEAR OPERATIONS, INC.	)	
	)	
Vermont Yankee Nuclear Power Station)	)	
	)	
(Operating License Amendment)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB ORDER (REGARDING STATE OF VERMONT'S MOTION OF AUG. 31, 2005) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

Office of Commission Appellate  
Adjudication  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

Administrative Judge  
Alex S. Karlin, Chair  
Atomic Safety and Licensing Board Panel  
Mail Stop - T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

Administrative Judge  
Anthony J. Baratta  
Atomic Safety and Licensing Board Panel  
Mail Stop - T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

Administrative Judge  
Lester S. Rubenstein  
4270 E Country Villa Drive  
Tucson, AZ 85718

Robert M. Weisman, Esq.  
Sherwin E. Turk, Esq.  
Jason C. Zorn, Esq.  
Office of the General Counsel  
Mail Stop - O-15 D21  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

Raymond Shadis  
New England Coalition  
P.O. Box 98  
Edgecomb, ME 04556

Docket No. 50-271-OLA  
LB ORDER (REGARDING STATE OF  
VERMONT'S MOTION OF AUG. 31, 2005)

John M. Fulton, Esq.  
Assistant General Counsel  
Entergy Nuclear Operations, Inc.  
440 Hamilton Avenue  
White Plains, NY 10601

Anthony Z. Roisman, Esq.  
National Legal Scholars Law Firm  
84 East Thetford Rd.  
Lyme, NH 03768

Jonathan M. Rund, Esq.  
Law Clerk  
Atomic Safety and Licensing Board Panel  
Mail Stop - T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

Sarah Hofmann, Esq.  
Special Counsel  
Department of Public Service  
112 State Street - Drawer 20  
Montpelier, VT 05620-2601

Jay E. Silberg, Esq.  
Matias F. Travieso-Diaz, Esq.  
Douglas J. Rosinski, Esq.  
Shaw Pittman LLP  
2300 N Street, NW  
Washington, DC 20037-1128

[Original signed by Adria T. Byrdsong]

---

Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
this 30<sup>th</sup> day of September 2005