

October 17, 2005

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
ENTERGY NUCLEAR VERMONT YANKEE,	)	Docket No. 50-271-OLA
LLC and ENTERGY NUCLEAR	)	
OPERATIONS, INC.	)	ASLBP No. 04-832-02-OLA
	)	
(Vermont Yankee Nuclear Power Station)	)	

NRC STAFF ANSWER TO NEW ENGLAND COALITION REQUEST  
FOR LEAVE TO FILE A NEW CONTENTION

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1), the staff of the Nuclear Regulatory Commission ("Staff") hereby answers the New England Coalition ("NEC") Request for Leave to File a New Contention, filed on September 21, 2005 ("Request"). For the reasons discussed below, the Staff does not oppose the admission of NEC's proposed new contention with limited exception.

BACKGROUND

In its request for hearing, NEC proffered, among others, the following proposed Contention 4:

The license amendment should not be approved. Entergy cannot assure seismic and structural integrity of the cooling towers under uprate conditions, in particular the Alternate Cooling System cell. At present the minimum appropriate structural analyses have apparently not been done.<sup>1</sup>

On November 22, 2004, this Licensing Board admitted NEC Contention 4 as restated in Appendix 1 to the Licensing Board's order. The admitted contention states the following:

The license amendment should not be approved because Entergy cannot assure the seismic and structural integrity of the cooling

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<sup>1</sup> See "New England Coalition's Request for Hearing, Demonstration of Standing, Discussion of Scope of Proceeding and Contentions," dated August 30, 2004.

towers under uprate conditions, in particular the Alternate Cooling System cell. At present the minimum appropriate structural analyses have apparently not been done.

*See Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-04-28, 60 NRC 548, 580 (2004). In admitting the contention, the Licensing Board stated, "The gist of this contention is that a new seismic and structural analysis should be performed to qualify the Vermont Entergy cooling towers for the additional loads that will result from increasing the maximum power by 20%." *Id.* at 573.

On May 25, 2005, Entergy filed an update to its mandatory disclosures, consisting of a compact disk containing two calculations, including Calculation No. 1356711-C-001, "Cooling Tower Seismic Evaluation" (the "Seismic Evaluation"), dated April 5, 2005, performed by Entergy's contractor, ABS Consulting. Subsequently, on July 13, 2005, Entergy filed a Motion to Dismiss as Moot, or in the Alternative, for Summary Disposition of NEC's Contention 4. The Staff supported Entergy's motion; NEC opposed it.<sup>2</sup>

On September 1, 2005 the Board issued its Memorandum and Order granting Entergy's motion to dismiss NEC Contention 4 as moot. *See Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-05-24, 62 NRC \_\_, slip op. ("Order"). In its ruling, the Board held that "if NEC moves for leave to file new or amended contentions challenging the adequacy of Entergy's seismic and structural analysis within 20 days of the date of this order, then the motion and contentions will be

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<sup>2</sup> See "NRC Staff's Answer to Entergy's Motion to Dismiss as Moot, or in the Alternative, for Summary Disposition of New England Coalition Contention 4" dated July 25, 2005; *see also* "New England Coalition's Answer Opposing Entergy's Motion to Dismiss as Moot, or in the Alternative, for Summary Disposition of New England Coalition's Contention 4" dated August 2, 2005.

deemed timely for purposes of 10 C.F.R. § 2.309(f)(2)(iii)."<sup>3</sup> *Id.* at 5. NEC filed its request for leave to file a new contention on September 21, 2005.

### DISCUSSION

#### A. Legal Standards for Admission of Late-Filed Contentions

Under Commission regulations, a late-filed contention may be admitted only upon the presiding officer's determination that it should be admitted after balancing the following eight factors, all of which must be addressed in the petitioner's filing:

- (i) Good cause, if any, for the failure to file on time;
- (ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
- (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;
- (iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;
- (v) The availability of other means whereby the requestor's/petitioner's interest will be protected;
- (vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;
- (vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and
- (viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

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<sup>3</sup> The Board also noted that if a motion for leave to file a new contention was filed within the prescribed 20-day period, it would be deemed to satisfy 10 C.F.R. § 2.309(c)(1)(i). See Order at 6, n.11.

10 C.F.R. § 2.309(c).<sup>4</sup> Petitioners seeking admission of a late-filed contention bear the burden of showing that a balancing of these factors weighs in favor of admittance. *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 347 (1998) (noting that the Commission has summarily dismissed petitioners who failed to address the factors for a late-filed petition). The first factor, whether good cause exists for the failure to file on time, is entitled to the most weight. *State of New Jersey* (Department of Law and Public Safety), CLI-93-25, 83 NRC 289, 296 (1993). Where no showing of good cause for the lateness is tendered, “petitioner’s demonstration on the other factors must be particularly strong.” *Texas Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 73 (1992) (quoting *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2, & 3), ALAB-431, 6 NRC 460, 462 (1977)). The fifth and sixth factors, the availability of other means to protect the petitioner’s interest and the ability of other parties to represent the petitioner’s interest, are less important than the other factors, and are therefore entitled to less weight. *See id.* at 74.

The Commission’s regulations additionally provide that a proposed late-filed contention may be admitted with leave of the presiding officer only upon a showing that:

- (i) the information upon which the amended or new contention is based was not previously available;
- (ii) the information upon which the amended or new contention is based is materially different than information previously available; and
- (iii) the amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

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<sup>4</sup> Although these regulations were revised recently (*see* Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182 (Jan. 14, 2004)), they incorporate the substance of the Commission’s long-standing late-filed contention requirements. *Compare* 10 C.F.R. § 2.309(c) and (f)(2), *with* 10 C.F.R. § 2.714(a)(1)(i)-(v) and (b)(2) (2004); *see also* 69 Fed. Reg. at 2221.

10 C.F.R. § 2.309(f)(2). In addition to fulfilling the requirements of 10 C.F.R. § 2.309(f)(2), a petitioner must also show that the late-filed contention meets the standard contention admissibility requirements of § 2.309(f)(1)(i)-(vi). See *Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 362-363 (1993). This regulation requires a petitioner to:

- (i) provide a specific statement of the issue of law or fact to be raised or controverted;
- (ii) provide a brief explanation of the basis for the contention;
- (iii) demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and
- (vi) provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

10 C.F.R. § 2.309(f)(1). Significantly, a late-filed contention must refer to specific documents and be accompanied by a concise statement of the alleged facts or expert opinion which support the proposed contention. See *Millstone*, CLI-01-24, 54 NRC at 358 (citing *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 333 (1999)); *Calvert Cliffs*, CLI-98-25, 48 NRC at 348 ("This absence of specificity and support is, without

more, a sufficient ground for rejecting the two contentions.”). Failure to comply with any of the requirements may be grounds for dismissing a contention. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

B. NEC’s Proposed New Contention

NEC’s proposed contention states:

The Entergy Vermont Yankee [Entergy] license application (including all supplements) for an extended power uprate of 20% over rated capacity is not in conformance with the plant specific original licensing basis and/or 10 C.F.R. Part 50, Appendix S, paragraph I(a), and/or 10 C.F.R. Part 100, Appendix A, because it does not provide analyses that are adequate, accurate, and complete in all material respects to demonstrate that the Vermont Yankee Nuclear Power Station Alternate Cooling System [ACS] in entirety, in its current actual physical condition (or in the actual physical condition [Entergy] will effectuate prior to commencing operation at EPU), will be able to withstand the effects of an earthquake and other natural phenomena without loss of capability to perform its safety functions. [Entergy] must be able to demonstrate that the actual structures, systems and components comprising the ACS will perform satisfactorily at the requested increased plant power level.

Request at 1 (footnotes omitted). NEC provides four bases in support of its contention. In addition, NEC also provides “Supporting Evidence,” which includes a declaration from its expert, Dr. Ross B. Landsman. *See* Request at 4-13 and Exhibit 1.

C. Staff Analysis of Proposed New Contention

As stated above, in its Order granting the motion to dismiss NEC Contention 4, the Board ruled that any new contention filed within 20 days would be deemed timely for purposes of 10 C.F.R. § 2.309(f)(2)(iii). Order at 5. In light of that Order, given that NEC filed its new contention on September 21, 2005, NEC’s new contention appears to be timely.<sup>5</sup>

Beyond satisfying this timeliness requirement, the Board indicated that NEC must address the remaining factors in 10 C.F.R. § 2.309(f)(2). Order at 5-6. Although NEC does not

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<sup>5</sup> The Staff does not address the requirement of 10 C.F.R. § 2.309(c)(1)(i) herein because the Board stated that any request filed within the prescribed 20-day period would be deemed to satisfy this requirement. *See* Order at 6, n.11.

specifically reference 10 C.F.R. § 2.309(f)(2)(i) and (ii) in its Request, NEC appears to satisfy these requirements. Section 2.309(f)(2)(i) requires a showing that the information on which the amended or new contention is based was not previously available and § 2.309(f)(2)(ii) requires a showing that the information on which the amended or new contention is based is materially different from information previously available. NEC appears to satisfy both of these criteria in that seismic and structural analyses associated with the ACS at EPU conditions were not available at the time it petitioned for a hearing, and the ABS report was, thus, “materially different” from information previously available. See *generally* Request at 16-17, ¶ 12.

Similarly, although it does not individually reference each of the § 2.309(c) factors in its Request, NEC addresses the substance of § 2.309(c)(ii),(iii), and (vi) at 15-16, ¶¶ 7, 8, and 9, where NEC states that it is a party to the proceeding, that it has already demonstrated its interests, and that it has already shown that no other party will protect its interests. With regard to Subsection viii, the extent to which the requestor’s participation may reasonably be expected to assist in developing a sound record, NEC states that it has retained Dr. Ross B. Landsman as an expert witness and that his expert assistance will contribute to the development of a sound record. Request at 16, ¶ 10. NEC does not address subsection iv - the possible effect of any order that may be entered in the proceeding on its interests, subsection v - the availability of other means whereby its interests will be protected, or subsection vii - the extent to which litigation of this issue will broaden the issues or delay the proceeding. Given that the first criterion, good cause, is entitled to great weight and the fifth, the availability of other means, to little weight (see Discussion, above), in the Staff’s weighing of the factors, it appears that NEC has satisfied the requirements of 10 C.F.R. § 2.309(f)(1).

NEC’s proposed new contention must also satisfy the Commission’s contention admissibility standards delineated in 10 C.F.R. § 2.309(f)(1)(i)-(vi), including a demonstration that a genuine dispute exists with the Applicant on a material issue of law or fact. Again, NEC

does not specifically reference these requirements; nevertheless, NEC addresses them. In the statement of the contention, NEC appears to satisfy subsection i. Request at 1. NEC offers four bases, three of which are merely restatements of the contention. *Id.* at 2 - 4. However, NEC appears to provide a basis adequate to satisfy subsection ii in its recitations of Dr. Landsman's findings of the deficiencies in the ABS report. With regard to subsections iii and iv, NEC states that its issue has already been found to be within the scope of the proceeding (Request at 17, ¶ 13), and this assertion appears consistent with the Board's decision admitting Contention 4. *Vermont Yankee*, LBP-04-28, 60 NRC at 573. NEC appears to satisfy subsection v by referencing Dr. Landsman's Declaration; similarly, subsection vi is satisfied by the provision of Dr. Landsman's opinion concerning the deficiencies of the ABS report. Therefore, in the Staff's view, NEC's proposed new contention appears to meet the requirements of 10 C.F.R. § 2.309(f)(1).

The Staff notes, however, that the scope of NEC's new contention appears to challenge the adequacy of current operations under the existing license, insofar as NEC takes issue with the "current actual physical condition" of the ACS. Request at 1. To this extent, the contention is outside the scope of this proceeding, which concerns not current operation but operation under extended power uprate conditions. To the extent that its concerns relate to the current status of this system, the contention raises an issue that is not appropriate for consideration in this proceeding.



CONCLUSION

As discussed above, the Staff does not oppose the admission of NEC's proposed new contention with the limited exception set forth above.

Respectfully submitted,

**/RA/**

Jason C. Zorn  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 17<sup>th</sup> day of October, 2005

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(Vermont Yankee Nuclear Power Station)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF ANSWER TO NEW ENGLAND COALITION REQUEST FOR LEAVE TO FILE A NEW CONTENTION," in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class; or as indicated by an asterisk (\*), by deposit in the Nuclear Regulatory Commission's internal mail system; and by e-mail as indicated by a double asterisk (\*\*), this 17<sup>th</sup> day of October, 2005.

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