

October 21, 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'S ANSWER TO VERMONT  
DEPARTMENT OF PUBLIC SERVICE'S SECOND MOTION TO COMPEL

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the staff of the U.S. Nuclear Regulatory Commission ("Staff") herein files its Answer to the "Motion to Compel Production of Certain NRC Staff Documents (II)" ("Second Motion"), filed by the State of Vermont Department of Public Service ("DPS" or "State") on September 29, 2005. For the reasons set forth below, the Staff respectfully submits that DPS's Second Motion should be denied.

BACKGROUND

The instant case arises out of Entergy Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.'s (collectively, "Entergy" or "Applicant") application for an amendment to the operating license for the Vermont Yankee Nuclear Power Station ("VYNPS"), to authorize an extended power uprate ("EPU").<sup>1</sup> The Licensing Board granted DPS's petition to intervene on November 22, 2004.<sup>2</sup> In accordance with Commission regulations, the Staff promptly

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<sup>1</sup> See Letter from J.K. Thayer, Entergy, to the NRC Document Control Desk, "Vermont Yankee Nuclear Power Station, License No. DPR-28 (Docket No. 50-271), Technical Specification Proposed Change No. 263, Extended Power Uprate," dated September 10, 2003 ("Application") (ADAMS Accession No. ML032580089).

<sup>2</sup> See *Entergy Nuclear Vermont Yankee, L.L.C. (Vermont Yankee Nuclear Power Station)*, LBP-04-28, 60 NRC 548 (2004) ("Memorandum and Order (Ruling on Standing, Contentions, and State Reservation of Rights)").

established a hearing file in which it filed pertinent documents as required by regulation, and has continued to update the file, pursuant to 10 C.F.R. § 2.336(d), on a regular basis since January, 2005. Throughout this process, the Staff has withheld documents that it believes are privileged and should be protected from public disclosure (e.g., documents containing attorney work product, attorney-client communications, proprietary information, or pre-decisional deliberations), and identified those documents in a privilege log pursuant to 10 C.F.R. § 2.336(b)(5); further, the Staff has provided summary information in a “comment” column in its privilege logs, to enable interested parties (and the Licensing Board) to assess the Staff’s claim of privilege.

On August 31, 2005, DPS filed its first motion to compel the production of documents, listing three documents which the Staff had withheld and identified in the deliberative process privilege log accompanying its hearing file update of July 27, 2005.<sup>3</sup> The Staff filed its answer in opposition to that motion on September 12, 2005.<sup>4</sup>

On September 29, 2005, DPS filed its Second Motion, in which it challenged the Staff’s claim of the deliberative process privilege with respect to 25 of the 38 internal NRC Staff E-mail communications which the Staff had identified in the deliberative process privilege log accompanying its hearing file update of September 6, 2005.<sup>5</sup>

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<sup>3</sup> “Vermont [DPS] Motion to Compel Production of Certain NRC Staff Documents,” filed August 31, 2005 (“First Motion”).

<sup>4</sup> “NRC Staff’s Answer to Vermont [DPS’s] Motion to Compel,” dated September 12, 2005.

<sup>5</sup> DPS subsequently filed a request for oral argument or, alternatively, for leave to file a request to file a reply brief; the Staff filed an answer in opposition to that motion on September 21, 2005; and DPS then filed a motion for leave to file a reply brief in support of its Motion to Compel. See (1) “Vermont [DPS] Request for Oral Argument or, Alternatively, for Leave to File a Request to File a Reply Brief,” dated September 15, 2005; (2) “NRC Staff’s Answer to Vermont [DPS’s] ‘Request for Oral Argument or, Alternatively, for Leave to File a Request to File a Reply Brief,’” dated September 21, 2005; and (3) “Vermont [DPS] Motion for Leave to File a Reply Brief in Support of Its Motion to Compel,” dated September 29, 2005.

On September 30, 2005, the Licensing Board issued its “Order (Regarding State of Vermont’s Motion of Aug. 31, 2005)” (“Order”), in which (a) it directed the Staff to provide, on October 12, 2005, information concerning the “high ranking agency official” who “personally reviewed the document and made the decision to invoke the deliberative process privilege” (Order at 2), and legal argument concerning the applicability of this element in NRC adjudicatory proceedings and the adequacy of the rank of the individual(s) who reviewed the documents and decided to invoke the privilege (and directing the Staff to file the three documents for *in camera* review); and (b) it directed the State to respond to the Staff’s legal brief, on October 19, 2005, limited to the issues specified in Paragraph 1.B of the Board’s Order concerning the third requirement involved in the Staff’s invocation of the deliberative process privilege.<sup>6</sup> On October 11, 2005, the Board granted the Staff’s motion for an extension of time, until October 21, 2005, to file its responses to the Board’s Order and the State’s Second Motion.

### DISCUSSION

DPS asserts that the 25 documents listed in its second motion to compel, “based on their limited description in the DPL [Deliberative Process Log], do not qualify for a deliberative process privilege. These documents merely represent ongoing work by NRC Staff personnel on issues which are directly relevant to the current proceeding.” Second Motion, at 1; emphasis added. According to DPS, “these documents appear to contain substantial factual information and none involve any decision-making process.” *Id.* DPS requests that the Licensing Board compel production of these documents, “and establish a principle for use of the deliberative process privilege that will require the NRC Staff to produce all similar documents that are

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<sup>6</sup> The Licensing Board has held DPS’s motions for oral argument or leave to file a reply brief regarding the first motion to compel in abeyance pending the Board’s resolution of the issues raised in that Order. See Order, at 2.

relevant to this proceeding.” *Id.* at 1-2.<sup>7</sup> Finally, DPS states that these documents “are of the same type and character” as the three documents sought in its First Motion, and it then incorporates by reference the arguments in its First Motion. *Id.* at 2-3.

For the reasons set forth below, the Staff respectfully submits that DPS has failed to demonstrate that the 25 documents listed in its Second Motion fail to qualify for the deliberative process privilege or should be required to be produced.

A. The Documents Qualify for the Deliberative Process Privilege.

While DPS asserts that the documents in question “appear to contain substantial factual information and none involve any decision-making process,” it provides absolutely no factual basis for this assertion. To the contrary, each of the listed documents consists of internal E-mail communications between members of the NRC Staff, regarding their review of the Vermont Yankee EPU license amendment application or the requests for additional information which the Staff was preparing or had prepared concerning that application. In particular, in its privilege log, the Staff described these documents as falling into one or more of the following five categories:

1. Category 1: “Contains draft requests for information” or “draft requests for additional information”;<sup>8</sup>
2. Category 2: “Contains draft requests for . . . clarification of terms in previous responses to RAIs”;<sup>9</sup>

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<sup>7</sup> Each of the assertions quoted in the text above reiterates, *verbatim*, the assertions which DPS had made with respect to the three documents listed in its first motion to compel. See First Motion, at 1.

<sup>8</sup> Five documents are in this category: Documents ML052230210, ML052230209, ML052340101, ML052340108, and ML052340258.

<sup>9</sup> One document is in this category: Document ML052230209 (also listed in Category 1 above).

3. Category 3: "Contains staff recommendations to changes to request for additional information";<sup>10</sup> and
4. Category 4: "Contains staff discussion of responses to requests for additional information";<sup>11</sup> and
5. Category 5: "Contains staff recommendations regarding internal procedures for following up responses to requests for additional information;"<sup>12</sup>

As indicated in the discussion above, each of these documents consists of internal E-mail communications by and between members of the NRC Staff, concerning its ongoing review of the Applicant's EPU license amendment application. In particular, these E-mail messages were transmitted in the course of the Staff's efforts to formulate requests for additional information (and to evaluate the Applicant's responses thereto) in order to allow the Staff to complete its safety evaluation of the application. Categories 1, 2, and 3 include 17 documents, each of which involves the formulation or proposed modification of requests for additional information on a variety of subjects; Category 4 contains six documents related to the Staff's discussion of the adequacy of the Applicant's responses to previous RAIs; and Category 5 includes two documents dealing with internal Staff review procedures. Notwithstanding the substantive differences in each E-mail message, all of the messages contain some form of "analysis, evaluations, recommendations, proposals, or suggestions reflecting the opinions of the writer rather than the final policy of the agency." *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 198 (1994) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975)). Further, to the extent that a particular E-mail

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<sup>10</sup> Twelve documents are in this category: Documents ML052360320, ML052410318, ML052410385, ML052410379, ML052410383, ML052410391, ML052410316, ML052410395, ML052420358, ML052420371, ML052420376, and ML052420384.

<sup>11</sup> Six documents are in this category: Documents ML052230204, ML052310075, ML052340089, ML052340239, ML052340262, and ML052340251. The latter three documents also contain recommendations and discussions of future draft RAIs.

<sup>12</sup> Two documents are in this category: Documents ML052410296 and ML052410310.

contains factual information, those facts are “inextricably intertwined” with the opinion portion,” *id.* (quoting *Hopkins v. Department of Housing and Urban Development*, 929 F.2d 81, 85 (2d Cir. 1991), and do not warrant disclosure of the documents.<sup>13</sup>

Categories 1, 2 and 3 contain the vast majority of the privileged documents requested by DPS.<sup>14</sup> These generally consist of discussions by and between members of the Staff involving their input to draft RAIs. These documents can further be subdivided into six sub-categories, each of which will be described in turn:

(1) Input for draft RAIs regarding the effect of the EPU on new and spent fuel storage (Documents ML052230210, ML052230209). Here the Staff discusses the need to draft additional RAIs in response to the Applicant’s response to previous RAIs concerning the effect of the EPU on new and spent fuel storage.

(2) Input to draft RAIs regarding accident and transient analyses (Documents ML052340108, ML052340258). Here again, the Staff discusses the proper wording of draft RAIs to address what the Staff found lacking in the Applicant’s previous responses.

(3) Input to RAIs regarding the condensate and feedwater system (Documents ML052340101, ML052340239, ML052340262, ML052340251, ML052410318, ML052410379, ML052410383, ML052410391, ML052410316, ML052410395, ML052420358, ML052420371, and ML052420384). Similarly, these E-mails represent an ongoing discussion among the Staff

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<sup>13</sup> In addition, to the extent that a document quotes or discusses the Applicant’s response to a previous Staff request for additional information, the Applicant’s response is a matter of public record and is contained in the hearing file already; it would be duplicative and of no benefit to redact the privileged document and produce the redacted document in the hearing file, as the Applicant’s response to the RAI would already be in the hearing file.

<sup>14</sup> The Staff notes that, due to the process by which it creates Official Agency Records, many of the documents identified in its privilege logs consist of a thread or series of E-mail messages and replies thereto, that could have been listed as a single document. For instance, the contents of Documents ML052410379, ML052410316, ML052410395, ML052420358, and ML052420371 (in part), are all contained, also, in ML052420384. Thus, the total number of documents identified as privileged is not as large as it might otherwise appear.

concerning revisions to RAIs related to the condensate and feedwater system. In them, the Staff analyzes past responses from the Applicant, evaluates the need for further information, and consults internally on the correct way to formulate draft RAIs to address the Staff's concerns.

(4) Input to RAIs regarding the performance of safety relief valves (Document ML052420376). This E-mail contains a Staff member's concern regarding the Applicant's response to a previous RAI concerning the operation of the safety relief valves during a station black-out ("SBO") event. The Staff member recommends formulation of a draft RAI to address this concern.

(5) Input to RAIs regarding linear heat generation rate (Document ML052410385). This E-mail contains a Staff member's recommended revision to a draft RAI regarding the linear heat generation rate.

(6) Input to RAIs regarding an unidentified subject (Document ML052360320). This E-mail contains a brief statement from a Staff member recommending the insertion of an additional phrase into an RAI regarding an unidentified subject.

The unifying factor in all documents in Categories 1, 2 and 3 is that they all contain some form of evaluation, recommendation, or analysis by the Staff leading to the formulation of a draft RAI to be sent to the Applicant. These communications may or may not reflect the final version of the RAI issued to the Applicant or made publicly available. Nor do they necessarily reflect what the final agency policy will be with respect to the Applicant's proposal. In essence, they are merely the opinions of the Staff member(s) concerning the process through which the Staff will ultimately make a decision on the Applicant's EPU proposal. Thus, these documents are classic examples of the type of material that has been consistently protected under the deliberative process privilege, because release "would inaccurately reflect or prematurely disclose the views of the agency,' suggesting as the agency's position that which as yet is

merely opinion.” *Vogtle*, CLI-94-5, 39 NRC at 199 (quoting *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980)).

Category 4 includes six documents (Documents ML052230204, ML052310075, ML052340089, ML052340239, ML052340262, and ML052340251), and consists of E-mail messages containing the Staff’s preliminary evaluations of the adequacy of the Applicant’s responses to prior RAIs regarding the effect of EPU on the condensate and feedwater system. While similar to Category (3) above, this particular set of documents contains a mix of content, from pure evaluative commentary on the Applicant’s responses, to recommendations on future draft RAIs to address perceived inadequacies. The nature of the Staff’s discussions supports a privilege claim for the documents because, once again, the communications merely reflect the Staff member(s)’ opinion(s) on the formulation of agency policy, and not agency policy itself.

The two E-mails in Category 5 (Documents ML052410296 and ML052410310) contain a continuing conversation by and between members of the Staff regarding the Staff’s process for providing input to proposed draft RAIs, review of the draft RAIs by management, submission of the RAIs to the Applicant, and follow-up with the Applicant. While the Staff’s discussion occurs in the context of the Vermont Yankee EPU application, much of the substance is generic. Thus, these documents are deliberative because they “relate[ ] to the process by which policies are formulated.” *Vogtle*, CLI-94-5, 39 NRC at 198 (quoting *Hopkins*, 929 F.2d at 84). Further, the documents are predecisional because they were written prior to the issuance of the Staff’s Safety Evaluation on the VY EPU, *i.e.* “an agency decision,” and were specifically written to “assist the decisionmaker in arriving at his or her decision.” *Id.* at 197.

B. DPS Has Not Shown That Disclosure of These Privileged Documents Is Warranted.

As noted above, DPS’s Second Motion incorporates by reference the arguments it had made in its first motion to compel, and presents no arguments beyond those raised in its first motion. While DPS reiterates the assertions made in its First Motion, that the documents in

question consist of factual information and do not qualify for the predecisional deliberative process privilege, it has provided absolutely no basis for this assertion. To the contrary, as the above discussion discloses, the documents in question plainly are of the type that may be withheld by the Staff under the privilege. The documents are “predecisional,” and they reflect the “deliberative” process involved in the Staff’s review of the pending EPU application. Accordingly, the Staff properly identified these documents and invoked the privilege in determining that they should be withheld from the hearing file.

The Staff has fully addressed DPS’s arguments in its response to DPS’s first motion to compel, as to whether the documents are predecisional and deliberative.<sup>15</sup> Rather than reiterate those arguments here, the Staff incorporates herein that portion of its response to DPS’s First Motion.

Further, as set forth in the Staff’s response to DPS’s First Motion, DPS has failed to show any “overriding” or “special” need for the documents in question.<sup>16</sup> As was the case with respect to the three documents sought in DPS’s First Motion, DPS has failed to present any showing whatsoever that it has a need – much less a special or overriding need – for the 25 documents identified in its Second Motion. Accordingly, DPS’s Second Motion to Compel fails to provide any basis to support compulsory disclosure of these documents.

C. Determination By A Responsible Agency Official.

In its Order of September 30, 2005, the Licensing Board directed the Staff, *inter alia*, to identify the “high ranking agency official” who “personally reviewed the document and made the decision to invoke the deliberative process privilege,” and any high level official who reviewed the documents and made such a determination at a later date; and to present legal argument

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<sup>15</sup> See “NRC Staff’s Answer to Vermont [DPS’s] Motion to Compel,” dated September 12, 2005, at 2-7.

<sup>16</sup> *Id.* at 7-10.

concerning the applicability of this element in NRC adjudicatory proceedings and the adequacy of the rank of the individual(s) who reviewed the documents and decided to invoke the privilege. Order at 2-3. The Staff is filing, simultaneously herewith, its response to the Licensing Board's Order, in which these matters are addressed.<sup>17</sup> That discussion is hereby incorporated by reference herein.

While the Licensing Board's Order pertains specifically to the three documents listed in DPS's First Motion, the Board noted that issues similar to those presented in that motion "may be presented" in its Second Motion. Order at 2 n.6. Accordingly, in the interest of facilitating the Board's consideration of DPS's Second Motion, the Staff wishes to inform the Licensing Board that the process followed in the Staff's identification and withholding (under the predecisional deliberative process privilege) of the 25 documents addressed in DPS's Second Motion, was substantially the same as the process described in the Staff's response the Board's Order concerning the documents requested in DPS's First Motion.

In sum, the documents sought in DPS's Second Motion were initially identified and withheld as privileged by the NRC Staff Project Engineer in consultation with Staff Counsel. Further, subsequent to the Staff's identification of these documents as privileged, a high-ranking agency official personally reviewed the documents and determined that they should be withheld from disclosure under the predecisional deliberative process privilege. Thus, in response to the Licensing Board's Order, an Affidavit has been prepared by Ledyard (Tad) B. Marsh, Director of the Division of Licensing Project Management ("DLPM"), NRC Office of Nuclear Reactor Regulation ("NRR"), attesting to his personal review of the documents and his determination that the documents should be withheld under the predecisional deliberative

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<sup>17</sup> See "NRC Staff Response to the Atomic Safety and Licensing Board's Order of September 30, 2005, Regarding Vermont Department of Public Service's First Motion to Compel," dated October 21, 2005, at 4-5.

process privilege.<sup>18</sup> Further, as set forth in Mr. Marsh's Affidavit, as Director of DLPM, he is specifically authorized to make such determinations, under an existing NRC management directive and administrative procedures.<sup>19</sup> The Staff respectfully submits that this determination satisfies the "third element" of the deliberative process privilege, to the extent that this element applies in NRC adjudicatory proceedings, for the reasons set forth in the Staff's response to the Licensing Board's Order.

#### CONCLUSION

For the reasons set forth above, each of the 25 internal NRC Staff E-mail messages is protected from disclosure under the predecisional deliberative process privilege. DPS has failed to identify any "special," "compelling" or "overriding" need for these documents. The Staff's identification of these documents as privileged, and its determination that they should be withheld from the hearing file, were proper and consistent with law. Accordingly, DPS's Second Motion to Compel should be denied.

Respectfully submitted,

**/RA/**

Jason C. Zorn  
Sherwin E. Turk  
Counsel for NRC staff

Dated at Rockville, Maryland  
this 21<sup>st</sup> day of October 2005.

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<sup>18</sup> See Affidavit of Ledyard (Tad) B. Marsh, dated October 21, 2005, attached hereto.

<sup>19</sup> The Management Directive and administrative procedures are available on the NRC's Agencywide Document Access and Management System ("ADAMS").

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OPERATIONS, INC.	)	ASLBP No. 04-832-02-OLA
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(Vermont Yankee Nuclear Power Station)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER TO VERMONT DEPARTMENT OF PUBLIC SERVICE'S SECOND MOTION TO COMPEL" 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 21<sup>st</sup> day of October, 2005.

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