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USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

September 8, 2006 (3:45pm)

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of)
ENTERGY NUCLEAR VERMONT YANKEE,))
LLC and ENTERGY NUCLEAR)
OPERATIONS, INC.)
(Vermont Yankee Nuclear Power Station))

Docket No. 50-271-OLA

ASLBP No. 04-832-02-OLA

NEW ENGLAND COALITION'S ANSWER
TO NRC STAFF'S MOTION FOR
LEAVE TO INTRODUCE TWO ADDITIONAL HEARING EXHIBITS

Pursuant to 10 C.F.R. §§ 2.323(a) and 2.1204, the NRC Staff ("Staff") has requested leave of the Atomic Safety and Licensing Board to introduce two exhibits into evidence at the evidentiary hearings scheduled to be held on September 13-15, 2006, which the Staff has not previously identified as proposed exhibits.

New England Coalition submits that Staff's request is not supported by good cause, that it would result in harm to New England Coalition, and that the probative value of the documents that Staff wishes to introduce is not sufficient to merit an exception to the schedule for entering evidence already set by the Board and long expired.

For these reasons and reasons as set forth below, New England Coalition respectfully requests that the Board deny the NRC Staff's Motion For Leave To Introduce Two Additional Hearing Exhibits.

I. INTRODUCTION

On April 13, 2006, the Licensing Board ordered the parties to file initial written statements of position and written testimony by May 17, 2006, and to file written responses and any rebuttal testimony by June 14, 2006.¹ All parties timely filed their initial statements of position, written testimony, and responses to the initial statements of position regarding New England Coalition's admitted Contentions.

On May 23, 2006, the Licensing Board held a telephone conference call with the parties, in which the Board observed that the testimony submitted by Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc. (collectively, "Entergy" or "Applicant") referenced particular documents that had not been submitted to the Licensing Board (Tr. 970-71

On June 5, 2006, the Licensing Board issued an Order (Regarding Submission of Supplemental Documents)," confirming and clarifying its instructions for the supplementation of testimony.² Therein, Licensing Board directed all parties to supplement their direct testimony by submitting, on or before June 19, 2006, "all reports and documents that are relied upon to prove or substantiate that party's position, or that are referenced by, and are material to support, the testimony of one of its witnesses." *Id.* at 3.

The Licensing Board directed the Applicant to submit, on or before June 19, 2006, three documents which it had cited in its testimony, as well as "documentation supporting its testimony on the ODYN code." Supp. Order at 2.

¹ "Revised Scheduling Order," April 13, 2006

² "Order (Regarding Submission of Supplemental Documents)," dated June 5, 2006 (hereinafter referred to as "Supplemental Order").

On June 19, 2006, the Applicant and Staff timely submitted copies of the documents requested by the Board including numerous documents pertaining to the “ODYN” Code; in particular, Staff’s initial and supplemental Safety Evaluations approving the use of ODYN for Boiling Water Reactor (“BWR”) transient analyses, dated June 1980 and January 1981

In it’s Motion For Leave To Introduce Two Additional Hearing Exhibits, NRC Staff claims that during the week of August 14, 2006, while preparing for hearings in this matter, Richard Ennis, the Staff’s Senior Project Manager for the Vermont Yankee Extended Power Uprate (EPU) Review and one of its proposed witnesses herein, “found”, while conducting a document search in the NRC’s Agencywide Documents Access & Management System (“ADAMS”). two historical documents – each approximately 25 years old – which directly relate to the acceptability of ODYN for use in BWR transient analyses: (a) Generic Letter 80-91, dated November 4, 1980; and (b) Generic Letter 81-08, dated January 29, 1981 (copies provided in NRC Staff’s Motion -Attachment 1).

The Staff the identified the documents, together with their respective ADAMS accession numbers (ML062330216 and ML031210181), in an update to the hearing file submitted on August 21, 2006.

On August 22, 2006, during a scheduled telephone conference call with the Licensing Board, New England Coalition asked for direction from the Board as to how it should treat NRC Hearing File Updates and Entergy disclosures filed after the date set by the Board for Statements of Position, Written Testimony, Responses and Supplements. New England Coalition objected to the possible introduction of the two Generic Letters or any other newly provided documents into evidence at the upcoming hearings.

Entergy stated that it had no intention of attempting to introduce any newly provided documents into evidence. NRC Staff argued that it should be allowed to introduce the two generic letters and the Board advised that it would find such introduction problematic; however if the Staff wanted to pursue the matter, then the Staff should file a Motion to that effect.

On August 23, 2006, the Staff filed the instant Motion seeking to introduce the two generic letters into evidence.

II. DISCUSSION

(A) The generic letters that NRC Staff seeks to introduce would not have been, and are not appropriate exhibits for introduction under the terms of the Board's Supplemental Order requesting of the licensee production as exhibits those documents to which it refers in its Statements of Position, Written Testimony, Responses.

(1) As NRC Staff states in its Motion , "...testimony does not refer to the Generic Letters and does not directly rely thereon"

(2) Further, although NRC Staff now says that the focus of our attention in reviewing these generic letters should be the "mandatory" language they contain, nowhere in the NRC Staff Statement of Position and Written Testimony, is it stated that use of the ODDYN code for transient analysis was, according to the generic letters or any other NRC source, mandatory. In fact, NRC Staff states, " the Staff's witnesses were not familiar [Emphasis added] with the specific (mandatory) language of these Generic Letters prior to filing their testimony.

Thus, NRC Staff does not seek to provide exhibits in support of anything in its Statement of Position or its Prefiled Written Testimony or in compliance with the Board's Supplemental Order of June 5, 2006.

(3) Rather, NRC Staff seeks admission of late-filed exhibits to modify or embellish its testimony based on the results of a search of the public documents during the week of August 14, 2006. NRC Staff was obliged to have performed such searches prior to its filing of a Statement of Position, prior to its filing in support of summary disposition of NEC Contention 3; and perhaps as early as its initial filing in opposition to the admission of NEC Contention 3.

(B) It is not simply the case that these generic letters were hiding in plain view as public documents; the Staff also had ready and ample access to these documents.

(1) These generic letters were in the Agencywide Documents Access and Management System and therefore were in the possession of and under the control of NRC Staff.

(2) NRC Staff has use of ADAMS topic and category search fields not available to intervenors or the general public.

(3) NRC Staff members use ADAMS on a daily or at least frequent basis are thus highly practiced in threading its labyrinth to retrieve information.

(4) Nor, as NRC Staff is well aware, is a search of ADAMS necessary to find Generic Letters. Generic Letters are listed by year on the NRC web page, www.nrc.gov, under Electronic Reading Room>All Collections> Generic Letters.

(5) These are NRC Staff documents.

Clearly, the claim that their identification at this time is the result of “unavoidable circumstances” is unsupportable.

And, in as much as the NRC Staff’s witness in this regard is the Vermont Yankee EPU Senior Project Manager, it strains the limits of credulity to be told by NRC Staff that it was oblivious of the existence or contents of two NRC Generic Letters on the topic of, and apparently containing requirements for, application of the ODYN code to transient analysis,

- throughout the witness’ tenure on the Vermont Yankee EPU project from September 2003 to March 2006),

and, in particular,

- throughout the NRC Staff’s review of General Electric’s Request for Generic Exemption for Full Transient Testing of Constant Pressure Power Uprate(d) plants, and the NRC Staff’s review the Duane Arnold (Docket 50-331) request for plant-specific exemption from requirement for full-transient testing,

and, of course,

- through the duration of this proceeding in which New England Coalition (Motion for Leave to Intervene, August 30, 2006) raised the question of the NRC Staff’s position with regard to an exemption to the requirement for full-transient testing at Duane Arnold.

An unbiased review of the facts and circumstances demonstrates that NRC Staff has no tenable excuse for identifying these documents two months after the deadline for identification of supporting documentation that was set by the Board. Such inexcusable untimeliness, disregard for the schedule, and lack of diligence should not be rewarded by admission of exhibits that are two months (if not two years) late.

(B) The Generic Letters that NRC Staff seeks to introduce are largely irrelevant and immaterial to the Licensing Board's consideration of the issues in NEC Contention 3, and they should therefore not be admitted into evidence in this proceeding.

(1) Generic Letters 80-91 and 81-08 do not directly relate to the issues that were raised by NEC in its Contention 3, and therefore do not warrant consideration by the Licensing Board and the Commission in their resolution of this contention.

(2) These documents were written over 25 years ago and "require" ... "ODYN analyses in place of those previously performed with REDY for the limiting transients".

Apparently, the generic letters inform licensees that NRC Staff will not review certain applications unless the ODYN code is substituted for the REDY code. They do not define the limits of the ODYN code in assessing system response under extended power uprate conditions which is the ODYN topic of concern in this proceeding.

(3) NRC Staff issued requirements, positions, and decisions regarding licensing for extended power uprate and the applicability of ODYN in considering generic and individual exemptions to the requirement for full-transient testing supercede the 1980 and 1981 generic letters. The Board is not obliged to consider the 25-year-old Generic Letters³

³ If there is a perceived conflict with an earlier regulation, the more recent regulation prevails, as the latest expression of the rule maker's intent, See 2B Sutherland, Statutory Construction § 51.02 (1992). And in Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-01-10, 53 NRC 353, 367 (2001), an example, "The specific provisions of 10 C.F.R. § 50.62 provide strong evidence for our current reading of the more general strictures of GDC 62".

(C) NRC Staff Motion through which it seeks to introduce lately found Generic Letters and the testimony offered in its motion and the testimony inherent in placing the Generic Letters before the Board adversely affects New England Coalition.

(1) NRC Staff's Motion to introduce additional exhibits (and testimony) comes just three weeks before hearing, a time when New England Coalition is expending all available resources to prepare for hearing. Responding to this Motion and preparing for responses to questions that it may engender in anticipation of the Board's possible grant of the Motion takes away time and attention that New England Coalition can ill afford in preparation to defending its contention against two amply resourced and closely allied opponents, NRC Staff and the Applicants.

(2) Should this motion be granted, it will mean that by conforming to the Board's Order and Memorandum of March 24, 2006, requiring all parties to adhere to its rulings on schedule, absent a showing of "unavoidable and extreme" or "very extraordinary" circumstances,⁴ New England Coalition has foregone the opportunity search out new information, dress up a late filing as a motion for leave to introduce new exhibits, and place both the proposed new exhibits and exposition on the meaning and import of their contents, with their lingering after-impression, before the Board. For one party to be treated as "more equal" than other parties inherently diminishes the rights and opportunities of the other parties.

⁴ See, e.g., "Memorandum and Order (Clarifying the Factual Scope of NEC Contention 4 and Denying Untimely Motion for Enlargement of Time to File Reply Brief)" (March 24, 2006) "Order (Granting Motion for Enlargement of Time Related to NEC Contention 4 and Granting Enlargement of Time, Subject to Sanction, Related to NEC Contention 3)" (March 23, 2006), slip op. at 3 ("Hereinafter, absent very extraordinary circumstances submitted to us via sworn declaration or affidavit, any motion . . . for an extension or enlargement of time that is not filed and in our hands by 2:00 PM on the day before the deadline in question, shall be automatically denied. . . .").

(3) NRC Staff has represented, albeit without specific identification as certification, that, “in accordance with 10 C.F.R. § 2.323(b), Counsel for the Staff has ...attempted several times, without success, to contact NEC’s representative (Mr. Shadis) concerning this request”. This is not true. On August 23, 2006, the day that NRC Staff filed the Motion, Mr. Sherwin Turk, NRC Counsel, left two telephone messages, which were returned to Mr. Turk’s voice mail at approximately 4 pm. Mr. Turk did not reply. Nor did Mr. Turk communicate anything via E-mail regarding intent to file a motion. Two missed calls or messages in a single afternoon do not constitute, “...attempted several times without success.” This is use of egregiously colored language in a blatant attempt to mislead the Board regarding NRC Staffs duty under §2.323 that it made” a sincere effort to contact other parties in the proceeding and resolve issue(s) raised in the motion and that the movants efforts to resolve issues have been unsuccessful.” New England Coalition was thus deprived of an opportunity to explore the possibility of a stipulation or other initiative that might have addressed the concerns of NRC Staff and New England Coalition with respect to the content of the proposed new exhibits. Such consultation might also have eliminated the need for the Board to weigh the avoided filings (Motion and Answers). Further, NRC Staff’s disingenuous “certification” taints the process; wherein it defeats the purpose of §2.323 and adversely affects all of the participants. Granting NRC Staff’s Motion would now serve to legitimize a token standard for consultation and for candor.

(4) NRC STAFF submits further that the parties are not prejudiced because “all parties have had an opportunity to discover the two Generic Letters in ADAMS entirely on their own,

independent from the Staff's search and discovery of the documents." In a footnote⁵ NRC Staff then shows how easy it is to find the information; this without any explanation of why it was New England Coalition's obligation to seek out adverse information or why, if it is so easy, NRC Staff didn't drag it out two months ago or two years ago. Clearly the example is an argument in apposite to NRC Staff's justifications for this motion.

(D) NRC Staff argues that the Generic Letters are consistent with and support the Staff's position on NEC Contention 3, and therefore do not require a revision of any party's testimony in the proceeding. What they don't say is that NRC Staff has already attached testimony on the content and meaning of the exhibits like a colony of barnacles on its motion; if the Board grants the Motion to accept the exhibit, it will be hard pressed to scrape the testimony free.

(F) Without the hint of basis or support, the Staff submits that if the two Generic Letters were to be knowingly disregarded, the adjudicatory record – and the public interest – would be ill served. To the contrary, if NRC Staff's Motion were to be denied the integrity of the process would be upheld without any effect on consideration of the central issue before the Board; should full-transient testing be a prerequisite of a license amendment for extended power uprate at Vermont Yankee Nuclear Power Station?

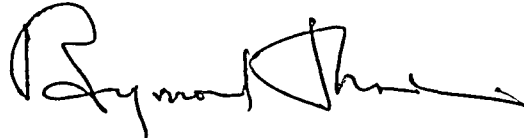
CONCLUSION

For the reasons set forth above, the New England Coalition respectfully requests that NRC Staff's Motion For Leave To Introduce Two Additional Hearing Exhibits in the evidentiary hearings to be held in this proceeding be denied and that the arguments and exhibits put forward

⁵ In addition, Generic Letters are available on the NRC public website under "Generic Communications" (www.nrc.gov/reading-rm/doc-collections/gen-comm/gen-letters).

in NRC's Staff's Motion be stricken. Further, New England Coalition respectfully requests that the Board consider sanctions and issue a determination with respect to NRC Staff's apparent violation of 10C.F.R. §323(b) and NRC Rules regarding standards of candor from Counsel.⁶ New England Coalition is prepared to file a sworn statement regarding the events of NRC Staff's attempts to consult under 10C.F.R. §323(b) if the Board believes that attestation, in addition to the contents of this filing and the signature below, is required.

Respectfully submitted,



Raymond Shadis
Pro Se Representative
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Dated at Edgecomb, Maine
this 1st day of September, 2006

⁶ Counsel appearing before all NRC adjudicatory tribunals "have a manifest and iron-clad obligation of candor." This obligation includes the duty to call to the tribunal's attention facts of record which cast a different light upon the substance of arguments being advanced by counsel. "Public Service Co. of Oklahoma (Black Fox Station, Units' 1 & 2), ALAB-505 8 'NRC 527, 532 (1978).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

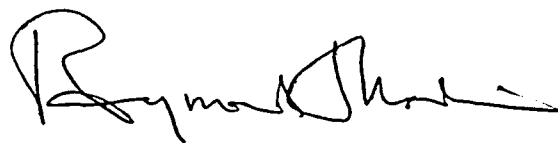
In the Matter of)	
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ENTERGY NUCLEAR VERMONT YANKEE)	Docket No. 50-271-OLA
LLC and ENTERGY NUCLEAR)	
OPERATIONS, INC.)	ASLBP No. 04-832-02-OLA
)	
(Vermont Yankee Nuclear Power Station))	

CERTIFICATE OF SERVICE

I hereby certify that copies of New England Coalition's ANSWER TO NRC STAFF'S MOTION FOR LEAVE TO INTRODUCE TWO ADDITIONAL HEARING EXHIBITS" 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 1st day of September, 2006.

Alex S. Karlin, Chair** Administrative Judge Atomic Safety and Licensing Board Panel Mail Stop T-3F23 U.S. Nuclear Regulatory Commission Washington, DC 20555-0001 E-mail: ask2@nrc.gov	Dr. Anthony J. Baratta** Administrative Judge Atomic Safety and Licensing Board Panel Mail Stop T-3F23 U.S. Nuclear Regulatory Commission Washington, DC 20555-0001 E-mail: ajb5@nrc.gov
Lester S. Rubenstein** Administrative Judge Atomic Safety and Licensing Board Panel 1750 Avenida del Mundo, Apt. 1106 Coronado, CA 92118 E-mail: lesrrr@comcast.net	Office of the Secretary** ATTN: Rulemaking and Adjudications Staff Mail Stop: O-16C1 U.S. Nuclear Regulatory Commission Washington, DC 20555-0001 E-mail: HEARINGDOCKET@nrc.gov
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New England Coalition

**UNITED STATES
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the matter of

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

September 1, 2006

Docket No. 50-271

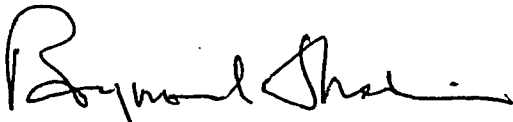
ASLBP No. 04-832-02-OLA

Office of the Secretary
ATTN: Rulemaking and Adjudications Staff
Mail Stop: O-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Dear Rulemaking and Adjudications Staff,

Please find for filing in the above captioned matter one original and two copies of
**NEW ENGLAND COALITION'S ANSWER NRC STAFF MOTION FOR LEAVE
TO FILE NEW EXHIBITS.**

Thank you for your kind assistance in making this filing,



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