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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

ENTERGY'S ANSWER TO THE NEW ENGLAND COALITION'S REQUEST FOR HEARING

Pursuant to 10 C.F.R. § 2.310(h)(1), Applicants Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.[1] (collectively "Entergy") hereby file this Answer in opposition to the "New England Coalition's Request for Hearing, Demonstration of Standing, Discussion of Scope of Proceeding and Contentions" (Aug. 30, 2004) ("NEC Petition") regarding Entergy's application to amend Facility Operating License DPR-28 for the Vermont Yankee Nuclear Power Station ("VY") to increase the maximum authorized power level. The NEC Petition should be rejected because it fails to propose any admissible contentions that meet the requirements of 10 C.F.R. § 2.309(f). *See* 10 C.F.R. § 2.309(a). Accordingly, NEC's request for hearing should be denied and the NEC Petition should be dismissed.[2]

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[1] Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. are the licensees of the Vermont Yankee Nuclear Power Station.

[2] It is fundamental that the NEC Petition must be judged on its own merits, notwithstanding the submittal of another request for hearing in this case. *See, e.g., Cincinnati Gas & Electric Co.* (William H. Zimmer Nuclear Power Station), ALAB-305, 3 NRC 8, 12 (1976) (where a State and several intervenors sought a hearing on an operating licensing proceeding, each of the prospective parties needed to satisfy the requirement of demonstrating standing and submitting at least one admissible contention.)

I. PROCEDURAL BACKGROUND

Entergy submitted its license amendment application to increase the authorized VY power level on September 10, 2003.[3] The proposed amendment will increase the maximum authorized power level from 1593 megawatts thermal ("MWt") to 1912 MWt. The proposed extended power uprate ("EPU") represents an increase of approximately 20% above original rated thermal power. Entergy included in its Application a description and justification for each proposed change to the VY operating license and Technical Specifications, a determination of no significant hazards consideration, and an assessment of environmental impacts associated with the license amendment request. Entergy supplemented its Application by submitting additional information over a dozen times since its initial filing. On February 20, 2004, the Nuclear Regulatory Commission ("NRC") Staff determined that Entergy had provided the information necessary for review of the license amendment request.

A Notice of Docketing and Opportunity for Hearing ("Notice") was published on July 1, 2004. 69 Fed. Reg. 39,976 (2004). The Notice permitted any person whose interest may be affected to file a request for hearing and petition for leave to intervene within 60 days of the notice (i.e., by August 30, 2004). *Id.* It stated that hearing requests shall be filed in accordance with the Rules of Practice in 10 C.F.R. Part 2 and advised interested persons to consult a current copy of 10 C.F.R. § 2.309 (the pertinent provision under the newly revised Part 2 rules).[4] The Notice directed any person requesting a hearing to set forth with particularity the interest of the petitioner in the proceeding and how that interest may be affected, and also, consistent with the

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[3] Letter from J. Thayer to U.S.N.R.C., "Vermont Yankee Nuclear Power Station License No. DPR-28 (Docket No. 50-271) Technical Specification Proposed Change No. 263 Extended Power Uprate" (Sept. 10, 2003) ("Application").

[4] *See Changes to Adjudicatory Process,* 69 Fed. Reg. 2182 (Jan. 14, 2004). A challenge to the new NRC rules is pending. *Citizens Awareness Network, Inc. v. NRC* (1st Cir., Docket No. 04-1145).

newly revised Part 2 rules, to "identify the specific contentions which the petitioner/requestor seeks to have litigated at the proceeding." *Id.*

On August 30, 2004, NEC filed its Petition, which includes a request for hearing and proffers seven contentions. This submittal is Entergy's answer to the NEC Petition.

II. STANDING

Entergy does not challenge NEC's standing to seek to participate in this proceeding.

III. STANDARDS FOR ADMISSIBILITY OF CONTENTIONS

The Commission's rules for admissibility of contentions in NRC licensing proceedings are clear and controlling.[5] Failure to satisfy the admissibility requirements must result in rejection of a proffered contention. Failure to proffer at least one admissible contention requires that a request for hearing or petition to intervene be denied. 10 C.F.R. § 2.309(a).

A. Contentions Must Be Within the Scope of the Proceeding and May Not Challenge NRC's Rules

As a fundamental requirement, a proposed contention is only admissible if it addresses matters within the scope of the proceeding and does not seek to attack the NRC's regulations governing the proceeding. 10 C.F.R. §§ 2.309(f)(1)(iii)-(iv) require a petitioner to demonstrate that the issue raised by each of its contentions is within the scope of the proceeding and material to the findings that the NRC must make. Licensing boards "are delegates of the Commission" and, as such, they may "exercise only those powers which the Commission has given [them]." *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-

[5] Adoption of the new adjudicatory hearing rules has not changed the requirements for admissibility of proffered contentions, and indeed has made those requirements explicitly applicable to informal hearings under Subpart L of 10 C.F.R. Part 2. 69 Fed. Reg. at 2,201-02, 2,221. As pointed out by the Commission, "no contention will be admitted for litigation in any NRC adjudicatory proceeding unless [the requirements in 10 C.F.R. § 2.309(f)] are met." *Id.* at 2,221.

316, 3 NRC 167, 170 (1976) (footnote omitted); *accord, Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979). Accordingly, it is well established that a contention is not cognizable unless it is material to a matter that falls within the scope of the proceeding for which the Commission has delegated jurisdiction to the licensing board, as set forth in the Commission's Notice of Opportunity for Hearing. *Id.; see also Commonwealth Edison Co.* (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 426-27 (1980); *Commonwealth Edison Co.* (Carroll County Site), ALAB-601, 12 NRC 18, 24 (1980).

It is also well established that a petitioner may not raise contentions that merely attack NRC requirements or regulations. *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 NRC 328, 334 (1999). "[A] licensing proceeding . . . is plainly not the proper forum for an attack on applicable statutory requirements or for challenges to the basic structure of the Commission's regulatory process." *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20, *aff'd in part on other grounds*, CLI-74-32, 8 AEC 217 (1974) (footnote omitted). Thus, a contention whose import is to attack a Commission rule or regulation is not appropriate for litigation and must be rejected. 10 C.F.R. § 2.335(a); *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 89 (1974). Also, a contention that "advocate[s] stricter requirements than those imposed by the regulations" is "an impermissible collateral attack on the Commission's rules" and must be rejected. *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982); *see also, Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-19, 33 NRC 397, 410, *aff'd in part and rev'd in part on other grounds*, CLI-91-12, 34 NRC 149 (1991). Likewise, a contention that seeks to litigate a generic determination established by Commission

rulemaking is "barred as a matter of law." *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 30 (1993).

B. Contentions Must Be Specific and Supported By a Basis Demonstrating a Genuine, Material Dispute

In addition to the requirement to address issues within the scope of the proceeding and material to the NRC's findings, a contention is admissible only if it provides a "specific statement of the issue of law or fact to be raised or controverted," accompanied by

(i) a "brief explanation of the basis for the contention;"

(ii) a "concise statement of the alleged facts or expert opinion" supporting the contention together with references to "specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;" and

(iii) "sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact," which showing 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)(i), (ii), (v) and (vi). The failure of a contention to comply with any one of these requirements is grounds for dismissing the contention. *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991).

These pleading standards governing the admissibility of contentions are the result of a 1989 amendment to 10 C.F.R. § 2.714, now § 2.309, which was intended "to raise the threshold for the admission of contentions." 54 Fed. Reg. 33,168 (Aug. 11, 1989); *see also Oconee*, CLI-99-11, 49 NRC at 334; *Palo Verde*, CLI-91-12, 34 NRC at 155-56. The Commission has stated that the "contention rule is strict by design," having been "toughened . . . in 1989 because in prior years 'licensing boards had admitted and litigated numerous contentions that appeared to be

based on little more than speculation.'" *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001) (citation omitted). The pleading standards are to be enforced rigorously. "If any one . . . is not met, a contention must be rejected." *Palo Verde*, CLI-91-12, 34 NRC at 155 (citation omitted). A licensing board is not to overlook a deficiency in a contention or assume the existence of missing information. *Id.*

The Commission has explained that this "strict contention rule" serves multiple purposes, which include putting other parties on notice of the specific grievances and assuring that full adjudicatory hearings are triggered only by those able to proffer at least some minimal factual and legal foundation in support of their contentions. *Oconee*, CLI-99-11, 49 NRC at 334. By raising the threshold for admission of contentions, the NRC intended to obviate lengthy hearing delays caused in the past by poorly defined or supported contentions. *Id.* As the Commission reiterated in incorporating these same standards into the newly revised Part 2 rules, "[t]he threshold standard is necessary to ensure that hearings cover only genuine and pertinent issues of concern and that issues are framed and supported concisely enough at the outset to ensure that the proceedings are effective and focused on real, concrete issues." 69 Fed. Reg. at 2,189-90.

Under these standards, a petitioner is obligated "to provide the [technical] analyses and expert opinion" or other information "showing why its bases support its contention." *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305, *vacated in part and remanded on other grounds*, CLI-95-10, 42 NRC 1, *aff'd in part*, CLI-95-12, 42 NRC 111 (1995). Where a petitioner has failed to do so, "the [Licensing] Board may not make factual inferences on [the] petitioner's behalf." *Id., citing Palo Verde*, CLI-91-12, 34 NRC 149.

Further, admissible contentions "must explain, with specificity, particular safety or legal reasons requiring rejection of the contested [application]." *Millstone*, CLI-01-24, 54 NRC at 359-60. In particular, this explanation must demonstrate that the contention is "material" to the NRC's findings and that a genuine dispute on a "*material* issue of law or fact" exists. 10 C.F.R. §§ 2.309(f)(1)(iv), (vi) (emphasis added). The Commission has defined a "material" issue as meaning one where "resolution of the dispute *would make a difference in the outcome* of the licensing proceeding." 54 Fed. Reg. at 33,172 (emphasis added).

As observed by the Commission, this threshold requirement is consistent with judicial decisions, such as *Conn. Bankers Ass'n v. Bd. of Governors*, 627 F.2d 245, 251 (D.C. Cir. 1980), which held that:

> [A] protestant does not become entitled to an evidentiary hearing merely on request, or on a bald or conclusory allegation that . . . a dispute exists. The protestant must make a minimal showing that material facts are in dispute, thereby demonstrating that an 'inquiry in depth' is appropriate.

Id. (footnote omitted); *see also Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-14, 48 NRC 39, 41 (1998) ("It is the responsibility of the Petitioner to provide the necessary information to satisfy the basis requirement for the admission of its contentions"). A contention, therefore, is not to be admitted "where an intervenor has no facts to support its position and where the intervenor contemplates using discovery or cross-examination as a fishing expedition which might produce relevant supporting facts." 54 Fed. Reg. at 33,171.[6] As the Commission has emphasized, the contention rule bars contentions where petitioners have

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[6] *See also Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982), *vacated in part on other grounds*, CLI-83-19, 17 NRC 1041 (1983) ("[A]n intervention petitioner has an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable [the petitioner] to uncover any information that could serve as the foundation for a specific contention. Stated otherwise, neither Section 189a of the Act nor Section 2.714 [now 2.309] of the Rules of Practice permits the filing of a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery against the applicant or staff.")

what amounts only to generalized suspicions, hoping to substantiate them later, or simply a desire for more time and more information in order to identify a genuine material dispute for litigation. *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 424 (2003).

Therefore, under the Rules of Practice, a statement "that simply alleges that some matter ought to be considered" does not provide a sufficient basis for an admissible contention. *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 246 (1993), *review declined*, CLI-94-2, 39 NRC 91 (1994). Similarly, a mere reference to documents provides no basis for a contention. *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 348 (1998).

C. Contentions Cannot Ignore Publicly Available Documentation

NRC's pleading standards require a petitioner to read the pertinent portions of the licensing request and supporting documents, including the Safety Analysis Report, state the applicant's position and the petitioner's opposing view, and explain why it has a disagreement with the applicant. 54 Fed. Reg. at 33,170; *Millstone*, CLI-01-24, 54 NRC at 358. Indeed, an intervenor

> [h]as an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable the petitioner to uncover any information that could serve as the foundation for a specific contention. Neither Section 189a of the Atomic Energy Act nor [the corresponding Commission regulation] . . . permits the filing of a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery against the applicant or Staff.

54 Fed. Reg. at 33,170 (1989) (*quoting Catawba*, ALAB-687, 16 NRC at 468). The obligation to make specific reference to relevant facility documentation applies with special force to an applicant's Safety Analysis Report and Environmental Report and a contention should be

rejected if it inaccurately describes an applicant's proposed actions or misstates the content of the licensing documents. *See, e.g., Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2076 (1982); *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), LBP-32-107A, 16 NRC 1791, 1804 (1982); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1504-5 (1982).

If the petitioner does not believe the licensing request and supporting documentation address a relevant issue, the petitioner is "to explain why the application is deficient." 54 Fed. Reg. at 33,170; *see also Palo Verde*, CLI-91-12, 34 NRC at 156. A contention that does not directly controvert a position taken by the applicant in the license application is subject to dismissal. *See Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992). An allegation that some aspect of a license application is "inadequate" or "unacceptable" does not give rise to a genuine dispute unless it is supported by facts and a reasoned statement of why the application is unacceptable in some material respect. *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-16, 31 NRC 509, 521 & n.12 (1990).

IV. NONE OF NEC'S CONTENTIONS IS ADMISSIBLE

NEC has failed to submit any admissible contentions. As discussed below, NEC ignores the NRC's rules requiring that contentions be within the scope of the proceeding and supported by a sufficient basis to establish a genuine dispute on a material issue. NEC's proposed contentions are vague, sweeping, and baseless assertions, lacking factual support, largely outside

the scope of the proceeding[7], and fail to reflect the available documentation. The failure to proffer a single admissible contention requires denial of the NEC Petition.

A. NEC Contention 1 – Quality Assurance/Quality Control ("QA/QC")

NEC Contention 1 is inadmissible because it contravenes the NRC's rule limiting contentions to the scope of the licensing proceeding. The contention is also factually unsupported, as NEC has misread or misunderstood the plain text of the sole document cited in support of its assertions.

NEC Contention 1 as submitted reads:

> New England Coalition contends that an Extended Power Uprate license amendment approval should not be considered until the potential effect of a reduced QA/Qc [sic] program is investigated and analyzed. 10CFR 50.54 details the requirement for maintaining a quality assurance program. Any changes requiring a reduction in the program must be submitted to NRC.

NEC Petition at 9. NEC offers no witness support for this proposed contention.

In order to focus the analysis on whether the contention should be admitted, Entergy proposes that the contention be restated incorporating the specific allegations as follows: [8]

> New England Coalition contends that an Extended Power Uprate license amendment approval should not be considered because VY

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[7] The statement in the NEC Petition that it "sets forth the following contentions concerning approval of the License Termination Plan for Yankee Rowe," NEC Petition at 9, is – we assume – a typographical error.

[8] The rewording of contentions to provide greater specificity can be achieved by agreement among the parties to a proceeding, or can be implemented by the Atomic Safety and Licensing Board in order to define or consolidate contentions or clarify their scope. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 182, *reconsideration granted in part and denied in part on other grounds,* LBP-98-10, 47 NRC 288, *aff'd on other grounds,* CLI-98-13, 48 NRC 26 (1998). The rewording of a contention includes explicitly setting forth its bases, for the "scope of a contention is determined by the 'literal terms' of the contention, coupled with its stated bases." *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), LBP-88-25, 28 NRC 394, 396 (1988) (citations omitted). Entergy developed the proposed rewording of each the NEC's contentions and provided the language to NEC and to the NRC Staff. Counsel for the NRC Staff has stated that it will take no position on the reworded contentions. NEC has declined to make changes to the wording of its contentions. While, as discussed below, each of NEC's contentions is deficient for lack of specificity even as reworded, the vagueness of the contentions as presented by NEC renders them totally inadmissible.

> has undertaken to reduce its Quality Assurance and Quality Control Program without prior NRC approval in violation of 10 C.F.R. § 50.54 in that VY is transferring quality control from a free standing program into other departments as shown in an internal Entergy memorandum dated August 15, 2004 [Exhibit F]

In support of the contention, NEC states that it has an "understanding that Entergy has undertaken a fleet effort to transition quality assurance and quality control from freestanding programs into the various departments" and that "it appears that Entergy is taking these changes through appropriate channels, except for Vermont Yankee." NEC Petition at 10. NEC further asserts that it "finds no historic record of an application to NRC" requesting review and approval of the purported quality program change. *Id.* The only support cited in this contention is a single sentence in "an internal Entergy memorandum." *Id.*

1. The Contention is Outside the Scope of the Proceeding

NEC Contention 1 is inadmissible because NEC has failed to identify how an alleged programmatic non-compliance with the reporting requirements of 10 C.F.R. § 50.54 has any relevance to the proposed EPU or is within the scope of an EPU proceeding. NEC provides no citation to the Application relating to the alleged change in the VY QA/QC program; there is in fact no discussion in the Application of any reliance on "changed" VY QA/QC programs in support of the EPU.[9] NEC also fails to identify how a purported failure of an administrative requirement (i.e., to *report* a quality program change to the NRC) would or could have an adverse impact on any aspect of EPU operations. Thus, the issue of VY compliance with 10 C.F.R. § 50.54 is clearly irrelevant to, and far outside, the scope of this proceeding.

[9] NEC levels the unsupported charge that the proposed EPU "launches" from a "base plant" that "has a minimum number of defects." NEC Petition at 10. Sweeping, unsupported charges such as this do not raise a litigable issue. *Turkey Point*, LBP-90-16, 31 NRC at 521 & n.12.

2. The Contention Lacks Factual Basis

There is also no factual basis for a challenge to VY's compliance with 10 C.F.R. § 50.54. Contrary to NEC's assertion, VY has *not* changed its QA/QC programs or method of implementation in the manner alleged in the contention. The statement in an April 15, 2004, internal Entergy memorandum cited by NEC that purportedly supports its contention is taken out of context, misunderstood by NEC and, as explained below, unequivocally *refutes* NEC's incorrect conclusion that VY fails to comply with 10 C.F.R. § 50.54. The sole basis alleged for NEC's contention is, therefore, demonstrably wrong.

The internal Entergy Corporation memorandum, which NEC cited as the sole basis for Contention 1,[10] reported the management activities of Entergy's ten nuclear unit fleet "to *move all* nondestructive examination activities to Engineering and ANSI N45.2.6 activities to Maintenance, through a *Peer Inspection Program.*" Transition Memo at 1 (emphasis added). The memorandum section entitled "Vermont Yankee Applicability" reads, in full:

> While the alignment of functions outlined in this paper will allow Inspection/NDE standardization throughout the Entergy Nuclear fleet, *there will be one outlier – Vermont Yankee. Currently at Vermont Yankee only:*
>
> - *There is no QC inspection group to transition.*
> - Maintenance personnel perform limited PT, MP and visual examinations.
> - There is one NDE Level III whose primary function is ISI coordination.
> - *Maintenance group is already performing peer inspection.*
>
> *If* it's desired to align Vermont Yankee with the rest of the Entergy Nuclear fleet, then it would require additional resources to be provided to Engineering to perform the assigned NDE/ISI

[10] Memorandum from M. Colomb to W. Limberger, *et al.*, "Transition of Quality Control Functions From Quality Assurance to Engineering & Maintenance for Fleet Alignment, Rev. 0." (Apr. 15, 2004) ("Transition Memo"). The memorandum was identified in the NEC Petition as Exhibit F (NEC Petition at 10), but was not submitted with the Petition itself. At VY's request, NEC subsequently served it by electronic mail on September 3, 2004.

> functions. ([T]his may happen through transfer of fleet personnel, new hires, resource sharing, outsourcing, and/or any combination of these methods.)

Transition Memo at 2 (emphasis added). The plain meaning of this section is fatal to NEC Contention 1.

VY is an "outlier," specifically excluded from the programmatic actions described in the memorandum, which are the sole basis for the contention. "There is no QC inspection group to transition" at VY because the VY "Maintenance Group is *already* performing peer inspection." *Id.* (emphasis added). Moreover, the VY QA/QC program is "currently" configured in this manner and *only if* "it's desired to align" the VY programs with the rest of the Entergy Corporation nuclear fleet would changes be made. Indeed, VY is explicitly identified as the exception to the proposed quality program realignment. *Id.* Contrary to NEC's erroneous assertion, *no changes* to the VY QA/QC program have been along the lines described in the Transition Memo, whether related or unrelated to the EPU Application. The contention, therefore, has no factual basis and must be rejected.

Moreover, even if Entergy had changed its quality control programs at VY as described in the Transition Memo, no violation of 10 C.F.R. § 50.54 would have occurred. The requirements in the regulations refer to changes in the "quality assurance *program* description," not to changes in quality *control* functions.[11] In addition, the regulations make it clear that licensees may "make a change to a previously accepted quality assurance program description" that "does not reduce the commitments in the program description as accepted" by the NRC Staff

[11] 10 CFR § 50.54(a)(3) states in relevant part: "Each licensee . . . may make a change to a previously accepted quality assurance *program* description included or referenced in the Safety Analysis Report without prior NRC approval, provided the change does not reduce the commitments in the program description as accepted by the NRC (emphasis added).

"*without* prior NRC approval." 10 C.F.R. § 50.54(a)(3) (emphasis added). This unequivocal language establishes two conditions for prior approval of a licensee quality program change: (1) a change to the program, and (2) a reduction in previously approved program commitments. NEC provides no basis for either condition existing here.

As stated repeatedly throughout the Transition Memo, Entergy's purpose was to "transition" the various program functions from certain plant organizations within the Entergy Corporation nuclear plant fleet to others ("Upon completion of this transition, no NDE or ANSI inspection functions will remain in the Oversight organization.") Transition Memo at 2. Entergy Corporation organizations are to "move *all* nondestructive examination activities" to the designated organization. *Id.* at 1 (emphasis added). There is no statement, or even implication, in the memorandum that there would be any reduction in the nature of the quality control functions or the VY quality program commitments or effectiveness. Indeed, if anything, the implementation of "additional oversight" and the development of an "On-call/Rapid Response schedule," *id.* at 2, suggest enhancements in QA/QC functions beyond those contained in NRC-approved commitments. Thus, there is no basis supporting NEC's assertion of a failure to comply with 10 C.F.R. § 50.54.

3. The Contention Improperly Challenges the Commission's Regulations

Finally, to the extent NEC is asserting that an unreported change in the description of the quality assurance program of a license applicant should result in the rejection of a license amendment request, the contention is an improper challenge to the Commission regulations. 10 C.F.R. § 50.54 does not require such a sanction and NEC has identified no other applicable rule that would impose it. NEC, therefore, is asking that Entergy be subjected to requirements that go beyond what the Commission regulations provide.

For all the above reasons, NEC Contention 1 is inadmissible.

B. NEC Contention 2 – Main Steam Line Isolation Valve Leakage

NEC Contention 2 must be rejected because it raises issues wholly outside the scope of the extended power uprate proceeding. The contention as submitted is also factually unsupported, as NEC has failed to identify any connection between its allegations and the operation of VY at EPU levels. The sole document cited in support of the contention actually refutes NEC's assertions, and does not provide a factual basis for any admissible issue.

NEC Contention 2 as submitted reads:

> The license amendment should not be approved at this time because Entergy has failed to address the root cause of Main Steam Line Isolation Valve ("MSIV") Leakage but instead proposes to shift the problem downstream to catch a higher allowable leakage in the condenser. Entergy's [sic] fails to pursue the root cause of a negative component performance trend that could ultimately yield failure of the MSIV safety function. MSIVs are a critical line of defense during a reactor accident.

NEC Petition at 10. NEC relies entirely upon the Declaration of Arnold Gundersen[12] as the factual basis for its contention. NEC Petition at 11.[13]

In order to focus the analyses on whether the contention should be admitted, Entergy proposes that its text be restated incorporating the specific allegations as follows:

> The license amendment should not be approved at this time because Entergy has failed to address the root cause of Main Steam Line Isolation valve ("MSIV") leakage, in that:

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[12] NEC Petition, Exh. D, "Declaration of Arnold Gundersen in Support of Petitioners' Contentions" (Aug. 30, 2004) ("Gundersen Declaration").

[13] NEC asserts repeatedly that it relies in support of its proffered contentions on "further testimony to be provided at hearing." *See, e.g.*, NEC Petition at 11, 12. Such reliance is contrary to the Commission's requirement that contentions "must be based on documents or other information available at the time the petition is to be filed." 10 C.F.R. § 2.309(f)(2); *see also* CLI-03-17, *supra*, 58 NRC at 427. Thus, the Board can consider only the information submitted by NEC in its Petition in determining the admissibility of the proffered contentions.

a) Entergy, in anticipation of an EPU and in response to a VY Condition Report (VTY-2004-0918) proposes to adopt a higher allowable leak rate;

b) the MSIV test failure rate is increasing due to plant aging and corrosion; and

c) the EPU will increase steam flow 20% with higher velocity steam flow and more moisture.

In support of the contention, Mr. Gundersen states that Entergy responded to a VY Condition Report documenting an adverse trend in MSIV Local Leak Rate Tests ("LLRT") by increasing the allowable "leakage from 44 [sic] [standard cubic feet per hour ('scfh')] to 62 scfh."[14] Gundersen Declaration at 2. He asserts that he "disagree[s] with Entergy's diagnosis of the reason for the increased LLRT MSIV test failure rate" and opines that "the MSIVs are failing at an increasing rate because they are aging and corroding." *Id.* He concludes that the function of the MSIVs is now "inadequate to maintain present safety margins" and that "the problem of MSIV failures will also increase" if the VY power level is increased. *Id.* at 3.

1. The Contention is Outside the Scope of the Proceeding

NEC's assertions are a challenge, not to the EPU Application, but to an entirely separate VY license amendment request, one concerning the use of Alternative Source Term ("AST") methodology for calculating potential off-site effects of a design basis event. Entergy submitted an application for a license amendment to allow AST implementation on July 31, 2003.[15] In its AST Application, Entergy explicitly stated that "the proposed changes to primary containment leakage rate testing requirements" would, *inter alia*, result in "increasing the allowable leakage

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[14] As discussed below, the proposed leakage rate limit increase is from 31 scfh to 62 scfh.

[15] J. Thayer to NRC, "Vermont Yankee Nuclear Power Station License No. DPR-28 (Docket No. 50-271) Technical Specification Proposed Change No. 262 Alternate Source Term" (July 31, 2003) ("AST Application").

for individual MSIVs." AST Application, Att. 1, at 8. Entergy further described the proposed change in allowable leakage as follows:

> The proposed change increases the individual MSIV leakage limit to 62 scfh. An increase in the allowable individual valve leakage limit is warranted since retaining the present leakage limit of 31 scfh would cause unnecessary maintenance on the valves simply to maintain the low leakage limit with no corresponding increase in safety at the expense of maintenance personnel radiation exposure and other burdens.

Id. at 9. The AST Application also discussed the alternative leakage treatment pathway using the main condenser, which NEC asserts is an issue in this proceeding. *Compare* AST Application, Att. 1, at 4, 9 (discussing alternate leakage treatment), *with* NEC Petition at 10 (shifting "the problem downstream" to "the condenser"). Entergy based the proposed changes on analyses which demonstrated that the "calculated radiological consequences of the combined leakages [of all main steam pathways] are within the criteria of [10 C.F.R. § 50.67], and are therefore acceptable." AST Application, Att. 1 at 12. The concerns raised in NEC Contention 2 might be relevant to the AST Application, but are outside the scope of this proceeding.

NEC had the opportunity to request a hearing on the AST Application, including the MSIV leakage rate change. The NRC published a proposed "no significant hazards" determination with regard to VY's AST Application in the Federal Register on November 25, 2003. 68 Fed. Reg. 66,131, 66,134 (2003). The Federal Register notice stated that by December 26, 2003, "any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene." *Id.* at 66,132. NEC did not file such a request (nor did anyone else). Having failed to seek a hearing on the MSIV leakage rate issue on a timely basis and in the appropriate proceeding, NEC should not be allowed to raise the issue on an untimely basis in the wrong proceeding.

The EPU Application does not discuss MSIV maintenance or allowable MSIV leakage rates, but merely states that that the EPU was analyzed and the corresponding safety analysis prepared "based on AST methodology." Application at 3. Thus, the issues raised by NEC in Contention 2 are clearly outside the scope of this proceeding.

2. The Contention Lacks Factual Basis

NEC fails to establish any connection between the MSIV leakage tests and EPU operation. Mr. Gundersen states only that "I believe this proposed change would result in a reduction in safety margin even at the *present* power level." Gundersen Declaration at 2 (emphasis added). Yet, he provides no factual basis for this belief other than a single Condition Report ("CR")[16] documenting an "adverse trend" in MSIV leakage tests since 1996. *Id.* Nowhere does NEC provide any basis for extrapolating any of the MSIV leakage tests to EPU conditions. Further, NEC's allegation that Entergy is attempting to solve "the problem of increased MSIV test failure rate" by "rais[ing] the leakage limits" in the AST Application, Gundersen Declaration at 2, is illogical since the 2003 AST Application (i.e., the alleged "solution") *preceded* the 2004 CR that identified the "adverse trend" (i.e., the alleged "problem").[17]

Similarly, Mr. Gunderson fails to identify any factual basis for his "view" that "the MSIVs are failing at an increasing rate because they are aging and corroding." Gundersen Declaration at 2. Nor has NEC drawn any connection between the purported "aging and

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[16] Condition Report CR-VTY-2004-00918, "MSIV As-Found LLRTs Show An Adverse Trend" (Apr. 7, 2004) ("CR-2004-00918"). Two paragraphs later in the Declaration, Mr. Gundersen erroneously refers to this CR as "CR-VTY-2004-0917," a CR that is unrelated to any issues raised in the NEC Petition, and erroneously gives the date of the CR as May 5, 2004.

[17] To be sure, some MSIV test data cited in the CR were available before the AST Application was submitted, but the trend was not identified until after the test results from the April 2004 outage were analyzed. *See generally*, CR-2004-00918.

corroding" and operating under EPU conditions. Even if NEC's assertion that the "problem is that as the plant ages, the valve leakage is increasing," *id.* at 3, were true, NEC points to no facts that would suggest that EPU operation will make the MSIVs "age" faster or cause any other MSIV-related problems. NEC's claim as to the existence of a "classic bathtub curve" is without any support, either in general or as applied to VY's MSIVs.[18]

Particularly notable is NEC's failure to provide a basis for its sweeping assertion that "the change in allowable MSIV leakage during testing would mask the increased vulnerability of the MSIVs to leakage and/or loss of function due to warping and/or binding under a power uprate," Gundersen Declaration at 2. NEC cites no references for its claim of an "increased vulnerability of the MSIVs to leakage under EPU operating conditions or the "masking" of such vulnerability. In reality, the MSIV testing required by NRC regulations (*e.g.*, 10 C.F.R. § 50.55a(f); 10 C.F.R. Part 50, Appendix J §§ III, IV), plus the quarterly testing required by the VY Technical Specifications,[19] are the primary means of detecting and avoiding an "unacceptable safety risk" due to MSIV operation. NEC provides no explanation as to why the same testing will not be effective at EPU power levels. And, to the extent that NEC is asserting that the NRC-required MSIV tests will be inadequate under EPU operation, the contention is an improper challenge to the Commission's rules.

CR-2004-00918, the only document cited by NEC as the basis for Contention 2, contradicts rather than supports its claims. Contrary to NEC's assertion that the MSIVs are

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[18] NEC also ignores information contained in the very document it cites that current VY MSIV maintenance practices have proven very effective at correcting leakage test failures. *See* CR-VTY-2004-00918, Att. "Adverse Trend Common Cause Analysis Report" ("CR-2004-00918 Analysis") at 3 (noting the all five valves that initially failed the LLRT "successfully passed the as-left LLRT on the first attempt, indicating that the maintenance lessons learned over the past two refueling outages have been effective").

[19] *See* VY Technical Specification 4.7.D.1.c. ("At least once per quarter, with the reactor power less than 75 percent of rated, trip all main steam isolation valves (one at a time) and verify closure time.")

"inadequate to maintain present safety margins," Gundersen Declaration at 3, the CR-2004-00918 Analysis states that

> The results of this investigation are that there are *no challenges to the safety or reliability of MSIVs* or their ability to perform their safety function. *The adverse trend in MSIV LLRT failures is the result of factors unrelated to the ability of the MSIVs to perform their safety function.*

CR-2204-00918 Analysis at 2 (emphasis added). This reported result, which is totally ignored by NEC, directly contradicts NEC's assertion of "inadequate" MSIV functioning.

The reason the MSIV safety function and reliability are not decreased is that, as the CR-2004-00918 Analysis clearly states, the MSIV "actuator does not provide sufficient force to ensure a leak-tight seal *when tested in the reverse direction.*" *Id.* (emphasis added). However, the analysis goes on to explain

> It must be emphasized that the seating force during an actual containment isolation event would be greater than the force exerted by the actuator alone. Therefore, the marginally sized actuator *penalizes minor imperfections* in the valve during LLRT but *does not affect the valve's ability to perform its safety function.*

CR-2004-00918 Analysis at 8 (emphasis added). Thus, NEC's reliance on the statement in CR-2004-00918 that "the seating force in the MSIVs is marginal," Gundersen Declaration at 3, provides no support for NEC's assertion that there has been a degradation in MSIV safety function. The CR-00918 Analysis in fact concludes that the test acceptance criteria are overly conservative, thus prompting the new VY MSIV leakage criteria proposed in the AST Application. NEC wholly ignores this information, even though it appears in the very document it relies upon.

For all of these reasons, NEC Contention 2 must be rejected.

C. NEC Contention 3 – Large Transient Testing

NEC Contention 3 is inadmissible because it does not contradict the Application. NEC has also failed to identify a factual basis for any admissible issue.

NEC Contention 3 as submitted reads:

> The license amendment should not be approved at this time or until it is agreed by all parties that Large Transient Testing will be prerequisite to Extended Power Uprate per the staff position on Duane Arnold Energy Center.
>
> Without adequate characterization, there can be no assurance that the license amendment will adequately safeguard public health by demonstrating compliance with 10 C.F.R. Part 20 standards.

NEC Petition at 11. NEC again relies solely on the statements of Mr. Arnold Gundersen as the basis for its contention. *Id.*; Gunderson Declaration at 3-5.[20]

NEC asserts in Contention 3 that Entergy's plan to avoid unnecessary plant transients by not performing Large Transient Testing following EPU implementation "cannot be justified as good engineering practice." Gundersen Declaration at 3. Mr. Gundersen also states that he "disagree[s] with and dispute[s] the assumptions and reasoning Entergy musters" in support of its test plan. *Id.* NEC also objects to Entergy's including the two European plants ("as if they were regulated by NRC") in its analysis of plant transients. *Id.* at 4. NEC also asserts that it "makes a difference" in plant response whether a transient were "indeed unplanned or if they were deliberate tests." *Id.* Finally, NEC decries Entergy's "timid approach" to large transient testing and asserts that a test of VY's "rapid shutdown capability at fully uprated power" is necessary to "preserve the current levels of assurance of safety" and "to test its operating crews under circumstances that are not a complete surprise." *Id.* at 5.

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[20] As to this contention, Entergy believes that no rewording is necessary.

1. The Contention Fails to Controvert Any Specific Aspect of the Application

NEC ignores the Application's detailed discussion of the justification for an exception the large transient testing. The Application contains a separate attachment devoted entirely to discussing the bases for an exception to VY large transient testing[21]. In that discussion, Entergy addresses: (1) VY's general response to unplanned transients, (2) analyses of specific events, (3) the impact of EPU modifications, and (4) relevant industry experience. The Justification states

> The transient analysis performed for [VY EPU] demonstrates that all safety criteria are met and that this uprate does not cause any previous non-limiting events to become limiting. . . . The instrument setpoints that were changed do not contribute to the response to large transient events. No physical modification or setpoint changes were made to the [Safety Relief Valves]. No new systems or features were installed for mitigation of rapid pressurization anticipated operational occurrences for this [EPU].

Justification at 2. NEC does not contradict any of the statements in the Justification but asserts broadly that it "disagree[s] with and dispute[s] the assumptions and reasoning Entergy musters to promote this exception." Gundersen Declaration at 3. Mr. Gundersen, however, fails to identify a single assumption, analysis or line of reasoning to which he objects or the grounds for his disagreement.[22] He goes on to assert dogmatically that "no such exception or exemption [from the large transient testing requirement] must be allowed." Gundersen Declaration at 3. Such broadly worded, non-specific challenges do not give rise to a litigable issue. *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003); *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 208 (2000); *Dominion Nuclear*

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[21] Application, Att. 7, "Justification for Exception to Large Transient Testing" ("Justification"). Entergy subsequently supplemented its justification discussion. *See*, Application, Supplement 3, Att. 2 (Oct. 28, 2003).

[22] NEC appears to object to the use of *data* from European plants and unplanned transients from any plant to confirm transient analyses. *See*, Gundersen Declaration at 3-4. Yet, NEC does not explain what difference the regulatory scheme (i.e., NRC or "European") or the nature of the transient (i.e., planned or unplanned) would make on the quality of the *data*.

North Anna, L.L.C. (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 NRC __, *slip op.* at 11 (Aug. 6, 2004); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), LBP-04-15, 60 NRC __, *slip op.* at 10 (July 28, 2004); *Turkey Point*, LBP-90-16, 31 NRC at 521 and n.12.

The contention, therefore, does not controvert the Application and must therefore be rejected.[23]

2. The Contention Lacks Factual Basis

NEC asserts that Entergy ignores the NRC Staff's "decision" on large transient testing in the case of the Duane Arnold EPU application. Gundersen Declaration at 4. However, NEC has failed to identify any such decision. The unidentified document partially quoted by Mr. Gunderson, Gunderson Declaration at 4, appears to be an excerpt from a Request for Additional Information ("RAI") from the NRC Staff to Nuclear Management Company ("NMC"), the Duane Arnold operator. The text cited by Mr. Gunderson only shows that the NRC Staff requested that NMC "provide further clarifications, information and answers" to certain questions regarding Duane Arnold's request for an exemption to large transient testing. Gundersen Declaration at 4 ("Discuss how [the cited] industry experience demonstrates that [for the] Duane Arnold power uprate, the cycle-specific limiting transient analysis would provide equivalent protection compared to startup test.") This is plainly not an NRC Staff "decision" mandating large transient testing as NEC represents, but a request for additional information of the type routinely made by the NRC Staff when evaluating a licensee's request for a license amendment. The so-called Duane Arnold "decision" provides no basis for NEC's contention.

[23] Mr. Gundersen speculates that Entergy may not want to face the "cumulative consequences" of large transient testing. Gundersen Declaration at 5. Such speculation is irrelevant to this proceeding, as is his reference in the same paragraph to "a twenty-year license extension" for VY.

Indeed, a review of the Duane Arnold docket establishes that the NRC Staff is still considering, and has not ruled on, NMC's exemption request.[24] NEC therefore mischaracterizes the NRC Staff document it quotes.

In any event, whatever the NRC Staff 's position may ultimately be regarding large transient testing at Duane Arnold, the Staff's ruling on an exemption request for that plant is inapplicable to VY. No Commission regulation requires that the NRC Staff 's resolution of a plant-specific licensing issue for one plant be controlling at another plant.

Moreover, a position adopted by the NRC Staff as part of its regulatory oversight is not dispositive of an issue raised in a licensing proceeding. It is well established that "the staff's views 'are in no way binding upon' the boards; they cannot be accepted without passing the same scrutiny as those of the other parties." *Consolidated Edison Company of New York* (Indian Point Units 1, 2 &3), ALAB-304, 3 NRC 1, 6 (1976) (*citing Southern California Edison* (San Onofre Units 2 & 3), ALAB-268, 1 NRC 383, 399 (1975)). Thus, the NRC Staff's position regarding large transient testing at Duane Arnold, even if applicable to VY, would only be one of the considerations before the Board. [25]

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[24] In response to the NRC Staff's request for additional justification for the requested exemption, "NMC provided that additional justification." Letter from Mark Peifer, Site Vice President, to NRC (Feb. 27, 2004) Encl. 1 § 2.A. In that same response, however, NMC committed to either perform the tests or to seek regulatory relief at a later date "to expedite the Staff's review of NMC's EPU application." *Id.* After consultation with the NRC Staff, NMC converted the commitment to a license condition. Subsequently, NMC submitted a separate request to remove the license commitment and operate at full EPU power without performing large transient testing. *Id.* at p. 1-2. This request is pending with the NRC Staff.

[25] NEC states that "[w]ithout adequate characterization, there can be no assurance that the license amendment will adequately safeguard public health by demonstrating compliance with 10 C.F.R. Part 20 standards." NEC Petition at 11. NEC gives no explanation for this reference to "10 C.F.R. Part 20 standards," and the Declaration of Mr. Gunderson, which is offered in support of this contention, does not mention Part 20. There is, accordingly, no way to determine to what "characterization" NEC is referring to, nor how such a "characterization" would be related to large transient testing. In any event, NEC's naked reference to 10 C.F.R. Part 20 is either erroneous, unconnected to EPU, or both. The rules in 10 C.F.R. Part 20 and establish, *inter alia*, the dose limits for occupational exposure and members of the public "from the licensed operation" of the facility. *See, e.g.*, 10 C.F.R. §§ 20.1201; 20.1301(a)(1). There is no apparent connection between dose limits to

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For all of the above reasons, the contention must be rejected.

D. NEC Contention 4 – Cooling Tower Seismic Analysis

Contention 4 is inadmissible because it raises issues wholly outside the scope of this extended power uprate proceeding. The contention is also unsupported in that the factual basis underlying NEC's assertions is demonstrably erroneous.

NEC Contention 4 as submitted reads:

> 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.

NEC Petition at 11. Once again, NEC relies solely on the statements of Mr. Arnold Gundersen as a basis for its contention. *Id.* at 12; Gundersen Declaration at 5-7.

In order to focus the analyses on whether the contention should be admitted, Entergy proposes that the contention be restated incorporating the specific allegations as follows:

> 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 (ACS) cell, in that:
>
> a) The ACS cell had its fill replaced in the mid-1980s without analyzing the effect on seismic qualification as evidenced by an undated Tower Performance, Inc. document stating that there was no analysis of the Class II structure.
>
> b) There is no documentation of the calculation of loads used for the original seismic analyses or a comparison of calculated loads to allowable loads, according to an undated attachment to a December 6, 2002 e-mail (Bates No. 700205-206).

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VY workers or the public and the issue of large transient testing, and NEC makes no attempt to draw such a connection. The above quoted statement, therefore, is simply irrelevant.

c) In connection with a 1983 cooling tower modification, there is no analysis of the forces that could break the ties connecting cooling tower cells, according to that attachment.

d) No analysis for 1985 cooling tower modifications was located according to the same attachment.

e) Several structural members of the Class I cells in the cooling towers were slightly overstressed for the safe shutdown earthquake seismic loads and would be suspect if new equipment is installed in the towers.

1. The Contention is Outside the Scope of the Proceeding

The VY mechanical-draft type cooling towers remove heat from the main condenser cooling water when necessary to meet temperature limits for discharge to the environment. There are two towers, east and west, each with 11 modules or "cells" connected in a longitudinal direction. VY Updated Final Safety Analysis Report ("UFSAR") § 10.8.3. The first cell of the west cooling tower (the Alternate Cooling System ("ACS") cell) is part of the ACS. The ACS is designed to provide an alternate means of heat removal in the unlikely event that the Service Water pumps become inoperable. The ACS cell, the cell adjacent to the ACS cell, and the deep basin are Seismic Class I. UFSAR §§ 10.8.3, 12.2.6.4.2. The remainder of the cooling tower complex is Seismic Class II. UFSAR § 12.2.6.4.2.

The Application proposes no changes to the VY cooling tower structure (including the ACS cell), basin, or fans. NEC acknowledges that it was only "in proceedings before the Vermont Public Service Board" that Entergy discussed potential cooling tower modifications. Gundersen Declaration at 5. NEC also states that "the Vermont Public Service Board, concerned with mitigating increased vapor plume visual effects," ordered Entergy to install larger cooling tower fan motors. *Id.* at 6. As a result of these State proceedings, Entergy will upgrade the fans

and fan motors in all the cooling tower cells *except for the ACS cell.* DPS Sept. 8, 2004, Order[26] § III.2. No change will be required to the fans and fan motor of the ACS cell, the only safety-related portion of the cooling tower. *Id.*

NEC's assertions thus relate to issues outside the scope of the Application. NEC has failed to identify any safety issues within the scope of this proceeding, and has claimed no tie between the alleged deficiency and the proposed EPU. Accordingly, the contention should be rejected.

Moreover, NEC asserts that the deficiency with the ACS analyses has existed since the mid-1980s and presumably would exist whether or not the Application was approved. Gundersen Declaration at 6. The appropriate procedure for bringing a deficiency in an operating plant to the attention of the NRC is via a petition under 10 C.F.R. § 2.206, not to assert it as a contention in an unrelated licensing proceeding. *Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, 562 (1980).

2. The Contention Lacks Factual Basis

NEC rests its contention solely on the demonstrably erroneous claim that VY has not performed the "appropriate structural analyses" of the VY cooling towers generally, and of the ACS cell in particular. In fact, VY has performed and maintains documentation of the appropriate seismic analysis for the cooling towers, including the ACS cell. NEC's errors in this regard are particularly egregious, as the very analyses and calculations it asserts do not exist are referenced in the very document cited by NEC in support of its contention. The contention, therefore, has no factual basis and must be rejected.

[26] State of Vermont Public Service Board, Docket No. 6812, "Order on Motion to Alter or Amend" (Sept. 8, 2004).

The current analysis of record for the seismic evaluation of the VY cooling towers is a 1986 analysis performed in support of a proposed modification to the cooling tower structure.[27] The analysis in fact considered that "*new heavier fill systems are to be installed* in the future." 1986 Seismic Analysis Report § 2 (emphasis added). The purpose of the 1986 analysis "was to determine the seismic loads" in the ACS cell. *Id.* The analysis was performed to account for the seismic impacts of "new heavier fill systems." *Id.* The 1986 Seismic Analysis Report demonstrated that the structural integrity of the alternate cooling cell, including "new heavier fill systems," would be maintained during the maximum hypothetical earthquake. *Id.* Thus, contrary to NEC's assertions, a cooling tower seismic analysis was performed and explicitly evaluated the impact of the current fill materials on structural integrity. And NEC was provided with a copy of this analysis in the State of Vermont proceeding relied on by NEC. *See* Gunderson Declaration at 5-6.

The objective of the 1986 seismic analysis was to analyze the seismic loads in the ACS cell so that strength assessments and, if necessary, modifications to the cooling tower structure could be performed as a part of the fill material replacement. 1986 Seismic Analysis Report § 2. Reanalysis incorporating the modifications demonstrated that the modified cooling tower configuration would be adequate to resist the loads from a maximum hypothetical earthquake or safe shutdown earthquake. *Id.* §§ 2, 5. VY incorporated the results of the 1986 seismic analysis into the 1986 cooling tower seismic modifications. Plant Design Change Request PDCR 86-02 ("Cooling Tower Seismic Modification") § 1.3 (explicitly describing the installation of additional diagonal and horizontal bracing "per the upgraded seismic criteria").

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[27] *See generally* Engineering Decision Analysis Company, Inc., "Dynamic Seismic Analysis of the Custodis-Ecodyne Cooling Tower at the Vermont Yankee Nuclear Power Station (Cooling Tower No. E70-11960),"

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NEC elects to rely on out-of-context statements from the document it cites as basis for the contention, while ignoring specific statements within the same document clearly contradicting its assertions. First, NEC ignores the fact that the very studies it claims do not exist are listed in the "Reference" section at the beginning of the very document it cites (the "undated attachment to an email from Dan Yasi dated 12/6/02" ("Dec. 2002 Att."), Gunderson Declaration at 7), which lists the 1986 Seismic Analysis Report as Reference 3. The analysis NEC alleges VY never performed is thus identified at the top of the first page of the document that NEC purports to rely upon.

Next, NEC selectively cites snippets of a critique of the original cooling tower analysis in the context of minor structural modifications made in 1983 and 1985. Gundersen Declaration at 7, ¶¶ A, B, C. NEC, however, ignores the plain, and plainly contrary, statement contained in the same document that

> In 1986, a *new analysis* was performed on the Class I sections of the Cooling Towers [Ref. 3 & 4] [sic]. This analysis was performed to *incorporate* the additional weight of the new fill material, the *modifications installed since the original tower construction,* and to align the analysis with the requirements of the UFSAR vs. the original design specification.

Dec. 2002 Att. at CT00206 (emphasis added). This discussion disproves NEC's assertions and explicitly references the 1986 Seismic Analysis Report and calculations that NEC claims never existed (but which were in fact provided to NEC during the State hearings). There is plainly no factual basis for admission of the contention.

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EDAC-388-020.02 (Apr. 7, 1986) ("1986 Seismic Analysis Report"). This document was provided to NEC in the State of Vermont proceeding [Bates stamp numbers CT01894 to CT01948].

3. There is No Genuine Dispute of Material Fact Between the Parties

The actions that NEC asserts need to be taken to correct the purported deficiency will actually be carried out by Entergy, although for different reasons. NEC argues that "[a] new analysis would have to be performed to qualify the towers for the additional loads." Gundersen Declaration at 7. Entergy, indeed, intends to perform a structural analysis of the cooling towers. *See* Dec. 2002 Att. at CT 00207 ("Replacement of the existing fans, motors, and gearboxes would require reanalysis of both the Class I and Class II cells."). [28] The structural analysis, which will be complete before EPU operation, will include a seismic analysis of the ACS cell and the adjacent cell. NEC has therefore failed not only to identify a basis for a dispute, but has failed to identify a dispute.

E. NEC Contention 5 – Design Basis

NEC Contention 5 is inadmissible because it challenges the NRC's rules limiting the scope of this proceeding and otherwise fails to satisfy the NRC's requirements for admissible contentions. The contention as submitted is also factually unsupported, for NEC provides only demonstrably erroneous assertions in support of its allegations.

NEC Contention 5 as submitted reads:

> The license amendment should not be approved at this time because Entergy has failed to maintain documentation and records, as required under 10 CFR 54 [sic] and elsewhere, and adequate [sic] to determine plant condition and design basis conformance as a foundation on which to build uprate analysis.

NEC Petition at 12; Gundersen Declaration at 8-9.

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[28] Entergy will perform this structural analysis of the cooling towers in support of the cooling tower modifications to be implemented (which cover all cooling tower cells *except the ACS cell*). State of Vermont Public Service Board, Docket 6812, "Order on Motion to Alter or Amend" (Sept. 8, 2004) § A.8.

In order to focus the analyses on whether the contention should be admitted, Entergy proposes that the contention be restated incorporating the specific allegations as follows:

> Contrary to the requirements of 10 C.F.R. § 50.54, Entergy has failed to maintain documentation and records adequate to determine VY's condition and design basis conformance as a foundation for EPU analyses in that:
>
> a) Portions of a 1986 Chicago Bridge & Iron Report on the 40-year design life of the plant are missing.
>
> b) There was a documentation problem from the 1979 time frame for a missing fuel rod.
>
> c) Twenty undocumented cracks were identified on the VY steam dryer.

In support of its contention, NEC states that if "the original design basis of the plant cannot be found, it is difficult to predict the future performance of the plant." Gundersen Declaration at 8 (emphasis in original). NEC further asserts that VY "inspection reports are rife with design basis issues." *Id.* NEC also "take[s] issue with Entergy's claim" that the VY design basis is "in good order" and "sufficient to form a base" for assumptions underpinning the Application. *Id.*

1. The Contention is Outside the Scope of the Proceeding

NEC fails to identify any specific design basis issue relevant to EPU. Instead, NEC points out three purported "documentation and record retention problems" unrelated to the EPU Application. Gundersen Declaration at 8. As NEC itself admits, the only "common thread for all these documentation issues is that all of them occurred a long time ago." *Id.* NEC offers no explanation of the relevance to the plant's current design basis of "problems" occurring in 1979, 1986, and "since the plant was built." *Id.* In addition, NEC offers not a hint of a connection (even assuming that these "problems" existed) between them and the EPU. Neither NEC nor

Mr. Gundersen explains how documentation of the design life of the reactor vessel, the storage location in 1979 of a segment of a spent fuel rod, or the length of time a potentially non-conforming physical condition on a steam dryer went undocumented have any bearing on the Application. The "documentation and record retention problems" NEC cited as examples are at most illustrative of administrative, not hardware or technical, deficiencies (i.e., a "missing" portion of a report, "lost" storage documentation, "undocumented" cracks). NEC fails to identify any actual plant condition, technical inadequacy or design basis inconsistency – much less an EPU-related condition – that arose from the examples it mentions.

NEC's reference to VY's response to 1996 NRC request for information regarding design basis pursuant to 10 C.F.R. § 50.54(f)[29] is, if anything, even more mystifying. It is inexplicable how the response by the former VY licensee to a request for information by the Staff eight years ago could have any bearing on the instant proceeding.[30]

Likewise, NEC fails to explain how Mr. Gundersen's loose references to "special NRC Architect and Engineering Inspections (1997)" and the currently ongoing "NRC pilot program team inspection" of VY (Gundersen Declaration at 8) raise any material issue relevant to this proceeding.[31] Such a rambling, unspecific contention, totally disconnected from the Application, should be rejected.

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[29] Letter from Donald A. Reid to NRC, Enclosure 1 "Vermont Yankee Nuclear Power Station Response to Nuclear Regulatory Commission 50.54(f) Letter Dated October 9, 1996" (Feb. 14, 1997) ("50.54(f) Response").

[30] Mr. Gundersen "wonders" how the then VY licensee "could have told NRC then that it had design basis information under control and now tell the Vermont Public Service Board and intervenors that some information is unavailable." Gundersen Declaration at 8. Mr. Gundersen's musings about what the former VY licensee may have told the NRC and how those statements compare to what Entergy told the Vermont PSB about another unspecified issue are also clearly irrelevant.

[31] NEC's assertion that if a NRC inspection "fails to find" certain issues, the "inspection is not sufficiently intense," *id.*, is, at best, a challenge to the performance of the NRC Staff's regulatory duties, an issue not cognizable in a licensing proceeding. *See, e.g., Louisiana Power & Light Company* (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5 (1985); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-80-12, 11 NRC 514, 516-17 (1980).

2. The Contention Lacks Factual Basis

NEC has also failed to identify any design basis issue that warrants litigation in this proceeding. Although NEC broadly claims NRC inspection reports "are rife with design basis issues," Gundersen Declaration at 8, it does not cite a single design basis issue raised in a single NRC inspection report. As discussed above, a contention based on unsupported generalizations cannot be admitted.

Moreover, each of the "design basis" examples cited by NEC in support of its contention is either demonstrably wrong or is unrelated to VY's design basis.

First, Entergy is unaware of any "1986 Chicago Bridge & Iron report" relating to the design basis of VY and specifically is unaware of a "1986 Chicago Bridge & Iron report on the 40 year design life of the plant." Gundersen Declaration at 8. Entergy believes that this claim is simply in error. In any event, the design basis for the VY reactor pressure vessel is established by the "Vermont Yankee Nuclear Power Corporation Reactor Pressure Design Report," which was produced and certified by the General Electric Company on October 23, 1969. This report is and has been available at VY. Contrary to the contention, the documentation and records of the VY reactor vessel design basis is not, and has not been, missing. Thus, this assertion is without factual basis.

Second, NEC's reference to "the well-publicized missing fuel rod documentation problem," Gundersen Declaration at 8, raises no design basis issues, and certainly none that are related to the EPU Application. NEC makes no reference to any design basis problem relating to the "missing fuel rod documentation" and provides no discussion of the nature of the problem to which NEC refers (which if there were such a problem was one of material accountability, not design basis). Moreover, NEC ignores the exhaustive Entergy effort to investigate and assess the

issues involving the inability for a period of time to identify the location of two spent fuel rod segments and determine appropriate corrective actions. *See* VY Condition Report CR-VTY-2004-1339. Finally, NEC has made no attempt whatsoever to connect any administrative deficiencies that might have existed in the VY nuclear material accountability process with EPU operation. Again, NEC's example provides no factual basis for its contention.

Third, NEC's reference to "20 undocumented cracks in the steam dryer" is confusing, vague, and fails to provide any support for the contention. NEC fails to provide any reference or citation for its assertion of "undocumented" steam dryer cracks. The assertion is in fact wrong, for Entergy performed and documented the results of a thorough inspection of the VY steam dryer as a part of the refueling outage in April 2004.[32] *See* BVY 04-058, Att. 1[33] at 57, 64, 71, and 72. VY identified and documented the existence of indications on the steam dryer in four separate inspection reports.[34] VY submitted a 21-page discussion of the steam dryer inspection results, specifically identifying and addressing the findings of each of the four inspection reports. BVY 04-058, Att. 1 at 57-78. VY also responded in detail to several Requests for Additional Information ("RAIs") by the NRC Staff regarding the steam dryer. *See* BVY 04-058, Att. 1, Responses to RAIs EMCB-A-1, A-2, and B-1. So, no "undocumented" cracks in the steam dryer exist and the documentation rebutting the contention was a matter of public record before the contention was submitted.

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[32] VY had not previously inspected steam dryer welds, as such inspections are not required by Commission regulations. The April 2004 inspections were performed in response to a vendor recommendation. *See* GE Services Information Letter No. 644, Supplement 1 (Sept. 5, 2003) at 4.

[33] Letter from Jay K. Thayer, Site Vice President, to NRC, BVY 04-058, Attachment 1, "Response to Request for Additional Information" (July 2, 2004) ("BVY 04-058").

[34] VY Inspection Reports VYR24-04-01 through VYR24-04-04.

Finally, NEC has failed to identify any litigable issue in this proceeding arising from the prior VY licensee's response to an October 1996 NRC information request under 10 C.F.R. § 50.54(f) on the VY design basis. In its 50.54(f) Response, the licensee indicated that it had "concluded that the programs and processes currently in place provide a reasonable level of assurance that that plant configuration and performance are consistent with the design bases." VY 50.54(f) Response at 1. The prior VY licensee also stated in the 50.54(f) Response the belief that its procedures and processes were of high quality and properly implemented:

> VY's procedures for controlling plant configuration, operations, surveillance, maintenance, and testing are designed and intended to maintain the plant's design bases. Review of recent program initiatives, and other audits, assessments, and inspections provides objective evidence of the generally effective implementation of these procedures and programs. The review of the design control and procedure change processes confirms that these processes contain the requirement for incorporating new or changed design bases requirements into the appropriate operating, maintenance and testing procedures. In addition, recent program initiatives and assessments (i.e., Appendix R, Equipment Qualification, Appendix J Program, IST Program, etc.) have resulted in program or procedure enhancements and changes that provide reasonable assurance that design bases requirements are incorporated into the appropriate operating, maintenance, and testing procedure. Therefore, VY concludes that there is reasonable assurance that design bases requirements are translated into operating, maintenance, and testing procedures.

50.54(f) Response at 29-30. NEC points to no facts or conditions relating to the Application that would contradict the conclusions in the 50.54(f) Response. Therefore, there is nothing in the 50.54(f) Response or in Entergy's current programs and processes that would support a challenge to the adequacy of VY's design basis information. Certainly, NEC has cited to nothing to support such a challenge.

Thus, none of the examples cited by NEC provides any factual basis for a contention challenging the VY design basis. The contention, therefore, is inadmissible.

3. The Contention Impermissibly Challenges Commission Regulations

To the extent that NEC is arguing that the VY design basis should be perfectly documented, such a claim goes beyond regulatory requirements. Thus, in its 1996 request for information to the VY licensee the NRC Staff did not expect or require the licensee to identify and eliminate every design bases discrepancy, but only to describe their processes "for identification of problems and implementation of corrective actions, including actions to determine the extent of problems" in the future. 50.54(f) Response at 4, 47-56. In its response, VY explicitly recognized that "reasonable assurance" did not mean discrepancies regarding the plant's design bases did not exist or would not be identified in the future. No commitment was made to have a problem-free program and none was requested by the NRC Staff.

Thus, the contention raises, at most, a generic challenge to the Commission's requirements for design basis documentation. Such a challenge is clearly impermissible in this proceeding.

For all of the reasons above, NEC Contention 5 is inadmissible.

F. NEC Contention 6 – Defense in Depth

NEC Contention 6 is inadmissible because it fails to satisfy the NRC's requirements for admissible contentions. The contention as submitted is also factually and legally unsupported, as NEC fails to address relevant portions of the Application.

NEC Contention 6 as submitted reads:

> The proposed license amendment fails to preserve defense-in-depth. By placing dependence on maintaining containment pressure to secure Residual Heat Removal and Core Spray Pump Suction under accident conditions, Entergy ignores single failure criteria and violates basic tenets of reactor safety. This must not be permitted as it deprives the public of protections afforded by defense-in-depth.

NEC Petition at 12. NEC relies solely on statements by Mr. Paul Blanch to support its contention.[35] *Id.* at 12-13; Blanch Declaration at 1-3.

In order to focus the analyses on whether the contention should be admitted, Entergy proposes that the contention be restated incorporating the specific allegations as follows:

> The proposed license amendment fails to preserve defense in depth by depending on maintaining containment pressure to secure Residual Heat Removal Pump and Core Spray Pump suction under accident conditions, contrary to the requirements in draft General Design Criterion 41 in that
>
> a) Entergy Calculation VYC-808, Revision 6 fails to analyze the consequences of the additional dose to the control room and the site boundary should a single failure occur while attempting to maintain elevated containment pressure.
>
> b) VY Calculation VYC-808, Revision 6, fails to address (1) ability to cool the reactor core, (2) any single active or passive failures of the containment or the torus (including failures of valves and penetrations) that may impact the operability of the Emergency Core Cooling System, and (3) recent failures of Boiling Water Reactor containment valves.
>
> c) VY Calculation VYC-808, Revision 6, fails to show compliance with the guidance in Regulatory Guide 1.174 (2.2.1.1 Defense in Depth), particularly as to demonstrating that the independence of barriers that prevent the release of radioactive materials to the environment is not degraded.

NEC disputes Entergy's analysis that "the ECCS will maintain its ability to cool the core after a large break LOCA." Blanch Declaration at 2. Mr. Blanch also asserts that Entergy "fails to address any single active or passive failures of the containment or the torus." *Id.* He cites the "requirement for defense in depth" in Regulatory Guide 1.174, § 2.2.1.1, and concludes that it "is

[35] NEC Petition, Exh. E, "Declaration of Paul M. Blanch in Support of Petitioners' Contentions" (Aug. 30, 2004) ("Blanch Declaration").

clear from the proposed changes that this Defense in Depth is being severely degraded." *Id.* at 3. He also criticizes Entergy for selectively applying certain requirements of Regulatory Guide 1.1, asserting that Entergy "invokes [Regulatory Guides] when it has the ability to comply, but remain[s] silent when the change violates design guidance and regulatory requirements." *Id.*

1. The Contention is Inadmissible on its Face

The language of NEC Contention 6 and its supporting bases requires rejection of the contention.[36] NEC's contention, as shown by its bases, focuses on the purported failures of VY Calculation VYC-808[37] to address certain issues, specifically the consequences of the additional doses to the control room and the site boundary, the ability to cool the reactor core, any single active or passive failures of the containment or the torus, recent failures of BWR containment valves, compliance with the guidance in Reg. Guide 1.174). Blanch Declaration at 2-3. NEC overlooks, however, that the sole purpose of the challenged calculation is to "determine the NPSH margin" for VY during specified conditions. VYC-808 § 1.1. Nowhere does NEC identify a regulatory requirement for an NPSH margin calculation to address the subjects that Mr. Blanch asserts are "missing" from VYC-808, and Entergy is unaware of any. The contention, therefore, is based on non-existent regulatory requirements and is thus inadmissible.

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[36] The "reach of a contention necessarily hinges upon its terms coupled with its stated basis." *Public Service Company of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988). The "scope of a contention is determined by the 'literal terms' of the contention, coupled with its stated bases." *Vermont Yankee*, LBP-88-25, 28 NRC at 396, *citing* ALAB-899, 28 NRC at 97.

[37] VYC-808, "Core Spray and Residual Heat Removal Pump Net Positive Suction Head Margin Following a Loss of Coolant Accident With Fibrous Debris on the Intake Structure," Revision 6 (Feb. 13, 2001) ("VYC-808").

2. The Contention Lacks Legal or Factual Bases

While NEC's allegations are directed at Calculation VYC-808, the contention is equally inadmissible if construed as claims against the entirety of the Application. NEC provides no support for general assertions that the Application fails to address single failure of the containment or torus, the ability to cool the core, or dose consequences to the control room or site boundary. Indeed, such general assertions are demonstrably incorrect, for VY has considered each of the issues described in the contention.

It is important to understand that not every pertinent analysis is physically included in the Application, but that does not mean that the analysis does not exist. This is made clear in the Safety Analysis Report prepared by Entergy in support of the uprate:

> It is not the intent of this report to explicitly address all the details of the analyses and evaluations described herein. For example, *only previously NRC-approved or industry-accepted methods were used for the analyses of accidents and transients*, as referred to in [the relevant topical report]. Therefore, the safety analysis methods have been previously addressed, and thus, are not explicitly addressed in this report. Also *event and analysis descriptions that are already provided in other licensing reports or the [UFSAR] are not repeated* within this report.

Application, Att. 4, "Safety Analysis Report For Vermont Yankee Nuclear Power Station Constant Pressure Power Uprate" (Sept. 2003) ("PUSAR") at xxiii (emphasis added). In addition, the PUSAR explicitly states that

> *All limiting accidents*, [Anticipated Operational Occurrences], and special events *have been analyzed* or generically dispositioned consistent with the [associated topical report] and *show continued compliance with regulatory requirements.*

Id. at 1-5 (emphasis added). The substance of the PUSAR describes the analyses of the effects of EPU, if any, on the current "NRC-approved" analyses for VY. *See* PUSAR §§ 2-10.

a. Control Room and Site Boundary Doses

The Application describes the radiological consequences of a design bases event in the control room and at the site boundary. The discussion identifies that the Application incorporates the "full implementation of the AST methodology" which VY submitted in a separate license application.[38] PUSAR at 9-3. The Application explicitly states that the analysis demonstrates that doses remain "below established regulatory limits." *Id.* By way of illustration, the Application also contains tables of the current and EPU calculated doses, as well as the applicable federal dose limits for design basis event. *Id.*, Table 9-1, 9-2, and 9-3.

b. Ability to Cool the Reactor Core

Contrary to NEC's allegation, the Application explicitly states that the Emergency Core Cooling System ("ECCS") "performance characteristics *will not be changed*" and that "analyses demonstrate that the requirements of 10 C.F.R. § 50.46[39] "*continue to be met*" at EPU conditions. PUSAR § 4.3 (emphasis added); *see also id.* (discussing assurance of coolable geometry during ATWS). A specific requirement of 10 C.F.R. § 50.46 is that "core geometry shall be such that the core remains amenable to cooling." 10 C.F.R. § 50.46(b)(4).

c. Single Active or Passive Failures of the Containment or the Torus

The Application describes no changes in the VY single failure criteria because the EPU does not impact or require a change to the existing single failure design basis. Single failure following EPU implementation will remain "considered in the design of certain systems" and "presumed in the evaluation of incidents to investigate the ability of the station to respond in the requires manner under degraded conditions." UFSAR at 1.2-13. Further, single failures of

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[38] *See generally* AST Application.

[39] "Acceptance criteria for emergency core cooling systems for light-water nuclear power reactors."

"passive equipment are assumed sometimes to be the causes of accidents." *Id.* Heat removal systems "shall be adequate to prevent fuel clad damage, assuming any single active or passive failure. *Id.* at 1.5-3. Thus, NEC's assertion that the Application "fails to consider any single active or passive failures" to the containment and torus systems, Blanch Declaration at 2, is factually incorrect.

NEC's sweeping assertion that "[r]ecent failures, both isolated and common mode failures of BWR containment valves have not been considered," Blanch Declaration at 2 (footnote omitted), is without factual basis. The only support cited by NEC is a lone Licensee Event Report ("LER") from another plant. *See* Edwin I. Hatch Nuclear Plant LER 2004-002 (Apr. 23, 2004) ("LER 2004-002"). Furthermore, the Hatch LER describes the failure of a local leak rate test, not a violation of the single failure criteria. *Id.* In addition, the test failures were attributed to an improper change to the air actuator seals. *Id.* at 1, 3. In any event, NEC failed to identify any relationship between the Hatch LLRT failure and VY single failure criteria or the Application. Nor did NEC establish that VY has the same or similarly designed valves as Hatch, or if VY could suffer the same failure, much less whether such a failure would violate VY's single failure criteria.[40] Thus, the only factual basis provided by NEC for this assertion is irrelevant or inapplicable to the proceeding.

d. Compliance with Regulatory Guide 1.174

Contention 6 vaguely references portions of Regulatory Guide 1.174 and asserts without explanation that "[i]t is clear from the proposed changes that this Defense in Depth is being

[40] The LER explicitly states that only the "inboard primary containment isolation barriers" were affected, a condition which although prohibited, did not result in a loss of containment isolation. LER 2004-002 at 1, 4

severely degraded with this change.[41] *Id.* NEC fails, however, to identify any specific plant change that it contends would create the "severe degradation" of the defense in depth it asserted. As discussed earlier, such broad and unsupported charges are insufficient to support admission of a contention. As the Commission has stated, a "mere reference to documents does not provide an adequate basis for a contention." *Calvert Cliffs*, CLI-98-25, 48 NRC at 348 (citation omitted).

There is also no legal support for this aspect of Contention 6. NEC fails to identify any Commission rule that would be violated by VY's proposed change. NEC states that the "calculation [VYC-808] also fails to discuss the requirement for defense in depth Regulatory Guide 1.174 (2.2.1.1 Defense in Depth)." However, regulatory guides are not regulations but serve merely to provide guidance for the NRC Staff to use in its review of the license application, and for applicants to consider following in their submittals to the Staff.[42] Compliance with Regulatory Guides is not required, and failure to comply with them does not give rise to a litigable contention in a licensing proceeding. *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Power Station), CLI-74-40, 8 AEC 809, 811 (1974); *Consumers Power Co.* (Big Rock Point Nuclear Power Plant), ALAB-725, 17 NRC 562, 568 n. 10 (1983).[43]

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[41] Mr. Blanch apparently refers to Proposed Technical Specification Change No. 263, which as he describes it "assumes that containment pressure will be maintained up to 7 PSIG above atmospheric pressure for as long as 200,000 seconds." Blanch Declaration at 2. While it is unclear whether Mr. Blanch's conclusions refer to this proposed change, the context of the subsequent discussion in his Declaration suggests that they do.

[42] Regulatory Guides contains the following disclaimer on their cover page: "Regulatory guides are used to describe and make available to the public such information as methods acceptable to the NRC staff for implementing specific parts of the NRC's regulations, techniques used by the staff in evaluating specific problems or postulated accidents, and data needed by the NRC staff in its review of applications for permits and licenses. *Regulatory guides are not substitutes for regulations, and compliance with them is not required.* Methods and solutions different from those set out in the guides will be acceptable if they provide a basis for the findings requisite to the issuance or continuance of a permit or license by the Commission." (emphasis added).

[43] Mr. Blanch references page 17 of VCY 808, where Entergy indicates that the calculation "assumes that containment pressure is equal to 14.7 psia regardless of the temperature and the initial pressure. This assumption is in accordance with Regulatory Guide 1.1." Mr. Blanch interprets this statement as indicating that '[i]t is clear that VY is conforming to Regulatory Guides; invoking them when it has the ability to comply but remaining silent when the change violates design guidance and regulatory requirements." Blanch Declaration at

Footnote continued on next page

For all the reasons above, NEC Contention 6 is inadmissible.

G. NEC Contention 7 – 10 C.F.R. § 50.71(e) Compliance

NEC Contention 7 is inadmissible because it challenges the NRC's rules limiting the scope of this proceeding and fails to satisfy the NRC's requirements for admissible contentions. The contention is factually unsupported, and NEC fails to address relevant portions of the Application. The contention also is an improper challenge to the Commission's rules.

NEC Contention 7 as submitted reads:

> Entergy has failed to comply with the requirements of 10 CFR 50.71(E) [sic], Maintenance of Records and Making of Reports [sic]. Observance of the rule is essential to provide reviewers with accurate information about plant status.
>
> Records provide a measure upon which future activity can be predicated while maintaining safety. Without accurate and complete records, no meaningful review of the proposed uprate in its entirety can take place.
>
> Therefore, NRC should deny this amendment until Entergy can demonstrate that it has its documentation and records in order.

NEC Petition at 13.[44]

In order to focus the analyses on whether the contention should be admitted, Entergy proposes that the contention be restated incorporating the specific allegations as follows:

Footnote continued from previous page

3. However, it is perfectly legitimate for a licensee to use where appropriate the guidance in regulatory guides, and the NRC Staff encourages doing so. The converse is not true. Failure to follow the guidance in a regulatory guide has no regulatory, let alone licensing, implications. *Petition for Emergency & Remedial Action*, CLI-78-6, 7 NRC 400, 406-07 (1978).

[44] The Blanch Declaration appears to discuss the same subject as NEC Contention 7 (compliance with 10 C.F.R. § 50.71(e) with respect of periodically updating the Final Safety Analysis Report for a nuclear power plant). Blanch Declaration at 3-4. The NEC Petition, however, does not refer to the Blanch Declaration with respect to Contention 7 and only raises the issue of compliance with record keeping requirements in the most general terms. NEC Petition at 13. Entergy is addressing this proposed contention as if the Blanch Declaration was intended to provide the basis for it. If the Blanch Declaration discussion is disregarded, it is clear that proposed Contention 7 is fatally deficient as lacking specificity and basis, making no showing of materiality to this proceeding, and referencing no supporting facts or expert opinions. *See* 10 C.F.R. § 2.309(f)(1)(i) – (vi).

Entergy has failed to comply with the requirements of 10 C.F.R. § 50.71(e), Maintenance of Records and Making of Reports in that

(1) Appendix F of the Updated Final Safety Analysis Report (UFSAR) classifies compliance with the proposed General Design Criteria (GDC) as "Historical Information;"

(2) Appendix F states that compliance with the proposed GDC is addressed elsewhere in the UFSAR; and

(3) by classifying compliance with the proposed GDC as "historical" VY is proposing to remove all commitments to the GDC.

Mr. Blanch asserts that VY's "proposed revision 18 to the UFSAR is misapplying the intent of" the historical information designation described in NEI 98-03[45] as endorsed by Regulatory Guide 1.81.[46] Blanch Declaration at 4. He claims that by "classifying compliance to the General Design Criteria" as "Historical" in UFSAR Appendix F, VY "is proposing to remove all commitments to these basic regulatory requirements." *Id.*

1. The Contention is Outside the Scope of the Proceeding

Contention 7 raises a purely administrative issue without providing even a minimal discussion of its factual or legal foundation or its relevance to this proceeding. NEC does not point to any relationship between the requirements of 10 C.F.R. § 50.71(e) and the Application. Even if VY is assumed to have violated the requirements of 10 C.F.R. § 50.71(e) as NEC asserts, NEC also fails to explain "with specificity, particular safety or legal reasons requiring rejection" of the Application. *Millstone*, CLI-01-24, 54 NRC at 359-60. The only explanation that NEC offers is that "[w]ithout accurate and complete records, no meaningful review of the proposed uprate in its entirety can take place." NEC Petition at 13.

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[45] Nuclear Energy Institute ("NEI") Report NEI 98-03, "Guidelines for Updating Final Safety Analysis Reports," Revision 1 (June 1999) ("NEI 98-03").

[46] Regulatory Guide 1.181, *Content of the Updated Final Safety Analysis Report in Accordance with 10 CFR 50.71(e)* (Sept. 1999).

The assertion that "no meaningful review" of the Application can be performed because an appendix to the VY UFSAR is improperly "classified" (as NEC contends) is not specific and does not provide a safety or legal basis for rejecting the Application.[47] Therefore, its relevance to this proceeding is not established and the contention must be rejected.

2. The Contention Lacks Legal Basis

As the basis for this contention, Mr. Blanch asserts that VY does not comply with the "requirements" of Regulatory Guide 1.181, which in turn endorses Revision 1 of NEI Report 98-03. Blanch Declaration at 3, 4. As discussed above, NEC's argument that "requirements" are contained in Regulatory Guides is incorrect as a matter of law. In this contention, NEC compounds its error by attempting to elevate the guidance contained in an industry document (i.e., NEI 98-03) to the rank of regulatory requirements.[48] Thus, NEC's assertion that VY "is misapplying the intent" of NEI 98-03 or Regulatory Guide 1.181 regarding FSAR information categorization is legally insufficient to raise a litigable contention. Also, to the extent that NEC is arguing that VY should be required to comply with this industry guidance in order to satisfy 10 C.F.R. § 50.71(e), the contention is an impermissible challenge to the Commission's regulations and is, therefore, inadmissible.

[47] At most, the contention could be construed as raising an issue with Entergy's compliance with the requirements in 10 C.F.R. § 50.71(e) with regard to FSAR updates. Such an issue may be brought up with the NRC Staff via a 10 C.F.R. § 2.206 petition, but is inappropriate in this license amendment proceeding, since it is not relevant to its scope. *Bailly*, ALAB-619, 12 NRC at 562.

[48] To further compound NEC's error, Regulatory Guide 1.181 itself makes it clear that "[l]icensees may use methods other than those proposed in Revision 1 of NEI 98-03 to meet the requirements of 10 CFR 50.71(e). The NRC will determine the acceptability of other methods on a case-by-case basis." Regulatory Guide 1.181, Section 5.

3. The Contention Lacks Factual Basis

In its Petition, NEC fails to cite a single example of the alleged failure of VY to comply with the requirements of 10 C.F.R. § 50.71(e). *See* NEC Petition at 13. Thus, on its face, the contention has absolutely no factual basis upon which to rest and is inadmissible.[49]

Mr. Blanch claims that in Appendix F of "proposed" Amendment 18 to the UFSAR, Entergy "classifies compliance with the General Design Criteria as Historical Information and further states that compliance is addressed elsewhere in the UFSAR." By classifying compliance with the GDC as "historical," Mr. Blanch contends, "VY is "proposing to remove all commitments to these basic regulatory requirements." Blanch Declaration at 4. Mr. Blanch's argument is totally incorrect and evidences a misunderstanding of the NRC's regulatory regime.

First of all, Revision 18 of the VY UFSAR is not "proposed" and has not been for some time. The UFSAR revision was submitted to the NRC Staff as a routine update pursuant to 10 C.F.R. § 50.71(e) on April 22, 2003, almost eighteen months ago. NEC's objections are thus untimely.

Next, VY designated UFSAR Appendix F as "historical" in January 2001.[50] The change was supported by an 84-page justification.[51] Thus, the contention comes three years too late. Further, the "historical" designation fully complied with industry guidelines in NEI 98-03 as endorsed by Regulatory Guide 1.181. The purpose of the "historical" designation is to reduce unnecessary administrative burdens and confusion regarding UFSAR contents. As NEC itself

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[49] The sole reference to the VY UFSAR in this contention is to "proposed Revision 18 to the UFSAR" and to "Appendix F" to that document. Blanch Declaration at 4. A non-specific reference to a UFSAR revision and an entire Appendix to the UFSAR utterly fails to identify a specific factual or legal dispute. *See* 10 C.F.R. §§ 2.309(f)(1)(i), (ii), (v) and (vi).

[50] VY FCR No. 17/195 (Jan. 18, 2001).

[51] VY/LIC 01-001, "Justification for Reinstatement of Original FSAR Appendix F – Comparison of GDC's to Draft AEC Criteria" (Jan. 3; 2001).

notes, NEI 98-03 defines "Historical Information" as information "provided in the original FSAR "that, *inter alia*, does not change with time." NEI 98-03 § 3.3. The material in UFSAR Appendix F, which describes the *original* design bases of the plant, clearly meets this definition. The *original* VY design bases (i.e., the proposed GDCs) cannot change with time. The *current* VY design bases, which can and do change over time, are not affected by the historical designation.

Moreover, it is a fundamental principle of nuclear regulation that a reactor licensee must comply with the regulations set forth in 10 C.F.R. Part 50, including the applicable design requirements.[52] 10 C.F.R. § 50.100. Regulatory compliance is mandated by the NRC regulations, and is not subject to being countermanded by licensee "commitments" that can be withdrawn at will. It makes no sense to suggest that a licensee could "propose" to the NRC that it need not comply with the Commission's design basis requirements. It is even more nonsensical to assert that such a "proposal" would be casually authorized by the NRC Staff as an incidental matter as part of a routine revision to a facility document (i.e., the UFSAR).[53]

There is absolutely no legal or factual basis for this contention, which should accordingly be rejected.

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[52] The VY design was evaluated against and licensed to the design requirements in proposed GDCs being considered by the Commission at the time the VY construction permit was issued. As a result, VY was granted an exemption from complying with the GDCs as finally adopted. *See* SECY-92-223, "Resolution of Deviations Identified During the Systematic Evaluation Program," dated June 19, 1992; Memorandum from the Commission to James M. Taylor, Executive Director for Operations (Sept. 18, 1992). Because VY is not a GDC plant, changes in the design basis have been incorporated throughout the FSAR and associated licensing basis documents.

[53] The process for seeking exemptions from the NRC regulations in Part 50 is described in 10 C.F.R. § 50.12 and requires, *inter alia*, the filing of a formal application providing the basis for seeking relief from the regulation's requirements. *See* 10 C.F.R. § 50.12(a). Needless to say, Entergy has not submitted such an application to the NRC with respect to design basis compliance in connection with the EPU Application (or otherwise) and has no intention to do so.

V. APPROPRIATE HEARING PROCEDURES

NEC argues that "the proper subject matter of the hearing in this case is a full adjudicatory test of the license amendment application." NEC Petition at 7. Formal hearings and full discovery are, however, the exception to the general rule that licensing hearings are to be conducted pursuant to the informal procedures in Subpart L to 10 C.F.R. Part 2. Formal hearings are to be held in only four situations:

> (1) Licensing of uranium enrichment facilities, (2) initial authorization of the construction of a HLW geologic repository, and initial issuance of a license to receive and possess HLW at a HLW geologic repository, (3) enforcement matters (unless the parties agree to use more informal hearing procedures), and (4) parts of nuclear power plant licensing proceedings where the presiding officer by order finds that resolution of an admitted contention necessitates resolution of: (a) Issues of material fact relating to the occurrence of a past activity, where the credibility of an eyewitness may reasonably be expected to be at issue, and/or (b) issues of motive or intent of the party or eyewitnesses material to the resolution of a contested factual matter.

69 Fed. Reg. at 2,191; 10 C.F.R. § 2.310 (a) through (d). It is evident that none of the exceptions applies to the issues raised by NEC's proposed contentions.

The grounds asserted by NEC for seeking to depart from the informal hearing procedures ordained by the new NRC adjudicatory rules boil down to three arguments. NEC's first argument is that the issues raised by the Application "are highly, technical, legally complex, and soundly disputed (see Declarations of Gundersen and Blanch generally)." NEC Petition at 8. However, the Commission has rejected complexity of the issues as a factor requiring formal hearings and full discovery:

> [T]he Commission believes that the complexity and number of issues in nuclear power plant licensing proceedings may not, per se, lead ineluctably to the conclusion that cross-examination is necessary to ensure a fair and adequate hearing on the contested matters. Rather, it is the nature of the disputed matters themselves

> that most directly and significantly bears on whether the techniques of formal hearings such as cross-examination are appropriate.

Id. at 2,196.[54] Nor is the claim that the issues are "soundly disputed" an adequate basis for formal hearings. If such a claim were sufficient, then the new rules would never apply; petitioners always "soundly dispute" the issues they seek to raise.

The second argument raised by NEC in favor of having full, formal hearings is that

> [t]here is also an issue of credibility. Since buying Vermont Yankee, Entergy has become the subject of widespread distrust in Vermont. During proceedings of the Vermont Public Service Board, the Board said in an order regarding the production of documents of Entergy, "Not only is it disingenuous in its reading of the rule since this tribunal imposed a filing deadline, but, more important, Entergy's selective quotation suggests a willingness to be less than forthright with this Board."

NEC Petition at 8, footnote omitted.[55] NEC goes further along in its claim that Entergy's testimony cannot be trusted to give forthright information by referring to allegedly less than forthright behavior by the *previous* VY licensee:

> Vermont Yankee has its own, pre-Entergy, history of problems with being forthcoming. On September 18, 2000, the NRC Office of Investigation issued a Notice of Violation for deliberately failing to comply with procedural requirements. The Notice makes it clear that the offending VY manager was untruthful with investigators as he was cited for being untruthful with a

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[54] In fact, the proposed amendments to the Rules of Practice issued for public comment included a criterion that would have called for the use of the hearing procedures of Subpart G in those reactor licensing proceedings that involve a large number of complex issues. In the final rule, however, the Commission deleted this criterion, reasoning that it may not be well suited for determining whether the procedures of Subpart G should be used in a given proceeding. 69 Fed. Reg. at 2204-05.

[55] NEC also states that "[o]n October 7, 2003, in an Order the [Vermont Public Service] Board found Entergy's handling of discovery information to be '...an example of the kind of corrosive and bullying attitude that threatens an otherwise fair and open process.' The Board then went on to award Sanctions ion [sic] the form of requiring Entergy to reimburse $51,000 in costs incurred through discovery to New England Coalition." NEC Petition at 8. Alleged discovery misconduct in another proceeding before another agency has absolutely nothing to do with "the credibility of an eyewitness," 69 Fed. Reg. at 2,191, and has no bearing in determining the appropriate hearing procedures in the NRC proceeding.

> maintenance contractor. The Associated Press (9/20/200) [sic] simply reported that Vermont Yankee violated its license when a plant manager "deliberately" gave false information to a contractor during a 1998 refueling outage. Hubert J. Miller, NRC Region I administrator, the article said, rejected Yankee's claim that it wasn't deliberate.

NEC Petition at 8. Even if NEC's characterizations of these previous events were correct, they are irrelevant to the current proceeding and the current licensee.

NEC's argument reflects a misunderstanding of the circumstances under which the NRC regulations call for formal hearings because of credibility issues. Allegations as to the overall credibility of a *party* are not sufficient to require holding formal hearings. Formal hearing procedures may be appropriate if adjudication of an admitted contention necessitates resolution of: (a) Issues of material fact relating to the occurrence of a past activity, where the credibility of an eyewitness may reasonably be expected to be at issue, and/or (b) issues of motive or intent of the party or eyewitnesses material to the resolution of a contested factual matter. It is *the issues* raised by a contention that may, in some cases, raise credibility questions that may need to be explored through formal adjudication devices. As the Commission put it, the issues that warrant full hearings "are *issues* relating to the *occurrence of a past event* material to the issue in controversy, where the *credibility of an eyewitness* (not an expert witness without first-hand knowledge) may reasonably be expected to be at issue, as well as issues of motive or intent on the party or eyewitness." 69 Fed. Reg. at 2,196; *see also id.* at 2,205. None of the contentions raised by NEC in its Petition fits the description of the issues that warrant resort to Subpart G procedures. The issues raised by NEC are garden-variety technical issues that do not require a formal hearing and full discovery to elucidate. Indeed, if the types of issues alleged by NEC were sufficient to justify formal hearings and full discovery, the exception would swallow the rule. *See id.* at 2,204.

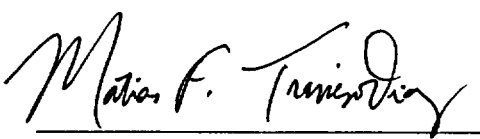
Finally, NEC claims that "the public interest can[not] be served without the full panoply of adjudicatory tests of truth." NEC Petition at 9. However, in establishing the informal hearing and streamlined discovery procedures in the new rules, the NRC expressly considered – and rejected – arguments that formal hearings and full discovery were necessary "in order to build public confidence". 69 Fed. Reg. at 2,192. Simply put, public concerns or interest in the subject of a licensing proceeding are *not* valid grounds for invoking formal hearing and full discovery procedures.

For these reasons, if a hearing is held on any of the contentions raised by NEC, the hearing on such contention should be governed entirely by the procedures of Subpart L.

VI. CONCLUSION

For the reasons stated above, NEC has failed to offer any admissible contention in this proceeding. Therefore, its request for hearing should be denied.

Respectfully submitted,



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Dated: September 29, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "Entergy's Answer to New England Coalition's Request for Hearing" were served on the persons listed below by deposit in the U.S. Mail, first class, postage prepaid, and where indicated by an asterisk by electronic mail, this 29th day of September, 2004.

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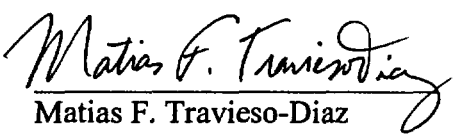

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