

October 21, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF RESPONSE TO THE ATOMIC SAFETY AND
LICENSING BOARD'S ORDER OF SEPTEMBER 30, 2005, REGARDING
VERMONT DEPARTMENT OF PUBLIC SERVICE'S FIRST MOTION TO COMPEL

INTRODUCTION

On September 30, 2005, the Atomic Safety and Licensing Board issued its "Order (Regarding State of Vermont's Motion of Aug. 31, 2005)" ("Order"), concerning the "State of Vermont Department of Public Service ["DPS"] Motion to Compel Production of Certain NRC Staff Documents" ("First Motion to Compel"), filed August 31, 2005 – in which DPS sought to compel the production of three documents listed in the NRC Staff's July 27, 2005, deliberative process privilege log. The NRC Staff ("Staff") herewith provides its response to the Licensing Board's Order.

For the reasons set forth below, in the attached Affidavit of Ledyard (Tad) B. Marsh, and the Staff's answer to DPS's First Motion to Compel,¹ the Staff respectfully submits that it has properly identified and withheld the three requested documents under the predecisional deliberative process privilege; that DPS has failed to demonstrate any special or overriding need for the documents; and, that DPS's motion to compel the production of the three documents should be denied.

¹ See "NRC Staff's Answer to Vermont Department of Public Service's Motion to Compel" ("Answer to First Motion to Compel"), dated September 12, 2005.

BACKGROUND

The Staff has presented a summary of facts pertinent to this matter in its answer to DPS's second motion to compel, filed simultaneously herewith.² In brief, this proceeding involves the application of Entergy Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.'s (collectively, "Entergy" or "Applicant") for an amendment to the operating license for the Vermont Yankee Nuclear Power Station ("VYNPS"), to authorize an extended power uprate ("EPU"). In accordance with applicable Commission regulations, after the Licensing Board issued its ruling on petitions to intervene and the admissibility of contentions, the Staff promptly established a hearing file, in which it filed pertinent documents as required by regulation. The Staff has continued to update the hearing file, pursuant to 10 C.F.R. § 2.336(d), on a regular basis since January 2005. Throughout this process, the Staff has withheld documents that it believes are privileged and should be protected from public disclosure (*e.g.*, documents containing attorney work product, attorney-client communications, proprietary information, or pre-decisional deliberations), and identified those documents in one or more privilege logs pursuant to 10 C.F.R. § 2.336(b)(5); further, the Staff has generally provided summary information in a "comment" column in its privilege logs, to enable interested parties (and the Licensing Board) to assess the Staff's claim of privilege.

On August 31, 2005, DPS filed its First Motion to Compel, in which it sought to compel the production of three documents which the Staff had withheld and identified in the deliberative process privilege log accompanying its hearing file update of July 27, 2005. The Staff filed its Answer to DPS's First Motion to Compel on September 12, 2005.³ On September 29, 2005,

² See "NRC Staff's Answer to Vermont Department of Public Service's Second Motion to Compel" ("Answer to Second Motion"), dated October 21, 2005.

³ DPS subsequently filed a request for oral argument or, alternatively, for leave to file a request to file a reply brief; the Staff filed an answer in opposition to that motion; and DPS then filed a motion for leave to file a reply brief in support of its Motion to Compel. See (1) "Vermont [DPS] Request for Oral
(continued...)

DPS filed its Second Motion to Compel, in which it challenged the Staff's claim of the deliberative process privilege with respect to 25 of the 38 internal NRC Staff E-mail communications which the Staff had identified in the deliberative process privilege log accompanying its hearing file update of September 6, 2005.⁴

On September 30, 2005, the Licensing Board issued the instant Order, in which it (a) directed the Staff to provide information concerning the identity and organizational role of the "high ranking agency official" who, initially and/or subsequently, "personally reviewed the document and made the decision to invoke the deliberative process privilege" (Order at 2), as well as legal argument concerning the applicability of this element in NRC adjudicatory proceedings, and the adequacy of the rank of the individual(s) who reviewed the documents and decided to invoke the privilege (*Id.* at 3);⁵ and (b) directed the State to respond to the Staff's legal brief submitted in response to Paragraph 1.B of the Board's Order (*Id.* at 4).⁶

DISCUSSION

As required by the Licensing Board, the following discussion presents, first, the factual information requested by the Board, and second, a discussion of the legal principles concerning

³(...continued)

Argument or, Alternatively, for Leave to File a Request to File a Reply Brief," dated September 15, 2005; (2) "NRC Staff's Answer to Vermont [DPS's] 'Request for Oral Argument or, Alternatively, for Leave to File a Request to File a Reply Brief,'" dated September 21, 2005; and (3) "Vermont [DPS] Motion for Leave to File a Reply Brief in Support of Its Motion to Compel," dated September 29, 2005. The Licensing Board has held DPS's motions for oral argument or leave to file a reply brief in abeyance pending the Board's resolution of the issues raised in its Order. *See* Order, at 2.

⁴ As noted *supra* at 2, the Staff's Answer to the State's Second Motion to Compel is being filed simultaneously herewith. The State's Second Motion is not addressed in the Board's Order; however, as the Board observed, "[s]imilar issues may be presented" in that motion. Order at 2 n.6.

⁵ The Licensing Board further directed the Staff to file the three documents for *in camera* review. *See* Order at 4. As required by the Board's Order, the Staff is herewith submitting the three requested documents to the Licensing Board for the Board's *in camera* review. *See* letter from Jason C. Zorn, Esq., to the Licensing Board, dated October 21, 2005.

⁶ On October 11, 2005, the Board granted the Staff's motion for an extension of time, permitting the Staff to file its responses to the Board's Order and DPS's Second Motion to Compel on October 21, 2005, and permitting the State to file its response to the Staff's legal argument on October 28, 2005.

"application of the third element of the deliberative process privilege in NRC adjudicatory proceedings and the adequacy of the rank of the NRC individual(s) who personally reviewed and made the decision to invoke the deliberative process privilege for the three documents."

A. Factual History Concerning the Staff's Assertion of the Predecisional Deliberative Process Privilege for the Three Requested Documents.

On information and belief, the Staff adhered to the following process, consistent with established agency practice, in submitting documents for inclusion in the hearing file and identifying documents as subject to withholding under the predecisional deliberative process privilege, pursuant to 10 C.F.R. § 2.336(b). First, NRC Staff employees involved in the review of the Vermont Yankee EPU application provided copies of relevant documents in their possession to the Staff's Senior Project Manager for review of the application (Mr. Rick B. Ennis), a member of the Staff employed in the Division of Licensing and Project Management ("DLPM") in the NRC's Office of Nuclear Reactor Regulation ("NRR"). Mr. Ennis collected those documents and forwarded them to a Project Engineer in DLPM (Mr. G. Edward Miller), who was charged with the task of filing the relevant documents in the hearing file, and identifying any documents which he believed should be withheld as privileged. Upon finding no need to confer with Mr. Ennis about the documents, Mr. Miller then prepared the required "ADAMS"⁷ documentation, following the guidance set forth in NRC Management Directive 3.4 (Release of Information to the Public), placing some documents in the ADAMS file for public disclosure and other documents in folders to be withheld as privileged. Mr. Miller then forwarded the documents to Staff Counsel in this proceeding (then Brooke Poole, Esq., with respect to the three documents in question) for review. Upon consultation and completion of Staff Counsel's review for legal sufficiency, Staff Counsel concurred in withholding the documents as privileged and added the documents to the privilege log for filing with the hearing file update.

⁷ Agencywide Document Access and Management System ("ADAMS").

Subsequent to issuance of the Board's Order of September 30, 2005, the three requested documents were provided to the Director of the Division of Licensing and Project Management, Mr. Ledyard (Tad) B. Marsh, who then reviewed the documents to determine whether they were properly identified as subject to the predecisional deliberative process privilege and should be withheld from production.⁸ On October 20, 2005, Mr. Marsh executed an Affidavit describing his review and conclusions.

As set forth in the Affidavit submitted herewith, Mr. Marsh's supervisory responsibilities include oversight of the NRC Staff's review and evaluation of the Vermont Yankee EPU application. Affidavit, ¶ 1. The three requested documents were identified as privileged by NRC Staff members under Mr. Marsh's supervision in a document review process conducted as part of this proceeding, in which relevant documents were placed in the hearing file or identified as privileged and withheld in accordance with NRC Management Directive 3.4, NRR Office Instruction ADM-200, and 10 C.F.R. § 9.17(a)(5). *Id.*, ¶ 2. Mr. Marsh has personally reviewed the three documents (as well as the 25 documents identified in the State's Second Motion to Compel) and determined, in accordance with the guidance contained in Management Directive 3.4, that the documents contain predecisional information concerning his staff's review of the EPU application, and comprise part of the deliberative process that forms a necessary part of the Staff's review of the pending EPU application. *Id.*, ¶ 3. Further, Mr. Marsh determined that disclosure of the requested documents could result in harm to the agency and could interfere with the agency's deliberative process (as more fully described in his Affidavit). *Id.*, ¶ 4. Accordingly, Mr. Marsh formally invoked the deliberative process privilege with respect to each of the three documents, as well as the 25 documents listed in the State's Second Motion to Compel. *Id.*, ¶ 5.

⁸ Three organizational charts depicting the NRC organizational structure, and in particular, the organizational structure of NRR, are attached hereto.

B. Applicability of the Requirement for Review by A High Ranking Agency Official, to the Agency's Identification of Privileged Documents Upon Compiling a Hearing File.

It is well established that the Staff bears the initial burden of showing that predecisional privilege should be invoked, with respect to documents withheld from production in NRC adjudicatory proceedings. *See, e.g., Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190 (1994)* ("the NRC Staff . . . bears the initial burden of showing that the privilege should be invoked"). To our knowledge, however, the Commission has not explicitly stated how or when this burden must be met in the course of the Staff's compilation of a hearing file. Further, the Staff is not aware of any existing precedent in NRC adjudicatory decisions, which would indicate whether the "third requirement" (*i.e.*, review by a high-ranking agency official) applies in the hearing file compilation process or, if it applies, at what point in the process such a high-ranking official's review must be undertaken.

In other contexts not directly applicable here, the federal courts have established a three-pronged requirement for invocation of the predecisional deliberative process privilege.⁹ *See, e.g., Landry v. Federal Deposit Ins. Corp.*, 204 F.3d 1125, 1135 (D.C. Cir.), *cert. denied*, 531 U.S. 924 (2000) (proper invocation of the privilege in response to a discovery request requires: "(1) a formal claim of privilege by the 'head of the department' having control over the requested information; (2) assertion of the privilege based on actual personal consideration by that official; and (3) a detailed specification of the information for which the privilege is claimed, with an explanation why it properly falls within the scope of the privilege.").

⁹ The "invocation" requirement is used to determine whether a government agency has properly invoked the executive privilege in response to a demand for documents. The deliberative process analysis (*i.e.* whether the document is (1) predecisional and (2) deliberative), in contrast, determines only whether the privilege applies, and does not involve consideration of any specific procedure needed to invoke the privilege. *See, e.g., Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 197 (1994)* (two-part test in determining the applicability of the privilege). Thus, in *Vogtle*, the Commission did not mention the "invocation" requirement, other than noting that the Staff has the "initial burden of showing that the privilege should be invoked." *Id.* at 198, *citing Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980). After the Staff has met its "initial burden" (upon determining that the document is both (1) predecisional and (2) deliberative in nature), the burden shifts to the requestor to show that it has "an overriding need for the material." *Id.*

The Staff submits that the "invocation" requirements developed in the federal courts do not apply to the Staff's assertion of privilege when it compiles or updates a hearing file. In compiling a hearing file, the agency is not responding to either a formal discovery request or a request for documents under the Freedom of Information Act, unlike the situation involved in the judicial cases. Rather, the compilation of a hearing file serves to create a readily accessible body of records concerning the application which is the subject of an informal proceeding under 10 C.F.R. Part 2, Subpart L. This body of records may then be viewed by a party, if it wishes to do so, during the course of the proceeding. See 10 C.F.R. 2.336(b). No formal demand for the documents has been made when the hearing file is compiled or updated, and the Staff has no means of knowing, at that time, that a party will request that any particular document(s) be disclosed.¹⁰ Thus, there is no reason why the formal invocation process established under federal caselaw should be applied upon making an initial determination whether to withhold documents from the hearing file.

Nor do Commission regulations mandate that any specific procedure be followed in asserting a claim of privilege when the Staff compiles or updates a hearing file. In accordance with 10 C.F.R. § 2.336(b)(4), the Staff is required to include in the hearing file "[a]ny NRC staff documents (except those documents for which there is a claim of privilege or protected status) representing the NRC Staff's determination on the application" Any documents withheld as privileged are to be identified in a privilege log, "together with sufficient information for assessing the claim of privilege or protected status of the documents." 10 C.F.R. § 2.336(b)(5). In doing so, the Staff determines, with the assistance of Counsel, whether the documents qualify to be withheld as privileged; in assessing whether documents should be withheld under

¹⁰ This situation is similar to the circumstances involved when the agency places documents in the NRC docket, and withholds other documents as proprietary or otherwise protected from disclosure as privileged. Only after a demand has been made to obtain the documents under the Freedom of Information Act ("FOIA") would an agency official formally invoke a privilege for withholding under FOIA.

the deliberative process privilege, the Staff considers (as it did here) whether the documents are both “predecisional” and “deliberative.” Unless and until a party informs the Staff that it wishes to obtain a document which has been withheld as privileged, the agency has no reason to go through a formal “invocation” process to support that claim of privilege.

Further, any requirement that a senior executive in the agency must personally review any document that the Staff wishes to withhold as privileged upon compiling a hearing file would cause an excessive and unnecessary burden on the agency. In recently revising its Rules of Practice under 10 C.F.R. Part 2, the Commission has adopted the informal hearing procedures set forth in Subpart L for most of the agency’s adjudicatory proceedings. Accordingly, the preparation of a hearing file, as required in Subpart L, § 2.336(b), is now required in numerous agency proceedings – and in each of those proceedings, routine document production will include the identification of countless documents that should be withheld as privileged, consistent with the provisions of 10 C.F.R. § 2.390. To require a high ranking agency official to review each such document prior to identifying the documents in a hearing file privilege log will bog down the agency’s management in endless document review – none of which would be required unless and until it is known that a party to the proceeding has determined that it wants to obtain a particular document. Further, the imposition of such a requirement upon the preparation and update of a hearing file in each proceeding would consume an enormous amount of time, and would divert the agency official’s attention from the critical and time-consuming tasks involved in supervising the Staff’s review of the applications at issue. In sum, to impose a requirement that a high ranking agency official routinely review each and every document that the Staff proposes to withhold as privileged, each time the Staff prepares or updates a hearing file in any NRC proceeding, would adversely affect the agency’s

ability to carry out its statutory functions¹¹ – and is altogether unnecessary, unless and until the agency receives a demand by a party for one or more of the documents that were withheld.¹²

The cases cited by the Licensing Board in its Order, which in our view have no precedential effect in this proceeding,¹³ in any event do not warrant a different conclusion. In *Kerr-McGee Chemical Corp.* (West Chicago Rare Earths Facility), LBP-85-38, 22 NRC 604, 627 (1985), for instance, the Board, in response to Kerr-McGee's motion to compel against the State of Illinois, ruled that the state did not properly invoke the executive privilege with respect to several documents. It held that the State must, subsequent to the Board's order, "file proper affidavits asserting the privilege executed by the heads of the agencies involved. . . ." *Id.* at 627. The Board based this requirement on the decision in *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-83-72, 18 NRC 1221 (1983), *rev'd on other grounds*, ALAB-773, 19 NRC 1333 (1984). In *Shoreham* – also cited by the Licensing Board in its Order here – the Board observed that FEMA had filed an affidavit by its director invoking the privilege claim in response to Suffolk County's motion to compel, and that the affidavit complied with criteria established by the Board, in that proceeding, during the discovery conference. See *id.* at 1226 (holding that "FEMA has complied with our order concerning the prerequisites of the claim of executive privilege"). Thus, in those proceedings, the Licensing Boards had specifically required that affidavits be filed by the heads of the agencies invoking the privilege;

¹¹ As the Commission indicated in adopting the recent revisions to 10 C.F.R. Part 2, "[s]ubjecting the NRC staff to extensive discovery early in the process will often require the staff to divert its resources from completing its review. . . . [A] focus on discovery against the NRC staff diverts the focus from the real issues in a licensing proceeding, which should be the adequacy of the applicant's/licensee's proposal." Final Rule, "Changes to Adjudicatory Process," 69 Fed. Reg. 2182, 2187 (Jan. 14, 2004).

¹² For example, in this proceeding, the State has not requested numerous documents that the Staff withheld as privileged. If a high ranking agency official had been required to review each such document prior to its identification in a privilege log, a tremendous amount of time would have been unnecessarily expended in his or her review of those documents.

¹³ *Sequoyah Fuels Corp.* (Source Material License No. SUB-1010), CLI-95-02, 41 NRC 179, 190 (1995) (Licensing Board decisions, concerning the withdrawal of an application, have "no precedential effect beyond the immediate proceeding in which they were issued").

no such requirement has been issued in this Subpart L proceeding, with respect to the preparation of the hearing file.¹⁴ Similarly, the procedures adopted for high level waste proceedings (Order at 2 n. 8) are specific to that proceeding and do not apply here.¹⁵

Nonetheless, in the event that the Board determines that these requirements should be applied to the Staff's compilation of a hearing file in this informal Subpart L adjudicatory proceeding, the Staff submits that the need to follow the "invocation" procedures does not arise until a motion to compel is filed, at which time the appropriate official may make a formal determination that the document should be withheld as privileged – comparable to the timing in which such a determination is made with respect to a request for documents under FOIA, or in the course of formal discovery procedures.¹⁶

C. Sufficiency of Mr. Marsh's Affidavit Under the Judicial Invocation Procedures.

In the event that the Board determines that the "invocation" requirements apply here, the Staff respectfully submits that the Staff has satisfied these requirements with respect to the

¹⁴ The Licensing Board issued a scheduling order in this proceeding, pursuant to 10 C.F.R. § 2.332, detailing the procedures to be followed by all parties, including the Staff, during discovery. See "Initial Scheduling Order", dated February 2, 2005. The Board's Scheduling Order specifically addresses the privilege log requirement in the proceedings, as required by 10 C.F.R. § 2.336(b)(5). *Id.* at 2 n.1. Unlike the cases cited by the Licensing Board, the Scheduling Order here is silent as to any requirement for the Staff to support a claim of privilege with an affidavit by a "high ranking agency official."

¹⁵ The hearing file procedures established in the HLW litigation are conducted under Subpart J of the Commission's regulations – and exclusively apply to the conduct of proceedings for the issuance of licenses for the receipt of high-level radioactive waster at a geologic repository. See 10 C.F.R. § 2.1000 ("[t]he procedures in [Subpart J] specifically take precedence over those in 10 C.F.R. part 2, subpart C [encompassing § 2.336 General Discovery].") Further, the requirements set forth in the Second Case Management Order, pertaining to the substantiation of a claim of deliberative process privilege in that proceeding, were established after two case management conferences and briefing by the parties concerning the Staff's obligations. (It should also be noted that the HLW procedures specify that a privilege determination is to be made by a "senior official," as opposed to a "high ranking agency official.")

¹⁶ An example of the practical application of this process can be seen in *Cobell v. Norton*, 213 F.R.D. 1 (D. D.C. 2003). There, the court found that the Department of the Interior had not properly invoked the privilege in response to the plaintiff's motion to compel, but provided the government with an opportunity to submit an affidavit invoking the privilege before the court. *Id.* at 7-8. In doing so, the court laid out the specific procedures to be followed by the agency when it claims privilege. Notable among those procedures was that the agency was not required to submit an affidavit until *after* the filing of a motion to compel. *Id.*

documents requested in the State's First (and Second) Motion(s) to Compel. Management Directive 3.4 specifically empowers Office Directors to protect predecisional agency documents. The Office of Nuclear Reactor Regulation ("NRR") has further delegated responsibility to Division Directors to withhold privileged documents pursuant to ADM-200 (Delegation of Signature Authority) and ADM-307 (Freedom of Information Act Requests).¹⁷ Thus, Division Directors within NRR have been delegated the task, and are specifically authorized, to withhold documents on the basis of privilege.¹⁸ As set forth in his Affidavit, Mr. Marsh is the Director of the Division of Licensing and Project Management ("DLPM") in NRR. Mr. Marsh has personally reviewed each of the documents requested by DPS in its First and Second Motions to Compel, and has certified that each such document is predecisional and deliberative in nature, and therefore properly withheld under the predecisional deliberative process privilege. Accordingly, Mr. Marsh's certification satisfies the invocation process requirements cited by the Board.

Existing Commission caselaw, to our knowledge, does not address this issue. Within the federal courts, however, there is some disagreement on the administrative level at which the privilege may be invoked, *i.e.*, the meaning of the phrase, "head of the department." While invocation by an agency head has sometimes been required, more often the courts have permitted invocation to be made by a properly delegated official within the agency. *See generally, U.S. Department of Energy* (High Level Waste Repository: Pre-Application Matters), Docket No. PAPO-00, 2005 NRC LEXIS 81 (May 12, 2005). Thus, the D.C. Circuit expressly held in *Landry, supra*, that the privilege need not be asserted by the "head of the *overall* department or agency," but rather could be properly asserted by a lesser agency official (such

¹⁷ See ADM-200 (Delegation of Signature Authority), Rev. 7, at 14; See ADM-307 (Freedom of Information Act Requests), Rev. 1, at 8.

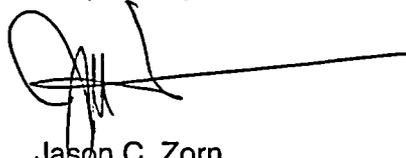
¹⁸ Designation of Division Directors as the agency officials authorized to invoke the deliberative process privilege on behalf of the Staff provides a proper level of managerial attention to the assertion of privilege, and ensures that an official with a sufficient level of knowledge about the document's contents is personally involved in the document review process in response to a specific request for the document.

as the FDIC regional division director in that case) who gave “actual and personal consideration” to the material in question. *See id.* at 1135 (quoting *In re Sealed Case*, 856 F.2d 268, 271 (D.C. Cir. 1988)).¹⁹ Other courts have similarly held that the “head of the department” can delegate his authority to assert the deliberative process privilege;²⁰ while other courts have set aside this requirement altogether.²¹

CONCLUSION

For the reasons set forth above, the Staff submits that the documents requested in DPS’s First and Second Motions to Compel are predecisional and deliberative in nature, and have properly been identified and withheld from disclosure under the deliberative process privilege. DPS’s First and Second Motions to Compel should therefore be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jason C. Zorn", with a long horizontal line extending to the right.

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

Dated at Rockville, Maryland
this 21st day of October, 2005

¹⁹ As the court in *Landry* observed, “the procedural requirements are designed to ensure that the privileges are presented in a deliberate, considered, and reasonably specific manner.” The requirement for “actual personal consideration by the asserting official” would “begin to be eroded” if the court was to insist on “an affidavit from the very pinnacle of agency authority.” Further, it found that “the gains from imposing demands in the interest of careful assertion must be balanced against the losses that would result of imposing super-stringent procedures.” *Id.* at 1135-36 (internal citations and quotations omitted).

²⁰ *See, e.g., United States v. Exxon*, 87 F.R.D. 624, 637 (D.D.C. 1980); *Coastal Corp. and Cities Service Co. v. Duncan*, 86 F.R.D. 514, 516 (D. Del. 1980) *Mobil Oil Corp. v. Department of Energy*, 520 F.Supp. 414, 416 (N.D.N.Y. 1981); *Department of Energy v. Brett*, 659 F.2d 154, 155 (Temp. Em. Ct. App. 1981) (permitting invocation by counsel who had “specific and detailed knowledge of the documents in which the privilege is asserted”).

²¹ *See, e.g., Yankee Atomic Electric Co. v. United States*, 54 Fed. Cl. 306, 310 (2003) (invocation of the deliberative process privilege to justify assertion on the agency’s privilege log did not require the head of the relevant agency or even a senior level official, but rather “individuals with specific and detailed knowledge of the documents in which the privilege is asserted”).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO ATOMIC SAFETY AND LICENSING BOARD ORDER OF SEPTEMBER 30, 2005, REGARDING THE VERMONT DEPARTMENT OF PUBLIC SERVICE'S AUGUST 31, 2005, MOTION TO COMPEL" in the captioned proceeding have been served on the following by deposit in the United States mail, first class; or as indicated by an asterisk (*), by deposit in the Nuclear Regulatory Commission's internal mail system; and by e-mail as indicated by a double asterisk (**), this 21st day of October, 2005.

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Respectfully submitted,

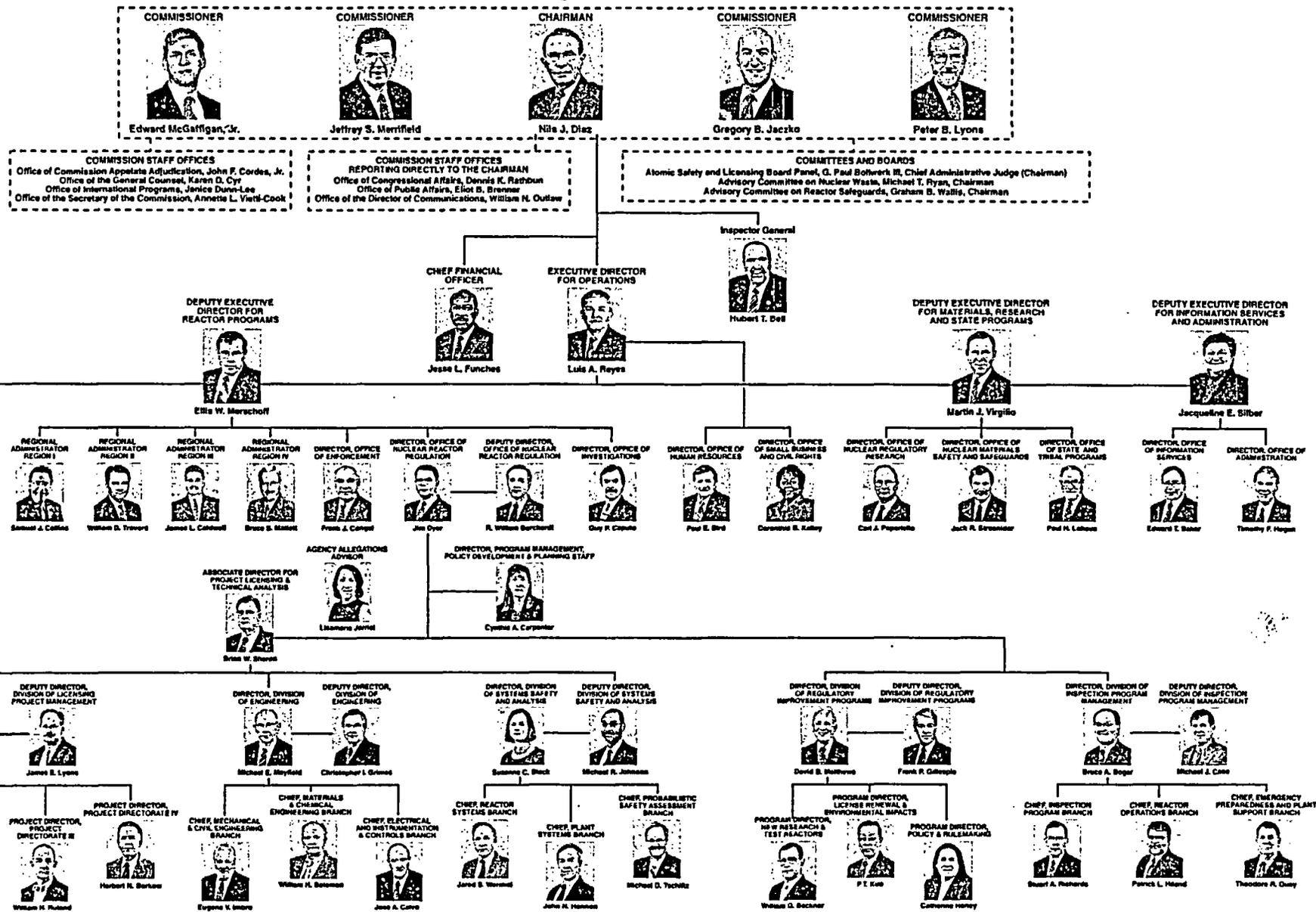


Jason C. Zorn
Counsel for NRC Staff

**NRC STAFF'S DESCRIPTION OF PRIVILEGED DOCUMENTS DISCLOSED IN
NRC STAFF HEARING FILE SUPPLEMENT 11 (JULY 27, 2005),
FILED PURSUANT TO THE LICENSING BOARD'S ORDER OF SEPTEMBER 30, 2005**

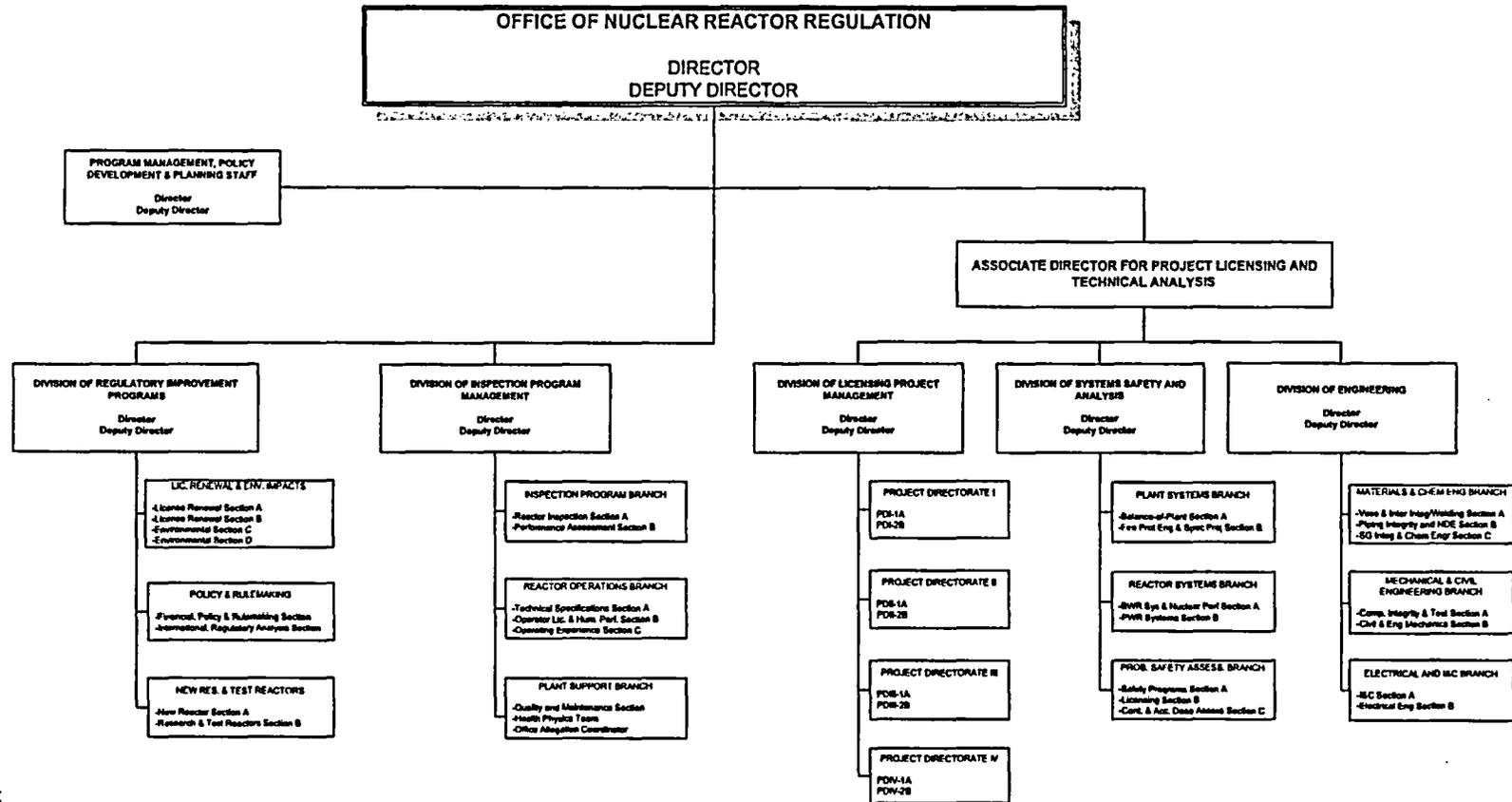
ADAMS No.	Description/Date:	Name, Title and Organizational Position of Author	Name, Title and Organizational Position of Addressee	Name, Title and Organizational Position of <u>Original</u> Reviewer	Name, Title and Organizational Position of <u>Final</u> Reviewer
ML051940095	Internal NRC Staff E-mail regarding input to Station Blackout analysis section of the draft safety evaluation (07/12/05)	Devender Reddy, Reactor Systems Engineer NRR/DSSA/SPLB-A, Balance-of-Plant Systems	Amritpa Gill, Senior electrical engineer NRR/DE/EEIB-B, Electrical Engineering Section	G. Edward Miller, Project Engineer, Division of Licensing and Project Management, NRR	Ledyard (Tad) B. Marsh, Director, Division of Licensing and Project Management, NRR
ML051990237	Internal NRC Staff E-mail regarding input to Station Blackout analysis section of the draft safety evaluation (07/13/05)	Amritpa Gill, Senior electrical engineer NRR/DE/EEIB-B, Electrical Engineering Section	Devender Reddy, Reactor Systems Engineer NRR/DSSA/SPLB-A, Balance-of-Plant Systems	G. Edward Miller, Project Engineer, Division of Licensing and Project Management, NRR	Ledyard (Tad) B. Marsh, Director, Division of Licensing and Project Management, NRR
ML052060072	Internal NRC Staff E-mail containing analysis of Entergy's responses to requests for additional information with respect to Station Blackout coping analysis (07/20/05)	James Tatum, senior reactor engineer NRR/DSSA/SPLB-A, Balance-of-Plant Systems	Rick Ennis, Senior Project Manager, DLPM/NRR	G. Edward Miller, Project Engineer, Division of Licensing and Project Management, NRR	Ledyard (Tad) B. Marsh, Director, Division of Licensing and Project Management, NRR

NRR in the NRC Organizational Structure



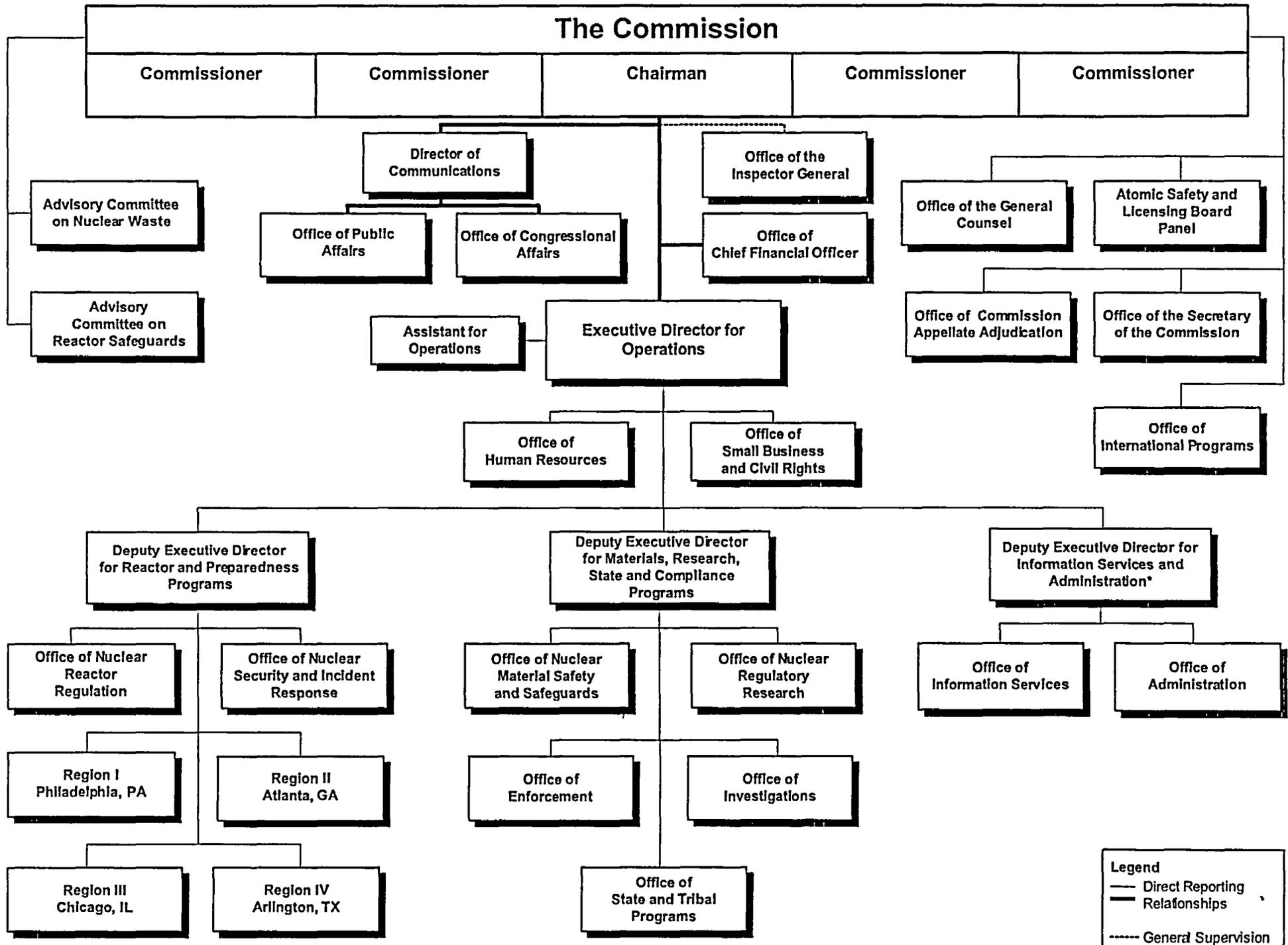
Above chart depicts the Office of Nuclear Reactor Regulation within the Nuclear Regulatory Commission organization; prepared for distribution at the 17th Annual Regulatory Information Conference, March 8-10, 2005

EXISTING ORGANIZATION



Nuclear Regulatory Commission Organization Chart

[View Text Version]



October 20, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

AFFIDAVIT OF LEDYARD (TAD) B. MARSH

I, Ledyard B. Marsh, being first duly sworn, do hereby state as follows:

1. I am employed as the Director of the Division of Licensing and Project Management in the Nuclear Regulatory Commission's ("NRC") Office of Nuclear Reactor Regulation ("NRR"), in Rockville, MD. My supervisory responsibilities include oversight of the NRC Staff's review and evaluation of the Vermont Yankee Nuclear Power Station Extended Power Uprate ("EPU") license amendment application.

2. I have been informed that the State of Vermont Department of Public Service has sought disclosure of certain documents identified by the NRC Staff in its predecisional deliberative process privilege logs, filed on July 27, 2005 (three documents) and September 6, 2005 (25 documents). These documents were generated by members of the NRC Staff under my supervision, concerning the Staff's review of the Vermont Yankee EPU application, and were identified as privileged by NRC Staff members under my supervision in a document review process conducted as part of this proceeding, in which relevant documents were placed in the hearing file or identified as privileged and withheld in accordance with NRC Management Directive 3.4, NRR Office Instruction ADM-200, and 10 C.F.R. § 9.17(a)(5).

3. I have personally reviewed each of the 28 documents in question, identified in the State of Vermont's motions to compel filed August 31 and September 29, 2005, and have determined, in accordance with the guidance contained in Management Directive 3.4, that they contain predecisional information concerning my staff's review of the EPU application. All of these documents contain either analysis, recommendations, opinions, or evaluations by the Staff, and may not necessarily reflect the Staff's final position with respect to the matters discussed therein. Further, I have determined that each of these documents comprise part of the deliberative process that forms a necessary part of the Staff's review of the pending EPU application.

4. Further, I have determined that disclosure of the 28 requested documents could result in harm to the agency, in that it would (a) prematurely disclose the preliminary views of individual Staff members and/or the Staff prior to reaching a final agency decision, and could thus create confusion as to the actual policy or views of the NRC Staff; (b) hinder the efficiency of my staff, in that forced disclosure of their internal discussions on an unresolved issue would serve to chill all future deliberations and would interfere with our ability to engage in a free exchange of opinions and analyses prior to publishing our final review document(s); and (c) imply or suggest incorrectly that the opinions of the Staff members involved in these communications are actually the final decisions of the agency, while no such final decision has yet been made.

5. Accordingly, I formally invoke the deliberative process privilege with respect to each of the 28 documents listed in the State of Vermont's two pending motions to compel production.

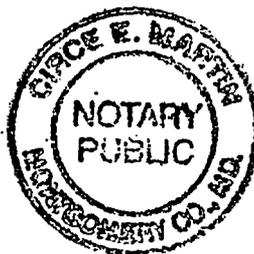
6. I hereby certify that the foregoing is true and complete to the best of my knowledge, information and belief.

L B Marsh
Ledyard (Tad) B. Marsh

Subscribed and sworn to before me
this 20th day of October, 2005

10/20/2005

Circe E. Martin
Notary Public



My commission expires: March 1, 2007

CIRCE E. MARTIN
NOTARY PUBLIC STATE OF MARYLAND
My Commission Expires March 1, 2007