

October 28, 2005 (1:18pm)

UNITED STATES  
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

In Re: Entergy Nuclear Vermont Yankee )  
LLC and Entergy Nuclear )  
Operations, Inc. )  
(Extended Power Uprate) )

Docket No. 50-271

ASLBP No. 04-832-02-OLA

VERMONT DEPARTMENT OF PUBLIC SERVICE ANSWER TO  
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

DPS responds to the filing by the NRC Staff (Staff) of its response to the Board's September 30, 2005 Order (Order). Before addressing the merits of the Staff filing, it is necessary to evaluate the nature of the filing made by the Staff. In a number of ways the Staff response to the Board's Order departs from the clear instructions in that Order. First, the brief submitted in response to paragraph 1. B. of the Order is not "limited to the presentation of the NRC Staff's position and argument, if any, as to application of the third element of the deliberative process privilege" but essentially reargues the entire Staff position regarding the alleged need for the privilege in this case. Second, the brief is supplemented by an Affidavit, which is itself argumentative, in that it not only describes the "process whereby the document was reviewed and the decision to assert the privilege was made" but provides the rational allegedly used to justify the privilege claim. Third, the brief and the Affidavit together exceed the page limit set by the Board and are not combined in one document. The Board will, of course, decide what, if any, consequences the Staff should incur as a result of its failure to obey this Board's explicit directives. However, DPS believes that by its conduct, the Staff has underscored the merits of the request by DPS to either have an oral argument on these issues or

to be allowed to file a reply brief relating to all of the merits of its two Motions to Compel.

DPS does not dispute the fact that Ledyard B. Marsh<sup>1</sup> is of sufficiently high rank to be able to invoke the deliberative process privilege as to the documents at issue.<sup>2</sup> However, DPS does dispute that this “third element of the deliberative process privilege” (September 30, 2005 Order (Order) at 3) has been properly applied by the NRC Staff. The core issue is:

Does the requirement that a “high ranking agency official personally reviewed the document and made the decision to invoke the deliberative process privilege” (Order at 2) merely seek a stamp of approval for the conduct of lower ranking NRC employees or is it a substantive requirement reflecting that the high ranking agency official actually used, or would use, the document substantively to inform that official’s decision-making?

Clearly the Staff takes the former view. It believes that as long as a high ranking official agrees the document is a deliberative process document (even subsequent to the privilege having been claimed), it does not matter whether the document was or would be used by that official in making a decision or even if the document was part of a chain of documents in which tentative decisions were or would be made on issues that were eventually part of the ultimate decision.

DPS believes the Staff’s reading of the proper application of the deliberative process privilege eviscerates the requirement and encourages exactly the conduct that has occurred here.

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<sup>1</sup> The Department understands that Mr. Marsh will hold his position for only a few weeks longer as he has apparently announced his retirement from the NRC effective November 2005.

<sup>2</sup> Mr. Marsh, unlike the high ranking officials in Shoreham and Kerr-McGee Chemical Corporation (West Chicago Rare Earths Facility), LBP 85-38, 22 NRC 604, 627 (1985), is neither the head of NRC nor even the head of the NRC Staff. Nonetheless, Mr. Marsh is sufficiently high in the NRC hierarchy that if these documents were part of the deliberative process they would have been reviewed by him in the normal course of carrying out his duties in making the final decision on the proposed uprate. Apparently, the lower ranking officials who did previously approve the privilege claim were a project engineer and a staff attorney, neither of whom saw the documents as part of their substantive work on the uprate. Staff Response at 4.

As the Board concluded in Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP 83-72, 18 NRC 1221, 1223 (1983) (where an affidavit was required from the head of the agency), rev'd on other grounds, ALAB-773, 19 NRC 1333 (1984):

The reason for protecting the confidentiality of communications between high government officials and those who advise and assist them is to achieve the goal of receiving the most candid advice without regard for appearances or self interest of the adviser. United States v. Nixon, 418 U.S. 683, 705 (1974).

Id. at 1226. If Mr. Marsh never saw these documents as part of making decisions related to the uprate, then his ability to receive candid advice could not be compromised. This is particularly true for these documents since they do not involve even preliminary opinions on the question of whether the proposed uprate should be approved, but rather are documents related to the information gathering process, the Staff's evaluation of the completeness of the information received and the need for additional information from the applicant. It is not surprising that Mr. Marsh would not see such documents in the normal course of his work nor review them in making the ultimate decision on the position the Staff will take on the proposed uprate.

The documents involved here are completely different than the documents involved in Shoreham and Kerr-McGee. In those cases the documents were drafts of the final decision document. The documents at issue here are merely drafts of information requests and evaluations of the completeness of the answers to those requests. This underscores their remoteness from the decision-making process and the error in the Staff view that merely because a decision-maker thinks the documents are privileged, the documents qualify for the privilege.

The level of irrelevancy of these documents to the decision making process is underscored by the fact that Mr. Marsh only saw these documents long after the privilege was

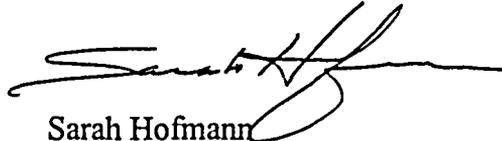
claimed and apparently only because the Staff decided that those who had seen the documents in the normal course of their work, were not sufficiently high up to qualify as "high ranking agency official[s]". Rather than provide a substantive discussion of how documents related to the information gathering process and the evaluation of the completeness of information provided by Entergy could be part of the early development of substantive positions regarding the proposed uprate, Mr. Marsh, in words sounding more like a lawyer than an engineer, offers the following:

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.

Marsh Affidavit at 2.

In sum, the DPS believes that even if the Staff has provided the rote words required for compliance with the third requirement for asserting the deliberative process, it has failed to comply with the substance of that requirement.

Respectfully submitted,



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Dated this 28<sup>th</sup> day of October 2005 at Montpelier, Vermont.

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the Vermont Department of Public Service Answer to 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 in the above captioned proceeding has been served on the following by deposit in the United States Mail, first class, postage prepaid, and where indicated by asterisk by electronic mail this 28<sup>th</sup> day of October, 2005.

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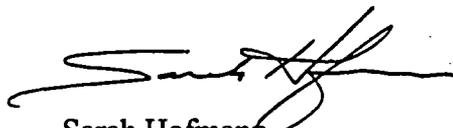
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Sincerely,



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