

RAS 10788

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION **DOCKETED 12/02/05**
ATOMIC SAFETY AND LICENSING BOARD **SERVED 12/05/05**

Before Administrative Judges:

Alex S. Karlin, Chairman
Dr. Anthony J. Baratta
Lester S. Rubenstein

In the Matter of

ENTERGY NUCLEAR VERMONT YANKEE
L.L.C.
and
ENTERGY NUCLEAR OPERATIONS, INC.

(Vermont Yankee Nuclear Power Station)

Docket No. 50-271-OLA

ASLBP No. 04-832-02-OLA

December 2, 2005

MEMORANDUM AND ORDER
(Admitting Intervenor's New Contention)

Before the Board is a request by the New England Coalition (NEC) for leave to file a new contention.¹ For the reasons stated below, the Board grants the request and finds NEC's new contention admissible under 10 C.F.R. § 2.309(f) and (c).

I. PROCEDURAL POSTURE

In September 2003, Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc. (collectively, Entergy) submitted an extended power uprate (EPU) application to the U.S. Nuclear Regulatory Commission for Entergy's Vermont Yankee Nuclear Power Station in Windham County, Vermont. On August 30, 2004, NEC challenged the proposed EPU by filing a request for a hearing that included seven proposed contentions.² On November

¹ New England Coalition's Request for Leave to File a New Contention (Sept. 21, 2005) [NEC Request].

² New England Coalition's Request for Hearing, Demonstration of Standing, Discussion of Scope of Proceeding and Contentions (Aug. 30, 2004) [NEC Original Petition].

22, 2004, this Board admitted several of NEC's contentions, including NEC's Contention 4, which we restated as follows:

The license amendment should not be approved because Entergy cannot assure the 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.

LBP-04-28, 60 NRC 548, 580 (2004). That contention focused "on the alleged need for Entergy to perform a seismic and structural analysis of the cooling towers under the proposed uprated conditions." Id. at 573.

Subsequently, Entergy performed a structural and seismic analysis of the cooling towers and the Alternate Cooling System (ACS) that addressed the cooling tower upgrades associated with the proposed EPU.³ The analysis, referred to by Entergy as "VYC-2413, Rev. 0 - Seismic Calculation" and performed by ABSG Consulting, is referred to herein as the "ABS Report."⁴ Entergy then filed a motion to dismiss NEC Contention 4 as moot, or in the alternative, for summary disposition.⁵ The NRC Staff supported Entergy's motion.⁶

On September 1, 2005, the Board granted Entergy's motion and dismissed NEC Contention 4 as moot, ruling that it was essentially a "contention of omission" and that the ABS Report had cured the omission. LBP-05-24, 62 NRC __, __ (slip op. at 3-4) (Sept. 1, 2005). However, we recognized that the language in NEC Contention 4 also suggested a qualitative challenge, and thus specified that, "if NEC moves for leave to file new or amended contentions

³ Entergy Motion to Dismiss, Declaration of George S. Thomas (July 10, 2005) ¶ 9.

⁴ Entergy's Response to the New England Coalition's Request for Leave to File a New Contention (Oct. 19, 2005) at 3 n.8 [Entergy Answer].

⁵ Entergy's Motion to Dismiss as Moot, or in the Alternative, for Summary Disposition of NEC's Contention 4 (July 13, 2005).

⁶ See NRC Staff's Answer to Entergy's Motion to Dismiss as Moot, or in the Alternative, for Summary Disposition of New England Coalition Contention 4 (July 25, 2005).

challenging the adequacy of Entergy's seismic and structural analysis within 20 days of the date of this order, then the motion and contentions will be deemed timely for purposes of 10 C.F.R. § 2.309(f)(2)(iii)." LBP-05-24, 62 NRC at _ (slip op. at 5).

On September 21, 2005, NEC filed its request for leave to file a new contention. The NRC Staff responded with its answer on October 17, 2005 and did not oppose admission of the new contention.⁷ Entergy's answer on October 19, 2005, opposed its admission.⁸ NEC filed its reply on October 26, 2005.⁹

II. POSITIONS OF THE PARTIES

NEC's newly proffered contention reads as follows:

The Entergy Vermont Yankee [ENVY] license application (including all supplements) for an extended power uprate of 20% over rated capacity is not in conformance with the plant specific original licensing basis and/or 10 CFR Part 50, Appendix S, paragraph I(a), and/or 10 CFR Part 100, Appendix A, because it does not provide analyses that are adequate, accurate, and complete in all material respects to demonstrate that the Vermont Yankee Nuclear Power Station Alternate Cooling System [ACS] in [sic] entirety, in its current actual physical condition (or in the actual physical condition ENVY will effectuate prior to commencing operation at EPU), will be able to withstand the effects of an earthquake and other natural phenomena without loss of capability to perform its safety functions. ENVY must be able to demonstrate that the actual structures, systems and components comprising the ACS will perform satisfactorily in service at the requested increased plant power level.

NEC Request at 1.

NEC proffered four "bases" in support of this contention.¹⁰

⁷ NRC Staff Answer to New England Coalition Request for Leave to File a New Contention (Oct. 17, 2005) [Staff Answer].

⁸ Entergy's Response to the New England Coalition's Request for Leave to File a New Contention (Oct. 19, 2005) [Entergy Answer].

⁹ New England Coalition's Reply to Applicant and NRC Staff Answers to New England Coalition's Request for Leave to File a New Contention (Oct. 26, 2005) [NEC Reply].

¹⁰ 10 C.F.R. § 2.309(f)(1)(ii) requires a "brief explanation of the basis for the contention."

(1) “[T]he Alternate Cooling System and its components are not seismically qualified and ENVY has not provided analyses that are adequate, accurate, and complete in all material respects which contravene this assertion and demonstrate that the actual structures, systems and components comprising the ACS will perform satisfactorily in service at the requested increased plant power level;”¹¹

(2) “The alternate cooling system is (and it [sic] comprised of) structures, systems and ‘components important to safety’ which must be able to withstand the effects of natural phenomena, such as earthquakes, without loss of capability to perform their safety functions. They must also be able to perform satisfactorily in service at the requested increased plant power level;”¹²

(3) “ENVY must provide documentation, per 10 CFR 50.9(a), that, e.g., the ACS under uprate condition will be in compliance with the original design basis as licensed by the Commission and that the actual structures, systems and components comprising the ACS will perform satisfactorily in service at the requested increased plant power level;”¹³ and

(4) ENVY’s “sole evaluation” of seismic qualification of the ACS - the ABS report - “is not adequate, accurate, and complete in all material respects, and does not demonstrate that the [ACS] in its current actual physical condition (or in the actual physical condition ENVY effectuates prior to commencing operation at EPU) will be able to withstand the effects of a Safe Shutdown or Design Basis earthquake and other natural phenomena without loss of capability to perform its safety functions.”¹⁴

As supporting evidence for its contention, NEC submitted the declaration of Dr. Ross B.

Landsman, who expressed his professional opinion that the ABS Report is “grossly deficient” in seven respects:

- (a) ABS did not conduct a physical examination of the alternate cooling tower cell;
- (b) ABS’s report lacks adequate documentation of the breaking strength of the tie rods;
- (c) ABS’s report does not use added conservatism in accounting for the effects of aging mechanisms and/or moisture and/or cooling system chemicals;
- (d) ABS’s structural analysis fails to assign a negative value to the replacement rate for degraded members;
- (e) ABS’s report fails to account for changes to ACS after the report was completed;

¹¹ NEC Request at 2.

¹² Id. at 3.

¹³ Id.

¹⁴ Id. at 3-4.

- (f) ABS relies on incorrect and non-conservative assumptions concerning the condition of the concrete in the alternate cooling tower cell and fails to take into account the unanalyzed effects of recent modification including steel splices; and
- (g) ABS does not provide reasonable assurance of seismic qualification of the ACS.

NEC Request at 5-6.

As to the timeliness of its new contention under 10 C.F.R. § 2.309, NEC contends that it never considered the ABS Report as satisfying the complaint of NEC's original Contention 4 (i.e., the "minimum appropriate structural analyses" of the "structural integrity of the cooling towers under uprate conditions," NEC Original Petition at 11), and therefore did not believe, until the Board's September 1, 2005 ruling, that a new or amended contention was necessary. NEC Request at 14. NEC argues that the Board ruled that a request for leave to file new contentions would be timely if filed within 20 days and that it has met this requirement. Id. at 15.

Entergy opposes NEC's request, arguing that the new contention is untimely, impermissibly broad and vague, and lacks factual basis. Entergy Answer at 4. Entergy urges the Board to find the contention untimely on two grounds. First, Entergy suggests that the "new" information on which it is based was available for four months before the proposed new contention was submitted" and thus that NEC failed to submit the new contention "in a timely fashion" as required by 10 C.F.R. § 2.309(f)(2)(iii). Id. Entergy states that "[p]etitioners have 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.'"¹⁵ According to Entergy, NEC's obligation to submit a new contention challenging the adequacy of the ABS Report began on

¹⁵ Entergy Answer at 5-6, (citing Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382 & n.42).

May 25, 2005, when the report was submitted to the NRC.¹⁶ Entergy suggests that, at the time of its September 1, 2005 Order, the Board may not have been aware of the fact that the ABS Report had been filed in May 2005. Entergy Answer at 6. Second, Entergy argues that the new contention is untimely because it raises new issues on matters that have been “unchanged, on the record” since the initial filling of the application, id. at 4, and because it is an “attempt to raise new issues that go far beyond the adequacy of the Seismic Calculation.” Id. at 7. Entergy lists some of the deficiencies alleged by NEC, and suggests that the contention “does not link these deficiencies to any new information.” Id. at 8.

Next, Entergy claims that NEC’s proposed new contention fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(vi). Id. at 10. Finding NEC’s definition of ACS overbroad, and citing a failure to identify specific analyses or components that are inadequate or deficient, Entergy asks the Board to reject the proposed contention as both overbroad and vague. Id. Finally, Entergy asserts that NEC’s “proposed contention lacks factual basis,” id. at 11, and challenges the alleged deficiencies identified by Dr. Landsman in NEC’s Request. Id. at 12-30.

The NRC Staff does not oppose the admission of NEC’s new contention. Staff Answer at 8. The Staff acknowledges that the contention appears to be timely, that it “appears to satisfy” the other requirements of 10 C.F.R. § 2.309(f)(2), and seems to agree that, under the balancing factors of 10 C.F.R. § 2.309(c), the contention is satisfactory. Staff Answer at 6 -7. Finally, the Staff concludes that the new contention satisfies the requirements of 10 C.F.R. § 2.309(f)(1) except “insofar as NEC takes issue with the ‘current actual physical condition’ of the ACS”, which the Staff asserts is “outside the scope of this proceeding.” Id. at 8.

¹⁶ The record does not reflect when the ABS Report became available to NEC.

III. ADMISSIBILITY OF PROPOSED CONTENTION

A. 10 C.F.R. § 2.309(f)(2) Analysis: New Contentions

Our analysis begins with the Commission's regulations for admissibility of "new contentions." This new regulation¹⁷ allows for a "new contention" to be filed upon a showing that:

- (i) The information upon which the amended or new contention is based was not previously available;
- (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
- (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

10 C.F.R. § 2.309(f)(2)(i)-(iii).

The three requirements listed above do not alleviate the Petitioner's burden to demonstrate that the new contention meets the standard admissibility requirements of 10 C.F.R. § 2.309(f)(1)(i)-(vi). Rather, the requirements of 10 C.F.R. § 2.309(f)(2)(i)-(iii) provide additional timing and procedural requirements governing the admissibility of new contentions.

The Board finds that NEC's proposed contention satisfies the three criteria required by 10 C.F.R. § 2.309(f)(2). As an initial matter, the contention was filed in a "timely fashion," as required by 10 C.F.R. § 2.309(f)(2)(iii). For reasons stated in our September 1, 2005 Order (e.g., the qualitative aspects of the original Contention 4), we provided NEC a twenty-day window to request leave to file a new contention regarding the adequacy of the ABS Report. LBP-05-24, 62 NRC at _ (slip op. at 5). The Order provided that any such contention filed within the specified time frame would be deemed timely pursuant to 10 C.F.R. § 2.309(f)(2)(iii) and (c)(1)(i). Id. at 5-6. The fact that Entergy submitted the ABS Report to the NRC in May

¹⁷ 10 C.F.R. § 2.309(f)(2) was added in 2004. 69 Fed. Reg. 2182, 2240 (Jan. 14, 2004).

2005 was known to the Board at the time of our September 1, 2005 Order¹⁸ and provides no basis to revisit the timeliness issue now.

The remaining subsections of 10 C.F.R. § 2.309(f)(2) are clearly met. The new contention challenges the sufficiency of the ABS Report, which, because it filled a prior omission, necessarily constitutes “information . . . not previously available.” 10 C.F.R. § 2.309(f)(2)(i). And since something is obviously different than nothing, the ABS Report is also “information . . . materially different than information previously available.” 10 C.F.R. § 2.309(f)(2)(ii).

Entergy argues that “none of the alleged deficiencies was raised by the NEC in its original Request for Hearing” and that the new contention is untimely under 10 C.F.R. § 2.309(f)(2) because “in the absence of subsequently developed information, NEC is not allowed to raise new issues now.” Entergy Answer at 8. This position is untenable. Originally, there was no seismic analysis of the ACS and NEC asserted that “Entergy cannot assure the seismic and structural integrity” of the ACS because “the minimum appropriate structural analyses” had not been done. NEC Original Petition at 11. Entergy has now done a seismic analysis and NEC is challenging it because it allegedly fails to take into account various factors, such as documentation of the breaking strength of tie rods, the effects of aging mechanisms, moisture and chemicals on the ACS, changes in the ACS since the ABS Report, and non-conservative assumptions about concrete and steel splices.¹⁹ NEC Request at 7. We conclude that NEC

¹⁸ The May 2005 submission of the ABS Report was referenced in Entergy’s Motion to Dismiss as Moot.

¹⁹ For example, NEC’s expert, Dr. Landsman, states that “[t]he ABS Consulting report fails to take into account the effects of lack of adequate documentation of the breaking strength of the tie rods connecting the seismic and non-seismic cells” and that “ABS has no basis to conclude that the collapse of one or more cells would not propagate through additional cells.” NEC Request at 7. In addition, NEC alleges that the “ABS Consulting seismic evaluation and accompanying materials do not include that ABS took into account the actual ‘as found’

(continued...)

raised the seismic issue, to the extent possible, in its original contention of omission and has continued to pursue the issue now, by alleging various deficiencies in the ABS Report.²⁰

B. 10 C.F.R. § 2.309(c) Analysis: Nontimely Filings

The Staff asserts that the proposed new contention must also pass the eight factor balancing test specified for “nontimely filings” in 10 C.F.R. § 2.309(c), Staff Answer at 3, as follows:

- (i) Good cause, if any, for the failure to file on time;
- (ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
- (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;
- (iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;
- (v) The availability of other means whereby the requestor's/petitioner's interest will be protected;
- (vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;
- (vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and
- (viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

Given that we have just held that NEC’s new contention is “timely” under 10 C.F.R. § 2.309(f)(2)(iii), it appears contradictory to rule that NEC must now also satisfy the eight

¹⁹(...continued)

physical condition of the cooling towers at issue as there is an absence of additional conservatisms to account for the effects of aging and/or moisture and/or cooling system chemicals and/or biotic action on the wooden structural members, steel connecting hardware, reinforcement rods and concrete within tower basins.” Id.

²⁰ We reject Entergy’s assertion that “it has been Entergy’s position from the start that the ACS is adequate to perform its safety function, and that it does not need to be part of the proposed uprate. That position has not been previously challenged by NEC, and any such challenge at this late date would be grossly untimely.” Entergy Answer at 13 (emphasis added). It is clear to this Board that NEC’s original Contention 4 challenged Entergy’s position on this point from the very outset of this proceeding. Subsequently, NEC has continued to litigate this point as the issue has evolved from focusing on the absence of any seismic analysis, to the quality of the analysis that was subsequently submitted.

additional balancing factors of 10 C.F.R. § 2.309(c) for “nontimely” filings.²¹ Tellingly, not even Entergy asserts that NEC’s new contention must also meet 10 C.F.R. § 2.309(c).

Assuming *arguendo* that 10 C.F.R. § 2.309(c) applies to timely new contentions, we conclude, after balancing the eight factors, that 10 C.F.R. § 2.309(c) should not bar the admission of NEC’s proposed contention. The Staff agrees. Staff Answer at 7. As acknowledged by the Staff, the first factor -- whether good cause exists for failure to file on time -- is entitled to the most weight. State of New Jersey (Dep’t of Law & Public Safety), CLI-93-25, 38 NRC 289, 296 (1993). The fact that this new contention is based on material information that was not previously available, and that it was “timely” under 10 C.F.R. § 2.309(f)(2), shows “good cause for the failure, if any, to file on time” under 10 C.F.R. § 2.309(c)(1)(i).

As to the remaining seven factors of 10 C.F.R. § 2.309(c)(1), NEC has been found to have standing and to have submitted at least one admissible contention; therefore, the factors in 10 C.F.R. § 2.309(c)(1)(ii) (nature of NEC’s right to be made a party), (iii) (nature of the NEC’s interest in the proceeding), and (vi) (NEC is an existing party), support the admission of this new contention. Pointing to the absence of contentions related to the seismic analysis of the ACS by the State of Vermont, NEC asserts that no other party is capable of protecting its interests, NEC Request at 15-16, thereby satisfying 10 C.F.R. § 2.309(c)(1)(v) (non-availability of other means to protect the NEC’s interest).²² NEC has filed its contention with the aid of Dr.

²¹ This inconsistency was noted in our January 11, 2005 order at 4 n.5. It is neither logical nor sensible to impose only eight conditions on the admissibility of a contention based on old information and where the proponent has, through his own inadvertence, forgotten to raise it, and yet impose even more hurdles (three plus eight) on a contention based on new information where the proponent is blameless and prompt. This situation contrasts sharply with permissive intervention, as specified in 10 C.F.R. § 2.309(e) and Rule 24(b) of the Federal Rules of Civil Procedure.

²² NRC Staff suggests that NEC has failed to address subsection (v); however, we find that, while not specifically referencing the subsection, NEC’s discussion sufficiently addressed the requirement. See NEC Request at 16.

Ross B. Landsman, and has asserted that his service as an expert witness “can assist the Board to develop a sound record on [the] proposed Alternate Cooling System Contention.” We agree and conclude that 10 C.F.R. § 2.309(c)(1)(viii) is satisfied. Given that NEC has raised concerns about the adequacy of the seismic and structural analysis of the ACS from the outset, we find that 10 C.F.R. § 2.309(c)(1)(iv) (the possible effect of any order that may be entered in the proceeding on its interests), and 10 C.F.R. § 2.309(c)(1)(vii) (the extent to which litigation of this issue will broaden the issues or delay the proceeding), favor the admission of this contention. On balance, if it is applicable at all, we conclude that the request for leave to file the proposed new contention satisfies the requirements of 10 C.F.R. § 2.309(c)(1).

C. 10 C.F.R. § 2.309(f)(1) Analysis: Basic Requirements for Contentions

In addition to satisfying the timeliness requirements, the substance of NEC’s contention must be evaluated as to whether it satisfies the basic contention admissibility standards of 10 C.F.R. § 2.309(f)(1). We apply these regulatory criteria in accordance with the principles set forth in our ruling on the Intervenor’s original requests for hearing and proposed contentions. LBP-04-28, 60 NRC 548. For the reasons explained below, we conclude that NEC’s proposed new contention meets these requirements and is admissible.

While not referring to 10 C.F.R. § 2.309(f)(1)(i) directly, NEC has satisfied the first requirement by providing a “specific statement of the issue of law or fact to be raised or controverted.” NEC’s proposed contention challenges Entergy’s proposed EPU license amendment and its ABS Report, alleging that they fail to comply with Commission regulations (10 C.F.R. Part 50, Appendix S, paragraph I(a), and/or 10 C.F.R. Part 100, Appendix A) because of a failure to provide adequate analysis to demonstrate that the ACS, under uprate conditions, will be able to withstand the effects of an earthquake and other natural phenomena without losing its safety capabilities. NEC Request at 1. NEC provides four bases and various supporting evidence, including seven specific examples from the Declaration of Dr. Landsman

identifying specific deficiencies in the ABS Report, id. at 2-6, and these define the basic scope of the proposed contention.

Next, we consider whether NEC provided a “brief explanation of the basis for the contention.” 10 C.F.R. § 2.309(f)(1)(ii). The NRC Staff suggests that of NEC’s four listed bases, three are “merely restatements of the contention.” Staff Answer at 8. Similarly, Entergy argues that Bases 2 and 3 fail to expand on the contention by providing nothing more than restatements of regulatory guidelines. Entergy Answer at 14. As for Basis 1 and Basis 4, Entergy finds them to be overlapping and repetitive. Id. at 12, 15 n.40.

We agree that the four points raised in NEC’s “Bases” discussion overlap, but conclude that, considered together and in conjunction with the deficiencies outlined by Dr. Landsman, they constitute a sufficient explanation of the basis or foundation of the contention to satisfy 10 C.F.R. § 2.309(f)(1)(ii). In essence, they form a syllogism. Point one says that the relevant regulation requires that “structures, systems and components important to safety must be able to withstand the effects of natural phenomena, such as earthquakes” and that Entergy has not provided adequate, accurate, and complete analyses making such a showing. Point two asserts that the ACS is a structure, system, or component important to safety. Point three argues that the regulations require the applicant to provide supporting information that is “complete and accurate in all material respects” and that this applies to the ACS. Point four is that the ABS Report does not satisfy the foregoing criteria. We do not see the four points as independent bases. Instead, we read them together as one brief and satisfactory explanation of the basic rationale for the contention.

We next turn to 10 C.F.R. § 2.309(f)(1)(iii) and (iv), which require that a proposed contention be within the scope of the proceeding and that it raise an issue material to the findings that the NRC must make if it were to approve the proposed EPU. NEC points out that the Board has already ruled that the subject matter of its new contention meets these criteria.

NEC Request at 17. We agree. Our admission of NEC's original Contention 4 made clear that a challenge to the omission or adequacy of a seismic/structural analysis of the ACS for increased loads is both within the scope of this proceeding and material to the findings the NRC must make to support the action. LBP-04-28, 60 NRC at 573. NEC's new Contention 4 -- focusing on the alleged failure of Entergy to adequately demonstrate that the ACS will satisfy the appropriate seismic requirements under EPU operating conditions because the ABS report does not consider or document the necessary factors or inputs that are listed by Dr. Landsman, NEC Request at 5-6, Landsman Declaration ¶ 7, -- is within the scope of this proceeding.

The Staff agrees that the proposed contention is within the scope of the proceeding, but warns that it can be read as not merely a permissible challenge to the ACS' "operation under extended power uprate conditions," but also as a purportedly impermissible challenge to the "current physical condition of the ACS." Staff Answer at 8. We recognize that a contention challenging the current physical condition of the ACS without respect to its performance at uprate conditions would be outside the scope of this proceeding. However, we read NEC's contention as focusing on the ability of the ACS (as it currently exists or as it may be modified) to meet safety requirements during operation at the requested increased power level. As we have previously noted, "[e]ven if the Entergy application proposes no modification of the cooling towers and related systems, it is relevant to ask whether the unchanged structures and systems are adequate to handle the uprate." LBP-04-28, 60 NRC at 573. NEC's new Contention 4 meets this criterion because it states, in pertinent part, "ENVY must be able to demonstrate that the actual structures, systems and components comprising the ACS will perform satisfactorily in service at the requested increased power plant level." NEC Request at 1 (emphasis added).

Next, the regulations specify that a contention must provide a "concise statement of alleged facts or expert opinions which support the requestor's . . . position." 10 C.F.R. § 2.309(f)(1)(v). NEC has certainly met this criterion. NEC has provided nine pages of relatively

specific factual allegations raising concerns about the ability of the ACS to perform under uprate conditions, NEC Request at 4-13, and a declaration from Dr. Ross Landsman supporting these points, and opining that the ABS Report is deficient. While Entergy disputes the merits of these allegations, the resolution of the merits is for another day. For now, we conclude that the proposed contention satisfies this section of the regulation.

Finally, 10 C.F.R. § 2.309(f)(1)(vi) requires that the requestor provide “sufficient information to show that a genuine dispute exists . . . on a material issue of law or fact.” Entergy argues that NEC’s allegations are impermissibly broad and vague and do not satisfy this regulation. Entergy Answer at 10. Entergy also avers that NEC has failed to “identify which analyses are inadequate, inaccurate, or incomplete” with the necessary specificity. *Id.* As noted above, NEC raises and discusses seven alleged deficiencies in the ABS Report. NEC Request at 5-13. Entergy urges that these are merely allegations of “non-existent” “errors of omission,” Entergy Answer at 15, and proceeds to address and attempt to rebut each one. *Id.* at 15-30. For example, in response to NEC’s allegation that the ABS failed to conduct a physical examination of the ACS and to collect and use field data to see how the actual structures would fare under uprated loads, NEC Request at 6, Landsman Declaration ¶¶ 7, 8, Entergy asserts that ABS conducted a “walk-through inspection” of each cell and “verified that the modeling assumptions were reasonable.” Entergy Answer at 17.²³ Similarly, in response to NEC’s allegation that the ABS Report does not include “additional conservatisms to account for the effects of aging and/or moisture and/or cooling system chemicals and/or biotic action” on the ACS, NEC Request at 5, Entergy states that ABS used the Cooling Tower Institute’s (CTI’s) “Standard Specifications for the Design of Cooling Towers with Douglas Fir Lumber.” Entergy Answer at 20.

²³ See Declaration of Paul D. Baughman (Oct. 17, 2005) ¶ 10.

Entergy's responses go to the merits and only confirm that there are genuine disputes on these material issues of fact and law. For example, it is not clear whether the ABS Report documents the walk-through inspections that Entergy states were performed, or whether they constitute a physical inspection sufficient to address the alleged deficiency. Did ABS obtain and rely upon "field data?" If so, was it mentioned in the ABS Report? If not, is it unnecessary? Does the use of CTI's standard adequately encompass and rebut the various factors that NEC alleges are deficient? These are disputed issues. NEC is not required, at this juncture, to prove its case, "but simply provide sufficient alleged factual or legal bases to support the contention." Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622-23 (2004). We find that NEC has provided sufficient information to demonstrate that an actual dispute exists and thus that 10 C.F.R. § 2.309(f)(1)(vi) is satisfied.

IV. SELECTION OF HEARING PROCEDURES

As charged by 10 C.F.R. § 2.310(a), upon admission of a contention, the Board must identify the specific hearing procedures to be used. The Board makes this determination on a contention by contention basis, selecting the hearing procedure "most appropriate for the specific contentions before it." LBP-04-31, 60 NRC 686, 705 (2004). The regulation provides, "[e]xcept as determined through the application of paragraphs (b) through (h) of this section, proceedings . . . may be conducted under the procedures of Subpart L of this part." 10 C.F.R. § 2.310(a). Paragraphs (b) through (h) outline specific instances where certain hearing procedures are available or mandated. None of the parties have addressed the question of which hearing procedures should apply to NEC new Contention 4 or whether paragraphs (b) through (h) apply to it. In this circumstance, we conclude that neither the procedures of Subpart L nor Subpart G are mandated. Accordingly, we must select the most appropriate course. In our December 16, 2004 ruling, we determined that the Subpart L procedures were

appropriate for the then admitted contentions, and for similar reasons we find that the proceeding on new Contention 4 should be held under Subpart L.²⁴

V. CONCLUSION

For the foregoing reasons, we find that New England Coalition's new contention, as modified and set forth in Attachment A hereto, satisfies the requirements of 10 C.F.R. § 2.309(c), (f)(1), and (f)(2), and is admitted.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD²⁵

/RA/

Alex S. Karlin, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Anthony J. Baratta
ADMINISTRATIVE JUDGE

/RA/

Lester S. Rubenstein
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 2, 2005

²⁴ See LBP-04-31, 60 NRC at 706.

²⁵ Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for (1) licensees Entergy Nuclear Vermont Yankee L.L.C. and Entergy Nuclear Operations, Inc.; (2) intervenors Vermont Department of Public Service and New England Coalition of Brattleboro, Vermont; and (3) the Staff.

ATTACHMENT A

New England Coalition New Contention 4 (Modified)

The Entergy Vermont Yankee [ENVY] license application (including all supplements) for an extended power uprate of 20% over rated capacity is not in conformance with the plant specific original licensing basis and/or 10 CFR Part 50, Appendix S, paragraph l(a), and/or 10 CFR Part 100, Appendix A, because it does not provide analyses that are adequate, accurate, and complete in all material respects to demonstrate that the Vermont Yankee Nuclear Power Station Alternate Cooling System [ACS] in its entirety, in its actual physical condition (or in the actual physical condition ENVY will effectuate prior to commencing operation at EPU), will be able to withstand the effects of an earthquake and other natural phenomena without loss of capability to perform its safety functions in service at the requested increased plant power level.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (ADMITTING INTERVENOR'S NEW CONTENTION) (LBP-05-32) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Docket No. 50-271-OLA
LB MEMORANDUM AND ORDER (ADMITTING
INTERVENOR'S NEW CONTENTION) (LBP-05-32)

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 2nd day of December 2005