

December 2, 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'S ANSWER TO VERMONT  
DEPARTMENT OF PUBLIC SERVICE'S THIRD MOTION TO COMPEL

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the staff of the U.S. Nuclear Regulatory Commission ("Staff") herein files its Answer to the "Motion to Compel Production of Certain NRC Staff Documents (III)" ("Motion III"), filed by the State of Vermont Department of Public Service ("DPS") on November 22, 2005. For the reasons set forth below, the Staff respectfully submits that DPS's Motion should be denied.

BACKGROUND

The instant case arises out of Entergy Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.'s (collectively, "Entergy" or "Applicant") application for an amendment to the operating license for the Vermont Yankee Nuclear Power Station ("VYNPS"), to authorize an extended power uprate ("EPU").<sup>1</sup> The Licensing Board granted DPS's petition to intervene on November 22, 2004.<sup>2</sup> In accordance with Commission regulations, the Staff promptly

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<sup>1</sup> See Letter from J.K. Thayer, Entergy, to the NRC Document Control Desk, "Vermont Yankee Nuclear Power Station, License No. DPR-28 (Docket No. 50-271), Technical Specification Proposed Change No. 263, Extended Power Uprate," dated September 10, 2003 ("Application") (ADAMS Accession No. ML032580089).

<sup>2</sup> See Licensing Board Memorandum and Order (Ruling on Standing, Contentions, and State Reservation of Rights), dated November 22, 2004. (ADAMS Accession No. ML43280053).

established a hearing file, and has continued to update the hearing file on a regular basis pursuant to 10 C.F.R. § 2.336(d) since January, 2005. Throughout this process, the Staff has identified otherwise discoverable documents that it believes are privileged and should be protected from public disclosure; further, pursuant to 10 C.F.R. § 2.336(b)(5), the Staff has listed the documents being withheld under either the proprietary information or the pre-decisional deliberative process privilege, in a privilege log, providing sufficient information in a "comment" column to facilitate an assessment of the Staff's claim of privilege.

On August 31, 2005, DPS filed its first motion to compel the production of privileged Staff documents, in which it challenged the Staff's claim of the deliberative process privilege with respect to three E-mail communications between members of the Staff, which were disclosed in the Staff's July 27, 2005, hearing file update.<sup>3</sup> The Staff filed its answer to Motion I on September 12, 2005.<sup>4</sup> The Licensing Board thereafter directed the Staff to produce the three documents to the Board for *in camera* inspection, and to respond to certain questions concerning the Staff's invocation of the pre-decisional deliberative process privilege.<sup>5</sup> DPS filed a second motion to compel on September 29, 2005, seeking the production of twenty-five Staff documents which had been identified as privileged in the Staff's September 6, 2005, hearing file update.<sup>6</sup> The Staff filed its answer to DPS's second motion on October 21, 2005, and

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<sup>3</sup> See "Vermont [DPS] Motion to Compel Production of Certain NRC Staff Documents," filed August 31, 2005 ("Motion I").

<sup>4</sup> See "NRC Staff's Answer to Vermont [DPS's] Motion to Compel," filed September 12, 2005 ("Response to Motion I").

<sup>5</sup> See "Order (Regarding State of Vermont's Motion of Aug. 31, 2005)," dated September 30, 2005. In its Order, the Licensing Board deferred ruling on certain procedural requests filed by DPS in connection with its first motion to compel (i.e., its requests for oral argument or for leave to file a reply brief). *Id.* at 2.

<sup>6</sup> See "Vermont [DPS] Motion to Compel Production of Certain NRC Staff Documents (II)," filed September 29, 2005 ("Motion II").

simultaneously filed its response to the Licensing Board's Order, together with the Affidavit of Ledyard B. (Tad) Marsh.<sup>7</sup>

On November 22, 2005, DPS filed the instant Motion, in which it again seeks to compel the production of documents which were identified and withheld by the Staff under the pre-decisional deliberative process privilege. Specifically, DPS seeks to compel the production of three documents which were identified as privileged in the Staff's hearing file update of September 29, 2005, and 12 documents which were identified as privileged in the Staff's hearing file update of October 31, 2005. The Staff respectfully submits that DPS's instant Motion should be denied, for the reasons set forth below and in the Staff's three previous filings in this proceeding concerning the deliberative process privilege.

#### DISCUSSION

DPS's current motion seeks disclosure, in total, of 15 documents. Of those, it claims that ten documents do not qualify for the deliberative process privilege at all, based on its assertion that they "appear to contain substantial factual information and none involve any decision-making process because none are shown to be among the documents that will be used by those who will be making the decision for the Staff." Motion III at 1-2. DPS does not assert, however, that it has any overriding or compelling need for these ten documents. With respect to the remaining five documents, DPS describes the documents as relating to its containment overpressure contention, and concedes that "it is possible that the deliberative process privilege is applicable," Motion III at 3. DPS then presents an argument in support of its claim that it has a compelling need to obtain the five requested documents. *Id.*, at 3-7. For

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<sup>7</sup> See (1) "NRC Staff's Answer to Vermont [DPS's] Second Motion to Compel," filed October 21, 2005 ("Response to Motion II"); and (2) "NRC Staff Response to the Atomic Safety and Licensing Board's Order of September 30, 2005, Regarding Vermont [DPS's] First Motion to Compel," dated October 21, 2005 ("Response to Board Order"). See also "Vermont [DPS] Answer to NRC Staff Response to the Atomic Safety and Licensing Board's Order of September 30, 2005, Regarding Vermont [DPS's] First Motion to Compel," dated October 28, 2005.

the reasons set forth below, the Staff submits that DPS has failed to show that the deliberative process privilege either does not apply or should be set aside with respect to any of these documents.<sup>8</sup>

I. Applicable Legal Principles

The Staff has previously described the legal principles governing an agency's assertion of the pre-decisional deliberative process privilege, in its response to DPS's first motion to compel.<sup>9</sup> As indicated therein, the deliberative process privilege is uniformly recognized and upheld in NRC adjudicatory proceedings, pursuant to 10 C.F.R. § 2.390(a)(5). *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 197 (1994) (discussing former 10 C.F.R. § 2.790(a)(5)). As the Commission indicated in *Vogtle*, the privilege may be invoked in NRC adjudicatory proceedings, and protects "intraagency communications 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *Id.* (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975)). See also *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1341 (1984). The

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<sup>8</sup> DPS also asserts that the instant Motion is timely, in that it did not receive the Staff's written response to its letter requests for these documents until November 17, 2005. Motion at 2. DPS further refers to an agreement which it had obtained from the Staff in August 2005, under which the Staff would undertake to review its documents a second time, after receiving a request by DPS for any documents which are identified in the Staff's privilege logs, after which DPS would file any motion to compel. See *id.* at 2-3 and n.2. That agreement was terminated by the Staff one month later, upon recognizing the undue burden which it would impose on the Staff, and the fact that it would effectively afford DPS an extension of time for filing any motions to compel. In view of the Staff's prompt termination of any such agreement, DPS's references thereto are of no effect and should be disregarded. See (1) Letter from Anthony Z. Roisman to Sherwin E. Turk, dated September 13, 2005; (2) letter from Sherwin E. Turk to Anthony Z. Roisman, dated September 23, 2005; (3) letter from Anthony Z. Roisman to Sherwin E. Turk, dated September 28, 2005; and (4) letter from Sherwin E. Turk to Anthony Z. Roisman, dated November 15, 2005, attached hereto. In this regard, the Staff notes that a motion to compel, like any motion, is required to be filed "no later than ten (10) days after the occurrence or circumstance from which the motion arises." 10 C.F.R. § 2.323(a). In the absence of a Licensing Board Order modifying that requirement or granting an extension of time, the parties may not disregard or agree to modify or waive that requirement. While, as a matter of comity, the Staff does not object to DPS's filing of the instant Motion as untimely, the Staff reserves the right to object to any future motions on grounds of timeliness, as appropriate.

<sup>9</sup> See Staff Response to Motion I, dated September 12, 2005, at 2-4.

agency may invoke the privilege to protect documents that are at once both predecisional and deliberative. See *Vogtle*, 39 NRC at 197. "A document is predecisional if it was prepared *before* the adoption of an agency decision and specifically prepared to assist the decisionmaker in arriving at his or her decision." *Id.* (emphasis in original; citations omitted). Further, "deliberative" communications are those which reflect a consultative process. *Id.* at 198. As the Commission explained in *Vogtle*:

Protected documents can include analysis, evaluations, recommendations, proposals, or suggestions reflecting the opinions of the writer rather than the final policy of the agency. Deliberative documents "relate[ ] to the process by which policies are formulated." However, a document need not contain a specific recommendation on agency policy to qualify as deliberative. A document providing "opinions or recommendations regarding facts" may also be exempt under the privilege.

*Id.* (internal citations omitted). The purpose of the privilege is to "encourage frank discussions within the government regarding the formulation of policy and the making of decisions." *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1164 (1982). See also *Shoreham*, ALAB-773, 19 NRC at 1346-47.

In litigation, the deliberative process privilege is qualified, in that the agency's interest in confidentiality must be balanced against the interest of the litigant in obtaining the information. *Vogtle*, CLI-94-5, 39 NRC at 198; *Shoreham*, ALAB-773, 19 NRC at 1341. Thus, 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., *Vogtle*, CLI-94-5, 39 NRC at 198. Once the agency has demonstrated that the privilege was properly invoked, the burden shifts to the party seeking disclosure, who must then show an "overriding need or special circumstances in order to overcome a valid claim of privilege." *Id.*; *Shoreham*, ALAB-773, 19 NRC at 1341, 1343. Neither the desire to use such documents to impeach a witness, or to find weaknesses in the opposing party's case, *id.* at 1343-44, nor the ultimate

incorporation of deliberative material into a final public document, demonstrates a “compelling need for the material.” *Id.* at 1346. In this regard, it has been held that “it is the ultimate institutional findings and determinations by [the decisionmaker], not the predecisional opinions of various members of [the Staff], that are centrally important.” *Id.* at 1346.

Finally, in response to the Licensing Board’s Order of September 30, 2005, the Staff set forth its view of the procedures which should be followed in order to properly “invoke” the pre-decisional deliberative process privilege in a Subpart L informal NRC adjudicatory proceeding, with respect to documents identified as privileged in the compilation of a hearing file.<sup>10</sup> The Staff hereby incorporates that discussion by reference herein.

II. DPS Has Failed to Demonstrate Either That the Deliberative Process Privilege Does Not Apply or That It Has A Compelling Need for the Requested Documents.

In its Motion, DPS states that “most of the documents at issue here are of the same type and character” as the documents sought in its prior motions, and it therefore “incorporates by reference those arguments in support of this Motion to Compel.” Motion III at 3. The Staff agrees that the instant Motion raises primarily the same arguments as were raised previously, and the Staff therefore incorporates by reference its responses to DPS’s previous arguments. In this regard, the Commission has recognized that the deliberative process privilege should be upheld in NRC adjudicatory proceedings, in order to protect the continued free flow of opinions, information and ideas in decision making. As the Commission has stated, the “the interests of the Commission in maintaining the confidentiality of deliberative materials” should not be overlooked. *Vogtle*, CLI-94-5, 39 NRC at 201. To hold otherwise would have a chilling effect

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<sup>10</sup> See Staff Response to Board Order, at 6-10. As noted therein, in other contexts not directly applicable here, the federal courts have established a three-pronged requirement for proper invocation of the privilege. See *id.* at 6, citing *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.”).

on the frank and open discourse which is required in the course of the Staff's review, and would thus impede the Staff's ability to engage in free and open discussions in the future.

In the following discussion, the Staff addresses, first, the applicability of the deliberative process privilege to the 15 documents sought in DPS's Motion and, second, DPS's required showing of a compelling need for the documents. For the reasons set forth below and in the attached Affidavit of Catherine Haney, the Staff submits that the privilege applies to each of these 15 documents, and that the privilege has been properly invoked by the Staff.<sup>11</sup> Further, the Staff submits that DPS has failed to sustain its burden of demonstrating that it has a "compelling need" for any of the documents in question. Accordingly, DPS's instant Motion should be denied.

A. The Documents Properly Have Been and Should Be Withheld From Disclosure Under the Deliberative Process Privilege.

The 15 documents sought by DPS in the instant Motion are identified by asterisks inserted by DPS in the Staff's privilege log supplements of September 29 and October 31, 2005, attached as Tab C of the Motion. As set forth below, all of the requested documents consist of pre-decisional and deliberative information, and contain discussions reflecting the contributions, views and/or opinions of individual Staff members. These documents do not reflect final Staff decisions; rather, they are part of the Staff's deliberative process leading to final Staff decisions and, thus, are exempt from disclosure under the Commission precedents discussed above. The following is a description of the documents at issue and an explanation

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<sup>11</sup> The attached Affidavit was executed by Catherine Haney, in her capacity as Director of the Division of Operating Reactor Licensing ("DORL"), in the NRC's Office of Nuclear Reactor Regulation ("NRR"). Therein, Ms. Haney indicated that she has personally reviewed the documents subject to this Motion, that she has determined the documents should be withheld under the pre-decisional deliberative process privilege, and she therefore formally invoked a claim of privilege on behalf of the agency. The Staff notes that it previously submitted the Affidavit of Ledyard B. (Tad) Marsh, Director of the Division of Licensing Project Management ("DLPM"), in its October 21, 2005 response to the Licensing Board's Order. Subsequent to filing Mr. Marsh's affidavit, Mr. Marsh retired and NRR was reorganized. Under the new organization, DORL replaced DLPM and Ms. Haney succeeded Mr. Marsh as Director of that Division, maintaining the same level of authority and responsibility.

of the reasons why the pre-decisional deliberative process privilege applies. Certain documents have been grouped together because of similarity in form and/or content.

1. Documents 14-22, 14-24, 14-30, 15-05, 15-06, and 15-07. These documents, although varying in substance, all contain the Staff's analysis, opinions, and recommendations regarding either the Applicant's responses to previous requests for additional information ("RAIs"), or the formulation of new RAIs to address the Staff's concerns. Documents 14-22, and 14-24 comprise a chain of E-mails containing several Staff member's assessments of the Applicant's responses to several RAIs concerning commitment tracking, Small Break Loss of Coolant Accidents (SBLOCAs), and peak bundle power, followed by suggestions for follow-up RAIs to address these concerns. Document 14-30 contains discussions related to issuing new RAIs, as well as a variety of other topics, including the procedural aspects of completing the Draft SER, the overall status of the EPU review; and the potential impact of the ACRS's letter concerning RG 1.82 (which at the time of the communication had not been released). Finally, Documents 15-05, 15-06, and 15-07, also part of a chain of E-mails, contain detailed back-and-forth deliberations between Staff members concerning the formulation of additional RAIs related to Large Break Loss of Coolant Accidents (LBLOCAs), fuel storage, and Residual Heat Removal (RHR) that would enable the Staff to complete its review of the EPU application.

With respect to these documents containing RAI-related deliberations, DPS argues that the deliberative process privilege does not apply to "documents that relate to the adequacy of information submitted by the applicant and the need for additional information because such documents are not part of a deliberative process but are generated outside that process and are not reviewed or used by those deliberating on the ultimate issue." Motion III, at 3. However, DPS has not cited a single authoritative source supporting this assertion, and the Staff has been unable to identify one. To the contrary, documents containing deliberations among Staff members concerning what information is or is not important to the review are

among the types of documents to which the privilege applies. See *Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2)*, CLI-94-5, 39 NRC 190, 198 (1994) ("A document providing 'opinions or recommendations regarding facts' may also be exempt from disclosure.") (quoting *National Wildlife Federation v. United States Forest Service*, 861 F.2d 1114, 1118 (9<sup>th</sup> Cir. 1988)). A particular Staff member's assessment of the available facts, and assertion that he or she needs additional facts in order to make an informed recommendation to the decision-maker, does not represent the position of the agency on the issue. It is merely part of the deliberative process by which the agency ultimately can make that decision.

DPS's argument regarding these documents seems to be based on its erroneous, and again unfounded, conclusion that in order for the deliberative process to apply to a particular document, it must be "apparent that [a] high ranking agency official actually used, or would use, the documents to inform the official's decision-making." Motion III at 3. This statement, unsupported by any authority, reflects a misunderstanding of the function of the deliberative process privilege. Contrary to DPS's assertion, applicability of the privilege to an agency document does not require that the ultimate decision-maker personally looked at the document in which the deliberations took place. Rather, it requires only that the deliberations reflected in the documents were part of the agency's decision making process. Agency decisions are typically made after Staff members investigate and evaluate a proposal, deliberate amongst themselves regarding the best course of action, and then present a final Staff recommendation to the decision-maker. The decision-maker may or may not choose to adopt that position. In any event, the discussion leading up to that presentation is not the agency decision, and is not subject to public scrutiny. See, e.g., *Montrose Chemical Co. v. Train*, 491 F.2d 63, 68 (D.C. Cir. 1974) (recognizing the validity of deliberative process claim under FOIA Exemption 5, and observing that "when faced with a voluminous record, the decision-maker may wisely utilize his

assistants to help him determine what materials will be significant in reaching a proper decision.”).

Thus, because all of these documents contains ongoing deliberations by the Staff concerning the EPU application and the information necessary to permit the Staff to reach a determination on that application, these documents are clearly protected from disclosure under the pre-decisional deliberative process privilege.

2. Documents 15-40, 15-41, 15-42, 15-43. These documents are part of a chain of E-mail messages regarding the Staff’s deliberations over the wording and scope of the transient testing license condition that was ultimately presented to and agreed upon with the Applicant.<sup>12</sup> All contain some form of “analysis, evaluations, recommendations, proposals, or suggestions reflecting the opinions of the writer rather than the final policy of the agency.” *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 198 (1994) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975)). To the extent that a particular email contains factual information, those facts are “inextricably intertwined’ with the opinion portion,” *id.* (quoting *Hopkins v. Department of Housing and Urban Development*, 929 F.2d 81, 85 (2d Cir. 1991), and do not warrant disclosure of the documents.

DPS fails to make any argument as to why the Staff’s claim of privilege should not stand with respect to these documents. For the reasons set forth above, the Staff’s assertion of the pre-decisional deliberative process privilege with respect to these documents should be upheld.

3. Documents 15-30, 15-31, 15-33, 15-35, and 15-36. Document 15-30 consists of draft input, by the Safety Programs Section of the Probabilistic Safety Assessment Branch, to the Draft SER concerning the Staff’s risk evaluation of the Vermont Yankee EPU application. Documents 15-31, 15-33, 15-35, and 15-36, consist of a series of E-mails between Staff

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<sup>12</sup> The final version of the license condition is available in the hearing file for these proceedings. (ADAMS No. ML052630053).

members regarding the possibility of imposing a license condition requiring the Applicant to submit a confirmatory risk-informed evaluation of its proposed credit for containment overpressure; in these documents, the Staff deliberates over the necessity of imposing a risk-related license condition on the Applicant, and several Staff members recommend language for such a condition.

The deliberative process privilege clearly applies to these documents. With respect to Document 15-30, draft input to the Staff's SER reflects those Staff members' recommendation as to the correct resolution of the issues addressed therein. That input may or may not ultimately be incorporated into the SER upon issuance thereof – but in either event, the privilege applies, and only the SER, as issued, reflects the Staff's position and must be disclosed. Similarly, Documents 15-31, 15-33, 15-35, and 15-36 merely contain individual Staff members' recommendations and non-binding opinions as to whether a license condition should be imposed and, as such, are protected from disclosure under the privilege.

DPS fails to make any argument that the deliberative process privilege does not apply to these five documents. Rather, DPS states that "it is possible that the deliberative process is applicable [to these five documents]," but that "[t]here is no way to know, from the information provided by the Staff, if the deliberative process privilege applies because it not apparent that any high ranking agency official actually used, or would use, the documents to inform that official's decision-making." Motion III, at 3. This assertion is without merit, as discussed above, because the pre-decisional deliberative process privilege applies regardless of whether or not the document in question is ultimately used or relied upon by the decision-maker – and DPS has provided no authority to the contrary.

DPS's Motion fails to address the Staff's bases for withholding any of the 15 requested documents as privileged, as set forth in the Staff's privilege log supplements 14 and 15, or in the Staff's detailed explanations of the bases for withholding the documents, provided in the

Staff's letter to DPS dated November 17, 2005 (attached at Tab C to the instant Motion).

Rather, the instant Motion appears to be founded on DPS's fundamental challenge to the scope and applicability of the deliberative process privilege, itself. In the Staff's view, the principles governing the applicability of the privilege are well-settled and fully apply to the documents at issue. Moreover, DPS's continued reliance on generic, unsupported arguments fails to establish that the privilege does not apply to these documents.<sup>13</sup> For these reasons, as more fully set forth above, DPS's assertion that the pre-decisional deliberative process privilege does not apply to the 15 requested documents should be rejected.

**B. DPS Has Failed to Demonstrate Any Need for the Documents.**

With respect to DPS's burden to demonstrate an overriding need for the documents, aside from the five documents discussed below, DPS has failed to make any assertion that it needs the documents, much less demonstrate that it has an "overriding need" for the documents. As noted in *Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1)*, ALAB-773, 19 NRC 1333 (1984), "Commission and judicial precedent requires some overriding need or special circumstances in order to overcome a valid claim of privilege," and the mere "desire to review the undisclosed documents in the interest of obtaining the maximum amount of background information," *id.* at 1343, does not qualify as such a need. Accordingly, insofar as it seeks to compel the production of these documents, DPS's Motion should be denied.

DPS argues that it has a compelling need for five documents – Documents 15-30, 15-32, 15-33, 15-35, and 15-36 – on the grounds that these documents relate to DPS's

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<sup>13</sup> As discussed above, DPS's challenge to the Staff's assertion of the deliberative process privilege, under established Commission precedent and federal law, lacks any legal support. Moreover, DPS's continued assault on the Staff's assertion of the privilege appears inconsistent with the fact that the privilege is recognized under Vermont state law, and the State of Vermont, itself (including the Governor and various departments of the State) cite and utilize the pre-decisional deliberative process privilege to support their withholding of documents under State law. See, e.g., *Herald Ass'n, Inc. v. Dean*, 174 Vt. 350, 355-56 (2003); *New England Coalition for Energy Efficiency & Environment v. Office of Governor*, 164 Vt. 337, 341 (1995); *Killington, Ltd. v. Lash*, 153 Vt. 628, 635-37 (1990).

containment overpressure credit contention, and the performance of a probability risk analysis ("PRA") pertaining to the Applicant's use of a containment overpressure credit. Motion at 4-6. According to DPS, this is an extremely important issue, and DPS needs to be able to assess the Staff's reasoning concerning the use of such analyses in evaluating the acceptability of the Applicant's use of a containment overpressure credit. *Id.* at 5.<sup>14</sup>

DPS's argument that it has a compelling need for these five documents, is without merit. First, as set forth above, Document 15-30 consists of the Safety Programs Section of the Probabilistic Safety Assessment Branch's input to the Draft SER concerning the Staff's risk evaluation of the Vermont Yankee EPU application. Section 2.13 of the Draft SER contains the final version of the Staff's preliminary risk evaluation, but the relevant information contained in Document 15-30 is substantially the same as what is contained in Section 2.13 of the Draft SER, which DPS already has.<sup>15</sup> As stated in *Shoreham*, a key consideration in assessing a party's need for a particular document is "the likely availability elsewhere of information equivalent to that contained in the documents." *Shoreham*, 19 NRC at 1345. A failure to demonstrate that "currently available sources are inadequate to permit a genuine probing of the bases for the [agency's] findings" is fatal to a party's claim of overriding need. *See id.* at 1343.

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<sup>14</sup> As an initial matter, the Staff notes that the cases relied on by DPS not only do not support its argument, but are erroneously cited. For instance, DPS cites *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144 (1982) to support its argument that "allowing disclosure of allegedly deliberative process information may be 'appropriate in light of the purposes of discovery, including that of providing a means for parties to prepare their cases for hearing in an efficient and meaningful manner, which minimizes surprise at the hearing as well as the expenditure of additional time at that point to address concerns that may arise based on a party's presentation of evidence that it has failed to disclose to an opposing party.'" Motion at 6. In fact, the language referred to by DPS appears to be a quotation from a Licensing Board decision in another proceeding, cited elsewhere in DPS's Motion. *See* Motion at 4, quoting *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), 2004 NRC Lexis 215 (Oct. 6, 2004) (unpublished). However, DPS's citation of that decision is inapposite, in that the Board in *Catawba* was not referring to a claim of the deliberative process privilege but, rather, to the release of Safeguards Information on the basis of a "need-to-know" determination. In contrast, the *Catawba* Board's discussion of the deliberative process privilege is set forth several pages later in its decision, and is consistent with the Staff's assertion of the privilege here. *See id.* at 10-14.

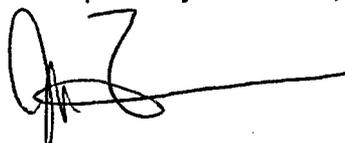
<sup>15</sup> Revision 1 of the Draft SER has been made available in the hearing file for this proceeding (ADAMS No. ML053010167).

Further, Documents 15-32, 15-33, 15-35, and 15-36 consist of a series of E-mails between Staff members regarding the possibility of imposing a license condition requiring the Applicant to submit a confirmatory risk-informed evaluation of its proposed credit for containment overpressure, and the potential wording of that license condition, if approved. In these documents, individual Staff members recommend language for a license condition to ensure that the Applicant conducts the appropriate evaluation. The documents contain no analysis of the Applicant's determinations because, as of the time of the communications, the Applicant had yet to conduct any analysis. Rather, the essence of the deliberations contained in these documents is a discussion of whether to propose a license condition regarding the Applicant's future obligation to conduct such an analysis. Thus, the documents do not fit DPS's description, and do not support its claim that it has a compelling need for the documents.<sup>16</sup>

CONCLUSION

For the reasons set forth above, the pre-decisional deliberative process privilege applies to the 15 documents requested by DPS in the instant Motion, and the Staff has properly invoked the privilege with respect to those documents, as set forth in the attached Affidavit of Catherine Haney. Further, DPS has failed to show any special or overriding need for any of the requested documents. DPS's Motion to Compel should therefore be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Jason C. Zorn', with a long horizontal stroke extending to the right.

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

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

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<sup>16</sup> The Staff notes that it provided an accurate description of these documents to DPS, in its letter to DPS Counsel dated November 17, 2005. See Motion III, Tab A. DPS's Motion altogether fails to acknowledge or address the Staff's detailed description of the documents in question.

**ENCLOSURE 1**

**AFFIDAVIT OF CATHERINE HANEY**

December 1, 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 CATHERINE HANEY

I, Catherine Haney, being first duly sworn, do hereby state as follows:

1. I am employed as the Director of the Division of Operating Reactor Licensing ("DORL") in the Nuclear Regulatory Commission's ("NRC") Office of Nuclear Reactor Regulation ("NRR"). 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.

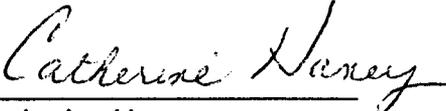
2. I have been informed that the State of Vermont Department of Public Service has sought disclosure of certain documents identified by the NRC Staff in its predecisional deliberative process privilege logs files on September 29, 2005, (three documents) and October 31, 2005 (thirteen documents). The NRC Staff generated or used these documents as part of the review and evaluation of the EPU license amendment application. NRC Staff members under my supervision identified these documents as privileged during a document review process conducted as part of this proceeding, in which relevant documents are placed in the hearing file or identified as privileged and withheld in accordance with NRC Management Directive 3.4, and 10 C.F.R. § 2.390(a)(5).

3. I have personally reviewed each of the fifteen documents in question, identified in the State of Vermont's motion to compel filed November 22, 2005, and have determined, in accordance with the guidance contained in Management Directive 3.4, that they contain predecisional information concerning the Staff's review of the EPU application. All documents contain either the Staff's analyses, recommendations, opinions, or evaluations, and may not necessarily reflect the final agency position with respect to the matters discussed therein. Each of the documents comprises part of the deliberative process necessary to the Staff's review of the pending EPU application.

4. Further, I have determined that disclosure of the fifteen 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 the 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 documents; 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 fifteen documents listed in the State of Vermont's pending motion to compel.

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

  
Catherine Haney

Subscribed and sworn to before me  
this 1<sup>st</sup> day of December, 2005.



C. Ellen Martin  
Notary Public

My commission expires: March 1, 2007

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

**ENCLOSURE 2**

**SEPTEMBER 13, 2005, LETTER FROM ANTHONY ROISMAN  
TO SHERWIN TURK**

# NATIONAL LEGAL SCHOLARS LAW FIRM, P.C.

84 EAST THETFORD ROAD LYME, NH, 03768  
603.795.4245 603.795.4246 (FAX)  
WWW.NATIONALLEGALSCHOLARS.COM

## MANAGING PARTNER

**ANTHONY Z. ROISMAN**

Dartmouth College (Research Fellow)\* □  
troisman@nationallegalscholars.com

## AFFILIATED ATTORNEYS

**PROF. ERWIN CHEMERINSKY**

Duke University Law School\*□

**PROF. SEAN DONAHUE**

Washington & Lee Univ. Law School (visiting)\*□

**PROF. JAY M. FEINMAN**

Rutgers Law School-Camden\*□

**DAVID G. GOLDBERG**

New York, NY □

**PROF. MICHAEL H. GOTTESMAN**

Georgetown Univ. Law Center\*□

**PROF. RICHARD J. LAZARUS**

Georgetown Univ. Law Center\*□

## AFFILIATED ATTORNEYS

**JONATHAN S. MASSEY**

Bethesda, MD □

**PROF. STEPHEN A. SALTZBURG**

George Washington University Law School\*□

**PROF. ALLAN R. STEIN**

Rutgers Law School-Camden\*□

**PROF. JOHN F. VARGO,**

Indiana University Law School \*□ (retired)

**PROF. ALVIN S. WEINSTEIN**

Prof. Emeritus, Carnegie-Mellon University\*□

**PROF. ROBERT F. WILLIAMS**

Rutgers Law School-Camden\*□

\* FOR IDENTIFICATION ONLY

□ NOT ADMITTED IN NEW HAMPSHIRE

September 13, 2005

Jason Zorn, Esq.  
Office of the General Counsel  
Mail Stop O-15 D21  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001

Re: VYUprate - Docket No. 50-271 (ASLBP No. 04-832-02-OLA)

Dear Jason:

This letter identifies documents on the NRC Staff's September 8, 2005 Deliberative Process Log which DPS believes should have been produced. The documents are the following:

ML052230204
ML052230209
ML052230210

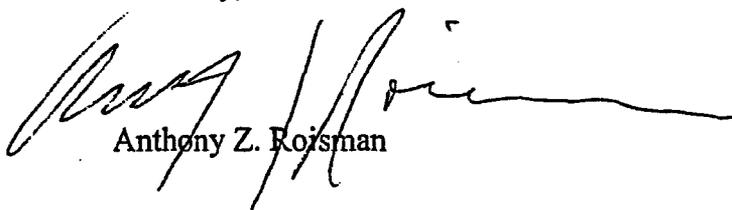
ML052340101
ML052310075
ML052340089
ML052340108
ML052340239
ML052340258
ML052340262
ML052340251
ML052360320
ML052410318
ML052410385
ML052410296
ML052410379
ML052410310
ML052410383
ML052410391
ML052410316
ML052410395
ML052420358
ML052420371
ML052420376
ML052420384

We believe the scope of the Deliberative Process Privilege is narrow and does not include documents that do not disclose the deliberative process leading to a policy decision by the NRC Staff and does not include facts contained in documents. As best as we can determine, from the limited disclosures made in the Log, none of the documents identified above meet the narrow criteria for application of the Deliberative Process Privilege.

Consistent with my previous discussions with Ms. Poole, I understand that the Staff agrees that the time for filing a motion with the ASLB regarding the failure to produce the identified documents will be extended until a reasonable time following a response to this letter from the Staff. I suggest the time be 5 business days from the date of the response. I also propose the Staff provide its response to this letter request within the next two weeks. Since technically an "agreement" between us as to a filing deadline set by the Regulations is ineffective, I propose we agree that I may advise the ASLB of our agreement and that the Staff will not oppose any motion with regard to these documents that we file based on timeliness.

Thank you for consideration of our request.

Sincerely,



Anthony Z. Roisman

cc: Sara Hofmann, Esq.

---

**ENCLOSURE 3**

**SEPTEMBER 23, 2005, LETTER FROM SHERWIN TURK  
TO ANTHONY ROISMAN**

---



OFFICE OF THE  
GENERAL COUNSEL

UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20555-0001

September 23, 2005

Anthony Z. Roisman, Esq.  
National Legal Scholars Law Firm, P.C.  
84 East Thetford Road  
Lyme, NH 03768

In the Matter of  
Entergy Nuclear Vermont Yankee, LLC, *et al.*  
(Vermont Yankee Nuclear Power Station)  
Docket No. 50-271-OLA (Extended Power Uprate)

Dear Mr. Roisman:

I am writing in response to your letter to Jason Zorn, dated September 13, 2005, in which you request the Staff's disclosure of 25 of the 38 documents that were identified as privileged in the NRC Staff's Deliberative Process Log of September 8, 2005.

We have reviewed the documents listed in your letter, in order to verify that they were properly withheld under the pre-decisional deliberative process privilege. The documents consist of internal NRC Staff E-mail communications, containing an exchange of thoughts, mental impressions, opinions and recommendations pertaining to the Staff's ongoing review of the Vermont Yankee extended power uprate (EPU) license amendment application and the Staff's requests for additional information (RAIs) concerning that application. In sum, the documents were properly withheld under the pre-decisional deliberative process privilege.

Your request for these documents fails to present any reason why you need these internal, pre-decisional documents. Further, inasmuch as the documents generally pertain to the formulation of RAIs and/or responses received from the Licensee, various other documents are or will be available to you (*e.g.*, the RAIs as issued, the Licensee's responses, and the Safety Evaluation Report) which would provide any necessary information for your review.

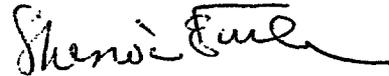
In our telephone discussion of September 16, you stated your view that the pre-decisional deliberative process privilege does not begin to apply until the Staff has concluded its effort to gather information and has commenced to "deliberate" on whether to grant the application. You were unable to cite any legal authority for that view, and I am not aware of any valid basis for it. In fact, the deliberative process includes various steps, including deliberations as to the sufficiency of the information contained in the application, and the need for further information in order to reach a final regulatory decision. Your interpretation would render the privilege meaningless; further, your request for so many internal NRC Staff communications, without showing any reason why the documents should be disclosed, represents a fundamental and unfounded challenge to the deliberative process privilege.

Anthony Z. Roisman, Esq.  
September 23, 2005  
Page 2

Finally, in your letter you refer to "previous discussions" you have had with Brooke Poole (formerly Counsel for the Staff in this proceeding), concerning the timeliness of any motion to compel that you may wish to file before the Atomic Safety and Licensing Board. As you know, I was not privy to any such previous discussions. However, I am not comfortable with your interpretation of those discussions which would, in effect, provide an extended time limit for your filing any motion to compel. Accordingly, while I am ready and willing to discuss any request for documents in advance of your filing a motion to compel, henceforth any extensions of time for the filing of a motion to compel should be discussed with me on a case-by-case basis. In the absence of any agreement for such an extension on a case-by-case basis, you should not assume that the Staff consents to an extension of the time for the filing of a motion to compel.

Please do not hesitate to contact me if you have any questions in this regard.

Sincerely,



Sherwin E. Turk  
Special Counsel for Litigation

cc: Sara Hofmann, Esq.

**ENCLOSURE 4**

**SEPTEMBER 28, 2005, LETTER FROM ANTHONY ROISMAN  
TO SHERWIN TURK**

**NATIONAL LEGAL SCHOLARS LAW FIRM, P.C.**

2005 OCT -5 AM 9:37  
64 EAST THETFORD ROAD LYME, NH, 03768  
603.795.4245 603.795.4246 (FAX)  
WWW.NATIONALLEGALSCHOLARS.COM

**MANAGING PARTNER**

**ANTHONY Z. ROISMAN**

Dartmouth College (Research Fellow)\* □  
aroisman@nationallegalscholars.com

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Duke University Law School\*□

**PROF. SEAN DONAHUE**

Washington & Lee Univ. Law School (visiting)\*□

**PROF. JAY M. FEINMAN**

Rutgers Law School-Camden\*□

**DAVID G. GOLDBERG**

New York, NY □

**PROF. MICHAEL H. GOTTESMAN**

Georgetown Univ. Law Center\*□

**PROF. RICHARD J. LAZARUS**

Georgetown Univ. Law Center\*□

**AFFILIATED ATTORNEYS**

**JONATHAN S. MASSEY**

Bethesda, MD □

**PROF. STEPHEN A. SALTZBURG**

George Washington University Law School\*□

**PROF. ALLAN R. STEIN**

Rutgers Law School-Camden\*□

**PROF. JOHN F. VARGO,**

Indiana University Law School \*□ (retired)

**PROF. ALVIN S. WEINSTEIN**

Prof. Emeritus, Carnegie-Mellon University\*□

**PROF. ROBERT F. WILLIAMS**

Rutgers Law School-Camden\*□

\* **FOR IDENTIFICATION ONLY**

□ **NOT ADMITTED IN NEW HAMPSHIRE**

September 28, 2005

Sherwin E. Turk  
Special Counsel for Litigation  
Mail Stop O-15 D21  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001

Re: VYUprate - Docket No. 50-271 (ASLBP No. 04-832-02-OLA)

Dear Sherwin:

This letter responds to your letter of September 23, 2005 which was sent to me by regular mail, not e-mail, and thus was not received by me until September 27, 2005. DPS will file its Motion to Compel with regard to the documents NRC Staff has refused to produce within the five days prescribed by the agreement reached between NRC Staff and DPS.

Your letter also asserts that you believe you are entitled to renege on an agreement reached between DPS and NRC Staff merely because you were not the attorney who made the agreement in the first instance. In particular, you allege that you are not comfortable with my "interpretation of those discussions which would, in effect, provide an extended time limit for . . . filing any motion to compel." Since those discussions between your predecessor and myself were reduced to writing and since my "interpretation" conforms in all respects with those writings, you have absolutely no basis to insist that DPS discuss with you the obtaining of an

extension of time to file Motions to Compel with regard to improper claims of a deliberative process privilege by NRC Staff. For your edification, I reproduce the relevant correspondence:

On July 19, 2005, Brooke Poole, who had entered an appearance as counsel of record for NRC Staff and was still functioning in that capacity at that time wrote the following:

Tony and Sara: This is to memorialize the brief conversation I had with Tony during a break in today's ACRS meeting, and to be certain we had a shared understanding on what I agreed to. I understand you have interest in some documents the Staff has designated as subject to withholding pursuant to the deliberative process privilege. I requested to Tony that, prior to the State's filing a motion to compel, that you provide me with a list of the documents you would be interested in seeing. The Staff will then consider whether any documents, or portions thereof, can be released.

Tony then asked if I would agree to "freeze" the deadline for filing a motion to compel (since 10 CFR 2.323(a) requires that motions be filed within 10 days of the initiating event). The Staff's last hearing file update, Supplement 10, was served on Thursday the 7th, and re-served on July 13. Notwithstanding the fact that all parties were served the electronic version of the filing on July 7th, I consider the service date as July 13, since the Staff made the error with the hard copies. The 10-day window for Supplement 10 is up on July 25 (as I count it). The Staff agrees to not challenge any subsequent motion to compel on the basis of timeliness of the motion, with respect to documents in Supplement 10 only, should the State file a motion to compel after we have discussed the documents.

To be clear, however, the Staff does not waive any timeliness arguments with respect to documents from previous hearing file supplements or the initial hearing file. Further, of course, we don't waive any substantive arguments that we would make with respect to Supplement 10 (or any other documents).

Thanks. I will look forward to receiving your letter on this topic, and the list of documents in which the State is interested.

If you have any questions, please call me.

Brooke  
301-415-1556

On July 20, 2005 I wrote a letter to Brooke Poole which included the following:

Consistent with our discussion yesterday during the lunch break at the ACRS Subcommittee meeting and your confirmatory e-mail this morning, I understand that the Staff agrees that the time for filing a motion with the ASLB regarding the failure to produce the identified documents will be extended until a reasonable time following a response to this letter from the Staff. I suggest the time be 5 business days from the date of the response. I also propose the Staff provide its response to this letter request within

the next two weeks. Since technically an "agreement" between us as to a filing deadline set by the Regulations is ineffective, I propose we agree that I may advise the ASLB of our agreement and that the Staff will not oppose any motion with regard to these documents that we file based on timeliness.

If my understanding of our agreement as to process is in error, please respond within the next two days so we can iron out any differences. Thank you for consideration of our request.

In a letter dated August 3, 2005, Ms. Poole, wrote the following:

Tony:

This responds to your voice mail of yesterday, August 2. As I understand it, DPS would like to enter into an arrangement regarding questions to the Staff's Deliberative Process Privilege Logs. We agree that an informal arrangement can be made with respect to future hearing file/mandatory disclosure supplements filed in this proceeding going forward. The following summarizes my understanding of the issue and the Staff's position.

To the extent that DPS challenges the Staff's decision to withhold certain documents pursuant to the deliberative process privilege, DPS would like to enter into an arrangement with the Staff to consult on certain documents prior to the filing by DPS of a motion to compel disclosure. Under such an arrangement:

(1) DPS would have ten (10) days from the date of service of the hearing file/mandatory disclosure update in question to provide to Staff counsel a list (in writing) of the documents challenged. The Staff requests that the DPS written request be transmitted via e-mail, with a conforming hard copy via U.S. mail.

(2) The Staff would have a reasonable period of time (I propose two weeks or ten business days) from the date of receipt of the e-mail to respond to the DPS request. The Staff would then respond in writing (by e-mail and hard copy, as described above) to DPS's request.

(3) To the extent DPS is not satisfied with the Staff's answer, it would then have five business days in which to file a motion to compel with the Licensing Board. In responding to the motion to compel, the Staff would not object to the motion on the basis of timeliness. (As I have previously stated, of course, the Staff does not waive any substantive objections that it would otherwise make, and it does not waive any timeliness objection with respect to documents provided in the initial disclosures or other, previous supplements, apart from the specific supplement in question.)

The Staff agrees that the consultative process described above would serve as the consultation required pursuant to 10 C.F.R. 2.323(b).

If this arrangement is amenable to you, let me know by return e-mail.

Thanks,  
Brooke Poole  
301-415-1556

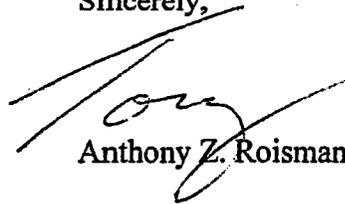
I responded to that letter from Ms. Poole on August 9, 2005 stating, in part, as follows:

Consistent with our previous discussions, I understand that the Staff agrees that the time for filing a motion with the ASLB regarding the failure to produce the identified documents will be extended until a reasonable time following a response to this letter from the Staff. I suggest the time be 5 business days from the date of the response. I also propose the Staff provide its response to this letter request within the next two weeks. Since technically an "agreement" between us as to a filing deadline set by the Regulations is ineffective, I propose we agree that I may advise the ASLB of our agreement and that the Staff will not oppose any motion with regard to these documents that we file based on timeliness.

\* \* \*

Under the circumstances DPS intends to continue to abide by the agreement reached between it and NRC Staff and to file any Motions to Compel within 5 days of receipt of the NRC Staff response to DPS objections to the deliberative process designation of identified NRC Staff documents. Should you attempt to breach the agreement by raising timeliness objections to the Motion to Compel, other than those specifically preserved in the agreement, we will treat it as a violation of 10 CFR §2.314(a) and will ask the Hearing Board to invoke appropriate sanctions as authorized by 10 CFR § 2.314(c) against you and any of your superiors who approved your unwarranted disregard of an agreement reached with DPS by the NRC Staff.

Sincerely,



Anthony Z. Roisman

cc: Sarah Hofmann

**ENCLOSURE 5**

**NOVEMBER 15, 2005, LETTER FROM SHERWIN TURK  
TO ANTHONY ROISMAN**



UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20555-0001

November 15, 2005

OFFICE OF THE  
GENERAL COUNSEL

Anthony Z. Roisman, Esq.  
National Legal Scholars Law Firm, P.C.  
84 East Thetford Road  
Lyme, NH 03768

In the Matter of  
Entergy Nuclear Vermont Yankee, LLC, *et al.*  
(Vermont Yankee Nuclear Power Station)  
Docket No. 50-271-OLA (Extended Power Uprate)

Dear Mr. Roisman:

I am writing in response to your letter of November 14, 2005, concerning the NRC Staff's monthly (now bi-weekly) updates of the hearing file in this proceeding. In particular, you refer to (a) two requests you have submitted on behalf of the Vermont Department of Public Service ("DPS"), dated October 3 and November 3, 2005, for the production of documents identified on the Staff's pre-decisional deliberative process privilege logs, and (b) a previous agreement you had reached with Brooke Poole, Esq., on behalf of the Staff, pertaining to procedures for handling your requests for documents and an extension of time for DPS to file any motions to compel. A response to the specific document requests contained in your letters of October 3 and November 3, 2005, will be provided by the Staff in a separate letter.

I have previously expressed my views concerning your former agreement with the Staff, in my letter to you dated September 23, 2005. Therein, I expressed my belief that the agreement you reached with Ms. Poole, as you described it, would provide you with an unduly extended time limit for filing any motions to compel – and I clearly informed you that the Staff would not adhere to that agreement in the future. In this regard, I stated as follows:

[W]hile I am ready and willing to discuss any request for documents in advance of your filing a motion to compel, henceforth any extensions of time for the filing of a motion to compel should be discussed with me on a case-by-case basis. In the absence of any agreement for such an extension on a case-by-case basis, you should not assume that the Staff consents to an extension of the time for the filing of a motion to compel.

In our subsequent telephone conversation, I further explained that your interpretation of the agreement you had reached with Ms. Poole could constitute an unauthorized and improper extension of the Licensing Board's mandatory filing requirements in this proceeding – and, further, that this procedure would impose an excessive burden on the Staff, by requiring the Staff to re-review each document that you may request, after having previously reviewed it to determine if the privilege applies and determining that it should be withheld and identified on the privilege log.

Anthony Z. Roisman, Esq.  
November 15, 2005  
Page 2

Your letter of November 14, like your letters of October 3 and November 3, 2005, cited therein, fails to recognize that my letter of September 23 effectively terminated any previous agreement that may have existed between DPS and the Staff relating to your document requests and the time in which DPS is required to file any motions to compel. In light of my clear disavowal of any such previous agreement, I see no basis for your repeated insistence that such an agreement continues to exist. Instead, as indicated in my letter of September 23, while I am ready and willing to discuss specific document requests with you, any request for an extension of time should be discussed with me on a case-by-case basis.

In your letters and in your pending motions to compel, you have repeatedly requested and/or sought to compel the production of privileged documents, based upon what appears to be an incorrect and unfounded interpretation of the deliberative process privilege. Our disagreement as to the applicability and scope of the deliberative process privilege is recounted in my letter of September 23, in which I stated as follows:

In our telephone discussion of September 16, you stated your view that the pre-decisional deliberative process privilege does not begin to apply until the Staff has concluded its effort to gather information and has commenced to "deliberate" on whether to grant the application." You were unable to cite any legal authority for that view, and I am not aware of any valid basis for it. In fact, the deliberative process includes various steps, including deliberations as to the sufficiency of the information contained in the application, and the need for further information in order to reach a final regulatory decision. Your interpretation would render the privilege meaningless; further, your request for so many internal NRC Staff communications, without showing any reason why the documents should be disclosed, represents a fundamental and unfounded challenge to the deliberative process privilege.

Given this fundamental disagreement as to the proper scope and applicability of the deliberative process privilege, I see no reason for DPS and the Staff to engage in repeated argument. The issue raised in your requests is not whether the documents were properly described in the privilege log, but whether they are properly protected from disclosure under the privilege. That issue, as well as whether DPS has identified any compelling need to obtain the documents, is now pending before the Licensing Board, in connection with your first and second motions to compel. I do not believe further argument between us would serve any useful purpose.

Finally, I do not agree with your suggestion that there has not been "a good faith effort on the Staff's part to resolve these disputes short of filing motions to compel." Like DPS, the Staff "wants . . . to do our jobs, not [to engage in] ongoing procedural litigation." Unfortunately, when I invited your suggestions as to how to resolve this dispute, the only "alternatives" you suggested would essentially require the Staff to waive the privilege (e.g., you suggested that the State's expert should be allowed to see all of the documents withheld under the deliberative

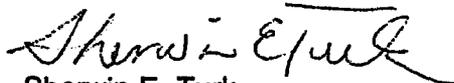
Anthony Z. Roisman, Esq.  
November 15, 2005  
Page 3

process privilege, and the State would then move to compel only those documents which it found to be of particular interest). I would not describe that as a "good faith" suggestion.

The Staff recognizes that DPS has a valid interest in the proper conduct and outcome of this proceeding. At the same time, the Staff has an interest in protecting its ability to engage in open and unfettered deliberations, in order to assure the reliability of the agency's decision-making process. Consistent with these principles, the Staff has properly compiled and regularly updated the hearing file for use by the parties and the Licensing Board in this proceeding, in accordance with the Commission's regulations in 10 C.F.R. § 2.336(b)(1)-(4). Further, in accordance with 10 C.F.R. § 2.336(b)(5) and well-established legal precedent, the Staff has compiled its privilege logs and identified therein those documents which it believes should be withheld as privileged. I regret that you do not agree with the Staff's view of the scope and applicability of the deliberative process privilege in this proceeding.

Please do not hesitate to contact me in the future if there are specific documents which you believe should be produced. As I stated in my letter of September 23, I remain ready and willing to discuss any request for specific documents which DPS may have. I do not believe, however, that repeated arguments over the general scope and applicability of the deliberative process privilege, or the existence of a former agreement which has now been terminated, would constitute a productive use of our time or serve to expedite the Staff's consideration of any specific document requests which you may have.

Sincerely,



Sherwin E. Turk  
Counsel for NRC Staff

cc: Sarah Hofmann, Esq.

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)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER TO VERMONT DEPARTMENT OF PUBLIC SERVICE'S THIRD MOTION TO COMPEL," in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class; or as indicated by an asterisk (\*), by deposit in the Nuclear Regulatory Commission's internal mail system; and by e-mail as indicated by a double asterisk (\*\*), this 2<sup>nd</sup> day of December, 2005.

Alex S. Karlin, Chair\*\*  
Administrative Judge  
Atomic Safety and Licensing Board Panel  
Mail Stop T-3F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
E-mail: ask2@nrc.gov

Dr. Anthony J. Baratta\*\*  
Administrative Judge  
Atomic Safety and Licensing Board Panel  
Mail Stop T-3F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
E-mail: ajb5@nrc.gov

Lester S. Rubenstein\*\*  
Administrative Judge  
Atomic Safety and Licensing Board Panel  
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Tucson, AZ 85718  
E-mail: lesrrr@comcast.net

Office of the Secretary\*\*  
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Jered J. Lindsay, Esq.\*\*  
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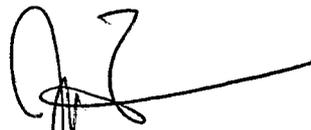
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E-mail: [sarah.hofmann@state.vt.us](mailto:sarah.hofmann@state.vt.us)

Jay E. Silberg, Esq.\*\*  
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