

**RAS 11407**

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

**DOCKETED 03/24/06**

**SERVED 03/24/06**

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

March 24, 2006

MEMORANDUM AND ORDER

(Clarifying the Factual Scope of NEC Contention 4 and Denying Untimely Motion for  
Enlargement of Time to File Reply Brief)

During the prehearing conference call of March 10, 2006 in this matter, the Board ruled orally that the factual scope of New England Coalition (NEC) Contention 4 is limited to the specific deficiencies alleged by NEC's expert, Dr. Ross B. Landsman, as they relate to the seismic and structural condition of the cooling tower and two safety-related cooling tower cells of the alternate cooling system (ACS), as analyzed in the ABS Report. See Tr. at 820-22. This Memorandum and Order now provides the written rationale for that decision. In addition, the Board denies NEC's motion to retroactively extend the time within which to file its reply brief.

I. BACKGROUND

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. On August 30, 2004, NEC challenged the proposed EPU by filing a request for a

hearing, which included several proposed contentions.<sup>1</sup> On November 22, 2004, this Board admitted two of NEC's contentions, including NEC 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 seismic and structural analysis of the ACS cooling tower cells that addressed the upgrades associated with the proposed EPU.<sup>2</sup> Based on this analysis, known as the ABS Report, Entergy filed a motion to dismiss NEC Contention 4 as moot, or in the alternative, for summary disposition.<sup>3</sup> On September 1, 2005, we granted Entergy's motion to dismiss the contention as moot, finding that NEC Contention 4 was a contention of omission that was cured by the ABS Report. See LBP-05-24, 62 NRC 429 (2005). We did, however, allow NEC the opportunity to file a new contention challenging "Entergy's new seismic and structural analysis." Id. at 433.

NEC duly requested leave to file a new contention and submitted a new NEC Contention 4 on September 21, 2005.<sup>4</sup> We granted NEC's motion and admitted new NEC Contention 4 on

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<sup>1</sup> [NEC]'s Request for Hearing, Demonstration of Standing, Discussion of Scope of Proceeding and Contentions (Aug. 30, 2004) [NEC Original Petition].

<sup>2</sup> Entergy's Motion to Dismiss as Moot, or in the Alternative, for Summary Disposition of [NEC]'s Contention 4 (July 13, 2005), Exh. 2, ABS Consulting, Cooling Tower Seismic Evaluation (Apr. 12, 2005) [ABS Report].

<sup>3</sup> Entergy's Motion to Dismiss as Moot, or in the Alternative, for Summary Disposition of [NEC]'s Contention 4 (July 13, 2005).

<sup>4</sup> [NEC]'s Request for Leave to File a New Contention (Sept. 21, 2005) [NEC Request].

December 2, 2005. LBP-05-32, 62 NRC 813 (2005). As modified by the Board, the contention states:

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 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.

Id. at 827. We explained that the contention satisfied the requirements for a new contention because the contention “challenges the sufficiency of the ABS Report, which, because it filled an omission, necessarily constitutes ‘information . . . not previously available.’” Id. at 820.

Later, at a prehearing conference call with parties, the Board learned that there was a disagreement about the scope of newly admitted NEC Contention 4. In order to resolve this dispute in a timely manner before the submission of written testimony, we instructed the parties to brief the issue. Tr. at 728-30, 765.<sup>5</sup> On February 14, 2006, NEC filed a brief concerning the factual scope of NEC Contention 4.<sup>6</sup> A week later, Entergy and the Staff filed responses.<sup>7</sup> NEC missed the February 28, 2006 deadline for a reply brief, but, on March 7, 2006, filed a motion

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<sup>5</sup> Pursuant to NEC’s unopposed request, we modified the briefing schedule, giving NEC an additional week to address the issue and prepare its initial brief. Licensing Board Order (Granting Unopposed Motion for Enlargement of Time) (Feb. 7, 2006) (unpublished).

<sup>6</sup> [NEC]’s Brief on the Scope of its Contention Regarding Inadequate Analysis of the Vermont Yankee Alternate Cooling System Performance Under Conditions of Extended Power Uprate (Feb. 14, 2006) [NEC Brief].

<sup>7</sup> Entergy’s Response to the [NEC]’s Brief on the Scope of Modified Contention NEC 4 (Feb. 21, 2006) [Entergy Response]; NRC Staff’s Response to [NEC]’s Brief Concerning the Scope of NEC Contention 4 (Feb. 21, 2006) [Staff Response].

for a retroactive enlargement of time, along with a reply brief.<sup>8</sup>

## II. POSITION OF THE PARTIES

Relying on the plain language of the admitted contention, NEC asserts the Alternate Cooling System (ACS) “in its entirety,” not just the cooling tower and associated safety cells, is within the scope of this proceeding. NEC Brief at 3. The relevant language that NEC points to in the contention alleges that Entergy’s application “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 . . . will be able to withstand the effects of an earthquake and other natural phenomena.” LBP-05-32, 62 NRC at 827 (emphasis added). Thus, NEC maintains that Entergy may not now, months after the contention has been admitted, seek reconsideration of that order. NEC Brief at 4.

Entergy argues that the scope of NEC Contention 4 is limited to ABS Report, which is the only new information that justified admitting the new contention. Entergy Response at 6. Because the ABS Report addresses only “the seismic and structural integrity of the Alternate Cooling System cell and is totally silent as to any other component of the ACS,” Entergy maintains that “any claims against the ACS (other than the Alternate Cooling System cell) are not based on the ABS Report and accordingly are outside of the permissible scope of the new contention.” Entergy Response at 6. Furthermore, Entergy asserts that any claim by NEC that the contention reaches beyond the ACS cell is vague and unsupported. Entergy Response at 8. Entergy explains that the Board’s use of the phrase “ACS” in NEC Contention 4 was shorthand for “Alternate Cooling System cell,” and was not meant to refer to the entire Alternate

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<sup>8</sup> [NEC]’s Unopposed Motion for Enlargement of Time to File a Reply Brief (Mar. 7, 2006); [NEC]’s Reply to Applicant and NRC Staff Answers to [NEC]’s Brief on the Scope of its Contention Regarding Inadequate Analysis of the Vermont Yankee Alternate Cooling System Performance Under Conditions of Extended Power Uprate (Mar. 7, 2006).

Cooling System as a whole, which is composed of a number of components at various locations, but is not defined in the ABS Report or the Board's decision. Entergy Response at 9-10.

The Staff recounts the procedural history in this proceeding and maintains that NEC has never raised and never supported the broad concerns regarding the entire Alternate Cooling System that NEC now maintains are within the scope of the contention. Staff Response at 7-9. Based on this lack of previous support, the Staff objects to NEC's claim that the ability of "the entire ACS" to withstand a seismic event is within the scope of NEC Contention 4, emphasizing that "the only issues which are within the scope of this contention are the issues which were timely filed and properly supported by NEC in the bases for the contention." Staff Response at 9. Thus, according to the Staff, NEC's contention submission properly challenged the adequacy of the ABS Report, but failed to provide support for the more generalized proposition that the "entire" ACS is deficient. Staff Response at 9.

On March 7, 2006, seven days after the already extended deadline of February 28, 2006, for filing its reply brief,<sup>9</sup> NEC filed an unopposed motion for retroactive enlargement of time to file a reply brief and also filed its proposed reply brief.<sup>10</sup>

### III. RULING ON MOTION FOR RETROACTIVE ENLARGEMENT OF TIME TO FILE REPLY

We find no basis to support NEC's request for a retroactive enlargement of time to file its reply brief. This Board had already granted NEC's request for a seven day extension for its

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<sup>9</sup> See Licensing Board Order (Granting Unopposed Motion for Enlargement of Time) (Feb. 7, 2006) at 2 (unpublished).

<sup>10</sup> [NEC]'s Unopposed Motion for Enlargement of Time to File a Reply Brief (Mar. 7, 2006); [NEC]'s Reply to Applicant and NRC Staff Answers to [NEC]'s Brief on the Scope of its Contention Regarding Inadequate Analysis of the Vermont Yankee Alternate Cooling System Performance Under Conditions of Extended Power Uprate (Mar. 7, 2006).

initial brief on this issue. The February 28, 2006 deadline for NEC's reply brief was clearly stated. It is not unreasonable to expect a party, even a busy pro se party, to read a simple two page decision granting it the very relief that it requested. Inadvertently writing the wrong deadline in a calender does not meet the Commission's "unavoidable and extreme circumstances" standard for granting an extension of time. See Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 21 (1998), 63 Fed. Reg. 41,872, 41,874 (Aug. 5, 1998). The fact that NEC filed the motion seven days after the deadline had expired, reflects a cavalier approach that bodes ill for the remainder of the schedule in this proceeding.<sup>11</sup> Accordingly, the motion is denied and the proffered reply brief is stricken.

#### IV. RULING ON THE FACTUAL SCOPE OF NEC CONTENTION 4

We find that the factual scope of NEC Contention 4 is limited to the seven areas where NEC's expert, Dr. Landsman, alleges that the analysis of the seismic and structural condition of the two safety-related cooling tower cells (CT2-1 and CT2-2) contained in the ABS Report, is "grossly deficient."<sup>12</sup> NEC Contention 4 cannot be read apart from the procedural history in this proceeding and NEC's supporting bases, both of which inform our decision. In addition, the ABS Report, which is the subject of NEC's complaint, deals only with these two cells.<sup>13</sup> As this Board and the parties turn from NEC's bare contention, to the specific issues that must be covered in the written testimony, written rebuttal testimony, and written briefs and materials that

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<sup>11</sup> This is the not first time that NEC has not troubled itself enough to request an extension until after the relevant deadline had already passed. Its first such motion was filed on December 23, 2005. See [NEC]'s Request for Extension of Time (Dec. 23, 2005). Its third such motion, seeking relief from a March 17, 2006 deadline, was filed on March 21, 2006. See [NEC]'s Unopposed Motion for Enlargement of Time to File a Reply Brief (Mar. 21, 2006).

<sup>12</sup> NEC Request, Declaration of Dr. Ross B. Landsman Supporting [NEC]'s Alternate Cooling System Contention (Sept. 19, 2005) at 2.

<sup>13</sup> "Only cells CT2-1 and CT2-2 are evaluated in this calculation." ABS Report at 6.

must be submitted shortly herein, we deem NEC's challenge to be focused and limited to the seven alleged deficiencies as they may apply to the cooling tower cells CT2-1 and CT2-2.

The evolution and history of NEC Contention 4 supports this conclusion. The deadline for filing contentions on the Vermont Yankee EPU application was August 30, 2004.<sup>14</sup> Any contention alleging an inadequacy or omitted analysis in the seismic and structural integrity of the entire Alternate Cooling System should have been raised by that deadline. NEC's original contentions did not raise concerns regarding the entire Alternate Cooling System. NEC did, however, allege that Entergy improperly omitted an analysis of the "seismic and structural integrity of the cooling towers under uprate conditions, in particular the Alternate Cooling System cell." NEC Original Petition at 11 (emphasis added). Thus, by failing to submit a contention dealing with other aspects of the Alternate Cooling System, NEC missed the opportunity to file a timely contention on these subjects.

The omission that NEC alleged in original NEC Contention 4 was cured by the ABS Report. It was for this reason that we dismissed the original NEC Contention 4 in LBP-05-24. Anticipating that NEC might seek to challenge Entergy's new analysis found in the ABS Report, we gave NEC the opportunity to file a new contention challenging "Entergy's new seismic and structural analysis," i.e., the ABS Report. LBP-05-24, 62 NRC at 433 (emphasis added).

NEC followed suit and filed a new contention, which addressed alleged inadequacies in the ABS Report. Specifically, NEC, through a declaration by Dr. Landsman, alleged that the ABS Report was "grossly deficient" in seven respects:

- (1) ABS did not conduct a physical examination of the alternate cooling tower cell;
- (2) ABS's report lacks adequate documentation of the breaking strength of the tie

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<sup>14</sup> See Notice of Consideration of Issuance of Amendment to Facility Operating License and Opportunity for a Hearing, 69 Fed. Reg. 39,976 (July 1, 2004).

- rods;<sup>15</sup>
- (3) ABS's report does not use added conservatism in accounting for the effects of aging mechanisms and/or moisture and/or cooling system chemicals;
  - (4) ABS's structural analysis fails to assign a negative value to the replacement rate for degraded members;
  - (5) ABS's report fails to account for changes to ACS after the report was completed;
  - (6) 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
  - (7) ABS does not provide reasonable assurance of seismic qualification of the ACS.

NEC Request at 5-6. We admitted the new version of NEC Contention 4 based upon these alleged deficiencies. Our contention decision acknowledged the importance of the ABS Report, stating that "NEC 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." LBP-05-32, 62 NRC at 820. Furthermore, we also held that NEC's four bases and Dr. Landsman's seven listed inadequacies "define the basic scope of the proposed contention." Id. at 823.

In summary, NEC's original Contention 4 clearly focused on the cooling tower cells. NEC's new Contention 4 challenges the ABS report, which deals solely with the cooling tower cells. NEC cannot now expand the scope of this contention to include additional components without satisfying the requirements for new, amended, or late contentions. Therefore, to alleviate any confusion regarding the scope of this proceeding, we clarify that the scope of this

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<sup>15</sup> The alleged deficiency related to these tie rods, which are part of the interface between the two safety-related ACS cooling tower cells and the remainder of the cooling system, is also included in the admitted scope of NEC Contention 4.

contention is limited to the condition of the two safety-related cooling tower cells that are analyzed in the ABS Report and addressed by Dr. Landsman in the declaration accompanying NEC's new contention filing and that the references to "ACS" in the contention shall be deemed to mean these two cooling tower cells.

It is so ORDERED.

THE ATOMIC SAFETY  
AND LICENSING BOARD<sup>16</sup>

*/RA/*

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Alex S. Karlin, Chairman  
ADMINISTRATIVE JUDGE

*/RA/*

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Anthony J. Baratta  
ADMINISTRATIVE JUDGE

*/RA by G. P. Bollwerk for/*

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Lester S. Rubenstein  
ADMINISTRATIVE JUDGE

Rockville, Maryland

March 24, 2006

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<sup>16</sup> 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 NRC Staff.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (CLARIFYING THE FACTUAL SCOPE OF NEC CONTENTION 4 AND DENYING UNTIMELY MOTION FOR ENLARGEMENT OF TIME TO FILE REPLY BRIEF) 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  
(CLARIFYING THE FACTUAL SCOPE OF  
NEC CONTENTION 4 AND DENYING UNTIMELY  
MOTION FOR ENLARGEMENT OF TIME TO FILE REPLY BRIEF)

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[Original signed by Evangeline S. Ngbea]

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
this 24<sup>th</sup> day of March 2006