

March 28, 2006

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

**DOCKETED
USNRC**

Before the Atomic Safety and Licensing Board

March 28, 2006 (11:08am)

In the Matter of)
)
)
ENTERGY NUCLEAR VERMONT)
YANKEE, LLC and ENTERGY)
NUCLEAR OPERATIONS, INC.)
(Vermont Yankee Nuclear Power Station))
)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Docket No. 50-271

ASLBP No. 04-832-02-OLA
(Operating License Amendment)

**ENTERGY'S RESPONSE TO
NEW ENGLAND COALITION'S BRIEF ON THE LEGAL SCOPE
OF MODIFIED NEC CONTENTION 4**

Pursuant to the Atomic Safety and Licensing Board's ("Board") Order (Supplemental Schedule) dated March 14, 2006 ("Order") and its subsequent Order (Granting Motion for Enlargement of Time Related to NEC Contention 4 and Granting Enlargement of Time, Subject to Sanction, Related to NEC Contention 3) and subsequent Memorandum, both dated March 23, 2006, Applicants Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively "Entergy") hereby respond to the New England Coalition's ("NEC") Brief on the Legal Scope of New England Coalition Contention 4 ("NEC Brief") dated March 17, 2006 (but actually served on the parties and the Board on March 21, 2006) on the legal standards that apply to Modified NEC Contention 4. As discussed below, the NEC Brief fails to comply with the Board's requirement that NEC identify which of the three legal standards cited in the contention are allegedly not satisfied with regard to each of the deficiencies asserted by NEC to exist in the Alternate Cooling System ("ACS")¹ at the Vermont Yankee nuclear power plant ("VY"), and

¹ The term "ACS" in this brief refers to the portion of the ACS contained in the Alternate Cooling System Cell in the West Cooling Tower and its seismic evaluation in the ABS Report. Memorandum and Order (Clarifying the Factual Footnote continued on next page

which provisions of the legal standards are allegedly not satisfied. The Coalition's failure to comply with the Board's directive has obviously made it impossible for Entergy to address the specific standards which NEC should have – but failed to – identify.

Moreover, ignoring the Board's direction to focus on the three legal standards cited in the contention, NEC raises several additional legal standards not cited in the contention, but which NEC asserts "are included in the bases argued for admittance of the contention." NEC Brief at 3.² Indeed, rather than providing the clarifications sought by the Board, NEC further confuses matters by asserting the violation of additional, clearly inapplicable, legal standards.

BACKGROUND

As admitted by the Board, Modified NEC Contention 4 reads:

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.

Footnote continued from previous page

Scope of NEC Contention 4 and Denying Untimely Motion for Enlargement of Time to File Reply Brief), March 24, 2006, slip. op. at 8-9.

² In fact, the only NRC regulation beyond those cited in the text of Modified NEC Contention 4 that is mentioned in NEC's request for admission of the contention is 10 C.F.R. § 50.9. This regulation is cited in connection with alleged deficiencies in the ABS Report that reflects the updated seismic analysis of the ACS, but the discussion is not directed at the condition of the ACS itself. See New England Coalition's Request for Leave to File a New Contention at 2 (Sept. 21, 2005) ("NEC New Contention Request") at 3-4.

Entergy Nuclear Vermont Yankee L.L.C. and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-05-32, 62 NRC 813, 827 (2005).

At successive telephone prehearing conferences held on January 24 and March 10, 2006 the Board expressed the concern that this contention refers in the alternative to three legal standards that allegedly are being violated by the physical condition of the ACS. *See* Tr. 735-38, 788-92. The Board found this statement in the alternative “problematic” and directed NEC to provide clarification of its claims:

----- Mr. Shadis, you need to tell us what deficiencies you are alleging and against which standards they might apply. For example, as I understand it, you have identified several deficiencies. A, B, and C let's call them. Deficiency A may be measured against regulation or standard X. Alleged deficiency B may be measured against a different one. I don't know. You have to tell me what you think.

Tr. 792. This directive was reflected in the Order as follows:

On March 17, 2006, NEC shall submit a statement or brief, not to exceed ten pages, that identifies which of these three legal standards are allegedly not satisfied with regard to each of the deficiencies asserted by NEC. This statement or brief should also specify with more particularity, which provisions of the legal standards are allegedly not satisfied, *e.g.*, which part of Appendix A of Part 100 or which part of the plant specific licensing basis are not met.

Order at 1-2.

DISCUSSION

At the outset, NEC states that “[t]he short answer to which of the three legal standards apply is that all three legal standards apply.” NEC Brief at 3. This assertion is totally unsupported, wholly unexplained, and clearly erroneous.

One of the standards invoked by NEC as applying to the alleged deficiencies in the ACS is Appendix S to 10 C.F.R. Part 50 (“Appendix S”). Appendix S, “Earthquake Engineering Criteria for Nuclear Power Plants,” was issued in 1996. *See* 61 Fed. Reg. 65173 (Dec. 11, 1996). The introduction to Appendix S reads:

This appendix applies to applicants for a design certification or combined license pursuant to part 52 of this chapter or a construction permit or operating license pursuant to part 50 of this chapter on or after January 10, 1997.

Appendix S, "General Information." Thus, Appendix S applies only to those seeking to license new nuclear power plants "on or after January 10, 1997." By its own terms, it does not apply to already licensed facilities, such as VY. NEC provides no explanation to the contrary, nor does it identify any specific deficiency related to Appendix S, as required by the Board's Order. NEC also fails to explain its prior statements questioning the applicability of Appendix S to VY.³

The second legal standard that NEC invokes as applying to the alleged deficiencies in the ACS is Appendix A to 10 C.F.R. Part 100 ("Appendix A"). Appendix A is entitled "Seismic and Geologic Siting Criteria for Nuclear Power Plants." It states:

It is the purpose of these criteria to set forth the principal seismic and geologic considerations which guide the Commission in its evaluation of the suitability of proposed sites for nuclear power plants and the suitability of the plant design bases established in consideration of the seismic and geologic characteristics of the proposed sites.

Appendix A, Section I, "Purpose." As this statement indicates, Appendix A is concerned solely with evaluating, in advance of the licensing of a nuclear power plant, the suitability of the potential plant site and the suitability of the plant's proposed seismic design bases. Both the VY site and its seismic design bases were selected decades ago at the time of original plant licensing, years before the 1973 promulgation of Appendix A. *See* 38 Fed. Reg. 31281 (Nov. 13, 1973). Therefore, Appendix A is inapplicable to the ACS.⁴

³ "Because Vermont Yankee Nuclear Power Station was granted a construction permit before May 21, 1971, Appendix S may not provide the applicable seismic design basis requirements." NEC New Contention Request at 2.

⁴ The only mention of 10 CFR Part 100, Appendix A in the USAR is in connection with post-earthquake assessment, and is wholly unrelated to facility design and is therefore wholly unrelated to Modified NEC Contention 4. USAR sec. 12.2.1 describes the strong motion accelerograph located in the Reactor Building for continuous monitoring of earthquakes and states that its primary function "is to provide data which will be of value in promptly assessing the condition of the plant subsequent to an earthquake per 10CFR100, Appendix A."

The third legal standard cited in Modified NEC Contention 4 as applying to the alleged deficiencies in the ACS is “the plant specific original licensing basis.” However, such a general reference to VY’s licensing basis is too vague to be meaningful. In its Brief, NEC proceeds to quote, at length and without explanation, from various plant licensing documents including (1) the definition of the ACS; (2) the Service Water System Design Basis Document; and (3) the Updated Final Safety Analysis Report. *See* NEC Brief at 4-7. This recitation does nothing to pinpoint which portions of these provisions are allegedly violated by the asserted (but unspecified) deficiencies in the ACS or what the nexus is between those deficiencies and EPU. In addition, most of the licensing documents quoted by NEC (i.e., the descriptions of the Service Water System, the Deep Basin, the RHR Heat Exchangers, and the RHRSW Pumps) are irrelevant to the seismic performance of the portions of the ACS relevant to the contention.

NEC makes the conclusory statement that if the ACS operating under uprate conditions is not shown to be able to withstand an earthquake, “then ENVY has not shown that Vermont Yankee will be operating in conformance with its licensing and design basis for its Alternate Cooling System.” NEC Brief at 7. This statement provides no clarification of how the alleged deficiencies in the ACS relate to the plant’s licensing basis.

Besides its inadequate response to the Board’s request on the three legal standards cited in the contention, NEC for the first time adds several other standards. NEC quotes Draft General Design Criteria 2 and 19 (neither of which were previously cited by NEC in support of this contention), and makes the same conclusory assertion that if the ACS operating under uprate conditions is not shown to withstand an earthquake, “then it has not been shown that Vermont Yankee will be operating in conformance with either the Draft or the General Design Criteria.” (*Id.* at

8).⁵ By invoking the Draft General Design Criteria, NEC is attempting to further expand the list of legal standards allegedly being violated by the deficiencies in the ACS, without providing any of the clarifications sought by the Board.

NEC also argues that the alleged deficiencies in the ACS constitute a violation of the Final General Design Criteria. NEC Brief at 8. NEC, however, recognizes – as it must – that VY is committed to the Draft General Design Criteria, not the Final ones. See NEC Brief at 4. Therefore, NEC’s references to the Final General Design Criteria in its Brief are irrelevant.

NEC adds for good measure a citation to 10 C.F.R. § 50.9(a), which requires that information provided by a licensee to the NRC be “complete and accurate in all material respects,” and claims that the alleged deficiencies in the ACS constitute a non-compliance with this duty to provide accurate information to the Commission. (*Id.* at 8-9). Again, this is an attempt to expand beyond the three legal standards cited in the contention, and one that provides no clarification of the relationship between alleged deficiencies and legal standards. Moreover, NEC totally misconstrues the purposes and applicability of 10 C.F.R. § 50.9. As is well known, this regulation addresses licensee communications with the NRC:

In promulgating section 50.9, the Commission emphasized that forthrightness in communications with the NRC is essential if the NRC is to fulfill its responsibilities to ensure that the use of radioactive material and operation of nuclear facilities are consistent with public health and safety.

Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), DD-97-8, 45 NRC 144, 155 (1997). In other words, 10 C.F.R. § 50.9 has nothing to do with determining whether plant deficiencies exist; it only comes into play when one seeks to assess the accuracy of communications between a licensee and the NRC.

⁵ The reference to Draft General Design Criterion 19 is obviously inapposite. This criterion reads: “Protection systems shall be designed for high functional reliability and in-service testability commensurate with the safety function to be performed.” 32 Fed. Reg. at 10216. The criterion refers to the design of reactor protection systems, not the seismic design of safety-related structures and components.

In summary, rather than specifying “which of these three legal standards are allegedly not satisfied with regard to each of the deficiencies asserted by NEC” as directed by the Board, NEC has attempted to raise for the first time in its Brief, without explanation and without regard for their applicability, several additional regulations allegedly being violated by the condition of the ACS at VY. The scattershot approach adopted by NEC provides no assistance to the Board or the parties in placing NEC’s claims in better focus.

CONCLUSIONS

It should be for neither Entergy, the NRC Staff, nor the Board to divine what NEC had in mind as to the legal standards that would allegedly be violated if the deficiencies claimed in Modified NEC Contention 4 were truly to exist. Certainly, the NEC Brief has not shed the light that the Board called for in its March 14, 2006 Order. The NEC Brief demonstrates once again that Modified NEC Contention 4 is vague and without specificity. There can also be no doubt that two of the three standards cited in the contention – Appendix S to 10 C.F.R. Part 50 and Appendix A to 10 C.F.R. Part 100 – are inapplicable on their face and do not provide a legal basis for NEC’s claims. As to the third standard, “the plant specific original licensing basis,” NEC has failed to provide any clarification of what aspects of the plant’s licensing basis are contravened by the alleged deficiencies.

Under these circumstances, the Board should direct NEC to provide forthwith a definition of the legal bases for its claims in Modified NEC Contention 4 that complies with the terms of the Board’s Order (and provide the NRC Staff and Entergy the opportunity to respond) or face

dismissal of the contention for failure to provide "a specific statement of the issue of law or fact to be raised or controverted." 10 C.F.R. § 2.309(f)(1)(i).

Respectfully submitted,



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Dated: March 28, 2006

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Entergy's Response to New England Coalition's Brief on the Legal Scope of Modified NEC Contention 4" were served on the persons listed below by deposit in the U.S. mail, first class, postage prepaid, and where indicated by an asterisk by electronic mail, this 28th day of March, 2006.

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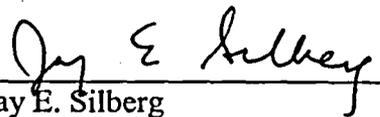
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