May 1, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
ENTERGY NUCLEAR VERMONT YANKEE, LLC and ENTERGY NUCLEAR OPERATIONS, INC.	)	Docket No. 50-271-OLA
	)	
	)	ASLBP No. 04-832-02-OLA
	)	
(Vermont Yankee Nuclear Power Station)	)	

NRC STAFF'S ANSWER TO NEW ENGLAND COALITION'S REQUEST FOR LEAVE TO FILE NEW CONTENTIONS

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1), the NRC Staff ("Staff") hereby responds to "New England Coalition's Request for Leave to File New Contentions" ("Request"), filed by the New England Coalition ("NEC") on April 6, 2006. As set forth below, the Staff submits that NEC's new contentions were filed substantially late without good cause, and that a balancing of the late-filed factors set forth in 10 C.F.R. § 2.309(c) does not support their admission. Further, NEC's new contentions are impermissibly vague and/or are not supported by a sufficient basis as required by 10 C.F.R. § 2.309(f). For these and other reasons more fully set forth below, the Staff respectfully submits that NEC's Request should be denied and its new late-filed contentions should be rejected.

BACKGROUND

This proceeding concerns the application filed by Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc. (collectively "Entergy" or "Applicant") for an amendment to the operating license for the Vermont Yankee Nuclear Power Station ("VYNPS" or "Vermont Yankee"), to authorize an extended power uprate ("EPU"), increasing the maximum power level by approximately 20%. On July 1, 2004, the Commission published in the *Federal*

Register a Notice of Consideration of Issuance and Opportunity for Hearing, which specified, *inter alia*, that any petitions for leave to intervene and contentions concerning the amendment must be filed within 60 days, *i.e.*, by August 30, 2004.[1] NEC timely filed its petition to intervene and its initial contentions on August 30, 2004.[2] On November 22, 2004, the Licensing Board granted NEC's petition to intervene and admitted several of its initial contentions.[3]

Following the Licensing Board's ruling on petitions to intervene and initial contentions, the Staff's review of the requested EPU amendment proceeded. On October 21, 2005, the Staff submitted its Draft Safety Evaluation ("SE") to the Advisory Committee on Reactor Safeguards ("ACRS") for its review, and on November 2, 2005, the Staff issued the Draft SE.[4] The ACRS Subcommittee on Thermal-Hydraulic Phenomena conducted public meetings on the EPU amendment on November 15-16 and November 29-30, 2005 – in which NEC's expert, Dr. Joram Hopenfeld, actively participated on behalf of NEC;[5] and on December 7-9, 2005, the ACRS full committee conducted a public meeting on the requested amendment. On January 4,

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[1] "Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.; Notice of Consideration of Issuance of Amendment to Facility Operating License and Opportunity for a Hearing," 69 Fed. Reg. 39,976 (2004). The Notice advised that "Nontimely . . . contentions will not be entertained absent a determination by the Commission or the presiding officer of the Atomic Safety and Licensing Board that the . . . contentions should be granted based on a balancing of the factors specified in 10 CFR 2.309(a)(1)(i)-(viii)." *Id.*

[2] "New England Coalition's Request for Hearing, Demonstration of Standing, Discussion of Scope of Proceeding and Contentions," dated August 30, 2004.

[3] *See Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-04-28, 60 NRC 548 (2004).

[4] The Staff also published in the *Federal Register* (1) a "Draft Environmental Assessment and Finding of No Significant Impact," 70 Fed. Reg. 68,106 (Nov. 9, 2005); (2) a "Notice of Consideration of Issuance of Amendment. . . and Proposed No Significant Hazards Consideration Determination," 71 Fed. Reg. 1774 (Jan. 11, 2006); and (3) a "Final Environmental Assessment and Finding of No Significant Impact," 71 Fed. Reg. 4614 (Jan. 27, 2006).

[5] NEC's Request is supported by the "Declaration of Dr. Joram Hopenfeld Supporting New England Coalition's New Contentions," dated April 6, 2006 ("Hopenfeld Declaration"), in which he provides additional basis statements in support of the contentions' admission.

2006, the ACRS issued a letter unanimously approving the EPU amendment.[6] After completing its review, on March 2, 2006, the Staff issued its Final SE (in which it made a No Significant Hazards Considerations determination) and the requested EPU amendment.[7]

During the past 18 months, litigation on all admitted contentions has likewise proceeded. On February 1, 2005, the Licensing Board issued its "Initial Scheduling Order," in which it established a preliminary schedule for the proceeding.[8] The Applicant then filed several motions seeking the dismissal or summary disposition of certain admitted contentions, which the Licensing Board has now resolved;[9] NEC filed, and the Licensing Board admitted, NEC's new Contention 4, challenging the adequacy of the Applicant's seismic analysis of the Alternate Cooling System cooling tower cell;[10] and the Board issued three decisions clarifying the legal and/or factual scope of NEC's two admitted contentions.[11]

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[6] *See* Letter from ACRS Chairman Graham B. Wallis to NRC Chairman Nils J. Diaz, dated January 4, 2006 (ADAMS Accession No. ML060090125).

[7] On March 3, 2006, the Commission declined to stay the Staff's issuance of the requested EPU license amendment. *See Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-06-08, 63 NRC__ (March 3, 2006).

[8] The Licensing Board issued a "Revised Scheduling Order" on April 13, 2006, adjusting the dates for filing testimony and subsequent hearing-related activities.

[9] *See* (1) *Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-5, 63 NRC 116 (Jan. 31, 2006) (denying Applicant's motion for summary disposition of NEC Contention 3); (2) *Id.*, LBP-05-24, 62 NRC 429 (2005) (granting summary disposition of NEC's initial Contention 4, as moot); and (3) *Id.*, "Memorandum and Order (Granting Motion to Dismiss State Contention 6)," unpublished (March 15, 2005).

[10] *See Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-05-32, 62 NRC 813 (Dec. 2, 2005) (NEC's new Contention 4).

[11] *See* (1) *Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), "Memorandum and Order (Clarifying the Legal Scope of NEC Contention 4), unpublished (April 24, 2006); (2) *Id.*, "Memorandum and Order (Clarifying the Scope of NEC Contention 3)," unpublished (April 17, 2006); and (3) *Id.*, "Memorandum and Order (Clarifying the Factual Scope of NEC Contention 4 and Denying Untimely Motion for Enlargement of Time to File Reply Brief)," unpublished (March 24, 2006).

On April 6, 2006, NEC submitted the instant Request, seeking the admission of three late-filed contentions.[12] For the reasons set forth below, the Staff submits that NEC's Request should be denied and its new late-filed contentions should be rejected.

DISCUSSION

I. Legal Standards for Admission of Late-Filed Contentions

Under Commission regulations, a late-filed contention may be admitted only upon the presiding officer's determination that it should be admitted after balancing the following eight factors, all of which must be addressed in the petitioner's filing:

(i) Good cause, if any, for the failure to file on time;

(ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;

(iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;

(iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;

(v) The availability of other means whereby the requestor's/petitioner's interest will be protected;

(vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;

(vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and

(viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

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[12] On April 20, 2006, NEC submitted a further late-filed contention, based on steam dryer cracks discovered at the Quad Cities Unit 2 Nuclear Power Station. *See* "[NEC's] Request for Leave to File A New Contention," dated April 20, 2006. In accordance with the Licensing Board's "Order (Granting Unopposed Motion for Extension of Time,) dated April 24, 2006, responses to that contention are due to be filed by May 25, 2006.

10 C.F.R. § 2.309(c).[13] Petitioners seeking admission of a late-filed contention bear the burden of showing that a balancing of these factors weighs in favor of admittance. *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 347 (1998) (noting that the Commission has summarily dismissed petitioners who failed to address the factors for a late-filed petition). The first factor, whether good cause exists for the failure to file on time, is entitled to the most weight. *State of New Jersey* (Department of Law and Public Safety), CLI-93-25, 83 NRC 289, 296 (1993). Where no showing of good cause for the lateness is tendered, "petitioner's demonstration on the other factors must be particularly strong." *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 73 (1992) (quoting *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2, & 3), ALAB-431, 6 NRC 460, 462 (1977)). The fifth and sixth factors, the availability of other means to protect the petitioner's interest and the ability of other parties to represent the petitioner's interest, are less important than the other factors, and are therefore entitled to less weight. *See id.* at 74.

The Commission's regulations additionally provide that a proposed late-filed contention may be admitted with leave of the presiding officer only upon a showing that:

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

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[13] Although these regulations were revised recently (*see* Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182 (Jan. 14, 2004)), they incorporate the substance of the Commission's long-standing late-filed contention requirements. *Compare* 10 C.F.R. § 2.309(c) and (f)(2), *with* 10 C.F.R. § 2.714(a)(1)(i)-(v) and (b)(2) (2004); *see also* 69 Fed. Reg. at 2221.

10 C.F.R. § 2.309(f)(2). In addition to fulfilling the requirements of 10 C.F.R. § 2.309(f)(2), a petitioner must also show that the late-filed contention meets the standard contention admissibility requirements of § 2.309(f)(1)(i)-(vi). *See Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 362-363 (1993). This regulation requires a petitioner to:

> (i) provide a specific statement of the issue of law or fact to be raised or controverted;
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> (ii) provide a brief explanation of the basis for the contention;
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> (iii) demonstrate that the issue raised in the contention is within the scope of the proceeding;
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> (iv) demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
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> (v) provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and
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> (vi) provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

10 C.F.R. § 2.309(f)(1). Significantly, a late-filed contention must refer to specific documents and be accompanied by a concise statement of the alleged facts or expert opinion which support the proposed contention. *See Millstone*, CLI-01-24, 54 NRC at 358 (citing *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 333 (1999)); *Calvert Cliffs*, CLI-98-25, 48 NRC at 348 ("This absence of specificity and support is, without more, a

sufficient ground for rejecting the two contentions."). Failure to comply with any of the requirements may be grounds for dismissing a contention. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

II. NEC's Proposed New Contentions Should Be Rejected.

A. The Contentions Were Filed Substantially Late Without Good Cause, and Fail to Satisfy 10 C.F.R. § 2.309(c).

As discussed *supra*, at 2, all contentions in this proceeding were required to be filed by August 30, 2004; contentions filed after that day may only be accepted if they satisfy the late filing criteria specified in 10 C.F.R. § 2.309(c). As discussed below, NEC's filing of its three "new contentions" on April 6, 2006 was extremely late, in that each of its new contentions could have been filed long before April 2006. NEC has failed to demonstrate good cause for its late filing of these contentions, or that a balancing of the Commission's late-filing criteria supports the admission of its new contentions at this late date. Its Request, therefore, must be rejected.

NEC's new contentions concern (a) the methodology used by the Applicant in calculating onsite and offsite radiological doses in the event of a design basis accident ("DBA") under EPU conditions (New Contention One); (b) the adequacy of information provided by the Applicant concerning the failure of small lines carrying primary coolant outside containment, as specified in a Staff guidance document (New Contention Two); and (c) steam dryer integrity under EPU conditions (New Contention Three). NEC claims that it could not have filed these contentions sooner, asserting as follows:

> Through review of Supplement 42 - (published December 5, 2005), subsequent Supplements 43, 44, and 45; Licensee and NRC staff statements contained in transcripts of ACRS meetings (11/15/2005, 11/16/2005, November 29, 2005, 11/30/2005, 12/07/2005, 12/08/2005 and 12/09/2005, (the dates at which these were added to the ACRS website are uncertain), the ACRS letter (published January 4, 2006), Licensee and NRC staff informational materials from the referenced ACRS meetings, and the Final Safety Evaluation Report provided to New England

> Coalition on March 6, 2006, New England Coalition was able to apprehend new information and information that is substantially different than that previously available. This new and substantially different information forms the initiating basis for New England Coalition's proposed new contentions.

Request at 2-3; emphasis added.

Significantly, NEC fails to identify precisely what "new" and "different" information was contained in any of the voluminous materials it vaguely cites, that was not available to NEC previously. In fact, had NEC been diligent in its review of the Applicant's EPU license amendment application and subsequent submittals, it could have raised these matters long ago. Moreover, as NEC admits, each of these concerns was raised by NEC's expert Dr. Hopenfeld in November 2005, in his statements before the ACRS Subcommittee, fully five months before NEC filed the instant contentions.[14] Absolutely no reason has been provided to show why NEC could not have filed its new contentions at that time, if not upon its receipt of the Applicant's licensing submittals.

Further, while NEC claims that it bases its new contentions, in part, on the Staff's issuance of its Final SE in March 2006, this claim, while superficially plausible, is without merit. First, NEC's expert, Dr. Hopenfeld, raised these matters before the ACRS more than three months before the Staff issued its Final SE; no reason appears why NEC could not have filed its contentions then. Second, NEC fails to point to any statements in the Final SE upon which it relies that are materially different than the statements contained in the Draft SE. In fact, a review of the Final SE shows that, with respect to the issues raised in NEC's three new

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[14] NEC admits that it raised these issues in its statements before the ACRS in November 2005. *See* Request at 13. As discussed below in the specific analysis of each contention, Dr. Hopenfeld raised most of these matters in his statements to the ACRS. The transcripts of the ACRS Subcommittee meetings of November 16 and 30, 2005, containing statements by Dr. Hopenfeld and Mr. Shadis to the ACRS, are attached hereto as "Attachment 1" and "Attachment 2," respectively.

contentions, the Final SE differed very little from the Draft SE.[15] Thus, the Staff's issuance of the Final SE in March 2006 does not support the admission of NEC's new contentions.

Nor is NEC's tardiness in filing excused by its claim that it filed these contentions "as soon as possible following [NEC's] first opportunity to cumulatively apprehend clear and unambiguous information about the erroneous assumptions and conclusions of the licensee," Request at 11, or that its status and "naiveté" as a *pro se* intervenor should excuse its tardiness, *id.* None of these excuses justify NEC's extreme tardiness in filing. Thus, NEC fails to indicate that the new information was any more complex or "ambiguous" than other information contained in Entergy's (or any other licensee's) application, or that it could not have understood these matters sooner if it had diligently attempted to do so. Further, the Board has previously instructed NEC that its status as a *pro se* intervenor does not excuse it from complying with its obligations as a participant in an NRC adjudicatory proceeding.[16]

Similarly, there is no basis for NEC's claims that its tardiness should be excused because it could not find a deadline for filing late contentions in the Board's initial scheduling order of February 1, 2005, or that it somehow was misled by the Licensing Board's statements

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[15] The issue of design basis accident radiological dose consequence analyses, raised in NEC's New Contention One, was addressed in sections 2.7.1, 2.9.2 and 2.10 of the Draft and Final SE's; the issues addressed in New Contention Three were addressed in sections 2.1.3 and 2.2.6 of the Draft and Final SE's; the subject addressed in New Contention Two (section 2.9.3) was omitted from both the Draft and Final SE's. Attached hereto as "Attachment 3" is a redline/strikeout version of these sections of the Staff's SE, showing how these sections in the Final SE differed from the Draft SE.

[16] The Licensing Board has previously expressed its "concern" over "NEC's repeated and cavalier disregard for the schedule," noting that "[t]he right of participation accorded pro se representatives carries with it the corresponding responsibilities to comply with and be bound by the same agency procedures as all other parties, even where a party is hampered by limited resources." *Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), "Order (Granting Motion for Enlargement of Time Related to NEC Contention 4 . . .)," unpublished (March 23, 2006), slip op. at 2-3, *quoting Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1247(1984).

in delaying the filing of these contentions. *See* Request at 12.[17] In this regard, the Licensing Board has previously ruled that if an intervenor seeks to file a new contention based on new information that was not previously available, the new contention must be filed "in a timely fashion" pursuant to 10 C.F.R. § 2.309(f)(2)(i)-(iii). *Entergy Nuclear Vermont Yankee L.L.C. and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-04-28, 60 NRC 548, 578 (2004).[18] Further, NEC's former Counsel (Mr. Block) informed that Board that NEC would want "at least 30 days" in which to formulate new contentions following the issuance of Staff review documents,[19] and NEC's representative (Mr. Shadis) later stated his belief that a 30-day rule applied to the filing of new contentions.[20] In response, the Licensing Board declined to impose a specific deadline for the filing of new contentions, but instructed NEC that "there is

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[17] NEC concedes that it "did have notice" about a matter raised in New Contention 3 based upon the Staff's issuance of the draft SE on November 2, 2005, and that it "considered filing a contention" at that time – but that a search of the Board's Order of February 1, 2005, disclosed only a deadline for filing motions for summary disposition, and no deadline for filing new contentions. Request at 12. NEC further claims that it relied upon the prehearing conference transcript of October 14, 2004, in which Administrative Judge Rubenstein stated that "contentions have to be derived from the SAR and related documents. And one cannot question the SER . . . ." *Id.* NEC claims that the this statement led it astray, and that it "[o]nly recently, through interaction with the Board on the scope of contentions, . . . learned not to rely on a plain reading interpretation of the Board's articulations." *Id.*; emphasis added. This claim is specious. Judge Rubenstein's statement did not preclude the filing of new contentions based on the Draft SE. Further, his statement was fully consistent with established NRC precedent, which indicates that "contentions must rest on the license application, not on [the sufficiency of] NRC Staff reviews." *Baltimore Gas and Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 349 (1998); *Tennessee Valley Authority* (Sequoyah Nuclear Plant, Units 1 & 2; Watts Bar Nuclear Plant, Unit 1), LBP-02-14, 56 NRC 15, 37 (2002); *Private Fuel Storage L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-3, 53 NRC 84, 97 (2001); Statement of Consideration, "Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process," 54 Fed. Reg. 33,168, 33,171 (1989).

[18] In other proceedings, the Licensing Boards have often applied – and the Commission has upheld – a 30-day requirement for the filing of late contentions based on new information. *See, e.g., Private Fuel Storage L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-4, 59 NRC 31, 46 (2004), *aff'g* LBP-00-28, 52 NRC 226, 234-39 (2000) (rejecting contentions filed six days late); *Louisiana Energy Services, L.P.* (National Enrichment Facility), 2005 NRC LEXIS 140 (Aug. 4, 2005); *Id.*, 2005 NRC LEXIS 100 (June 30, 2005); *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), 2003 NRC LEXIS 219 (Dec. 8, 2003); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-03-21, 58 NRC 338, 346-47 (2003).

[19] Transcript of Telephone Conference (Jan. 21, 2005), at Tr. 584.

[20] Transcript of Telephone Conference (Aug. 3, 2005), at Tr. 699.

a short time frame," and new contentions must be filed "very promptly" after the receipt of new information – and that a 30-day, or even a 10-day, period might be appropriate. Tr. 698.[21] There is thus no basis for NEC's claim that it did not know when it was required to file its new contentions, or that it should have filed its contentions within 30 days following the receipt of new information in order to be considered timely. NEC's delay of five months – or even years – before filing its new contentions can not be deemed to be "very prompt" or "timely,"[22] and good cause for their late filing has not been established.

NEC generally refers to the Staff's Final SE,[23] notes that the Licensing Board "set a schedule within which to file contentions based on the [Final] SER," and claims that it filed its new contentions "within that schedule." Request at 15. NEC fails to show that the new contentions were based on information in the Final SE that was not available previously;[24] however, even if the contentions had been based on the Final SE, they were still filed late.

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[21] Tr. 699-700; *cf.* Tr. 698, *citing* Statement of Consideration, "Model Milestones for NRC Adjudicatory Proceedings," 70 Fed. Reg. 204,57, 204,63 (April 20, 2005) (late-filed contentions in a Subpart L proceeding to be filed within 30 days after issuance of SER). In suggesting that a 10-day period for filing late contentions might be appropriate, Tr. 698, the Chairman cited 10 C.F.R. § 2.323, which requires that motions "must be made no later than ten (10) days after the occurrence or circumstance from which the motion arises."

[22] As NEC notes (Request at 12), the Licensing Board imposed a requirement that motions for summary disposition be filed within 30 days following issuance of the Draft SER. *Entergy Nuclear Vermont Yankee L.L.C. and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), "Initial Scheduling Order" (Feb. 1, 2005), slip op. at 3. Even if NEC failed to remember that new contentions were to be filed "very promptly," it should have understood that late-filed contentions based on new information contained in the Draft SE should also be filed within 30 days, to be considered "timely."

[23] *See* Request at 3, 13 (New Contention 3); *Id.* at 11, 14 (New Contention 1).

[24] In fact, on January 24, 2006 – six weeks before the Final SE was issued – Mr. Shadis informed the Board that NEC "has in the works" three late-filed contentions, which he expected to file by the end of the week (*i.e.,* by January 27, 2006). Transcript of Telephone Conference Call (Jan. 24, 2006), at Tr. 733. In a subsequent telephone conference held on March 10, 2006, Mr. Shadis reiterated that NEC had three contentions under consideration, and stated that NEC was attempting to review the licensing documents and "recent NRC issuances" so as to demonstrate a "dispute" with the Applicant. Tr. 779. Accordingly, NEC's delay in filing these contentions appears to be based, not on the Staff's issuance of the Final SE, but on NEC's own delay in preparing its contentions for filing.

Thus, NEC filed these contentions on April 6, 2006 – one day after the 30-day time period for filing contentions based on the Final SE had expired.[25]

In sum, good cause for NEC's late filing of these contentions is lacking. Further, a balancing of the late-filing factors specified in 10 C.F.R. § 2.309(c) demonstrates that NEC's new contentions should be rejected. In this regard, NEC's failure to demonstrate good cause for its tardiness requires a compelling showing that the other factors favor the contentions' admission. *Louisiana Energy Services, L.P.* (National Enrichment Facility), 2006 NRC LEXIS 34 (March 3, 2006), *citing Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-29, 48 NRC 286, 293 (1998). In this regard, it has been held that the absence of good cause may be "determinative":

> Even if [the intervenor] had sought to admit its nontimely contentions under section 2.309(c), however, it appears to us that its effort would have been unavailing, because it would not have been able to show "good cause . . . for the failure to file on time" (10 C.F.R. § 2.309(c)(1)(i)), which would, in our judgment, be a determinative factor militating against admission of the belated contentions. See Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-25, 60 NRC 223, 224-25 (2004) ("Our contention admissibility and timeliness requirements 'demand a level of discipline and preparedness on the part of petitioners,' who must examine the publicly available material and set forth their claims and the support for their claims at the outset")(quoting Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2), CLI-03-17, 58 NRC 419, 428-29 (2003)).

Amergen Energy Co., LLC (License Renewal for Oyster Creek Nuclear Generating Station), LPB-06-11, 63 NRC __, 2006 NRC LEXIS 71 (March 22, 2006). Moreover, while certain factors

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[25] The Final SE was delivered to Mr. Shadis' address on Monday, March 6, 2006, which is the "trigger date" that commenced the 30-day filing period. *See* Transcript of Telephone Conference Call (March 10, 2006), at Tr. 823-24. Contentions based on the Final SE were thus required to be filed no later than 30 days thereafter, *i.e.*, by April 5, 2006. *See* Tr. 886-87. NEC did not request an extension of time to file new contentions based upon the Final SE (or any other document), despite the Licensing Board's admonition that "the failure to meet the deadlines and briefing schedules may include default under 10 C.F.R. § 2.320." *See* "Order (Granting Motion for enlargement of Time . . .)," dated March 23, 2006, slip op. at 4.

may favor the contentions' admission,[26] those factors are generally entitled to less weight than the other factors – which here weigh against the contention's admission. *See, e.g., Louisiana Energy Services, L.P.* (National Enrichment Facility), 2005 NRC LEXIS 140 (Aug. 4, 2005). Here, as discussed above, NEC has failed to demonstrate good cause for its late filing of this contention; the admission of these contentions will significantly broaden the issues to be litigated and will cause substantial delay to the proceeding – for which testimony is due to be filed just two weeks from now; and NEC has not shown that its participation in the litigation of these issues is reasonably likely to assist in developing a sound record. For these and other reasons set forth below, NEC's late-filed contentions should be rejected.

B. The Contentions Fail to Satisfy 10 C.F.R. § 2.309(f)(1)-(2).

1. NEC's "New Contention One".

In its New Contention One, NEC asserts as follows:

> ENVY has failed to provide correctly calculated offsite and control room radiological consequences in the event of a design basis accident ("DBA") under extended power uprate ("EPU") conditions; using both questionable models and applied erroneous assumptions. NRC staff has, through incorporation in the SER, erroneously accepted and approved the ENVY methodology of predicting dose releases under the EPU conditions. Thus ENVY and NRC staff have failed to provide adequate assurance that all Vermont Yankee DBAs while operating under uprate conditions will meet 10 CFR 50.67, General Design Criteria 19, and SRP 15.01 radiological dose requirements. Since therefore the public will be at risk of exposure to radioactivity releases that would exceed the allowable limits, ENVY should not be allowed to operate Vermont Yankee Nuclear Power Station under the proposed EPU.

Request at 5. NEC asserts that this contention is "narrowly drawn," and can be "readily resolved if ENVY can demonstrate that it has applied or will apply adequate radiological consequence

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[26] The Staff does not here challenge NEC's claims as to its right under the Act to be made a party to the proceeding; the nature and extent of NEC's property, financial or other interest in the proceeding; the possible effect of any order that may be entered in the proceeding on NEC's interest; the availability of other means whereby NEC's interest will be protected; and whether NEC's interests will be represented by existing parties. *See* Request at 8-10.

analysis." *Id.* at 10. NEC then cites five specific matters identified by Dr. Hopenfeld as flaws in the Applicant's DBA radiological dose consequence analyses, as follows:

> a. The iodine source term is not affected by the EPU because the 20% increase in fission products is compensated by a 20% decrease in the iodine concentration in the coolant, or, as NRC staff, apparently in complete agreement, restated ENVY's position, both in testimony before ACRS (tr. ACRS, 11/30/2005 at pp.205-214) and in the draft Safety Evaluation Report (DSER) at p.248, 2.10.1, " The concentration of noble gas and other volatile fission products in the main steam line [under EPU] will not change. The increased production rate (20%) of these materials is offset by the by the corresponding increase in steam flow (20%)."
>
> b. The use of iodine activity of 1.1 uCi/gm and 4uCi/gr with a pre accident iodine spike in the dose calculations is not applicable to the EPU conditions.
>
> c. The assumption that the concurrent iodine spike during the Main Steam Line Break, ("MSLB"), can be ignored is incorrect and is not valid.
>
> d. The assumption that dry well sprays will remove iodine is not applicable to the MSLB design basis accidents.
>
> e. The assumption that credit can be taken for iodine deposition in the main steam lines is not valid.

Request at 15-16. NEC then notes that "Dr. Hopenfeld notes the continued omission of small bore piping analysis from NRC's review and in particular from the SER," and that he "disputes ENVY and NRC reliance on incorrectly extrapolated data and incorrectly applied formulae in attempting to predict steam dryer behavior." *Id.* at 16.

Finally, NEC appears to seek to expand upon the bases for this contention, stating:

> In addition to the five disputed assumptions listed above, Dr. Hopenfeld's Declaration includes, as a brief explanation of the basis for proposed contention one, factual, expert refutation of each assumption. New England Coalition summarizes as follows: ENVY has based estimates of the potential radiological consequences of a design basis accident on assumptions that are contravened or invalidated by the facts:

a. Increased flow offsets increased iodine concentration under normal operating conditions, but not an iodine spiking factor resulting in increased dose under accident conditions.

b. Extrapolating iodine coolant concentrations to EPU conditions is technically indefensible and not supported, as required under regulation, by experimental and empirical data.

c. ENVY has not accounted for concurrent iodine spike and resultant dose consequences during a postulated main steam line break under EPU conditions.

d. Since a postulated MSLB outside containment ends with isolation valve closure before activation of dry well sprays, ENVY should not be allowed to take credit for iodine capture in the dry well in a MSLB event.

e. No credit should be permitted for iodine deposition in steam lines during a MSLB outside containment event (under uprate conditions) inasmuch as high flow rates and turbulence early in the event will shear fission products (including iodine) as well as rust, scale, and CRUD from pipe walls.

Request at 16-17; emphasis added.[27]

NEC's New Contention One addresses the Applicant's analyses of the radiological consequences of design basis accidents, which were approved in a separate license amendment implementing an alternative source term (AST) for Vermont Yankee. As such, the analyses are not a proper subject for this proceeding, and the contention should be rejected pursuant to 10 C.F.R. § 2.309(f)(1)(iii)-(iv).[28]

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[27] While NEC states that these statements "summarize" Dr. Hopenfeld's statements, Request at 16, it actually appears to "add" to the bases stated in its expert's Declaration; further NEC's additions confuse the issues raised, and it is not clear that they are supported by facts or expert opinion, as required by 10 C.F.R. § 2.309(1)(f)(iv)-(v). Accordingly, these additional "basis" statements should be rejected.

[28] NEC claims that it "does not take issue" with Entergy's AST amendment. See Request at 17. It fails to indicate, however, how its contention raises anything beyond the matters that were included and approved in the Applicant's AST amendment application. Further, while the Staff's Draft and Final SE's for the instant EPU application refer to the AST dose consequence analyses, those analyses were approved and discussed in detail in the safety evaluation for Amendment 223, dated March 29, 2005 (ML0412804900), at pages 11-28.

(continued...)

Further, NEC's Request is replete with generalized assertions that the Applicant's radiological dose consequence analyses are marred by (unspecified) "non-conservative conclusions," "planned actions," "consequences," erroneous assumptions," questionable models, "erroneous applied assumptions," and "false conclusions." *See, e.g.*, Request at 13, 14, 15. It is wholly unclear whether these assertions were intended to refer to the specific deficiencies alleged by Dr. Hopenfeld. NEC's identification of these numerous bases for its late-filed contention are confusing and fail to properly identify the specific deficiencies in the Applicant's documents which NEC now seeks to litigate. Accordingly, the contention fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(i)-(vi), in that it fails to provide a "concise statement of the alleged facts" which support the contention and on which NEC intends to rely at hearing, and fails to "provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact."

Moreover, the contention fails to provide "references to specific portions of the application (including the applicant's . . . safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and

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[28](...continued)
In addition, the Staff notes that New Contention One is founded upon a misunderstanding of the matters addressed in the AST amendment. Thus, Dr. Hopenfeld claims, in part, that the Applicant (and Staff) erroneously failed to evaluate a concurrent iodine spike for the MSLB. The Applicant's treatment of this issue was contained in its AST amendment application, consistent with Regulatory Guide 1.183, "Alternative Radiological Source Terms for Evaluating Design Basis Accidents at Nuclear Power Reactors" (July 2000), which provides guidance for performing radiological consequences analyses with an AST. *See* RG 1.183, Appendix D, "Assumptions for Evaluating the Radiological Consequences of a BWR Main Steam Line Break," § 2 (assumptions to be used for the coolant source term, including the modeling of iodine release). Also, Basis 1.d claims that Entergy inappropriately took credit for deposition in the drywell for the MSLB accident; in fact, the licensee did not take such credit in the MSLB radiological consequence analysis in its AST amendment. Similarly, basis 1.e claims that Entergy inappropriately took credit for main steam line deposition for the MSLB; the licensee did not take such credit in the MSLB radiological consequence analysis. The Staff's evaluation of the licensee's radiological consequences analyses are included in the approved AST amendment SE, which was later referred to in the Draft and Final SE's for the EPU license amendment. The Main Steam Line Break (MSLB) analysis and the modeling of iodine in the reactor coolant for the accident analysis is discussed at page 20 of the SE for Amendment No. 223.

the supporting reasons for the petitioner's belief," contrary to the requirements of 10 C.F.R. § 2.309(f)(1)(vi). NEC's failure to provide a specification of alleged deficiencies in the Applicant's analyses, as required by Commission regulations, precludes the reader from understanding precisely which portions of the application NEC wishes to contest, and requires that the contention be rejected.

Further, each of the matters raised by NEC and Dr. Hopenfeld's Declaration could have been raised many months, if not years, earlier, based on the Applicant's analyses when they were first docketed in this licensing proceeding. Thus, in its original EPU license amendment application, the Applicant indicated that its analyses of DBA radiological dose consequences were submitted in a separate AST license amendment application.[29] Accordingly, NEC should have filed this contention in connection with the AST license amendment application, or at the latest, upon the Applicant's reference of that application in the EPU application. Moreover, no reason appears why it could not have raised these issues (although still untimely) upon its receipt of the Staff's Draft SE in November 2005; indeed, Dr. Hopenfeld presented his views on this matter in his statements before the ACRS.[30] Further, the Staff's Draft and Final SE's did not present any information on this issue that was not available in the Applicant's original application; and the Final SE did not present any new information that differed materially from the information available in the Draft SE.[31]

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[29] *See* Letter from Jay K. Thayer (Entergy) to NRC Document Control Desk, dated September 10, 2003 (ADAMS Accession No. ML032580089), at 3 (noting that Entergy had submitted a "full scope" AST license amendment application on July 31, 2003, and that "the VYNPS EPU was analyzed, and the VYNPS PUSAR was prepared, based on AST methodology."); *see id.*, Attachment 6 ("Safety Analysis Report for [Vermont Yankee] Constant Pressure Power Uprate," NEDC-33090, Rev. 0 (Sept. 2003) (ADAMS Accession No. ML0325801030), at 4-13, 8-3, 8-5 and 9-3 (non-proprietary version provided as "Attachment 4" hereto).

[30] *See* Transcript of ACRS Meeting (Nov. 16, 2005), at 285-88 (Attachment 1 hereto); Transcript of ACRS Meeting (Nov. 30, 2005), at 293-95 (Attachment 2 hereto).

[31] *See* Attachment 3 hereto, at Sections 2.7.1, 2.9.2, and 2.10.

There is no basis for NEC's claims that the matters addressed in this contention were "to [NEC's] knowledge, first publicly revealed in full" in the Applicant's and Staff's presentations to the ACRS on November 29 and December 8, 2005. Request at 13. The issue sought to be contested by NEC appears, instead, to be based on the alternative source term methodology which the Commission has already approved, in Vermont Yankee license amendment No. 223 issued on March 29, 2005;[32] as such, the issues raised in this contention appear to be outside the scope of this proceeding, contrary to the requirements of 10 C.F.R. § 2.309(f).[33] Further, NEC fails to identify precisely what information it believes was not available prior to the ACRS meetings, or what information was not available in the EPU application or the Staff's Draft SE. NEC's claim that it lacked sufficient "resources" to identify these issues in a timely manner fails to support its late filing of the contention at this time, and its claim that these matters could not have been raised previously should be rejected.

For these reasons, NEC's New Contention One fails to satisfy the Commission's requirement that NEC demonstrate that "the issue raised in the contention is within the scope of the proceeding," 10 C.F.R. § 2.309(f)(1)(iii); demonstrate that "the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding," 10 C.F.R. § 2.309(f)(1)(iv); provide "references to the specific sources and documents on which the requestor . . . intends to rely to support its position on the issue," 10 C.F.R. § 2.309(f)(1)(v); and provide "sufficient information to show that a genuine dispute

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[32] *See* Letter from Richard B. Ennis (NRC) to Michael Kansler (Entergy), dated March 29, 2005, enclosing Vermont Yankee license amendment No. 223 (revising the Vermont Yankee licensing basis to incorporate a full-scope application of an Alternative Source Term ("AST")methodology) (ADAMS Accession No. ML0412804900).

[33] NEC asserts that it had reviewed the "45 supplements" to the EPU application "with as much alacrity as [NEC's] citizen resources would allow," and asks the Board to consider "the unusual volume and complexity of the information to be sifted." Request at 13. These assertions fail to justify its delay in filing New Contention One. The supplements to the EPU application have been available to NEC in the hearing file and on ADAMS, as they were filed, for the past several years. NEC's lack of resources simply does not justify its delay in timely filing its contention.

exists with the applicant/licensee on a material issue of law or fact [which] . . . must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes . . . ." 10 C.F.R. § 2.309(f)(1)(vi).

Further, NEC's New Contention One fails to comply with the Commission's requirement for timely filing, as set forth in 10 C.F.R. § 2.309(f)(2). Pursuant to that regulation, "Contentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner." While the regulation allows an Intervenor to amend its contentions or file new contentions after its initial filing, it may do so "only with leave of the presiding officer upon a showing that -- (i) The information upon which the amended or new contention is based was not previously available; (ii) The information upon which the amended or new contention is based is materially different than information previously available; and (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information." 10 C.F.R. § 2.309(f)(2). Here, as set forth above, NEC's contentions could have been filed long before the Staff issued its Final SE, based on information that was available to it in the Applicant's licensing submittals. NEC has not shown that "the information upon which the . . . new contention is based was not previously available," that "the information upon which the . . . new contention is based is materially different than information previously available," or that "the . . . new contention has been submitted in a timely fashion based on the availability of the subsequent information." 10 C.F.R. § 2.309(f)(2)(i)-(iii). NEC's failure to comply with these requirements requires that its New Contention One be rejected.

2. NEC's "New Contention Two".

In its second new contention, NEC seeks to raise an issue concerning an "omission" in the application, the Draft SE and the Final SE, concerning the "Radiological Consequences of

the Failure of Small Lines Carrying Primary Coolant Outside Containment" under EPU conditions. NEC asserts:

> The ENVY application (Technical Specification Proposed Change No.263 w/ Supplements 1-45) the radiological consequences at Vermont Yankee under uprate, and NRC staff review thereof, including Requests for Additional Information ("RAI") (ADAMS ML053260427-Added 12/05/2005) and the SER, is incomplete insofar as it does not discuss how Vermont Yankee would comply with GDC-19, GDC 55 and 10CFR 100.11 following the failure of small lines carrying primary coolant outside of containment. ENVY has not provided the requisite information in the instant application.

Request at 6. NEC states that "Contention Two is a simple contention of omission" which, like New Contention One, can be "readily resolved if ENVY can demonstrate that it has applied or will apply adequate radiological consequence analysis." *Id.* at 10. The basis for this proposed contention is provided by Dr. Hopenfeld's Declaration. Therein, Dr. Hopenfeld asserts that the Staff's SE was incomplete in that it failed to include Section 2.9.3, "Radiological Consequences of the Failure of Small Lines Carrying Primary Coolant Outside Containment" – which he asserts is "required" by an NRC guidance document, NRC Review Standard RS-001.[34] Hopenfeld Declaration at 9. Further, Dr. Hopenfeld asserts that a "diligent search" of the Applicant's EPU amendment application, "including Supplements Nos. 1 through 42," did not disclose any "comprehensive discussion of the information required per RS-001 for SE Section 2.9.3." *Id.* at 9-10.

NEC's (and Dr. Hopenfeld's) assertion that this matter was required to be included and addressed in the Applicant's submittals or in the Staff's SE is premised upon a demonstrably incorrect understanding of the applicable NRC guidance document, and should be rejected. Review Standard RS-001, upon which NEC relies, was issued by the NRC's Office of Nuclear

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[34] Office of Nuclear Reactor Regulation, "Review Standard for Extended Power Uprates," RS-001, Rev. 1 (Dec. 2003) (ADAMS Accession No. ML033640024), at [unnumbered] 1 ("Purpose"). A copy of relevant portions of RS-001is attached as "Attachment 5" hereto.

Reactor Regulation to provide guidance for the Staff in its review of EPU license amendment applications. RS-001 contains a "template" or sample SE for Boiling Water Reactors ("BWRs") and a template SE for Pressurized Water Reactors ("PWRs"). Vermont Yankee is a BWR, and the BWR template SE (Section 3.2 of RS-001) therefore applies. Insert 9 for Section 3.2 of RS-001 provides the template for Section 2.9 of a BWR SE, "Source Terms and Radiological Consequence Analyses." Insert 9 contains two notes which direct the Staff as to what subsections in Section 2.9 of the template SE apply, depending on whether the licensee's radiological dose consequence analyses are based on an alternative source term ("AST") or a traditional source term.

As the notes in Insert 9 clearly indicate, SE Section 2.9.3 ("Radiological Consequences of the Failure of Small Lines Carrying Primary Coolant Outside Containment") should only be used "if the licensee's radiological consequences analyses are not based on an alternative source term (*i.e.*, if the analyses are based on a traditional source term (*i.e.*, TID-14844)."[35] In contrast, as discussed above, Vermont Yankee has adopted an alternative source term, pursuant to an AST amendment issued on March 29, 2005, and its EPU radiological dose consequence analyses are based on the AST. Accordingly, template SE Section 2.9.3 does not apply, and this template properly was not included in either the Draft SE issued on November 2, 2005, or the Final SE issued on March 2, 2006.[36]

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[35] *See* Attachment 5 hereto, Insert 9 at [unnumbered] 5; emphasis added. The template SE also indicates that the Staff should "[u]se Sections 2.9.2 and 2.9.3 below if the licensee's radiological consequences analyses are based on an alternative source term." *Id.* at [unnumbered] 2. The referenced template section 2.9.3 is entitled "Additional Review Areas," and is only to be utilized "as necessary." *Id.* at [unnumbered] 4. No such additional review areas were identified for Vermont Yankee.

[36] Similarly, this template SE section was not included in Entergy's EPU application. In Supplement No. 4 to its EPU application, dated January 31, 2004, Entergy provided a revision to the RS-001 template SE, at the Staff's request, to reflect the Vermont Yankee licensing basis (ADAMS Accession No. ML040360118). As noted in the template SE contained in Attachment 4 to that letter, Entergy indicated that Section 2.9.3 ("Radiological Consequences of the Failure of Small Lines Carrying Primary Coolant Outside Containment") is not applicable to its EPU application because Vermont Yankee is implementing an AST.

Inasmuch as RS-001 template SE Section 2.9.3 ("Radiological Consequences of the Failure of Small Lines Carrying Primary Coolant Outside Containment") does not apply to the Vermont Yankee EPU application, there is no basis for NEC's assertion that the Staff erroneously omitted this template section from its SE for the Vermont Yankee EPU amendment, and the contention should be rejected for failing to raise a material issue, as required by 10 C.F.R. § 2.309(f)(1)(iv).

Further, even if the issue raised by NEC had been admissible, NEC failed to raise this issue in a timely manner. As noted above, the Applicant did not include information specified for template SE section 2.9.3 in its application, and it indicated, as early as January 31, 2004 (in Supplement No. 4), that this template SE section does not apply to the Vermont Yankee EPU application. Similarly, the Staff excluded this template SE section from its Draft SE, issued on November 2, 2005. Thus, NEC could have raised this issue in its initial contentions, filed in August 2004, or even upon receiving the Staff's Draft SE in November 2005. No reason appears why NEC could not have framed and filed this contention previously.[37]

In sum, NEC's failure to raise this issue until April 2006 lacks good cause, and it has failed to show that a balancing of the other factors stated in 10 C.F.R. § 2.309(c) favors the admission of the contention at this time. Further, NEC has not shown that "the information upon which the . . . new contention is based was not previously available," that "the information on which the . . . new contention is based is materially different than information previously available," or that "the . . . new contention has been submitted in a timely fashion based on the availability of the subsequent information," as required by 10 C.F.R. § 2.309(f)(2)(i)-(iii). NEC's "New Contention Two" should therefore be rejected.

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[37] Dr. Hopenfeld states that "Insert 9 for Section 2.9.3 is not included in the NRC SER." Hopenfeld Declaration at 9. He does not indicate, however, whether he is referring to the Final SE or the Draft SE; in fact, the template SE section was omitted from both the Final and Draft SE's.

3. NEC's "New Contention Three".

In its third new contention, NEC seeks to raise various issues concerning potential cracking of the steam dryer under EPU conditions. NEC asserts as follows:

> ENVY Technical Specification Proposed Change No.263 w/ Supplements 1-42 does not comply with Drafts GDC- 40 and 42 insofar as they require that protection must be provided against the dynamic effects of a LOCA.
>
> Specifically, and in contradiction to Supplement 42 (provided to New England Coalition 12 05/ 2005) and ENVY testimony before the NRC Advisory Committee on Reactor Safeguards (11/15/2005, 11/16,2005, 11/29/2005, 11/30/2005, 12/07/2005, 12/08/2005, 12/09/2005), and the Steam Dryer Monitoring Plan endorsed in the NRC Final Safety Evaluation Report at page 50, and NRC staff endorsement of Ascension Power Testing as described in NRC staff's response to public comments on the SER at page 325, and NRC Staff's acceptance of ENVY steam dryer inspection results as determinative of no further crack growth at SER page 337, New England Coalition asserts that:
>
> a. The fatigue and the intergranular stress corrosion cracks, (IGSCC) which already exist on various Vermont Yankee steam dryer surfaces will increase in number and grow in size because of the higher stresses on the dryer structure from flow induced vibrations under EPU conditions.
>
> b. The increase energy content in the flow under EPU conditions will increase the intensity and duration of the dynamic loads that act on the dryer causing it potentially to fragment and generate many loose parts.
>
> c. The loose parts may migrate to the core region or the Main Steam Isolation Valve ("MSIV"), potentially blocking fuel flow channels and /or preventing the MSIV from isolating the containment following a main steam line break. The ultimate danger to the public from dryer failure is a core-melt with an early containment by pass.
>
> d. Because the ascension to power tests, as described in Supplement 42, are limited to steady state conditions they will not provide any data that could indicate that the dryer would not fail catastrophically following LOCA.

Request at 6-7.

In support of its late filing of this contention, NEC asserts that it should be admitted because "the reliance on steam dryer inspection results in the final SER was materially different than what was presented in the draft SER." Request at 15. This claim is without merit. A redline/strikeout comparison of the Staff's discussion of the steam dryer in Draft and Final SE's (Attachment 3 hereto) shows very little difference between the two documents. Moreover, the differences that appear between the Draft and Final versions of the SE do not support the admission of this expansively written contention. See Attachment 3, SE at §§ 2.1.3 and 2.2.6. While the Final SE does address the results of the Applicant's steam dryer inspection in the fall of 2005, the contention seeks to raise numerous issues beyond the inspection results, which were addressed in the Draft SE as well. In sum, the information which serves as the basis for most of the issues raised in this contention appeared in the Draft SE as well as in the Final SE, and the information in the Final SE is not "materially different" than the information that had appeared in the Draft SE.

Further, even the information pertaining to the Applicant's steam dryer inspection, mentioned in this contention, appeared in other documents issued long before NEC filed its contention. Thus, the results of the Vermont Yankee steam dryer inspection, conducted by the Applicant in the fall of 2005, were discussed in Supplement 42 to the EPU application, dated November 22, 2005.[38] If NEC was concerned about the findings in that inspection, under well-established NRC legal precedent, it could – and should – have filed this contention at that time, four months earlier than it filed the instant contention.[39] Moreover, while the Staff discussed the steam dryer inspection findings in its Final SE, NEC's proposed New Contention Three does not address new information that appeared for the first time in the SE; rather, it addresses

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[38] *See* Letter from William F. Maguire (Entergy) to NRC Document Control Desk, dated November 22, 2005 (ADAMS Accession No. ML0533 201900).

[39] *See, e.g., Nuclear Management Co.*, LLC (Palisades Nuclear Plant), LBP-06-10, 2006 NRC LEXIS 56, 63 NRC__ (March 7, 2006).

information that was available to NEC previously – and which, in fact, was addressed by Dr. Hopenfeld in his statements to the ACRS in November 2005.[40] No reason appears as to why NEC could not have filed its New Contention Three at the time it addressed these issues before the ACRS.

For the reasons described above, NEC has not shown that "the information upon which the . . . new contention is based was not previously available," as required by 10 C.F.R. § 2.309(f)(2)(i), that "the information on which the . . . new contention is based is materially different than information previously available," as required by 10 C.F.R. § 2.309(f)(2)(ii), or that "the . . . new contention has been submitted in a timely fashion based on the availability of the subsequent information," as required by 10 C.F.R. § 2.309(f)(2)(iii). Accordingly, NEC's New Contention Three should be rejected.

CONCLUSION

For the reasons set forth above, the Staff submits that NEC's new contentions were untimely filed without good cause, and a balancing of the factors specified in 10 C.F.R. § 2.309(c) weighs against their admission. Further, NEC's Request fails to satisfy the Commission's requirements governing the filing of late contentions, as set forth in 10 C.F.R. § 2.309(f). Accordingly, the Staff respectfully submits that NEC's Request should be denied, and its three new contentions should be rejected.

Respectfully submitted,

Sherwin E. Turk

Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 1st day of May, 2006

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[40] *See* ACRS Transcript (Nov. 16, 2005), at 277-83 (Attachment 1 hereto); ACRS Transcript (Nov. 30, 2005) at 293, 297-98, and slides attached thereto (Attachment 2 hereto).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
ENTERGY NUCLEAR VERMONT YANKEE LLC and ENTERGY NUCLEAR OPERATIONS, INC.	)	Docket No. 50-271-OLA
	)	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 NEW ENGLAND COALITION'S REQUEST FOR LEAVE TO FILE NEW CONTENTIONS," 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 1st day of May, 2006.

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