

June 1, 2006 (3:20pm)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

**UNITED STATES
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

May 22, 2006
Docket No. 50-271

ASLBP No. 04-832-02-OLA

**NEW ENGLAND COALITION'S COMMENTS REGARDING A PROPOSED
SETTLEMENT OF DEPARTMENT OF PUBLIC SERVICE CONTENTIONS
AND
NEW ENGLAND COALITION'S REQUEST FOR A DETERMINATION THAT
CONTINUED AJUDICATION OF THE ISSUES RAISED IN THE DEPARTMENT OF
PUBLIC SERVICE CONTENTIONS IS IN THE PUBLIC INTEREST**

INTRODUCTION

New England Coalition, in compliance with the Atomic Safety and Licensing Board (Board) Order of May 10, 2006, now respectfully submits comments regarding a proposed settlement of the Vermont Department of Public Service (DPS) Contentions (1&2) as submitted by the DPS in an Amended Notice of Withdrawal and Request For Dismissal of Contentions of the Vermont Department of Public Service on May 9, 2006.

In addition, New England Coalition respectfully requests that the Board, for all of the good reason's stated below, make a determination that the issues raised in DPS Contentions 1 &2 are (1) of safety significance, (2) are not satisfied by either the reasons set out in the DPS Notice of Withdrawal (May 9, 2006) or in the underlying Memorandum of Understanding (MOU) (May 2, 2006) or Addendum to the MOU (May 9, 2006), and (3) are appropriate for the Board to take

up *sua sponte* and or may be taken up by remaining parties, New England Coalition and/or U.S. Nuclear Regulatory Commission staff (NRC Staff) in a new contention based on the new information provided in the MOU and Addendum.

BACKGROUND

On August 30, 2004, DPS filed a Notice of Intent to Participate... and six proposed contentions, including the two contentions that are now the subject of the DPS Notice of Withdrawal and Request For Dismissal of Contentions.

On November 11, 2004, the Board issued an Order accepting two of the DPS contentions and restating the contentions as follows:

State Contention 1: Entergy has claimed credit for containment overpressure in demonstrating the adequacy of ECCS pumps for plant events including a loss of coolant accident in violation of draft General Design Criteria 44 and 52 and therefore Entergy has failed to demonstrate that the proposed uprate will provide adequate protection for public health and safety as required by 10 C.F.R. § 50.57(a)(3).

State Contention 2: Because of the current level of uncertainty of the calculation which the Applicant uses to demonstrate the adequacy of ECCS pumps, the Applicant has not demonstrated that the use of containment overpressure to provide the necessary net positive suction head for ECCS pumps will provide adequate protection for the public health and safety as required by 10 C.F.R. § 50.57(a)(3).

On May 2, 2006, DPS filed a Notice of Withdrawal and a Request For Dismissal of Contentions of the Vermont department of Public Service, together with a Memorandum of Understanding between DPS and Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, INC (ENVY or the Applicant).

On May 3, 2006, the Board convened a Conference Call to consider the state's notice of withdrawal and the requirements of 10 C.F.R. 2.338(h).

On May 9, 2006, DPS filed an Amended Notice of Withdrawal and a Request For Dismissal of Contentions of the Vermont department of Public Service, together with an Addendum To MOU.

On May 10, 2006 the Board issued an Order lifting filing requirement[s] for DPS and Entergy regarding the DPS Contentions pending issuance of an Order regarding the DPS Notice of withdrawal etc. In two footnotes to its May 10, 2006 Order, the Board also stated,

1. Any comments supporting or objecting to the Amended Notice and/or the proposed settlement should be submitted to the Board, in writing, on or before May 22, 2006. Such submissions shall focus on the "public interest" as specified in 10 C.F.R. § 2.338(I). No answers, replies, or public hearing on the withdrawal or the settlement are contemplated.

And

2. In some cases, Boards have conducted a public hearing to discuss the proposed settlement. See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-1, 35 NRC 1, 9 (1992). This is not contemplated here. If, however, the New England Coalition files a motion related to the State's contentions (as it has intimated it might do, Tr. at 922), then it shall do so by May 22, 2006, and the parties shall have seven days within which to answer.

DISCUSSION

Applicability of § 2.338 Settlement of issues; alternative dispute resolution.

The Board has already ruled that §2.338 applies to this situation, wherein the settlement is reached without the assistance of a third part neutral. Further, the Board has articulated its view that the MOU constitutes a settlement in as much as it memorializes a quid-pro-quo arrangement. (see, Transcript, ASLB Conference Call, 05/03/2006).

Under 10 C.F.R. 2.338 (a) Availability, one finds:

The parties shall have the opportunity to submit a proposed settlement of some or all issues to the Commission or presiding officer, as appropriate, or submit a request for alternative dispute resolution under paragraph (b) of this section.[Emphasis added]

Under 10 C.F.R. 2.338 (i), it is clear that the presiding officer or Commission [may] make findings and order further proceedings regarding "public interest" aspects of the proposed action; in this instance, dismissal of the DPS contentions.

(i) Approval of settlement agreement. Following issuance of a notice of hearing, a settlement must be approved by the presiding officer or the Commission as appropriate in order to be binding in the proceeding. The presiding officer or Commission may order

the adjudication of the issues that the presiding officer or Commission finds is required in the public interest to dispose of the proceeding. In an enforcement proceeding under subpart B of this part, the presiding officer shall accord due weight to the position of the NRC staff when reviewing the settlement. If approved, the terms of the settlement or compromise must be embodied in a decision or order. Settlements approved by a presiding officer are subject to the Commission's review in accordance with § 2.341.

***Sua Sponte* Consideration by the Board**

New England Coalition asks that the Board consider taking up the issues in the DPS Contentions *sua sponte* per its authority under 10 CFR § 2.31.2.7, wherein a Licensing Board has the power to raise *sua sponte* any significant environmental or safety issue in operating license hearings. (See, Consolidated Edison Co. of N.Y., Inc. (Indian Point Nuclear Plant, Units 1,2 & 3), ALAB-319,3 NRC 188, 190 (1976); Houston Lighting and Power Co. (South Texas Project, Units Sand 2),LBP-85-8, 21 NRC 516,519 (1985).

In this proceeding, DPS proposed the subject contentions on the basis that the licensee's actions constituted an unacceptable and illegal level of threat to the public health and safety under 10 C.F.R. § 50.57(a)(3) and that the licensee's actions constituted a violation of draft General Design Criteria 44 and 52. The DPS Notice of Withdrawal and a Request For Dismissal of Contentions of the Vermont department of Public Service, together with a Memorandum of Understanding and (Amendments and Addendum) [fail to] discuss how the level of threat to public health and safety is diminished to acceptable, or how the violation of draft General Design Criteria 44 and 52 is negated, by the terms of the MOU or by the level the license amendment application scrutiny of NRC staff and Advisory Committee on Reactor Safeguards. Simply put, review does not alter regulation or physics. DPS offers little help in understanding how the MOU or increased levels of review address the particular regulatory, health and safety issues enumerated in its initial (August 30, 2004) filing.

While New England Coalition can find no regulation that would require DPS to remain a party, it is evident that this Board had [has] discretionary authority to determine that public interest (regulatory, public health and safety) concerns raised in DPS Contentions 1&2 warrant continued exploration by the Board and the remaining parties.

Finally New England Coalition seek [s] leave to file a new (late) contention based on new information contained in the MOU and its Addendum; subject of course to all of the criteria for late-filed contentions. New England Coalition does not seek to adopt the DPS contentions. However, New England Coalition proposes to take notice of the regulatory, public health and safety issues recognized and accepted by the Board for adjudication and [to incorporate] ~~incorporation~~ only the issues raised by DPS into a [new] Contention based on the implication that the MOU satisfies or somehow invalidates those very real (and remaining) concerns.

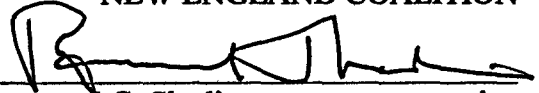
CONCLUSION

New England Coalition respectfully requests that the Board, in consideration of the foregoing and the record of the DPS intervention, make a determination that the issues raised in DPS Contentions 1 &2 are (1) of safety significance, (2) are not satisfied by either the reasons set out in the DPS Notice of Withdrawal (May 9, 2006) or in the underlying Memorandum of Understanding (MOU) (May 2, 2006) or Addendum to the MOU (May 9, 2006), and (3) are appropriate for the Board to take up *sua sponte* and/or may be taken up by remaining parties, New England Coalition and/or U.S. Nuclear Regulatory Commission staff (NRC Staff) in a new contention based on the new information provided in the MOU and Addendum.

Respectfully submitted:

NEW ENGLAND COALITION

BY:



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**+UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of **NEW ENGLAND COALITION'S COMMENTS REGARDING A PROPOSED SETTLEMENT OF DEPARTMENT OF PUBLIC SERVICE CONTENTIONS AND NEW ENGLAND COALITION'S REQUEST FOR A DETERMINATION THAT CONTINUED AJUDICATION OF THE ISSUES RAISED IN THE DEPARTMENT OF PUBLIC SERVICE CONTENTIONS IS IN THE PUBLIC INTEREST** in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class and by e-mail as indicated by a double asterisk (**), this 22nd day of May 2006

<p>Alex S. Karlin, Chair** Administrative Judge Atomic Safety and Licensing Board Panel Mail Stop T-3F23 U.S. Nuclear Regulatory Commission Washington, DC 20555-0001 E-mail: ask2@nrc.gov</p>	<p>Dr. Anthony J. Baratta** Administrative Judge Atomic Safety and Licensing Board Panel Mail Stop T-3F23 U.S. Nuclear Regulatory Commission Washington, DC 20555-0001 E-mail: ajb5@nrc.gov</p>
<p>Lester S. Rubenstein** Administrative Judge Atomic Safety and Licensing Board Panel 4760 East Country Villa Drive Tucson, AZ 85718 E-mail: lesrr@comcast.net</p>	<p>Office of the Secretary** ATTN: Rulemaking and Adjudications Staff Mail Stop: O-16C1 U.S. Nuclear Regulatory Commission Washington, DC 20555-0001 E-mail: HEARINGDOCKET@nrc.gov</p>

<p>Office of Commission Appellate Adjudication Mail Stop: O-16C1 U.S. Nuclear Regulatory Commission Washington, DC 20555-0001</p>	<p>John M. Fulton, Esq. Assistant General Counsel Entergy Nuclear Operations, Inc. 440 Hamilton Avenue White Plains, NY 10601</p>
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<p>Jonathan M. Rund, Esq.** Law Clerk Atomic Safety and Licensing Board Panel Mail Stop: T-3F23 U.S. Nuclear Regulatory Commission Washington, DC 20555-0001 (E-mail: jmr3@nrc.gov)</p>	<p>Sherwin E. Turk, Esq.** Jason C. Zorn, Esq.** Office of the General Counsel Mail Stop O-15 D21 U.S. Nuclear Regulatory Commission Washington, DC 20555-0001 set@nrc.gov, jcz@nrc.gov</p>



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Office of the Secretary
ATTN: Rulemaking and Adjudications Staff
Mail Stop: O-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Dear Rulemaking and Adjudications Staff,

Please find for filing in the above captioned matter one original and two copies of

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SETTLEMENT OF DEPARTMENT OF PUBLIC SERVICE CONTENTIONS
AND
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Thank you for your kind assistance in making this filing,



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