RAS 11880

June 22, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
Entergy Nuclear Vermont Yankee, LLC	)	Docket No. 50-271-LR
and Entergy Nuclear Operations, Inc.	)	ASLBP No. 06-849-03-LR
	)	
(Vermont Yankee Nuclear Power Station)	)	

ENTERGY'S ANSWER TO
VERMONT DEPARTMENT OF PUBLIC SERVICE
NOTICE OF INTENTION TO PARTICIPATE AND PETITION TO INTERVENE

I. INTRODUCTION

Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (hereinafter collectively referred to as "Entergy") hereby answer the "Notice of Intention to Participate and Petition to Intervene" dated May 26, 2006 (the "Petition" or "Pet."), filed by the Vermont Department of Public Service ("DPS") regarding Entergy's application to renew the operating license for the Vermont Yankee Nuclear Power Station ("VYNPS"). Entergy submits that the DPS should not be admitted as a party because it has not identified any admissible contentions. Entergy does not object to the DPS participating as an interested State pursuant to 10 C.F.R. § 2.315(c) if DPS' petition to intervene as a party is denied.[1]

[1] DPS is also seeking to adopt the contentions of the New England Coalition ("NEC"). Notice of Intent to Adopt Contentions and Motion for Leave to be Allowed to Do So" (June 5, 2006). DPS' motion has not yet been granted. Entergy will respond to NEC's contentions when it submits its answer to NEC's hearing request.

II. PROCEDURAL BACKGROUND

Entergy submitted its application, dated January 25, 2006, requesting renewal of Operating License DPR-28 for the Vermont Yankee Nuclear Power Station (the "Application"). On March 27, 2006, the Nuclear Regulatory Commission ("NRC" or "Commission") published a Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing ("Notice") regarding Entergy's application. 71 Fed. Reg. 15,220 (Mar. 27, 2006)). The Notice permitted any person whose interest may be affected to file a request for hearing and petition for leave to intervene within 60 days of the notice. Id. at 15,220-21.

The Notice directs that any petition shall set forth with particularity the interest of the petitioner and how that interest may be affected, and must also set forth the specific contentions sought to be litigated. Id. at 15,221. The Notice states:

> Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the requestor/petitioner shall provide a brief explanation of the bases of each contention and a concise statement of the alleged facts or the expert opinion that supports the contention on which the requestor/petitioner intends to rely in proving the contention at the hearing. The requestor/petitioner must also provide references to those specific sources and documents of which the requestor/petitioner is aware and on which the requestor/petitioner intends to rely to establish those facts or expert opinion. The requestor/petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the action under consideration. The contention must be one that, if proven, would entitle the requestor/petitioner to relief. A requestor/petitioner who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Id. (footnote omitted).

III. STANDING

Entergy does not challenge the DPS' standing in this proceeding. See 10 C.F.R. § 2.309(d)(2). However, to be admitted as a party, DPS must meet the other requirements

applicable to a hearing request, including the requirement to propose at least one admissible contention meeting the NRC's pleading standards. 10 C.F.R. § 2.309(d)(2), (f). As discussed later in this Answer, none of the DPS contentions is admissible.

Entergy also does not challenge DPS' right to participate as an interested State in accordance with 10 C.F.R. § 2.315(c) if a hearing is held and if DPS is not admitted as a party. [2] However, if DPS is admitted as a party to this proceeding, it cannot also participate as an interested State. See 10 C.F.R. § 2.315(c). See also Louisiana Energy Services, L.P (National Enrichment Facility), CLI-04-35, 60 N.R.C. 619, 627 (2004).

IV. STANDARDS FOR ADMISSIBILITY OF CONTENTIONS

A. Contentions Must Be Within the Scope of the Proceeding and May Not Challenge NRC's Rules

As a fundamental requirement, a contention is only admissible if it addresses matters within the scope of the proceeding and does not seek to attack the NRC's regulations governing the proceeding. This fundamental limitation is particularly important in a license renewal proceeding, because the Commission has conducted extensive rulemaking to define and limit the technical and environmental showing that an applicant must make. As discussed later in this Answer, certain DPS contentions fall outside the scope of this proceeding.

10 C.F.R. Part 54 governs the health and safety matters that must be considered in a license renewal proceeding. The Commission has specifically limited this safety review to the

[2] Entergy construes the DPS' "Notice of Intent to Participate" and its assertion of a right to participate in any hearing under 10 C.F.R. § 2.315(c) as a request to participate under this section. The DPS asserts, however, that it also has the right to offer evidence and interrogate witnesses even if no hearing would otherwise be held. This is incorrect. A request to participate under section 2.315(c) is not cause to initiate a hearing. Northern States Power Co. (Tyrone Energy Park, Unit 1), CLI-80-36, 12 N.R.C. 523, 527 (1980). "[S]uch participation is dependent on the existence of a hearing independent of the interested State . . . participation, and such participation ends when the hearing is terminated." Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,201 (Jan. 14, 2004).

matters specified in 10 C.F.R. §§ 54.21 and 54.29(a),[3] which focus on the management of aging of certain systems, structures and components, and the review of time-limited aging evaluations. See Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 N.R.C. 3, 7-8 (2004); Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2), CLI-02-26, 56 N.R.C. 358, 363 (2002). Thus, the potential effect of aging is the issue that essentially defines the scope of license renewal proceedings. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 N.R.C. 631, 637 (2004).

The rules in 10 C.F.R. Part 54 are intended to make license renewal a stable and predictable process. 60 Fed. Reg. at 22,461, 22,462, 22,463, 22,485. As the Commission has explained, "We sought to develop a process that would be both efficient, avoiding duplicative assessments where possible, and effective, allowing the NRC Staff to focus its resources on the most significant safety concerns at issue during the renewal term." Turkey Point, CLI-01-17, 54 N.R.C. at 7 (2001). "License renewal reviews are not intended to 'duplicate the Commission's ongoing reviews of operating reactors.'" Id. (citation omitted). To this end, the Commission has confined 10 C.F.R. Part 54 to those issues uniquely determined to be relevant to the public health and safety during the period of extended operation, leaving all other issues to be addressed by the existing regulatory processes. 60 Fed. Reg. at 22,463. This scope is based on the principle, established in the rulemaking proceedings, that with the exception of the detrimental effects of aging and a few other issues related to safety only during the period of extended operation, the existing regulatory processes are adequate to ensure that the licensing bases of currently-

[3] The Commission has stated that the scope of review under its rules determines the scope of admissible issues in a renewal hearing. 60 Fed. Reg. 22,461, 22,482 n.2 (May 8, 1995). "Adjudicatory hearings in individual license renewal proceedings will share the same scope of issues as our NRC Staff review, for our hearing process (like our Staff's review) necessarily examines only the questions our safety rules make pertinent." Turkey Point, CLI-01-17, 54 N.R.C. at 10.

operating plants provide and maintain an adequate level of safety. 60 Fed. Reg. at 22,464, 22,481-82. Consequently, license renewal does not focus on operational issues, because these issues "are effectively addressed and maintained by ongoing agency oversight, review, and enforcement." Millstone, CLI-04-36, 60 N.R.C. at 638 (footnote omitted).

The NRC rules governing environmental matters – which are contained in 10 C.F.R. §§ 51.53(c), 51.95(c), and Appendix B to Part 51 – are similarly intended to produce a more focused and, therefore, more effective review. 61 Fed. Reg. 28,467 (June 5, 1996); Turkey Point, CLI-01-17, 54 N.R.C. at 11. To accomplish this objective, the NRC prepared a comprehensive Generic Environmental Impact Statement ("GEIS") for License Renewal of Nuclear Plants (NUREG-1437) and made generic findings reflected in the GEIS and in Appendix B to 10 C.F.R. Part 51. Those issues that could be resolved generically for all plants are designated as Category 1 issues and are not evaluated further in a license renewal proceeding (absent waiver or suspension of the rule by the Commission based on new and significant information). 61 Fed. Reg. at 28,468, 28,470, 28,474; Turkey Point, CLI-01-17, 54 N.R.C. at 12. The remaining (i.e., Category 2) issues that must be addressed in an applicant's environmental report are defined specifically in 10 C.F.R. § 51.53(c). See generally, Turkey Point, CLI-01-17, 54 N.R.C. at 11-12.

10 C.F.R. § 2.309(f)(1)(iii)-(iv) requires a petitioner to demonstrate that the issue raised by each of its contentions is within the scope of the proceeding and material to the findings that the NRC must make. Licensing boards "are delegates of the Commission" and, as such, they may "exercise only those powers which the Commission has given [them]." Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 N.R.C. 167, 170 (1976) (footnote omitted); accord Portland General Electric Co. (Trojan Nuclear Plant),

ALAB-534, 9 N.R.C. 287, 289-90 n.6 (1979). Accordingly, it is well established that a contention is not cognizable unless it is material to a matter that falls within the scope of the proceeding for which the licensing board has been delegated jurisdiction. Id.; see also Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-616, 12 N.R.C. 419, 426-27 (1980); Commonwealth Edison Co. (Carroll County Site), ALAB-601, 12 N.R.C. 18, 24 (1980).

It is also well established that a petitioner is not entitled to an adjudicatory hearing to attack generic NRC requirements or regulations. Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 N.R.C. 328, 334 (1999). "[A] licensing proceeding . . . is plainly not the proper forum for an attack on applicable statutory requirements or for challenges to the basic structure of the Commission's regulatory process." Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 A.E.C. 13, 20, aff'd in part on other grounds, CLI-74-32, 8 A.E.C. 217 (1974) (footnote omitted). Thus, a contention which collaterally attacks a Commission rule or regulation is not appropriate for litigation and must be rejected. 10 C.F.R. § 2.335; Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 A.E.C. 79, 89 (1974). A contention which "advocate[s] stricter requirements than those imposed by the regulations" is "an impermissible collateral attack on the Commission's rules" and must be rejected. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 N.R.C. 1649, 1656 (1982); see also Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-19, 33 N.R.C. 397, 410, aff'd in part and rev'd in part on other grounds, CLI-91-12, 34 N.R.C. 149 (1991). Likewise, a contention that seeks to litigate a generic determination established by Commission rulemaking is "barred as a matter of law." Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 N.R.C. 5, 30 (1993).

These limitations are very germane to this proceeding in that the scope of admissible environmental contentions is constrained by 10 C.F.R. §§ 51.53(c), 51.95(c), and Appendix B to Part 51; and the scope of technical contentions is constrained by 10 C.F.R. Part 54. See Turkey Point, CLI-01-17, 54 N.R.C. at 5-13. See also Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 N.R.C. 327, 329 (2000); Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-14, 48 N.R.C. 39, 41 (1998), motion to vacate denied, CLI-98-15, 48 N.R.C. 45, 56 (1998); Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2 and 3), CLI-98-17, 48 N.R.C. 123, 125 (1998).

B. Contentions Must Be Specific and Supported By a Basis Demonstrating a Genuine, Material Dispute

In addition to the requirement to address issues within the scope of the proceeding, a contention is admissible only if it provides:

- a "specific statement of the issue of law or fact to be raised or controverted;"
- a "brief explanation of the basis for the contention;"
- a "concise statement of the alleged facts or expert opinions" supporting the contention together with references to "specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;" and
- "[s]ufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact," which showing 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)(i), (ii), (v) and (vi). The failure of a contention to comply with any one of these requirements is grounds for dismissing the contention. Palo Verde, CLI-91-12, 34

N.R.C. at 155-56. As discussed later in this answer, none of Petitioners' contentions complies with these requirements.

These pleading standards governing the admissibility of contentions are the result of a 1989 amendment to 10 C.F.R. § 2.714, now § 2.309, which was intended "to raise the threshold for the admission of contentions." 54 Fed. Reg. 33,168 (Aug. 11, 1989); see also Oconee, CLI-99-11, 49 N.R.C. at 334; Palo Verde, CLI-91-12, 34 N.R.C. at 155-56. The Commission has stated that the "contention rule is strict by design," having been "toughened . . . in 1989 because in prior years 'licensing boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation.'" Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 N.R.C. 349, 358 (2001) (citation omitted). The pleading standards are to be enforced rigorously. "If any one . . . is not met, a contention must be rejected." Palo Verde, CLI-91-12, 34 N.R.C. at 155 (citation omitted). A licensing board is not to overlook a deficiency in a contention or assume the existence of missing information. Id.

The Commission has explained that this "strict contention rule" serves multiple purposes, which include putting other parties on notice of the specific grievances and assuring that full adjudicatory hearings are triggered only by those able to proffer at least some minimal factual and legal foundation in support of their contentions. Oconee, CLI-99-11, 49 N.R.C. at 334. By raising the threshold for admission of contentions, the NRC intended to obviate lengthy hearing delays caused in the past by poorly defined or supported contentions. Id. As the Commission reiterated in incorporating these same standards into the new Part 2 rules, "[t]he threshold standard is necessary to ensure that hearings cover only genuine and pertinent issues of concern

and that issues are framed and supported concisely enough at the outset to ensure that the proceedings are effective and focused on real, concrete issues." 69 Fed. Reg. at 2,189-90.

Under these standards, a petitioner is obligated "to provide the [technical] analyses and expert opinion" or other information "showing why its bases support its contention." Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 N.R.C. 281, 305, vacated in part and remanded on other grounds, CLI-95-10, 42 N.R.C. 1, aff'd in part, CLI-95-12, 42 N.R.C. 111 (1995). Where a petitioner has failed to do so, "the [Licensing] Board may not make factual inferences on [the] petitioner's behalf." Id., citing Palo Verde, CLI-91-12, 34 N.R.C. 149. See also Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 N.R.C. 142, 180 (1998) (a "bald assertion that a matter ought to be considered or that a factual dispute exists . . . is not sufficient"; rather "a petitioner must provide documents or other factual information or expert opinion" to support a contention's "proffered bases") (citations omitted).

Further, admissible contentions "must explain, with specificity, particular safety or legal reasons requiring rejection of the contested [application]." Millstone, CLI-01-24, 54 N.R.C. at 359-60. In particular, this explanation must demonstrate that the contention is "material" to the NRC's findings and that a genuine dispute on a material issue of law or fact exists. 10 C.F.R. § 2.309(f)(1)(iv), (vi) (emphasis added). The Commission has defined a "material" issue as meaning one where "resolution of the dispute would make a difference in the outcome of the licensing proceeding." 54 Fed. Reg. at 33,172 (emphasis added).

As observed by the Commission, this threshold requirement is consistent with judicial decisions, such as Conn. Bankers Ass'n v. Bd. of Governors, 627 F.2d 245, 251 (D.C. Cir. 1980), which held that:

> [A] protestant does not become entitled to an evidentiary hearing merely on request, or on a bald or conclusory allegation that . . . a dispute exists. The protestant must make a minimal showing that material facts are in dispute, thereby demonstrating that an "inquiry in depth" is appropriate.

Id. (footnote omitted); see also Calvert Cliffs, CLI-98-14, 48 N.R.C. at 41 ("It is the responsibility of the Petitioner to provide the necessary information to satisfy the basis requirement for the admission of its contentions . . . ."). A contention, therefore, is not to be admitted "where an intervenor has no facts to support its position and where the intervenor contemplates using discovery or cross-examination as a fishing expedition which might produce relevant supporting facts." 54 Fed. Reg. at 33,171.[4] As the Commission has emphasized, the contention rule bars contentions where petitioners have what amounts only to generalized suspicions, hoping to substantiate them later, or simply a desire for more time and more information in order to identify a genuine material dispute for litigation. Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2), CLI-03-17, 58 N.R.C. 419, 424 (2003).

Therefore, under the Rules of Practice, a statement "that simply alleges that some matter ought to be considered" does not provide a sufficient basis for a contention. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 N.R.C. 200, 246 (1993), review declined, CLI-94-2, 39 N.R.C. 91 (1994). Similarly, a mere reference to

[4] See also Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 N.R.C. 460, 468 (1982), vacated in part on other grounds, CLI-83-19, 17 N.R.C. 1041 (1983) ("[A]n intervention petitioner has an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable [the petitioner] to uncover any information that could serve as the foundation for a specific contention. Stated otherwise, neither Section 189a. of the Act nor Section 2.714 [now 2.309] of the Rules of Practice permits the filing of a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery against the applicant or staff.").

documents does not provide an adequate basis for a contention. Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 N.R.C. 325, 348 (1998).

Rather, NRC's pleading standards require a petitioner to read the pertinent portions of the license application, including the safety analysis report and the environmental report, state the applicant's position and the petitioner's opposing view, and explain why it has a disagreement with the applicant. 54 Fed. Reg. at 33,170; Millstone, CLI-01-24, 54 N.R.C. at 358. If the petitioner does not believe these materials address a relevant issue, the petitioner is "to explain why the application is deficient." 54 Fed. Reg. at 33,170; Palo Verde, CLI-91-12, 34 N.R.C. at 156. A contention that does not directly controvert a position taken by the applicant in the license application is subject to dismissal. See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 N.R.C. 370, 384 (1992). Furthermore, an allegation that some aspect of a license application is "inadequate" or "unacceptable" does not give rise to a genuine dispute unless it is supported by facts and a reasoned statement of why the application is unacceptable in some material respect. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-16, 31 N.R.C. 509, 521 & n.12 (1990).

V. THE DPS HAS NOT PROFFERED ANY ADMISSIBLE CONTENTIONS

As explained below, the DPS contentions do not meet any of the applicable standards.

A. DPS' First Contention

DPS' first contention, which alleges that the Application does not provide necessary information with regard to aging management of primary containment concrete, is inadmissible because it is vague and unsupported by an adequate basis. DPS' discussion of this contention fails to demonstrate the existence of a genuine dispute concerning a material issue.

The contention itself[5] is unduly vague and overbroad because it does not identify what necessary information is lacking, what aging effect is allegedly at issue, and what aspect of the aging management program is being challenged. The NRC's Rules of Practice require that contentions be stated with particularity and include a "specific statement" of the issue controverted. 10 C.F.R. § 2.309(f)(1). Accordingly, the first contention cannot be admitted.

While somewhat more information is provided in the discussion accompanying DPS' first contention, that discussion does not establish the existence of a genuine dispute concerning a material issue. The gravamen of DPS' discussion is that there is a conflict between section 3.5.2.2.1.3 of the Application and section 5.2.3.2 of the Updated Final Safety Analysis Report ("UFSAR") concerning whether primary containment concrete will be exposed to temperatures at which a reduction in strength and modulus may occur. See Pet. at 10-11. As discussed below, the statement in the UFSAR is not inconsistent with the Application and therefore gives rise to no genuine, material dispute.

Section 3.5.2.2.1.3, "Reduction of Strength and Modulus of Concrete Structures Due to Elevated Temperature," states in part:

> ASME Code, Section III, Division 2, Subsection CC indicates that aging due to elevated temperature exposure is not significant as long as concrete general area temperatures do not exceed 150° F and local area temperatures do not exceed 200° F. During normal operation, areas within primary containment are within these temperature limits. Therefore, reduction of strength and modulus of concrete structures due to elevated temperature is not an aging effect requiring management for VYNPS containment concrete.

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[5] Contention 1 states in its entirety "The Application must be denied because the Applicant has failed to provide the necessary information with regard to age management of primary containment concrete in accordance with 10 C.F.R. § 54.21 such that the Commission cannot find that 10 C.F.R. § 54.29(a) is met." Pet. at 10.

Application at 3.5-8. DPS points out that the UFSAR indicates that the normal ambient temperature in the drywell is about 135°F to 165°F. Pet. at 11, quoting UFSAR at 5.2-8 (emphasis added). However, the UFSAR also states that the drywell is cooled by four cooling units, which maintain an average temperature of 150°F, with a maximum of 135°F in vicinity of the recirculating pump motors. UFSAR at 5.2-18. Thus, DPS' reference to the UFSAR is selective and ignores the statements indicating that the general temperature in the drywell is 150°F, consistent with the section of the AMSE Code discussed in the Application. Further, the only structural[6] concrete "in the drywell" is the floor, in which the bottom of the drywell shell is embedded, and the concrete in the reactor pedestal. These structures are located in lower areas of the drywell, as are the recirculating pumps, and thus are in a zone maintained below 150°F by the cooling units. Therefore, the UFSAR statement quoted by DPS provides no basis establishing a genuine dispute with the Application.

Nor does the UFSAR statement provide a basis to dispute the temperatures of primary containment concrete outside of the drywell. The UFSAR statement quoted by DPS relates to temperatures inside the drywell, not outside. In addition, as stated in the UFSAR, the drywell cooling units maintain an average temperature of 150°F, so there is no basis indicating that the "general area temperature" of concrete outside the drywell shell exceeds 150°F.[7] Nor does the DPS provide any basis to assume that temperatures at the periphery of the drywell would exceed 150°F. Further, above the transition zone between the spherical and cylindrical portions (i.e., the upper half of the drywell), the drywell is separated from exterior concrete by a two-inch gap.

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[6] There is some additional concrete that is present in the drywell for shielding, but this concrete does not carry structural loads.

[7] The ASME Code provision referenced in the sections of the Application cited by DPS also indicates that aging is not significant if local area temperatures do not exceed 200°F, so even if there were local areas where the temperature exceeded 150°F, there would still be no basis to question to adequacy of the Application.

UFSAR at 5.2-7. Moreover, while the surface of the exterior concrete adjacent to the drywell could experience some localized heating, the reactor building in which this concrete is located is cooled with outside air by the HVAC system, which limits the general temperatures to approximately 100°F. UFSAR § 5.3.5.2, at 5.3.12. DPS asserts that "the concrete surface behind the steel shell will closely match the drywell ambient temperature," but provides absolutely no support for this assertion. In particular, Mr. Sherman makes no such statement in his declaration (see Declaration of W. Sherman at ¶8), and no other support is offered for this bald claim. In short, DPS provides no basis indicating that the "general area temperature" of concrete outside the drywell will exceed 150°F, and therefore no basis to dispute section 3.5.2.2.1.3 of the Application.

B. DPS' Second Contention

DPS' Second Contention, which in effect alleges that the Environmental Report is deficient in not analyzing "the substantial likelihood" that spent fuel will have to be stored at the Vermont Yankee site longer than evaluated in the GEIS and perhaps indefinitely" (Pet. at 12-13), is inadmissible because it impermissibly challenges Commission regulations and is outside the scope of this proceeding. DPS has not petitioned to waive the rules, and even if it had, the information that DPS asserts is "new and significant" is neither.

DPS' Second Contention must be rejected as a direct challenge to the Commission's Waste Confidence Rule, which provides,

> (a) The Commission has made a generic determination that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor at its spent fuel storage basin or at either onsite or offsite independent spent fuel storage installations. Further, the Commission believes there is reasonable assurance that at least one mined geologic repository will be available within the first quarter of

> the twenty-first century, and sufficient repository capacity will be available within 30 years beyond the licensed life for operation of any reactor to dispose of the commercial high-level waste and spent fuel originating in such reactor and generated up to that time.
>
> (b) Accordingly, as provided in §§ 51.30(b), 51.53, 51.61, 51.80(b), 51.95 and 51.97(a), and within the scope of the generic determination in paragraph (a) of this section, no discussion of any environmental impact of spent fuel storage in reactor facility storage pools or independent spent fuel storage installations (ISFSI) for the period following the term of the reactor operating license or amendment or initial ISFSI license or amendment for which application is made, is required in any environmental report, environmental impact statement, environmental assessment or other analysis prepared in connection with the issuance or amendment of an operating license for a nuclear reactor or in connection with the issuance of an initial license for storage of spent fuel at an ISFSI, or any amendment thereto.

10 C.F.R. § 51.23(a)-(b) (emphasis added).

Further, this contention is a direct challenge to the license renewal rules and generic findings in the GEIS. As the Commission ruled in dismissing a similar contention in another license renewal proceedings:

> . . . 10 C.F.R. § 51.53(c)(3)(i) explicitly states that an applicant's site specific environmental report for operating license renewals need not contain any issues identified as "Category 1" issues in Appendix B to Part 51, Subpart A, because the Commission already has addressed those issues in a generic fashion. Category 1 issues include the radiological impacts of spent fuel and high-level waste disposal, low-level waste storage and disposal, mixed waste storage and disposal, and onsite spent fuel. See Table B-1, Part 51, Subpart A, Appendix B. The Commission's generic determinations governing onsite waste storage preclude the Petitioners from attempting to introduce such waste issues into this adjudication.

Oconee, supra, CLI-99-11, 49 N.R.C. at 343; accord, Turkey Point, supra, CLI-01-17, 54 N.R.C. 21; Nuclear Management Co., LLC (Palisades Nuclear Plant), LBP-06-10, 63 N.R.C. __, slip op. at 47-49 (Mar. 7, 2006).[8]

[8] See also Final Rule, Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. 66,537, 66,538 (Dec. 18, 1996) ("The Commission believes that conditioning individual license renewal

Because DPS' second contention challenges both the Waste Confidence Rule and the license renewal rule, its admission is barred. 10 C.F.R. § 2.335(a). DPS attempts to side-step these rules and the limited scope of this license renewal proceeding by wording its contention as one asserting that the Application has failed to provide new and significant information in accordance with 10 C.F.R. § 51.53(c)(3)(iv). However, DPS misconstrues both the scope and intent of section 54.53(c)(3)(iv), which does not allow Category 1 issues to be litigated absent a waiver of the rules.

Section 51.53(c)(3)(iv) does not open Category 1 issues to litigation. The requirement in section 51.53(c)(3)(iv) requires no more than the provision in applicant's environmental report of information "of which the applicant is aware."[9] It does not require an applicant to address information that some other party thinks is significant, or to analyze or revalidate Category 1 issues.[10] The Commission has explicitly stated that an environmental report need not contain analyses of Category 1 issues (10 C.F.R. § 51.53(c)(3)(i)) and that an applicant need not attempt to validate the generic conclusions in the GEIS.

> Based on the NRC's confidence in the applicability of its generic review, it does not see any reason to require that an applicant perform a site-specific validation of GEIS conclusions. The NRC believes that such a requirement eliminates the efficiency and stability sought by the Part 51 rulemaking.

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decisions on resolution of radioactive waste disposal issues is not warranted because the Commission has already made a generic determination, codified in 10 C.F.R. 51.23, that spent fuel generated at a reactor can be stored safely and without significant environmental impacts for at least 30 years beyond a license renewal term and that there will be a repository available within the first quarter of the twenty-first century.")

[9] This provision is analogous to 10 C.F.R. § 50.9, which requires licensees to report significant information to the NRC but does not require new studies or analyses to develop such information. An analogy may also be drawn to the obligation developed in licensing proceedings to report material information. See Virginia Electric & Power Co. (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 N.R.C. 480 (1976). Here too, the obligation is to report information that is discovered, not to require the creation or generation of new information.

[10] Entergy has met this requirement by stating in section 5 of its environmental report that it is aware of no new and significant information regarding the environmental impacts of VYNPS license renewal. ER at 5-2.

NUREG-1529, "Public Comments on the Proposed 10 CFR Part 51 Rule for Renewal of Nuclear Power Plant Operating Licenses and Supporting Documents: Review of Concerns and NRC Staff Response" (Feb. 1996) at p. C9-14.

Moreover, the Commission has explained that the provision of new and significant information should be presented as the basis for a petition for waiver or rulemaking.

> The Commission recognizes that even generic findings sometimes need revisiting in particular contexts. Our rules thus provide a number of opportunities for individuals to alert the Commission to new and significant information that might render a generic finding invalid either with respect to all nuclear power plants or for one plant in particular. In the hearing process, petitioners with new information showing that a generic rule would not serve its purpose at a particular plant may seek a waiver of the rule. See 10 C.F.R. § [2.355] . . . Petitioners with evidence that a generic finding is incorrect for all plants may petition the Commission to initiate a fresh rulemaking.

Turkey Point, supra, CLI-01-17, 54 N.R.C. at 12 (emphasis added). As explained when this requirement was first proposed,

> Litigation of environmental issues in a hearing will be limited to unbounded category 2 and category 3 issues unless the rule is suspended or waived.

SECY-93-032, 10 CFR Part 51 Rulemaking on Environmental Review for Renewal of Nuclear Power Plant Operating Licenses (Feb. 9, 1993) at. 4. The final rule subsequently combined Category 2 and 3 issues (61 Fed. Reg. at 28,474), but made no change that would alter the treatment of Category 1 issues. Thus, a petitioner who wishes to litigate a Category 1 issue must submit a petition for waiver, pursuant to 10 C.F.R. § 2.335.

In sum, if DPS believes that there is new and significant information changing the findings on a Category 1 issue, it should have petitioned the Commission either to waive the rules or to initiate a rulemaking proceeding. Allowing Category 1 issues to be admitted for litigation based on mere allegations that some information is new and significant would be

inconsistent with the provisions of the rules eliminating consideration of Category 1 issues (10 C.F.R. § 51.53(c)(3)(i)) as well as with the explicit Commission decisions holding that such contentions are barred.[11] Further, if contentions could be litigated based on a mere allegation that some information is new and significant, or that the applicant has failed to adopt a petitioner's view of such information, the finality intended by the Commission would be rendered meaningless.

DPS has not followed the procedures required by 10 C.F.R. § 2.335 to waive a rule, and hence its contention cannot be entertained. Further, DPS offers no information that is in fact new and significant, and would thus demonstrate that the Waste Confidence Rule and license renewal rules would not serve their purpose. The Commission's purpose in promulgating these rules was "to address high-level waste disposal generically rather than unnecessarily to revisit the same waste disposal questions, license-by-license, when reviewing individual applications" because spent nuclear fuel management "'is a national problem of essentially the same degree of complexity and uncertainty for every renewal application and it would not be useful to have a repetitive consideration of the matter.'" Oconee, CLI-99-11, 49 N.R.C. at 345 (quoting 61 Fed. Reg. at 66,538). DPS' assertion that spent nuclear fuel issues should be adjudicated "at least once to create fairness and public process" (Pet. at 31) is simply a challenge to the Commission's decision to address this question generically in the Waste Confidence rulemaking proceeding and to apply that rule in license renewal proceeding. The Commission has ample authority to proceed generically in this manner. Oconee, CLI-99-11, 49 N.R.C. at 343; Vt. Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978); Baltimore Gas & Electric Co. v. Natural Resources Defense Council, 462 U.S. 87, 100-01 (1983).

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[11] Oconee, 99-11, 49 N.R.C. at 343-45; Turkey Point, CLI-01-17, 54 N.R.C. at 11.

Furthermore, DPS raises no issue not already considered by the Commission in promulgating its Waste Confidence Rule. DPS contends that long-term or perhaps indefinite storage of spent fuel is inevitable because the assumptions underlying the Commission's generic determinations no longer apply. Pet. at 14. Specifically, DPS alleges that (1) there is only a "slight" likelihood that a repository will be in place by 2062 because of "unanticipated technical problems;" (2) insufficient space exists within the first planned repository for the spent nuclear fuel generated during the extended license period; (3) no plans currently exist for a second repository; (4) changes have been proposed in national nuclear waste policy to renew reprocessing of spent nuclear fuel; (5) there is no "reasonable prospect" that the federal government or a third party will either take title to spent fuel generated during the Vermont Yankee extended license term and/or remove it from the site; and, therefore, (6) it is "reasonable to expect" that at least some spent nuclear fuel generated during the license renewal period will remain at the Vermont Yankee site for a longer time than the time period evaluated in the GEIS. Pet. at 14-16.

However, the Commission has explicitly considered all of these issues in its Waste Confidence rulemaking. The NRC considered "the probability that site characterization activities will not proceed entirely without problems" and nonetheless concluded that it had reasonable assurance that a repository would be available within the first quarter of the 21st century. Review and Final Revision of Waste Confidence Decision, 55 Fed. Reg. 38,474, 38,494-95 (Sept. 18, 1990). The Commission also explicitly considered the first repository's capacity and the need for a second repository and concluded that "if the need for an additional repository is established, Congress will provide the needed institutional support and funding, as it has for the first repository," and that it "need not at this time consider the institutional

uncertainties arising from having to restart a second repository program." 55 Fed. Reg. at 38,502, 38,504. Likewise, the Commission explicitly "recogniz[ed] the possibility" that the country might renew reprocessing of spent nuclear fuel. 55 Fed. Reg. at 38,489, 38,493. The Commission also explicitly considered the individual contracts between the Department of Energy and the utilities that own and possess the spent nuclear fuel, which provide for DOE's responsibility over spent nuclear fuel. 55 Fed. Reg. at 38,479.[12] The Commission has since reaffirmed its 1990 Waste Confidence findings, finding them "confirm[ed] and strengthen[ed]" by events the previous decade. Waste Confidence Decision Review: Status, 64 Fed. Reg. 68,005, 68,007 (Dec. 6, 1999).

DPS' 1992 comments on the draft GEIS, quoted on pages 24 through 31 of the Petition and attached as Exhibit 1 thereto, are certainly not new, because they pre-date the GEIS as well as the Commission's 1999 review of the Waste Confidence Decision. Nor is DPS' reference to the Global Nuclear Energy Partnership (GNEP) significant. DPS touts GNEP as a "major shift in policy," Pet. at 15, but currently it is nothing more than a proposal. Even if implemented as envisioned, it would hardly amount to a major shift in spent fuel disposal policy. As stated in the President' press release on GNEP,

> It is important to emphasize . . . that GNEP does not diminish in any way the need for, or the urgency of, the nuclear waste disposal program at Yucca Mountain. Yucca Mountain is still required under any fuel cycle scenario.[13]

Similarly, a DOE press release issued in connection with a legislative proposal addressing a number of Yucca Mountain issues explained that GENP would not impact Yucca Mountain.

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[12] These contracts are still in effect today and, thus, provide at least a "reasonable prospect" that DOE will assume responsibility for the spent fuel.

[13] The President's Energy Vision (Feb. 20, 2006), available at http://www.whitehouse.gov/stateoftheunion/2006/energy/print/index.html.

> GNEP is a comprehensive, global, nuclear energy strategy that will enable the expansion of emissions-free nuclear energy worldwide in a safe, environmentally clean, affordable manner that will minimize waste and reduce the threat of nuclear proliferation. Even with the potential waste minimization benefits of GNEP, the Yucca Mountain repository would still be needed to provide for safe, permanent geologic disposal of spent nuclear fuel.[14]

Consequently, the GNEP initiative is in no way inconsistent with the Commission's reasonable assurance that at least one repository will be available in the first quarter of this century.

Similarly misplaced is DPS' reliance on comments made by Senator Domenici (Pet. at 16). Aside from the fact that a single Senator cannot decree the nation's spent nuclear fuel policy, six days later Senator Domenici also stated:

> I remain committed to integrating GNEP and Yucca. I intend to fully-fund GNEP and find even more money for the program if I can. In the meantime, I am working to help DOE get Yucca back on track. I'm delighted by the momentum in this country toward new nuclear power. This is something I have been working toward for more than a decade.[15]

Thus, DPS' conclusions that recent spent nuclear fuel policy proposals will undermine the Commission's generic determinations have no merit. The same holds true for DPS' speculative assertions about the current political environment and what Senator Reid may or may not accomplish if he were to become Senate Majority Leader (Pet. at 17). Likewise, DPS' reliance on the fact that the Western Governors Association (which does not set national spent fuel policy) has repeatedly adopted a spent nuclear fuel resolution has little significance and is certainly not new, particularly where DPS' Petition indicates that the most recent adoption occurred in 1999. Pet. at 17-18.

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[14] U.S. Dep't of Energy, DOE to Send Proposed Yucca Mountain Legislation to Congress (Apr. 4, 2006), available at http://www.energy.gov/print/3428.htm (emphasis added).

[15] Press release, Senate Committee on Energy and Natural Resources, 16 Utility Companies Plan 25 New Nuke Plants Despite Uncertainty Over Yucca Role, May 22, 2006, available at http://energy.senate.gov/public/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=234971&Month=5&Year=2006&Party=1.

DPS also claims (without reference to any factual support) that the assumption of Yucca Mountain's suitability is no longer valid because of "water in-leakage," which has allegedly caused the design to be changed, as evidenced by the recent decision to use multi-purpose canisters for the transportation, aging, and disposal of spent nuclear fuel. Pet. at 17. DPS provides no basis or support for its allegation of "water-in-leakage," let alone water in-leakage that calls into question the suitability of Yucca Mountain. DOE has not rescinded or modified its suitability determination. Nor does DOE's proposed plan to use multi-purpose canisters have any connection to DPS' claimed "water in-leakage." The multi-purpose canister plan is being considered not because of new information on the suitability of the repository site, but instead to simplify the handling and packaging of spent nuclear fuel before it is emplaced in the repository.[16] For purposes here, these recent developments certainly have not undermined the Commission's generic spent fuel determinations.

Finally, DPS suggests that terrorist threats after September 11, 2001 should be considered new and significant information with environmental effects that should be evaluated. Pet. at 18, 29-30. The Commission has ruled that "NEPA imposes no legal duty on the NRC to consider intentional malevolent acts, such as [the September 11, 2001 attacks], on a case-by-case basis in conjunction with commercial power reactor license renewal applications." McGuire, CLI-02-26, 56 N.R.C. at 365 (footnote omitted). On reply, DPS may refer to a recent decision by the U.S. Court of Appeals for the Ninth Circuit holding that the NRC should have considered the effects of terrorism in an environmental assessment for an independent spent fuel storage installation at the Diablo Canyon Power Plant. San Luis Obispo Mothers for Peace v. NRC, No. 03-74628, slip

[16] Press release, U.S. Department of Energy Yucca Mountain Project, New Yucca Mountain Repository Design to be Simpler, Safer, and More Cost-Effective, October 2005, available at http://www.ocrwm.doe.gov/info_library/newsroom/documents/repos_design_pr.pdf.

op. (9th Cir. June 2, 2006). The Court, however, has not yet issued its mandate,[17] so this decision currently has no effect. Even if this decision becomes effective,[18] it would not affect license renewal proceedings, because the Commission has held:

> Even if we were required by law to consider terrorism under NEPA, the NRC has already issued a Generic Environmental Impact Statement ("GEIS") that considers sabotage in connection with license renewal. . . . The GEIS concluded that, if such an event were to occur, the resultant core damage and radiological release would be no worse than those expected from internally initiated events.

McGuire, CLI-02-26, 56 N.R.C. at 365 n.24 (citations omitted).

In short, DPS provides no information indicating that the Waste Confidence Rule and Category 1 findings in the license renewal rules will not serve their intended purpose. Similarly, DPS has provided no information suggesting that Entergy has failed to comply with 10 C.F.R. § 54.53(c)(3)(iv). The Commission has specifically considered and rejected claims that license renewal applications need to address the potential availability and viability of a permanent repository due to alleged uncertainties in the schedule and capacity of the proposed Yucca Mountain repository or of alternative repositories. Oconee, CLI-99-11, 49 N.R.C. at 344-45 ("At bottom, the petitioners voice concerns only about uncertainties in high-level waste disposal, uncertainties that the Commission has always acknowledged, but has decided will be overcome in the next several decades."). DPS' Contention is thus barred, and its allegations provide no basis to reopen the Commission's generic determinations.

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[17] Nor has the time expired within which the NRC or the utility involved may seek rehearing, rehearing *en banc*, or Supreme Court review.

[18] The Ninth Circuit's decision is inconsistent with Limerick Ecology Action v. NRC, 869 F.2d 719, 741-44 (3d Cir. 1989), which upheld the NRC's determination that the risk of sabotage could not be assessed meaningfully and therefore was unlitigable. Therefore, even if the Ninth Circuit's decision were to become effective, there would be a split in the circuits. Because the Ninth Circuit decision would not necessarily be controlling, and because the Commission held in McGuire that sabotage is already addressed in the GEIS, Entergy respectfully submits that until the Commission directs otherwise, the Board should continue to follow the NRC's license renewal precedent. In any event, because spent fuel storage is governed by the Waste Confidence Rule and is a Category 1 issue in license renewal, it can be admitted as a contention only if the Commission waives these rules.

C. DPS' Third Contention

DPS' third contention, which alleges that Entergy has failed to identify systems, structures and components in the security area (Pet. at 31), is inadmissible, because such components are not within the scope of the license renewal rule. In promulgating the license renewal rules, the Commission explicitly excluded these components from the scope of the rule. DPS has not sought a waiver of the rules in accordance with 10 C.F.R. § 2.335, and therefore this contention may not be entertained.

As a threshold matter, the Commission has repeatedly ruled that security issues, while vital, are simply not among the aging-related questions at stake in a license renewal proceeding. Millstone, CLI-04-36, 60 N.R.C. at 638; McGuire, CLI-02-26, 56 N.R.C. at 364.

Security systems are not within the scope of license renewal rules, as defined in 10 C.F.R. § 54.4. They are not safety-related systems as defined in 10 C.F.R. § 54.4(a)(1). Nor are they encompassed by any of the specific regulations invoked by 10 C.F.R. § 54.4(a)(3).

The exclusion of security systems is deliberate. As explained by the Commission when it first promulgated the license renewal rules:

> The requirements of 10 CFR part 73, notably the testing and maintenance requirements of 10 CFR 73.55(g), include provisions for keeping up the performance of security equipment against impairment due to age-related degradation or other causes. Once a licensee establishes an acceptable physical protection system, changes that would decrease the effectiveness of the system cannot be made without filing an application for license amendment in accordance with 10 CFR 50.54(p)(1).
>
> Application for a renewed license will not affect the standards for physical protection required by the NRC. The level of protection will be maintained during the renewal term in the same manner as during the original license term, since these requirements remain in effect during the renewal term by the language of § 54.35. The requirements of 10 CFR part 73 will continue to be reviewed and changed to incorporate new information, as necessary. The NRC will continue to

> ensure compliance of all licensees, whether operating under an original license or a renewed one, through ongoing inspections and reviews. Therefore, the Commission concludes that a review of the adequacy of existing security plans is not necessary as part of the license renewal review process.
>
> The NRC has reviewed current requirements for physical protection and determined that they provide reasonable assurance that an adequate level of physical protection will exist at any reactor at any time in its operating lifetime.

56 Fed. Reg. 64,943, 64,967 (Dec. 13, 1991) (emphasis added)

Similarly, in NUREG-1412, which was published as a supplement to the statement of considerations accompanying the license renewal rule, the NRC stated:

> Age-related degradation of safeguards equipment is not a license renewal issue because it is an issue that is being currently experienced and managed. A number of the originally licensed sites have reached the life expectancy of certain types of security equipment. Because of the general performance objectives and requirements in 10 CFR 73.55(a) and the site-specific commitments contained in the individual security plans, normal inspection activities will force the replacement of degraded equipment or subject the licensee to enforcement action.

NUREG-1412, "Foundation for the Adequacy of the Licensing Bases, A Supplement to the Statement of Considerations for the Rule on Nuclear Power Plant License Renewal (10 CFR Part 54)" (Dec. 1991), at 13-11.

Nor are security systems encompassed within 10 C.F.R. § 54.4(a)(2).[19] At the outset, when the Commission has explicitly stated its specific intent to exclude security equipment from the scope of license renewal because it is already adequately managed under 10 C.F.R. § 73.55(a), it would be inappropriate to interpret section 54.4(a)(2) as indirectly reaching such equipment. Moreover, as discussed below, section 54.4(a)(2) is focused on systems, structures

[19] 10 C.F.R. § 54.4(a)(2) brings within scope all non-safety-related systems, structures, and components whose failure could prevent safety-related systems, structures and components from performing their intended safety functions.

and components whose failure could have a fairly direct effect on safety-related systems, and not on remote and hypothetical scenarios.

When the NRC first promulgated its license renewal rules in 1991, it limited the category of SSCs now defined in section 54.4(a) (2) to "all non-safety related SSCs whose failure could directly prevent satisfactory accomplishment of any of the required functions [of safety related SSCs]." 10 C.F.R. 54.4 (1992). See 56 Fed. Reg. at 64,977 (emphasis added). The Commission explained:

> The inclusion of SSCs whose failure could prevent another SSC from accomplishing a safety function is intended to provide protection against safety function failure in cases where the safety-related structure or component is not itself impaired by age-related degradation but is vulnerable to another structure or component that may be so impaired. Two examples of these types of SSCs are: (1) Nonseismically qualified equipment located near seismically qualified equipment and thus potentially affecting seismically qualified equipment, and (2) the direct connection of non-safety-related systems (i.e., some instrument air systems) with safety-related systems. Other examples are components providing power, cooling, fluid, etc. to safety-related SSCs.
>
> The Commission intends this provision of the definition of SSCs important to license renewal to apply to SSCs with a reasonably direct bearing on the functioning of the safety-related SSCs. This provision of the rule does not include the propagation of failures that are hidden or unanticipated as included in the definition of a system interaction, GL 89-18, or other indirect effects that are so remote or speculative as to cause no reasonable safety concern.

56 Fed. Reg. at 64,956 (emphasis added).

Obviously, the failure of a security system has no direct affect on whether a safety-related system will fail. Rather, the effects suggested by the DPS would be caused by an intervening event – a terrorist intrusion. See Pet. at 33. This is not the type of interdependence that 10 C.F.R. § 54.4(a)(2) is intended to capture.

In its 1995 revision of the license renewal rules, the NRC removed the word "directly" from section 54.4(a)(2), but did not alter the intended scope of this provision. As the Commission stated,

> The first two categories of systems, structures and components discussed in the new scope section (§54.4(a)(1) and (a)(2)) are the same categories defined in the previous definition of systems, structures and components important to license renewal. . . . These two categories are meant to capture, as a minimum, engineered safety feature systems, systems required for safe shutdown (achieve and maintain the reactor in a safe shutdown condition), and non-safety related systems, such as auxiliary systems, necessary for the function of safety related systems.

60 Fed. Reg. at 22,645 (emphasis added).

Responding to comments noting deletion of the word "directly" in section 54.4(a)(2), the Commission explained:

> The Commission reaffirms its position that consideration of hypothetical failures that could result from system interdependencies that are not part of the CLB and that have not been previously experienced is not required. However, for some licensee renewal applicants, the Commission cannot exclude the possibility that hypothetical failures that are part of the CLB may require consideration of second-, third- or fourth-level support systems. In these cases the word "directly" may cause additional confusion, not clarity, regarding the systems, structures and components required to be within the scope of license renewal. In removing he word "directly" from this scoping criterion, the Commission believes that it has (1) achieved greater consistency between the scope of the license renewal rule and the scope of the maintenance rule (§50.65) regarding non-safety related systems whose failure could prevent satisfactory accomplishment of safety-related functions and thus (2) promoted greater efficiency and predictability in the license renewal scoping process.
>
> The inclusion of nonsafety-related systems, structures and components whose failure could prevent other systems, structures and components from accomplishing a safety function is intended to provide protection against safety function failure in cases where the safety-related structure or component is not itself impaired by age-related degradation but is vulnerable to failure of another structure or component that may be so impaired. Although it may be considered outside the scope of the maintenance rule, the Commission intends to include equipment that is not seismically qualified located near seismically qualified equipment (i.e. Seismic II/I equipment already identified in a plant CLB) in this set of nonsafety-related systems, structures and components.

Id. at 22,467-68.

This explanation indicates that the Commission removed the word "directly" for two reasons: (1) to not foreclose consideration of support systems considered in systems interaction analyses that are part of a plant's current licensing basis; and (2) to be consistent with the maintenance rule. As before, the intent of section 54.4(a)(2) is to encompass non-safety related support systems required for safety-related systems to operate, and non-safety related components such as Seismic II/I equipment whose failure could directly and physically impact safety related systems.

The stated intent to be consistent with the maintenance rule is particularly telling. While the maintenance rule applies to non-safety related systems, structures and components whose failure could prevent safety-related structures, systems and components from fulfilling their safety functions (see 10 C.F.R. § 50.65(b)(2)(ii)), the Commission has made it clear that

> [I]t is the intent to ensure that each licensee's maintenance program minimizes failures in those BOP SSCs that affect safe operation of the plant. In response to comments, security has been deleted from 10 CFR 50.65 as it is adequately addressed in § 73.46(g) and § 73.55(g).

56 Fed. Reg. 31,314, 31,315 (July 10, 1991).

In sum, DPS is contending that Entergy's application must include systems, structures and components that the Commission has specifically excluded. In arguing that 10 C.F.R. § 54.4(a)(2) requires the inclusion of these components, DPS is stretching that provision beyond its intended scope. In light of the Commission's explicit statements of intent, this interpretation and the DPS' third contention must be rejected.

D. DPS' Reservation of Rights

DPS states that because the NRC Staff has yet to develop a draft supplemental environmental impact statement, the State cannot at this time file any contentions related to energy alternatives but reserves the right to do so should filings by Entergy or the Staff require such action. Pet. at 9. With respect to such environmental issues, however, the NRC rules require that contentions be based on the applicant's environmental report, and permit amended or new contentions only if there are data or conclusions in the NRC draft environmental impact statement that differ significantly from the data or conclusions in the applicant's documents. 10 C.F.R. § 2.309(f)(2). Accordingly, Entergy reserves the right to object to any late-filed contentions that do not meet the standards for such late-filing in 10 C.F.R. §§ 2.309(c) and (f), as applicable.

VI. SELECTION OF HEARING PROCEDURES

Commission rules require the Atomic Safety and Licensing Board designated to rule on the Petition to "determine and identify the specific procedures to be used for the proceeding" pursuant to 10 C.F.R. §§ 2.310 (a)-(h). 10 C.F.R. § 2.310. The regulations are explicit that "proceedings for the . . . renewal . . . of licenses subject to [10 C.F.R. Part 50] may be conducted under the procedures of subpart L." Id. § 2.310(a). The regulations permit the presiding officer to use the procedures in 10 C.F.R. Part 2, Subpart G ("Subpart G") in certain circumstances. Id. § 2.310(d). It is the proponent of the contentions, however, who has the burden of demonstrating "by reference to the contention and the bases provided and the specific procedures in Subpart G of this part, that resolution of the contention necessitates resolution of material issues of fact which may be best determined through the use of the identified procedures." Id. § 2.309(g).

DPS requests and asserts that it is entitled to a full adjudicatory hearing under 10 C.F.R. Subpart G, but does not address the criteria for the selection of hearing procedures. See Pet. at 2. It does not relate the applicable criteria to any of the proposed contentions and bases, and thus has not satisfied its burden to demonstrate why Subpart G procedures should be used in this proceeding. Accordingly, any hearing should be governed by the procedures of Subpart L.

VII. CONCLUSION

For the reasons stated above, the DPS has not offered any admissible contentions in this proceeding. Therefore, its request to intervene as a party should be denied. If DPS is not admitted as a party, Entergy does not object to DPS participating as an interested State in the event that a hearing is held.

Respectfully Submitted,

David R. Lewis
Matias F. Travieso-Diaz
PILLSBURY WINTHROP SHAW PITTMAN LLP
2300 N Street, N.W.
Washington, DC 20037-1128
Tel. (202) 663-8474

Counsel for Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.

Dated: June 22, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
Entergy Nuclear Vermont Yankee, LLC	)	Docket No. 50-271-LR
and Entergy Nuclear Operations, Inc.	)	ASLBP No. 06-849-03-LR
	)	
(Vermont Yankee Nuclear Power Station)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Entergy's Answer to Vermont Department of Public Service Notice of Intention to Participate and Petition to Intervene," dated June 22, 2006, were served on the persons listed below by deposit in the U.S. Mail, first class, postage prepaid, or with respect to Judge Elleman by overnight mail, and where indicated by an asterisk by electronic mail, this 22nd day of June, 2006.

*Administrative Judge
Alex S. Karlin, Esq., Chairman
Atomic Safety and Licensing Board
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
ask2@nrc.gov

*Administrative Judge
Dr. Richard E. Wardwell
Atomic Safety and Licensing Board
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
rew@nrc.gov

*Administrative Judge
Dr. Thomas S. Elleman
Atomic Safety and Licensing Board
5207 Creedmoor Road, #101,
Raleigh, NC 27612.
tse@nrc.gov; elleman@eos.ncsu.edu;

*Secretary
Att'n: Rulemakings and Adjudications Staff
Mail Stop O-16 C1
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
secy@nrc.gov; hearingdocket@nrc.gov

Office of Commission Appellate Adjudication
Mail Stop O-16 C1
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Atomic Safety and Licensing Board
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

*Mitzi A. Young, Esq.
*Steven C. Hamrick, Esq.
Office of the General Counsel
Mail Stop O-15 D21
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
may@nrc.gov; sch1@nrc.gov

*Sarah Hofmann, Esq.
Director of Public Advocacy
Department of Public Service
112 State Street – Drawer 20
Montpelier, VT 05620-2601
Sarah.hofmann@state.vt.us

*Anthony Z. Roisman, Esq.
National Legal Scholars Law Firm
84 East Thetford Road
Lyme, NH 03768
aroisman@nationallegalscholars.com

*Ronald A. Shems, Esq.
*Karen Tyler, Esq.
Shems, Dunkiel, Kassel & Saunders, PLLC
9 College Street
Burlington, VT 05401
rshems@sdkslaw.com
ktyler@sdkslaw.com

*Diane Curran, Esq.
Harmon, Curran, Spielberg &Eisenberg, LLP
1726 M Street, N.W., Suite 600
Washington, D.C. 20036
dcurran@harmoncurran.com

*Matthew Brock, Esq.
Assistant Attorney General
Environmental Protection Division
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
Matthew.brock@ago.state.ma.us

*Mr. Dan MacArthur
Director, Emergency Management
P.O. Box 30
Marlboro, VY 50344
dmacarthur@igc.org

*Callie B. Newton, Chair
Gail MacArthur
Lucy Gratwick
Town of Marlboro
Selectboard
P.O. Box 518
Marlboro, VT 05344
marcialynn@ev1.net; cbnewton@sover.net

Matias F. Travieso-Diaz