

July 7, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

DOCKETED
USNRC

July 7, 2006 (11:50am)

In the Matter of)

ENTERGY NUCLEAR VERMONT)

YANKEE, LLC and ENTERGY)

NUCLEAR OPERATIONS, INC.)

(Vermont Yankee Nuclear Power Station))

Docket No. 50-271

ASLBP No. 04-832-02-OLA

(Operating License Amendment)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

**ENTERGY'S ANSWER TO NEW ENGLAND
COALITION'S MOTIONS IN LIMINE**

Pursuant to the Atomic Safety and Licensing Board's ("Board") Revised Scheduling Order dated April 13, 2006 ("Revised Scheduling Order"), Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.¹ (collectively "Entergy") hereby answer the New England Coalition's Motions In Limine ("Motions") dated June 23, 2006, but served on the Board and parties on June 26, 2006. Since the Motions are demonstrably unwarranted, only a brief response to them is necessary.

I. DISCUSSION

A. The Motion to Exclude Craig Nichols' Testimony is Without Merit

NEC seeks to have the Board exclude the testimony of Craig J. Nichols, Entergy's Vermont Yankee Extended Power Uprate ("EPU") Manager, "in all areas pertaining to New England Coalition Contention 3 except for those questions having to do with electrical engineering or nuclear power plant technical personnel management." Motions at 1. As grounds

¹ Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. are the licensees of the Vermont Yankee Nuclear Power Station ("VY").

for excluding Mr. Nichols' testimony, NEC alleges that "[n]othing in Mr. Nichols' [sic] indicates more than entry-level education, training, or experience in thermal-hydraulics ('T-H'), strength of materials, T-H code design or any of the other highly specialized disciplines necessary to determine appropriate substitution for full transient testing." Id. at 2.

NEC's motion to strike Mr. Nichols' testimony is without merit. First, Mr. Nichols' May 17, 2006 *Curriculum Vitae*, attached as Exhibit 1 to his direct testimony on NEC Contention 3, states that his responsibilities as VY EPU Project Manager since December 2001 have included:

[p]rovid[ing] overall project management for an Extended Power Uprate at Vermont Yankee. Includes all engineering, analyses, modifications, implementation, fiscal and project management for the most comprehensive site project since original plant startup.

Testimony of Craig J. Nichols and Jose L. Casillas on NEC Contention 3 – Large Transient Testing (May 17, 2006) ("Direct Testimony"), Exhibit 1 at 1. Moreover, Mr. Nichols earlier testified under oath that:

In my capacity as manager for the VY EPU project, I am responsible for overseeing the plant modifications that are needed to implement the upgrade and the performance of the technical evaluations and analyses required to demonstrate VY's ability to operate safely under uprate conditions. I am familiar with VY's operating history, current plant operations, and the anticipated operating conditions after the uprate.

Declaration of Craig J. Nichols (December 2, 2005) at ¶ 3. Therefore, NEC's claim that Mr. Nichols' expertise is limited to "electrical engineering or nuclear power plant technical personnel management" is frivolous.

Second, in his testimony on NEC Contention 3, Mr. Nichols is not offering opinions on "thermal-hydraulics ('T-H'), strength of materials, T-H code design or any of the other highly [but unidentified] specialized disciplines necessary to determine appropriate substitution for full

transient testing.” Mr. Nichols’ testimony describes: (1) how the EPU application was developed (Direct Testimony at A13); (2) the tests for which Entergy sought an exception and the basis for seeking such an exception (id. at A19-A29; Rebuttal Testimony of Craig J. Nichols and Jose L. Casillas on NEC Contention 3 – Large Transient Testing (June 14, 2006) (“Rebuttal Testimony”) at A11); (3) the analyses of a Main Steam Isolation Valve (“MSIV”) closing transient and a generator load rejection transient occurring at VY under EPU conditions (Direct Testimony at A40); (4) VY’s operational experience with large transients (id. at A49-A51 and Rebuttal Testimony at A22-A24); (5) the program for system and component testing during normal operations at VY (Direct Testimony at A52-54 and Rebuttal Testimony at A29-A30); (6) the similarities in the plant configuration pre- and post-uprate (Direct Testimony at A55-57); (7) the undesirable effects of conducting large transient tests (id. at A58); and (8) the conclusion by the Advisory Committee on Reactor Safeguards that performance of large transient testing at VY is not necessary (id. at 59). All of these matters are well within Mr. Nichols’ expertise and experience; none require, as NEC alleges, specialized expertise in “thermal-hydraulics (‘T-H’), strength of materials, T-H code design.”

For these reasons, NEC’s motion *in limine* to strike Mr. Nichols’ testimony is groundless and should be summarily rejected.

B. NEC is not Entitled to the Relief it Seeks Regarding Certain Proprietary Documents

NEC’s second motion *in limine* requests “that the Board order, as a matter of fairness, that Entergy provide to New England, as promptly as practicable, non-proprietary versions of all documents upon which Entergy intends to rely at hearing.” Motions at 2. That motion, too, is without basis and should be denied.

The documents to which NEC presumably refers are seven General Electric ("GE") proprietary documents relating to NEC Contention 3 that Entergy furnished to the Board in response to a specific Board directive. See Entergy's Supplement to Direct Testimony on NEC Contentions 3 and 4 (June 19, 2006) ("Supplement") and the Board's Order (Regarding Submission of Supplemental Documents) dated June 5, 2006. Each of these documents has previously been designated by GE as proprietary in accordance with NRC regulations. Supplemental Affidavit of Jose L. Casillas (July 5, 2006) attached hereto ("Casillas Affidavit"), at ¶¶ 3-5. Those seven GE documents (listed as items 27-33 in the Index included in the Supplement) were not provided to NEC because NEC had not executed the confidentiality and non-disclosure agreement that is part of the Board's March 1, 2005 Protective Order governing the non-disclosure of proprietary information.² No redacted versions of those documents exist, so Entergy witness (and GE employee) Jose L. Casillas prepared summaries of the relevant information that they contain, specifically for the purpose of complying with the Board's June 5, 2006 Order. Those summaries were provided to the Board, NEC and the NRC Staff as Items 4 and 7.³

NEC's motion does not acknowledge the existence of these summaries, let alone indicate that NEC had reviewed them.⁴ Nevertheless, NEC demands redacted versions of the full documents, which it claims is "a matter of fairness." Motions at 2. However, there is no legal,

² An eighth proprietary document, Item 26 in the Index, was provided in its entirety to the Board. A full, redacted copy of that document was available and was provided to NEC and the Staff as Item 1.

³ As it possesses both the full proprietary documents and the summaries thereof prepared by Mr. Casillas, the Board is in a position to determine whether the summaries fairly describe the main technical items discussed in the full documents.

⁴ During the June 20, 2006 Prehearing Conference, the Board suggested that NEC read the non-proprietary materials to determine whether or not they were satisfactory. Tr. 1008.

factual, or equitable reason for Entergy to be required to develop and provide non-proprietary versions of those GE documents to NEC.

Legally, NEC has no right to receive redacted versions of those seven third-party documents. NEC cites no legal support for its demand and we know of none. NEC refers to Entergy's "obligation" to produce "non-proprietary versions of all documents upon which Entergy intends to rely at hearing." Motions at 2. But, NEC cites no basis for this alleged "obligation." Had NEC agreed to sign, and have its witnesses and consultants execute, the confidentiality and non-disclosure agreement that is part of the Board's March 1, 2005 Protective Order, Entergy would have provided those documents to NEC on June 19, 2006, at the same time that it made them available to the Board. NEC's unsupported and far-fetched explanation for its refusal to sign the nondisclosure and confidentiality agreement is that neither of its witnesses "wishes to increase his vulnerability to the potential of nuclear industry complaints nor to have to defend against them." NEC letter to Board, dated June 1, 2006. Having waived the opportunity to receive the documents, NEC has no right to demand that substitute, redacted documents be supplied at Entergy's effort and expense.

The NRC regulations concerning the disclosure of proprietary information in licensing proceedings are contained in 10 C.F.R. § 2.390.⁵ This section generally provides that all documents related to a licensing proceeding will be subject to public disclosure unless they fall within at least one of nine categories of exempted documents. Exemption 4 includes information that is "[t]rade secrets and commercial or financial information obtained from a person and

⁵ Prior to the comprehensive revision to the NRC's rules in 2004, the regulations regarding the protection of proprietary information were contained in 10 C.F.R. § 2.790.

privileged or confidential.” 10 C.F.R. § 2.390(a)(4). Section 2.390(b) specifies the procedures that must be followed by anyone submitting information to the NRC that they wish to have withheld from public disclosure. Finally, § 2.390(b)(6) describes the procedures for making proprietary information available to the parties in a Commission proceeding. Specifically, this section of the regulations provides in relevant part:

Withholding from public inspection does not affect the right, if any, of persons properly and directly concerned to inspect the document. . . . [T]he Commission may require information claimed to be a trade secret or privileged or confidential commercial or financial information to be subject to inspection under a protective agreement by contractor personnel or government officials other than NRC officials, by the presiding officer in a proceeding, and under protective order by the parties to a proceeding.

§ 2.390(b)(6) (emphasis added). Certainly, there is no requirement that the party whose contractor controls the protected information must also generate at its expense and make available a redacted version of the document containing proprietary information. As discussed above, Entergy was willing to fully comply with these provisions for disclosure; it is NEC that has refused to comply with the conditions set by the regulations and the orders of the Board for access to the information.

The necessity for a protective order in order to review privileged documents is illustrated in Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-88-8, 27 N.R.C. 293 (1988). In that proceeding, the Massachusetts Attorney General requested that the applicant provide information that had been provided to the NRC Staff and was designated as commercial proprietary information. The applicant agreed to provide the information to the Attorney General, but only under a protective order. Id. at 294. The Attorney General objected to a protective order, however, “as a matter of policy.” Id. The production of the documents

remained at an impasse until the licensing board ruled that protecting the proprietary information was in the public interest and would not deny the Attorney General's opportunity to fully litigate the issues of concern, and therefore extended the protective order. Id. at 301. See also, Power Authority of the State of New York (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 N.R.C. 266, 292 (2000) (if parties cannot agree on order to protect applicant's confidential information, intervenors may move for issuance of a protective order to gain access to information for hearing.)

As in Seabrook, NEC is attempting to circumvent the NRC's rules for protection of privileged information in a licensing hearing. This Board should uphold the procedural rules as the Seabrook board did and determine that the only mechanism for NEC to gain access to the proprietary documents in question is to execute a valid confidentiality agreement.

Factually, NEC's demand is based on the erroneous premise that Entergy "intends to rely" on these documents at the hearing. Entergy's witness Mr. Casillas is familiar with those documents and has testified as to the methodology used in them and the results of the tests and analyses they contain, and is prepared to answer the Board's questions on these documents at the hearing. However, Entergy is not relying on those documents themselves to make its case on NEC Contention 3. The Direct and Rebuttal testimony of Messrs. Nichols and Casillas (and the exhibits thereto) are sufficient to show that NEC Contention 3 is without basis. Thus, there are no documents on which Entergy intends to rely that have not been provided to NEC.

Equitably, Entergy has gone out of its way, notwithstanding NEC's refusal to sign the confidentiality and non-disclosure agreement, to provide to NEC the basic information contained in those documents so that NEC can prepare questions for the Board to pose to the Entergy

witnesses at the hearing. To prepare redacted versions of the documents that NEC demands would take approximately four hundred (400) man-hours of work by the GE technical staff over a period of fourteen weeks at an approximate cost in excess of \$120,000. See Casillas Affidavit at ¶ 9. There is no equitable reason why Entergy should be compelled to incur that level of effort and expense at this late stage in the proceeding when NEC could have simply obviated the issue by agreeing to protect the confidentiality of the documents. Entergy has done enough; NEC has done nothing. The balance of equities is clear. NEC's second motion *in limine* must be denied.

C. NEC's Third Motion In Limine is Unwarranted

NEC's third motion *in limine* asks the Board to "consider extending the schedule for filing additional supporting information until Adjust [sic] 1, 2006." Motions at 3. NEC provides no indication of the "additional supporting information" it would want to file. What is clear, however, is that the regulations governing this and other hearings conducted pursuant to Subpart L of 10 C.F.R. Part 2 contemplate two, and only two, pre-hearing submittals by the parties: direct testimony and rebuttal testimony (and accompanying statements of position). See 10 C.F.R. §§ 2.1207(a)(1) and (2). Such submittals have already been made in both of NEC's admitted contentions in accordance with schedules set by the Board. There is neither provision nor need for more at this stage in the proceeding; nor does the schedule allow for further evidentiary filings.⁶ This motion *in limine* should also be denied.

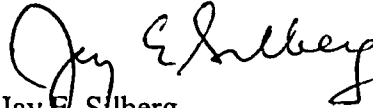
⁶ The Board has set August 4, 2006 as the deadline for the parties to file proposed questions for the Board to consider propounding to the direct and rebuttal witnesses pursuant to 10 C.F.R. § 2.1207(a)(3)(i) and (ii). Revised Scheduling Order at 4. The parties should at this time be devoting their full efforts to developing such questions instead of seeking to identify additional "supporting information" for their positions.

II. CONCLUSION

For the reasons stated, none of the three motions *in limine* filed by NEChas any merit.

Accordingly, they should all be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jay E. Silberg". The signature is fluid and cursive, with the first name "Jay" being particularly prominent.

Jay E. Silberg

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Before the Atomic Safety and Licensing Board

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

**Atomic Safety and Licensing Board
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***Secretary**

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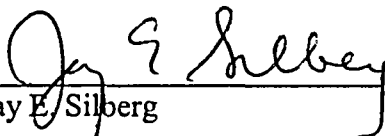
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Jay E. Silberg

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

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

SUPPLEMENTAL AFFIDAVIT OF JOSE L. CASILLAS

County of Santa Clara)	
)	
State of California)	

I, Jose L. Casillas, being duly sworn according to law, depose and state the following:

1. I am the Plant Performance Consulting Engineer in the Nuclear Analysis group of the Engineering organization of GE Nuclear Energy. My business address is 1989 Little Orchard Street, San Jose, California 95125.

2. In my capacity as the Plant Performance Consulting Engineer in GE's Nuclear Analysis group, I am responsible for boiling water reactor ("BWR") plant performance design and analyses, including evaluations in support of EPU applications and the development and application of computer codes used to predict BWR plant performance.

2. I have provided direct testimony in the above captioned proceeding on behalf of Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. ("Entergy"). My testimony is dated May 17, 2006 entitled "Testimony of Craig J. Nichols and Jose L. Casillas on NEC Contention 3 – Large Transient Testing." ("Entergy's Direct Testimony"). I have also

provided rebuttal testimony dated June 14, 2006, "Rebuttal Testimony of Craig J. Nichols and Jose L. Casillas on NEC Contention 3 – Large Transient Testing" ("Entergy's Rebuttal Testimony").

3. In support of Entergy's Rebuttal Testimony, I prepared summaries of the key information contained in each of the four volumes of GE Report NEDO 24154-A, as it pertains to the qualification of the ODYN computer code and its application to BWR safety analyses. Copies of these summaries were included as Exhibit 1 to the Rebuttal Testimony. Volumes 3 and 4 of that report contain GE proprietary information. GE established the proprietary nature of those documents in accordance with the requirements of 10 C.F.R. §2.390(b), or its predecessor, their proprietary nature was accepted by the NRC Staff. No redacted versions of these documents exist.

4. Exhibit 1 to the Rebuttal Testimony also contains summaries, which I prepared, of the following documents relating to benchmarking of the ODYN code: (1) GE report GE-NE-A13-00413-01-04, "Engineering Evaluation of KKL Revision 99 Turbine Trip Test 109% Power of 11 September 1999" (December 1999); (2) GE report NEDE-30253 "Qualification of the ODYNM05 and ODYNV05 Computer Programs" (September 1983); (3) GE report GE-NE-0000-0041-1254, "ODYN Benchmark of the Dresden 3 January 30, 2004 Turbine Trip Event" (January 2005). Each of these documents has been designated by GE as proprietary in accordance with the requirements of 10 C.F.R. §2.390(b), or its predecessor. No redacted versions of these documents have been prepared.

5. Exhibit 2 to the Rebuttal Testimony contains summaries, which I prepared, of the following documents reporting on detailed simulations conducted by GE of some of the

transients for the purpose of revising the equipment response or setpoints in order to improve the plant response: (1) GE report GE-NE-B13-00296-002P, "Recirculation Flow Control Valve Maximum Pump Up-Shift Position for LaSalle County Nuclear Stations 1 and 2" (March 1998); and (2) GE report GE-NE-B31-00265-01P "Duane Arnold Energy Center Recirculation Runback Setpoint Evaluation" (April 1998). Each of these documents has been designated by GE as proprietary in accordance with the requirements of 10 C.F.R. §2.390(b), or its predecessor. No redacted versions of these reports exist.

6. The summaries that I prepared accurately and completely present the relevant technical information contained in the corresponding documents.

7. On June 19, 2006, Entergy provided to the Atomic Safety and Licensing Board copies of the proprietary documents for which I had prepared summaries. Entergy's Supplement to Direct Testimony on NEC Contentions 3 and 4 (June 19, 2006) Index items 26-33.

8. Preparation of redacted versions of the proprietary documents referenced in paragraphs 3 to 5 above would require reviewing each document page by page, paragraph by paragraph, sentence by sentence, and determining whether each sentence, graph or figure contains proprietary nature as defined in 10 C.F.R. §2.390(b) and elaborated with the guidance in the NRC Staff's Regulatory Issue Summary 2004-11: Supporting Information Associated with Requests for Withholding Proprietary Information (June 29, 2004) ("RIS 2004-11"). This review must be conducted by qualified technical personnel who are familiar with the information contained in the document and the reasons it is or should be considered to be proprietary and thus protected from disclosure.

9. Based on my familiarity with the documents described in paragraphs 3 to 5 above I estimate that preparing redacted versions of the documents would require the expenditure of approximately 400 hours of work by the GE technical staff over a period of 14 weeks. The approximate cost of this activity would be in excess of \$120,000.

Further, the affiant sayeth not.

Jose L. Casillas
Jose L. Casillas

Subscribed and sworn to before me
this 5th day of July, 2006

Christina M. Garcia
Notary Public

My commission expires July 2, 2009

