RAS 11979

July 10, 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 MOTION TO STRIKE
PORTIONS OF NEW ENGLAND COALITION'S REPLY

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(a), Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (hereinafter collectively referred to as "Entergy") hereby move to strike portions of "New England Coalition, Inc.'s Reply to Entergy and NRC Staff Answers to Petition for Leave to Intervene, Request for Hearing, and Contentions" ("NEC's Reply") filed by Petitioner New England Coalition ("NEC") on June 29, 2006. NEC's Reply impermissibly raises entirely new allegations and provides new declarations and testimony not found in NEC's May 26, 2006 "Petition for Leave to Intervene, Request for Hearing, and Contentions" ("NEC's Petition"). NEC's Reply has not sought leave to amend its contentions either to alter their original scope or to provide new bases, and has not demonstrated compliance with the standards for accepting such late-filed amendments, as required by 10 C.F.R. §§ 2.309(c) and (f)(2). Accordingly, the new portions of NEC's Reply raising new allegations and containing or referring to the new declarations must be stricken.

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II. 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).

On May 26, 2006 NEC filed its Petition seeking the institution of a licensing proceeding on the renewal of the VY operating license and raising six contentions. On June 22, 2006 Entergy filed its "Answer to New England Coalition's Petition for Leave to Intervene, Request

For Hearing, and Contentions" ("Entergy's Answer") opposing NEC's Petition on the grounds that NEC had failed to plead an admissible contention. On the same day, the NRC Staff filed its "NRC Staff Answer to Request for Hearing of New England Coalition" ("Staff's Answer") in which the Staff stated that it did not object to the admission of limited versions of NEC's Contentions 1 and 2, but opposed the admission of the remaining four contentions.

On June 29, 2006, NEC filed its Reply. In it, NEC does not limit itself to defending the adequacy of its contentions as originally pled in its Petition. Rather, NEC makes new allegations to bolster its contentions and attaches two new declarations, one of which attaches testimony from another proceeding, all raising a host of new issues and claims nowhere to be found in the original Petition. As discussed below, NEC's attempt to provide new claims and declarations is clearly impermissible under the Commission's rules of practice and controlling NRC case law.

III. STATEMENT OF LAW

Under the NRC's rules at 10 C.F.R. § 2.309(h)(2), a petitioner may file a reply to any answer within seven days after service of that answer. While the Commission's rules do not specify the content of such a reply, other provisions of Part 2, the Statement of Considerations published with the final rule, and Commission precedent make clear that this reply is to "be narrowly focused on the legal or logical arguments presented" in the answers of the applicant and NRC Staff. Final Rule: "Changes to Adjudicatory Process," 69 Fed. Reg. 2,182, 2,203 (Jan. 14, 2004). In this case, NEC has gone far beyond any reasonable interpretation of an allowable reply by raising numerous new facts, claims and arguments in its Reply. If the hearing procedures established in Part 2 are to have any meaning whatsoever, the impermissible portions of the NEC Reply, and all of the extraneous new evidentiary materials provided in support thereof, must be stricken.

The Commission has squarely ruled that a reply to an answer may not be used as a vehicle to raise new arguments or claims not found in the original contention or be used to cure an otherwise deficient contention. Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-25, 60 N.R.C. 223, 225 (2004) ("LES"); LES, CLI-04-35, 60 N.R.C. 619, 623 (2004); Nuclear Management Company (Palisades Nuclear Plant), CLI-06-17, 63 N.R.C. ___, slip op. at 6 (2006). In the LES case, the licensing board rejected four contentions filed by the State of New Mexico Environment Department ("Environment Department") and the New Mexico Attorney General ("Attorney General") and "declined to consider new 'purportedly material' information in support of the contentions that was first submitted as part of a reply pleading." LES, CLI-04-25, 60 N.R.C. at 224. On appeal of the board's decision, the Commission agreed that "the reply briefs constituted a late attempt to reinvigorate thinly supported contentions by presenting entirely new arguments in the reply briefs." Id. The Commission went on to state that such a course of action was clearly impermissible under its rules of practice:

> [O]ur contention admissibility and timeliness requirements "demand a level of discipline and preparedness on part of petitioners," who must examine the publicly available material and set forth their claims and the support for their claims at the outset. The Petitioners' reply brief should be "narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer," a point the Board itself emphasized in this proceeding. As we face an increasing adjudicatory docket, the need for parties to adhere to our pleading standards and for the Board to enforce those standards are paramount. There simply could be "no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements" and add new bases or new issues that "simply did not occur to [them] at the outset."

Id. at 224-25 (footnotes omitted) (emphasis added).

In CLI-04-35, the Commission rejected requests for reconsideration from the Attorney General and the Environment Department and reaffirmed its holding in CLI-04-25. In its reconsideration decision, the Commission noted that the "contentions at issue contained

conclusory and unsupported allegations and thus no adequate basis." LES, CLI-04-35, 60 N.R.C. at 622 (emphasis added). The Commission cited, for example, the Attorney General's and the Environment Department's contention concerning the storage of depleted uranium at the LES facility. The Attorney General had claimed that "such onsite storage 'poses a distinct environmental risk to New Mexico.'" Id. (footnote omitted). Similarly, the Environment Department had claimed that "onsite storage 'may pose a threat' to health and property and that LES's proposed storage plan was insufficiently detailed." Id. (footnote omitted). The Commission went on describe the inadequacy of this contention by the Attorney General and the Environment Department as follows:

> Neither petition alleged facts or expert opinion in support of these broad and conclusory allegations. LES's application outlines potential environmental, health, and safety impacts of storing depleted uranium in uranium byproduct cylinders (UBCs) on an open-air storage pad. But neither the Attorney General nor the Environment Department addressed with any particularity or support how LES's proposed plan for onsite storage of depleted uranium lacks sufficient information, provides an inaccurate environmental impacts assessment, or otherwise falls short.

Id. (emphasis added).

The Commission then reiterated the reasons set forth in CLI-04-25 explaining why allowing a reply to raise new arguments or claims not found in the original contention would eviscerate its requirements for the pleading of contentions:

> "Allowing contentions to be added, amended, or supplemented at any time would defeat the purpose of the specific contention requirements" . . . "by permitting the intervenor to initially file vague, unsupported, and generalized allegations and simply recast, support, or cure them later." The Commission has made numerous efforts over the years to avoid unnecessary delays and increase the efficiency of NRC adjudication and our contention standards are a cornerstone of that effort. We believe that the 60-day period provided under 10 C.F.R. § 2.309(b)(3) for filing hearing requests, petitions, and contentions is "more than ample time for a potential requestor/intervenor to review the application, prepare a filing on

> standing, and develop proposed contentions and references to materials in support of the contentions." Under our contention rule, Intervenors are not being asked to prove their case, or to provide an exhaustive list of possible bases, but simply to provide sufficient alleged factual or legal bases to support the contention, and to do so at the outset. We agree with the Licensing Board that on these four particular contentions, the Attorney General and the Environment Department failed to do so.

Id. at 622-23 (footnotes omitted).

Finally, the Commission went on to strongly reaffirm its holding in CLI-04-25 that a reply to an answer may not, under its rules of practice, be used as a vehicle to raise new arguments or claims not found in the original contention or be used to cure an otherwise deficient contention:

> What our rules do not allow is using reply briefs to provide, for the first time, the necessary threshold support for contentions; such a practice would effectively bypass and eviscerate our rules governing timely filing, contention amendment, and submission of late-filed contentions.

Id. at 623 (emphasis added).

The Commission has since expanded upon the appropriate content of reply briefs in a license renewal proceeding. In ruling on the admissibility of contentions in the Palisades license renewal proceeding, the licensing board held that it would not "consider anything in the [Petitioner's] Reply that does not focus on the matters raised in the [applicant's and Staff's] Answers." Palisades, LBP-06-10, 63 N.R.C. ___, slip op. at 9. Regarding a contention concerning reactor pressure vessel embrittlement, the licensing board declined to consider information submitted in the petitioners' reply, finding that petitioners had provided no good cause for failing to provide that information with the original petition to intervene. Id. at 37 (noting that the reply included an exhibit from a 1970 report, references to documents produced in the 1990s, and a letter from March 2005, which preceded by five months the August 2005 deadline for submission of intervention petitions). Thus, the licensing board limited its

admissibility review of the embrittlement contention to that information submitted with the original petition in support of the contention. Id.

The Commission affirmed the licensing board, ruling that the petitioners' reply "constituted an untimely attempt to supplement" the contention. Palisades, CLI-06-17, 63 N.R.C. ___, slip op. at 4. Indeed, the Commission noted that the proposed one sentence contention and paragraph-long basis stood in "stark contrast" to the 22 pages of material relating to the contention submitted in the reply brief and found that the additional arguments contained in the reply were "not even suggested" by the petitioners' proposed embrittlement contention as initially pled. Id. at 4-6.

The Commission then held that "[n]ew bases for a contention cannot be introduced in a reply brief, or any other time after the date the original contentions are due, unless the petitioner meets the late-filing criteria set forth in 10 C.F.R. §§ 2.309(c), (f)(2)." Palisades, CLI-06-17, slip op. at 6. Further, a petitioner cannot remediate a deficient contention "by introducing in the reply documents that were available to it . . . during the timeframe for initially filing contentions." Id. The Commission reiterated a justification for so limiting the content of replies expounded upon in its LES decision: allowing new content in reply briefs "would defeat the contention-filing deadline." Id. In addition, the Commission held that allowing new claims in a reply "would unfairly deprive other participants an opportunity to rebut the new claims." Id.

Thus, the Commission has unambiguously ruled that a reply to an answer may not be used to cure or supplement an otherwise deficient contention. As made clear by the Commission, a contrary ruling would eviscerate the rules of practice governing timely filing of properly pled contentions, contention amendments, and submission of late-filed contentions, and

would unfairly limit the other proceeding participants' ability to rebut new information. Under 10 C.F.R. § 2.309(f), a petitioner must "set forth with particularity the contentions sought to be raised." To do so a petitioner must "provide a concise statement of the alleged facts or expert opinions which support" the alleged contention and must further "provide sufficient information to show that a genuine dispute exists...on a material issue of law or fact," which showing must include "references to specific portions of the application . . . that the petitioner disputes and the supporting reasons for each dispute . . . ." Id. To develop sufficient information to support a properly pled contention, "an intervention petitioner has an ironclad obligation," *inter alia*, "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." 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) (emphasis added).

Thus, contentions must be based on information available to petitioners at the time a petition is filed. 10 C.F.R. 2.309(f)(2). Here, the Notice of Opportunity for Hearing – quoted above – clearly provided notice to NEC of these well-established Commission pleading requirements. Further, the rules clearly provide that "amended or new contentions filed after the initial filing" may be done "only with leave of the presiding officer upon a showing that –

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

Id. (emphasis added). As held by the Commission in LES and Palisades, allowing a reply to introduce new or amended contentions would clearly eviscerate these provisions of the rule for they would become meaningless.

IV. ARGUMENT

NEC's Reply clearly runs afoul of the Commission's rules of practice and its decisions in LES. Rather than responding to legal or logical arguments raised in Entergy's or the NRC Staff's answers, the Reply offers new declarations and testimony,[1] and makes new claims nowhere to be found within the four corners of the original Petition. Permitting introduction of these new declarations and claims would completely "bypass and eviscerate" the NRC's hearing rules. LES, CLI-04-35, 60 N.R.C. at 623, and "unfairly deprive other participants an opportunity to rebut the new claims." Palisades, CLI-06-17, 63 N.R.C. ___, slip op. at 6. Accordingly, the new declarations and testimony, as well as the portions of the Reply referring to these documents, and certain additional new allegations identified below, must be stricken.[2]

A. THE NEW ARGUMENTS MADE IN THE REPLY WITH RESPECT TO NEC CONTENTION 1 SHOULD BE STRICKEN

Entergy moves to strike all references in NEC's Reply to certification under section 401 of the Clean Water Act. NEC's original Contention 1 alleged solely that "Entergy failed to assess impacts to water quality." NEC's Petition at 10. Thus, the original contention does not relate to whether a 401 certification is required.

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[1] Second Declaration of Joram Hopenfeld, dated June 27, 2006 ("Second Hopenfeld Declaration") (including Attachment A thereto, the Direct Testimony on Steam Dryer Reliability of William K. Sherman dated June 21, 2006); Declaration of Arnold Gundersen Supporting New England Coalition Inc.'s Reply to Entergy and NRC Staff Answers to New England Coalition's Petition for Leave to Intervene, Request for Hearing, and Contentions, dated June 29, 2006 ("Second Gundersen Declaration").

[2] For the convenience of the Board, Attachment 1 to this Motion lists the portions of NEC's Reply that should be stricken.

Nor are NEC's new claims regarding 401 certification related to the purported bases for the original contention. All of the allegations concerning Contention 1 in NEC's Petition related solely to whether the Environmental Report had adequately addressed the impacts of a 1°F increase in the thermal effluent limitations recently approved in an amendment to the NPDES permit. Petition at 10-14. Entergy responded that, under the NRC rules, an Environmental Report is not required to assess thermal impacts if the applicant provides a determination under section 316(a) of the Clean Water Act. Entergy Answer at 11-14. Neither the original Contention nor Entergy's Answer had anything to do with the need for a 401 certification now newly alleged by NEC. Indeed, 401 certification is addressed in an entirely different section of the Environmental Report (section 9.2.1 of the Environmental Report, which is never even mentioned by NEC).

Thus, NEC's Reply fails to comply with the Commission's requirement that replies be "narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer." LES, CLI-04-25, 60 N.R.C. at 225. NEC's entirely new allegation that, until Entergy applies for and receives a Clean Water Act Section 401 certification, the NRC cannot renew Vermont Yankee's operating license (NEC Reply at 3, 6, 14)[3] was not even suggested in

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[3] The impermissible text is as follows:

"In fact, renewal of Entergy's license is presently barred by the Clean Water Act (CWA). Any federal license for 'any activity. . . which may result in any discharge' requires State water quality certification under the CWA. A federal agency is barred from issuing a license in the absence of a § 401 Certification. Entergy has neither applied for, nor received a CWA § 401 Certification. Until and unless that happens, the NRC cannot renew Entergy's license." NEC Reply at 3-4 (citations omitted).

* * *

"Fourth, any determination of whether a federally permitted activity complies with water quality standards must be made pursuant to CWA § 401. Indeed, that is § 401's exact purpose. And, as mentioned above, Entergy has not applied for a § 401 Certification."

"The Staff May argue that the NPDES permit is functionally equivalent to a § 401 Certification. However, the NPDES permit is not functionally equivalent to a § 401 Certification for all of the above reasons, and particularly for the reasons that: (1) the NPDES permit has expired, (2) any new permit must be based on studies

NEC's proposed Contention 1. Absent even an attempt to justify its untimely new allegation by addressing the Commission's late-filing criteria, this allegation must be rejected from further consideration by the Board. LES, CLI-04-35, 60 N.R.C. at 623.

NEC's Reply also seeks impermissibly to recast Contention 1 in other ways. The Reply argues that Entergy has failed to assess impacts to water quality resulting from increases in water temperature of several degrees, not just the one degree increase originally pled. Indeed, NEC now claims that that Entergy's Vermont Yankee license renewal application has failed to address impacts of the alleged potential five degree increase in temperature from May 16 through October 14, and the alleged potential increases of as much as 13.4° from October 15 to May 15 over (as now pled) a specific 1.4 mile stretch of river. NEC Reply at 2-3, 5-6.[4] NEC's Reply goes on to claim that it was Entergy who failed to consider, *inter alia*, (1) "the 80-100° water that Entergy will discharge during the summer months," NEC Reply at 9[5]; and (2) "the actual temperature (and temperature increase) that American shad (or other fish) will experience in the discharge pipe's vicinity in lower Vernon Pool." NEC Reply at 11.[6] Similarly, NEC also rebukes the NRC Staff for failing to consider issues not mentioned in NEC's original Petition,

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that have not yet occurred, and (3) any new permit will expire prior to 2012 and have no bearing on the relicensing period or the discharge's cumulative impacts." NEC Reply at 6 (citations and footnote omitted).

* * *

"And, as explained above, Entergy does not have a § 401 Certification the adequacy of which can be challenged. If anything, Entergy's argument underscores the need for a § 401 Certification. Entergy's reliance on this provision of the CWA is wholly misplaced." NEC Reply at 14.

[4] NEC's impermissible new arguments occupy the last 3 lines of page 2, the first 4 lines of page 3, the last 11 lines of page 5, and the first 3 lines of page 6.

[5] NEC's impermissible new arguments occupy the last 5 lines of the first paragraph and the entire second paragraph on page 9.

[6] NEC's impermissible new arguments occupy the entire first paragraph on page 11.

summarizing: "It is not, as Staff asserts, a one degree increase --- the amount of and temperature of the actual discharge must also be considered." NEC Reply at 11-13 (emphasis added).[7]

NEC's Contention 1, as originally pled, contained none of the above arguments. The only specific temperatures discussed by NEC in it is initial Petition were those referred to by Dr. Jones in his discussion of temperature shock caused by rapid temperature increases of nine degrees (68° to 77°F) or eighteen degrees (68° to 86°F). Jones Decl. ¶ 10. If Entergy's and the NRC Staff's answers focused on NEC's claim that a one degree increase in water temperature would adversely impact river biota and Dr. Jones' temperature shock concerns, it was because those two issues encompassed the fullest extent of Contention 1 as initially pled by NEC.

NEC's belated attempt to recast its contention is impermissible and must be rejected. LES, CLI-04-35, 60 N.R.C. at 622-23; Palisades, CLI-06-17, 63 N.R.C. ___, slip op. at 4.

B. THE SECOND HOPENFELD DECLARATION AND ATTACHED TESTIMONY OF WILLIAM SHERMAN, AND ALL REFERENCES THERETO, SHOULD BE STRICKEN

Entergy also moves to strike the new declaration by Dr. Hopenfeld, including its attached testimony of William Sherman from another proceeding, and all references to these documents in NEC's Reply. Submittal of a new declaration and testimony clearly violates the Commission's requirement that replies be "narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer." LES, CLI-04-25, 69 N.R.C. at 225. Rather than explaining why its original contention met pleading requirements, NEC is attempting to inject new allegations and supply bases for its contentions that were originally lacking. The

[7] NEC's impermissible new arguments occupy the last 4 lines of page 11, all of page 12, and the first 4 lines and first full paragraph on page 13.

introduction of such documents and would render the requirements applicable to an initial petition meaningless, and is therefore not permitted. Palisades, CLI-06-17, slip op. at 6.

NEC states that it offers the Second Hopenfeld Declaration to "point out technical mistakes made in Entergy's Answer" (NEC's Reply at 16), and "to clarify a number of technical issues" (id. at 20, 25). These transparent attempts to clothe Dr. Hopenfeld's new factual claims with the garb of mere "clarifications" fail to hide the obvious fact that virtually every sentence in Dr. Hopenfeld's Second Declaration is intended to cure the deficiencies in NEC's Petition or to assert claims that NEC failed to include with its original filing.

Even the most cursory review of the Second Hopenfeld Declaration shows how NEC is attempting to recast its contentions – in effect seeking to amend its contentions without complying with the standards for such amendments. For example, NEC's Contention 3 alleged that the monitoring program for the steam dryer is inadequate because it is allegedly based on two computer models subject to large uncertainties. Petition at 17. Entergy's Answer pointed out that NEC was seeking to raise an issue from the extended power uprate ("EPU") proceeding and that the NRC in that proceeding had required actual strain measurements during power ascension, additional monitoring, and added post-EPU inspections (Entergy's Answer at 28-29). The new Hopenfeld declaration now seeks to attack the actual strain measurements and the analysis that was based on those measurements in the EPU proceeding. See Second Hopenfeld Declaration at ¶ 14. Indeed, Dr. Hopenfeld attaches testimony from a State proceeding whose sole focus is on attacking the adequacy of the analysis of the instrumentation measured strain. In short, the original contention focused solely on uncertainties in two models – uncertainties that are entirely irrelevant because of the actual measurements. NEC is now simply recasting its

contention to attack the analysis of the actual strain measurements – something that was not even mentioned in its original petition.

Likewise, NEC seeks to recast its Contention 4, which originally alleged that CHECWORKS could not be used to manage flow accelerated corrosion ("FAC") because it is an empirical code that can no longer be benchmarked as a result of the uprated conditions. Petition at 18-19. Now that Entergy has pointed to the information on the docket showing that CHECWORKS is not the sole basis for establishing inspections and that Entergy provided projected wear rates for the most significantly affected components in the uprate proceeding (Entergy's Answer at 33-34), the new Hopenfeld Declaration now seeks to attack the projections from the uprate proceeding. Second Hopenfeld Declaration at ¶¶ 21-22.

Finally, Dr. Hopenfeld's Declaration makes new allegations concerning Contention 2. Whereas Contention 2 originally focused on whether the Application adequately explained what actions VYNPS would take for components whose cumulative usage factor ("CUF") was projected to exceed 1 when adjusted to account for environmentally assisted fatigue (Petition at 16-17), Dr. Hopenfeld and NEC now seek to challenge (1) how the CUFs were calculated and adjusted for environmentally assisted fatigue (Second Hopenfeld Declaration at ¶ 6); and (2) whether Entergy could rely on generic correction factors for certain components (id.). These issues are beyond the scope of the original contention.

C. THE NEW DECLARATION OF ARNOLD GUNDERSON, AND ALL REFERENCES THERETO, SHOULD BE STRICKEN

Just as NEC's submittal of the new Hopenfeld Declaration is improper, so too is NEC's submittal of a new declaration from Arnold Gunderson. Again, the submittal of a new declaration is obviously not a narrow response to legal and logical arguments concerning the

admissibility of the original contention, but an attempt to inject new allegations and purported bases entirely lacking in the original petition. Accordingly, Entergy moves to strike the new Gunderson Declaration and all references to it in NEC's Reply.

Once more, it is clear from the face of the document that the new Gunderson Declaration seeks to recast an original contention, and thus is but a veiled and improper attempt to amend the petition without meeting the late filing criteria.[8] NEC's Contention 5 alleges that the Application does not include an adequate plan to monitor and manage aging of VY's condenser, which is already significantly degraded such that its integrity to mitigate the leakage of radioactive gases in the event of an accident cannot be assured during the period of extended operation. Petition at 19-20. Entergy's Answer asserted, inter alia, that the condenser needs only to retain its structural integrity and does not need to retain its leak-tight integrity in order to perform its post-accident function, and that even if it did, NEC's Petition fails to explain how condenser integrity would be suddenly lost in an accident, or provide any support for such a scenario being plausible. Entergy's Answer at 36-38. The Second Gunderson Declaration and NEC's Reply now seek to recast the Contention from a claim that the condenser's integrity to mitigate the leakage of radioactive gases in the event of an accident cannot be assured to a claim that an unexpected transient could simultaneously cause both implosion of the condenser and a release of radioactive gas, citing: (1) examples of the type of "unusual accident or occurrence" that could both compromise the condenser and trigger a Design Basis event, including a full load rejection, and a broken turbine disk; and (2) an incident at Entergy's Grand Gulf plant in which the plant condenser imploded while the plant was in operation. None of these allegations was mentioned

[8] As with the Second Hopenfeld Declaration, NEC's Reply describes the Second Gundersen Declaration as being intended "to clarify technical issues." NEC's Reply at 28. Notwithstanding that seemingly innocent description, Mr. Gundersen's latest testimony is intended to either bolster or cure the deficiencies in NEC's Petition or to assert claims that NEC failed to include with its original filing.

or even hinted at in the original Contention. Thus, the Second Gunderson Declaration is not a permissible reply .

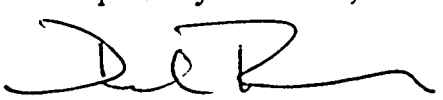
V. CONCLUSION

As demonstrated above, NEC's submittal of new declarations and attached testimony are not permitted by the Commission regulations and controlling precedent. Thus, these documents and all references to them in NEC's Reply must be stricken.

CERTIFICATION

In accordance with 10 C.F.R. §2.323(b), counsel for Entergy has discussed this motion with counsel for the other parties in this proceeding in an attempt to resolve this issue but has not been successful in resolving it.

Respectfully Submitted,



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Counsel for Entergy

Dated: July 10, 2006

Attachment 1

Location of the impermissible new facts, claims, and argument to be stricken from NEC's Reply:

Second Hopenfeld Declaration and Attachment A thereto

- To be stricken in their entireties

Second Gunderson Declaration

- To be stricken in its entirety

Contention 1: Clean Water Act Certification and Water Quality Arguments.

- Last 3 lines of page 2
- First 4 lines and last 8 lines of page 3
- First 2 lines of page 4
- Last 11 lines of page 5
- First 3 lines and first and second full paragraphs of page 6
- Last 5 lines of the first paragraph and the entire second paragraph on page 9
- Page 11 in its entirety
- Page 12 in its entirety
- First 4 lines and first full paragraph on page 13
- Last 5 lines of the first full paragraph on page 14

Contention 2: CUF Analysis Argument

- First 4 lines and the sentence beginning "For this same reason. . . ." of the first full paragraph on page 17
- Last 4 lines of page 18
- First 3 lines of page 19

Contention 3: Steam Dryer Argument

- First full paragraph and the first 6 lines of the last full paragraph on page 21
- Second full paragraph on page 22
- First full paragraph on page 23

Contention 4: Flow Accelerated Corrosion Argument

- Last 10 lines of page 26
- First 7 lines of page 27

Contention 5: Condenser Monitoring Argument

- Last 16 lines of page 29
- First three lines of page 30

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	)	
(Vermont Yankee Nuclear Power Station)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Entergy's Motion to Strike Portions of New England Coalition's Reply," dated July 10, 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 10th day of July, 2006.

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