RAS 11980

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 DEPARTMENT OF PUBLIC SERVICE'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 "Department of Public Service's Reply to Answers of Applicant and NRC Staff to Notice of Intention to Participate and Petition to Intervene" ("DPS Reply") filed by the Department of Public Service ("DPS") on June 30, 2006.[1] DPS' Reply impermissibly submits a new declaration and exhibit in order to raise issues and add bases not found in DPS' May 26, 2006 "Department of Public Service Notice of Intention to Participate and Petition to Intervene" ("DPS Petition"). The DPS has not requested 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 declaration and exhibit, and all portions of the DPS Reply referring or relying thereon, must be stricken.

[1] On July 6, 2006, DPS filed a "Corrected Copy" of its Reply. The Corrected Copy does not affect the matters which are the subject of this Motion.

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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 DPS filed its Petition seeking the institution of a licensing proceeding on the renewal of the VY operating license and raising three contentions. On June 22, 2006 Entergy filed its "Answer to Vermont Department of Public Service Notice of Intention to

Participate and Petition to Intervene" ("Entergy's Answer") opposing the DPS Petition on the grounds that DPS had failed to plead an admissible contention. On the same day, the NRC Staff filed its "NRC Staff Answer to Vermont Department of Public Service Notice of Intention to Participate and Petition to Intervene" ("Staff's Answer") in which the Staff stated that it opposed the admission of all of DPS' contentions.

On June 30, 2006, DPS filed its Reply. In it, DPS does not limit itself to defending the adequacy of its contentions as originally pled in its Petition. Rather, DPS attaches a new declaration and an exhibit intended to raise new issues and claims nowhere to be found in the Petition. As discussed below, DPS' submittal of additional documents in its Reply 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, DPS has gone far beyond any reasonable interpretation of an allowable reply by submitting new documents in order to raise new allegations in its Reply. If the hearing procedures established in Part 2 are to have any meaning, the portions of the DPS Reply in which these new matters are raised must be stricken.

The Commission has 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"); Louisiana Energy Services, L.P. (National Enrichment Facility), 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 provided additional guidance on 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 additional 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. 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 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).

The regulations make it clear that 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 DPS 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

The DPS Reply clearly runs afoul of the Commission's rules of practice and its decisions in LES and Palisades. Submittal of a new declaration and exhibit 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. It is attempting to use its Reply to introduce documents[2] that could have been offered in the original petition. The introduction of such documents would completely "bypass and eviscerate" the NRC's hearing rules, and is therefore not permitted. LES, CLI-04-35, 60 N.R.C. at 623; Palisades, CLI-06-17, 63 N.R.C. ___, slip op. at 6. Accordingly, the new Declaration and Exhibit, as well as the portions of the Reply referring to these documents, must be stricken.[3]

While submittal of new documents in a Reply appears impermissible by itself, it is clear that DPS is doing so in an attempt to cure deficiencies in its original contentions and to provide

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[2] The new documents are the "Declaration of William K. Sherman Accompanying Vermont Department of Public Service Reply to Answers of Applicant and NRC Staff to Notice of Intention to Participate and Petition to Intervene" dated June 30, 2006 ("Sherman Supplemental Declaration"); and a "Vermont Yankee Summary Report of Plant Environmental Conditions for Environmental Qualifications Program" authored by D.E. Yasi and dated March 19, 1984 ("Yasi Report"). The DPS Reply also quotes from a U.S. Nuclear Waste Technical Review Board's ("NWTRB") Report to the U.S. Congress and Secretary of Energy, January 1, 2005 to February 28, 2006.

[3] For the convenience of the Board, Attachment 1 to this Motion lists the portions of the DPS Reply to be stricken.

new bases for its contentions -- in effect seeking to amend its contentions without complying with the standards for such amendments. For example, with respect to DPS Contention 1, Entergy pointed out that DPS has provided absolutely no support for its assertion that "the concrete surface behind the steel shell will closely match the drywell ambient temperature." Entergy Answer at 14. The Sherman Supplemental Declaration now offers "a sample heat transfer calculation of a section through the drywell to assess the temperature on the face of the concrete outside the steel drywell." Mr. Sherman describes in detail the calculation and its results. Sherman Supplemental Declaration at ¶¶ 8-20.[4] The DPS Reply then incorporates these new allegations extensively.[5] Clearly, DPS is simply attempting to provide support that was

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[4] The calculation described in Sherman Supplemental Declaration is based in part on the Yasi Report.

[5] The DPS Reply takes credit for Mr. Sherman's new calculation as follows:

> It is telling that neither Applicant nor NRC Staff have offered an expert opinion to refute the conclusion presented by Mr. Sherman. This is particularly significant because the calculation required is basic heat transfer science and easily done. As the calculation described below demonstrates, the likely reason neither Applicant nor NRC Staff did a calculation is that their experts told them what Mr. Sherman had already concluded - 2.5-inches of steel and a 2-inch sand gap would not be sufficient to reduce 165℉ to 150℉ at the concrete wall. Mr. Sherman's statement is correct and a sufficient basis to demonstrate the existence of a genuine dispute on a material issue of law or fact, and so it should be considered. Provision of actual heat transfer calculations are a level of detail that should be reserved for the evidence of the hearing and not an initial petition. Nevertheless, Mr. Sherman has prepared a calculation to demonstrate the accuracy of his statement at ¶8 of his Declaration for Petition.
>
> The sample heat transfer calculation is for a representative cross section at El. 280 ft through the drywell to assess the temperature on the face of the concrete outside the steel drywell. *Marks' Standard Handbook for Mechanical Engineers* , Eighth Edition, 1978, McGraw Hill, pp. 4-59 to 4-70 (Transmission of Heat by Conduction and Convection) is used for the calculation. Data for the calculation was taken from Entergy's *License Renewal Application, Amendment No. 2*, dated May 15, 2006 (Vermont Reply Exhibit 1). This submittal identifies that, above the transition zone from spherical to cylindrical portions, the drywell is separated from reinforced concrete by a two-inch gap. The gap below this transition is filled with sand. In addition, the Amendment refers to the nominal plate thickness of the drywell as 2.5 inches.
>
> The calculation assumes a steel plate of 2.5 inches, a sand-filled gap of 2 inches, and a concrete thickness of 6 feet, with drywell temperature was 165°F, the maximum value from UFSAR Section 5.2.3.2, and a reactor building temperature of 100°F. It was assumed that the drywell (near the drywell shell) and the reactor building were at their respective temperatures long enough such that the steel surface inside the drywell and the concrete surface temperature in the reactor building were at these respective temperatures. The following thermal conductivities, in units of btu/hr/ft^2/°F/ft, were taken from the *Marks Handbook:* steel plate - 26.2, dry sand - 0.188, concrete - 1.05.
>
> At equilibrium, the results of this temperature gradient are:
>
> Temperature at steel surface in the drywell - 165°F
> Temperature at the steel/sand interface - 164.9°F
> Temperature at the inside concrete face - 156.2°F

entirely lacking in the original petition. This attempt to cure a defective contention by adding new bases is exactly what the Commission has prohibited. It goes without saying that including a brand new calculation in a reply is contrary to the controlling Commission authority referenced above and is unfair, since neither Entergy nor the NRC Staff will have had an opportunity to address it in their answers.

Similarly, in response to DPS Contention 2, which attacks the NRC's Waste Confidence Rule, Entergy pointed out that DPS had provided no basis or support for its allegation of "water in-leakage" at Yucca Mountain, let alone water in-leakage that calls into question its suitability. Entergy Answer at 22. The Sherman Supplemental Declaration now tries to cure this deficiency by referring to a U.S. Nuclear Waste Technical Review Board's ("NWTRB") Report to the U.S. Congress and Secretary of Energy, January 1, 2005 to February 28, 2006 ("NWTRB Report"). Sherman Supplemental Declaration at ¶¶ 23-25. The DPS Reply then quotes from this NWTRB Report extensively. DPS Reply at 29-31. DPS provides no explanation as to why it could not have presented the information contained in the NWTRB Report in its initial Petition. Its failure to include this information in its initial Petition has prevented Entergy and the NRC Staff from responding to that information in their answers.[6]

In this calculation, approximately 8 inches of thickness of the concrete remains over 150°F. This calculation confirms Mr. Sherman's statement that "the concrete surface behind the steel shell will closely match the drywell ambient temperature." DPS Reply at 15-16.

[6] This example demonstrates the importance of prohibiting replies from containing new information or argument. DPS argues that geologic and water related discoveries at Yucca Mountain has created a "paradigm shift" in repository design. DPS Reply at 29. The sections cited to by DPS in the NWTRB Report do not state there has been a "paradigm shift" in repository design. Rather, they indicate that the NWTRB seeks more information from the Department of Energy on the repository design. In any event, had DPS raised this same argument and referred to this same NWTRB Report in its initial Petition, Entergy would have had an opportunity to include in its Answer information rebutting DPS' assertions of a "paradigm shift" in repository design and its mischaracterizations of the NWTRB Report's conclusions.

The Sherman Supplemental Declaration seeks to offer other, additional bases for Contention 2. Mr. Sherman states that he has reviewed the GEIS and concludes that "there is no substantive analysis or discussion of the environmental impact associated with the loss of land use due to the continued storage of spent fuel at the reactor site following the shutdown of a reactor." Sherman Supplemental Declaration at ¶ 21. Mr. Sherman then states the political and technical reasons why he believes spent fuel will remain on the Vermont Yankee site indefinitely. Id. at ¶¶ 22-32. Once more, all of this information could have been provided in the original petition.

Finally, with respect to DPS Contention 3, the Sherman Supplemental Declaration discusses how the failure of select security related systems might "prevent satisfactory accomplishment of safety related functions," Id. at ¶¶ 33-39, and why Mr. Sherman believes it is necessary, now, for the security related systems to be subject to an aging management program. Id. at ¶¶ 40-46. Again, such information could have been provided in the original contention.

As previously discussed, Commission precedent clearly holds 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. LES, CLI-04-25, 60 N.R.C. at 225. Otherwise, the provisions governing the untimely submission of contentions or amended contentions would become meaningless. DPS has not made any attempt to explain why the information discussed in the Sherman Supplemental Declaration was not timely submitted with its original Petition. For these reasons, the Sherman Supplemental Declaration and the portions of the DPS Reply that refer to or rely on it, including the NWTRB Report in the DPS Reply, should be stricken.

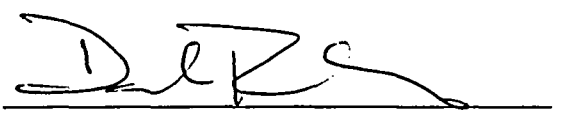
V. CONCLUSION

As demonstrated above, the Sherman Supplemental Declaration, the references to this declaration in the DPS Reply, and the added discussion of the NWTRB Report are not permitted under Commission regulations and precedent regarding reply briefs. Therefore, these new documents and allegations 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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Dated: July 10, 2006

ATTACHMENT 1

Location of the impermissible new facts, claims, and arguments to be stricken from the DPS Reply:

Sherman Supplemental Declaration

- To be stricken in its entirety

Supplement 2 to the Application (Entergy letter BVY 06-043, dated May 15, 2006)

- To be stricken in its entirety

Yasi Report

- To be stricken in its entirety

Contention 1: Heat transfer calculation argument

- Last 4 lines of the first full paragraph, the second and third full paragraphs, and the last two lines of page 15
- Page 16 in its entirety
- Supplement 2 to the Application (Entergy letter BVY 06-043, dated May 15, 2006)
- Yasi Report

Contention 2: Yucca Mountain groundwater argument

- On page 29, from the sentence that begins "The fact that groundwater. . ." through the end of that page.
- Page 30 in its entirety
- First 3 lines and the first full paragraph of page 31.

Contention 3: Security systems, structures, and components argument

- Last 5 lines of page 40
- First 10 lines and last 4 lines of page 41, including footnote 19
- Last 8 lines of page 42
- Last line of page 43
- First 7 lines and the last line of page 44
- First 2 lines of page 45
- Footnote 22.
- Last 5 lines of the first partial paragraph, the entire first full paragraph, and the last 2 lines of page 46

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NUCLEAR REGULATORY COMMISSION

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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 Motion to Strike Portions of Department of Public Service'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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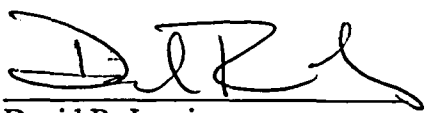

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