

July 20, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

| | | |
|----------------------------------------|---|------------------------|
| In the Matter of |) | |
| |) | |
| ENTERGY NUCLEAR VERMONT YANKEE, |) | Docket No. 50-271-LR |
| LLC, and ENTERGY NUCLEAR |) | |
| OPERATIONS, INC. |) | ASLBP No. 06-849-03-LR |
| |) | |
| (Vermont Yankee Nuclear Power Station) |) | |

NRC STAFF ANSWER TO ENTERGY'S MOTION TO STRIKE
PORTIONS OF DEPARTMENT OF PUBLIC SERVICE'S REPLY

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the Staff of the Nuclear Regulatory Commission ("Staff") hereby answers the Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively "Entergy") "Motion to Strike Portions of the Department of Public Service's Reply" ("Motion"), dated July 10, 2006. For the reasons set forth below, Entergy's Motion should be granted in large part.

BACKGROUND

On March 27, 2006, the NRC published in the *Federal Register* a notice of acceptance for docketing and opportunity for a hearing of Entergy's application, under 10 C.F.R. Part 54, to renew Operating License No. DPR-28 for the Vermont Yankee Nuclear Power Station ("VYNPS").¹ In response to this notice, the Vermont Department of Public Service ("DPS") timely filed a petition on May 26, 2006, which included three proposed contentions.²

¹ See Entergy Nuclear Operations, Inc., Vermont Yankee Nuclear Power Station; Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License No. DPR-28 for an Additional 20-Year Period, 71 Fed. Reg. 15,220 (March 27, 2006).

² See "Department of Public Service Notice of Intention to Participate and Petition to Intervene," dated May 26, 2006 ("Petition").

On June 22, 2006, both Entergy and the NRC Staff filed answers opposing the admission of all three of DPS's contentions.³ On June 30, 2006, DPS filed "Vermont Department of Public Service Reply to Answers of Applicant and NRC Staff to Notice of Intention to Participate and Petition to Intervene" ("Reply").⁴ Subsequently, Entergy filed the instant Motion, claiming that the Reply "impermissibly submits a new declaration and exhibit in order to raise issues and add bases not found in DPS' [petition]." Motion at 1. For the reasons discussed below, the Motion should be granted in large part.

DISCUSSION

Under the Commission's rules of procedure, a petitioner may file a reply to any answer filed in response to its petition. 10 C.F.R. § 2.309(h)(2). While the regulation does not limit the scope of a reply, the Commission has held that it must be "narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC Staff answer." *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004) *reconsideration denied*, CLI-04-35, 60 NRC 619 (2004); *see also* Final Rule: "Changes to the Adjudicatory Process," 69 Fed. Reg. 2182, 2199 (Jan. 14, 2004). Petitioners may not use a reply to reinvigorate thinly supported contentions. *LES*, CLI-04-25, 60 NRC at 224. Nor may petitioners "initially file vague, unsupported, and generalized allegations and simply recast, support, or cure them later." *LES*, CLI-04-35, 60 NRC at 622. In supporting their contentions, petitioners are "not . . . asked to prove their case, or to provide an exhaustive list of possible

³ See "NRC Staff Answer to Vermont Department of Public Service Notice of Intention to Participate and Petition to Intervene," dated June 22, 2006 ("Staff Answer"); "Entergy's Answer to Vermont Department of Public Service Notice of Intention to Participate and Petition to Intervene," dated June 22, 2006 ("Entergy Answer").

⁴ On July 6, 2006, DPS filed a "Corrected Copy" of its Reply. To ensure consistency with Entergy's Motion, the Staff's response includes page references to the original Reply filed by DPS.

bases, but simply to provide sufficient alleged factual and legal bases to support the contention, and to do so at the outset.” CLI-04-35, 60 NRC at 623.

In order to supplement the bases for a contention, petitioners must address the Commission’s late-filed contention criteria, 10 C.F.R. §§ 2.309(c) and (f)(2). *Id.* at n.20, 625; *see also Louisiana Energy Services* (National Enrichment Facility), LBP-04-14, 60 NRC 40, 58 (2004). Allowing “reply briefs to provide, for the first time, the necessary threshold support for contentions . . . would effectively bypass and eviscerate [the Commission’s] rules governing timely filing, contention amendment, and submission of late-filed contentions.” CLI-04-35, 60 NRC at 623. Furthermore, raising new claims in a reply unfairly deprives other participants of an opportunity to rebut the claims. *Nuclear Management Company, LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC ____, slip op. at 6 (2006).

DPS’s Reply includes three exhibits: (1) Entergy’s “License Renewal Application, Amendment No. 2,” dated May 15, 2006; (2) “Declaration of William K. Sherman,” dated June 30, 2006 (“Sherman Supplemental Declaration”); and (3) “Vermont Yankee Summary Report of Plant Environmental Conditions for Environmental Qualifications,” authored by D.E. Yasi, dated March 19, 1984 (“Yasi Report”). Without addressing the Commission’s late-filed contention criteria, DPS references these exhibits in its Reply in an effort to provide threshold support for its contentions.⁵ This effort to use a reply brief to rehabilitate contentions is contrary to Commission pleading requirements. *See LES*, 60 NRC at 623.

Regarding Contention 1, Mr. Sherman’s original declaration included a statement that “the concrete surface behind the steel shell will closely match the drywell ambient temperature.” Sherman Declaration at 2, ¶ 8. Both the Staff and Entergy Answers called this statement

⁵ Petitioners have an ironclad obligation to examine publicly available information pertaining to a facility to find information that could support proffered contentions. *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982), *vacated in part on other grounds*, CLI-83-19, 17 NRC 1041 (1983).

unsupported speculation and an insufficient basis for the admission of a contention. Staff Answer at 11-12; Entergy Answer at 14. The Staff specifically cited the need for heat profile data. Staff Answer at 11. Mr. Sherman's new declaration, filed with and relied upon in the Reply, includes a heat transfer calculation. Reply at 15; Sherman Supplemental Declaration at 2-5, ¶¶ 8-20. The inclusion of this heat transfer data is plainly rehabilitative in nature as DPS impermissibly seeks to provide threshold support for its contention.

Because it was introduced in a reply brief, Entergy and the Staff are not entitled to file responses to the heat transfer data. 10 C.F.R. § 2.309(h)(3). This highlights one of the reasons for the Commission rule that it is improper to include new arguments based upon new information in a reply brief. *Palisades*, CLI-06-17, slip op. at 6. Allowing new claims in a reply unfairly deprives other participants of an opportunity to rebut the claims. *Id.* The discussions of Mr. Sherman's heat transfer calculation should be stricken. See Motion at 10-11.

Similarly, as to Contention 2, the Sherman Supplemental Declaration includes a reference to the U.S. Nuclear Waste Technical Review Board Report to the U.S. Congress and Secretary of Energy, January 1, 2005 to February 28, 2006 ("NWTRB Report"). See Sherman Supplemental Declaration at 6. DPS apparently added this reference in response to Entergy's argument that DPS had provided no basis for its discussion of water in-leakage at Yucca Mountain. See Entergy Answer at 22. The Reply's inclusion of this supplemental information is another example of an impermissible attempt to rehabilitate an insufficiently supported contention.⁶ See *LES*, 60 NRC at 623. The sections of the Reply that discuss this report should be stricken. See Motion at 11.

⁶ The Reply also included other new information with respect to Contention 2, including statements from Mr. Sherman regarding the substance of the Generic Environmental Impact Statement ("GEIS") for License Renewal and the technical and political reasons he believes fuel will remain onsite indefinitely. See Motion at 12.

With respect to Contention 3, the Sherman Supplemental Declaration provides a discussion of those security systems whose failure may prevent satisfactory accomplishment of safety related functions. Sherman Supplemental Declaration at 7-8, ¶¶ 33-39. DPS then uses these new claims in its Reply to bolster its argument. Reply at 40-41. This discussion is an attempt to remedy a specific failing of the original contention that was raised by the Staff, that DPS did not identify those systems, structures or components it believed to be subject to an aging management plan. See Staff Answer at 21. The Reply does not include an explanation as to why this information was not included in its original petition, nor does it apply the late-filed contention criteria to the new information. Therefore, these portions should be stricken. See Motion at 12.

The DPS Reply's reliance on these additional documents broadens the scope of the contention. DPS's new arguments do not represent legitimate amplification or clarification of its previous arguments, nor are they narrowly focused on the legal or logical arguments of the Answers of Entergy and the Staff. Instead, the Reply's arguments constitute untimely attempts to supplement the bases for its contentions. Without the required discussion of the late-filed contention criteria, these arguments should not be considered by the Licensing Board in determining the admissibility of the contentions. *LES*, 60 NRC at 623.

Finally, as a matter of clarification, the Staff would limit the scope of the text to be stricken in the following manner. Entergy states that the second paragraph of page 15 should be stricken in its entirety. However, the first two sentences of that paragraph represent an appropriate reply argument concerning the admissibility of the contention as supported by Mr. Sherman's original declaration and should not be stricken.⁷

⁷ Those sentences read: "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 (continued...)"

CONCLUSION

Entergy's July 10 Motion demonstrates that the reply filed by DPS impermissibly included new arguments and bases for its contention without discussing the Commission's late-filed contention criteria. Accordingly, except as noted above, Entergy's Motion should be granted.

Respectfully submitted,

/RA/

Steven C. Hamrick
Counsel for NRC Staff

Dated at Rockville, Maryland
this 20th day of July, 2006

⁷(...continued)
of the hearing and not an initial petition." Reply at 15.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF ANSWER TO ENTERGY'S MOTION TO STRIKE PORTIONS OF DPS'S REPLY" in the above-captioned proceeding have been served on the following by electronic mail with copies by deposit in the NRC's internal mail system or, as indicated by an asterisk, by electronic mail with copies by U.S. mail, first class, this 20th day of July 2006.

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