

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 MOTION TO STRIKE
PORTIONS OF NEW ENGLAND COALITION'S INTERVENTION 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 New England Coalition (NEC) reply to Entergy and NRC Staff answers to NEC's intervention petition. See "Entergy's Motion to Strike Portions of New England Coalition's Reply," dated July 10, 2006 (Motion); "New England Coalitions, Inc.'s Reply to Entergy and NRC Staff Answers to Petition for Leave to Intervene, Request for Hearing, and Contentions," dated June 29, 2006 (Reply). For the reasons set forth below, Entergy's motion should be granted in large part.

BACKGROUND

In response to a notice of docketing and opportunity for hearing, 71 Fed. Reg. 15,220 (Mar. 27, 2006), NEC timely filed an intervention petition proffering six contentions. "Petition for Leave to Intervene, Request for Hearing, and Contentions," dated May 26, 2006 (Petition). Subsequently, the Staff opposed the admission of Contention 3-6 and Entergy opposed the admission of all six contentions. See "NRC Staff Answer to Request for Hearing of New

England Coalition,” dated June 22, 2006; “Entergy’s Answer to New England Coalition’s Petition for Leave to Intervene, Request for Hearing, and Contentions,” dated June 22, 2006.

On June 29, 2006, NEC filed its reply, arguing that its contentions satisfy the contention admissibility requirements in 10 C.F.R. § 2.309(f)(1), raising new arguments and contention bases, and appending statements and testimony not included with its intervention petition. See Reply at 33, Exhibit 1 (Second Declaration of Dr. Joram Hopenfeld)¹ and Exhibit 2 (Declaration of Arnold Gundersen Supporting [NEC’s] Reply to Entergy and NRC Staff Answers to New England Coalition’s Petition for Leave to Intervene, Request for Hearing, and Contentions). Entergy filed the instant motion to strike the new declarations and testimony, all portions of the Reply that refer to those documents, and the new allegations raised in the Reply. See Motion at 9-16.

DISCUSSION

Entergy argues that the Reply should be stricken because it is not limited to defending the adequacy of its contentions as originally pled, but instead proffers new claims and declarations to bolster its contentions, thus raising matters for the first time in its reply. See Motion at 3. Entergy states that NEC goes beyond providing a reply that is “‘narrowly focused on the legal or logical arguments presented’ in the answers of the applicant and NRC Staff.” See Motion at 3 (quoting Final Rule: Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,203 (Jan. 14, 2004)). Entergy further argues that new bases for a contention cannot be introduced subsequent to the deadline for filing contentions unless the petitioner meets the late-filing criteria in 10 C.F.R. §§ 2.309(c) and (f)(2). See Motion at 7-8. Consequently, Entergy moves that the new declarations and testimony, portions of the Reply that refer to those documents, and the new allegations should be stricken. See Motion at 9-16. The Staff

¹ Attachment A to Dr. Hopenfeld’s declaration is the “Direct Testimony on Steam Dryer Reliability of William Sherman on behalf of the Vermont Department of Public Service,” dated June 21, 2006.

supports the Motion to the extent that NEC has gone beyond narrowly focused arguments and instead has raised new matters without addressing late-filing criteria.

A reply to an intervention petition answer may not raise new arguments, new contention bases or new issues in an attempt to cure a defective petition. See *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 224-225 (2004), *reconsideration denied*, CLI-04-35, 60 NRC 619 (2004); *Nuclear Management Co.* (Palisades Nuclear Plant), CLI-06-17, 63 NRC ___, slip op. at 6 (June 23, 2006). The Commission requires strict adherence to contention admissibility standards, demanding discipline and preparedness on the part of petitioners, and avoiding needless delays in NRC adjudications. *LES*, CLI-04-25, 60 NRC at 224-225. Given that contentions must be based on documents or other information available at the time the petition is filed, 10 C.F.R. § 2.309(f)(2), untimely attempts to amend a defective, original petition are to be rejected as failing to satisfy the late-filing factors in 10 C.F.R. §2.309(c) and (f)(2), see *Palisades*, CLI-06-17, slip op. at 6. A practice that would allow petitioners to use “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.” *LES*, CLI-04-35, 60 NRC at 623. Further, the raising of new claims in a reply unfairly deprives other participants of an opportunity to rebut the claims. *Palisades*, CLI-06-17, slip op. at 6.

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. Although petitioners are not required “to prove their case, or to provide an exhaustive list of possible bases,” they are required 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.

With respect to Contention 1, Entergy correctly states that NEC's reply raises, for the first time, arguments about section 401 of the Clean Water Act, 33 U.S.C. § 1341. See Motion at 9-11. Neither the Petition nor the Entergy and Staff answers addressed whether Entergy had complied with section 401. See Petition at 10-14; Entergy Answer at 11-18; Staff Answer at 7-9. Thus, these arguments should be stricken. In addition, NEC seeks to expand the scope of the contention (which challenges the adequacy of an assessment of a one degree increase in thermal discharges into the Connecticut River, see Petition at 10-11) and now claim that its contention encompasses an assessment of larger temperature increases over a 1.4 mile stretch of the river, particularizing its concern to identify the impacts on American shad in the "vicinity of the lower Vernon pool." See Reply at 2-3, 5-6, 9-13. These newly pled arguments and bases run afoul of NRC pleading requirements. See *LES*, CLI-04-35, 60 NRC at 622-23; *Palisades*, CLI-06-07, slip op at 4. Therefore, Entergy has demonstrated that the references to section 401, arguments concerning whether Entergy has complied with that provision, and other arguments expanding the scope of the contention or providing newly articulated bases for the NEC contention, should be stricken.²

Entergy further argues that the declaration of Dr. Hopenfeld (Reply, Exhibit 1), the testimony of William Sherman (Reply, Exhibit 1 at Attachment A), and all references to those documents should be stricken. See Motion at 12-14. To the extent those documents provide new arguments or factual bases that would expand the scope of, or revive, thinly supported NEC Contention 2 (metal fatigue), Contention 3 (steam dryer), Contention 4 (flow-accelerated corrosion), and Contention 5 (condenser), the Staff agrees they should be stricken. See *LES*, CLI-04-25, 60 NRC at 224.

² The Staff does not agree that the last four lines of page 11, the first three lines of page 12, and the first three lines of page 6 of the Reply should be stricken. See Motion at 12 n.7 & Attachment 1. Those portions do not appear to raise new matters. See Petition at 11-13.

Contention 2 alleges that Entergy's aging management program was vague, lacked a clear inspection schedule and relies on a fatigue analysis calculated using thermal-hydraulic codes that were not properly benchmarked. See Petition at 14-16. NEC now seeks to expand the contention to challenge (1) "the validity of the entire [fatigue] analysis," including how cumulative usage factors (CUFs) are calculated and adjusted for environmentally assisted fatigue (see Reply, Exhibit 1 at ¶¶ 7, 6; Reply at 17) and (2) whether it was appropriate for Entergy to use generic correction factors (see Reply, Exhibit 1 at ¶ 6). Therefore, Entergy's request that these new matters be stricken as improper and late-filed should be granted.

NEC's late-filed attempt to expand Contention 3 to challenge steam dryer strain measurements should also be rejected since that contention challenges whether two computer models (Computational and Fluid Dynamic Model, and the Acoustic Circuit Model) provided an adequate basis for monitoring of crack propagation and growth. See Reply at 20, 22 & Exhibit 1 at ¶¶ 13-15; Petition at 17. NEC cites the Sherman testimony as a basis for its new claim that Entergy cannot predict dryer failure (see Reply at 23 and Exhibit 1 at ¶ 14), but that document primarily recounts technical information that was available before the deadline for filing contentions and that could have been included in NEC's intervention petition (see Reply Exhibit 1, Attachment A at 8-18, 21).³ Therefore, Entergy's request that these matters be stricken should also be granted with the exception of the last full paragraph on page 21 (which appears to be narrowly focused on arguments presented by Entergy, see 69 Fed. Reg. at 2,203).

Similarly, NEC's attempt to reformulate Contention 4, which alleges that use of the CHECKWORKS computer model is improper for uprate conditions without 10-15 years of

³ Intervention 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).

inspection data (see Petition at 18-19) should be rejected. Statements that raise new concerns about Entergy's flow-accelerated corrosion program (see Reply at 26-27 & Exhibit 1 at ¶¶ 17-22) should also be stricken as inappropriate for a reply and late-filed.

Finally, NEC's attempt to transform Contention 5, which alleges a lack of a plan to monitor and manage aging of the condenser relied on to mitigate leakage of radioactive gases (see Petition at 19-20), into newly-filed allegations of transients that could cause a loss of condenser integrity and a Design Basis Accident that could result in release of radioactive gas (see Reply at 29-30 & Exhibit 2 at ¶¶ 6.1-9, 13) should be rejected. NEC cannot now raise a new technical argument to flush out vague references in its initial petition and declarations. With the exception of Exhibit 2 at ¶¶ 10-11 (which appear to be narrowly focused reply arguments), the Motion should be granted.

CONCLUSION

As discussed above, except for the areas noted, the Staff supports Entergy's motion.

Respectfully submitted,

/RA/

Mitzi A. Young
Counsel for NRC Staff

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

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF ANSWER TO ENTERGY MOTION TO STRIKE PORTIONS OF NEW ENGLAND COALITION'S INTERVENTION 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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