RAS 12417

UNITED STATES
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

NEW ENGLAND COALITION, INC'S OPPOSITION TO ENTERGY'S PETITION FOR INTERLOCUTORY REVIEW OF LBP-06-20 ADMITTING NEW ENGLAND COALITION'S CONTENTION 1

I. INTRODUCTION

The Commission should deny Entergy's petition for interlocutory review of the Atomic Safety and Licensing Board's ("the Board") decision in LBP-06-20[1] admitting New England Coalition, Inc.'s ("NEC") Contention 1 in the Vermont Yankee Nuclear Power Station license renewal proceeding. Entergy's petition does not satisfy the 10 C.F.R. § 2.341(f)(2) standard for interlocutory review, and Entergy's arguments concerning the merits of the Board's decision are baseless.

NEC's Contention 1 was properly admitted pursuant to 10 C.F.R. § 2.309(f)(1). Contention 1 addresses Entergy's failure to adequately assess whether increased thermal discharges to the Connecticut River during the renewed license term will result in fish mortality due to heat shock, a

[1] Memorandum and Order (Ruling on Standing, Contentions, Hearing Procedures, State Statutory Claim, and Contention Adoption), LBP-06-20, 63 N.R.C. ___, slip op. at 47-57 (Sept. 22, 2006).

TEMPLATE = SECY-037

SECY-02

Category 2 environmental issue within the scope of the license renewal proceeding. Entergy's Environmental Report fails to provide the information concerning this issue required by 10 C.F.R. § 51.53(c)(3)(ii)(B): it includes neither a current Clean Water Act § 316 variance or determination, an equivalent state permit and supporting documents, or Entergy's independent assessment of water quality impacts. In neglecting to provide this information, Entergy both obstructs NEC's and the State of Vermont's[2] ability to evaluate its ER, and defeats the ER's purpose, which is to inform the NRC Staff's preparation of the Environmental Impact Statement (EIS) required by the National Environmental Policy Act (NEPA). Acceptance of Entergy's deficient ER will force the NRC Staff to perform the missing analysis, and possibly lead to litigation of the EIS.

II. ENTERGY FAILS TO MEET THE 10 C.F.R. § 2.341(f)(2) STANDARD FOR INTERLOCUTORY REVIEW.

Interlocutory review is disfavored and undertaken as a discretionary matter only in the most compelling circumstances. *Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 &3)*, 18 N.R.C. 380, 383 n. 17 (1983). A petitioner must demonstrate that the issue for which that party seeks interlocutory review either 1) threatens "immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision," or 2) "affects the basic structure of the proceeding in a pervasive or unusual

[2] The State of Vermont has adopted NEC's Contention 1. LBP-06-20, slip op. at 109, 113.

manner." 10 C.F.R. § 2.341(f)(2). Entergy entirely fails to satisfy this standard.

A. Entergy Fails To Claim Serious Irreparable Harm That Cannot be Remedied Through Appeal of the Board's Final Decision on NEC's Contention 1.

Entergy's irreparable harm argument boils down to a complaint that the Board's decision to admit NEC's Contention 1 will require Entergy to litigate it. Entergy asserts that the decision to admit Contention 1 is based on an erroneous interpretation of the Clean Water Act and NRC regulations, and that a correct construction of this authority would have resulted in the denial of this Contention. Specifically, Entergy claims that 1) litigation of Contention 1 will usurp authority granted the State of Vermont under Section 511(c) of the Clean Water Act, 2) Entergy will be required to litigate Contention 1 before the Board, and 3) litigation of Contention 1 before the Board will duplicate ongoing litigation before Vermont's Environmental Court concerning Entergy's Clean Water Act National Pollution Discharge Elimination System (NPDES) permit amendment. Entergy Petition for Interlocutory Review at 19-20. None of these alleged impacts of the Board's decision constitute "serious irreparable harm" as defined under Commission rule and precedent.

Entergy's claim that litigation of Contention 1 will usurp Vermont's delegated authority, and violate the Clean Water Act Section 511(c) is both false (see part III, below), and nothing more than a rehash of Entergy's

arguments before the ASLB. Commission precedent is clear that alleged legal error on the part of the Board does not constitute "serious irreparable harm" that justifies interlocutory review. Rather, "a mere legal error is not enough to warrant interlocutory review because interlocutory errors are correctable on appeal from final Board decisions." *In the Matter of Connecticut Yankee Atomic Power Company (Haddam Neck Plant)*, 54 N.R.C. 368, 373 (2001)(denying interlocutory review of Board's alleged misinterpretation of an NRC regulation concerning residual radiation at decommissioned sites); *In the Matter of Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, 53 NRC 1 (2001), 2001 WL 458221 (N.R.C.) at 3 ("The possibility that an interlocutory ruling may be wrong does not itself justify interlocutory review."); *In the Matter of Public Service Company of New Hampshire, et. al. (Seabrook Station, Units 1 and 2)*, 25 NRC 17, 21-22 (1987)(The mere commitment of resources to a hearing that may later turn out to have been unnecessary does not justify interlocutory review.).

This precedent is well grounded in avoiding the gross inefficiencies concomitant with piecemeal review on incomplete records. If any party were allowed interlocutory appeal because it disagrees with the Board's legal analysis, the process would quickly come to a grinding halt. Hence, mere legal error is not "serious irreparable harm."

Nor does Entergy suffer "serious irreparable harm" as a result of the fact that it will be required to litigate Contention 1 before the Board. The burden and expense of litigation does not constitute "serious irreparable harm." *In the Matter of Connecticut Yankee Atomic Power Company (Haddam Neck Plant)*, 54 N.R.C. 368 (2001), 2001 WL 1563167 (N.R.C.) at 4 ("We have . . . rejected the argument that a mere increase in the burden of litigation constitutes 'serious and irreparable' harm [under 10 C.F.R. § 2.342(f)(2)(i)]."); *Cf., Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, 55 N.R.C. 260, 263 (2002)(The expense of litigation does not constitute "irreparable injury" that would support a stay of proceedings.).

Entergy's claim that the Board's consideration of NEC's Contention 1 will duplicate proceedings before Vermont's Environmental Court concerning Entergy's NPDES permit amendment is patently false. NEC's Contention 1 concerns Entergy's and the NRC's obligation under NEPA to assess and consider the cumulative impacts of thermal discharges from the Vermont Yankee Plant over the twenty year term of the proposed second license, from 2012 to 2032. The proceeding before Vermont's Environmental Court concerns Entergy's five-year term Clean Water Act NPDES permit and stems from Entergy's separate application to the NRC for extended power uprate (EPU) at the Vermont Yankee plant. In sum, NEPA and the Clean Water Act are not one in the same. The two proceedings have different purposes, concern different statutory mandates, and are not duplicative. Entergy's

argument that the proceedings are duplicative is again nothing more than an overly simplistic effort to rehash merits heard by the ASLB. As stated above, the Board's alleged error of law does not constitute "irreparable harm" to Entergy under 10 C.F.R. § 2.341(f)(2)(i).

Finally, Entergy is not prevented as a practical matter from seeking Commission review of the Board's allegedly erroneous interpretation of the Clean Water Act and Commission regulations upon issuance of the Board's final order in this proceeding. *See*, 10 C.F.R. § 2.341(b). This is not a case in which issues "must be reviewed now or not at all." *In the Matter of Georgia Power Company, et. al. (Vogtle Electric Generating Plant, Units 1 and 2)*, 39 N.R.C. 190, 193 (1994)(interlocutory review warranted where Board ordered immediate release of NRC investigatory report). Entergy loses no rights by waiting for a final decision on a complete record before taking an appeal.

B. Entergy Fails to Demonstrate that the Board's Decision to Admit NEC's Contention 1 Affects the Basic Structure of the Proceeding in a Pervasive or Unusual Manner.

Entergy argues that the Board's decision to admit NEC's Contention 1 "affects the proceeding in a pervasive and unusual manner" because litigation of Contention 1 will go forward based on the Board's allegedly erroneous interpretation of the Clean Water Act and NRC regulations. Entergy Petition for Interlocutory Review at 21 ("First, the majority's ruling will require the litigation of an issue that, under NRC rules and the Clean Water Act, the NRC is barred from reviewing."); *Id.* at 22 ("Second, the majority's

ruling admitting NEC's Contention 1 also appears to contemplate litigating whether 10 C.F.R. § 51.53(c)(3)(ii)(B) is valid."). Commission precedent is clear that, just as the Board's alleged errors of law do not constitute "irreparable harm" that would justify interlccutory review, neither do they affect the proceeding in a pervasive or unusual manner, as defined pursuant to 10 C.F.R. § 2.341(f)(2)(ii). "A legal error, standing alone, does not alter the basic structure of an ongoing proceeding and therefore does not justify interlocutory Commission review. Such errors can be raised on appeal after a final Licensing Board decision." *In the Matter of Dr. James E. Bauer (Order Prohibiting Involvement in NRC-Licensed Activities)*, 41 N.R.C. 245, 246 (1995)(internal citations omitted).

III. ENTERGY'S ARGUMENT ON THE MERITS OF THE BOARD'S DECISION TO ADMIT NEC'S CONTENTION 1 ARE IRRELEVANT TO THE STANDARD FOR INTERLOCUTORY REVIEW AND, IN ANY EVENT, WHOLLY INVALID.

As stated above, Entergy's attempt to now rehash issues decided by the Board are not relevant to the standard for interlocutory review and thus irrelevant. In any event, Entergy takes significant liberty in its portrayal of these issues. Indeed, Entergy's argument on the merits of the Board's decision turns the regulatory process here on its head.

A. Contention 1 Does Not Usurp Vermont's Authority.

NEC's Contention 1 is a NEPA contention. It seeks assessment of the cumulative impacts of thermal shock from 2012 to 2032, the requested

renewed license term. NEC clearly raised the issue: "An episodic increase in temperature from 68° F to 77° F over 48 hours reduces survival of yolk-sac and feeding stage larvae of American shad. The temperature shock that results from an increase from 68° F to 86° F kills all larval shad." Ross Jones PhD. Declaration (5/26/06) attached to Contention 1.[3]

NEPA requires that the 20-year cumulative impact of this adverse environmental effect be assessed and considered. Entergy turns this straightforward procedural mandate on its head by claiming that compliance would usurp the State of Vermont's authority. Here, NEPA simply informs the Commission's decision-making process. The State retains full authority to grant or deny NPDES permits pursuant to its delegated authority under the Clean Water Act.

Likewise, the NRC retains full authority to grant or deny Entergy's requested license based on its informed decision-making – decision-making informed (in part) by NEPA. While the Commission clearly cannot set effluent standards in lieu of Vermont, the Commission, pursuant to its own mandate, may deny or condition the license based on the "hard look" that it must give to the competing considerations.

> NEPA establishes environmental protection as an integral part of the Atomic Energy Commission's basic mandate. The primary responsibility for fulfilling that

[3] Dissenting Judge Wardwell apparently overlooked this portion of Dr. Jones' declaration in stating that: "The Category 2 thermal issues include entrainment of fish and shellfish in early life stages, impingement of fish and shellfish, and heat shock. It seems apparent that the increase in thermal discharge limits during the license renewal period (i.e. the water quality issues that NEC argues are not assessed in Entergy's application) does not relate to any of these Category 2 issues." LBP-06-20, slip op., dissent at 3.

> mandate lies with the Commission. Its responsibility is not simply to sit back, like an umpire, and resolve adversary contentions at the hearing stage. Rather, it must itself take the initiative of considering environmental values at every distinctive and comprehensive stage of the process beyond the staff's evaluation and recommendation.

Calvert Cliffs' Coordinating Committee, Inc. v. U. S. Atomic Energy Commission 449 F.2d 1109, 1119, (D.C. Cir. 1971)

Entergy argues that § 511(c) of the Clean Water Act, 33 U.S.C. § 1371(c) effectively precludes the Commission's consideration of water quality impacts because mere consideration of water quality impacts is tantamount to establishing an effluent limit. Entergy's reliance on § 511(c) is, to say the least, misplaced. NEPA mandates nothing more than the *procedural* requirement that the NRC develop and consider (take a hard look) at the proposed action's environmental impacts. As the U.S. Supreme Court held just this year:

> Warren briefly makes another argument for disregarding the plain meaning of the word "discharge," relying on § 511(c)(2) of the Clean Water Act, 33 U.S.C. § 1371(c)(2). This section addresses the intersection of the Act with another statute, the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 *et seq.* NEPA "imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions." *Department of Transportation v. Public Citizen,* 541 U.S. 752, 756-757, 124 S.Ct. 2204, 159 L.Ed.2d 60 (2004). Section 511(c)(2) makes the point that nothing in NEPA authorizes any federal agency "authorized to license or permit the conduct of any activity which may result in the discharge of a pollutant" to review "any effluent limitation or other requirement established pursuant to this chapter or the adequacy of

> any certification under [§ 401] of this title." 33 U.S.C. § 1371(c)(2).

S.D. Warren Co. v. Maine Bd. of Environmental Protection, ___ U.S. ___, ___ n. 8, 126 S.Ct. 1843, 1852 (2006).

> "NEPA itself does not mandate particular results" in order to accomplish these ends. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989). Rather, NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions. See *id.*, at 349-350, 109 S.Ct. 1835. At the heart of NEPA is a requirement that federal agencies "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on-(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." 42 U.S.C. § 4332(2)(C).

Department of Transportation v. Public Citizen, 541 U.S. 752, 756-757 (2004).

NEPA's procedural requirements are a very far cry from usurpation of state authority through NRC establishment of effluent limitations. Indeed, as Entergy construes NEPA, no federal agency could ever look at water quality impacts out of fear that they would establish an effluent limitation. This is a patently absurd result, wholly contrary to NEPA and the Clean Water Act.

Indeed, it is contrary to the practice of all other federal agencies. For example, the Federal Energy Regulatory Commission always assesses the water quality impacts of relicensing hydroelectric dams despite the parallel state permitting and § 401 water quality certification (33 U.S.C. §1341) proceedings. *See S.D. Warren*, 126 S.Ct. at 1852. Likewise, the Army Corps of Engineers routinely assesses the water quality impacts of the § 404 dredge and fill (33 U.S.C. § 1344), Rivers and Harbors Act, and aquatic nuisance permits it issues even though the States also issues related or parallel permits, including NPDES permits, and permits implementing the States' public trust obligations. Ironically, as Entergy points out, the NRC's generic EIS assesses numerous water quality impacts. 10 C.F.R. § Pt. 50, App. B, Table B-1. The NRC did so without usurping any state-established effluent limitations or otherwise running afoul of CWA § 511(c), even though the impacts assessed in the generic EIS are subject to state authority including effluent limitations and NPDES permits. Likewise, Entergy does not claim that 10 C.F.R. § 51.53(c)(3)(ii)(B) runs afoul of CWA § 511(c) because it gives an applicant the option to conduct it own assessment of the proposed action's water quality impacts.

It is also important to note that the State of Vermont is not only a party to this matter, but has adopted NEC's Contention 1.[4] LBP-06-20, slip op. at 109, 113. Entergy does not have standing to address the State of

[4] NEC is the designated party for furthering this contention. New England Coalition's Notice of Adoption of Contentions, or in the Alternative, Motion to Adopt Contentions (June 5, 2006).

Vermont's rights and prerogatives, particularly while the State, actively participating in this issue, is perfectly content with the notion that cumulative thermal impacts from 2012 to 2032 have not been assessed under NEPA or in accordance with 10 C.F.R. §51.53(c)(3)(ii)(B).

In sum, Entergy's argument that its obligation to assess impacts somehow usurps Vermont's authority is without merit.

B. Contention 1 is In Step With 10 C.F.R. § 51.53(c)(3)(ii)(B).

The NRC's NEPA process commences with the applicant's provision of relevant and useful information, namely a complete application. Entergy is trying to shirk that responsibility, and in turn, violates 10 C.F.R. § 51.53(c)(3)(ii)(B). The result is to increase the burden on the NRC Staff's development of an EIS, and to deprive parties of important information at the critical early stages of this streamlined proceeding.[5]

The Rule's purpose is not met if the information provided by Entergy is irrelevant, dated, or defective. Section 51.53(c)(3)(ii)(B) provides that:

> If the applicant's plant utilizes once-through cooling or cooling pond heat dissipation systems, the applicant shall provide a copy of current Clean Water Act 316(b) determinations and, if necessary, a 316(a) variance in accordance with 40 CFR part 125, or equivalent State permits and supporting documentation. If the applicant can not provide these documents, it shall assess the impact of the proposed action on fish and shellfish

[5] This proceeding is pursuant to streamlined hearing procedures at 10 C.F.R. pt. 2, subpart L. LPB-06-02, slip op. at 106. Subpart L does not provide for traditional discovery, or cross-examination. 10 C.F.R. §§ 2.1203, 2.336, 2.1204. In light of these limitations, it is particularly important that Entergy's ER contain complete information for NEC's early evaluation. *Cf., Citizens Awareness Network, Inc. v. NRC*, 391 F.3d 338, 355 (1st Cir. 2004)(NRC's Part 2 rules "may approach the outer limits of what is permissible under the [Administrative Procedures Act]."). Entergy's violation of the streamlined rules would push this over the outer limits.

resources resulting from heat shock and impingement and entrainment.

This rule's plain language dictates, and its purpose is to require, that the applicant provide the seed for the NRC Staff's independent preparation of an EIS. Likewise, its purpose is to provide public notice of potential environmental impacts.

Entergy's application provided none of the above. It is undisputed that Entergy did not conduct its own study. Likewise, it is undisputed that the permit attached to its application at the time that contentions were due was long expired and did not reflect the *increased* thermal discharge sought in its extended license term (or in the EPU proceeding). Hence, NRC Staff allowed that NEC's Contention 1 should be admitted at least until such time that Entergy provides a Clean Water Act 316 determination or equivalent state permits and documentation.

On the eve of the August 1 and 2, 2006 hearings in this matter, Entergy amended its application and simply informed the Board of its efforts to seek an updated NPDES permit and CWA § 316 variance by way of an "FYI letter" with the attached information.[6] The attached information consisted of a temporary NPDES permit amendment[7] and a purportedly

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[6] Entergy had this since March 31, 2006, but provided it electronically on Friday afternoon July 29, 2006. The hearings commenced on Tuesday morning August 1. Hard copies were received by NEC after the hearing. Until then, this information was not part of the application. NEPA contentions may only be made on information in the application. 10 C.F.R. § 2.309(f)(2).

[7] Curiously, the temporary permit amendment was granted and expired on the same day -- March 31, 2006. However the temporary permit amendment remained in effect under Vermont's Administrative Procedure Act that provides that an expired permit remains in effect until action is taken on a timely application for

"partial" 316 variance. The ASLB struck this information. Order Striking Entergy's Letter to the Board and Attached Materials (August 11, 2006). It also chastised Entergy for waiting until the last minute to provide this information and for doing so by "FYI letter" rather than by motion.

However, it is apparent why Entergy waited until the last minute – it was hoping for a determination that would actually meet § 51.53(c)(3)(ii)(B)'s requirements. Instead, on August 28, 2006, the Vermont Environmental Court, where the temporary permit is under *de novo* review, stayed the temporary permit upon finding that it would result in irreparable harm to American shad and that there is "substantial probability" that the permit amendment was illegal. It held that the plaintiffs had, "demonstrate[d] a substantial probability that they will prevail on the merits," Decision and Order on Motion to Stay Permit Amendment Pending Appeal at 2,[8] and that:

> Appellants have shown sufficient potential for irreparable injury to American Shad in the Connecticut River, both at present as the juveniles become accustomed to cooler water temperatures prior to their migration down the River in the falls, and in the summer of 2007 for the next generation of juveniles.

Id. at 3. Any increased thermal discharge is now prohibited regardless of time of year because of the potential impact on American shad and juvenile fish.

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renewal. 3 V.S.A. § 814(b). As explained below, however, the temporary permit is no longer in effect because it was stayed by the Vermont Environmental Court.

[8] Attachment A to New England Coalition, Inc.'s Motion to File Supplemental and New Authority re: NEC's Contention 1 and Request for Leave to Amend Contention 1 or File a New Contention (August 29, 2006).

The Court went on to conclude that:

> The best interests of the public will be served by granting the stay so that it is not only in effect for September and the first half of October, but so that it remains in effect if this matter is not resolved by the time that American shad return to the River in April to Spawn, for the 2007 component of the life cycle of the 2007 cohort of juvenile shad in the River.

Id.

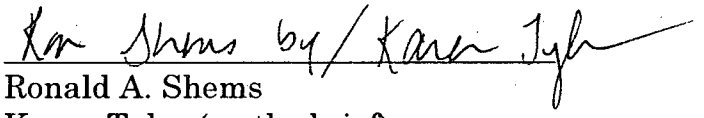
In sum, there is now no argument that Entergy does *not* have a current CWA § 316 variance or determination, or an equivalent permit and supporting documents regarding its "proposed action." 10 C.F.R. § 51.53(c)(3)(ii)(B). As Entergy has not conducted its own assessment, it is amply clear that its application fails to provide the information required by 10 C.F.R. § 51.53(c)(3)(ii)(B).

Hence, the parties and public are without the information required to assess the application. Further, Entergy's failure, if upheld, simply puts the full onus of assessing these impacts on NRC staff – Entergy escapes all responsibility for getting the process started.

IV. CONCLUSION

Entergy's petition for interlocutory review should be denied.

October 20, 2006 New England Coalition

by: 

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
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and Entergy Nuclear Operations, Inc.	)	ASLBP No. 06-849-03-LR
	)	
(Vermont Yankee Nuclear Power Station)	)	

CERTIFICATE OF SERVICE

I, Ron Shems, hereby certify that copies of the NEW ENGLAND COALITION, INC'S OPPOSITION TO ENTERGY'S PETITION FOR INTERLOCUTORY REVIEW OF LBP-06-20 ADMITTING NEW ENGLAND COALITION'S CONTENTION 1 in the above-captioned proceeding were served on the persons listed below, by U.S. Mail, first class, postage prepaid; by Fed Ex overnight to Judge Elleman; and, where indicated by an e-mail address below, by electronic mail, on the 20th day of October, 2006.

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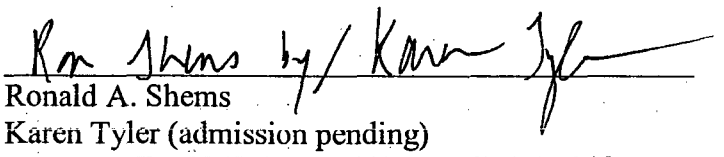
by: 

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October 20, 2006

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Re: In the Matter of Energy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), Docket No. 50-271-LR, ASLBP No. 06-849-03-LR

Dear Sir or Madam:

Please find enclosed for filing in the above-stated matter New England Coalition, Inc.'s Opposition to Entergy's Petition for Interlocutory Review of LBP-06-20 Admitting New England Coalition's Contention 1.

Thank you for your attention to this matter.

Sincerely,

Karen Tyler

Karen Tyler
SHEMS DUNKIEL KASSEL & SAUNDERS PLLC

Cc: attached service list
Enclosures (3)

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*Also admitted in the District of Columbia