

October 31, 2006

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

DOCKETED
USNRC

Before the Atomic Safety and Licensing Board

October 31, 2006 (10:03am)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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| In the Matter of |) | |
| |) | |
| ENTERGY NUCLEAR VERMONT |) | Docket No. 50-271 |
| YANKEE, LLC and ENTERGY |) | |
| NUCLEAR OPERATIONS, INC. |) | ASLBP No. 04-832-02-OLA |
| (Vermont Yankee Nuclear Power Station) |) | (Operating License Amendment) |
| |) | |

**ENTERGY'S RESPONSE TO NEW ENGLAND COALITION'S MOTION TO REOPEN
THE RECORD**

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.¹ (collectively "Entergy") hereby respond to the New England Coalition's ("NEC") October 24, 2006 Motion to Reopen the Record for the Purpose of Re-Examining Dr. Joram Hopenfeld ("Motion"). The Motion makes substantially the same allegations contained in the letter sent to the Atomic Safety and Licensing Board ("Board") on September 21, 2006 by Mr. Raymond Shadis, NEC's representative in this proceeding ("NEC Letter"). The Motion, like the earlier NEC Letter, is without merit and the Board should deny it.

DISCUSSION

The record in this proceeding was closed (subject to transcript corrections) at the end of the hearing held by the Board on September 13 and 14, 2006 in Newfane, Vermont. Tr. 1609

¹ Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. are the licensees of the Vermont Yankee Nuclear Power Station ("VY").

(Karlin). The Motion seeks to reopen the record and have the Board question NEC's witness Dr. Joram Hopfenfeld "via written (electronic and hard copy format) or transcribed teleconference questions and answers." Motion at 1. The subject of the requested Board questioning of Dr. Hopfenfeld appears to be one that was already covered by him extensively in his oral testimony on September 14, 2006, *i.e.* the "contents of table 1, now identified by Entergy's counsel as Exhibit 23 and drawing comparisons to data in item 03 or Entergy Exhibit 27," and the Table 1 data "in particular as it relates to the phenomenon of Critical Heat Flux and transition." *Id.* at 7.²

The requirements for reopening a closed record to receive additional evidence are set forth in 10 C.F.R. § 2.326. The applicable subsections of that regulation, (a) and (b), state:

(a) A motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied:

- (1) The motion must be timely. However, an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented;
- (2) The motion must address a significant safety or environmental issue; and
- (3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

(b) The motion must be accompanied by affidavits that set forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) of this section have been satisfied. Affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. Evidence contained in affidavits must meet the admissibility standards of this subpart. Each of the criteria must be separately addressed, with a specific explanation of why it has been met. When multiple allegations are involved, the movant

² The Motion quotes some of the testimony offered by Dr. Hopfenfeld on this issue. See *id.* at 7. The entire testimony of Dr. Hopfenfeld relating to Table 1 extends for twelve transcript pages. See Tr. 1539-51.

must identify with particularity each issue it seeks to litigate and specify the factual and/or technical bases which it believes support the claim that this issue meets the criteria in paragraph (a) of this section.

10 C.F.R. §§ 2.326 (a) and (b).

The Motion fails to satisfy any of the requirements of 10 C.F.R. § 2.326 (a) and (b); indeed, it does not even cite or refer to the regulation. Contrary to the mandate of 10 C.F.R. § 2.326 (b) (“[t]he motion *must* be accompanied by affidavits . . . ”)(emphasis added), the Motion is not accompanied by any affidavits. Remarkably, although the Motion alleges that confusion on the part of Dr. Hopenfeld affected the quality of his testimony, no affidavit from Dr. Hopenfeld is included. Such an affidavit would be indispensable to establish that he was indeed confused, to explain the way in which that confusion affected his testimony, and to point out what else he would have said or would have said differently had he not been confused. All that is included in the Motion are the inadmissible speculations of Mr. Shadis on the matter of Dr. Hopenfeld’s confusion and its effects. See 10 C.F.R. § 2.337(a).

The Motion is untimely, contrary to 10 C.F.R. § 2.326 (a)(1), in that the issue it raises – Dr. Hopenfeld’s alleged inability to provide coherent testimony because he was distracted over the numbering of the exhibits to which he was referring – became, according to NEC itself, patently obvious while he was testifying, and could have been easily addressed at the hearing by taking a recess. The NEC Letter admits as much:

The Coalition’s witness was observably upset and confused by the discrepancy, which appeared to reflect negatively on the quality of his testimony. . . . New England Coalition’s *pro se* representative erred in not asking for a recess to allow time for the Coalition’s witness to regain his composure.

NEC Letter at 3. Nowhere does NEC offer an explanation why it chose to wait until after the conclusion of the hearing to raise the alleged problems with Dr. Hopenfeld’s testimony. Such untimeliness is particularly egregious because the Motion comes only a few days before the

already postponed deadline for the filing by the parties of proposed findings of fact and conclusions of law.³ Were the Motion to be granted, it would introduce a further delay in the ultimate resolution of this matter and impose an unfair burden on the parties by requiring them to participate in the reopened hearing and prepare additional proposed findings of fact.

The Motion also does not meet the requirement of 10 C.F.R. § 2.326 (a)(2) in that it fails to address a significant safety issue. It is unclear what specific aspect of Dr. Hopenfeld's testimony regarding Table 1 of Entergy Exhibit 23 NEC wishes the Board to revisit.⁴ However, it is very clear from the testimony given by Dr. Hopenfeld that his concern is with the accuracy of the ODYN code analyses and the code's ability to reliably predict the behavior of the VY facility in the event of a large transient from EPU conditions. That concern, assuming he could explain it more clearly than he did in his September 14 testimony and in his direct testimony, see Prefiled Written Testimony of Dr. Joram Hopenfeld Regarding Contention 3 (May 17, 2006) at A9, does not raise a significant safety issue because there is uncontested evidence in the record that ODYN's analytical predictions are only one of several independent ways in which VY's ability to respond safely to a large transient is demonstrated. For example, there is unchallenged testimony by the NRC Staff that the operating experience of VY and other facilities undergoing large transients is the most significant factor that supports the conclusion that large transient testing from EPU operating levels is not necessary. See Tr. 1435 (Abdullahi).

³ The deadline for filing proposed findings of fact and conclusions of law was extended by three weeks at NEC's request. Order (Granting Extension of Time to File Proposed Corrections to Transcript and Proposed Findings of Fact and Conclusions of Law) (October 12, 2006).

⁴ Entergy Exhibit 23 is a summary prepared by Entergy witness Mr. Jose L. Casillas of General Electric Report NEDO-24154 Vol. 1, "Qualification of the One Dimensional Core Transient Model for BWRs" (Entergy Exh. 26), which provides the technical detail of the ODYN model. Table 1 of the Exhibit 23 is a reproduction of a table included in the NRC Staff's evaluation of the ODYN code showing a comparison of the uncertainties and bounding values of certain parameters estimated by ODYN versus the same parameters estimated by other means. The table is also included in Entergy Exh. 26, at p. xlvi. Both documents were provided to NEC long before the hearing.

Finally, the Motion fails to “demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.” 10 C.F.R. § 2.326 (a)(3). The Motion’s premise is that the testimony that Dr. Hopenfeld gave on Table 1 of Entergy Exhibit 23 was unsatisfactory or unpersuasive, hence NEC would like Dr. Hopenfeld to be able to repeat the testimony again, this time unencumbered by the confusion that NEC alleges afflicted the witness. See Motion at 7, 8. The Motion does not identify what new evidence Dr. Hopenfeld would provide that he failed to supply at the hearing, or how the new evidence, if proffered, would be material to the Board’s ultimate findings on NEC Contention 3. Indeed, the Board examined Dr. Hopenfeld thoroughly on this matter and provided him with ample opportunity to present his views. Given the considerable length of Dr. Hopenfeld’s testimony on Table 1 and the numerous questions posed by the Board and answered by the witness, it is difficult to envision what else Dr. Hopenfeld could say a second time around that would be new or would make any difference in the Board’s assessment of the reliability of ODYN.⁵ Certainly, NEC has failed to even hint to the new evidence that it would present. NEC has also failed to present any basis for anticipating that the new evidence could alter the Board’s views.

It is well established that a party seeking to reopen a closed record has a “heavy burden” to bear. *Louisiana Power & Light Co.* (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5 (1986); *Public Service Electric & Gas Co.* (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 63 (1981); *Kansas Gas and Electric Co.* (Wolf Creek Generating

⁵ The length of Dr. Hopenfeld’s testimony belies NEC’s accusation that “[t]he Board did not allow Dr. Hopenfeld to continue to offer his reasoned conclusions and complete answer. . . . The Board the [sic] completed its remaining questions in short order, but New England Coalition believes with [sic] Dr. Hopenfeld’s ability to answer their queries was now handicapped not only by the insult to Dr. Hopenfeld but also by an apparent insult to the Board’s patience.” NEC Letter at 3. Nor did the Board “from the point of confusion regarding the exhibit, forward tended to cut Dr. Hopenfeld off whenever he attempted, in response to the Board’s questions, offer any substantive discussion of the transient modeling and thermal-hydraulic issues involved.” *Id.* at n.4.

Station, Unit 1), ALAB-462, 7 NRC 320, 338 (1978). NEC has not even begun to approach meeting this heavy burden. Indeed, the situation presented by the Motion is not unlike that which arose in *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-87-21, 25 NRC 958 (1987), where the Licensing Board considered the petition of an intervenor to reopen the record. Following the close of evidence in that proceeding, a determination was made that some of the calculations that supported the plant's licensing basis needed to be corrected. *Turkey Point*, 25 NRC at 962. The intervenor's motion to reopen was based on their assertion that they had "'reason to believe' that the regulatory criterion would be exceeded if the Board were to require the Licensee to perform a reanalysis with the corrected version of [the calculation]." *Id.* at 963. The Board rejected the motion to reopen, stating that "the Intervenors have offered no evidence in support of this speculation and have not supplied any affidavits from competent experts to justify this claim... . Intervenors' 'belief' is not sufficient to warrant a reopening of the record." *Id.* Here, of course, there is no evidence of any deficiency in the record that would be cured by hearing from Dr. Hopenfeld again.⁶

CONCLUSION

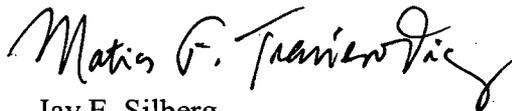
The Motion provides no support for NEC's claim that Dr. Hopenfeld's testimony was adversely affected by any brief confusion over the number of the exhibit about which he was

⁶ Most of the Motion is devoted to repeating the charges first raised in the NEC Letter that the failure by Entergy counsel to provide a list of Entergy's exhibits showing their final numbers was the cause of Dr. Hopenfeld's confusion. Motion at 2-6, 8-9. Those charges have been adequately responded to in Entergy's Response to New England Coalition's Letter to Board (Sept. 25, 2006) and will not be addressed here, except for one additional factual clarification: The reason that Entergy's counsel did not supply NEC a copy of its final exhibit list on the evening of September 13, 2006 was because he had no extra copies, and no reproduction facilities were available in the Newfane courthouse. A copy was provided to NEC before the start of the September 14 hearing, several hours before Dr. Hopenfeld took the stand.

testifying.⁷ NEC also provides no identification of any important safety question that would be illuminated by reopening the record to receive additional testimony by Dr. Hopenfeld. In reality, all that the requested remedy would accomplish would be to give Dr. Hopenfeld an unwarranted “second bite at the apple.” In addition, reopening the record would unnecessarily and unfairly delay the conclusion of this proceeding, with the attendant burdens on the Board and the parties.

For the above stated reasons, NEC’s Motion is procedurally deficit and totally lacking in merit and should be denied.

Respectfully submitted,



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October 31, 2006

⁷ If the confusion over the exhibit numbers caused Dr. Hopenfeld to “be thrown off his stride” NEC is solely to blame for that result. NEC had copies of all non-proprietary Entergy exhibits for several months prior to the hearing so Dr. Hopenfeld could have adequately identified the exhibits by referring to their titles, if not their numbers. Also, as NEC acknowledges, by the time Dr. Hopenfeld testified Mr. Shadis had a copy of Entergy’s final exhibit list and could have promptly provided the correct exhibit information to his witness. He failed to do so. The implication that Entergy is responsible for Dr. Hopenfeld’s lack of preparation is without basis.

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| |) | |

CERTIFICATE OF SERVICE

I hereby certify that copies of "Entergy's Response to New England Coalition's Motion to Reopen the Record" were served on the persons listed below by deposit in the U.S. mail, first class, postage prepaid, and where indicated by an asterisk by electronic mail, this 31st day of October, 2006.

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