

COPY

June 8, 2007

DOCKETED
USNRC

June 8, 2007 (4:01pm)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

**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))	

**ENERGY'S RESPONSE IN SUPPORT OF NRC STAFF'S MOTION TO STRIKE
NEC'S RESPONSE TO NRC STAFF'S SUMMARY DISPOSITION ANSWER**

Pursuant to 10 C.F.R. §2.323(c), Applicants Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively "Entergy") provide this Response in support of the NRC Staff's ("Staff") "Motion to Strike NEC Response to NRC Staff's Summary Disposition Answer" filed on May 29, 2007 ("Staff's Motion to Strike"). The NEC filing in question is unauthorized and impermissibly raises new arguments not contained in the Staff's pleading to which it purportedly responds.

On April 19, 2007, Entergy sought summary disposition of NEC Contention 3 (steam dryer) in this proceeding. Entergy's Motion for Summary Disposition of New England Coalition's Contention 3 (Steam Dryer) ("Entergy's Motion"). On May 9, 2007, NEC and the Staff filed answers to Entergy's Motion. New England Coalition Inc.'s (NEC) Opposition to Entergy's Motion for Summary Disposition of NEC's Contention 3 (Steam Dryer) ("NEC Answer to Entergy's Motion"); NRC Staff's Answer In Support of Entergy's Motion for Summary Disposition of New England Coalition's Contention 3 (Steam Dryer) ("Staff's Answer"). On May 18, 2007, NEC filed, without seeking leave from the Board to do so, a response to the Staff's Answer. New England Coalition, Inc.'s (NEC) Response to NRC Staff's

TEMPLATE = SECY-037

SECY-02

Answer in Support of Entergy's Motion for Summary Disposition of New England Coalition
Contention 3 (Steam Dryer) ("NEC Response").

The NEC Response is as an unauthorized pleading. Summary disposition motions in Subpart L proceedings are governed by 10 C.F.R. § 2.1205. When such a motion is filed, the only response authorized by the regulation is that "[a]ny other party may serve an answer supporting or opposing the motion within twenty (20) days after service of the motion." 10 C.F.R. § 2.1205(b). Responses to such answers are not authorized. While 10 C.F.R. § 2.1205(c) provides that "[i]n ruling on motions for summary disposition, the presiding officer shall apply the standards for summary disposition set forth in subpart G of this part," that cross-reference refers to the substantive standards in subpart G for granting or denying summary disposition motions,¹ not the summary disposition procedures in subpart G.² The Commission made this clear in its section-by-section analysis of 10 C.F.R. § 2.1205:

Section 2.1205 provides a simplified *procedure* for summary disposition in informal proceedings. The *standards* to be applied in ruling on such motions are those set out in Subpart G.

"Changes to Adjudicatory Process," 69 Fed. Reg. 2,182, 2,228 (Jan. 14, 2004) (emphases added).

Consistent with the plain language of the Section 2.1205 and the Commission's statement of considerations, Licensing Boards, including this Board, have routinely noted and applied the *substantive* standard in 10 C.F.R. § 2.710(d)(2) when ruling on motions for summary disposition under 10 C.F.R. § 2.1205(c). See, e.g., Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), Memorandum and Order

¹ Under the subpart G standards, a summary disposition motion will be granted "if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law." 10 C.F.R. § 2.710(d)(2).

² The summary disposition procedures in subpart G allow a party opposing such a motion "within ten (10) days after service, respond in writing to new facts and arguments presented in any statement filed in support of the motion." 10 C.F.R. § 2.710(a).

(Denying Entergy Motion for Leave to File Motion for Reconsideration of NEC Contention 3), (Dec. 13, 2006), slip op. at 6, n. 12; Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site), Memorandum and Order (Granting in Part and Denying in Part Summary Disposition on Contention EC 3.3.2 -- Impacts on Striped Bass in Lake Anna) (June 16, 2005), slip op. at 5. To hold that the *procedural* provisions in § 2.710(a) apply would negate the Commission's purpose in establishing a "simplified procedure" for summary disposition motions in Subpart L proceedings. 69 Fed. Reg. at 2,228.

Accordingly, the NEC Response is an unauthorized filing and must be stricken.

Even assuming, *arguendo*, that the procedures in 10 C.F.R. § 2.710(a) applied to subpart L summary disposition motions, the NEC Response would still need to be stricken because in it NEC does not respond to any "new facts and arguments presented" in the Staff's Answer, but raises three arguments, none of them contained in the Staff's Answer, against Entergy's Motion:

- That "Entergy does not expressly state on [its Motion] that visual inspection will continue throughout the license renewal period." NEC Response at 2. This argument is new and constitutes an untimely additional response to Entergy's Motion, not a response to the Staff's Answer. The Staff's Answer does not mention this subject.³
- That "[t]he Board should not decide Entergy's motion for summary judgment [sic] until the results of the May 2007 inspection are made available to the Board and all

³ This NEC argument is invalid as well as new. Entergy's Motion clearly states that the proposed aging management program for the steam dryer during the license renewal period "is based solely on monitoring of plant parameters and periodic visual examinations of the steam dryer in accordance with accepted industry guidance." Entergy's Motion at 7; *see also*, Declaration of John R. Hoffman in Support of Entergy's Motion for Summary Disposition of NEC Contention 3 (Apr. 18, 2007), ¶ 23: "The aging management program for the VY steam dryer during the twenty-year license renewal period will consist of well-defined monitoring and inspection activities that are defined in the GE SIL-644 guidelines and are identical to those being conducted during the current post-EPU phase. . . . The inspection activities will include visual inspections of the steam dryer every two refueling outages consistent with GE and BWR Vessel Internals Program (VIP) requirements. The inspections will focus on areas that have been repaired, those where flaws exist, and areas that have been susceptible to cracking based on reactor operating experience throughout the industry."

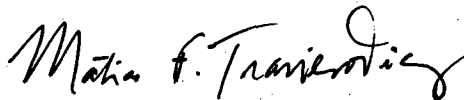
the parties.” NEC Response at 4. The Staff’s Answer makes no statement as to the potential applicability of the May 2007 inspection to Entergy’s Motion.

- That the “NRC Staff also disagrees with Entergy[’s representation that inspections to date confirm that there has been no fatigue-induced cracking of the steam dryer], apparently taking the position that there has been some fatigue-induced cracking, but not such as would generate loose parts, or cracks or tears that would result in excessive moisture carryover.” NEC Response at 5. However, the Staff’s Answer contains no such “position.” The Staff merely states that “[T]he monitoring that has been performed under the EPU program, and the inspections conducted to date (i.e. prior to the inspections to be conducted under the Steam Dryer Monitoring Plan), confirm that fatigue induced cracking of the VY steam dryer such as would generate loose parts, or cracks or tears that would result in excessive moisture carryover is not occurring. Id.” Affidavit of Jonathan G. Rowley, Kaihwa R. Hsu and Thomas G. Scarbrough Concerning NEC Contention 3 (May 9, 2007), ¶ 10, emphasis in original. The quoted statement clearly does *not* say that fatigue induced cracking has occurred at VY, but only clarifies that the definition of unacceptable dryer performance includes “the generation of loose parts, or cracks or tears in the steam dryer that would result in excessive moisture carryover is not occurring.” See id., ¶ 9.

Therefore, the Staff’s Answer contains no new statement or argument to which NEC would be entitled to reply if 10 C.F.R. § 2.710(a) were applicable (which it is not).

For these reasons, and those set forth in the Staff's Motion to Strike, the Staff's motion should be granted and the NEC Response should be stricken.

Respectfully Submitted,



David R. Lewis
Matias F. Travieso-Diaz
PILLSBURY WINTHROP SHAW PITTMAN LLP
2300 N Street, N.W.
Washington, DC 20037-1128
Tel. (202) 663-8000

Counsel for Entergy

Dated: June 8, 2007

**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))	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Entergy's Response in Support of NRC Staff's Motion to Strike NEC's Response to NRC Staff's Summary Disposition Answer," dated June 8, 2007, 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 8th day of June, 2007.

*Administrative Judge
Alex S. Karlin, Esq., Chairman
Atomic Safety and Licensing Board
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
ask2@nrc.gov

*Administrative Judge
Dr. Thomas S. Elleman
Atomic Safety and Licensing Board
5207 Creedmoor Road, #101,
Raleigh, NC 27612.
tse@nrc.gov; elleman@eos.ncsu.edu

*Administrative Judge
Dr. Richard E. Wardwell
Atomic Safety and Licensing Board
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
rew@nrc.gov

*Secretary
Att'n: Rulemakings and Adjudications Staff
Mail Stop O-16 C1
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
secy@nrc.gov , hearingdocket@nrc.gov

Office of Commission Appellate Adjudication
Mail Stop O-16 C1
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

*Mitzi A. Young, Esq.
*Mary C. Baty, Esq.
Office of the General Counsel
Mail Stop O-15 D21
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001may@nrc.gov;
mcb1@nrc.gov

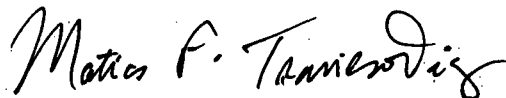
*Anthony Z. Roisman, Esq.
National Legal Scholars Law Firm
84 East Thetford Road
Lyme, NH 03768
aroisman@nationalllegalscholars.com

*Jennifer J. Patterson, Esq.
Senor Assistant Attorney General
Environmental Protection Bureau
33 Capitol Street
Concord, NH 03301
Jennifer.Patterson@doj.nh.gov

Atomic Safety and Licensing Board
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

*Sarah Hofmann, Esq.
Director of Public Advocacy
Department of Public Service
112 State Street – Drawer 20
Montpelier, VT 05620-2601
Sarah.hofmann@state.vt.us

*Ronald A. Shems, Esq.
*Karen Tyler, Esq.
Shems, Dunkiel, Kassel & Saunders, PLLC
9 College Street
Burlington, VT 05401
rshems@sdkslaw.com
ktyler@sdkslaw.com



Matias F. Travieso-Diaz