

April 11, 2008 (3:33pm)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

UNITED STATES
NUCLEAR REGULATORY 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 (NEC) MOTION TO COMPEL
AND FOR SUBPOENA**

Pursuant to 10 C.F.R. §§ 2.323, 2.319(b), 2.321(c), and 2.1203(d), New England Coalition, Inc. ("NEC") moves to compel the production of the CHECWORKS code, which is relevant to NEC's Contention 4 (Flow-Accelerated Corrosion). Entergy's counsel has represented that CHECWORKS is proprietary to the Electric Power Research Institute (EPRI). *See*, Exhibit 1 (e-mail exchange between counsel). NEC therefore requests that the Atomic Safety and Licensing Board ("the Board") issue a subpoena to EPRI, requiring that EPRI make the CHECWORKS code, including the mathematical algorithm it uses, available for inspection by Dr. Joram Hopenfeld, NEC's expert witness on NEC's Contention 4.

NEC is authorized to seek discovery in this proceeding as permitted under 10 C.F.R. Subpart C. 10 C.F.R. § 2.1203(d). Pursuant to Subpart C rules, 10 C.F.R. §§ 2.319(b) and 2.321(c), the Board is authorized to:

Issue subpoenas authorized by law, including subpoenas requested by a participant for the attendance and testimony of witnesses or the production of evidence upon the requestor's showing of general relevance and reasonable scope of evidence sought.

10 C.F.R. §§ 2.319(b), 2.321(c).

The CHECWORKS code and the mathematical algorithm it uses are relevant to NEC's Contention 4 (Flow-Accelerated Corrosion). NEC's Contention 4 is that Entergy has not proposed an adequate plan to manage aging of the plant piping due to flow-accelerated corrosion (FAC). NEC Petition to Intervene (May 26, 2006) at 18-19. NEC contends in part that Entergy cannot rely on the CHECWORKS code to determine the scope and frequency of inspection of components susceptible to FAC because it will not be possible, prior to the expiration of Entergy's current operating license, to "benchmark" this code to changes in Vermont Yankee plant parameters resulting from a twenty percent increase in the plant's operating power, implemented in 2006. *Id.*

Entergy's witnesses on NEC's Contention 4 include the author of CHECWORKS, Dr. Jeffrey S. Horowitz. Dr. Horowitz will testify "on the methodology, assumptions and data used in performing CHECWORKS evaluations, describe the industry experience with FAC and the use of CHECWORKS, and will explain why the data accumulated on VY's operations at uprate levels by the time the period of extended operations begins will be sufficient to permit accurate FAC predictions." Entergy's Final Witness List at 5. As the basis for his testimony, Dr. Horowitz must rely, in part, on his knowledge of CHECWORKS and the algorithm it uses, which he wrote.

NEC proposes that EPRI make CHECWORKS and the mathematical algorithm it uses available for Dr. Hopfenfeld's inspection under the Protective Agreement and Order in place in this proceeding. Entergy has already produced other materials that are proprietary to EPRI under the Protective Order and Agreement, such as, for example, EPRI's NSAC 202L report.

Pursuant to 10 C.F.R. § 2.323(b), NEC has attempted to resolve the issues raised in this motion in consultation with Entergy's counsel. Relevant E-mail correspondence between counsel is attached hereto as Exhibit 1. NEC's Counsel first requested that Entergy produce the CHECWORKS Code on December 20, 2007, and Entergy's Counsel agreed that day to consult with EPRI. *See*, Exhibit 1. NEC's Counsel again inquired about the production of CHECWORKS on February 19, 2008, and Entergy's Counsel suggested that the code could possibly be made available for inspection by Dr. Hopenfeld under the supervision of an EPRI representative. *Id.* NEC's Counsel again inquired about the production of CHECWORKS on March 13, 2008. On March 19, 2008, Entergy's Counsel proposed the following:

- An EPRI representative will give a short (two hours or so) briefing to Dr. Hopenfeld, explaining how the code works and illustrating the explanation with a sample run for a plant piping system, using generic (not Vermont Yankee-specific) data.
- The briefing will be held in Washington, DC, either at our offices or EPRI's.
- The briefing will be informal, although participants will be free to take notes.
- Attorneys, if present, will observe but not participate in the briefing except that we reserve the right to cut off any discussions that specifically relate to the issues set for hearing with respect to NEC Contention 4. This briefing is not intended to provide discovery to NEC, but only to assist Dr. Hopenfeld in understanding how CHECWORKS works.
- No details of the proprietary mathematical algorithm used by CHECWORKS will be provided.
- EPRI believes that Dr. Jeffrey Horowitz, the developer of CHECWORKS, is the most suitable person to provide this briefing. Dr. Horowitz is currently in France, participating in the International Conference on Flow Accelerated Corrosion "FAC2008," and will return in mid-April. Therefore, we propose that the briefing take place upon Dr. Horowitz's return, at a date in the second half of April to be decided at a later time.

Id.

The proposed briefing is not an adequate production of the CHECWORKS code. Dr. Hopenfeld would not be permitted to personally manipulate the model, and therefore

might not have the opportunity to review it in full, especially given that he would not be permitted to ask questions that relate to NEC's Contention 4. Most significantly, Dr. Hopenfeld would not be permitted to review the mathematical algorithm that drives the model.

April 11, 2008

New England Coalition

by:



Karen Tyler

Andrew Raubvogel

SHEMS DUNKIEL KASSEL & SAUNDERS PLLC

For the firm

Attorneys for NEC

Exhibit 1

ktyler@sdkslaw.com

From: Travieso-Diaz, Matias F. [matias.travieso-diaz@pillsburylaw.com]
Sent: Friday, April 11, 2008 1:35 PM
To: ktyler@sdkslaw.com
Cc: Lewis, David R.; nwilmshu@epri.com; MCostello@epri.com; Andy Raubvogel; Mr. Raymond Shadis; Noverflo@aol.com; Hofmann, Sarah; Anthony Z. Roisman
Subject: RE: Docket No. 50-271-LR

Dear Ms. Tyler: As discussed in our telephone conversation today, we are not going to provide a videotaped tutorial on CHECWORKS to NEC and Dr. Hopenfeld. I understand you intend to file a motion to compel discovery of the CHECWORKS code and its algorithm, and may file a request for the Board to issue a subpoena to EPRI to produce those materials. In view of these actions by NEC (which we will oppose), our offer to provide to Dr. Hopenfeld a briefing on CHECWORKS is withdrawn.

Matias F. Travieso-Diaz | Pillsbury Winthrop Shaw Pittman LLP

Tel: 202.663.8142 | Fax: 202.663.8007 | Cell: 703.472.6463
2300 "N" Street, NW | Washington, DC 20037-1122

Email: matias.travieso-diaz@pillsburylaw.com
Bio: www.pillsburylaw.com/Matias.travieso-diaz
www.pillsburylaw.com

From: ktyler@sdkslaw.com [mailto:ktyler@sdkslaw.com]
Sent: Thursday, April 10, 2008 5:23 PM
To: Travieso-Diaz, Matias F.
Cc: Lewis, David R.; nwilmshu@epri.com; MCostello@epri.com; 'Andy Raubvogel'; 'Mr. Raymond Shadis'; Noverflo@aol.com; 'Hofmann, Sarah'; 'Anthony Z. Roisman'
Subject: RE: Docket No. 50-271-LR

Matias:

Re. the proposed CHECWORKS briefing:

NEC does not consider the proposed briefing a fully sufficient "production" of CHECWORKS in that a) it appears that Dr. Hopenfeld would not be permitted to personally manipulate the model, and therefore may not have the opportunity to explore all relevant aspects of it (given that he won't be permitted to ask questions that relate to NEC's Contention 4); and b) Dr. Hopenfeld will not be permitted to review the algorithm that drives the model.

Although NEC does not consider the proposed briefing fully sufficient, it nonetheless accepts Entergy's and EPRI's offer to provide it. An in-person briefing may not, however, be possible due to schedule constraints -- Dr. Hopenfeld will be traveling outside the DC area after April 19th, and you've indicated that Dr. Horowitz will not return from France until mid-April. I suggest that Entergy and EPRI record and produce a video of Dr. Horowitz's proposed presentation. Please let me know if this is agreeable.

Finally, it is my understanding based on your e-mail, below, that you are unable to secure EPRI's consent

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to permit Dr. Hopenfeld to personally manipulate the CHECWORKS code, or to review the mathematical algorithm that CHECWORKS uses. I will therefore file a motion to compel and for subpoena of CHECWORKS tomorrow afternoon. If my understanding of EPRI's position is incorrect, please call tomorrow morning so that we can discuss this further.

Re. two other document production issues:

1. We are unable to locate in Entergy's document production information concerning how temperature and velocity was calculated for each transient in the CUFen analysis NEC's Contention 2A addresses. Please either confirm that Entergy has not produced this information, or identify where it appears among the documents provided.
2. The documents on the proprietary disk produced to NEC as part of Entergy's Supplement 11 are redacted. Please produce unredacted copies of these documents.

Thanks,

Karen Tyler
 Shems Dunkiel Kassel & Saunders PLLC
 91 College Street
 Burlington, Vermont 05401
 (802) 860-1003
 Fax: (802) 860-1208
www.sdkslaw.com

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From: Travieso-Diaz, Matias F. [<mailto:matias.travieso-diaz@pillsburylaw.com>]
Sent: Wednesday, March 19, 2008 1:19 PM
To: ktyler@sdkslaw.com
Cc: Lewis, David R.; nwilmsu@epri.com; MCostello@epri.com
Subject: RE: Docket No. 50-271-LR

Karen: This is in response to your two questions.

(1) The three confirmatory calculations are non-proprietary.

(2) We have been working with EPRI on a procedure for providing a briefing to Dr. Hopenfeld on the proprietary EPRI CHECWORKS code. We have agreed with EPRI on the following procedure:

- An EPRI representative will give a short (two hours or so) briefing to Dr. Hopenfeld, explaining how the code works and illustrating the explanation with a sample run for a plant piping system, using generic (not Vermont Yankee-specific) data.
- The briefing will be held in Washington, DC, either at our offices or EPRI's.
- The briefing will be informal, although participants will be free to take notes.
- Attorneys, if present, will observe but not participate in the briefing except that we reserve the right to cut off any discussions that specifically relate to the issues set for hearing with respect to NEC Contention 4. This briefing is not intended to provide

discovery to NEC, but only to assist Dr. Hopenfeld in understanding how CHECWORKS works.

- No details of the proprietary mathematical algorithm used by CHECWORKS will be provided.
- EPRI believes that Dr. Jeffrey Horowitz, the developer of CHECWORKS, is the most suitable person to provide this briefing. Dr. Horowitz is currently in France, participating in the International Conference on Flow Accelerated Corrosion "FAC2008," and will return in mid-April. Therefore, we propose that the briefing take place upon Dr. Horowitz's return, at a date in the second half of April to be decided at a later time.

Please let me know if the procedure described above is satisfactory. Thanks.

Matias F. Travieso-Diaz | Pillsbury Winthrop Shaw Pittman LLP

Tel: 202.663.8142 | Fax: 202.663.8007 | Cell: 703.472.6463
2300 "N" Street, NW | Washington, DC 20037-1122

Email: matias.travieso-diaz@pillsburylaw.com
Bio: www.pillsburylaw.com/Matias.travieso-diaz
www.pillsburylaw.com

From: ktyler@sdkslaw.com [<mailto:ktyler@sdkslaw.com>]
Sent: Thursday, March 13, 2008 3:23 PM
To: Travieso-Diaz, Matias F.
Cc: 'Andy Raubvogel'
Subject: Docket No. 50-271-LR

Matias,

A couple questions for you:

Your letter dated 2/15/08, forwarding three additional SIA EAF reports, does not indicate that any of the reports are proprietary. Please confirm that this is correct.

Also, please update me on your progress with EPRI re. Dr. Hopenfeld's review of the CHECWORKS Code.

Thanks,

Karen Tyler
Shems Dunkiel Kassel & Saunders PLLC
91 College Street
Burlington, Vermont 05401
(802) 860-1003
Fax: (802) 860-1208
www.sdkslaw.com

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ktyler@sdkslaw.com

From: Travieso-Diaz, Matias F. [matias.travieso-diaz@pillsburylaw.com]
Sent: Thursday, January 03, 2008 12:03 PM
To: ktyler@sdkslaw.com
Cc: Lewis, David R.
Subject: RE: Docket No. 50-271-LR
Attachments: NEC Non-Disclosure Agreement.pdf

We are still checking with EPRI about making a copy of CHECWORKS available for Dr. Hopenfeld's review. I notice, however, that the confidentiality agreements that NEC provided a few months ago (see copy enclosed) do not include one from Dr. Hopenfeld. Has he signed one such agreement, and could you please send me a copy if he has? Thanks,

From: Travieso-Diaz, Matias F.
Sent: Thursday, December 20, 2007 5:59 PM
To: ktyler@sdkslaw.com
Cc: Lewis, David R.
Subject: RE: Docket No. 50-271-LR

Without conceding that the CHECWORKS code is relevant to NEC Contention 4, we will contact EPRI (which has the proprietary rights to CHECWORKS) to seek its agreement that the code can be released to NEC and Dr. Hopenfeld. Because of the upcoming holiday period, this will take some time.

From: ktyler@sdkslaw.com [mailto:ktyler@sdkslaw.com]
Sent: Thursday, December 20, 2007 11:40 AM
To: Travieso-Diaz, Matias F.
Cc: Lewis, David R.; 'Andy Raubvogel'; shadis@prexar.com; Noverflo@aol.com
Subject: Docket No. 50-271-LR

Matias,

NEC's expert witness, Joram Hopenfeld, needs to review a copy of the CHECKWORKS code – relevant, of course, to NEC's Contention 4. You have produced user manuals, but do not appear to have produced a copy of the code itself.

Karen Tyler
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Burlington, Vermont 05401
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Fax: (802) 860-1208
www.sdkslaw.com

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4/10/2008

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ktyler@sdkslaw.com

From: Travieso-Diaz, Matias F. [matias.travieso-diaz@pillsburylaw.com]
Sent: Tuesday, February 19, 2008 5:21 PM
To: ktyler@sdkslaw.com
Cc: Lewis, David R.; Dennis, Bill; Nelson, Blake J.; Andy Raubvogel
Subject: RE: Docket 50-271-LR

I need to consult with EPRI on whether this is feasible and let you know.

From: ktyler@sdkslaw.com [mailto:ktyler@sdkslaw.com]
Sent: Tuesday, February 19, 2008 5:20 PM
To: Travieso-Diaz, Matias F.
Cc: Lewis, David R.; 'Dennis, Bill'; Nelson, Blake J.; 'Andy Raubvogel'
Subject: RE: Docket 50-271-LR

Do I understand correctly that you propose that Dr. Hopenfeld would review a copy of the model under the supervision of an EPRI staff person who would explain its design and use? If so, I think this would be sufficient, although I'll have to discuss it with Dr. Hopenfeld. When could this review be arranged?

Karen Tyler
 Shems Dunkiel Kassel & Saunders PLLC
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 Fax: (802) 860-1208
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From: Travieso-Diaz, Matias F. [mailto:matias.travieso-diaz@pillsburylaw.com]
Sent: Tuesday, February 19, 2008 5:10 PM
To: ktyler@sdkslaw.com
Cc: Lewis, David R.; Dennis, Bill; Nelson, Blake J.
Subject: RE: Docket 50-271-LR

I have had several conversations with EPRI's in-house counsel. EPRI is extremely reluctant to provide, even under a protective order, a copy of a valuable, proprietary program such as CHECWORKS. We are still trying to come up with an alternative approach that would be satisfactory to EPRI. Perhaps if Dr. Hopenfeld were willing to look at a copy of CHECWORKS and have someone from EPRI walk him through the program's use, these difficulties could be obviated.

From: ktyler@sdkslaw.com [mailto:ktyler@sdkslaw.com]
Sent: Tuesday, February 19, 2008 4:57 PM
To: Travieso-Diaz, Matias F.
Cc: 'Raymond Shadis'; 'Andy Raubvogel'; Noverflo@aol.com
Subject: Docket 50-271-LR

4/10/2008

Matias,

Have you made any progress in obtaining EPRI's authorization to release the CHECWORKS code to NEC's witness, Joram Hopenfeld? Please update me.

Thanks,

Karen Tyler
Shems Dunkiel Kassel & Saunders PLLC
91 College Street
Burlington, Vermont 05401
(802) 860-1003
Fax: (802) 860-1208
www.sdkslaw.com

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**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, Clara Cavitt, hereby certify that copies of NEW ENGLAND COALITION, INC.'S (NEC) MOTION TO COMPEL AND FOR SUBPOENA in the above-captioned proceeding were served on the persons listed below, by U.S. Mail, first class, postage prepaid; and, where indicated by an e-mail address below, by electronic mail, on the 11th day of April, 2008.

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E-mail: ask2@nrc.gov

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for the firm
Attorneys for New England Coalition, Inc.