

June 16, 2008

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
AMERGEN ENERGY COMPANY, LLC	)	Docket No.
(Oyster Creek Nuclear Generating Station)	)	50-219-LR
	)	
In the Matter of	)	
	)	
ENTERGY NUCLEAR OPERATIONS, INC.	)	Docket Nos.
(Indian Point Nuclear Generating	)	50-247-LR
Units 2 and 3)	)	and 50-286-LR
	)	
In the Matter of	)	
	)	
ENTERGY NUCLEAR OPERATIONS, INC.	)	Docket No.
(Pilgrim Nuclear Power Station)	)	50-293-LR
	)	
In the Matter of	)	
	)	
ENTERGY NUCLEAR OPERATIONS, INC.	)	Docket No.
(Vermont Yankee Nuclear Power Station)	)	50-271-LR
	)	

NRC STAFF'S RESPONSE TO JOINT MOTION FOR LEAVE TO REPLY TO  
NRC STAFF OPPOSITION TO SUPPLEMENTAL PETITION FOR ADDITIONAL  
INVESTIGATION AND CORRECTION OF DEFICIENCIES IN LICENSE RENEWAL REVIEWS

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c) the staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby responds to the "Motion by Nuclear Information and Resource Service; Jersey Shore Nuclear Watch, Inc.; Grandmothers, Mothers, and More for Energy Safety; New Jersey Public Interest Research Group; New Jersey Sierra Club; New Jersey Environmental Federation; Riverkeeper, Inc; Pilgrim Watch and New England Coalition ["Petitioners"] for Leave

to Reply to NRC Staff's Oppositions to Supplemental Petition for Additional Investigation and Correction of Deficiencies Regarding License Renewal Reviews for Oyster Creek, Indian Point, Pilgrim, and Vermont Yankee Nuclear Power Plants" ("Motion for Leave to Reply"), served June 4, 2008.<sup>1</sup> For the reasons set forth below, the Staff opposes the Motion for Leave to Reply.

### BACKGROUND

On May 15, 2008, Petitioners served a supplemental petition<sup>2</sup> to their January 3, 2008 petition to "Suspend License Renewal Reviews for Oyster Creek, Indian Point, Pilgrim, and Vermont Yankee Nuclear Power Plants Pending Investigation of NRC Staff Review Process and Correction of Deficiencies."<sup>3</sup> The Staff filed its answer to this Supplemental Petition on May 27, 2008.<sup>4</sup>

Subsequently, on June 4, 2008, Petitioners filed the instant motion seeking leave to reply to the Staff Answer.<sup>5</sup> Petitioners note that the Commission's regulations do not provide a

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<sup>1</sup> Petitioners' also submitted, with their Motion for Leave to Reply, a pleading entitled "Reply by [Petitioners] to NRC Staff Opposition to Supplemental Petition for Additional Investigation and Correction of Deficiencies Regarding License Renewal Reviews for Oyster Creek, Indian Point, Pilgrim, and Vermont Yankee Nuclear Power Plants" (June 4, 2008) ("Reply").

<sup>2</sup> Supplemental Petition by [Petitioners] for Additional Investigation and Correction of Deficiencies Regarding License Renewal Reviews for Oyster Creek, Indian Point, Pilgrim, and Vermont Yankee Nuclear Power Plants (May 15, 2008) ("Supplemental Petition").

<sup>3</sup> Petition by [Petitioners] to Suspend License Renewal Reviews for Oyster Creek, Indian Point, Pilgrim, and Vermont Yankee Nuclear Power Plants Pending Investigation of NRC Staff Review Process and Correction of Deficiencies" (Jan. 3, 2008) ("January Petition"). After receipt of Petitioners' Supplemental Petition, the Commission postponed its scheduled May 16, 2008 affirmation session regarding Petitioners' Initial Petition. See NRC Sunshine Federal Register Notice for Weeks of May 12, 19, 26, June 2, 9, 16, 2008, 73 Fed. Reg. 27,580 (May 13, 2008) (noticing the affirmation session).

<sup>4</sup> NRC Staff's Answer to Supplemental Petition for Additional Investigation and Correction of Deficiencies in License Renewal Reviews (May 27, 2008) ("Staff Answer").

<sup>5</sup> The Staff notes that this is the second time in this joint proceeding that Petitioners have moved for leave to reply (and attached a reply) based on a claim of "compelling circumstances," alleging each time that they could not reasonably have anticipated the arguments raised against them. See Motion by (continued. . .)

right to reply, and that permission to reply may be granted only in “compelling circumstances.” Motion for Leave to Reply at 1 (citing 10 C.F.R. § 2.323(c)<sup>6</sup>). Nonetheless, Petitioners argue that the requested leave to reply is warranted. *Id.* Petitioners assert that compelling circumstances are present because Petitioners could not have anticipated the arguments contained in the Staff Answer regarding 1) “the legality of the Staff’s destruction of audit-related documents”; 2) “interpretation of the privilege doctrine”; and 3) the fact that “there is sufficient documentation available to show that the relicensing reviews are adequate.” See Motion for Leave to Reply at 1-2.

### DISCUSSION

Petitioners’ joint effort, which began with their January Petition and continued with their Supplemental Petition, attempts to obtain adjudicatory relief in four license renewal adjudications by challenging various aspects of the Staff’s safety reviews of renewal applications.<sup>7</sup> This is in spite of the fact that, according to well-settled Commission precedent, the quality of the Staff’s safety reviews *is not a material issue in NRC licensing proceedings*, because what matters is the adequacy of the *application itself*, not the Staff’s performance. See

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(. . .continued)

[Petitioners] For Leave to Reply to Oppositions to Petition to Suspend License Renewal Reviews for Oyster Creek, Indian Point, Pilgrim, and Vermont Yankee Nuclear Power Plants Pending Investigation of NRC Staff Review Process and Correction of Deficiencies” (Jan. 25 2008); Reply by [Petitioners] to Opposition to Suspend License Renewal Reviews for Oyster Creek, Indian Point, Pilgrim, and Vermont Yankee Nuclear Power Plants Pending Investigation of NRC Staff Review Process and Correction of Deficiencies (Jan. 25, 2008).

<sup>6</sup> Regarding motions, answers, and replies, 10 C.F.R. § 2.323(c) states that the moving party has no right to reply, and permission to reply may be granted only in compelling circumstances, such as where the moving party demonstrates that it could not reasonably have anticipated the arguments to which it seeks leave to reply.

<sup>7</sup> See *generally* January Petition; Supplemental Petition.

Changes to Adjudicatory Process, Final Rule, 69 Fed. Reg. 2,182, 2,202 (Jan. 14, 2004) (citing Commission case law); *see also Curators of the Univ. of Missouri* (Trump-S Project), CLI-95-1, 41 NRC 71, 121-22 (1995), *aff'd on motion for reconsid.*, CLI-95-8, 41 NRC 386, 396 (1995).

Therefore, Petitioners' January Petition and Supplemental Petition were not viable to begin with, making it all the more improbable that there could be any "compelling" reason to allow Petitioners to submit yet another pleading. Nonetheless, the Staff will address the arguments Petitioners raise in their attempt to show that "compelling circumstances" warrant granting their Motion for Leave to Reply.

Petitioners<sup>8</sup> claim that their inability to anticipate the Staff's arguments in response to their Supplemental Petition presents the sort of "compelling circumstances" that would permit the Commission to grant its Motion for Leave to Reply. The Staff disagrees.

First, the Staff notes that Petitioners have kept their Motion for Leave to Reply relatively brief, providing only skeletal arguments. In order to understand these skeletal arguments, the reader must review the Reply, which Petitioners have appended to their as-yet-ungranted Motion for Leave to Reply. Thus, Petitioners apparently hope to evade the Commission's regulation restricting the right to file replies by forcing the Commission to read the reply in order to decide whether to allow it. In the Staff's view, this defeats the purpose of the regulation. Moreover, to file the actual reply requires "permission." 10 C.F.R. § 2.323(c). Absent such permission, the reply effectively does not exist, and so cannot be relied upon. To preserve the

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<sup>8</sup> Multiple Petitioners from four separate proceedings that are represented by counsel and experienced *pro se* representatives are essentially asserting to the Commission, in their Motion for Leave to Reply, that they could not have reasonably anticipated that the Staff would respond to the very points raised by their representatives.

integrity of the Commission's procedural rules, the Commission should therefore restrict its analysis of the Motion for Leave to Reply to the four corners of that motion.

Petitioners' Motion for Leave to Reply makes three arguments in support of Petitioners' alleged inability to anticipate the Staff's arguments. These arguments are both vague and unfounded. This response will address each of Petitioners' arguments in turn.

I. Legality of Staff Actions

First, Petitioners claim to be surprised at the Staff's position that the Staff did not violate any document retention laws, Motion for Leave to Reply at 1, even though this Staff position directly responds to the Supplemental Petition's claims that the Staff's actions were "illegal," see Supplemental Petition at 6-15 (Section IV, entitled "The Destruction of the 'Working Papers' Violates NRC Policy and is Illegal"). Petitioners' sole allegation, quoted in full, in support of this facially unlikely claim is that "the Staff's arguments are blatantly inconsistent with program plans that were developed by the Staff itself for license renewal reviews at the Oyster Creek and Indian Point plants and with NRC's general document retention policies." Motion for Leave to Reply at 1. Petitioners fail to explain what, precisely, these "program plans" or "general document retention policies" are or why "the Staff's arguments are blatantly inconsistent" with them. Thus, Petitioners have failed to provide any meaningful support for their "compelling circumstances" argument.

The Staff also notes that, while the Supplemental Petition did include an extensive discussion of the "NRC's general document retention policies" found in Management Directive ("MD") 3.53,<sup>9</sup> see Supplemental Petition at 7-14,<sup>10</sup> there is no mention in the Supplemental

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<sup>9</sup> MD 3.53, *NRC Records and Document Management Program* (Mar. 15, 2007).

Petition of anything that might reasonably be termed a “program plan.” *See generally* Supplemental Petition. It is likely, though, the “program plans” to which Petitioners are referring are the *Audit Plans* for Indian Point and Oyster Creek.<sup>11</sup>

Petitioners do not, however, explain why they think these Audit Plans (or any other “program plans”) have any legal significance. In the Staff’s view, these Audit Plans constitute merely the license renewal division staff’s own internal guidance to itself and are intended to serve pragmatic managerial purposes rather than legal purposes. Moreover, the Audit Plans never claim to be setting forth or interpreting any laws or Commission policies on document retention. After all, the goal of instructing the Staff how to comply with laws and Commission policy regarding document retention is already being served by MD 3.53. Petitioners also do not indicate in their Motion for Leave to Reply what “blatant inconsistency” they think has occurred with respect to these Audit Plans (or any other “program plans”), leaving it to the Commission to guess what they might be talking about. Thus, Petitioners have not come close to meeting their burden of demonstrating the “compelling circumstances” necessary to justify granting their Motion for Leave to Reply.

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(. . .continued)

<sup>10</sup> The Staff responded to Petitioners’ arguments regarding MD 3.53 in the Staff Answer. *See* Staff Answer at 12.

<sup>11</sup> *See* Audit and Review Plan for Plant Aging Management Reviews and Programs for Indian Point Nuclear Generating Unit Nos. 2 and 3, Docket No. 50-247, 50-286 (Sep. 27, 2007) (ADAMS Accession No. ML072290180) (“Indian Point Audit Plan”); Audit and Review Plan for Plant Aging Management Reviews and Programs, Oyster Creek Generating Station, Docket No. 50-219, Rev. 1 (Jan. 17, 2006) (ADAMS Accession No. ML060200084) (“Oyster Creek Audit Plan”).

## II. Deliberative Process Privilege

Second, Petitioners assert that they could not have predicted that the Staff would argue that “audit-related documents” are privileged because this argument is “so far afield of NRC’s ordinary interpretation of the privilege doctrine.” Motion for Leave to Reply at 1. Petitioners claim that, as a result, they “could not foresee the Staff’s argument that the failure to retain working papers did not affect Petitioners’ right to participate in license renewal proceedings.” *Id.* at 2.<sup>12</sup>

The Commission has held that “the deliberative process privilege may be invoked in NRC proceedings.” *Georgia Power Co., et al.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 197 (1994). Staff notes at the outset that Entergy recognized in its own response to the Supplemental Petition that the NRC could have invoked the deliberative process privilege with respect to these working papers,<sup>13</sup> a fact that tends to undercut Petitioners’ assertion that they “could not have anticipated” such an argument. Indeed, the Staff’s deliberative process argument was perfectly appropriate, and should have been

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<sup>12</sup> The Commission’s regulations in 10 C.F.R. § 2.337 show what evidence is required and anticipated at a hearing; working papers and notes are simply not among the evidence the Staff is expected to present. See 10 C.F.R. § 2.337. By contrast, the Staff’s safety evaluation report is anticipated and contemplated as evidence. See 10 C.F.R. §§ 2.337(g)(2)(ii) & 2.337(g)(3)(ii) (stating that in proceedings involving applications, the NRC staff, at its discretion, offers into evidence the safety evaluation report). If there are environmental contentions, the Staff would also provide its supplemental environmental impact statement. See 10 C.F.R. §§ 2.337(g)(2)(iv) & 2.337(g)(3)(iv). Only relevant, material, and reliable evidence is admitted, 10 C.F.R. § 2.337(a), and the absence of any regulatory requirement for the Staff to offer into evidence its working papers and notes further supports the argument that these non-record papers are not necessary for a complete record, and are not required to be preserved.

<sup>13</sup> Answer of Entergy Nuclear Operations, Inc. Opposing Supplemental Petition to Suspend License Renewal Proceedings (May 27, 2008) at 8 (“[E]ven if [the documents in question] were retained as formal agency records, [they] would be considered predecisional in nature and subject to protection under the deliberative process privilege.”).

predictable, given Petitioners' claim that lack of access to the documents in question has harmed their ability to participate in their respective adjudications. See Supplemental Petition at 16-17. Such a claim necessarily presupposes that Petitioners would have had some right to obtain these documents, which in turn would implicate any potentially relevant privileges. Given that the OIG Memo<sup>14</sup> describes the documents in question as "working papers" which Staff reviewers "used to prepare their formal input for an audit report, which is then used as input to the SER," OIG Memo at 3, it is no surprise that the Staff would raise deliberative process privilege arguments to dispute Petitioners' suggestion that they would have had some right to obtain these clearly pre-decisional (and likely deliberative<sup>15</sup>) documents in order to aid their adjudicatory participation.<sup>16</sup>

Petitioners also completely fail to explain their claim that the Staff's deliberative process arguments are "so far afield of NRC's ordinary interpretation of the privilege doctrine" that they

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<sup>14</sup> Memorandum from Inspector General Hubert T. Bell to Dale E. Klein, Chairman of the Commission, regarding NRC Staff Review of License Renewal Applications (May 2, 2008).

<sup>15</sup> While the "predecisional" nature of Staff "working papers" appears beyond dispute given their role in the development of Staff SERs, the Motion for Leave to Reply also does not specifically allege that the "working papers" discussed in the OIG Memo were not "deliberative." See Motion for Leave to Reply at 1-2. Nor can any apparent basis for making such a claim be found in the OIG Memo's vague descriptions of these "working papers." See OIG Memo at 3. Indeed, a Licensing Board recently recognized that there are several types of documents that can potentially qualify as deliberative, ranging from documents that expressly depict internal agency deliberations to fact summaries that are developed to assist in discretionary decisionmaking. See *David Geisen*, LBP-06-25, 64 NRC 367, 382 (2006). The Commission has likewise acknowledged the variety of ways in which documents can satisfy the "deliberative" prong of deliberative process analysis. *Vogtle*, CLI-94-5, 39 NRC at 198. Therefore, given the very limited detail given in the OIG Memo about the "working papers" in question, it is unclear how Petitioners could have concluded with any certainty that these working papers would not have been deliberative. This further confirms that Petitioners should have been able to anticipate the Staff's deliberative process privilege arguments.

<sup>16</sup> Only documents that are both (1) "predecisional" and (2) "deliberative" are protected by the deliberative process privilege. *Vogtle*, CLI-94-5, 39 NRC at 197.



could not reasonably have been anticipated. This vague and unexplained assertion clearly does not demonstrate the “compelling circumstances” necessary to warrant permission to reply.

III. Commission’s Ability to Make License Renewal Decisions

Third, Petitioners argue that they meet the compelling circumstances requirement of § 2.323(c) because they could not have anticipated the Staff’s argument that the Commission *does* have adequate information to make license renewal determinations. See Motion for Leave to Reply at 2. This assertion is not credible because the Staff’s argument was in direct response to the Supplemental Petition’s section entitled “The Commission Has Insufficient Information to Form an Opinion on Adequate Protection for the Facilities.”<sup>17</sup> Petitioners claim, nonetheless, that the Staff’s argument contradicts “the core finding of the May 8, 2008 memorandum from the Inspector General . . . that ‘it was very difficult to verify specific details of on-site review activities,’ because the NRC Staff did not preserve its working files.” Motion for Leave to Reply at 4. This assertion, however, does not demonstrate that Petitioners could not have reasonably anticipated this argument. In fact, Petitioners argued in their Supplemental Petition that “[t]he IG’s major finding is that because the NRC Staff destroyed their ‘audit working papers’ and did not retain copies of all applicant documents reviewed, it was ‘difficult to verify specific details of on-site review activities’” (Supplemental Petition at 3) and that “the IG Memo shows that the Staff have destroyed essential working papers without which the Commission cannot show that the quality of the relicensing reviews was adequate” (*id.* at 16). Thus, instead of demonstrating that they could not have anticipated the Staff’s arguments, Petitioners have merely demonstrated a desire to repeat arguments they made in the first

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<sup>17</sup> Supplemental Petition at 15.

instance and rebut the Staff's perfectly foreseeable arguments. A mere desire to rebut an argument does not constitute compelling circumstances.

CONCLUSION

For the reasons stated above, Petitioners have failed to demonstrate compelling circumstances in their Motion for Leave to Reply. Thus, the Staff respectfully requests that the Commission deny Petitioners' Motion for Leave to Reply and not entertain the Petitioners' Reply.

Respectfully submitted,

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Dated at Rockville, Maryland  
this 16th day of June, 2008

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
 )  
AMERGEN ENERGY COMPANY, LLC ) Docket No. 50-219-LR  
 )  
(Oyster Creek Nuclear Generating Station) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S RESPONSE TO JOINT MOTION FOR LEAVE TO REPLY TO NRC STAFF OPPOSITION TO SUPPLEMENTAL PETITION FOR ADDITIONAL INVESTIGATION AND CORRECTION OF DEFICIENCIES IN LICENSE RENEWAL REVIEWS" for James E. Adler 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 16<sup>th</sup> day of June, 2008.

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
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ENTERGY NUCLEAR OPERATIONS, INC.	)	Docket Nos. 50-247/286-LR
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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
Entergy Nuclear Generation Co. and	)	
Entergy Nuclear Operations, Inc.	)	Docket No. 50-293-LR
	)	
(Pilgrim Nuclear Power Station)	)	ASLBP No. 06-848-02-LR
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO JOINT MOTION FOR LEAVE TO REPLY TO NRC STAFF OPPOSITION TO SUPPLEMENTAL PETITION FOR ADDITIONAL INVESTIGATION AND CORRECTION OF DEFICIENCIES IN LICENSE RENEWAL REVIEWS" in the above-captioned proceeding have been served on the following by electronic mail and by deposit in the U.S. Nuclear Regulatory Commission's internal mail system, or, as indicated by an asterisk (\*), by electronic mail and by deposit in the U.S. Mail system this 27<sup>th</sup> day of March, 2008.

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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)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S RESPONSE TO JOINT MOTION FOR LEAVE TO REPLY TO NRC STAFF OPPOSITION TO SUPPLEMENTAL PETITION FOR ADDITIONAL INVESTIGATION AND CORRECTION OF DEFICIENCIES IN LICENSE RENEWAL REVIEWS" 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 2nd day of June, 2008.

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