

June 23, 2008

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))	

NRC STAFF'S MOTION IN LIMINE TO STRIKE LATE-FILED
REBUTTAL TESTIMONY AND EXHIBITS OF NEC WITNESS ULRICH WITTE

Pursuant to 10 C.F.R. § 2.323 and the Atomic Safety and Licensing Board's ("Board") Order (Granting Motion to Extend Time to File Motion in Limine with Regard to Ulrich Witte's Testimony and Setting Deadline for Answers Thereto) (June 11, 2008) (unpublished) ("June Order"), the staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby submits this motion requesting the Board to exclude the late-filed rebuttal testimony and exhibits of New England Coalition's ("NEC") witness, Mr. Ulrich Witte.¹

BACKGROUND

Pursuant to the Board's Initial Scheduling Order (Nov. 17, 2006) (unpublished) ("November Order"), all rebuttal statements of position, testimony, affidavits, and exhibits were to be filed no later than twenty (20) days after service of the Applicant's Initial Statement of Position, Testimony, Affidavits, and Exhibits. November Order at ¶10D. The Applicant, Entergy, filed its Initial Statement of Position, Testimony, Affidavits, and Exhibits on

¹ The Staff's Motion in Limine regarding the timely filed portions of NEC's Initial and Rebuttal statements of position, testimony and exhibits was filed on June 12, 2008 ("June 12 Motion in Limine").

May 13, 2008. Thus, in accordance with the November Order, rebuttal statements, testimony, affidavits, and exhibits were due on June 2, 2008, twenty days after May 13, 2008.

On June 2, 2008, NEC filed rebuttal testimony and exhibits for Dr. Hopenfeld and Dr. Hausler. On June 4, 2008, NEC notified the Staff via email that Mr. Witte had been ill and therefore was unable to file his rebuttal testimony and exhibits by the June 2, 2008. The Staff received NEC's Motion to Late-File Rebuttal Testimony of Ulrich Witte ("Motion to Late File") and Ulrich Witte's rebuttal testimony ("NEC Exh. 3") and exhibits via U.S. Mail on June 11, 2008.² NEC's Motion to Late File requests that the Board authorize the late-filed rebuttal testimony and exhibits of Mr. Witte. Motion to Late File at 1.

In the event the Board permits Mr. Witte's late-filed rebuttal testimony and exhibits, the Staff submits this Motion in Limine, to exclude Mr. Witte's rebuttal testimony and exhibits in their entirety, in accordance with the Board's June Order.

DISCUSSION

I. Legal Standards

The scope of this proceeding is limited to the issues raised by the admitted contentions³ and the scope of the admitted contentions is limited by their bases. *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1&2), CLI-02-28,

² NEC's Motion to Late File states that Mr. Witte was ill from May 30 to June 1, 2008. When contacted by NEC, the Staff stated that it would oppose the Motion to Late File (see Motion to Late File at 2) because NEC failed to inform the Staff of the status of Mr. Witte's testimony in a timely fashion. The deadline for rebuttal testimony and exhibits was June 2, 2008, but NEC did not inform the Staff of Mr. Witte's illness until June 4, 2008. Although a Board Order has not yet authorized Mr. Witte's late-filed rebuttal testimony and exhibits, the Board has granted an extension to file Motions in Limine regarding Mr. Witte's rebuttal testimony. See June Order at 1-2. Given the fact that an extension has been granted to reply to this late-filing, the Staff does not oppose NEC's Motion to Late File.

³ See Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 23 (1998).

56 NRC 373, 379 (2002) (internal citations omitted).⁴ Testimony and exhibits that raise issues outside the scope of an admitted contention should be excluded. See *Public Service Co. of New Hampshire, et al.* (Seabrook Station, Units 1 & 2), ALAB-899, 28 NRC 93, 97 (1988) (stating that contentions and bases must be stated with specificity to put the parties on notice of the issues that they must defend against or oppose and that the scope of a contention is defined by the contention and its stated bases).

Pursuant to 10 C.F.R. § 2.337(a), only relevant, material, reliable and not unduly repetitious evidence may be admitted. Irrelevant or immaterial portions of an admissible document should be excluded to the extent practicable. *Id.*; see also 10 C.F.R. § 2.319(d), (e) (stating that the presiding officer may strike written presentations or responses or restrict evidence and/or arguments that are irrelevant, immaterial, unreliable, duplicative or cumulative). Furthermore, unsupported statements and conclusions should be excluded or afforded no weight because a board's decision should only rely on information that is included in the record. See *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-580, 11 NRC 227, 230 (1980) (stating that "it is a statutory requirement that the adjudicatory decisions of this Commission stand or fall on the basis of the record on which they rest") (internal citation omitted).⁵

⁴ The Staff has previously briefed the limited scope and litigable issues in this proceeding. See NRC Staff Initial Statement of Position on NEC Contentions 2A, 2B, 3, and 4 (May 13, 2008) at 8-13. In particular, the Staff has noted that the adequacy of the Staff's review of Vermont Yankee's License Renewal Application is not at issue. See *id.* at 9 (citing Rules of Practice for Domestic Licensing Proceedings-Procedural Changes in the Hearing Process, Final Rule, 54 Fed Reg. 33168, 33171 (Aug. 11, 1989) (internal citations omitted)).

⁵ In *Diablo Canyon*, the Atomic Safety and Licensing Appeal Board vacated the licensing board's decision because it was not supported by evidence in the record. ALAB-580, 11 NRC at 230-31 (1980).

Similarly, an expert's opinion may be excluded if the witness is not properly qualified as an expert or the opinion would not assist the trier of fact in understanding the evidence. See *Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3)*, ALAB-732, 17 NRC 1076, 1091 (1983) (internal citations omitted). Expert opinions that are based on "subjective belief or unsupported speculation" should not be admitted as evidence. *Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility)*, LBP-05-04, 61 NRC 71, 80, 99 (2005) (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 US 579, 589-90 (1993)). An expert's qualifications are based on "knowledge, skill, experience, training or education." *Id.* at 80 (internal citations omitted).

II. Rebuttal Testimony of Mr. Witte that Warrants Exclusion

A. NEC Contentions 2A and 2B

Mr. Witte's rebuttal testimony and exhibits regarding NEC Contentions 2A and 2B warrant exclusion, in their entirety, because Mr. Witte's submittal is unsupported, unreliable, irrelevant, and not useful to the trier of fact.⁶ Throughout Mr. Witte's rebuttal testimony, there are discussions that are not relevant to the admitted contentions. Pursuant to Commission regulations and case law regarding the scope of proceedings, irrelevant material that is outside the scope of an admitted contention warrants exclusion.⁷ In addition, as discussed below, Mr. Witte fails to provide bases to support his assertions and conclusions. Unsupported statements are unreliable, not helpful to the trier of fact, and thus warrant exclusion.

⁶ The Staff also notes that NEC did not intend to have Mr. Witte testify on issues concerning NEC Contentions 2A and 2B. See New England Coalition, Inc.'s (NEC) Final Witness List (March 7, 2008) (stating that "Mr. Witte will testify concerning NEC's Contentions 3 (steam dryer) and 4 (flow-accelerated corrosion)"). This fact raises questions regarding Mr. Witte's ability and qualifications to testify on matters related to these contentions.

⁷ See discussion and citations *supra* pp. 2-3.

First, Mr. Witte does not indicate why his discussion of EPRI Report Number 8480-Seismic Piping Test Analysis, 1980, from Indian Point, is relevant to NEC Contentions 2A or 2B, nor has he submitted the report as an exhibit. See NEC Exh. 3 at A4, p.2 (last two sentences). These statements appear to be irrelevant to Vermont Yankee and the admitted contentions in this proceeding. Furthermore, absent evidentiary support, these statements are unreliable, unsupported, and are not helpful to the trier of fact.

Second, many of Mr. Witte's statements and conclusions in Answers 5 and 6 (A5 and A6) are also not relevant and/or are unsupported, and therefore warrant exclusion. For example, in A5, Mr. Witte discusses an event at "another plant" that occurred December 26, 1986. NEC Exh. 3 at A5 (top of p.4). However, Mr. Witte provides no explanation as to how this statement is relevant to Vermont Yankee's feedwater nozzle, he does not indicate where the incident occurred, nor does he provide any evidentiary support for his personal recollection of an event that he states occurred almost 22 years ago. See *id.* Mr. Witte also refers to historical records and unplanned shutdowns (he counts 42), three of which he concludes "were downright dangerous." *Id.* at A5, p.3 (second paragraph). Mr. Witte, however, again fails to reference any supporting evidence for these statements.

Additional examples of statements that are not supported include:

- "New methods removed the uncertainties and doubts of accuracy in CUF and CUF_{en}." NEC Exh. 3 at A5, p.3 (last sentence, continues on p.4).
- "Occurrence of these events throughout the industry was not as uncommon as one might presume." *Id.* at A5, p.4 (first full paragraph, last sentence).
- "The outcome of the engineering analysis holds one of three possibilities" *Id.* at A5, p.4 (last paragraph, second sentence).
- "There are other examples of transients that appear to have not been incorporated as input in the refined fatigue analysis." *Id.* at A5, p.5 (second paragraph, first sentence).

- “My observation is that this particular design input is an ungrounded estimate, an *assumption*, and not an actual historical number; any conclusion stemming from it, therefore, cannot be relied on without corroboration.” *Id.* at A5, p.6 (third sentence) (emphasis in original).
- “[T]he estimated transient history – *assumption* – may or may not be conservative. *Id.* at A6, p.7 (first full paragraph, first sentence) (emphasis in original).⁸
- “There is no credible basis provided in the Applicant’s analysis that justifies thermal cycle projections to 60 years.” *Id.* at A6, p.7 (second full paragraph, last sentence).

Absent evidentiary support or a reasoned basis, these statements are simply unsupported and unreliable opinions that are of little, if any, assistance to the trier of fact.

Furthermore, even where Mr. Witte refers to exhibits, the exhibits he relies on provide little, if any, support for his assertions and conclusions. First, Mr. Witte cites exhibits NEC-UW_24 and _25 to support statements he makes in A5. NEC Exh. 3 at A5, p.5. There is, however, no indication where NEC-UW_24 or _25 are from or who the authors are. Rather, NEC-UW_24 simply lists information regarding “Nuclear Near-Misses” and NEC-UW_25 lists information regarding shutdowns at Vermont Yankee. Moreover, there are no explanations regarding the data in these exhibits nor is there any attribution to the source of the data. See NEC-UW_24, 25. In addition, based upon NEC-UW_25, Mr. Witte asserts that Vermont Yankee had 42 “unplanned forced shutdowns” between 1973 and 1977, yet nowhere does the referenced exhibit state or otherwise suggest that the listed shutdowns were all forced

⁸ In this same paragraph, Mr. Witte indicates that Vermont Yankee’s EPU began in 2004. This is factually incorrect because Vermont Yankee’s EPU was not approved by the NRC until 2006. See Staff Exh. 14 (EPU License Amendment dated March 2, 2006). This factual error undercuts the credibility of Mr. Witte’s analyses and therefore, this assertion should not be considered by the Board.

unplanned shutdowns. See NEC Exh. 3 at A5, p.5 (third paragraph); NEC-UW_25. Thus, both NEC-UW_24 and _25 are unreliable and NEC-UW_25 does not support Mr. Witte's claims.

Therefore, these exhibits warrant exclusion.

In addition, Mr. Witte refers to EN-DC-141, Rev. 3, Exhibit NEC-UW-27, in his discussion regarding thermal transients. NEC Exh. 3 at A5, p.6 (last two paragraphs in answer). Mr. Witte states that he compared EN-DC-141 (NEC Exh. UW-27) and NEC Exhibit UW-26, "NRC Audit 10/09/07 with responses provided by 10/18/07." See NEC Exh. 3 at A5 (first full paragraph on page). NEC Exhibit UW-27 was not, however, submitted as an exhibit with Mr. Witte's rebuttal testimony. Thus, without EN-DC-141 (NEC Exh. UW-27), the results of Mr. Witte's comparison and his conclusions regarding thermal transients remain unsupported and therefore are unreliable, not helpful to the trier of fact and warrant exclusion.

Therefore, as illustrated above, much of Mr. Witte's rebuttal testimony and exhibits regarding contentions 2A and 2B are irrelevant, unsupported, and/or unreliable and, therefore are not useful to the trier of fact and should be excluded in their entirety.

B. NEC Contention 4

Mr. Witte's late-filed rebuttal testimony regarding NEC Contention 4 also warrants exclusion in its entirety because 1) Mr. Witte is not qualified to testify on matters related to this area; and 2) Mr. Witte's rebuttal testimony is unsupported, unreliable, irrelevant and not useful to the trier of fact.

1. Mr. Witte is Not Qualified

The issue NEC raises with Contention 4 is whether Entergy's plan to monitor and manage the aging of plant piping due to flow-accelerated corrosion (FAC) is inadequate because it relies on CHECWORKS. See *Entergy Nuclear Vermont Yankee LLC & Entergy Nuclear Operations Inc.* (Vermont Yankee Nuclear Power Station, LBP-06-20, 64 NRC 131, 192-194 (2006)). Thus, an expert testifying on matters related to the adequacy of the program

should have a comprehensive understanding of the CHECWORKS program in order to properly assess the program's inputs and outputs. Mr. Witte, however, specifically states that he is not "intimately familiar with the empirically based CHECWORKS algorithm." NEC Exh. 3 at A8, p.10 (last paragraph in answer, first sentence). Despite this lack of familiarity with the program, Mr. Witte offers his opinion regarding Entergy's use of the program e.g., how the program is updated and the data that was and should be entered into the program (see NEC Exh. 3 at p.21 (citing claims made by Mr. Witte regarding CHECWORKS in NEC-UW_03)), as well as the significance of past shortcomings in Entergy's flow accelerated corrosion program (NEC Exh. 3 at A12).⁹

In addition, in spite of his lack of familiarity with CHECWORKS, Mr. Witte challenges Entergy's assertion that its Quality Assurance audit of Vermont Yankee's flow-accelerated corrosion program uncovered only minor, mostly administrative issues. See NEC Exh. 3 at A10. Absent familiarity and the proper knowledge, skill, and training with CHECWORKS, Mr. Witte's testimony regarding the significance of these matters is unreliable and should be excluded or accorded no weight.

⁹ The Staff further notes that in April 2008 NEC filed a Motion to Compel production of the CHECWORKS code for Dr. Hopenfeld, not Mr. Witte, to review. See New England Coalition Inc.'s (NEC) Motion to Compel and for Subpoena (Apr. 11, 2008). NEC stated that Dr. Hopenfeld would rely on his "knowledge of CHECWORKS and the algorithm it uses" to testify on matters related to CHECWORKS and NEC contention 4. See *id.* at 2. NEC, however, withdrew its Motion to Compel later that month. New England Coalition Inc.'s (NEC) Motion to Withdraw Motion to Compel and for Subpoena (Apr. 29, 2008). Thus, it appears that NEC views Dr. Hopenfeld and not Mr. Witte as their expert on CHECWORKS.

2. Mr. Witte's Statements are Unsupported and Unreliable

Much like his rebuttal testimony and exhibits regarding NEC Contentions 2A and 2B, Mr. Witte's rebuttal testimony and exhibits regarding NEC Contention 4 includes a number of unsupported, unreliable, and irrelevant statements that are not useful to the trier of fact.

First, Mr. Witte concludes that Entergy has not provided reasonable assurance that pipe thinning will not occur beyond code limits in the period between outages. See NEC Exh. 3 at A11. Mr. Witte further states "that the staff erroneously concluded that the program is complete, correct, and adequate."¹⁰ *Id.* (last sentence). Mr. Witte does not, however, provide any evidentiary support or even discuss the bases for these statements. See *id.*

Similarly, Mr. Witte states that "[t]he premise that only flow rate and temperature input changes were needed is not properly supported and incorrect," *id.* at A14, p.17 (first full paragraph, last sentence), but Mr. Witte himself provides no support for this statement, see *id.* Furthermore, Mr. Witte states that:

[a] lack of timely susceptible review can only serve to skew the results appropriate selection of specific wear points. An updated and inclusive Susceptibility Review should definitely have been required by NRC Staff in their review. It apparently was not.¹¹

Again, Mr. Witte provides no evidence to support his conclusion. See *id.* at A14, p.18 (second full paragraph). Thus, absent evidentiary support or an articulated basis, these statements are unreliable, unhelpful to the trier of fact and therefore warrant exclusion.

¹⁰ Not only is this statement unsupported, it exceeds the scope of this proceeding in that it challenges the adequacy of the Staff's review. See *supra* note 4 (noting that the adequacy of the Staff's review may not be challenged).

¹¹ Mr. Witte's assertion that the Staff should have required an updated and inclusive susceptibility review is outside the scope of this proceeding and should therefore be excluded. See *supra* note 4.

Second, the discussion regarding whether Mr. Witte believes “that Entergy has met its commitment to increase the scope of inspections by 50%” warrants exclusion because it is unsupported and is not accurate. See NEC Exh. 3 at Q14 & Q15. In his rebuttal testimony, Mr. Witte refers to a commitment made by Entergy to increase inspection points by 50%. *Id.* at A15, p.19 (first full paragraph). He fails, however, to provide evidence to show that this is actually a commitment that Entergy made, and contrary to his assertion, Entergy’s Initial Statement of Position at 39 does not acknowledge such a commitment. See *id.* at A15. Commitments, by definition, are made by a licensee “in docketed licensing correspondence such as licensee responses to NRC bulletins, generic letters, and enforcement actions, as well as licensee commitments documented in NRC safety evaluations or licensee event reports.” 10 C.F.R. § 54.3; see also SECY-00-0045, *Acceptance of NEI 99-04, Guidelines for Managing NRC Commitments* (Feb. 22, 2000). Thus, documentation should exist for all commitments, yet Mr. Witte has failed to provide any. Clearly, Mr. Witte’s identification of this as a commitment is incorrect and his discussion is therefore unreliable and should be excluded.

In addition, Mr. Witte’s discussion regarding the number of inspection data points is not accurate. *Id.* at A15, p.19 (first full paragraph). On June 20, 2008, NEC filed a motion in which it acknowledged that the report Mr. Witte relied on in his initial testimony regarding the number of FAC inspection data points (NEC-UW_20), was improperly converted – the conversion process altered the number of inspection data points.¹² Mr. Witte’s late-filed rebuttal testimony regarding inspection data points also relies on this flawed document, and therefore is not accurate. See NEC Exh. 3 at A15, p.19 (first full paragraph) (citing NEC-UW_20). NEC’s

¹² See New England Coalition, Inc.’s Opposition to NRC Staff’s Motion in Limine to Strike Testimony and Exhibits Filed by New England Coalition, Inc. (June 20, 2008) at 8 (“NEC June 20 Motion”).

June 20 Motion indicates that it will file a motion to withdraw Mr. Witte's testimony regarding this issue. NEC June 20 Motion at 8. However, in the event that the motion to withdraw is limited to statements in Mr. Witte's initial testimony, the Staff submits that this material should also be excluded from Mr. Witte's rebuttal testimony because it is not accurate and is misleading.

Third, Mr. Witte's statements regarding the Chockie Report (NEC-UW_13) (which Mr. Witte relies heavily upon to support his testimony and analyses of NEC Contention 4) also warrant exclusion because they are unsupported and unreliable. See NEC Exh. 3 at A16.

Mr. Witte insists that:

The Chockie Report most certainly assimilates industry guidance, including regulatory rules and implementation of those rules, and compiles aging programs strictly with respect to the United States domestic power plants. On page 38, it answers exactly what is required if there is no pre-existing baseline, as is the case for Vermont Yankee. The use of the report by the Norway Petroleum Safety Authority has no bearing on its content. The Report is on point to Contention 4.

The Chockie Report is applicable to the question of what constitutes an adequate baseline. Entergy assumes that its present baseline is adequate. I believe after examination of the failure to adequately implement the program, that VY does not have an adequate baseline. The Chockie Report is a concise primer on the effective implementation of NSAC 202L, including CHECWORKS, and by inference impeaches Entergy's Application as well as the adequacy of the NRC Staff Review.

Id. at A16, p.20. Mr. Witte, however, does not explain how the Chockie Report is, in fact, relevant to NEC Contention 4, let alone how it impeaches Entergy's flow-accelerated corrosion program and the adequacy of the Staff's review.¹³ See *id.* The only page of the report Mr. Witte

¹³ Mr. Witte's assertion regarding the adequacy of the Staff's review of Entergy's flow-accelerated corrosion program is impermissible. NEC Exh. 3 at A16 (last sentence). As stated above, the adequacy of the Staff's review is not at issue. See *supra* note 4. Therefore, this statement should be excluded.

specifically cites, page 38, discusses trending work orders to determine equipment reliability and has no apparent connection to Entergy's flow-accelerated corrosion program. *See id.* Therefore, this discussion should be excluded as unhelpful to the trier of fact.

Finally, Mr. Witte's assertions regarding Entergy's failure to refute or specifically address a number of statements in his initial testimony concerning NEC Contention 4 warrant exclusion. *See* NEC Exh. 3 at A12 & A17.¹⁴ These assertions, again, remain unsupported, unreliable, and unhelpful to the trier of fact. Moreover, testimony stating that Entergy failed to refute or specifically address unsupported assertions is irrelevant and not useful to the trier of fact.

Thus, Mr. Witte's rebuttal testimony and exhibits regarding NEC Contention 4 should be excluded or accorded no weight because Mr. Witte is not qualified to testify concerning NEC Contention 4 and because his rebuttal testimony is unsupported, unreliable, and irrelevant.

In accordance with 10 C.F.R. § 2.323(b), the Staff contacted counsel for the other parties on June 19, 2008 and again on June 23, 2008 in regards to the filing of this motion. Entergy stated that it would support this motion, NEC stated that it would oppose, and the Vermont Department of Public Service stated that it would not object to the filing of the motion but could not comment on its substance. The State of New Hampshire stated it did not take a position and the Commonwealth of Massachusetts did not state a position.

¹⁴ In A17, Mr. Witte simply lists statements that Entergy failed to refute or specifically address. *See* NEC Exh. 3 at A17.

CONCLUSION

For the reasons discussed above, this Motion in Limine should be granted.

Respectfully submitted,

/RA/

Lloyd B. Subin
Counsel for NRC Staff

Dated at Rockville, Maryland
this 23rd day of June, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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ENTERGY NUCLEAR VERMONT YANKEE,) Docket No. 50-271-LR
LLC, and ENTERGY NUCLEAR)
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(Vermont Yankee Nuclear Power Station))

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S MOTION IN LIMINE TO STRIKE LATE-FILED REBUTTAL TESTIMONY AND EXHIBITS OF NEC WITNESS ULRICH WITTE" 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 23rd day of June, 2008.

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