

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED 06/27/08  
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ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Alex S. Karlin, Chairman  
Dr. Richard E. Wardwell  
Dr. William H. Reed

In the Matter of

ENERGY NUCLEAR VERMONT YANKEE,  
L.L.C.,  
and  
ENERGY NUCLEAR OPERATIONS, INC.

(Vermont Yankee Nuclear Power Station)

Docket No. 50-271-LR

ASLBP No. 06-849-03-LR

June 27, 2008

ORDER

(Regarding the Briefing of Certain Legal Issues)

The evidentiary hearing in this proceeding commences on July 21, 2008, in Newfane, Vermont. In preparation for that hearing, and in compliance with 10 C.F.R. § 2.1207 and our November 17, 2006, initial scheduling order, the parties have submitted initial and rebuttal statements of position, testimony, affidavits, and exhibits.<sup>1</sup> As we stated in our June 24, 2008, pre-hearing conference call, our initial review of these submissions revealed several legal issues where briefing by the parties may be of material assistance. Accordingly, we request that the parties (including the NRC Staff and the Interested States) submit initial and responsive briefs on the following issues.

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<sup>1</sup> Licensing Board Order (Initial Scheduling Order) (Nov. 17, 2006) (unpublished) [ISO].

A. Issues to be Briefed

1. Performance of TLAA Subsequent to Issuance of License Renewal?

In August 2007 the NRC Staff took the following position:

It is the NRC position that in order to meet the requirements of 10 C.F.R. §54.21(c)(1), an applicant for license renewal must demonstrate in the LRA that the evaluation of time-limited aging analyses (TLAA) has been completed. The NRC does not accept a commitment to complete the evaluation of TLAA prior to entering the period of extended operations.<sup>2</sup>

In 2008 the NRC Staff changed its position, stating:

If a licensee chooses to satisfy § 54.21(c)(1)(i) or (ii), the “demonstration” must be in the LRA, and a commitment to perform analyses projecting 60-year CUFs prior to the period of extended operation is inconsistent with regulatory language. However, if the licensee chooses to satisfy § 54.21(c)(1)(iii), the licensee must instead demonstrate that effects of aging will be adequately managed and a commitment to perform refined CUF analyses in the future as a part of an aging management program is acceptable.<sup>3</sup>

The NRC Staff now proposes to issue the license renewal prior to the completion of these time limited aging analyses (TLAAs) (e.g., prior to the completion of the environmentally assisted cumulative use factor (CUFen) analyses for the core spray and reactor recirculation outlet nozzles) provided that Entergy Nuclear Vermont Yankee L.L.C. and Entergy Nuclear Operations, Inc. (collectively, Entergy) commits to perform these TLAAs after the license has been issued.<sup>4</sup> In short, the NRC Staff apparently takes the position that TLAAs are not a condition precedent to the issuance of a license renewal, but instead may be imposed as a

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<sup>2</sup> NEC Exh. NEC-JH-62 at Enclosure 2, NRC Summary of Telephone Conference Call Held on August 20, 2007, Between the U.S. Nuclear Regulatory Commission and Entergy Nuclear Operations, Inc., Concerning the Vermont Yankee Nuclear Power Station License Renewal Application (Oct. 25, 2007).

<sup>3</sup> NRC Staff Initial Statement of Position on NEC Contentions 2A, 2B, 3, and 4 (May 13, 2008) [NRC Staff Initial Statement] at 11-12. We do not know whether Entergy ever actually characterized this as an aging management program under 10 C.F.R. § 54.21(c)(1)(iii).

<sup>4</sup> See § 4.3.3.2 at p. 4-43 and Appendix A, Item 27 of NRC Staff Exh. 1, NUREG-1907: Safety Evaluation Report Related to the License Renewal of Vermont Yankee Nuclear Power Station (May 2008).

condition subsequent.

The New England Coalition (NEC) disagrees, arguing *inter alia*, that such an interpretation “would defeat NEC’s due process rights in this proceeding and deny public review of Entergy’s TLAA,”<sup>5</sup> is “inconsistent with the plain [regulatory] language and with standard rules of construction,” renders 10 C.F.R. § 54.21(a)(1)(ii) “mere surplusage,” and would “frustrate public scrutiny of the TLAA methodology.”<sup>6</sup>

Under these circumstances, the Board requests legal briefing of the following issues:

Issue 1A: Does a license condition that requires the performance of certain CUFen TLAA’s after the license renewal is issued comply with the law, particularly Part 54 and the requirement that the license application “contain . . . an evaluation of time-limited aging analyses” pursuant to 10 C.F.R. § 54.21(c)?

Issue 1B: Is it legally permissible under 10 C.F.R. § 54.29 to issue a license renewal even though certain of the TLAA’s have not been performed?

In briefing these issues, the parties should address, *inter alia*, the following questions.

Are affirmative answers to Issues 1A and 1B consistent with the regulatory language, structure, and intent? Do they render subsection 10 C.F.R. § 54.21(c)(1)(ii) superfluous and elevate form over substance (e.g., evade (ii) by re-labeling it (iii))? Would such answers undermine due process and/or frustrate the statutory and regulatory opportunity for the public to participate in, or to request, a hearing? Are affirmative answers consistent with the definition and purpose of TLAA’s? How does the phrase “have been or will be taken” in 10 C.F.R. § 54.29(a) apply here, if at all? In addition to focusing on Part 54 and its case law and regulatory preambles, the parties should cite any general Commission case law concerning the appropriateness of using a license condition subsequent to satisfy a requirement for issuing a license.

## 2. Reference to a NUREG as a Demonstration that Aging Will be Managed?

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<sup>5</sup> New England Coalition Inc. Initial Statement of Position (Apr. 28, 2008) at 19.

<sup>6</sup> New England Coalition Inc. Rebuttal Statement of Position (June 2, 2008) at 4-6.

All three of NEC's original contentions raise issues related to whether Entergy's application "demonstrate[s] that the effects of aging will be adequately managed." 10 C.F.R. §§ 54.21(a)(3) and 54.21(c)(1)(iii). NEC's original Contention 2 alleges that Entergy's aging management program (AMP) for metal fatigue is nothing more than a "plan to develop a plan." LBP-06-20, 64 NRC 131, 184 (2006). NEC Contentions 3 and 4 challenge whether Entergy's AMPs for the steam dryer and for flow accelerated corrosion (FAC), respectively, constitute adequate AMPs.

Entergy's AMP for FAC exemplifies part of the alleged problem. Entergy's entire written FAC AMP is apparently stated on a single page of its license renewal application, as follows:

B.1.13 Flow-Accelerated Corrosion - Program Description

The Flow-Accelerated Corrosion Program at VYNPS is comparable to the program described in NUREG-1801, Section XI.M17, Flow Accelerated Corrosion.

This program applies to safety-related and nonsafety-related carbon steel components carrying two-phase or single-phase high energy fluid > 2% of plant operating time.

The program, based on EPRI Report NSAC-202L-R2 recommendations for a effective flow accelerated corrosion program, predicts, detects and monitors FAC in plant piping and other pressure retaining components. This program includes (a) an evaluation to determine critical locations, (b) initial operational inspections to determine the extent of thinning at these locations, and (c) follow-up inspections to confirm predictions, or repair or replace components as necessary.<sup>7</sup>

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<sup>7</sup> Entergy Exh. E4-04-VY. Entergy Initial Statement of Position on New England Coalition Contentions (May 13, 2008) at 35 ("Section B.1.13 of the License Renewal Application for VY ("Application") (Exhibit E4-04) sets forth the VY program for addressing FAC.")

In evaluating NEC Contention 4 (which focuses primarily on the use of a computer program called CHECWORKS), Entergy, the NRC Staff and NEC have argued over the adequacy of this FAC AMP, in part because section B.1.13 of the application lacks specifics and instead refers to guidance documents. The FAC AMP states that (a) the VYNPS FAC program is “comparable to” the program described in NUREG 1801, (b) applies to certain components, (c) is “based on” EPRI Report NSAC-202L-R2 recommendations, and (d) includes an evaluation to determine critical locations, initial operational inspections, and follow-up inspections to confirm predictions, or repair or replace components as necessary. The Staff asserts that this AMP is adequate because, *inter alia*, the program is “consistent with” NUREG-1801 (GALL).<sup>8</sup> But the references to NUREG 1801 and EPRI NSAC-202L-RS are not definitive because (a) these documents constitute broad instructions that provide the applicant with a substantial amount of discretion as to the specifics of any given AMP, and (b) Entergy merely says that its AMP is “comparable to” and “based on” these documents. Thus, there remains the issue of what Entergy’s proposed FAC AMP for the Vermont Yankee license renewal actually requires and contains.<sup>9</sup>

Under these circumstances, the Board requests legal briefing of the following issue:

Issue 2: Does a renewal application that contains a short written description of an aging management program that lacks content or details but instead states that it is “comparable to” and “based on” the relevant section of NUREG-1801 or EPRI NSAC-202L, “demonstrate that the effects of aging will be adequately managed” as required by 10 C.F.R. §§ 54.21(a)(3) and 54.21(c)(1)(iii)?

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<sup>8</sup> NRC Staff Initial Statement at 21.

<sup>9</sup> In this context, we note that Mr. James C. Fitzpatrick, one of Entergy’s witnesses, states “The FAC Program during the license renewal period will be identical to the existing program” and references an unidentified “Entergy Nuclear Management Manual EN-DC-315 Flow-Accelerated Corrosion Program” document. Entergy Exh. E4-01-VY at 11-12.

B. Briefing Schedule

The parties, NRC Staff, and the interested States are instructed to submit their respective initial briefs on the above-referenced issues on or before July 9, 2008. Responsive briefs are due on or before July 15, 2008. Initial briefs should be no longer than seven pages per issue (with issues 1A and 1B combined for a total of seven pages). Responsive briefs should be no longer than five pages per issue.

It is so ORDERED.

FOR THE ATOMIC SAFETY  
AND LICENSING BOARD<sup>10</sup>

/RA/  
Alex S. Karlin, Chairman  
ADMINISTRATIVE JUDGE

Rockville, Maryland

June 27, 2008

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<sup>10</sup> Copies of this order were sent this date by Internet e-mail transmission to counsel for (1) licensees Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc.; (2) intervenors Vermont Department of Public Service and New England Coalition of Brattleboro, Vermont; (3) the NRC Staff, (4) the State of New Hampshire and (5) the Commonwealth of Massachusetts.

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NUCLEAR REGULATORY COMMISSION

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ENTERGY NUCLEAR OPERATIONS, INC. ) Docket No. 50-271-LR  
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(Vermont Yankee Nuclear Power Station) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB ORDER (REGARDING THE BRIEFING OF CERTAIN LEGAL ISSUES) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

Office of Commission Appellate  
Adjudication  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

Administrative Judge  
Alex S. Karlin, Chair  
Atomic Safety and Licensing Board Panel  
Mail Stop - T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

Administrative Judge  
Richard E. Wardwell  
Atomic Safety and Licensing Board Panel  
Mail Stop - T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

Administrative Judge  
William H. Reed  
Atomic Safety and Licensing Board Panel  
1819 Edgewood Lane  
Charlottesville, VA 22902

Lloyd B. Subin, Esq.  
David E. Roth, Esq.  
Mary C. Baty, Esq.  
Jessica A. Bielecki, Esq.  
Brian Newell, Paralegal  
Office of the General Counsel O15D21  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

Susan L. Utall, Esq.  
Office of the General Counsel O15D21  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

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LEGAL ISSUES)

Sarah Hofmann, Esq.  
Director for Public Advocacy  
Department of Public Service  
112 State Street - Drawer 20  
Montpelier, VT 05620-2601

Anthony Z. Roisman, Esq.  
National Legal Scholars Law Firm  
84 East Thetford Rd.  
Lyme, NH 03768

Matthew Brock  
Assistant Attorney General  
Environmental Protection Division  
Office of the Attorney General  
One Ashburton Place, 18<sup>th</sup> Floor  
Boston, MA 02108

Diane Curran, Esq.  
Harmon, Curran, Spielberg,  
& Eisenberg, L.L.P.  
1726 M Street, NW, Suite 600  
Washington, DC 20036

Callie B. Newton, Chair  
Gail MacArthur  
Lucy Gratwick  
Town of Marlboro  
SelectBoard  
P.O. Box 518  
Marlboro, VT 05344

Dan MacArthur, Director  
Town of Marlboro  
Emergency Management  
P.O. Box 30  
Marlboro, VT 05344

David R. Lewis, Esq.  
Matias F. Travieso-Diaz, Esq.  
Elina Teplinsky, Esq.  
Blake J. Nelson, Esq.  
Pillsbury Winthrop Shaw Pittman LLP  
2300 N Street, NW  
Washington, DC 20037-1128

Peter C. L. Roth, Esq.  
Senior Assistant Attorney General  
State of New Hampshire  
Office of the New Hampshire  
Attorney General  
33 Capitol Street  
Concord, NH 03301

Robert L. Stewart  
New England Coalition  
229 Kibbee Ext.  
Brookfield, Vermont 05036

Alan A. Pemberton, Esq.  
Derron J. Blakely, Esq.  
Covington & Burling LLP  
Counsel for Electric Power Research Institute  
(EPRI)  
1201 Pennsylvania Avenue, N.W.  
Washington, DC 20004-2401



Docket No. 50-271-LR  
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Ronald A. Shems, Esq.  
Karen Tyler, Esq.  
Andrew Raubvogel, Esq.  
Shems Dunkiel Kassel & Saunders, PLLC  
91 College Street  
Burlington, VT 05401

[Original signed by Evangeline S. Ngbea]

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
this 27<sup>th</sup> day of June 2008