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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)	)	

**ENTERGY'S RESPONSE IN OPPOSITION TO NEC MOTION TO FILE UNTIMELY  
REBUTTAL TESTIMONY BY ULRICH WITTE**

Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively "Entergy") hereby answer and oppose the "Motion to Late-File Rebuttal Testimony of Ulrich Witte" ("Late Filing Motion") which the New England Coalition, Inc. ("NEC") served by mail on June 6, 2008. The Late Filing Motion seeks leave from the Licensing Board to file four days late the rebuttal testimony of Ulrich Witte ("Witte Rebuttal") in this proceeding.<sup>1</sup> This motion should be denied because it is untimely, unjustified, and prejudicial. The Licensing Board's Initial Scheduling Order dated November 17, 2006 ("Initial Scheduling Order"), which set out the deadlines and procedures for filings in this case, explicitly requires such a motion to be filed as soon as the grounds are known and no later than the applicable deadline. NEC simply ignored this Order, waited four days after the deadline before filing its motion, and then served it only by mail.

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<sup>1</sup> The Late Filing Motion, which in total is approximately forty pages long, was not served electronically on the Board and parties but sent by first-class mail. Accordingly, pursuant to 10 C.F.R. § 2.306 and the guidance in the Board's Order (Clarifying Filing Schedule) dated May 1, 2008, all responses to the NEC's June 6, 2008 motion are due on Monday, June 23, 2008.

As grounds for its motion, NEC asserts that Mr. Witte was ill “from Friday, May 30<sup>th</sup> through Sunday, June 1<sup>st</sup>” and was unable to complete his testimony by the June 2, 2008 deadline. Late Filing Motion at 1. NEC further states that its Counsel “was unaware of Mr. Witte’s illness or inability to complete his testimony until Monday, June 2, 2008, and therefore could not meet the deadline for a request to extend the proceeding schedule pursuant to Initial Scheduling Order ¶ 9.” Id.

It is uncontested that NEC was aware that the deadline for filing rebuttal testimony was June 2, 2008, and indeed filed rebuttal testimony on that date. NEC’s Rebuttal Statement of Position and Exhibits, dated June 2, 2008. It is also undisputed that NEC was aware that paragraph 9 of the Initial Scheduling Order provides clear requirements for seeking a postponement of the due dates of filings in this proceeding:

Motions for Extension or Modification of Schedule. A motion, opposed or unopposed, for extension of time or for modification of this schedule shall be filed as soon as the movant knows or should have known of the facts, circumstances, or grounds for the motion, and in no event later than 11 AM Eastern Time on the day preceding the applicable deadline. The motion shall inform the Board of the position of the other parties regarding the requested extension. A motion for extension or modification filed after the applicable deadline will be summarily denied unless it is accompanied by a sworn declaration or affidavit from the counsel or representative of the party that describes very extraordinary circumstances explaining why the motion was not filed earlier, and otherwise justifies the requested extension. Opposed motions for extension or modification shall address the factors specified in 10 C.F.R. § 2.332(b).

Initial Scheduling Order, para. 9, emphasis added.

It is also unquestionable that, by the time it filed its Rebuttal Statement of Position on June 2, 2008, NEC knew that it did not have at hand the rebuttal testimony by Mr. Witte. Yet it failed to advise the Board “of the facts, circumstances, or grounds” for Mr. Witte’s testimony being unavailable and of the future need to file the Late Filing Motion when Mr. Witte had completed the testimony. Therefore, NEC’s failure to disclose on June 2 the circumstances

surrounding the already known unavailability of Mr. Witte's testimony contravened the Initial Scheduling Order, and misled the Board and parties into believing that such testimony would not be forthcoming. Such a failure to disclose is in itself sufficient grounds for denying the Late Filing Motion.

Moreover, it was a failure of due diligence on the part of NEC not to sufficiently inform itself of the status of the testimony it intended to file so as to be able to advise the Board in a timely manner of its inability to meet the filing date with respect to any part of it.<sup>2</sup> Such a lack of diligence does not constitute the "very extraordinary circumstances" that would justify allowing the late filing of the testimony, but on the contrary warrants the summary denial of the Late Filing Motion.

Further, NEC provides no justification for taking four additional days before mailing Mr. Witte's additional testimony. NEC provides no explanation how Mr. Witte's unspecified illness over the weekend and inability to complete his testimony by June 2 is justification for it taking another four days to prepare the testimony.

Finally, the late submittal of Mr. Witte's rebuttal testimony was also prejudicial to Entergy. The testimony was filed on June 6, four days after the rebuttal testimony filed by the other parties. Thus, Mr. Witte had four full days to study those filings and craft his rebuttal testimony accordingly. Indeed, a substantial portion of Mr. Witte's rebuttal testimony and all his rebuttal exhibits focus on NEC Contentions 2A and 2B (contentions as to which he had offered no direct testimony), and are directed at challenging the way the number of transient cycles is computed in Entergy's environmentally assisted fatigue calculations. The transient cycle computation methodology was one of the topics addressed in Entergy's rebuttal testimony.

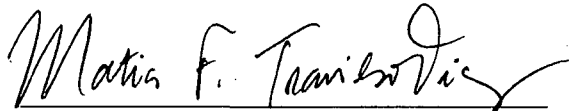
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<sup>2</sup> It is surprising that Mr. Witte would not have advised NEC of his illness during the three days it lasted, and that NEC counsel would not have sought to inquire of Mr. Witte as to the status of his testimony until June 2.

Compare Pre-filed Rebuttal Testimony of Ulrich Witte Regarding New England Coalition, Inc.'s Contentions 2A, 2B and 4 (June 6, 2008), Exhibit 3 to Late Filing Motion, at 2-7 (A5-A6) with Joint Supplemental Declaration of James C. Fitzpatrick and Gary L. Stevens on NEC Contention 2A/ 2B – Environmentally Assisted Fatigue (May 30, 2008) at 7-9 (A17). Whether by coincidence or design, Mr. Witte's untimely testimony has provided NEC with the opportunity to have "the last word" on that and other issues in dispute, rather than affording that opportunity to Entergy as is appropriate for the party with the burden of proof.

For these reasons, Entergy submits that the Late Filing Motion does not describe the "very extraordinary circumstances" that would warrant allowing Mr. Witte's rebuttal testimony to be accepted for filing. Accordingly, the motion should be denied and the testimony excluded.<sup>3</sup>

Respectfully Submitted,



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<sup>3</sup> Entergy is filing simultaneously with this Response a Motion in Limine to exclude Mr. Witte's Rebuttal Testimony for failure to satisfy with the standards for the admissibility of evidence in Commission proceedings. Denial of NEC's Late Filing Motion will moot that Motion in Limine.

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(Vermont Yankee Nuclear Power Station)	)	

**ENERGY’S MOTION IN LIMINE TO EXCLUDE REBUTTAL TESTIMONY OF  
ULRICH WITTE**

Pursuant to 10 C.F.R. § § 2.337(a),<sup>1</sup> 2.1207(a)(2),<sup>2</sup> and 2.323(a)<sup>3</sup> and the Atomic Safety and Licensing Board (“Board”)’s Order (Granting Motion to Extend Time to File Motions in Limine with Regard to Ulrich Witte’s Testimony and Setting Deadline for Answers Thereto) dated June 11, 2008, Applicants Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively “Entergy”) hereby move to exclude the late-filed rebuttal testimony and exhibits submitted by Ulrich Witte on behalf of the New England Coalition, Inc. (“NEC”) in this proceeding, Exhibit 3 to NEC’s June 6, 2008 Motion to Late-File Rebuttal Testimony of Ulrich Witte (“Witte Rebuttal Testimony”).<sup>4</sup> The Witte Rebuttal Testimony must be excluded in

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<sup>1</sup> 10 C.F.R. § 2.337(a) reads: “(a) Admissibility. Only relevant, material, and reliable evidence which is not unduly repetitious will be admitted. Immaterial or irrelevant parts of an admissible document will be segregated and excluded so far as is practicable.” It is substantially identical to former 10 C.F.R. § 2.743(c).

<sup>2</sup> 10 C.F.R. § 2.1207(a)(2) states: “(a) Unless otherwise limited by this subpart or by the presiding officer, participants in an oral hearing may submit and sponsor in the hearings: . . . (2) Written responses and rebuttal testimony with supporting affidavits directed to the initial statements and testimony of other participants.”

<sup>3</sup> 10 C.F.R. § 2.323(a) provides: “(a) Presentation and disposition. All motions must be addressed to the Commission or other designated presiding officer. A motion must be made no later than ten (10) days after the occurrence or circumstance from which the motion arises. All written motions must be filed with the Secretary and served on all parties to the proceeding.”

<sup>4</sup> Concurrently with this Motion, Entergy is filing a response in opposition to NEC’s pending motion to file late the Witte Rebuttal Testimony. If the Board denies NEC’s motion, the instant Motion in Limine will become moot.

its entirety because Mr. Witte is not qualified to opine as an expert on the contentions it addresses – NEC Contentions 2A, 2B and 4 – and because he fails to provide any factual support for his opinions. Moreover, the exhibits he includes in support of his rebuttal testimony (NEC Exhibits NEC-UW\_24, NEC-UW\_25 and NEC-UW\_26) are irrelevant, immaterial, and unreliable and must also be excluded.

## I. LEGAL STANDARDS

The legal standards governing motions in limine in Commission proceedings are discussed in detail in Entergy’s Motion in Limine (June 2, 2008) (“Motion in Limine”) and that discussion will not be repeated here. In a nutshell, a proffered witness can only qualify as expert if his credentials show that he possesses the requisite “knowledge, skill, experience, training, or education.” Fed. R. Evid. 702. In addition, an expert opinion cannot be based merely on “subjective belief or unsupported speculation.” Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-04, 61 N.R.C. 71, 80 (2005) (citing Daubert v. Merrell Dow Pharms., 509 U.S. 579, 589-90 (1993)). Thus, “[e]xpert opinion is admissible only if the affiant is competent to give an expert opinion and only if the factual basis for that opinion is adequately stated and explained in the affidavit.” Id., 61 N.R.C. at 81 (citing Garside v. Osco Drug, Inc., 895 F.2d 46, 50 (1st Cir. 1990) and United States v. Various Slot Machs. on Guam, 658 F.2d. 697, 700 (9th Cir. 1981)).

## II. THE WITTE REBUTTAL TESTIMONY ON NEC CONTENTIONS 2A AND 2B MUST BE EXCLUDED

### A. MR. WITTE IS NOT QUALIFIED TO TESTIFY AS AN EXPERT ON NEC CONTENTIONS 2A AND 2B

In the Witte Rebuttal Testimony, Mr. Witte describes his alleged expertise on analyzing the fatigue of nuclear reactor components by stating:

I have extensive experience in original stress analysis in qualifying Class 1 and Class 2 pipe and components, and applicable ASME codes as well as ANSI B31.1 codes, in particular the design, analysis, construction and qualification of Class 1 and 2 systems within the domestic nuclear industry. This experience includes, for example, original stress analysis for McGuire, Catawba, and V.C. Summers [sic] Power Plants. In addition, I have performed non-linear finite element analysis for a number of components and I am familiar with Swanson's computer algorithms such as ANSYS, RELAP, and other commercial analytical computer programs. Under contract to EPRI, I conducted detailed correlation studies of non-linear finite element analysis code predictions against actual in-situ testing of piping and components at Indian Point 1 Nuclear facility after the plant was closed. The results are published in EPRI Report Number 8480, -- Seismic Piping Test and Analysis, 1980.

Witte Rebuttal Testimony at A4. This same experience (acquired thirty years ago, while an undergraduate student, see NEC Exhibit NEC-UW\_02 at 9) is described in his curriculum vitae as follows:

Senior Engineer, performed original pipe stress analysis and support placement for Duke Power's Catawba Plant. Qualified approximately 8 class one and two plant systems. (ABB Impell 6/78 – 12/79).

Non-linear finite element analysis of large diameter piping for EPRI. Analysis of production stress codes versus non-linear evaluation techniques, versus actual in situ testing of the system. Results were published in EPRI Report "Seismic Piping Test and Analysis. (ABB Impell, 1980-1981).

NEC Exhibit NEC-UW\_02 at 4. Neither the summary description in his curriculum vitae nor the expanded version in the Witte Rebuttal Testimony indicates that Mr. Witte has any experience or expertise in the evaluation of reactor pressure vessel components such as those subject to the analyses performed by Entergy, as opposed to piping. Mr. Witte's testimony also does not indicate he has any experience in the evaluation of environmentally assisted fatigue of reactor components, nor any exposure to the related complex methodologies involved in the refined and confirmatory analyses performed by Entergy and described in the testimony of Entergy and NRC

witnesses on NEC Contentions 2A and 2B.<sup>5</sup> Mr. Witte's audacious attempt to bootstrap his assignments three decades ago while still in college into expert credentials should be rejected.

B. MR. WITTE'S REBUTTAL TESTIMONY ON NEC CONTENTIONS 2A AND 2B IS SPECULATIVE AND UNSUPPORTED BY FACTS OR EVIDENCE

The gist of the Witte Rebuttal Testimony on NEC Contentions 2A and 2B is the opinion that major thermal transients at VY have not been properly incorporated into the operational history of VY and into the number of fatigue cycles that go into the environmentally assisted fatigue analysis of reactor components. Witte Rebuttal Testimony at A5. Mr. Witte, however, cites no actual facts in support of his thesis. Instead, he speculates:

*“. . . it appears to me that major thermal transients have likely not been incorporated into the operational history, as referenced in the SER.*

Witte Rebuttal Testimony at 4, A5, emphasis in italics added. Mr. Witte goes on to state that:

*“There are other examples of transients that *appear not to have been incorporated as input in the refined fatigue analyses.**

Id. at 6, A5, emphasis added. He then concludes:

*It appears that, in Entergy's calculation of 60-year CUFs in its CUFen reanalyses, operational histories were not properly or accurately compiled and that instead of documented transients, estimated thermal histories were used to predict the number of Reactor Thermal Cycles for 60 years.*

Id., emphasis in italics added. Mr. Witte's rebuttal testimony is, by its own terms, sheer speculation, unsupported by any facts, and as such must be rejected.

Not only are his opinions patently speculative, but the “evidence” he provides in support of them is also without factual basis, irrelevant, or non-existent. He states that “[d]uring the early years of plant start-up and operation there were many unplanned forced shutdowns. I found 42 for VY. Not exactly a silky smooth running reactor. Three were downright

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<sup>5</sup> By contrast, NEC's other witness on NEC Contentions 2A and 2B, Dr. Joram Hopenfeld, has submitted an over twenty-page expert report, NEC Exhibit NEC-JH\_03 (Corrected) describing these methodologies and the flaws he claims exist in Entergy's analyses.



dangerous.” Witte Rebuttal Statement at 3, A5. Mr. Witte provides no factual support for any of these assertions.

Likewise, Mr. Witte makes reference to a December 1, 1972 transient at VY, which he describes as a core melt near-miss. *Id.* at 5, A5. The sole support for this characterization (and for the description of the event) is NEC Exhibit NEC-UW\_24, which is an anonymous listing of “Nuclear Near-Misses” offered without any description as to source or any attempt at validation. Moreover, Mr. Witte does not state whether the transient in question was counted in Entergy’s analyses or enveloped in the simplified and confirmatory analyses methodologies. Mr. Witte goes on to assert that “[d]uring the period from 1973 through 1977, Vermont Yankee experienced 42 unplanned forced shutdowns. This is a significant number, and expended much of the fatigue life of the reactor vessel and feedwater nozzle. See Exhibit UW-25.” Exhibit NEC-UW\_25, however, is just a list apparently reflecting the number of VY shutdowns per year claimed by Mr. Witte to have occurred between 1973 and 2007. No source or validation is offered for the exhibit. Moreover, there is no support in the exhibit or anywhere else for the assertion that those shutdowns “expended much of the fatigue life of the reactor vessel and feedwater nozzle.” Nor does he provide any evidence that would indicate that Entergy did not consider these events in the refined and confirmatory analyses.

Mr. Witte then alleges that a 1976 event at VY had a core melt frequency of  $6.25 \text{ E-}2$  and “stressed a number of systems and impacted the fatigue life of numerous components.” *Id.* at 6 and A5. Again, no factual support is offered for the description of the event or its severity, or for the event’s impact on the fatigue life of the reactor components addressed in NEC Contentions 2A and 2B, nor is there any statement as to whether the event was included in Entergy’s fatigue transient analyses.

Mr. Witte also alleges that “[t]he rationale provided for not using actual transient operational cycles as found in Exhibit UW\_26 at sequential page no. 8 (Bates number NEC 069994) is not valid in the event of a thermal transient event that was outside the original design basis.”<sup>6</sup> Mr. Witte provides no explanation as to which “rationale” is not valid or why, what thermal transient events were “outside the original design basis” and what supports his suspicion that these events may not have been included in Entergy’s analysis. The claim is not only without support but incomprehensible.<sup>7</sup>

Finally, Mr. Witte alleges that “considering Extended Power Uprate contributing factors such as increased flow, component modification, increased vibration, and increased core heat and neutron flux, the transients experienced by the plant beginning with power escalation to 120% should be given more weight in forecasting thermal transient cycles. There is no credible basis provided in the Applicant’s analysis that justifies thermal cycle projections to 60 years.” Witte Rebuttal Statement at 7. This assertion ignores Entergy’s sworn testimony that “[t]he effects of the uprate were incorporated into the CUF computations” and that “[t]he numbers of cycles used in the EAF analyses are conservative projections of the numbers of cycles actually experienced by the plant over its operating history.” Joint Declaration of James C. Fitzpatrick and Gary L. Stevens on NEC Contentions 2A and 2B – Environmentally Assisted Fatigue” (May 12, 2008) at A28 and A55. Mr. Witte provides no facts to contradict this testimony.

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<sup>6</sup> Exhibit NEC-UW\_26 is a draft (with hand-written annotations) of the proposed responses to questions raised by the NRC Staff during the October 9, 2007 audit of Entergy’s refined EAF analyses for VY.

<sup>7</sup> Mr. Witte also states that “[t]he estimates of thermal transients are provided in Attachment 1, page 1 of 6, EN-DC-141, Rev. 3. See Exhibit UW-27 Design Input Record, Environmental Fatigue Analysis for Vermont Yankee Nuclear Power Station.” Witte Rebuttal Testimony at 6 and A5. No Exhibit NEC-UW\_27 was provided with the testimony, and NEC counsel confirmed that no such exhibit was prepared.

In short, the entirety of Mr. Witte's rebuttal testimony on NEC Contentions 2A and 2B is speculative, lacks factual support, and is tendered by an unqualified witness. It should be excluded.

### **III. THE WITTE REBUTTAL TESTIMONY ON NEC CONTENTION 4 MUST BE EXCLUDED**

#### **A. MR. WITTE IS NOT QUALIFIED TO TESTIFY AS AN EXPERT ON NEC CONTENTION 4**

As discussed in Entergy's Motion in Limine, Mr. Witte does not qualify as an expert on the issues raised by NEC Contention 4 by "knowledge, skill, experience, training, or education." Motion in Limine at 22. Mr. Witte's curriculum vitae (NEC Exhibit NEC-UW\_02) gives no indication that he has any familiarity – either by education, training or work experience – with the programs instituted at nuclear power plants to manage the risks of flow accelerated corrosion ("FAC") in BWRs. Whatever expertise Mr. Witte may have in other areas, he shows no experience or qualifications beyond those of a layman on any technical or plant operational matters that relate to the implementation of a FAC management program, and is forced to admit in his rebuttal testimony that he is not "intimately familiar with the empirically based CHECWORKS algorithm."<sup>8</sup> That is an obvious understatement. While Mr. Witte provides an expansive discussion of his involvement in nuclear power plant "get well" programs, his self-proclaimed experience does not include any exposure to piping corrosion control programs.<sup>9</sup>

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<sup>8</sup> Witte Rebuttal Testimony at A8.

<sup>9</sup> Mr. Witte describes himself as having experience in, "for example, implementation and validation of NUREG-0737 'Clarification of TMI Action Plan Requirements,' and was a principal manager in the successful restoration of Indian Point 3 from the NRC's Watch List, as well as Millstone Units 2 and 3. For the Tennessee Valley Authority, specifically the completion of the Watts Bar Nuclear Plant, I developed a program entitled 'Program to Assure Completion and Quality.' For Georgia Power's Plant Hatch, I developed and implemented a Configuration Management Program, led in-house Safety Functional Inspections, and an Electrical Distribution Function Inspection so as to prevent Plant Hatch from going on the NRC's watch list. For Northeast Utilities, I developed a multiple department and multi-function program to reestablish the fidelity of the design basis and licensing basis, including identifying, dispositioning and either eliminating or implementing over 30,000

In addition to Mr. Witte's lack of qualifications to opine on programmatic FAC issues, his rebuttal testimony on NEC Contention 4 suffers from the same deficiencies that rendered his direct testimony inadmissible: it is outside the scope of the admitted contention, is speculative, and is without factual support.

The Witte Rebuttal Testimony strikes repeatedly the same irrelevant note, i.e., the allegation that the current FAC Program at VY has suffered from quality assurance deficiencies that make implementation of the program during the license renewal period after 2012 somehow unacceptable. Witte Rebuttal Testimony at 12-14 (A10). Without factual support, Mr. Witte restates time and again the alleged existence of quality assurance non-conformances and concludes with the following broad indictment of VY's entire license renewal program: "[t]he implications of Entergy's statements are profound and raise questions regarding credibility of all the Aging [sic] Related Management Programs proposed and Entergy's actual intentions for monitoring, and maintaining the plant if the license is extended." *Id.* at 14.

Mr. Witte's rebuttal testimony on alleged quality assurance deficiencies is clearly irrelevant since it is outside the admitted contention. VY's current quality assurance practices are not within the scope of this proceeding, and no contention has been (or could have been) admitted relating in any way to quality assurance practices with respect to the aging management programs. Quality assurance is not an aging management issue and is out of scope in a license renewal proceeding, which is limited to age-related degradation topics. Final Rule, "Nuclear Power Plant Renewal," 56 Fed. Reg. 64,943, 64,961 (Dec. 13, 1991).

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regulatory commitments. My leadership in establishing and implementing these programs – successful initiatives – was well-received by the Licensee and well-received by the regulator. By their transparency to the community, they were generally accepted as improvements by the Licensee in protecting the health and safety of the public and minimizing risk to public assets." *Id.*

The balance of the Witte Rebuttal Testimony on Contention NEC 4 essentially repeats the arguments made in Mr. Witte's direct testimony and should be excluded for the same reasons enumerated in the Motion in Limine.<sup>10</sup> In addition, Mr. Witte's arguments are directed at Entergy's Statement of Position with respect to NEC Contention 4 instead of at the testimony which it summarizes, the Testimony of Jeffrey S. Horowitz and James C. Fitzpatrick on NEC Contention 4 – Flow-Accelerated Corrosion, attached to the Joint Declaration of Jeffrey S. Horowitz and James C. Fitzpatrick on NEC Contention 4 – Flow-Accelerated Corrosion, Entergy Exhibit E4-01 (“Horowitz/Fitzpatrick direct testimony”). This is more than just a technical point: by responding to the Statement of Position instead of to the Horowitz/Fitzpatrick direct testimony, Mr. Witte glosses over the details of the testimony that provide the backup for Entergy's position.

Thus, Mr. Witte's rebuttal testimony on NEC Contention 4 is speculative, lacks factual support, and is tendered by an unqualified witness. It should be stricken.

#### **IV. CONCLUSION**

For the reasons set forth above, the Witte Rebuttal Testimony and supporting exhibits (NEC-UW\_24 through NEC-UW\_26) should be excluded in their entirety.

#### **CERTIFICATION**

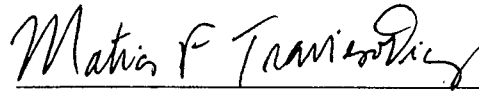
As required by 10 C.F.R. § 2.323(b), counsel for Entergy certifies that he has consulted with the other parties in connection with this Motion. The NRC Staff supports the motion. NEC opposes the Motion. The Vermont Department of Public Service does not oppose the filing of the Motion, but reserves the right to evaluate and respond to it as appropriate. The

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<sup>10</sup> See also, NRC Staff's Motion in Limine to Strike Testimony and Exhibits Filed by New England Coalition, Inc. (June 12, 2008) (“Staff Motion in Limine”) at 5-9.

Commonwealth of Massachusetts and the State of New Hampshire take no position on the Motion.

Respectfully Submitted,



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Dated: June 23, 2008

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(Vermont Yankee Nuclear Power Station) )

**ENERGY'S RESPONSE IN OPPOSITION TO NEC'S MOTION TO STRIKE STAFF'S  
REBUTTAL TESTIMONY**

Pursuant to 10 C.F.R. § 2.323(c), Applicants Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively "Entergy") hereby file their response in opposition to intervenor New England Coalition, Inc. ("NEC")'s "Motion to Strike the NRC Staff Rebuttal Testimony of Kaihwa R. Hsu Concerning NEC Contention 4" and exhibits thereto, filed June 2, 2008 ("NEC Motion").

The NEC Motion seeks to graft its own interpretation on the provisions of the Initial Scheduling Order issued by the Board in this proceeding on November 17, 2006 ("Initial Scheduling Order" or "Order"). Three aspects of the Board's Initial Scheduling Order are involved in the NEC Motion. The first of these is the provision governing the initial filing of testimony by intervenors, addressed in para. 10.B, which reads:

Intervenor's Initial Statements of Position, Testimony, Affidavits, and Exhibits. Sixty (60) days after the Staff's Second Notice, each Intervenor shall file its initial written statements of position, written testimony with supporting affidavits, and exhibits, on a contention-by-contention basis, pursuant to 10 C.F.R. § 2.1207(a)(1). The initial written statement should be in the nature of a trial brief that provides a precise road map of the party's case, setting out affirmative arguments and applicable legal standards, identifying witnesses and evidence, and specifying the purpose of witnesses and evidence (i.e., stating with particularity

how the witness, exhibit, or evidence supports a factual or legal position). The written testimony shall be under oath or by an affidavit so that it is suitable for being received into evidence directly, in exhibit form, in accordance with 10 C.F.R. § 2.1207(b)(2). The exhibits shall include all documents that the party or its witnesses, refer to, use, or are relying upon for their statements or position.

Initial Scheduling Order, para. 10.B. There is no question that pursuant to the Initial Scheduling Order, NEC had to file (and did file) its Initial Statement of Position on April 30, 2008.

The second relevant aspect of the Initial Scheduling Order, para. 10.C, which governs the submittal of direct testimony by Entergy, reads:

Applicant's Initial Statements of Position, Testimony, Affidavits, and Exhibits.

No later than ten (10) days after service of the materials submitted under paragraph 10.B, the Applicant shall file its initial written statements of position, written testimony with supporting affidavits, and exhibits, on a contention-by-contention basis, pursuant to 10 C.F.R. § 2.1207(a)(1). The initial written statement should be in the nature of a trial brief that provides a precise road map of the party's case, setting out affirmative arguments and applicable legal standards, identifying witnesses and evidence, and specifying the purpose of witnesses and evidence (i.e., stating with particularity how the witness, exhibit, or evidence supports a factual or legal position). The written testimony shall be under oath or by an affidavit so that it is suitable for being received into evidence directly, in exhibit form, in accordance with 10 C.F.R. § 2.1207(b)(2). The exhibits shall include all documents that the party or its witnesses, refer to, use, or are relying upon for their statements or position.

Initial Scheduling Order, para. 10.C. This paragraph does not mention the Staff because at the time the Order was issued the NRC Staff had not aligned itself with either Entergy or the intervenors. However, on March 12, 2008, the Staff filed its "NRC Staff Declaration of Position," in which the Staff declared that NEC's "challenges challenging Entergy's application for renewal of Vermont Yankee's operating license cannot be sustained." Therefore, under para. 10.A of the Initial Scheduling Order, "the NRC Staff submissions on each contention shall be filed at the same time as those of the party it supports," so the Staff is subject to the same filing deadlines as Entergy. Again, there is no dispute that Entergy and the Staff were required to file



(and did file) their “initial written statements of position, written testimony with supporting affidavits, and exhibits” on May 13, 2008.

The last aspect of the Board’s Initial Scheduling Order is para. 10.D, which governs the filing of rebuttal testimony by all parties. It reads: --

Rebuttal Statements of Position, Testimony, Affidavits, and Exhibits. No later than twenty (20) days after service of the materials submitted under paragraph 10.C, parties, shall file their written responses, rebuttal testimony with supporting affidavits, and rebuttal exhibits, on a contention-by-contention basis, pursuant to 10 C.F.R. § 2.1207(a)(2). The written response should be in the nature of a response brief that identifies the legal and factual weaknesses in an opponent’s position, identifies rebuttal witnesses and evidence, and specifies the precise purpose of rebuttal witnesses and evidence. The rebuttal testimony shall be under oath or by an affidavit so that it is suitable for being received into evidence directly, in exhibit form, in accordance with 10 C.F.R. § 2.1207(b)(2). The exhibits shall include all documents that the party or its witnesses, refer to, use, or are relying upon for their statements or position. Being in the nature of rebuttal, the response, rebuttal testimony and rebuttal exhibits are not to advance any new affirmative claims or arguments that should have been, but were not, included in the party’s previously-filed initial written statement.

Initial Scheduling Order, para. 10.D. On June 2, 2008, all parties – Entergy, NEC and the Staff – filed rebuttal testimony pursuant to para. 10.D of the Order.

By their own terms, the provisions of the Initial Scheduling Order establish deadlines for the filing of direct and then rebuttal testimony by the parties, and identify the format and content requirements for the various filings. The Order does not, however, establish requirements or limitations on what aspects, if any, of NEC’s case should be addressed in the direct testimony by Entergy or the Staff, nor does it set any limitations on whose direct testimony should be the subject of rebuttal testimony by any of the parties. NEC, however, seeks to impose its own “reasonable interpretation” into the three cited paragraphs in the Order, which it reads as precluding the Staff from filing rebuttal to NEC’s testimony:

In light of the staggered filing of Initial Statements of Position, the Initial Scheduling Order ¶ 10(D) is most reasonably interpreted to allow the NRC Staff to file rebuttal testimony responsive only to Entergy’s Initial Statement of

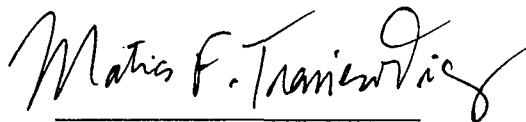
Position and direct testimony. The NRC Staff should not be permitted to file “rebuttal” testimony that essentially constitutes a late-filed addendum to its direct testimony in response to NEC’s Initial Statement of Position.

NEC Motion at 2.

The Initial Scheduling Order says nothing of the sort, but to the contrary allows each of the “parties” to file “a response brief that identifies the legal and factual weaknesses in an opponent’s position, identifies rebuttal witnesses and evidence, and specifies the precise purpose of rebuttal witnesses and evidence.” The Staff is a “party,” and NEC is its “opponent,” so there is absolutely no reason why the Staff would be precluded from responding to NEC in its rebuttal testimony.<sup>1</sup>

The NEC Motion is groundless and should be denied.

Respectfully Submitted,



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Dated: June 23, 2008

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<sup>1</sup> NEC cites the fact that Entergy filed on June 2, 2008 supplemental testimony addressing the Staff’s initial filing as somehow supporting NEC’s interpretation of para. 10.D. NEC’s interpretation of Entergy’s filing is only speculation as to Entergy’s understanding of the Order and Entergy’s litigation strategy. Entergy did not state that it was precluded in any manner from also filing on June 2, 2008 a rebuttal to NEC’s initial filing. It simply chose not to file such a rebuttal.

**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 Opposition to NEC Motion to File Untimely Rebuttal Testimony by Ulrich Witte," "Entergy Motion in Limine to Exclude Rebuttal Testimony of Ulrich Witte," and "Entergy's Response in Opposition to NEC's Motion to Strike Staff's Rebuttal Testimony" were served on the persons listed below by deposit in the U.S. Mail, first class, postage prepaid, and where indicated by an asterisk by electronic mail, this 23<sup>rd</sup> day of June, 2008.

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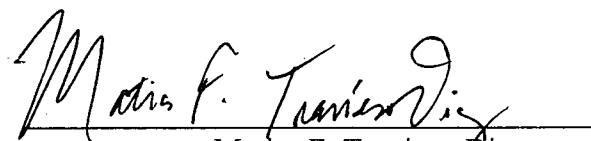
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