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OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

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)	)	

**NEW ENGLAND COALITION, INC's OPPOSITION TO  
ENTERGY'S AND THE NRC STAFF'S MOTIONS IN LIMINE TO EXCLUDE  
REBUTTAL TESTIMONY OF ULRICH WITTE**

New England Coalition, Inc. ("NEC") opposes Entergy's and the NRC Staff's motions to exclude from the record the Rebuttal Testimony of Ulrich Witte concerning NEC's Contentions 2A, 2B and 4. The Nuclear Regulatory Commission rules that govern the Board's decision of these motions require only that evidence must be "relevant, material, and reliable," and that a party's rebuttal must be "directed to the initial statements and testimony of other participants." 10 CFR §§ 2.337(a), 2.1207(a)(2); *See also*, 10 CFR § 2.319(d) ("In proceedings under this part, strict rules of evidence do not apply to written submissions."). "Relevant" evidence is defined by the Federal Rules of Evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it

would be without the evidence.” Federal Rules of Evidence 401. With one exception noted below, the rebuttal testimony and exhibits of Ulrich Witte meet these standards and are therefore admissible.

The scope of admissible evidence in this ASLB hearing overseen by a panel of judges with technical expertise is very broad in recognition that such a panel is well equipped to evaluate the evidence and give it its proper weight in the final decision.

The Supreme Court relaxed the formal rules about the admissibility of evidence in agency proceedings as early as 1904. Today, it is well accepted in federal courts that relevant evidence not admissible in court, including hearsay, is admissible at an administrative hearing. Not only may an agency admit and rely on evidence not admissible at trial but it cannot ignore relevant and probative evidence merely because the evidence would not be admissible in a trial. This has developed because the rules of evidence are designed to protect unsophisticated members of a jury and hence are not appropriate for hearings in which the trier of fact is sophisticated and usually expert in the area of the factual controversy.

2 Admin. Law & Prac. §5.52; *See also*, Catholic Medical Center of Brooklyn and Queens, Inc. v. N.L.R.B., 589 F.2d 1166, 1170 (1978)(“an agency thus *may not* provide for the exclusion of relevant evidence”).

**I. The Board Should Not Exclude Mr. Witte’s Rebuttal Testimony Concerning NEC’s Contentions 2A and 2B**

Entergy contends that Mr. Witte is not qualified to testify concerning NEC’s Contentions 2A and 2B because his testimony “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.” Entergy’s Motion in Limine to Exclude Rebuttal Testimony of Ulrich Witte at 3. Mr. Witte’s testimony is confined to a narrow

issue – whether Entergy considered the complete VY thermal transient history in its computation of transient cycles for purposes of calculating uncorrected 60-year CUFs. This is an issue that Mr. Witte is well qualified to address based on a review of plant records, given his substantial management-level experience in licensing and regulatory compliance of commercial nuclear facilities. Mr. Witte’s experience includes six years as a Project Manager for Dominion Resources, Inc., Millstone Station, where he developed a successful program to manage implementation of docketed commitments to the NRC, and five years as a manager with the New York Power Authority (NYPA), where he established a program to bring NYPA nuclear facilities into compliance with EPRI guidance and NRC requirements. *See*, Exhibit NEC-UW\_02.

Both Entergy and the NRC Staff argue that the Board should exclude Mr. Witte’s testimony as unreliable because he does not provide references for some statements, and does not provide the plant records he reviewed as Exhibits to his testimony. Mr. Witte has explained his method and stated his conclusions. Entergy and the NRC Staff’s criticisms go to the weight of his testimony rather than its admissibility. NEC requests that the Board consider this testimony, and allow both Mr. Witte and Entergy’s witnesses to address Mr. Witte’s concern that Entergy’s computation of transient cycles did not account for significant transients at the hearing.

**II. The Board Should Not Exclude Mr. Witte’s Rebuttal Testimony Concerning NEC’s Contention 4**

Both Entergy and the NRC Staff contend that Mr. Witte is not qualified to testify regarding NEC’s Contention 4. Entergy also questioned Mr. Witte’s qualifications in its Motion in Limine to exclude his direct testimony on Contention 4, and NEC has

responded to this argument. *See*, NEC's Opposition to Entergy's Motion in Limine (June 19, 2008) at 9-10.

Entergy argues that Mr. Witte's testimony is outside the scope of NEC's Contention 4. The NRC Staff made this same argument in its Motion in Limine to exclude Mr. Witte's direct testimony, and NEC has responded. *See*, NEC's Opposition to NRC Staff's Motion in Limine to Strike Testimony and Exhibits Filed by New England Coalition, Inc. (June 20, 2008) at 4.

The NRC Staff moves to strike Mr. Witte's discussion of one of his Exhibits, Exhibit NEC-UW\_13, because it disagrees with Mr. Witte's interpretation this document. The Staff's disagreement with Mr. Witte is not reason to exclude his testimony

The NRC Staff contends that Mr. Witte should not be permitted to testify "regarding Entergy's failure to refute or specifically address a number of statements in his initial testimony." NRC Staff Motion in Limine to Strike Late-Filed Rebuttal Testimony and Exhibits of NEC Witness Ulrich Witte at 12. This is clearly an appropriate topic of rebuttal testimony; the Board certainly should consider Entergy's failure to refute or address issues raised by NEC's direct testimony.

**II. One Portion of the Rebuttal Testimony of Ulrich Witte Should be Excluded.**

The Board should exclude Mr. Witte's Rebuttal Testimony at A15 concerning Entergy's alleged reduction in the number of FAC inspection points. Mr. Witte has determined that this testimony was based on a document printed from a corrupted file and NEC has filed a motion to withdraw it.

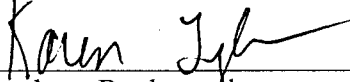
\* \* \*

The Board should deny Entergy's and the NRC Staff's Motions in Limine to exclude the rebuttal testimony of Ulrich Witte, except as stated in Part III, above.

June 30, 2008

New England Coalition, Inc.

by:

  
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**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

In the Matter of )

Entergy Nuclear Vermont Yankee, LLC )  
and Entergy Nuclear Operations, Inc. )

(Vermont Yankee Nuclear Power Station) )

) Docket No. 50-271-LR

) ASLBP No. 06-849-03-LR

**CERTIFICATE OF SERVICE**

I, Christina Nielsen, hereby certify that copies of NEW ENGLAND COALITION, INC.'S OPPOSITION TO ENTERGY'S AND THE NRC STAFF'S MOTIONS IN LIMINE TO EXCLUDE REBUTTAL TESTIMONY OF ULRICH WITTE in the above-captioned proceeding were served on the persons listed below, by U.S. Mail, first class, postage prepaid; and, where indicated by an e-mail address below, by electronic mail, on the 30<sup>th</sup> of June, 2008.

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