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UNITED STATES
NUCLEAR REGULATORY COMMISSION

July 9, 2008

In Re: Entergy Nuclear Vermont Yankee	)	**Docket No. 50-271-LR**
LLC and Entergy Nuclear	)	**ASLBP No. 06-849-03-LR**
Operations, Inc.	)	**(License Renewal)**

The Vermont Department of Public Service ("DPS") submits this brief in response to the Board's June 27, 2008 Order seeking the parties' position on three legal issues.

I. BOARD ISSUES 1A AND 1B

> Issue 1A: Does a license condition that requires the performance of certain CUFen TLAAs 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 TLAAs have not been performed?

The core question raised by the Board is whether there is a function for the license renewal hearing process or whether resolution of "the detrimental effects of aging on the functionality of certain systems, structures, and components in the period of extended operation" (60 Fed. Reg. 22461, 22464 (Nuclear Power Plant License Renewal; Revisions (May 8, 1995) Statement of Considerations)(hereinafter "1995 SOC")) may be deferred for resolution until after issuance of a renewed license? In short, do the regulations allow any and all significant safety issues to be dealt with as if they were ongoing safety issues and thus to be excluded from consideration in the license renewal hearing? If the answer to this question were "yes", there would be no purpose to the license renewal hearing process, and the extensive regulatory and case law history regarding license renewal would be moot. However, as the following discussion amply demonstrates, the regulations assure a very

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important role for the license renewal hearing process. That role would be pointless if NRC Staff and Entergy were allowed to take central questionsand postpone resolution until after the hearing was concluded.

A. The Regulatory Requirements

It is indisputable that the obligation imposed by § 54.21 is that "for each structure and component identified in paragraph (a)(l) of this section, [Entergy must] *demonstrate* that the effects of aging will be adequately managed so that the intended function(s) will be maintained consistent with the CLB for the period of extended operation." 10 C.F.R. § 54.21(a)(3) (emphasis added). In addition, 10 C.F.R. § 54.21(c) requires that the LRA "contain . . . an evaluation of time-limited aging analyses" and that an applicant "demonstrate" that analyses have been conducted properly or, if no analyses are required, the effects of aging will be adequately managed. The current position of NRC Staff and Entergy is that, although admittedly new CUFen analyses will have to be conducted, neither those analyses or the details of how they will be conducted are a legitimate part of the LRA hearing and the new CUFen analysis need not be demonstrated and the analyses required need not be made until after the license is issued. This position is contrary to the plain language of the regulations, the underlying policy for LRA review and decision, and long-standing legal precedent.

The findings required to be made under 10 C.F.R. § 54.29(a) include a finding that certain actions required to be taken under § 54.21(a) and (c) "have been or will be taken". This language cannot be read to allow new time limited aging analyses to be postponed until after license renewal has been authorized because, when referring to the requirements for time limited aging analyses, § 54.29(a) refers to "time-limited aging analyses that have been identified to *require review* under §54.21(c)"

(emphasis added). Since Part 54 "governs the issuance of renewed operating licenses for nuclear power plants" the review referred to must be the review that precedes the licensing decision. Once an applicant concedes, as Entergy does here, that a new CUFen analysis is required, it cannot and does not meet its obligations by merely agreeing to do the analyses. Rather, to meet the requirements of §§ 54.21(c)(1)(i) and (ii), the new analysis must be subject to review as part of the LRA review, not after that review.

The regulations (§ 54.21(c)(1)) require an applicant to "demonstrate" that the effects of aging will be managed properly. The accepted definition of "demonstrate" is:

> 1. To point out; to show; to exhibit; to make evident. . . .
> 2. To show, or make evident, by reasoning or proof; to prove by deduction; to establish so as to exclude the possibility of doubt or denial. . . .

Webster's Revised Unabridged Dictionary, © 1996, 1998 MICRA, Inc. There is no room in this clear definition for the phrase "to promise to demonstrate in the future", which is the phrase upon which Entergy and Staff would have to base their interpretation of the regulations. Agreeing to do an analysis, the details of which are not subject to review, cannot meet the obligation to "demonstrate" that the proposed steps will be adequate. *See* discussion at II. *infra.*

NRC Staff takes the position that 10 C.F.R. § 54.21(c)(1)(iii) allows an applicant to meet the requirements of § 54.21(c)(1) if it can "demonstrate" that the "effects of aging on the intended function(s) *will be* adequately managed for the period of extended operation" (*id.* (emphasis added)). But once, as here, it is conceded that a new analysis is part of the steps needed to demonstrate that an applicant will adequately manage the aging problem, an applicant is obligated to conduct the required analyses prior to issuance of the renewed license. If the Staff position were correct, no purpose would

be served by §§ 54.21(c)(1)(i) and (ii), each of which require an analysis be conducted and the analysis be proven to be adequate.[1]

The Staff position appears to ignore the important distinction between TLAA analyses, on the one hand, and adequate management of aging impacts, on the other. A prerequisite to an adequate aging management plan is an adequate TLAA analysis. Merely promising to do the analyses in the future does not meet the requirements of §§ 54.21(c)(1)(i) and (ii). If however, without a new analysis, Entergy concedes components will need to be managed, § 54.21(c)(iii) will be relevant and § 54.21(a)(3) will apply. *See* n. 1 *supra*.

B. The Purpose of the Regulations

The idea that certain key issues that must be resolved as part of the license renewal process are somehow outside the license renewal *hearing* process is also contrary to the clear statement of purpose behind the license renewal regulations. In the 1995 amendments to the license renewal rules, the Commission emphasized that all safety issues that might be relevant to license renewal were divided into two groups - those which were ongoing safety issues that are dealt with by ongoing Staff review and thus outside the scope of the license renewal and those involving the detrimental effects of aging during the license renewal term. *See* 1995 SOC, 60 Fed. Reg. at 22463 ("A new §54.30 has been added to distinguish between those issues identified during the license renewal process that *require resolution*

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[1] 10 C.F.R. § 54.21(a)(3) already imposes on an applicant the duty to demonstrate that "the effects of aging will be adequately managed so that the intended function(s) will be maintained consistent with the CLB for the period of extended operation". Thus, a similar obligation in § 54.21(c) must be read to relate only to those cases where there is no need for a TLAA and not a substitute for a TLAA where one is required, as it is for CUFen.

during the license renewal process and those issues that require resolution during the current license term" (emphasis added)).

> The objective of a license renewal review is to determine whether the detrimental effects of aging, which could adversely affect the functionality of systems, structures, and components that the Commission determines require review for the period of extended operation, are adequately managed. *The license renewal review is intended to identify any additional actions that will be needed to maintain the functionality of the systems, structures, and components in the period of extended operation.* . . . [A]ll systems, structures, and components evaluated based on time-limited aging analyses would be subject to a license renewal evaluation.

1995 SOC, 60 Fed. Reg. at 22464 (emphasis added). If the Commission intended that even issues related to "the detrimental effects of aging" could be dealt with solely by Staff/applicant interaction after the license renewal had been issued and without public or licensing board review, the distinctions in § 54.30 and the SOC would be meaningless. In fact, nothing in the Commission's 1995 SOC supports the Staff's newly-minted interpretation of Part 54.

Obviously, some of the steps to be taken to manage aging problems will have to be taken in the future. During the hearing the applicant may only be able to agree to do them and will not be able to do them. However, that is a far cry from identifying steps that can be taken now, the details of which are not fully spelled out and which details are likely to be controversial, and seek to rely only on the promise to do something in the future.

C. Commission Policy

Even Staff does not claim that a mere promise to do certain aging analysis calculations is sufficient to meet the requirements for license renewal since Staff specifically reserves for itself the right to review the calculations once they are conducted. If all that were required were the general

commitment to do the required analyses, no reason would exist for NRC Staff to review what Entergy will be doing. Staff does not want to eliminate a full review of the safety analyses that Entergy has now promised to do, it only wants to eliminate the role of the public and this Board in that review. But the Commission has made clear that the scope of issues that may be litigated and reviewed in a license renewal hearing is co-extensive with the Staff review:

> [a]djudicatory hearings in individual license renewal proceedings will share the same scope of issues as our NRC Staff review, for our hearing process (like our Staff's review) necessarily examines only the questions our safety rules make pertinent.

Turkey Point, CLI-01-17, 54 NRC at 10; *see also* 1995 SOC, 60 Fed. Reg. at 22,482 n.2 ("The scope of Commission review determines the scope of admissible contentions in a renewal hearing absent a Commission finding under 10 CFR 2.758 [now § 2.309]").

The Staff's new position runs directly contrary to long standing and current NRC policy on hearings and public participation. NRC Commissioners have affirmed the importance and value of meaningful public participation in NRC decisions. *See, e.g.*, "A Vision of Tomorrow, A Plan for Today," a speech by former Commissioner Jeffrey S. Merrifield at the NRC 2001 Regulatory Information Conference (Mar. 14, 2001, NRC News # S-01- 005) and "Perspectives on Nuclear Regulation and the Global Interest in Nuclear Energy," remarks of Commissioner Peter B. Lyons at the Trombay Colloquium (Mar. 27, 2006, NRC News # S-06-011) both cited in *In the Matter of Shaw Areva MOX Services (Mixed Oxide Fuel Fabrication Facility)*, 66 N.R.C. 169, 2007 WL 4976933 (N.R.C.) n. 81 ("MOX"); "Report to the Convention on Nuclear Safety": Remarks Prepared for NRC Chairman Dale E. Klein, Vienna, Austria (Apr. 15, 2008), available at http://www.nrc.gov/reading-rm/doc-collections/commission/speeches/2008/s-08-015.html (the NRC

"continue[s] to emphasize the value of regulatory openness by ensuring that our decisions are made in consultation with the public, our Congress, and other stakeholders" . . . "[w]e view nuclear regulation as the public's business and, as such, we believe it should be transacted as openly and candidly as possible." ; "Openness and Transparency: The Road to Public Confidence": Prepared Remarks for NRC Commissioner Gregory B. Jaczko, at the Organization for Economic Co-operation and. Development's Nuclear Energy Agency Workshop on the Transparency of Nuclear Regulatory Activities, Tokyo, Japan (5/22/07), available at http://www.nrc.gov/reading-rm/doc-collections/commission/speeches/2007/S-07-032.html.

D. Commission Precedent

Long-standing NRC precedent confirms that key safety issues must be resolved in the hearing itself, not post-hearing by Staff. *Waterford Steam Electric Station, Unit 3*, ALAB-732, 17 NRC 1076, 1103 (1983), citing *Consolidated Edison Co. (Indian Point Station, Unit No. 2)*, CLI-74-23, 7 AEC 947, 951 n.8, 952 (1974); *accord, Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2)*, ALAB-298, 2 NRC 730, 736-37 (1975); *Washington Public Power Supply System (Hanford No. 2 Nuclear Power Plant)*, ALAB-113, 6 AEC 251, 252 (1973); *Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 & 2)*, LBP-84-2, 19 NRC 36, 210 (1984), rev'd on other grounds, ALAB-793, 20 NRC 1591, 1627 (1984); *Philadelphia Electric Co. (Limerick Generating Station, Units 1 & 2)*, ALAB-836, 23NRC 479, 494 (1986); *Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2)*, ALAB-461, 7 NRC 313, 318 (1978)(Board delayed issuance of a construction permit so it, and not a post-hearing Staff review, could resolve a safety issue).

II. BOARD ISSUE 2

> 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)?
> (Regarding the Briefing of Certain Legal Issues) 6/27/08 at 5

When, as here, an applicant submits, at best, a brief description of what it intends to do about a safety issue required to be resolved prior to issuance of a renewed operating license, it is difficult to see how vague commitments to take action "based on" certain guidelines and to implement a program "comparable to" another program could fulfill the strict obligations imposed by 10 C.F.R. §§ 54.21(a) and (c)(1)(iii). Both of those regulations, as noted above, require a "demonstration" that certain actions will be adequate to meet the safety requirements for a license renewal. Issue 2 is not a question that can be resolved as a legal matter independent of an evidentiary hearing. An applicant certainly has the right to attempt to prove that even without all the necessary details of the program it will implement, it can nonetheless demonstrate to the satisfaction of the Board that it has carried its burden of proof under the regulations.

However, regardless of the level of detail provided, at the end of the day the key question is whether the safety issues have been fully resolved. What is at issue in this proceeding is the grant of a new operating license for VY authorizing its operation for an additional twenty years. Because of the operation of 10 C.F.R. § 54.31, what Entergy would receive, if its application were approved, is a new operating license with a term equal to twenty years plus the remaining years on its existing license, and the existing license would end March 21, 2012. Thus, this is an operating license proceeding subject to

all the requirements applicable to operating license proceedings. Although the Commission has narrowed the scope of the issues that are to be resolved in relicensing proceedings, it has not loosened the Atomic Energy Act obligation to make definitive findings on all safety issues. What Entergy and NRC Staff propose is that no such definitive finding is required for VY. Rather, they claim that all that is required is the assertion of a promise to take certain steps, not spelled out in any detail, that, if done properly, will result in adequate protection of the health and safety of the public. That approach has long since been found unacceptable by the Supreme Court.

Many decades ago, the United States Supreme Court recognized that, pursuant to section 182(a) of the Atomic Energy Act (42 U.S.C. § 2232(a)), although definitive safety findings may not be required before issuance of a construction permit, such definitive findings must be made before issuance of an operating license. *Power Reactor Development Co. v. International Union of Elec., Radio and Mach. Workers, AFL-CIO,* 367 *U.S.* 396, 397 (196l)("It is clear from this provision that before licensing the operation of PRDC's reactor, the AEC will have to make a positive finding that operation of the facility will 'provide adequate protection to the health and safety of the public.'"); *see also Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1451 (D.C. Cir.1984), *cert. denied*, 469 U.S. 1132 (1985) (holding that material licensing issues may not be excluded from a licensing hearing). Thus, in this operating license proceeding the Board is required to resolve all properly presented safety issues and cannot defer their resolution to Staff/applicant interaction after the license renewal decision has been made.

Entergy hopes to prevail on this safety issue with a very limited presentation of its aging management plans. The stakes are high for an applicant that chooses this course of action. The thrust

of the NEC contentions is that certain information required to be included in the LRA has not been included, invoking the provisions of 10 C.F.R. § 2.309(f)(1)(vi) and challenging the LRA as incomplete. Determining if the LRA is complete and accurate is a condition precedent to the extension of the license beyond its expiration date pending completion of hearings:

> (b) If the licensee of a nuclear power plant licensed under 10 CFR 50.21(b) or 50.22 files a sufficient application for renewal of either an operating license or a combined license at least 5 years before the expiration of the existing license, the existing license will not be deemed to have expired until the application has been finally determined.

10 C.F.R. § 2.109(b). The initial decision by NRC Staff to accept the LRA for docketing is not a definitive resolution of the issue of whether the LRA is complete and accurate within the meaning of § 2.109(b). Where, as here, the completeness of the LRA is properly raised as a contention by a party, the obligation to determine the completeness of the LRA becomes an issue for Board resolution.[2] That decision could take years when the time for appeal, possible remand and further appeal is considered. Once the final decision has been reached on the contentions raised by NEC regarding the completeness of the LRA, the issue of the implication of that decision on the ongoing viability of the VY license will be ripe for consideration.

Here, NEC is challenging the adequacy of the application and Entergy's ability to meet its statutory obligations. This is clearly an issue that the Board can and should address in the licensing

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[2] The Board's decision on the completeness and accuracy of the LRA, and the implications of that decision, are governed by the Administrative Procedure Act (APA) which allows the filing of a timely application for renewal of a license to act to extend the license until such time as a final and no longer appealable decision on renewal is issued but only if "the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules." 5 U.S.C. § 558(c).

hearing. *See In the Matter of Duke Energy Corporation (Oconee Nuclear Station, Units 1, 2, and 3)*, CLI 99-11, 49 N.R.C. 328, 335-40 (1999), where the Commission affirms rejection of a contention based on the incompleteness of the application and seeking dismissal of the application, not because such a contention is inadmissible as a matter of law, but because the intervenor failed to carry its evidentiary burden to provide any substantive basis or evidence that the application was legally deficient. "A contention alleging that an application is deficient must identify 'each failure and the supporting reasons for the petitioner's belief.' 10 C.F.R. § 2.714(b)(2)(iii)." *Id.* at 336-37. NEC has done that in this case.

Allowing an intervenor to challenge the completeness and accuracy of the LRA is a corollary of the obligation imposed on intervenors to strictly comply with the specificity and basis requirements of 10 C.F.R. § 2.309(f). If, as the regulation requires, an intervenor must plead contentions with sufficient specificity to put "other parties in the proceeding on notice of the petitioners' specific claims" in order to "give[] them a good idea of the claims they will be either supporting or opposing" (*Matter of Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2 and 3*), 49 NRC 328, 333 (NRC Apr. 15, 1999)), the LRA also must be sufficiently complete and accurate to allow such specific pleading to occur.

Since a condition precedent to a finding on the LRA is a finding that the LRA is sufficiently complete and accurate to allow resolution of all relevant safety issues, a contention challenging that assertion by the applicant is material to findings that the Board must make. *In the Matter of Nuclear Management Company, LLC (Monticello Nuclear Generating Plant),* 62 N.R.C. 735, 743 (ASLB) ("If NAWO believed there were deficiencies in the LA that it wished to raise before this

Board, it should have identified them in a proposed contention and, if the contention were admitted and found meritorious, the license application would not be granted." *Id.* (footnote omitted)). In this case, NEC has identified, with specificity, basis and evidence, deficiencies in the LRA. The evidentiary hearings will determine if NEC is correct.

III. CONCLUSION

In response to the specific questions posed by the Board Vermont answers as follows:

Issue 1A: The proposed condition subsequent does not comply with the law.

Issue 1B: It is illegal to issue a license renewal unless all required TLAAs have been performed.

Issue 2: It is not possible to determine, without an evidentiary hearing, whether the identified aging management program can meet the requirements of Part 54 but if it does not, the application as submitted will have been incomplete and the automatic license extension provisions of 10 C.F.R. § 2.109(b) will not be met.

Respectfully submitted,

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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	)	Docket No. 50-271-LR
YANKEE LLC AND ENTERGY NUCLEAR	)	ASLBP No. 06-849-03-LR
OPERATIONS, INC.	)	
(Vermont Yankee Nuclear Power Station)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the Vermont Department of Public Service Responses to Board Questions were served on the persons listed below by deposit in the U.S. Mail, first class, postage prepaid on July 9, 2008, and where indicated by an asterisk by electronic mail, this 9th day of July, 2008.

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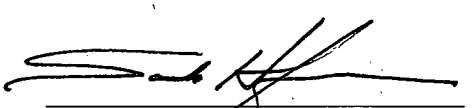

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