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July 15, 2008

**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**

Docket No. 50-271-LR

ASLBP No. 06-849-03-LR

(Vermont Yankee Nuclear Power Station))

**VERMONT DEPARTMENT OF PUBLIC SERVICE
RESPONSE TO ENTERGY AND NRC STAFF
BRIEF ON PRE-TRIAL LEGAL ISSUES¹**

BOARD ISSUES 1A AND 1B

The crux of the analysis offered by NRC Staff and Entergy is that because 10 C.F.R. § 54.21(c)(1)(iii) is stated in the disjunctive, compliance with it may be achieved without actually conducting any TLAA analysis.² Whether that is correct, and there is serious doubt it is correct, it is irrelevant in this proceeding because Entergy has announced it will do a new TLAA, in the

¹ On page 6 of its July 9th brief, Vermont inadvertently identified the wrong current regulatory version of what was formerly 10 C.F.R. § 2.758. The correct current version is 10 C.F.R. § 2.335.

² NRC Staff's explanation of why its position on Entergy's metal fatigue analysis has changed over time rests on an indefensible regulatory interpretation. Staff Brief at 3-4. Staff asserts that when Entergy said it was going to do the CUFen analysis, it was invoking (c)(ii) and all the Board and intervenor review which comes along with that choice. Then Entergy invoked (c)(iii) and committed to do the analysis, but did not offer to do it before the end of the hearing, and thus avoided any intervenor or Board review. The Staff offers no analysis or reasoning to explain why the Commission would have created this enormous loophole which would allow an applicant to totally avoid intervenor or Board scrutiny by the simple expedient of promising to do in the future something it could clearly do now. When would an applicant ever choose (c)(ii)?

future, that it believes will show that no systems or components will require any aging management. The new analysis will, in the words of 10 C.F.R. § 54.21(c)(ii), “have been projected to the end of the period of extended operation”. The new analysis cannot be conducted under (iii) because, as the Staff notes “unlike (i) and (ii), the word ‘analysis’ does not even appear in (iii)”. Staff Brief at 5. If (c)(iii) is the basis for the LRA, GALL does not authorize the use of an initial TLAA when that option is chosen. The only analysis authorized by GALL as part of an aging management plan is “a more rigorous analysis of the component to demonstrate that the design code limit will not be exceeded during the extended period of operation”. GALL, Section X.M1 Metal Fatigue of Reactor Coolant Pressure Boundary at X M-2. To have a “more rigorous analysis” there must already have been an analysis and, since the analysis at issue is one related to extended operation, it must have been a previous analysis of CUFen for extended operation. In this proceeding Entergy proposes to defer its initial CUFen analysis for the extended period of operation for certain vulnerable safety components until after conclusion of the hearing. No regulation or regulatory guide authorizes that deferral.

Entergy argues that in the Statement of Consideration for License Renewal Regulations (“SOC”) the Commission authorized postponing the CUFen analysis until after a license renewal decision when the Commission explained that no analysis is required for the LRA “if an applicant cannot or chooses not to justify or extend an existing time-limited aging analysis.” Applicant Brief at 2-3 citing 60 Fed. Reg. 22,461, 22,480 (May 8, 1995) (emphasis added by Applicant). But, as noted above, that is not this case. Entergy is choosing to try to justify an extension of its existing TLAA by proposing, after the LRA hearings are completed, to conduct a projection of the previous TLAA by adding environmental factors and redoing the analysis, in an

attempt to demonstrate that no further management is required. It is not a mere coincidence that Entergy adopted this new strategy only after Entergy actually performed such a projection analysis on some components and NEC was able to provide compelling expert testimony that the analyses were deeply flawed. *See* NEC Contentions 2A and 2B and supporting testimony.

Both Entergy and Staff ignore the role of the CUFen analysis. This analysis is used to identify the components, if any, for which aging management is required. Entergy can no more fail to conduct these analyses prior to obtaining a decision on its LRA than it could fail to conduct AMP analyses that are needed to identify which components and systems require TLAA. The Commission has created a logical progression from the AMP to the TLAA to aging management. The only way to avoid a step is to concede that certain unanalyzed components or systems will be included in the next step. Aging management means just that - management of systems and components that have been shown to be vulnerable to aging. As Entergy notes, the 1991 SOC for license renewal defined the elements of a license renewal approval as consisting of “the current licensing basis and new commitments to monitor, manage, and correct age-related degradation unique to license renewal, as appropriate.” Entergy Brief at 5 citing 56 Fed. Reg. at 64,946. “Analysis” is not one of the elements for which a new commitment is authorized. Similarly, again as Entergy notes, the 1995 SOC limited the use of commitments to those systems and components “identified in §54.21(a), integrated plant assessment and §54.21(c) time-limited aging analyses”. Entergy Brief at 5 citing 60 Fed. Reg. at 22,473. Yet Entergy argues that the analyses it proposes to commit to conduct, which will determine whether certain components need aging management, are not TLAAAs. Entergy Brief at 3 (“An analysis of EAF is not part of the current licensing basis and therefore is not, per se, a TLAA.”). A commitment

to conduct an analysis in the future to determine whether a component needs aging management is not among the commitments authorized by the Commission. The fact that a component that is already within the management program may be shown, after some years of extended operating data have been gathered, by a more rigorous analysis, to not need additional management, is a far cry from allowing an applicant to avoid, in the first instance, a commitment to active aging management for that component and to conduct in the future an analysis to justify that exclusion.

Finally, Entergy and Staff argue that some subjects may be authorized to be dealt with by a commitment rather than the actual completion of the task. That is certainly correct, but neither Entergy nor Staff provide any legal support for the proposition that the commitment to determine in the future, after a license renewal decision has been reached, which systems or components require aging management is among the authorized commitments. The Staff attempts to equate a commitment to obtain financial security subsequent to a licensing decision, after full Board review of a model financial contracting instrument, as occurred in *Private Fuel Storage LLC* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 29-30 (2000), with a commitment to conduct a complex scientific calculation which entails the use of numerous assumptions and engineering judgment. This citation merely confirms the difference between this case and those rare instances in which the Commission allows a post-licensing condition in lieu of Board resolution of the issue. The post hearing approach should be employed sparingly and only in clear cases, for example, where minor procedural deficiencies are involved. *See e.g. Louisiana Power & Light Co. (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). Nor does GALL provide any support for Entergy or Staff.

As noted above, GALL is premised upon the previous completion of a TLAA for the extended period of operation and the determination, based on that TLAA, that aging management is required. Once that analysis is completed the various steps of aging management can be implemented, including monitoring of the identified components and even a more rigorous analysis of the fatigue factors for that component based upon evidence gathered during the monitoring program following the onset of extended operation.

BOARD ISSUE 2

There is no dispute that GALL, and other regulatory guides, constitute evidence, not the resolution of any issue addressed in those regulatory guides. But, as noted by Entergy, the principal benefit of regulatory guides is to reduce the work load on applicants and the regulatory staff, not to remove issues for full consideration by licensing boards when those issues are properly raised by an intervenor. *See* Entergy Brief at 11-12 citing SECY-01-0074, Memorandum from W. Travers to Commissioners, “Approval to Publish Generic License Renewal Guidance Documents” (Apr. 26, 2001) (ADAMS Accession No. ML010990201) at pp. 4-5. In addition, incorporation by reference of guidance from GALL or any other regulatory guide may only occur “provided that the references are clear and specific.” 10 C.F.R. § 54.17(e). The Staff agrees, noting that the Standard Review Plan-License Renewal (“SRP-LR”) allows credit for GALL only if an applicant ensures:

that the plant program contains all the elements of the referenced GALL Report program. In addition, the conditions at the plant must be bounded by the conditions for which the GALL Report program was evaluated.

Staff Brief at 13 citing SRP-LR at 3.0.1. By using such qualifying phrases as “comparable to” and “based on” rather than clear and unequivocal commitments to follow with precision the

guidance in GALL or to agree to all of its elements, Entergy has failed to meet the conditions imposed for reliance on § 54.17(e) or the SRP-LR. Given the substantial skill of Entergy's counsel and Entergy's sophistication with nuclear licensing, the use of these equivocal phrases cannot be seen as anything other than deliberate and as evidence of either an unwillingness to make a "clear and specific" commitment to the GALL program or a recognition that GALL itself is sufficiently ambiguous that no "clear and specific" commitment can be made.

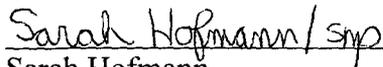
Entergy also argues that to the extent it is obeying the prescriptions of GALL, those prescriptions should be given "special weight". However, it is totally unclear, from Entergy's brief or the case cited for that proposition, what "special weight" means. It is clear that it does not mean that the burden of proof has shifted, that a presumption has been created or that the absence of a detailed description of precisely what Entergy will do to meet its regulatory and statutory obligations is excused. Thus, when Entergy leaps to the conclusion that "special weight" means "deference" (Entergy Brief at 12) it does so by an *ipse dixit* and without any legal authority or analysis to support that conclusion. Entergy even attempts to elevate GALL to the status of a rule by noting its approval process followed some of the procedures used for a rule. Of course, it is not a rule and the Commission has not chosen to make it a rule. In addition, the most important procedures associated with a rule - the issuance of a final and reviewable "order," never occurred. At most GALL is a very complicated and imprecise guideline, on which the Staff received considerable industry input, designed to allow applicants and the Staff to conduct their part of the license renewal process, assuming there is no evidentiary hearing, as efficiently as possible. Reference to GALL is not a substitute for a detailed LRA sufficient to allow a thorough review by the public and this Board. NEC and its expert witnesses have identified

numerous gaps in GALL and the LRA, gaps that can only be filled by a more thorough and detailed analysis than provided by the ambiguous references to GALL guidance.

CONCLUSION

For the reasons stated in Vermont's initial brief and above, the answer to each of the questions posed by the Board should be no.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of the Vermont Department of Public Service Response to Entergy and NRC Staff Brief on Pre-Trial Issues were served on the persons listed below by deposit in the U.S. Mail, first class, postage prepaid on July 15, 2008, and where indicated by an asterisk by electronic mail, this 15th day of July, 2008.

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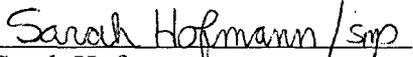
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