

December 23, 2008

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of )  
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ENTERGY NUCLEAR VERMONT YANKEE, )  
L.L.C., and ENTERGY NUCLEAR ) Docket No. 50-271-LR  
OPERATIONS, INC. )  
 )  
(Vermont Yankee Nuclear Power Station) )

NRC STAFF'S REPLY TO NEC'S ANSWER TO  
NRC STAFF'S PETITION FOR REVIEW OF LBP-08-25

INTRODUCTION

Pursuant to 10 C.F.R. § 2.341(b)(3), the staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby responds to "New England Coalition's ["NEC"] Response to NRC Staff's Petition for Review of the Licensing Board's ["Board"] Partial Initial Decision, LBP-08-25"<sup>1</sup> ("Answer") dated December 20, 2008.<sup>2</sup> NEC's Answer opposes the Staff's Petition for Review of LBP-08-25.<sup>3</sup> The Staff submits that NEC's opposition to the Staff's Petition is without merit.

DISCUSSION

In its Answer, NEC argues that the Staff's Petition should be denied. Answer at unnumbered page 2. NEC asserts the Commission should show deference to the ASLB panel and that the Staff has failed to provide a "compelling case" as to why the judgment of the Board

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<sup>1</sup> Partial Initial Decision (Ruling on Contentions 2A, 2B, 3 and 4), LBP-08-25, 68 NRC \_\_\_\_ (Nov. 24, 2008) (slip op.) ("Decision" or "LBP-08-25").

<sup>2</sup> The Staff notes that NEC sent two Answers via e-mail; the first was sent on December 19, 2008 at 11:19 PM and received on December 20, 2008 at 12:20 AM, and the second Answer was sent on December 20, 2008 at 10:27 AM and received at 10:28 AM. NEC claimed that the December 20 version is the one it intended to file. Therefore, the Staff is responding to the December 20 version.

<sup>3</sup> NRC Staff's Petition for Review of the Licensing Board's Partial Initial Decision, LBP-08-25 (Dec. 9, 2008) ("Petition").

should be set aside regarding the proper application of NRC regulation, precedence and guidance. See Answer at unnumbered page 5. This statement does not however, support NEC's assertion that the Staff's Petition should be denied because the standard for Commission review of a licensing board's full or partial initial decision is not a "compelling case." Pursuant to 10 C.F.R. § 2.341(b), the standard for Commission review is the existence of a substantial question with respect to 1) a clearly erroneous finding of fact; 2) a legal conclusion that is without precedent or is contrary to established law; 3) important question of law, policy or discretion; 4) prejudicial procedural error; or 5) any other consideration that the Commission deems to be in the public interest.

The Staff's Petition meets the Commission's standard for review.<sup>4</sup> The Staff asserts that the Board made clearly erroneous findings of fact and conclusions of law in its Decision, including: that Entergy has not correctly addressed environmentally assisted fatigue through an aging management program; that environmentally assisted fatigue is a time-limited aging analysis ("TLAA"); and that an aging management program ("AMP") may not include a calculation. Furthermore, the Board's Decision raises substantial questions of law and policy concerning the standards for the license renewal process. Therefore, the Staff's Petition meets the Commission's legal standards for granting a petition for review under 10 C.F.R. § 2.341(b).

NEC alleges that the Staff had the opportunity to bring its complaints to the Board in pre-hearing briefs and that the Staff's questions and concerns have been heard and should be raised in a Motion for Reconsideration. See Answer at unnumbered pages 5-6. This is irrelevant and in no way demonstrates that the Staff's Petition fails to meet the standard set

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<sup>4</sup> See also Entergy's Answer in Support of NRC Staff's Position For Review of The Licensing Board's Partial Initial Decision, LBP-08-25 (Dec.19, 2008).

forth in 10 C.F.R. § 2.341(b). There is no requirement for a party to first seek reconsideration before the Board before it may file a petition for review with the Commission.<sup>5</sup> Therefore, there is no basis for NEC's assertions.

NEC also asserts that the Board's decision grants the Intervenors a small accommodation of protection of public health and safety by keeping the record open until after submission of the remaining reanalysis to recalculate the CUF<sub>ens</sub>. See Answer at 6. However, this is immaterial as to whether the Staff's Petition meets that Commission's standard for review.

Further, NEC asserts that the Staff and the Applicant allegedly entered into some sort of deal to address the defects in the LRA after the proceeding has closed. See Answer at 6. This assertion is unsupported and has no bearing on whether Commission review of the Staff's Petition should be granted.

In addition, NEC further accuses the Staff of not assisting in providing a fair hearing process without specifically stating what regulation, rule or policy the Staff has violated by filing this petition. See Answer at 6-8. This is unrelated to the issue before the Commission, i.e., whether to grant the Staff's Petition for review.

Finally, NEC argues that if the Commission considers the Staff's Petition, the Commission should hold consideration of the Staff's Petition in abeyance until NEC has "exhausted its allotted time in which to file a Petition for Review." Answer at 10. NEC asserts that this is necessary to avoid "overlapping, confused, and duplicative litigation." *Id.* The Staff

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<sup>5</sup> See Staff Petition at 1, whereby "In accordance with 10 C.F.R. § 2.341(b)(4), the Staff submits that Commission review is warranted because the Board's decision regarding Contentions 2, 2A and 2B raises substantial questions of law and policy that are without governing precedent, and the Board makes clearly erroneous findings of fact. Furthermore, Commission review is in the public interest because this decision raises issues that could affect pending and future license renewal determinations."

disagrees. NEC has filed a motion for reconsideration alleging that LBP-08-25 “rests on clearly erroneous findings of fact” and “conclusions based on the erroneous findings of fact” as well as procedural errors with respect to Contentions 2A, 2B, and 4. See [NEC] Motion for Reconsideration of the Licensing Board’s Partial Initial Decision (Dec. 17, 2008) at 1-3. However, unlike the Staff’s Petition, NEC’s Motion for Reconsideration does not assert that the Board’s Decision misinterpreted and misapplied the Commission regulations or that Board’s decision challenges Commission policy and precedent. The issues NEC requests for reconsideration and the issues the Staff has request the Commission review are different. Further, if the Staff’s Petition is granted and the Commission finds error in the Board’s decision, this could render NEC’s reconsideration requests moot. Thus, NEC’s arguments to hold the Staff’s Petition in abeyance are unpersuasive.

#### CONCLUSION

For the reasons stated above, the Staff submits that the Commission review of LBP-08-25 is warranted.

Respectfully submitted,

**/RA/**

Lloyd B. Subin  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 23rd day of December, 2008

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S REPLY TO NEC'S RESPONSE TO NRC STAFF'S PETITION FOR REVIEW OF LBP-08-25" in the above-captioned proceeding have been served on the following by electronic mail and by deposit in the U.S. Nuclear Regulatory Commission's internal mail system, or, as indicated by an asterisk (\*), by electronic mail and by deposit in the U.S. Mail system this 23rd day of December, 2008.

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