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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

BEFORE THE COMMISSION

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In the Matter of

ENTERGY NUCLEAR VERMONT YANKEE,  
L.L.C., and ENTERGY NUCLEAR  
OPERATIONS, INC.

Docket No. 50-271-LR

(Vermont Yankee Nuclear Power Station)  
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**MOTION FOR LEAVE BY THE STATES OF NEW YORK AND CONNECTICUT,  
HUDSON RIVERKEEPER, INC., HUDSON RIVER SLOOP CLEARWATER, INC.,  
AND THE PRAIRIE ISLAND INDIAN COMMUNITY  
TO SUBMIT BRIEF *AMICI CURIAE*  
IN OPPOSITION TO STAFF'S PETITION FOR REVIEW  
AND IN SUPPORT OF INTERVENORS STATE OF VERMONT  
AND THE NEW ENGLAND COALITION**

Filed December 19, 2008

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**MOTION FOR LEAVE TO SUBMIT BRIEF *AMICUS CURIAE*  
IN OPPOSITION TO STAFF'S PETITION FOR REVIEW  
AND IN SUPPORT OF INTERVENORS STATE OF VERMONT  
AND THE NEW ENGLAND COALITION**

The States of New York and Connecticut, Riverkeeper, Inc., Hudson River Sloop Clearwater, Inc., and the Prairie Island Indian Community seek leave to submit a brief *amici curiae* to the Commissioners in support of the State of Vermont and the New England Coalition and in opposition to the December 9, 2008, petition for review filed by the Staff of the Nuclear Regulatory Commission that seeks review of certain aspects of the November 24, 2008, ruling issued by the Atomic Safety and Licensing Board in the ongoing license renewal proceeding for the Vermont Yankee nuclear power station.

**THE INTERESTS OF THE *AMICI***

As participants in various ongoing NRC administrative proceedings, each of the *amici* have a keen interest in the Commission's response to the Staff's petition for review because it seeks to limit public review and adjudication of various license renewal issues including metal fatigue and distorts the role of a NRC Staff guidance document entitled Generic Aging Lessons Learned, NUREG-1801 (also known as GALL). See NRC Staff's Petition for Review of the Licensing Board's Partial Initial Decision, LBP-08-25 (Dec. 9, 2008) (Staff's Petition for Review). Resolution of the Staff's petition conceivably could affect the *amici*'s interests in those other proceedings, which include license renewal applications for the Indian Point and Prairie Island power reactors.

The State of New York and Riverkeeper are two of the three intervenors in the Indian Point license renewal proceeding and have pursued issues about which the Staff now seeks to

curtail review. For example, the State of New York and Riverkeeper have raised a contention concerning metal fatigue, which the Indian Point ASLB has accepted. *See* New York State Notice of Intention to Participate and Petition to Intervene (Nov. 30, 2007); Riverkeeper Inc.'s Request for Hearing and Petition to Intervene in the License Renewal Proceeding for the Indian Point Nuclear Power Plant, November 30, 2007, at 7-15; *see also* Memorandum and Order (Ruling on Petitions to Intervene and Requests for Hearing), Docket Nos. 50-247-LR and 50-286-LR, ASLBP No. 07-858-03-LR-BD01, 68 NRC \_\_ (July 31, 2008). Moreover, the State of New York specifically brought the Vermont Yankee metal fatigue experience to the attention of the ASLB Panel in the Indian Point license renewal proceeding because of its direct relevance to the Indian Point proceeding. *See* Petitioner State of New York's Reply to Entergy's Answer and NRC Staff's Response to New York's Supplemental Contention No. 26-A (Metal Fatigue), Docket Nos. 50-247-LR and 50-286-LR, ASLBP No. 07-858-03-LR-BD01 (May 1, 2008). In addition, as noted in the Staff's Petition for Review, in the Indian Point proceeding, the State of New York has also raised contentions questioning the adequacy of the applicant's commitments that purport to comply with the Staff's GALL Report. *See* Staff Petition for Review at 23, n.44; *see also* New York State Notice of Intention to Participate and Petition to Intervene (Nov. 30, 2007) (*e.g.*, Contentions 5, 6, 7, 26).<sup>1</sup>

The State of Connecticut has been admitted to the Indian Point license renewal proceeding as an interested government entity pursuant to 10 C.F.R. § 2.315(c). Approximately one-third of Connecticut's population, or approximately 1 million people, live within the 50-mile

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<sup>1</sup>The State of New York also has an interest in this proceeding because the Vermont Yankee power reactor is approximately 42 miles from the Town of Hoosick Falls, in eastern New York State.

mile from the Connecticut border, directly upstream on the Connecticut River, which is the largest river in Connecticut.

Clearwater also has been admitted as an intervenor party to the Indian Point license renewal proceeding and has a long-standing interest in ensuring the safe operation of the facility and its systems, structures, and components.

The Prairie Island Indian Community (“PIIC” or “the Community”) is an intervenor in the ongoing license renewal proceeding for the two nuclear power reactors at the Prairie Island Nuclear Generating Plant (“PINGP”) in Minnesota and has pursued issues which the Staff has sought (and may continue to seek) to curtail review. PIIC is a federally-recognized Native-American Tribe with a 1,900-acre reservation, a portion of which is situated approximately 600 yards north of the PINGP. Nearly half of the Tribe’s members live on or near the reservation. Given the Community’s close proximity to the PINGP facilities, PIIC is concerned that renewal of the operating licenses might affect the health and safety of its members and might have a detrimental effect on the environment. On December 5, 2008, the Prairie Island ASLB accepted various contentions submitted by PIIC, including three that reference the GALL Report (Contention 6 – adequacy of AMP for containment coatings; Contention 8 – adequacy of AMP for nickel-alloy components; Contention 11 – sufficiency of AMP for flow accelerated corrosion). *See* Memorandum and Order, Docket Nos. 50-282-LR and 50-306-LR, ASLBP No. 08-871-01-LR (Dec. 5, 2008) at pp. 36-39 (PIIC Contention 6), 44-51 (PIIC Contention 8), and 56-60 (PIIC Contention 11). In its pending petition for review in this proceeding, NRC Staff stated that resolution of its concerns in this proceeding “is likely to affect” the Prairie Island proceeding. *See* Staff Petition for Review at 23, n.44.

stated that resolution of its concerns in this proceeding “is likely to affect” the Prairie Island proceeding. *See* Staff Petition for Review at 23, n.44.

**AMICI COULD BE PREJUDICED IF THE COMMISSION  
DID NOT CONSIDER THEIR VIEWS AT THIS JUNCTURE**

In its Petition for Review, Staff seeks to curtail public review of metal fatigue and misapplies GALL. Any decision rendered by the Commission on the GALL or metal fatigue issues at issue in Vermont Yankee conceivably could affect the interests of the *amici* in the identified license renewal proceedings. Accordingly, the *amici* have demonstrated a sufficient interest in the Commission’s pending response to the Staff’s Petition for Review and the Commission should consider the views of the *amici*.

The States of New York and Connecticut respectfully submit this motion for leave to file and the accompanying brief in their capacity as sovereign States and in their *parens patriae* capacity in order to advise the Commissioners of the States’ position. 42 U.S.C. § 2021(l).

All the *amici* also submit the motion and the accompanying brief pursuant to 10 C.F.R. § 2.315(d). Since the Commission retains the authority to address the arguments contained in Staff’s Petition for Review in this matter without seeking any additional briefing, *see* 10 C.F.R. § 2.341(c)(1); the *amici* seek leave to submit the accompanying brief at this juncture. *Amici* would be prejudiced if the Commissioners definitively resolved the matter in favor of Staff at this juncture without considering the *amici*’s brief.<sup>2</sup>

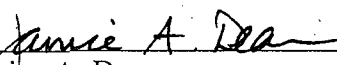
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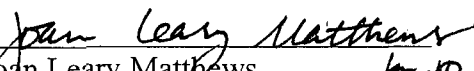
<sup>2</sup>Should the Commission accept the Staff’s petition and establish an additional briefing schedule pursuant to 10 C.F.R. § 2.341(6)(c)(1) and (2), the *amici* reserve the right to request leave to submit an amicus brief and participate in any oral argument.

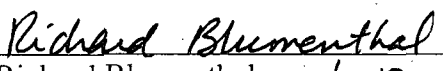
## CONCLUSION

For the reasons set forth in this motion and the accompanying *amici* brief, the undersigned respectfully request that the Commission grant the motion and accept the brief.

Dated: December 19, 2008  
New York, New York

  
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PRAIRIE ISLAND INDIAN COMMUNITY

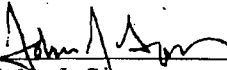
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**CERTIFICATE OF CONSULTATION WITH PARTIES  
PURSUANT TO 10 C.F.R. § 2.323(b)**

Before filing this motion, on Friday, December 19, 2008, Assistant Attorney General John Sipos asked counsel for NRC Staff, counsel for Entergy, counsel for the State of Vermont, and Mr. Shadis of the New England Coalition if they would consent to a motion for leave to file an amicus brief.

Counsel for Entergy "opposes" the motion for leave to file an amicus brief. Counsel for NRC Staff took no position with respect to the motion for leave to file an amicus brief.

Counsel for the State of Vermont consented to the motion, as did Mr. Shadis for the New England Coalition.

  
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John J. Sipos  
Assistant Attorney General

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NUCLEAR REGULATORY COMMISSION  
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## PRELIMINARY STATEMENT

On December 9, 2008, Nuclear Regulatory Commission (“NRC”) Staff (“Staff”) submitted a Petition asking the Commissioners to review the Atomic Safety and Licensing Board’s (the “ASLB” or the “Board”) November 24, 2008, Partial Initial Decision in the Vermont Yankee relicensing proceeding. *See* NRC Staff’s Petition for Review of the Licensing Board’s Partial Initial Decision, LBP-08-25 (Dec. 9, 2008) (“Staff’s Petition for Review”). The States of New York and Connecticut, Riverkeeper, Inc., Hudson River Sloop Clearwater, Inc., and the Prairie Island Indian Community submit this brief *amici curiae* to urge the Commission to deny review of Staff’s Petition for Review because Staff has not been aggrieved by the ASLB’s decision, or, in the alternative, because Staff’s position is incorrect as a matter of law and is inconsistent with Commission policy.

The States of New York and Connecticut submit this brief in their capacity as sovereign states. All the *amici* submit the brief pursuant to 10 C.F.R. § 2.315(d) because the Commission could rule on Staff’s petition without any further opportunity for briefing pursuant to 10 C.F.R. § 2.341(c)(1).<sup>1</sup>

## BACKGROUND

Staff’s Petition for Review concerns two issues: (1) the applicability of a Staff document entitled Generic Aging Lessons Learned, NUREG-1801 (“GALL”); and (2) metal fatigue analyses

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<sup>1</sup> The *amici* submit this brief for the Commission’s consideration now but reserve the right to submit a new brief on the merits should the Commission accept this petition and seek additional briefing.

known as “CUFen” analyses.<sup>2</sup> In its November 24 Ruling, the Vermont Yankee ASLB considered, among other things, two contentions which challenged Entergy’s CUFen reanalyses. *See* Ruling on Contentions 2A, 2B, 3 and 4, LBP-08-25, 68 NRC \_\_\_\_ (Nov. 24, 2008) at 1-2 (slip op.) (“Nov. 24 Ruling”). The Board concluded, after extensive briefing and a four-day adjudicatory hearing involving numerous witnesses and intervenor parties, including one interested State, that license renewal was not authorized and could not be granted until 45 days after Entergy satisfactorily completes metal fatigue calculations and serves them on Staff and other parties. *See* Nov. 24 Ruling at 2.

Staff filed a petition for review of the November 24 Ruling claiming that it “raises substantial questions of law and policy that are without governing precedent, and the Board makes clearly erroneous findings of fact [and] because this decision raises issues that could affect pending and future license renewal determinations.” *See* Staff Petition for Review at 1. Specifically, Staff alleges that the Board’s decision “raises substantial legal questions with regard to the proper interpretation and application of 10 C.F.R. §§ 54.3, 54.21(c)(1), and 54.29[;] made a number of clearly erroneous findings regarding the contents of Vermont Yankee’s license renewal application, including amendments thereto that are not supported by the record ...; and that the Board’s finding that the use of an aging management program (“AMP”) consistent with the Generic Aging Lessons Learned (GALL) Report, NUREG-1801, does not satisfy the

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<sup>2</sup> One important tool in analyzing potential metal fatigue is a cumulative usage factor (“CUF”) along with environmental adjustment factors (“Fen factors”) which together form the “CUFen analysis.” The CUFen analysis takes into account the effects of the coolant environment on plant components. Depending on the context, CUFen may also be referred to as “environmentally adjusted fatigue,” “environmentally adjusted CUF,” “refinements” to CUF, or simply CUF.

Commission's regulations, raises important questions of policy and is a clear departure from Commission precedent." *Id.* at 1, 2. Staff notes that the Board's finding related to GALL could implicate ongoing license renewals in the Indian Point and Prairie Island license renewal proceedings. *See* Staff Petition for Review at 23, n.44. Staff asks the Commission to reverse the Board's decision on Contentions 2, 2A, and 2B.

### **THE INTERESTS OF THE *AMICI***

As participants in various ongoing NRC administrative proceedings, each of the *amici* have a keen interest in the Commission's response to Staff's Petition for Review because it seeks to limit public review and adjudication of various license renewal issues including metal fatigue and distorts the role of a NRC Staff guidance document known as the GALL Report. The accompanying motion details the interests of the various *amici*, and Staff believes that the Commission's ruling here conceivably could affect other ongoing license renewal proceedings including Indian Point and Prairie Island. By way of example, *amici* State of New York and Riverkeeper have raised a contention concerning metal fatigue in the Indian Point proceeding, which the ASLB there has accepted and consolidated. The State of New York has also challenged Staff's view of GALL. The State of Connecticut and Clearwater are also participants in the Indian Point proceeding and seek to ensure the proper application of GALL and a thorough, public review of metal fatigue issues. The Prairie Island ASLB admitted numerous contentions advanced by PIIC, including three which implicate GALL.

## ARGUMENT

### POINT I

#### **The Commission Should Not Accept This Petition for Review Because the November 24 Ruling Promotes Public Participation And Does Not Burden Staff**

One of Staff's responsibilities is "Protecting People and the Environment." See [www.nrc.gov](http://www.nrc.gov). The ASLB's ruling to require the applicant to submit further metal fatigue analyses is grounded in an overriding concern to protect the public. Plants undergo fatigue due to stresses during plant operation. Fatigue becomes more of a concern as a plant gets older, especially at the end of a 40-year license term and continuing into a new 20-year term. As a threshold matter, Staff here has not identified how the Board's ruling is adverse to Staff or its responsibilities, especially because the applicant itself has not appealed the ruling. At the heart of the Board's ruling is a recognition of the need for the applicant to perform additional metal fatigue analyses. The applicant is currently undertaking those analyses,<sup>3</sup> and Staff will presumably review those analyses. Thus, since Staff would examine the metal fatigue analyses in any event, Staff will not experience any additional burden or injury as a result of the November 24 Ruling.

Instead, it appears that Staff's ultimate objective is to remove a component of license renewal from public scrutiny and adjudication. This runs contrary to the Commission's repeated commitment to public involvement and its benefits.<sup>4</sup> As the Vermont Yankee ASLB pointed out,

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<sup>3</sup> Entergy has stated publicly that it has already begun the analyses and expects to have them done in nine to fourteen weeks. See Bob Audette, *NRC Staffers Contest Metal Fatigue Ruling*, BRATTLEBORO REFORMER, Dec. 11, 2008, available at [http://www.reformer.com/ci\\_11193375?source=most\\_email](http://www.reformer.com/ci_11193375?source=most_email).

<sup>4</sup> Indeed, Chairman Klein recently stated that the NRC "continue[s] to emphasize the  
(continued...)

Staff's current position improperly removes the issue of metal fatigue from meaningful review in the hearing process. See November 24 Ruling at 57, 62; see also *In re Northern States Power Company* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-75-1, 1 N.R.C. 1 (1975) (underscoring "the fundamental importance of meaningful public participation in [the NRC's] adjudicatory process. Such participation, performed in the public interest, is a vital ingredient in the open and full consideration of licensing issues and in establishing public confidence in the sound discharge of the important duties which have been entrusted to [the NRC]"). Because Staff will not be burdened by the Board's ruling, and because Staff seeks to curtail public involvement, the Commission should not accept Staff's Petition for Review.

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<sup>4</sup>(...continued)

value of regulatory openness by ensuring that our decisions are made in consultation with the public, our Congress, and other stakeholders" and that "[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." *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> (last visited Apr. 27, 2008); see also "A Vision of Tomorrow, A Plan for Today," a speech by former Commissioner Jeffrey S. Merrifield at the NRC 2001 Regulatory Innovation Conference (Mar. 14, 2001, NRC News # S-O1- 005) ("The Commission has a significant responsibility to provide fair and meaningful opportunities for public involvement in our licensing proceedings"); 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) (in speaking about the "opportunity for public hearings," stressing how very seriously the agency takes its "responsibility for public participaon" because "when the public has an opportunity to ... participate in our decision-making process, nuclear safety is enhanced and public confidence in the NRC as a fair, stable and strong nuclear regulator is strengthened"), quoted in *In the Matter of Shaw Areva MOX Services* (Mixed Oxide Fuel Fabrication Facility), 66 NRC 169, 2007 WL 4976933 (Oct. 31, 2007), n.81.



## POINT II

### **Staff's Position Regarding the Legal Effect of the GALL Report Is Incorrect; GALL Is Merely Guidance and Is Not Equivalent to a Regulation**

Staff argues in its Petition for Review that the “Board’s finding that the use of an AMP consistent with the GALL Report is inadequate to demonstrate compliance with the Commission’s regulations raises important questions of policy regarding whether an applicant for license renewal may rely on GALL, and is a clear departure from Commission precedent.” Petition for Review at 11. Staff’s position is wrong.

As an initial matter, GALL was not subject to a rulemaking procedure and does not qualify as a regulation for purposes of the federal Administrative Procedure Act. 5 U.S.C. § 553. Thus, Staff should not now attempt to use GALL as a proxy for a properly promulgated regulation.

In addition, the Indian Point ASLB Panel rendered a similar decision in that proceeding, admitting the State of New York’s Contention 7 regarding low voltage cables, rejecting Staff’s objection that the contention was inadmissible because “[t]he SRP-LR and the GALL Report do not address a separate program for inaccessible low voltage cables...” NRC Staff’s Response to Petitions for Leave to Intervene, Docket Nos. 50-247/286-LR (Jan 22, 2008). The Indian Point ASLB Panel admitted Contention 7 over Staff’s objection, explicitly disagreeing with “[t]he NRC Staff[’s] represent[ation] that an applicant may satisfy 10 C.F.R. § 54.21(a)(3) by committing to develop a program that meets the requirements of the GALL Report...” *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), Docket Nos. 50-247-LR and 50-286-LR, LBP-08-13, 68 NRC \_\_\_\_, slip op. (July 31, 2008) at 40. In other words, the Board acknowledged that the regulations require programs not addressed by GALL. The Board also

stated that it “do[es] not comprehend how a commitment to develop a program can *demonstrate* that the effects of aging will be adequately managed.” *Id.* at 40 (emphasis in original).

Notably, elsewhere Staff itself has characterized GALL as “guidance.” For example, in the Indian Point proceeding, Staff stated that GALL is but one example of guidance offered “to assist applicants in preparing license renewal applications and to assist the Staff in ‘judging whether the criterion of a sufficient application is met.’” *See* NRC Staff’s Response to Petitions for Leave to Intervene, Docket Nos. 50-247/286-LR (Jan 22, 2008) at 16, n.37 (internal citations omitted). Entergy itself acknowledges that NUREGs are merely guidance. *See* Entergy’s Answer to Licensing Board Questions, Docket No. 50-271-LR, ASLBP No. 06-849-03-LR (July 9, 2008), at 10. Yet Staff now takes the position that compliance with GALL is the equivalent of compliance with the regulations and that the ASLB cannot require anything further to fulfill the NRC’s mandate of ensuring public safety in the relicensing of nuclear power plants. Despite Staff’s protestations, nothing forecloses the Board from finding areas of regulatory noncompliance between the thresholds of guidance and the requirements of the actual regulations.

Staff makes much of the Commission’s recent statement that a “license renewal applicant’s use of an aging management program identified in the GALL Report constitutes reasonable assurance that it will manage the targeted aging effect during the renewal period.” *See* Staff’s Petition for Review at 14, citing *In the Matter of Amergen Energy Company, LLC, et al.*, CLI-08-23, 68 NRC \_\_\_\_ (Oct. 6, 2008), slip op. at 6. If the Commission did intend to say what Staff interprets this statement to mean, such a statement would be incorrect as a matter of law because (1) GALL has not been promulgated as a regulation pursuant to 5 U.S.C. § 553, and (2) by delaying part of the license renewal obligations beyond the glare of a relicensing proceeding,

the Commission would have sanctioned the removal of a critical analysis from public review. However, reading this statement in the context of the statement which precedes it in the October 6, 2008 order (“An applicant for license renewal ‘*may* reference the GALL Report ... to demonstrate that the programs at the applicant’s facility correspond to those reviewed and approved’ therein, and the applicant must ensure and certify that its programs correspond to those reviewed in the GALL Report” (emphasis added)) it appears that the Commission correctly recognized that although an applicant’s commitment to meet GALL makes what amounts to a “*prima facie*” case for regulatory compliance, an applicant is always obligated to comply with the over-arching requirements of the regulations. The Board remains free to seek additional information from an applicant even if the applicant promises to adhere to GALL. The Commission’s statements focus on an applicant’s compliance with the regulations in the present tense, while Staff would be content with a mere statement of commitment for compliance at some unknown later date.

Nothing in GALL, or in the regulations, limits the Board’s authority to seek additional analyses from an applicant. As the New England Coalition correctly argued to the Board, “NUREG[s] and similar documents are akin to ‘regulatory guides.’ That is, they provide guidance for the Staff’s review, but set neither minimum nor maximum regulatory requirements.” New England Coalition, Inc.’s Proposed Findings of Fact and Conclusions of Law, Docket No. 50-271-LR, ASLBP No. 06-849-03-LR (Aug. 25, 2008) at 10, ¶ 20, *quoting In the Matter of Connecticut Yankee Atomic Power Company* (Haddam Neck Point), ASLBP No. 01-787-02-0LA, 54 NRC 177, 184 (2001); *see also Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 290 (1988).

### POINT III

#### **Staff's CUFen Position Is Erroneous as a Matter of Law**

One important tool in analyzing potential metal fatigue is a cumulative usage factor (“CUF”) along with environmental adjustment factors (“Fen factors”) which together form the “CUFen analysis.” In its pending petition, Staff claims that environmental adjustment factors (CUFen) should be artificially divorced from the CUF analysis and therefore not be subject to public review and adjudication during a license renewal adjudication. As demonstrated below, not only is this wrong as a matter of law, Staff has in fact advocated the use of CUFen for nearly a decade. Staff’s current Petition for Review should be denied because its reading of 10 C.F.R. § 54.21 is incorrect, and because it is well-established that the Commission favors resolution of issues at the hearing stage.

#### **A. CUFen Analyses Are by Necessity Time-Limited Aging Analyses**

Given the text of 10 C.F.R. § 54.21, the CUFen analysis is by necessity a time-limited aging analysis (“TLAA”). *See* 10 C.F.R. § 54.21(c)(1)(i)-(iii). Section 54.21(c), which establishes that each application must contain an evaluation of time-limited aging analyses, requires the applicant to produce a list of time-limited aging analyses, as defined in § 54.3, and to demonstrate that

- (i) The analyses remain valid for the period of extended operation;
- (ii) The analyses have been projected to the end of the period of extended operation; or
- (iii) The effects of aging on the intended function(s) will be adequately managed for the period of extended operation.

10 C.F.R. § 54.21(c)(1)(i)-(iii). In other words, if an applicant’s CUFen analysis is less than 1.0, and the applicant complies with 10 C.F.R. § 54.21(c)(1)(i) or (ii), the applicant need not prepare

an aging management plan at all. Therefore, Staff's argument that the CUFen analysis is not a TLAA makes no sense in terms of § 54.21(c)'s language. Indeed, as the Indian Point ASLB recently found, there is no technical or logistical reason why CUF calculations and any refined CUF analyses cannot be completed as part of the license renewal application. See Memorandum and Order (Ruling on Petitions to Intervene and Requests for Hearing), Docket Nos. 50-247-LR and 50-286-LR, ASLBP No. 07-858-03-LR-BD01 (July 31, 2008) at 112-13, 153-62.

In the Oyster Creek proceeding, the Commission recently expressed its view that consideration of environmentally-adjusted CUF analyses (*i.e.*, CUFen analyses) is relevant to license renewal. See *In the Matter of Amergen Energy Company, LLC* (License Renewal for Oyster Creek Nuclear Generating Station), Docket No. 50-219-LR, Memorandum and Order (Nov. 6, 2008) at 7-8 (citing to the Standard Review Plan for Review of License Renewal Applications for Nuclear Power Plants, NUREG 1800, Rev. 1 (1995) ("SRP"), section 4.3). The Commission assumed that CUFen analyses would be conducted as part of CUF analyses, because "the fatigue life of components in an operational environment (*e.g.*, exposure to reactor coolant) may be less than predicted by the ASME Code, where fatigue life was measured in a controlled laboratory setting." *Id.* at 8. Given the Commission's recognition in *Oyster Creek* of the importance of accounting for environmental effects caused by the real world operational environment in a reactor (*id.* at 6-8), it would make little sense to base a license renewal decision on analyses based on a controlled laboratory setting that do not account for such real world conditions.

Staff has attempted to obscure a very real issue, which could have safety implications, with misguided and incorrect legal analysis. As an initial matter, NRC staff supported industry's

suggestion to incorporate Fen into CUF analyses when EPRI (the Electric Power Research Institute) originally proposed the idea in 1999. *See* Memorandum, Ashok C. Thadani to William D. Travers, Closeout of Generic Safety Issue 190, “Fatigue Evaluation of Metal Components for 60-year Plant Life” (Dec. 26, 1999) (“GSI-190 Closeout Memorandum”) at Exhibit C - Interaction With Industry (noting that EPRI’s “report proposes use of an environmental correction factor to the current Code fatigue evaluation procedures” and stating that “[t]he staff agrees with the concept of using an environmental correction factor (Fen) to obtain fatigue usage reflecting environmental effects.”). NRC staff acknowledged that risk from fatigue failure of components was generally small for a 40-year plant life, and becomes an issue primarily in the renewed licensing term. *Id.* at Attachment 2. Staff stated clearly that “[e]nvironmentally assisted fatigue degradation should be addressed in aging management programs developed for license renewal.” *Id.* After stating for nine years that consideration of environmental factors is important in the context of license renewal, Staff’s present attempt to divorce the environmental Fen factor from the CUF analyses performed as part of time-limited aging analyses is disingenuous.

**B. Commission Precedent Favors Resolution of Issues at the Hearing Stage**

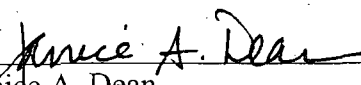
The Commission favors resolution of issues at the hearing stage and not at a later date. *See Consolidated Edison Co.* (Indian Point Station, Unit No. 2), CLI-74-23, 7 AEC 947, 951-952 (1974) (internal citation omitted), citing *Wisconsin Electric Power Co.* (Point Beach Unit 2), RAI-73-1, at 6 (“the mechanism of post-hearing resolution must not be employed to obviate the basic findings prerequisite to an operating license – including a reasonable assurance that the facility can be operated without endangering the health and safety of the public. In short, the ‘post-

hearing' approach should be employed sparingly and only in clear cases.”). The Vermont Yankee Board’s conclusion that “in the context of license renewal, the term ‘time-limited aging analysis’ appropriately incorporates *both* the metal fatigue analysis previously embedded in the applicant’s licensing basis (*e.g.*, the CUF), and the environmental adjustment factors (Fen)” (Nov. 25 Ruling at 65) is not clearly erroneous and is in line with the Commission’s earlier statements as to the timing of analyses that bear on the ability of a facility to withstand the tests of time. Aside from the legal precedent controlling the resolution of aging management issues, scientific reality also favors addressing this issue at the hearing stage. A CUF analysis that excludes the application of the Fen factor would fail to address the likelihood that “environmental effects could result in fatigue still being an issue for plants operating an additional 20-years under a renewed license.” See GSI-190 Closeout Memorandum at 2.

### CONCLUSION

The undersigned *amici* respectfully urge the Commission to deny Staff’s Petition for Review because Staff has not been aggrieved by the ASLB’s decision, or, in the alternative, because Staff’s position is incorrect as a matter of law and is inconsistent with Commission policy.

Dated: December 19, 2008  
New York, New York

  
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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

-----X  
In the Matter of

ENTERGY NUCLEAR VERMONT YANKEE,  
L.L.C., and ENTERGY NUCLEAR  
OPERATIONS, INC.

Docket No. 50-271-LR

(Vermont Yankee Nuclear Power Station)  
-----X

DECLARATION OF SERVICE

Pursuant to 28 U.S.C. §1746, Janice A. Dean hereby declares upon penalty of perjury that:

1. I am over 18 years old and am an employee of the Office of the Attorney General for the State of New York, counsel for the amicus State of New York.

2. On December 19, 2008, I forwarded the attached motion for leave and brief *amicus curiae* to the following judges, law clerk, offices, organizations, attorneys, and/or other individuals at the e-mail and street addresses that follow via electronic and regular United States Mail.

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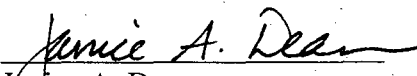
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