

RAS M-419

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OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

<i>In the Matter of</i>	)	May 7, 2009
	)	
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	)	

**NEW ENGLAND COALITION'S REPLY TO NRC STAFF AND ENTERGY  
ANSWERS TO NEW ENGLAND COALITION'S MOTION TO HOLD IN  
ABEYANCE ACTION ON IT'S PROPOSED CONTENTION UNTIL  
ISSUANCE OF NRC STAFF SUPPLEMENTAL SAFETY EVALUATION REPORT**

Pending permission of the Presiding Officer in the above captioned proceeding, New England Coalition, Inc. ("NEC"), intervenor, through its *pro se* representative, Raymond Shadis, herein Replies to Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.'s ("Entergy") Answers to NEC's Motion to Hold in Abeyance Action on This [Its] Proposed Contention Until Issuance Of NRC Staff Supplemental Safety Evaluation Report.

NEC's Motion to Hold in Abeyance Action on This [Its] Proposed Contention Until Issuance of NRC Staff Supplemental Safety Evaluation Report was filed together with NEC's Motion for Leave to File a Timely New Contention on April 24, 2009.

NRC Staff filed its Answer on April 30, 2009.

Entergy filed its Answer on May1, 2009

NEC respectfully submits this Reply pending permission of the Presiding Officer in as much as NRC practice provides for a Motion and Answer, but no Reply absent permission.

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NEC has sought permission of the Presiding Officer to make Reply by letter filed concurrent with this Reply.

NEC's Reply addresses only those arguments that it could not reasonably have anticipated<sup>1</sup>. The unanticipated arguments to which NEC replies are found primarily within the NRC Staff's Answer and involves Entergy only insofar as Entergy unreservedly adopted and endorsed the NRC Staff's arguments in its Answer.

On April 30, 2009 the NRC Staff filed its "Answer in Opposition to NEC Motion to Hold in Abeyance Action on Proposed Contention until Issuance of NRC Staff Supplemental Safety Evaluation Report" ("Staff's Answer"), which provides a cogent explanation of the reasons why the NEC Motion to Hold Action in Abeyance should be denied. Entergy wholly agrees with and supports the Staff's Answer.

Entergy's Answer P.2

## DISCUSSION

1. NRC recklessly mischaracterizes NEC's motion to incorporate consideration of the Supplemental Safety Evaluation Report (SSER) as an attempt to challenge the adequacy of the SSER.

The SSER is Irrelevant to the Issue of Whether the Board Should Admit NEC's Proposed New Contention.

NEC asks the Board to delay acting on its contention until the NRC Staff issues the SSER. Specifically, NEC asserts that the SSER "will be helpful in both building a record in this docket and helpful to the Board and the parties in evaluating the merits of NEC's proposed contention." Motion at 7. However, under well-established Commission precedent, the SSER is not the focus regarding admissibility of NEC's new contention.

The NRC's regulations indicate that "the proper focus of any contention should be the application." *Detroit Edison Co. (Fermi Unit 3)*, CU-09-04, 69 NRC , (Feb. 17, 2009)(slip op. at 4) *citing* 10 C.F.R. § 2.309(f)(1)(vi). **The Commission has stated time**

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<sup>1</sup> 10 CFR § 2.323(c) Answers to motions. Within ten (10) days after service of a written motion, or other period as determined by the Secretary, the Assistant Secretary, or the presiding officer, a party may file an answer in support of or in opposition to the motion, accompanied by affidavits or other evidence. The moving party has no right to reply, except as permitted by the Secretary, the Assistant Secretary, or the presiding officer.

Permission may be granted only in compelling circumstances, such as where the moving party demonstrates that it could not reasonably have anticipated the arguments to which it seeks leave to reply.

**and again that "it is the license application, not the NRC staff review, that is at issue in [NRC] adjudications...."** [Bold Emphasis added]

Nothing could be further from the truth. NEC points to the SSER as a potentially valuable assist in discerning otherwise difficult technical distinctions. Certainly if a proceeding goes forward and NRC Staff, as an adversarial party, cites portions of the SSER in support of the licensee's application; then, certainly, NEC could challenge the accuracy of the information in that context. NEC has indicated nothing regarding a challenge to the adequacy of staff review.

2. NRC Staff has mischaracterized NEC's Motion as asserting the ASLBP must await the NRC Staff's Supplemental Safety Evaluation Report (SSER) before ruling on the admissibility of NEC's proposed new motion.

**The Authorities NEC Cites Do Not Establish that the Board Must Wait for the SSER**  
[Emphasis in Bold added] NRC STAFF Answer -P.6

In fact where in its Motion does NEC state or imply that the Board "must" do anything. In fact a word search of NEC's Motion will not find the word "must" used in any context. NRC Staff's rude polemic device of unilaterally assigning an adversary a position which that party does not own; then knocking it down should not be countenanced and certainly such arguments should be given no credence. What is clear from an unbiased reading of NEC's Motion is that NEC is concerned that the Board has all of the information to which it is entitled and which may be of assistance in making a decision as to whether further hearing is warranted in response to NEC's proposed new contention; before making that decision.

NRC Staff has made no excuse for not providing a SSER and/or an Audit Summary of the confirmatory analyses that are the heart of NEC's proposed new contention and which NRC Staff had scheduled for filing with the Board by April 30,

2009. Similarly missing are Entergy's documentation of how error corrections, reported in its February 27, 2009 letter, were integrated into its fatigue calculations and resolution of the errors through the Vermont Yankee quality assurance and/or corrective action programs. NEC avers that it is reasonable to assume that the SSER will have taken notice of, and resolved these discrepancies.

If not, it appears that NRC Staff and the licensee may be back in the position of postponing resolution of technical safety issues under litigation record until after the record is closed. In this case, the Board has hung whether or not it will further investigate safety issues regarding reactor component metal fatigue on the single pin of NEC producing an admissible contention.

NEC began pursuit of assurance of public safety in this proceeding in May of 2006, in part by challenging Entergy's Aging Management Program for reactor components including reactor nozzles. Soon thereafter Entergy substituted Time Limited Aging analysis (TLAA) ; which in turn proved unacceptable and which was twice redone until it was agreed with NRC Staff that full component specific analyses would be completed after hearings were concluded, but before entering the extended period of operation.

In its November 24, 2008 Partial Initial decision the Board Ordered that Entergy complete these analyses before issuance of a license renewal amendment. Some forty days after filing its confirmatory analyses, Entergy, without offering excuse, informed the Board and the parties that the confirmatory analyses contained a number of errors, that they were not the calculations of record, and that the errors would be entered into

Vermont Yankee's corrective action program. Surely, any SSER would be expected to take these perturbations into account.

As the Board recognized in the PID, "Such recalculations (or an adequate AMP) cannot be consigned to some post-hearing activity, because they are a condition precedent to the license, involve complex scientific and technical judgments and discretion, and are not merely ministerial." NEC believes that it was clear in its motion that the Board has discretion to wait for what assistance the SSER may offer in assessing the "complex scientific and technical judgments"

3. NEC could not have anticipated the NRC Staff's excessively narrow, cribbed, and off-point interpretations of authorities cited by NEC in an effort to demonstrate precedent and policy basis for reliance on NRC Staff Reports, SERs, analyses, and the like; especially for assistance in deciding whether or not proceeding with a hearing is in the public interest.

However the NRC Staff most disingenuously asserts,

NEC cites several authorities to support its argument that the Board should hold further action on NEC's new contention in abeyance until the NRC Staff issues the SSER. A review of these decisions indicates that not one addresses a situation analogous to the instant case. NRC STAFF Answer -P.6

Certainly, every decision cited is "analogous" with respect to the current situation: a Board confronted with complex technical issues weighing the competing considerations of more fully informing its decision and avoiding unnecessary delay. Because the specifics of the technical and legal issues are unique to this proceeding, it should come as no surprise that NEC could locate no decisions formed in identical circumstances. Indeed, NRC Staff has petitioned the Commission for Review of the PID because Staff claims that it transcends current policy.

NEC pleads for particularly careful, fully-informed decision making because a decision on admissibility of the proposed contention hinges in large part on distinguishing discretionary scientific and technical judgments in the confirmatory

analyses of the Core Spray and Recirculation Outlet nozzles from technical and scientific concerns previously litigated with respect to the Feedwater nozzle.

Thus, NEC's concern and the invocation of authorities has little to do with procedure, as NEC Staff colors it, and everything to do with responsible investigation. Specifically, in its Motion NEC requests that the Board extend the time permitted for intervenors to file comment, response, and timely new or amended contentions regarding Entergy Nuclear Vermont Yankee, LLC. and Entergy Nuclear Operations, Inc.'s ("Entergy") confirmatory environmentally-assisted fatigue analyses of Vermont Yankee's core spray ("CS") and recirculation outlet ("RO") nozzles until thirty (30) days after Entergy has filed final, accurate, and complete analyses and until at least fifteen days after NRC Staff has filed its planned Supplemental Safety Evaluation Report and Audit Summary regarding the confirmatory analyses of the CS and RO nozzles.

#### CONCLUSION

For all of the good reasons stated above, NEC respectfully requests the that the Board strike or ignore NRC Staff and Entergy Answers and grant NEC's Motion to Hold in Abeyance Action on This [Its] Proposed Contention Until Issuance Of NRC Staff Supplemental Safety Evaluation Report.

#### CERTIFICATION

New England Coalition has made a good faith effort (via e-mail) to seek the concurrence of the parties in making this filing. The State of Vermont had no objection. The State of Massachusetts had no objection pending review of the contents. New Hampshire made no comment. Entergy and NRC Staff stated that they would object to any such filing. Entergy's counsel requested that NEC attach Entergy's response. It is attached.

Respectfully submitted,

  
Raymond Shadis

Pro se Representative

New England Coalition

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## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing NEC Reply were served on the persons listed below by deposit in the U.S. Mail, first class, postage prepaid; where indicated by an asterisk, by electronic mail; and where indicated by a double asterisk, by both U.S. First Class and electronic mail, this 7th day of May, 2009.

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A handwritten signature in black ink, appearing to read "Raymond Shadis", written over a horizontal line.

Raymond Shadis  
New England Coalition

# *New England Coalition*

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May 7, 2009

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Washington, DC 20555-0001

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**Re: Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.  
Vermont Yankee Nuclear Power Station, Docket No. 50-271LR ASLBP No. 06-849-03-LR**

**New England Coalition's Request for Leave to Reply To NRC Staff And Entergy  
Answers To New England Coalition's Motion To Hold In Abeyance Action On It's  
Proposed Contention Until Issuance Of NRC Staff Supplemental Safety Evaluation  
Report**

Dear Judge Karlin,

New England Coalition (NEC) respectfully request your permission to Reply to NRC Staff and Entergy Answers to New England Coalition's Motion to hold in Abeyance Action on it's Proposed Contention until Issuance of NRC Staff Supplemental Safety Evaluation Report.

NEC is fully aware that such permission is granted only under extraordinary circumstances, for example, when the movant could not reasonably have anticipated the arguments in the Answers. That is precisely the circumstance in the above captioned matter.

NRC Staff, with Entergy seconding, has completely and starkly mischaracterized NEC's Motion and taken NEC to task for arguments NEC never made and objectives it never espoused.

Specifically,

1. NRC recklessly mischaracterizes NEC's motion to incorporate consideration of the Supplemental Safety Evaluation Report (SSER) as an attempt to challenge the adequacy of the SSER.

It most clearly and emphatically is not.

2. NRC Staff has mischaracterized NEC's Motion as asserting the ASLBP must await the NRC Staff's Supplemental Safety Evaluation Report (SSER) before ruling on the admissibility of NEC's proposed new motion.

The Authorities NEC Cites Do Not Establish that the Board Must Wait for the SSER

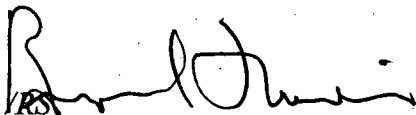
[Emphasis in Bold added] NRC STAFF Answer -P.6

NEC has made no such assertion.

3. NEC could not have anticipated the NRC Staff's excessively narrow, cribbed, and off-point interpretations of authorities that were cited by NEC in an effort to demonstrate precedent and policy basis for reliance on NRC Staff Reports, SERs, analyses, and the like; especially for assistance in deciding whether or not proceeding with a hearing is in the public interest.

NEC has made an attempt to respond to and refute the above NRC Staff's unanticipated arguments in the attached Reply and for all of the good reasons above, NEC respectfully requests that you permit its Reply.

Thank you for your kind attention,



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# New England Coalition

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May 7, 2009

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Washington, DC 20555-0001

**RE: Docket No. 50-271-LR, ASLBP No. 06-849-03-LR, Vermont Yankee Nuclear Power Station**

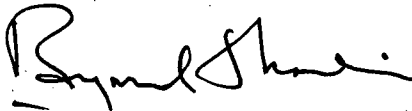
Dear Rulemaking and Adjudications Staff,

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Please find enclosed for filing before the Atomic Safety and Licensing Board in the above-captioned proceeding:

New England Coalition's Letter to the Presiding Officer Requesting Permission to File Reply  
And  
Reply To NRC Staff And Entergy Answers To New England Coalition's Motion To Hold in Abeyance Action on It's Proposed Contention Until Issuance of NRC Staff Supplemental Safety Evaluation Report

Thank you for your kind attention,

/RS 

for New England Coalition, Inc.

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