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June 2, 2009

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

In the Matter of)	
)	
Entergy Nuclear Vermont Yankee, LLC)	Docket No. 50-271-LR
and Entergy Nuclear Operations, Inc.)	ASLBP No. 06-849-03-LR
)	
(Vermont Yankee Nuclear Power Station))	

**ENTERGY'S MOTION TO STRIKE NEW ENGLAND COALITION'S REPLY TO NRC
STAFF AND ENTERGY OPPOSITIONS TO NEC'S MOTION TO FILE
A TIMELY NEW CONTENTION**

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(a), Applicants Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively "Entergy") hereby move to strike New England Coalition, Inc.'s ("NEC") "Reply to NRC Staff and Entergy Oppositions to NEC's Motion for Leave to File a Timely New Contention" dated May 26, 2007 but served no earlier than May 27, 2009 ("NEC Reply"). In addition to being late and not served electronically on Entergy -- the party against whom most of the Reply is directed -- the NEC Reply impermissibly seeks to supplement NEC's previous motion to admit a new contention¹ by providing a new affidavit that makes additional factual claims not found in the NEC Motion. These new claims are asserted without any attempt to satisfy the standards for late-filed amendments to contentions set forth in 10 C.F.R. §§ 2.309(c) and (f)(2). For all these reasons, the NEC Reply should be stricken.

¹ New England Coalition, Inc.'s ("NEC") Motion for Leave to File a Timely New Contention and Motion to Hold in Abeyance Action on this Proposed Contention until Issuance of NRC Staff Supplemental Safety Evaluation Report, dated April 24, 2009 ("NEC Motion").

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DS-03

II. ARGUMENT

A. THE NEC REPLY IS UNTIMELY

The NEC Reply is untimely because replies to the responses filed by Entergy² and the NRC Staff³ to the NEC Motion were due no later than May 26, 2009, seven days after the filing of the responses to NEC's Motion. 10 C.F.R. § 2.309(h)(1).⁴ NEC submitted its Reply electronically on May 27, 2009. The Certificate of Service provided by NEC (Attachment 1 hereto) certifies that hard copies were mailed to all parties on May 26, 2009. The envelope that contained Entergy's hard copy of the NEC Reply, however, has a U.S. Postal Service label demonstrating that the postage for the document was purchased on May 27, 2009, so the document could not have been mailed before that date. (See id.) Entergy's counsel received the hard copy by mail of the NEC Reply on June 1, 2009.

Counsel for Entergy learned of the filing of the NEC Reply on May 28, 2009, when they inquired from counsel for the NRC Staff whether they had received a reply filing from NEC. NRC Staff counsel advised counsel for Entergy that the Staff had received an electronic copy of the NEC Reply on the morning of May 27, 2009. NRC Staff Counsel forwarded a copy of NEC's electronic filing of the NEC Reply to Entergy. The email transmitting the electronic filing shows that it was served on the Board and some of the parties -- but not Entergy -- on May 27, 2009 at 4:17 AM. See Attachment 2 hereto.

From the outset of this proceeding, the Board has required that, if a party anticipates being late in meeting a filing deadline, the party must file a motion for an extension of time as

² Entergy's Opposition to NEC's Motion to File a Timely New Contention, filed on May 18, 2009 ("Entergy's Opposition").

³ NRC Staff's Answer in Opposition to NEC's Motion for Leave to File a New Contention, filed on May 19, 2009 ("Staff's Opposition").

⁴ The seven day deadline for responding to Entergy's response would have expired on May 25, 2009, but it was extended until the next day because May 25, 2009 was a legal holiday. 10 C.F.R. § 2.306.

soon as the movant knows or should have known of the facts, circumstances, or grounds for the motion, and in no event later than 11 AM Eastern Time on the day preceding the applicable deadline. Initial Scheduling Order (Nov. 17, 2006), at 10. NEC's Reply was untimely and was not preceded, or even accompanied, by a motion for an extension of time. Therefore, NEC's late filing was unexcused, and the NEC Reply should be rejected.

B. ENTERGY WAS NOT SERVED WITH AN ELECTRONIC COPY OF THE NEC REPLY EVEN THOUGH THE REPLY WAS MAINLY DIRECTED AT ENTERGY'S RESPONSE

The NRC rules require that pleadings be served on counsel for all parties. 10 C.F.R. § 2.305(b). NEC's failure to serve Entergy electronically requires that the Board strike the NEC Reply. Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), Memorandum and Order (Administrative Matters and Directing Parties Attention to Requirements for Proper Service) (Oct. 29, 2007), slip op. at 2-3; Order (Denying an Extension of Time Within Which To File Requests For Hearing) (Nov. 27, 2007), slip op. at 2-3.

NEC's failure to provide electronic copies of the NEC Reply to Entergy is particularly surprising since three different attorneys have entered appearances on behalf of Entergy, and none was served. Also, NEC has for many years included (as it should) Entergy's counsel among the addressees of its electronic filings. If NEC was using its existing list of addressees, it would have required an affirmative step on NEC's part to delete Entergy counsel from the list.⁵

Most significantly, essentially all of the NEC Reply and most of the 20-page accompanying "Declaration of Dr. Joram Hopfenfeld in Support of New England Coalition's

⁵ While NEC has indicated that its failure to serve Entergy counsel's electronically was due to a computer error, in the Certificate of Service accompanying the NEC Reply the asterisk (*) denoting that the party was served electronically has been deleted for Messrs. Lewis and Travieso-Diaz. See Attachment 1. The certificates of service for all prior NEC filings in this proceeding showed an asterisk next to the Entergy counsel's names, signifying that the filing had been served electronically on them.

Reply to NRC Staff and Entergy Oppositions to Motion to File a Timely New Contention” dated May 26, 2009 (“Hopenfeld Declaration”) are directed at Entergy’s Opposition. NEC’s failure to serve the party against whom its pleading is directed runs contrary to the requirements of fairness and avoidance of surprise in Commission proceedings, see 10 C.F.R. § 2.319, and warrants striking the NEC Reply as the offending pleading.

C. THE NEC REPLY EXCEEDS THE PERMISSIBLE SCOPE OF A REPLY IN AN ADJUDICATORY PROCEEDING

The NEC Reply impermissibly seeks to supplement its proposed contention by providing an affidavit from Dr. Hopenfeld that raises new claims not found in the NEC Motion. The NEC Reply does not provide any basis that would warrant accepting such late-filed amendments to NEC’s proposed contention, as required by 10 C.F.R. §§ 2.309(c) and (f)(2). Accordingly, the NEC Reply and the Hopenfeld Declaration must be stricken.

The NEC Reply is based entirely on the Hopenfeld Declaration, a document that ostensibly responds to the statements in the Entergy Opposition and the Staff Opposition. However, the Hopenfeld Declaration attempts to rehabilitate the claims in the NEC Motion by making a number of new factual assertions.⁶

While the NRC rules do not specify the content of a reply, other provisions of Part 2, the Statement of Considerations published with the final rule that amended the 10 C.F.R. Part 2

⁶ For example, with respect to Entergy’s assertion that it is unwarranted and illogical to use different dissolved oxygen concentrations for both ends of the same nozzle, Dr. Hopenfeld alleges:

Because of the variation of the oxygen during startup and shutdown transients it impossible for Entergy to single [sic] value of oxygen for both ends of the RO nozzle and at the same time comply with ANL’s instructions. This is a new material issue that has not previously been discussed. Using different oxygen concentration could significantly affect the calculated CUF values.

Hopenfeld Declaration at 6. Dr. Hopenfeld therefore concedes that this allegation (that regardless of what the actual value of dissolved oxygen is in a transient one must postulate the worst value for each nozzle) is new. Other instances of new claims in the Hopenfeld Declaration are listed in Appendix 1.

regulations, and Commission precedent make clear that a reply is to “be narrowly focused on the legal or logical arguments presented” in the answers of the applicant and NRC Staff. Final Rule: “Changes to Adjudicatory Process,” 69 Fed. Reg. 2,182, 2,203 (Jan. 14, 2004). In this case, NEC has gone beyond the scope of an allowable reply by providing a new affidavit that raises new factual claims in support of the Reply.

The Commission has squarely ruled that a reply to an answer may not be used to add new bases for or supplement an otherwise deficient contention. Louisiana Energy Services, L.P. (National Enrichment Facility) (“LES”), CLI-04-25, 60 N.R.C. 223, 225 (2004) and CLI-04-35, 60 N.R.C. 619, 623 (2004); Nuclear Management Company (Palisades Nuclear Plant), CLI-06-17, 63 N.R.C. 727, 732 (2006). In Palisades, the Commission held that allowing new claims in a reply “would unfairly deprive other participants an opportunity to rebut the new claims.” Id. Such unfairness would result because NRC regulations do not allow the applicant or other parties to respond to a Petitioner's reply. 10 C.F.R. § 2.309(h)(3).

New arguments or support for a contention “cannot be introduced in a reply brief, or any other time after the date the original contentions are due, unless the petitioner meets the late filing criteria set forth in 10 C.F.R. § 2.309(c), (f)(2).” Palisades, CLI-06-17, 63 N.R.C. at 732. Under the provisions of 10 C.F.R. § 2.309(f)(2), “amended or new contentions filed after the initial filing” may be submitted “only with leave of the presiding officer upon a showing that –

- (i) The information upon which the amended or new contention is based was not previously available;
- (ii) The information upon which the amended or new contention is based is materially different than information previously available;
and

(iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.”

10 C.F.R. § 2.309(f)(2) (emphasis added). In this case NEC has neither cited nor attempted to demonstrate that the new claims raised in its Reply meet the requirements of 10 C.F.R. § 2.309(f)(2).⁷ Therefore, the new claims raised in the NEC Reply are impermissible and should be stricken.

The Board in this proceeding has recognized and applied these principles to strike impermissible new claims and affidavits filed by NEC in its Reply to Entergy’s response to NEC’s initial Petition to Intervene.⁸ The Board found that NEC impermissibly "expand[ed] its arguments" by filing with its Reply a declaration from Dr. Hopfenfeld that provided additional detail regarding NEC’s flow accelerated corrosion contention. Memorandum and Order (Ruling on Standing, Contentions, Hearing Procedures, State Statutory Claim, and Contention Adoption), LBP-06-20, 64 N.R.C. 131, 198 (2006). The Board also struck all portions of Dr. Hopfenfeld’s declaration relating to the steam dryer contention, finding that these portions of the Reply and its supporting documents "include[d] new arguments and factual information that were not included in the initial petition and do not directly address challenges in the answers, and that therefore exceed the permissible scope of a reply." Id. at 191. Finally, the Board struck the portions of the NEC Reply dealing with the main condenser integrity contention and the corresponding paragraphs of NEC’s expert Mr. Arnold Gunderson’s declaration on the same contention because they “exceed[ed] what is permissible in a reply brief and therefore should be seen as an attempt to rehabilitate and to amend the original contention. The Commission has stated clearly that such attempts to amend contentions are impermissible in reply briefs.” Id. at 198-99, footnote

⁷ NEC has also failed to address the factors used in evaluating nontimely contentions set forth in 10 C.F.R. § 2.309(c).

⁸ NEC’s Reply to Entergy and NRC Staff Answers to Petition for Leave to Intervene, Request for Hearing, and Contentions (June 29, 2006).

omitted. The same remedy – striking the NEC Reply and the Hopenfeld Declaration – should be applied here.

III. CONCLUSION

The NEC Reply ignores the Commission's well-established rules of practice with respect to timeliness, service of pleadings, and permissible scope of replies. These rules were put in place specifically to ensure fair, judicious, and efficient administration of licensing proceedings. Both the Commission's rules and precedents mandate striking the NEC Reply and the accompanying Hopenfeld Declaration. Entergy respectfully requests that the Board do so.

CERTIFICATION

In accordance with 10 C.F.R. §2.323(b), counsel for Entergy has discussed this motion with counsel for the other parties in this proceeding in an attempt to resolve this issue but has not been successful in resolving it.

Respectfully Submitted,



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Dated: June 2, 2009

APPENDIX 1

NEW FACTUAL ASSERTIONS IN HOPENFELD DECLARATION

Although unclear, the Hopfenfeld Declaration lists at a minimum the following new claims:

- Page 2: “[b]ecause of the flow acceleration along the convergent nozzle the heat transfer coefficient is expected to [sic] much less uniform in comparison to the flow in a pipe where no acceleration exists.”
- Page 4: “the Grashoff number is defined in terms of X^3 and not in terms of X as stated by Entergy. (See 0801038.301 page 10).”
- Page 6: “Because of the variation of the oxygen during startup and shutdown transients it [sic] impossible for Entergy to use a single value of oxygen for both ends of the RO nozzle and at the same time comply with ANL’s instructions. This is a new material issue that has not previously been discussed. Using different oxygen concentration could significantly affect the calculated CUF values.”
- Page 8: “Consequently, as a result of Entergy’s refusal to provide the ASLB their final calculations on the RO and CS nozzle that [sic] the details of the heat transfer and oxygen, calculations for these specific components were not discussed at the hearing.” (This assertion is repeated on page 19).
- Page 8: “The RO nozzle has a convergent (non uniform diameter) shape while the FW has a uniform diameter.”
- Page 9: “The differences in gradients at the walls of the nozzle relate yo [sic] to the heat transfer coefficient.”

- Pages 9-10: “It is preposterous for Entergy to claim that resolution of the corner effects for a straight pipe is universal and is applicable to all geometries. Such a conclusion is refuted by the enormous amount of work in the past 100 years in studying the effects [sic] **different geometries** on heat transfer, and mass transfer controlled corrosion (emphasis in original).”
- Page 10: “For this reason in the related issue of local corrosion Entergy testifies that nozzles and discontinuities behave differently than flow in a constant diameter pipe.”
- Page 10: “A very rudimentary review of NEC Motion Attachment 1 clearly shows that below a length to diameter ratio of about 4 the heat transfer strongly depends on the Reynolds number. Only when the diameter is larger than 4 the heat transfer coefficient becomes less sensitive to Reynolds number as pointed out by Mr. Stevens. It is not possible to interpret that data any other way. There is no indication that, it is not sensitive, it is only less sensitive.”
- Page 10: “Because of its large diameter, the entire length of the RO nozzle is affected by the non uniformity of heat transfer. Entergy’s application of the axis symmetrical model for stress calculations is not applicable to the RO nozzle” (emphasis in original).
- Pages 11-12: “At a public meeting devoted to the CUF calculations, January 2008, SIA stated that the CUF was very sensitive to the heat transfer coefficient. At that meeting, SIA presented data on the effect of velocity on the stress during transients. Because of the almost linear relation between heat transfer coefficient and the velocity this data is relevant to the present discussion. . . . The data that SIA presented at the January meeting was also discussed at the VY hearing, it demonstrated the sensitivity of the stress to the heat transfer coefficient as a function of time during the transient.”

- Page 12: “At the beginning of the transient the effect of the heat transfer coefficient in [sic] the stress is insignificant but it becomes more pronounced, 75%, during the later part of the transient.”
- Page 12: “The assertion that the heat transfer coefficient both in absolute terms and its non uniformity is a new information that must be explored because it could significantly effect [sic] the CUF.”
- Page 13: “The equation on page 6 of the above Reference is easily recognized as the Dittus and Boelter equation. This equation was empirically derived for a fully developed flow in **straight pipe of a uniform diameter**. It has been used successfully in numerous engineering applications for the last 80 years. However, the Dittus-Boelter equation is **not applicable** to flow in **convergent nozzles**” (emphasis in original).
- Page 14: “The discovery of the cracks [at Fitzpatrick and Oyster Creek] demonstrates that the fatigue analysis may not have been conservative because of preexisting cracks.”
- Page 15: “Given the history of cracking in BWR nozzles the possibility of cracks in the RO nozzles cannot be excluded. The fact the large crack at Oyster Creek has gone **undetected since 1991** illustrates this point very clearly” (emphasis in original).
- Page 16: “Entergy’s witnesses did not establish that the ASME code does not require postulating cracks in analysis. This is true in general, but not when plant experience clearly indicates that the component which is being analyzed already contains cracks.”
- Page 16: “The absolute velocity is not the relevant parameter which would determine whether one can assume, as Entergy did that the heat transfer is uniform throughout the

channel. Secondly the data in the attachment is given in terms of the Reynolds number, and convergence angle.”

- Page 17: “The analogy between heat transfer and flow dictates that the relevant parameter to consider in comparing flow velocities to heat transfer is **shear or skin friction** at the wall which is described by the local velocity gradient at the wall and the heat transfer coefficient which is described by the temperature gradient at the wall, and not by the velocity as implied by the NRC. As the velocity increases the gradient at the wall increases” (emphasis in original).
- Page 17: “Since the flow area in the RO nozzle varies continuously, from 36 inches to 26 inches, it would be physically impossible for the velocity to be uniform throughout the nozzle.”
- Page 18: “Entergy did not indicate anywhere, (Table 7, 08011038,304 and page 9 of 0801038.301) that the equations were obtained under transient conditions.”
- An earlier edition of the NRC cited text, gives no indication that the natural convection used by Entergy, with or without condensation, were obtained under transient conditions.”
- Page 18: “Holman also states that the free convection phenomena inside the tubes are extremely complicated. Equation 9-29 represents the average heat transfer in tube which is adequate for calculating overall heat transfer performance of engineering systems. It is inappropriate to use average heat transfer values when local differences in temperature could introduce stresses.”

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing “Entergy’s Motion to Strike New England Coalition’s Reply to NRC Staff and Entergy Oppositions to NEC’s Motion to File a Timely New Contention” were served on the persons listed below by deposit in the U.S. Mail, first class, postage prepaid, and where indicated by an asterisk by electronic mail, this 2nd day of June, 2009.

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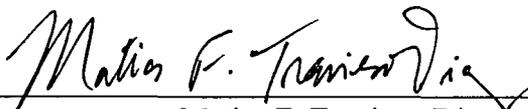
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NEC's Reply to Entergy's and NRC Staff's Opposition to NEC's Motion to File a Timely New Contention" were served on the persons listed below by deposit in the U.S. Mail, first class, postage prepaid, and where indicated by an asterisk by electronic mail, this 26th day of May 2009.

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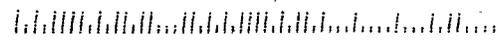


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Subject: FW: NEC Filing Vermont Yankee License Renewal Docket 50-271

Attachments: AAANEC REPLY FINAL.doc; AAAJH FINAL.doc; AAAREPLY CVR FINAL.doc



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Subject: NEC Filing Vermont Yankee License Renewal Docket 50-271

Attached please find NEC REPLY, DECLARATION , AND TRANSMITTAL LETER. Thank you.
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