

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)

ENTERGY NUCLEAR VERMONT YANKEE)
LLC, AND ENTERGY NUCLEAR)
OPERATIONS, INC.)

(Vermont Yankee Nuclear Power Station))

Docket No. 50-271-LR

NRC STAFF'S ANSWER IN OPPOSITION TO NEW ENGLAND COALITION'S PETITION FOR
REVIEW OF THE LICENSING BOARD'S FULL INITIAL DECISION, LBP-09-09

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August 3, 2009

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NRC STAFF'S ANSWER IN OPPOSITION TO NEW ENGLAND COALITION'S PETITION FOR
REVIEW OF THE LICENSING BOARD'S FULL INITIAL DECISION, LBP-09-09

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") petition for review ("Petition") of the Atomic Safety and Licensing Board's ("Board") Full Initial Decision, LBP-09-09, 69 NRC ____ (July 8, 2009) (slip op.) ("FID" or "LBP-09-09").¹ For the reasons set forth herein, the Petition should be denied on the grounds that NEC has not met the criteria set forth in 10 C.F.R. § 2.341(b)(4)(i)-(v) for Commission review.

BACKGROUND

By letter dated January 25, 2006, Entergy submitted to the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") an application for license renewal,² pursuant to 10 C.F.R.

¹ New England Coalition's Petition for Review of the Licensing Board's Full Initial Decision, LBP-09-09 (July 23, 2009) (ADAMS Accession No. ML092120220) ("Petition").

² Vermont Yankee Nuclear Power Station License Renewal Application (Jan. 25, 2006) (ADAMS Accession No. ML060300085). Entergy has since supplemented and amended its application several times.

Part 54, of Operating License No. DPR-28 for the Vermont Yankee Nuclear Power Station (“VYNPS”). The current operating license expires on March 21, 2012.

NEC filed a petition for leave to intervene on May 26, 2006.³ As relevant to this petition, the Board granted intervention and admitted NEC Contention 2. NEC Contention 2 alleged that Entergy’s License Renewal Application (“LRA”) did not include an adequate plan to monitor and manage the effects of aging due to metal fatigue on key reactor components, as required by 10 C.F.R. § 54.21(c).⁴

On September 4, 2007, NEC filed a motion to file a timely new or amended contention challenging Entergy’s August 2, 2007, environmentally adjusted cumulative usage factor (“CUFen”) analyses for nine key locations (“refined CUFen analyses”). In admitting the new contention, the Board noted that if Entergy could successfully show that the refined CUFen analyses met the requirements of 10 C.F.R. § 54.21(c), Entergy would not need to demonstrate that the aging management plan met the requirements of that section. The refined CUFen analyses would meet the requirements of 10 C.F.R. § 54.21(c) if they resulted in a value less than one, or unity. A value less than unity indicates that the analyzed component would not likely develop metal fatigue cracks that would affect its function during the period of extended operation. Thus, the Board admitted the new contention as Contention 2A and held NEC’s original Contention 2 in abeyance.⁵

On March 17, 2008, NEC filed a motion for leave to file a new or amended contention challenging Entergy’s February 15, 2008, confirmatory CUFen analysis for the feedwater (“FW”)

³ Vermont Department of Public Service (“DPS”), the Massachusetts Attorney General (“AG”), and the Town of Marlboro, Vermont (“Marlboro”) also filed petitions to intervene.

⁴ *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 183 (2006).

⁵ *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-07-15, 66 NRC 261, 264, 270-71 (2007).

nozzle (“confirmatory CUFen analysis”). Entergy had submitted the confirmatory CUFen analyses to address concerns raised by the Staff regarding Entergy’s use of the simplified Green’s function methodology in calculating the refined CUFen analyses for the nine key locations. The confirmatory CUFen analysis did not rely on the simplified Green’s function methodology. Entergy intended the confirmatory CUFen analyses for the FW nozzle to demonstrate the validity of the refined CUFen analysis for the remaining key locations because Entergy believed the FW nozzle was the bounding component. NEC alleged that the confirmatory CUFen analysis was flawed, that it did not bound the refined CUFen analyses for other components, and that it only addressed the use of the Green’s function methodology (i.e. the confirmatory CUFen analysis did not address NEC’s other concerns with the refined CUFens raised by Contention 2A). The Board admitted this contention as Contention 2B.⁶

The Board held a hearing in Vermont during the week of July 21, 2008. Subsequently, the Board issued a Partial Initial Decision (“PID” or “LBP-08-25”), finding that the confirmatory CUFen analysis for the FW nozzle met all regulatory requirements.⁷ The Board also found that Entergy’s refined CUFen analyses met all regulatory requirements but one. The Board concluded that Entergy’s use of the simplified Green’s function methodology in calculating the refined CUFen analyses for the core spray (“CS”) and reactor recirculation outlet (“RO”) nozzles did not comply with NRC regulations.⁸ Thus, the Board concluded,

Assuming Entergy still wishes to pursue this license renewal, it must (1) recalculate the CUFen analyses for the CS and [RO] nozzles, in accordance with the ASME Code, NUREG 6583 and 5704, and all other regulatory guidance, (2) resubmit these results to the NRC Staff and serve them on the other parties

⁶ Order (Granting Motion to Amend Contention 2A) (April 24, 2008) (Unpublished) (ADAMS Accession No. ML081150600).

⁷ *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), Partial Initial Decision, LBP-08-25, 68 NRC 763, 831 (2008).

⁸ *Id.* at 831.

herein, and (3) either demonstrate that the [results of the calculations] are less than unity or submit an adequate AMP for these components. . . .

If the CUFen analyses are (1) done in accordance with the above stated guidance and the basic approach used in the Confirmatory CUFen Analysis for the FW nozzle, (2) contain no significantly different scientific or technical judgments, and (3) demonstrate values less than unity, then this adjudicatory proceeding terminates. If not, NEC may file a new or amended contention challenging the adequacy of the CUFen calculation⁹

In a subsequent order clarifying the PID, the Board stated that such a new or amended contention must meet the requirements of 10 C.F.R. § 2.309(f)(1) and (2).¹⁰ Last, the Board cautioned NEC not to file proposed new contentions “to rehash or renew any technical challenges that have already been raised and resolved in this proceeding (e.g., dissolved oxygen, outdated equations, etc.).”¹¹

On December 9, 2008, the Staff filed a Petition for Review of the PID with respect to Contention 2A.¹² That petition is pending before the Commission. On December 17, 2008, NEC filed a Motion for Reconsideration of the PID.¹³ The Board issued an order denying NEC’s Motion for Reconsideration on January 26, 2009.¹⁴

⁹ *Id.* at 831-32.

¹⁰ Memorandum and Order Clarifying Deadline for Filing New or Amended Contention, at 3 (Mar. 9, 2009) (ADAMS Accession No. ML090680620).

¹¹ *PID*, LBP-08-25, 68 NRC at 832 n. 95.

¹² NRC Staff’s Petition for Review of the Licensing Board’s Partial Initial Decision, LBP-08-25 (Dec. 9, 2008) (ADAMS Accession No. ML083440600). The Staff’s Petition requested review of the Board’s interpretation of 10 C.F.R. § 54.21(c). That interpretation required the applicant’s AMP to contain some form of analysis. The Staff believed this reading confused and mixed the AMP and TLAA approaches. NRC Staff’s Petition for Review of the Licensing Board’s Partial Initial Decision, LBP-08-25 at 18-21.

¹³ New England Coalition’s Motion for Reconsideration of the Licensing Board’s Partial Initial Decision (Dec. 18, 2008) (ADAMS Accession No. ML090160358) (“Motion for Reconsideration”).

¹⁴ Order (Denying NEC Petition for Reconsideration Under 10 C.F.R. § 2.345(b)), (Jan. 26, 2009) (ADAMS Accession No. ML090260355).

Entergy performed the refined CUFen analyses for the CS and RO nozzles without relying on the simplified Green's function methodology ("final CUFen analyses") and submitted them to the NRC on March 10, 2009.¹⁵

On April 24, 2009, NEC filed a motion to admit a new or amended contention challenging the final CUFen analyses.¹⁶ NEC attached the "Declaration of Dr. Joram Hopenfeld In Support of New England Coalition's Motion to File a New of Amended Contention on Entergy's Fatigue Reanalysis" ("Hopenfeld Declaration") to that motion. Therein, NEC argued that "Entergy has not *properly* recalculated the Core Spray and Recirculation Outlet nozzle CUFens such that they demonstrate that these important components will not fail during the period of extended operation."¹⁷ NEC asserted that, contrary to regulatory guidance, Entergy relied on technically and factually flawed scientific judgments to calculate the final CS and RO nozzle CUFen analyses.¹⁸ Specifically, NEC stated that in preparing the final CUFen analyses for the RO and CS nozzles, Entergy incorrectly assumed (1) a fully developed, uniform flow in calculating the heat transfer coefficient during forced convection flow, (2) that the heat transfer coefficient did not vary in the vertical direction within the nozzles during natural convection flow, (3) a constant dissolved oxygen ("DO") concentration, and (4) the absence of cracks in the RO nozzle.¹⁹ The NRC Staff and Entergy filed Answers to NEC's Motion,²⁰ to which NEC subsequently filed a reply.²¹

¹⁵ Letter from Matias F. Travieso-Diaz, Counsel for Entergy to Atomic Safety and Licensing Board (Mar. 10, 2009) (ADAMS Accession No. ML090840422) ("March 10, 2009 Entergy Letter").

¹⁶ New England Coalition, Inc.'s 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 (Apr. 24, 2009)(ADAMS Accession No. ML091200514)("NEC Motion").

¹⁷ NEC Motion at 1 (emphasis in original).

¹⁸ *Id.* at 2.

¹⁹ Hopenfeld Declaration at A7-A24.
(continued. . .)

On July 8, 2009, the Board responded to these arguments in the FID. The Board found that NEC's motion did not meet the requirements for a new or amended contention set forth in the PID.²² Additionally, the Board concluded that the motion did not meet the standards for filing a new or amended contention under 10 C.F.R. § 2.309(f)(2).²³ As a result, the Board denied NEC's motion and entered an order terminating the adjudicatory proceedings.²⁴

Subsequently, NEC filed the instant Petition for Commission review of the FID.

DISCUSSION

Since the Board's decision in LBP-09-09 constituted the Board's full initial decision, a petition for Commission review is authorized by 10 C.F.R. § 2.341(b). Section 2.341(b)(1) provides for *discretionary* Commission review of "a full or partial initial decision by a presiding officer." In deciding whether to grant review, the Commission considers whether the petition raises a *substantial question* with respect to the following criteria found in section 2.341(b)(4):

- (1) a finding of material fact is clearly erroneous,
- (2) a necessary legal conclusion is without precedent or conflicts with existing law,
- (3) the appeal raises a substantial and important question of law or policy,
- (4) the proceeding involved a prejudicial procedural error, or
- (5) any other consideration the Commission determines to be in the public interest.

(. . .continued)

²⁰ NRC Staff's Answer in Opposition to NEC's Motion for Leave to File a New Contention (May 19, 2009) (ADAMS Accession No. ML091390785) (Staff's May 18, 2009, Answer); Entergy's Opposition to NEC's Motion to File a Timely New Contention (May 18, 2009) (ADAMS Accession No. ML091420373).

²¹ New England Coalition's Reply to NRC Staff and Entergy Oppositions to NEC's Motion to File a Timely New Contention (May 26, 2009) (ADAMS Accession No. ML091540404).

²² LBP-09-09 at 8-9.

²³ *Id.* at 9.

²⁴ *Id.* at 9-10.

The burden is on NEC, the petitioner, to identify the error in the Board's decision and thereby demonstrate that Commission review is warranted.²⁵

As explained more fully below, NEC has failed to demonstrate that the Board's material factual findings are clearly erroneous, that the Board's legal conclusions depart from or are contrary to established law, or that the Board's procedural rulings resulted in actual prejudice. Therefore, NEC has not met its burden under 10 C.F.R. § 2.341(b)(4), and its petition for review should be denied.

I. Standard of Review

The Commission's standard to demonstrate that a finding of a material fact is clearly erroneous is quite high and requires a showing that the Board's findings are "not even plausible in light of the record viewed in its entirety."²⁶ The Commission defers to a licensing board's findings of fact as long as the "Licensing Board has issued a plausible decision that rests on carefully rendered findings of fact" and is particularly deferential to a Board's determinations of witness credibility and the weight to be given to witness testimony.²⁷ Thus, the Commission will reject or modify a board's findings only if, after accounting for appropriate deference to the "primary fact finder," the Commission is "convinced that the record *compels* a different result."²⁸ The Commission will not overturn a board's findings simply because it might have reached a

²⁵ See *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 40441), CLI-94-6, 39 NRC 285, 297-98 (1994).

²⁶ *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11, 25-26 (2003) ("PFS") (citing *Anderson v. Bessemer City*, 470 U.S. 564, 573-76 (1985)).

²⁷ *Id.*; *Union Electric Co.* (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 368 (1983).

²⁸ *General Public Utilities* (Three Mile Island Nuclear Station, Unit No. 1) ALAB-881, 26 NRC 465, 473 (1987) (emphasis added).

different result or because the record could support a view sharply different from that of the Board.²⁹

With respect to a Board's conclusions of law, a petitioner must show an "error of law or abuse of discretion" by the Board.³⁰ The Commission will reverse a Board's legal conclusions only "if they are a departure from or contrary to established law."³¹

Another factor the Commission considers when deciding whether to grant review is whether the proceeding involves a prejudicial procedural error. See § 2.341(b)(4)(iv). The Commission will grant relief for procedural errors that result in actual prejudice; i.e., if the petitioner demonstrates that the Board's procedural error had a substantial impact on the outcome of the proceeding.³²

II. The Board Properly Rejected NEC's New or Amended Contention in LBP-09-09

A. The Board Properly Found that NEC's New Contention Did Not Meet the Requirements for a Late Filed Contention under 10 C.F.R. § 2.309(f)(2)

Under 10 C.F.R. § 2.309(f)(2), a presiding officer may grant leave to a party to file a new or amended contention if the party makes the following showings: (1) "[t]he information upon which the amended or new contention is based was not previously available," (2) "[t]he information upon which the amended or new contention is based is materially different than information previously available," and (3) "[t]he amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information." NEC's proposed

²⁹ See *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1; Sequoyah Plants, Units 1 & 2; Browns Ferry Nuclear Plant, Units 1, 2 & 3), CLI-04-24, 60 NRC 160, 190 (2004); *PFS*, CLI-03-8, 58 NRC at 27 (quoting *Kenneth G. Pierce* (Shorewood, Illinois), CLI-95-6, 41 NRC 381, 382 (1995)).

³⁰ *USEC, Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 439 n.32 (2006).

³¹ *TVA*, CLI-04-24, 60 NRC 160, 190 (2004) (internal quotations omitted).

³² *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1151 (1984) (citing *Louisiana Power & Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1096 (1983)).

new contention challenged several elements of Entergy's final CUFen analyses for the CS and RO nozzles. Specifically, NEC challenged Entergy's calculation of the heat transfer coefficient during natural and forced convection, Entergy's assumptions regarding dissolved oxygen ("DO"), and Entergy's assumption that no cracks existed in the RO nozzle.³³ However, Entergy's final CUFen analyses for the CS and RO nozzles calculated heat transfer coefficients in the same manner as the refined CUFen analyses for those nozzles, and both sets of analyses made identical assumptions regarding DO and cracks in the RO nozzle.³⁴ The primary change between the two sets of analyses was that the final CUFen analyses did not rely on the simplified Green's function methodology. Yet, NEC did not base any of its challenges on that aspect of the final CUFen analyses. Moreover, NEC did not demonstrate how any of the changes between the two sets of analyses impacted the areas of the final CUFen analyses that NEC had challenged. Thus, the Board correctly denied NEC's petition for leave to file a new or amended contention because it was not based on new information or information that was materially different from previously available information.³⁵

NEC raises several unsupported objections to the Board's conclusion, but none have merit. NEC asserts that it did not challenge assumptions incorporated into "discarded license renewal application amendments" but rather challenged assumptions that were part of the "*confirmatory analyses*, which were removed from these proceedings by agreement."³⁶ To which set of analyses NEC refers with the phrase "confirmatory analyses" is unclear. In any

³³ Hopenfeld Declaration at A7-A24.

³⁴ Compare March 10, 2009 Letter from Entergy, Fatigue Analysis of Reactor Recirculation Outlet Nozzle, file number 0801038.306 and Fatigue Analysis of Reactor Core Spray Nozzle, file number 0801038.303 with Intervenor Exhibit NEC_JH-13 (fatigue analysis of CS nozzle); Applicant Exhibit E2-15-VY (fatigue analysis of RO nozzle).

³⁵ LBP-09-09 at 9.

³⁶ Petition at 18.

event, the refined CUFen analyses for the CS and RO nozzles, which contained inputs identical to those in the final CUFen analyses challenged by NEC, were certainly before the Board when it issued the PID.³⁷ Moreover, as made clear in LBP-09-09, the Board clearly understood the refined CUFen analyses to be within the scope of the 2008 evidentiary hearing.³⁸ Thus, the inputs to the final CUFen analyses for the CS and RO nozzles that NEC sought to challenge were available to NEC long before the 2008 evidentiary hearing and were certainly within the scope of that hearing. As a result, any claim by NEC that it only had an opportunity to challenge those inputs once Entergy issued the final CUFen analyses is not correct.³⁹

NEC's claim that the Board impermissibly limited the scope of topics upon which it could file a new or amended contention is also incorrect.⁴⁰ NEC asserts that the Board "unfairly reached beyond the minimal factual, material requirements for a new contention" and "radically reduc[ed] the acceptable scope of any new contention."⁴¹ However, as demonstrated above, the Board applied the standards of 10 C.F.R. § 2.309(f)(2) to NEC's proposed new contention and found that it was based upon information that was previously available to NEC.⁴² The

³⁷ See *PID*, LBP-08-25, 68 NRC at 794, 804-06, 807-09, 815-16 (evaluating the refined CUFen analyses in light of evidence presented on those calculations).

³⁸ LBP-09-09 at 9.

³⁹ NEC also argues that its proposed new contention met the normal contention admissibility requirements of 10 C.F.R. § 2.309(f)(1). The NRC Staff and Entergy each submitted ample argument suggesting that it did not. See *supra* note 20. Nonetheless, because the Board did not base its decision on whether the proposed new contention met the requirements of 10 C.F.R. § 2.309(f)(1), LBP-09-09 at 8, this argument provides no basis for the Commission to review the Board's decision.

⁴⁰ Contrary to NEC's assertion, Section 189a of the Atomic Energy Act of 1954, as amended, does not guarantee the right to an adjudicatory hearing on an issue not properly raised under NRC regulations. *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 677-78 (2008).

⁴¹ Motion at 18.

⁴² LBP-09-09 at 9.

record supports this conclusion.⁴³ Therefore, NEC has failed to provide support for its assertion that the Board unfairly limited the scope of topics upon which NEC could file a new or amended contention.⁴⁴

Finally, NEC suggests that even if its challenges to the final CUFen analyses relied on previously available information, the Board erred by failing to consider new arguments based on that information when NEC raised those arguments in “defense of a contention.”⁴⁵ NEC asserts that earlier the Board stated that “new information may be introduced in defense of a contention if the particular subject was raised by another party attacking it.”⁴⁶ However, all of the bases upon which NEC challenged the final CUFen analyses were in Dr. Hopenfeld’s declaration supporting NEC’s motion for leave to file a new contention.⁴⁷ Thus, contrary to NEC’s claim, the arguments the Board rejected as untimely were not raised in defense of a contention but rather as part of the contention.

The Board properly determined that NEC’s new contention failed to meet the requirements of 10 C.F.R. § 2.309(f)(2). NEC has not shown that the Board’s conclusion was based on an erroneous legal conclusion or a clearly erroneous finding of a material fact. As a result, this claim does not warrant Commission review.⁴⁸

⁴³ See *supra*, note 34.

⁴⁴ NEC argues that the “challenges to the assumptions made by Entergy are challenges that fall outside of the scope or apart from the particularity of those previously rejected by the Board.” Petition at 19. But, the standard for admission of a new or amended contention is whether it is based on new and materially different information as required by 10 C.F.R. § 2.309, not whether it is in the scope of previously raised contentions.

⁴⁵ Petition, at 17.

⁴⁶ *Id.*

⁴⁷ See Hopenfeld Declaration at A6-A24.

⁴⁸ 10 C.F.R. § 2.341(b)(4).

B. The Board Properly Found that NEC's New Contention Did Not Meet the Requirements of LBP-08-25

Next, NEC challenges the Board's conclusion that NEC's proposed new contention failed to meet the requirements specified in the PID. As described above, in the PID the Board stated,

If the [final] CUFen analyses [for the CS and RO nozzles] are (1) done in accordance with the above stated guidance and the basic approach used in the Confirmatory CUFen Analysis for the FW nozzle, (2) contain no significantly different scientific or technical judgments, and (3) demonstrate values less than unity, then this adjudicatory proceeding terminates. If not, NEC may file a new or amended contention challenging the adequacy of the CUFen calculation . . .⁴⁹

Moreover, the Board cautioned NEC not to rehash previously litigated issues in any new or amended contentions it filed challenging the sufficiency of the final CUFen analyses for the CS and RO nozzles.⁵⁰ In LBP-09-09, the Board concluded that "NEC did not follow the foregoing requirements, and its motion fails to show that the Final CUFen Analyses were not performed in accordance with the approach used by Entergy in its analysis of the FW nozzle."⁵¹

The record supports the Board's conclusion that NEC's proposed contention did not meet the requirements set out in the PID. The final CUFen analyses for the CS and RO nozzles used the same basic approach as the confirmatory CUFen analyses for the FW nozzle, contained no significantly different scientific or technical judgments, and demonstrated values less than unity.⁵² Indeed, NEC conceded that Entergy used the same methodology in

⁴⁹ PID, LBP-08-25, 68 NRC at 831-32.

⁵⁰ *Id.* at 832 n.95.

⁵¹ LBP-09-09 at 8.

⁵² Compare March 10, 2009 Letter from Entergy, Fatigue Analysis of Reactor Recirculation Outlet Nozzle, file number 0801038.306 ("Calculation 306") and Fatigue Analysis of Reactor Core Spray Nozzle, file number 0801038.303 ("Calculation 303") (ADAMS Accession No. ML090840422) with Applicant Exhibits E2-25-VY, E2-26-VY, and E2-27-VY (ADAMS Accession Nos. ML082490573, ML082490574, ML082490575) (Confirmatory CUFen Analyses for the FW nozzle).

computing the final CUFen analyses for the CS and RO nozzle that it used in computing the confirmatory CUFen analysis for the FW nozzle.⁵³ NEC's Motion simply rehashed previously litigated arguments.⁵⁴ Thus, the Board reasonably denied NEC's Motion and terminated the adjudicatory proceedings.⁵⁵

On appeal, NEC challenges each of the Board's findings on whether NEC complied with the PID in filing its Motion. NEC notes that the first element the Board laid out in the PID required Entergy to recalculate the CUFen analyses in conformity with "the ASME Code, NUREG 6583 and 5704, and all other regulatory guidance."⁵⁶ NEC contends that in his attached testimony to the NEC Motion and Reply, Dr. Hopenfled discussed Entergy's failure to comply with the ASME code or other regulatory guidance in calculating the final CUFen analyses for the CS and RO nozzles.⁵⁷ However, NEC does not specifically explain why or how Dr. Hopenfled established that Entergy failed to recalculate the CUFen analyses as the Board required. Thus, NEC's opaque reference to the testimony provided by Dr. Hopenfled in support of the new contention hardly satisfies its obligation to clearly identify the error in the Board's decision and demonstrate that it merits Commission review.⁵⁸

Moreover, to warrant Commission review, NEC must demonstrate that the Board's decision was not even plausible in light of the record.⁵⁹ However, the record contains ample

⁵³ Hopenfled Declaration at A6.

⁵⁴ *Compare* Hopenfled Declaration at A6-A24 with PID, LBP-08-25, 68 NRC at 807-09, 809-10, 815-16.

⁵⁵ LBP-09-09 at 9-10.

⁵⁶ Petition at 15.

⁵⁷ *Id.*

⁵⁸ *See Advanced Medical Systems*, CLI-94-6, 39 NRC at 297-98.

⁵⁹ *PFS*, CLI-03-8, 58 NRC at 25-26.
(continued. . .)

support for the Board's decision that the final CUFen analyses met the standards in the ASME Code, NUREGs 6593 and 5704, and other applicable regulatory guidance. As mentioned above, NEC raised four challenges to the final CUFen analyses for the CS and RO nozzles. NEC challenged Entergy's use of heat transfer coefficients during natural convection, use of heat transfer coefficients during forced convection, assumptions regarding DO, and assumption that no cracks existed in the RO nozzle.⁶⁰ However, in the PID, the Board rejected arguments that were similar to those NEC raised. Specifically, the Board found that Entergy properly calculated the heat transfer coefficients, made valid assumptions regarding DO, and properly assumed that no cracks existed in the FW nozzle.⁶¹ The Board developed a vigorous and complete record to support these conclusions.⁶² NEC simply has not demonstrated that the Board's findings were implausible in light of the well-developed record.⁶³

(. . .continued)

⁶⁰ Hopenfeld Declaration at A6-A24.

⁶¹ *PID*, LBP-08-25, 68 NRC at 807-09 (DO), 809-10 (base metal cracking), 815-16 (heat transfer coefficients).

⁶² Entergy's DO values for areas outside the FW line were based on EPRI guidance document MRP-47. Entergy Hearing Exh. E2-09, Attach. 2 at 1; Fitzpatrick/Stevens Decl. Post Tr. 763, at 32-33 (Stevens); Hearing Transcript ("Tr.") at 1031 (Fitzpatrick). In addition, Entergy's experts testified at great length concerning how Entergy calculated heat transfer coefficients. Fitzpatrick/Stevens Decl. Post Tr. 763, at 29-31, Tr. at 1111-13, 1124-26 (Stevens). Finally, Entergy's experts described in some detail the measures Entergy takes to inspect for and repair cracks in the FW nozzle. Tr. at 1051-52, 1062-63 (Fitzpatrick). As the Staff informed the Board in its May 28, 2009 Answer to NEC's Motion, Entergy employs a similar inspection regime for the RO nozzle. ASME, Boiler and Pressure Vessel Code, Section XI, IWB-2000, "Examination and Inspection" Examination Category B-D, Full Penetration Welded Nozzles in Vessels, Items B3.90 and B3.100. Moreover, the most recent results from the examination uncovered no findings of significance. Vermont Yankee Nuclear Power Station – NRC Integrated Inspection Report, Attachment at 6-7 (January 28, 2009) (ADAMS Accession No. ML090280422); see Staff's May 28, 2009 Answer at 23.

⁶³ NEC also notes "The ASME Code fatigue design curves and CUFs are based on fatigue testing of polished metal, at room temperature in an air environment. This is problematic because the actual environment inside of a nuclear reactor is very different." Petition at 14 n.11. To the extent this comment operates as a challenge to the NRC adoption of the ASME Code in its regulations, it is untimely and an impermissible attack to Commission regulations in an adjudicatory proceeding. 10 C.F.R. §§ 2.341(b)(5), (continued. . .)

Next, NEC challenges the Board's decision that Entergy's final CUFen analyses for the CS and RO nozzles contained no significantly different scientific or technical judgments and thereby met the second element in the PID. The Board noted that Dr. Hopenfeld conceded that "the Final CUFen Analyses 'methodology was the same' as the prior analyses."⁶⁴ NEC responds that Entergy should have adjusted its scientific and technical judgments in calculating the final CUFen analyses to account for the different environments, materials, and geometries of the CS and RO nozzles. Particularly, NEC claimed that Entergy employed unreliable scientific and technical judgments in calculating the final CUFen analyses for the CS and RO nozzles through its use of heat transfer coefficients, assumptions regarding DO concentration, and assumption that no cracks existed in the RO nozzle. However, as discussed above,⁶⁵ NEC cannot demonstrate that the Board's rejection of these arguments is implausible in light of the well-developed record. As a result, this challenge does not warrant Commission review.

Additionally, NEC challenges the Board's finding that the final CUFen analyses met the third requirement in the PID because they demonstrated values less than unity. Specifically, NEC contends that because Entergy did not perform the final CUFen analyses for the CS and RO nozzles in conformity with the ASME code and other applicable guidance, Entergy's conclusion that the final CUFen analyses demonstrated a value less than unity is unreliable. However, as explained above,⁶⁶ NEC cannot show that the Board's finding that Entergy

(. . .continued)

2.335(a). Moreover, the environmentally adjusted CUFs, or CUFens, at stake in this proceeding accounted for applicable environmental conditions and surface finish. Tr. at 839-40 (Stevens); PID, LBP-08-25, 68 NRC at 810-11.

⁶⁴ LBP-09-09 at 8.

⁶⁵ See *supra*, p. 14.

⁶⁶ *Id.*

complied with applicable regulatory guidance in calculating the final CUFen analyses is clearly erroneous. Thus, the Commission need not review the Board's finding that the final CUFen analyses met the third requirement listed in the PID.

Finally, NEC asserts that the Board incorrectly concluded that NEC rehashed already litigated issues in its motion for leave to file a new contention. However, as discussed above, in the PID the Board previously addressed many of the specific issues NEC identified in the final CUFen analyses and several issues that were similar to the concerns NEC raised.

Therefore, NEC has not shown a valid basis for Commission review of the Board's decision that the proposed new contention did not meet the requirements laid out in the PID. All of NEC's complaints on this topic relate to the Board's conclusion that NEC's proposed new contention sought to relitigate issues the Board already decided in the PID. The Board's conclusion, however, is well supported by the record. Thus, NEC cannot show that the Board's decision was clearly erroneous.

III. NEC's Request for Commission Review of the Board's Denial of its Motion for Reconsideration is Untimely

NEC incorporates by reference and requests that the Commission review NEC's Motion for Reconsideration of the PID.⁶⁷ This request is not timely.⁶⁸ First, NEC's request for review of the Board's denial of its Motion for Reconsideration is itself untimely. Second, to the extent NEC asks the Commission to consider its Motion for Reconsideration as a mechanism to challenge the Board's underlying rulings in the PID, that request is also untimely.

The Commission's regulations set forth the standards for filing a timely appeal in 10

⁶⁷ Petition at 14.

⁶⁸ A petition for review may incorporate documents by reference and may certainly rely on the record developed by the Board. However, the Commission's regulations governing timely appeals would be rendered meaningless if petitions for review could raise clearly defaulted arguments simply by incorporating by reference the documents from which those claims originated.

C.F.R. § 2.341(b)(1).

Within fifteen (15) days after service of a full or partial initial decision by a presiding officer, and within fifteen (15) days after service of any other decision or action by a presiding officer with respect to which a petition for review is authorized by this part, a party may file a petition for review with the Commission on the grounds specified in paragraph (b)(4) of this section. Unless otherwise authorized by law, a party to an NRC proceeding must file a petition for Commission review before seeking judicial review of an agency action.⁶⁹

Once a partial initial decision is rendered, review must be filed in accordance with the regulations or the review is waived.⁷⁰

NEC's request for reconsideration was based on the PID; LBP-08-25 issued November 24, 2008. NEC timely filed its Motion for Reconsideration and the Board issued its Denial of NEC's Motion for Reconsideration on January 26, 2009.⁷¹ Therefore, NEC's time to petition the Commission for review on the matters considered in its Motion for Reconsideration would have been 15 days after the Board's denial or by February 16, 2009.⁷² NEC filed the present Petition on July 23, 2009, more than five months after the deadline to petition for review of the Board's denial of its Motion for Reconsideration. NEC has not presented any justification to excuse its delay in petitioning for review of that decision. Consequently, NEC's request that the Commission consider its Motion for Reconsideration is late.

Moreover, upon NEC's request, the Commission granted NEC an extension of time to file a petition for review on the PID until 15 days after the Board ruled on NEC's motion for

⁶⁹ 10 C.F.R. § 2.341(b)(1).

⁷⁰ *Mississippi Power & Light Co.* (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-195, 7 AEC 455, 456 n.2 (1974). See also *Houston Lighting & Power Co.* (Allens Creek Nuclear Generating Station, Units 1 & 2), ALAB-301, 2 NRC 853, 854 (1975).

⁷¹ Order, (Jan. 26, 2009) (ADAMS Accession No. ML090260355).

⁷² Adding five days for service by mail under pre-2007 version of 10 C.F.R. § 2.306.

reconsideration.⁷³ Consequently, if NEC wished to seek review of the PID, it should have filed a petition for review by February 16, 2009. Because NEC failed to petition for review of the PID by that date, it has procedurally waived its right to challenge the Board's findings in the PID. The Commission should not permit NEC to raise otherwise untimely arguments by reviewing NEC's motion for reconsideration.⁷⁴

IV. NEC Was Not Improperly Denied an Opportunity to Pursue Contention 2

NEC argues that the Board erred by denying it an opportunity to pursue Contention 2 and requests that the Commission order full adjudication of Contention 2.⁷⁵ This argument lacks merit. In the Board's view Contention 2 challenged the adequacy of Entergy's Aging Management Plan ("AMP") for metal fatigue, whereas Contentions 2A and 2B challenged the adequacy of Entergy's Time Limited Aging Analyses ("TLAA").⁷⁶ Therefore, the Board held Contention 2 in abeyance unless NEC prevailed in its challenges to Entergy's CUFen analyses, which constituted its TLAA, or Entergy chose to proceed with an AMP.⁷⁷ As stated above, in the PID the Board found that the confirmatory CUFen analysis for the FW nozzle met all regulatory requirements and that Entergy's refined CUFen analyses for the CS and RO nozzles met all

⁷³ See [NEC's] Motion to Extend Time to File Petition for Review (Dec. 8, 2008). The Commission extended the time for NEC to file a petition for review on the PID until 15 days after the Board ruled on NEC's motion for reconsideration. See Order (Dec. 11, 2009) (Order of the Secretary of the Commission granting extension of time pursuant to her authority under 10 CFR § 2.346(b)) (ADAMS Accession No. ML083460431)("Secretary's Order").

⁷⁴ NEC's incorporation by reference of its Motion for Reconsideration amounts to an untimely effort to have those arguments considered but does not preclude its use as a reference.

⁷⁵ Petition at 3, 5-10.

⁷⁶ PID, LBP-08-25, 68 NRC at 790.

⁷⁷ See *Vermont Yankee*, LBP-07-15, 66 NRC 261, 271 (2007); PID, LBP-08-25, 68 NRC at 790 (stating that if the TLLAs are found to be inadequate or predicted metal fatigue will exceed regulatory limits during the period of extended operation, Contention 2, dealing with the adequacy of Entergy's AMP for metal fatigue, would re-surface).

regulatory requirements except that they used the simplified Green's function methodology.⁷⁸ The Board therefore gave Entergy a choice: perform CUFen analyses for the CS and RO nozzles demonstrating that those TLAA's are less than unity for the period of extended operation in accordance with 10 CFR § 54.21(c)(1)(ii) or submit an adequate AMP in accordance with 10 CFR § 54.21(c)(1)(iii).⁷⁹ If Entergy chose the former, NEC could challenge the analyses. If Entergy chose the latter, NEC could "revitalize dormant Contention 2 (as to the adequacy of Entergy's AMP)."⁸⁰ In response to the Board's ruling, Entergy chose the former. Because NEC's challenges to the adequacy of Entergy's CUFen TLAA analyses were ultimately unsuccessful, the Board did not require Entergy to submit an adequate AMP, and therefore Contention 2 was moot. Consequently, NEC's assertion that the Board erred by not conducting a hearing on Contention 2 lacks merit.

In a similar vein, NEC asserts that the Board unfairly informed it during a pre-hearing conference call just under a month before the hearing, but after testimony and exhibits had been filed, that the Board would likely probe Contention 2, as well as Contentions 2A, and 2B, during the hearing.⁸¹ This argument also lacks merit. In the passage cited in the Petition, Judge Karlin stated that the Board planned to probe the issue of whether it is permissible under the Commission's regulations to perform CUFen analyses as part of an AMP after issuance of a renewed license.⁸² In response, counsel for NEC stated its concern that NEC had not briefed the legal issue the Board planned to explore. *Id.* Three days later, on June 27, 2008, the Board

⁷⁸ *PID*, LBP-08-25, 68 NRC at 831.

⁷⁹ *Id.* at 831-32; FID at 2.

⁸⁰ *PID*, LBP-08-25, 68 NRC at 832.

⁸¹ Petition at 9-10 (referencing a pre-hearing conference on June 24, 2008).

⁸² *Id.* at 10.

issued an Order requesting that the parties submit briefs and reply briefs on the legal issues discussed during the pre-hearing conference.⁸³ NEC, the Staff, Entergy, and DPS filed initial⁸⁴ and reply briefs⁸⁵ in response to the Board's order. Consequently, NEC had an opportunity to brief the legal issues related to Contention 2. Thus, NEC's assertion that the Board "arbitrarily and capriciously" modified the scope of hearing lacks merit and provides no basis for Commission review.

V. No Prejudicial Error Occurred

As a further basis for Commission review, NEC argues in its Petition that the Board conducted the evidentiary hearing "in a manner overly prejudicial to NEC's case" by "lavishing time and attention on NRC Staff and Entergy witnesses," "while greeting NEC's witness's shy, polite attempt to gain attention with a snarled admonition"⁸⁶ NEC further asserts that the Board was overly critical of NEC's witness and that NEC's counsel was unfamiliar with NRC proceedings and thus failed to effectively object to the Board's questioning of NEC's witness.⁸⁷ NEC's arguments lack merit.

The Commission will grant relief for procedural errors resulting in actual prejudice, i.e.,

⁸³ Order (Regarding the Briefing of Certain Legal Issues) (June 27, 2008) (ADAMS Accession No. ML081790429).

⁸⁴ The parties filed briefs on July 9, 2008. See Entergy's Answers to Licensing Board Questions (July 9, 2008)(ADAMS Accession No. ML081970484); New England Coalition, Inc. Supplemental Prehearing Brief (July 9, 2008)(ADAMS Accession No. ML081970481); Vermont Department of Public Service Brief in Response to June 27, 2008 Order (July 9, 2008)(ADAMS Accession No. ML081970483); NRC Staff's Brief in Response to Board Order (July 9, 2008)(ADAMS Accession No. ML081920248).

⁸⁵ The parties filed reply briefs on July 15, 2009. See Entergy's Reply Response to Licensing Board Questions (July 15, 2008)(ADAMS Accession No. ML082050101); New England Coalition, Inc. Supplemental Prehearing Reply Brief (July 15, 2008)(ADAMS Accession No. ML082050104); Vermont Department of Public Service Response to Entergy and NRC Staff Brief on Pre-Trial Legal Issues (July 15, 2008)(ADAMS Accession No. ML082040615); NRC Staff's Reply Brief (July 15, 2008)(ADAMS Accession No. ML081980654).

⁸⁶ Petition at 12.

⁸⁷ *Id.* at 12-13.

the petitioner must demonstrate that the Board's procedural error had substantial impact on the outcome of the proceeding.⁸⁸ Further Commission case law provides that "the resolution of issues of fact in favor of one side suggests neither bias nor error on the tribunal's part."⁸⁹

NEC's Petition fails to demonstrate actual prejudice. Instead of demonstrating actual prejudice, NEC simply asserts that "while no single act or display on the part of the Board, crossed the threshold of preservable error, it is impossible to see how the Board's overall attitude did not color its findings."⁹⁰ This is insufficient to demonstrate actual prejudice. Similarly, NEC's attempts to illustrate examples of the Board's demeanor toward NEC are insufficient to demonstrate actual prejudice.⁹¹ First, NEC asserts that the Board's acceptance of Entergy and Staff testimony as more credible than NEC testimony demonstrates Board bias against NEC.⁹² This, however, is simply a disagreement with the Board's weighing of testimony and evidence and is insufficient to demonstrate a procedural error warranting Commission review.⁹³

Second, NEC's assertions that the Board unfairly questioned NEC's witness regarding his testimony on metal fatigue and that due to NEC counsels' lack of familiarity with NRC

⁸⁸ *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1151 (1984) (citing *Louisiana Power & Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1096 (1983)).

⁸⁹ *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-644, 13 NRC 903, 923 (1981)

⁹⁰ Petition at 13.

⁹¹ NEC fails to provide citations to the hearing transcript to support its allegations. Arguments not clearly articulated in a petition for Commission review are deemed waived. See *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 383 (2001).

⁹² Petition at 12-13.

⁹³ See *Diablo Canyon*, ALAB-644, 13 NRC at 923. See also *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 68 NRC ____ (2009) (slip op. at 36)(ADAMS Accession No. ML090930344) (stating that dissatisfaction with Board findings of fact is insufficient to demonstrate clear error, another basis for Commission review in 10 CFR § 2.341(b)(4)).

proceedings NEC counsel failed to object to Board questioning are also insufficient to show actual prejudice. NEC's claims are not properly supported. NEC provides no references to the hearing transcript in which the Board allegedly engaged in "tag-team" questioning of NEC witness Dr. Hopenfeld and rebuked NEC counsel's request for relief from such questioning.⁹⁴ NEC's vague references to events during a four-day hearing are insufficient to demonstrate actual prejudice.⁹⁵ Further, Commission case law provides that a party cannot challenge on appeal Board practices to which it did not object at the hearing stage.⁹⁶ NEC concedes that its counsel did not lodge an objection to the Board's questioning and its Petition fails to specify the basis for such an objection to the Board's questioning.⁹⁷ Moreover, NEC's assertion that its counsel's inexperience is a basis for the Commission to grant this petition for review is unsupported by law. The Commission's regulations do not guarantee litigants access to counsel who are experienced in NRC proceedings. NEC, however, "is an experienced player in NRC proceedings"⁹⁸ having been involved in proceedings concerning Vermont Yankee since initial licensing.⁹⁹ Moreover, NEC was represented by two attorneys during the evidentiary hearing, including one who had been representing NEC since the beginning of the license

⁹⁴ Petition at 13.

⁹⁵ See *Advanced Medical Systems*, CLI-94-6, 39 NRC at 297-98 (finding that the Petitioner bears the burden of ensuring that its brief contains sufficient detail and cogent argument to alert the parties and the Commission to the nature of and bases for its claims).

⁹⁶ *Houston Lighting & Power Co.* (South Texas Project, Units 1 & 2), ALAB-799, 21 NRC 360, 378 (1985).

⁹⁷ Petition at 13.

⁹⁸ *Entergy Nuclear Vermont Yankee LLC. and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 581 (2006).

⁹⁹ See, e.g., *Vermont Yankee Nuclear Power Corporation* (Vermont Yankee Nuclear Power Station), ALAB-57, 4 AEC 946 (1972) (addressing NEC's intervention in the initial operating license proceeding).

renewal proceeding.¹⁰⁰ Therefore, counsel for NEC had adequate time to familiarize themselves with NRC proceedings. Consequently, even if NEC's counsel erroneously failed to object, this failure did not violate any provision of the NRC's regulations or NEC's due process rights. Thus, NEC has failed to demonstrate actual prejudice or bias.

Not only has NEC failed to demonstrate prejudicial error by the Board, NEC's claims of Board bias and prejudice are untimely. NEC's assertions are based upon the evidentiary hearing held July 21-24, 2008. The Board issued the PID on November 24, 2008. NEC filed and the Board granted motions for extension of time to file a motion for reconsideration.¹⁰¹ NEC also filed and the Secretary of the Commission granted, a motion requesting an extension of time to file a petition for Commission review until after a Board ruling on NEC's motion for reconsideration.¹⁰² In its motion for reconsideration of the Board's PID, NEC argued that the Board's conduct of the evidentiary hearing was unfair to NEC and its witnesses.¹⁰³ On January 26, 2009, the Board issued an order denying NEC's motion for reconsideration.¹⁰⁴ By operation of the Secretary's Order and the Commission's regulations, NEC had fifteen days after issuance of the Board's decision on its motion for reconsideration to petition for Commission review of the PID. NEC failed to do so and thereby waived its right to petition for Commission review. Thus,

¹⁰⁰ See Tr. at 701 (Tyler) (Ms. Tyler introducing herself, co-counsel Andrew Raubvogel, and NEC representative Raymond Shadis to the Board); New England Coalition's Petition for Leave to Intervene, Request for Hearing, and Contentions; and the Notice of Appearance on behalf of New England Coalition of Shems Dunkiel Kassel & Saunders PLLC by attorneys Ronald A. Shems, and Karen Tyler (May 26, 2006).

¹⁰¹ See [NEC]'s Motion to Extend Time to File Motion for Reconsideration (Dec. 3, 2008); Order (Granting NEC's Motion to Extend Time) (Dec. 4, 2008); [NEC]'s [Second] Motion to Extend Time to File Petition for Review (Dec. 8, 2008); Order (Granting NEC's [Second] Motion to Extend Time) (Dec. 15, 2008).

¹⁰² See Secretary's Order (Dec. 11, 2008).

¹⁰³ See Motion for Reconsideration at 2-4 and attached Exhibit JH MR 1.

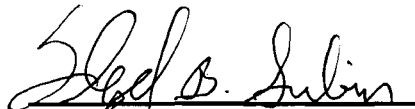
¹⁰⁴ See Order (Denying NEC Petition for Reconsideration Under 10 C.F.R. § 2.345(b)) (Jan. 26, 2009).

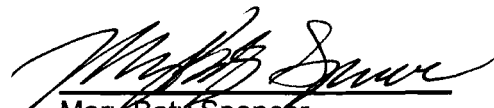
not only has NEC failed to demonstrate prejudicial error by the Board, NEC's arguments are untimely.

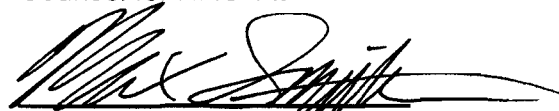
CONCLUSION

For the reasons well articulated by the Board's rulings and decisions and, as set forth above, the Commission should deny NEC's Petition for Review.

Respectfully submitted,


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Dated at Rockville, Maryland
This 3rd day of August, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S ANSWER IN OPPOSITION TO NEW ENGLAND COALITION'S PETITION FOR REVIEW OF THE LICENSING BOARD'S FULL INITIAL DECISION, LBP-09-09" in the above-captioned proceeding have been served on the following by electronic mail with copies by deposit in the NRC's internal mail system or, as indicated by an asterisk, by electronic mail, with copies by U.S. mail, first class, this 3rd day of August, 2009.

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