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ADJUDICATIONS STAFF

September 30, 2010

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of

ENTERGY NUCLEAR VERMONT YANKEE, LLC  
AND ENTERGY NUCLEAR OPERATIONS, INC.  
(Vermont Yankee Nuclear Power Station)  
(License Renewal Application)

Docket No. 50-271-LR

ASLBP No. 06-849-03-LR  
(On Remand)

**NEW ENGLAND COALITION'S ANSWER AND OPPOSITION  
TO  
ENTERGY'S MOTION TO STRIKE  
THE DECLARATION OF PAUL BLANCH**

**I. INTRODUCTION**

Pursuant to 10 C.F.R. § 2.323(c), New England Coalition ("NEC") provides the following Answer and Opposition to Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.'s ("Entergy") Motion (September 23, 2010) to Strike<sup>1</sup> the Declaration of Paul Blanch (Sept.20, 2010), which accompanied the "New England Coalition's Reply to NRC Staff and Entergy Nuclear Vermont Yankee Opposition to

<sup>1</sup> Rule 12(f) of the Federal Rules of Civil Procedure does provide for the submission of a motion to strike, upon which the court can act to order "stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." There is no explicit mention of such a motion in the agency's rules of practice.

New England Coalition's Motion to Reopen the Hearing and Reply to NRC Staff's Answer to Proposed New Contention (Sept. 20, 2010) ("NEC Reply").

As discussed below, Entergy's Motion to Strike the Declaration of Paul Blanch must be denied because it is utterly devoid of basis and specificity; and it is patently wrong even in its broadly sketched allusions to fact and law.

Further, NEC asserts that the Board should consider, given the specious and gratuitously misleading character of Entergy's filing and the fact that Entergy is represented by a large, well-resourced law firm with extensive experience of practice before NRC, whether or not sanctions are merited.

## **II. DISCUSSION**

Entergy's argument opens with a summary of the regulation,

NRC's regulation governing motions to reopen the hearing record requires that the motion itself "be accompanied by affidavits that set forth the factual and/or technical bases for the movant's claim that the criteria" contained in 10 C.F.R. § 2.326(a) for reopening the record are satisfied. 10 C.F.R. § 2.326(b). In other words, the affidavit accompanying the motion to reopen the record must provide the requisite support.

This summary is accurate, but irrelevant. The Motion to Strike does not address the intervenor's Motion to Reopen. The Motion to Strike takes issue with the inclusion of the Declaration of Paul Blanch in NEC's Reply. Entergy then makes the unfounded, unsupported, erroneous global accusation that the declaration somehow strays into unfamiliar territory in order to provide what Entergy imagines may have been lacking in the first Blanch Declaration, which was filed in support of the Motion to Reopen.

Nonsense.

The declaration in question is a direct response to assertions made and issues raised in

the Answers of NRC Staff (“Staff”) and Entergy (September 14, 2010).<sup>2</sup> The Declaration of Paul M. Blanch is offered as a direct response to the affidavits of NRC Staff and Entergy witnesses; in part to affirm that a live dispute on the adequacy of the LRA with respect to aging management of certain safety-related electrical cables remains. Entergy’s Answer argues through an attached affidavit that no factual dispute remains<sup>3</sup>.

**Based on our review, it is our opinion that (1) the VYNPS Non-EQ Inaccessible Medium-Voltage Cable Program is an adequate program that will manage the effects of aging on inaccessible non-EQ medium- and low-voltage cables subject to aging management review in a manner providing reasonable assurance that such cable will continue to perform its intended function in accordance with the CLB during the period of extend operation; (2) that NEC and Mr. Blanch have not raised any genuine dispute with this program or any other portions of the LRA; and (3) that NEC and Mr. Blanch have not raised any significant safety issue. [Emphasis added]**

Declaration of Norman L. Rademacher and Roger B. Rucker in Support of Entergy’s Answer Opposing New England Coalition’s Motion to Reopen, September 14, 2010 at 25

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<sup>2</sup> In a reply, petitioner may submit arguments that are focused on the legal or logical arguments presented in the applicant/licensee or NRC Staff answer *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 624 (2004) [This decision is selectively quoted later in Entergy’s “Motion to Strike.”] see also, LBP-08-6, 67 NRC 241 (2008), Petitioner may submit arguments in a reply that are focused on the legal or logical arguments presented in the applicant/licensee or NRC Staff answer;

Replies must focus narrowly on the **legal or factual arguments** first presented in the original petition or **raised in answers to it.** [emphasis added]. New bases 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). While a petitioner need not introduce at the contention phase every document on which it will rely in a hearing, if the contention as originally plead did not cite adequate documentary support, a petitioner cannot remediate the deficiency by introducing in the reply documents that were available to it during the time frame for initially filing contentions. Nuclear Management Co., LLC (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006); Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-08-18, 68 NRC 533, 541-42 (2008).

<sup>3</sup> No reopening of the evidentiary hearing will be required if the affidavits submitted in response to the motion demonstrate that there is no genuine unresolved issue of fact; LBP-05-20, 62 NRC 227-28 (2005); *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973) See also, 10 C.F.R. 2.1205a licensing board may grant summary disposition as to all or any part of a proceeding if the board finds that the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law; LBP-05-19, 62 NRC 180 n.186 (2005)

If this false assertion were allowed to stand without reply, then NEC's single contention would be in jeopardy of summary dismissal. A proper reply to the affidavit of an expert seeking dismissal is the affidavit of an expert affirming existence of a live dispute; which affidavit NEC has provided.

Entergy then says, "The regulations do not provide for the submittal of affidavits with a reply".

Entergy cites no regulations or NRC decisions in support of this claim. It is, in fact, meaningless except in the context of Entergy's Motion where it is presumably intended to disingenuously imply that the attachment of affidavits to a reply is expressly prohibited. They are not prohibited and have been provided and accepted for consideration in license renewal proceedings.<sup>4</sup> In fact, ASLB Panels and the Commission have chided, and explained the cost to, intervenors for not providing affidavits to support their replies.<sup>5</sup>

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<sup>4</sup> See, for example, Motion For Leave To File A Reply [and Reply] To The NRC Staff's Opposition To Citizens' Motion To Reopen, Docket No. 50-0219-LR, Oyster Creek February 19, 2009 ( containing the affidavit of expert Rudolf Hausler and other [documentary] evidence ), ML090560650 AND LBP-08-12 Docket No. 50-0219-LR, ASLBP No. 06-844-01-LR Memorandum And Order (Denying Citizens' Motion to Reopen the Record and to Add a New Contention) July 24, 2008 (discussing the Reply) ML082060639

<sup>5</sup> See, 61 NRC 202 (2005) LBP-05-8, Nuclear Fuel Services, Inc. (March 28, 2005) We Sierra did not offer one scintilla of affirmative evidence tending to buttress that claim. Nor did it include in its rebuttal presentation any expert opinion to counter the affidavits supplied by the Staff and Licensee in response to that claim... [Emphasis added]

A like situation obtained in *FMRI, Inc.* [formerly *Fansteel, Inc.*] (Muskogee, Oklahoma Facility), LBP-04-8, 59 NRC 266 (2004). In that case, the State of Oklahoma challenged on a variety of grounds a site decommissioning plan presented by the Licensee for the Staff's approval. The State offered, however, no expert opinion either to support the challenge or (in its rebuttal written presentation) to counter the expert evidence supplied by way of affidavits in the Staff and Licensee responsive presentations. With regard to this state of affairs, the presiding officer observed:

The State offered, however, no expert opinion either to support the challenge or (in its rebuttal written presentation) to counter the expert evidence supplied by way of affidavits in the Staff and Licensee responsive presentations.

Entergy then changes horses.

From arguing that it is prohibited to attach affidavits to replies; Entergy next jumps to arguing that replies may not be used to cure deficient contentions,

The situation here is analogous to longstanding Commission precedent prohibiting a reply to be used to cure an otherwise deficient contention, because such practice “would effectively bypass and eviscerate [the Commission’s] rules governing timely filing, contention amendment, and submission of late-filed contentions.” See *Louisiana Energy Services, L.P. (National Enrichment Facility)*, CLI-04-35, 60 N.R.C. 619, 623 (2004). Here, NEC’s attempt to provide new support in a reply would eviscerate the Commission’s rules governing motions to reopen.

Entergy does not trouble itself to say exactly (or even generally) what parts of the NEC Reply or Mr. Blanch’s Declaration it thinks are an attempt “to cure an otherwise deficient contention” or what alleged deficiencies NEC may be attempting to cure. There have been instances where Boards have stricken portions of affidavits when there were claims that the affidavits went beyond the bounds<sup>6</sup>, but Entergy has given the Board

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The short of the matter is that the affidavits of experts supplied by the Licensee and the Staff (taken in conjunction with the supporting exhibits that were also included in the former’s presentation) squarely and persuasively responded to those concerns. To the limited extent that the Licensee’s and Staff’s evidentiary showing is at all confronted in the State’s rebuttal presentation, the challenge takes the form of argumentation by counsel and, as such, has not been found to cast significant doubt upon the probative value of that showing.[11]

[11]We do not mean to suggest that materials licensing proceedings conducted under Subpart L of the Rules of Practice always should consist of contests between expert witnesses supplying affidavits and counter-affidavits. As earlier noted (p. 271, *supra*), however, there are difficulties associated with endeavors to refute the evidentiary presentation of the adversary without putting forth a like presentation of one’s own. In this instance, those difficulties were simply not overcome by Oklahoma in its two written presentations that were both entirely devoid of anything in the way of an evidentiary showing. [Emphasis added]

<sup>6</sup> A Board denied a motion to strike portions of petitioner’s reply that appeared to raise new arguments supporting a contention. The board noted that a reply is limited to “legitimate amplification” to a contention and that a reply may not raise new arguments. The board then decided to disregard portions [Emphasis added] of a reply that appeared to provide more than legitimate amplification of the intervenors contentions. Even so, for the sake of caution, the board allowed the entire reply to remain in the record. *PPL Susquehanna, LLC (Susquehanna Steam Electric Station, Units 1 and 2)*, LBP-07-4, 65 NRC 281, 299-302(2007).

nothing (presuming the Board does not waste its time on innuendo); nothing specific; nothing with a whiff of particularity, upon which to cast judgment or act, nor has it provided NEC with any clear or definitive allegations to which to respond.

Further, a motion to strike is an inappropriate means to bring a complaint that arguments in a reply raise new issues not captured in the scope of a contention. The Board does not need to “strike” anything in order to consider and resolve the issue. And it also has the ability to do so without a motion to strike. The appropriate vehicle, considering the concerns that Entergy has articulated would have been a timely ‘Reply’ preceded by a likewise timely ‘Motion for Leave to Reply.’<sup>7</sup>

Finally Entergy declares itself (we surmise) aggrieved and “deprived of an opportunity to challenge new evidence”,

Moreover, consideration of new evidence appended to a reply deprives other parties of an opportunity to challenge the new evidence.

Entergy Nuclear Operations, Inc. and Entergy Nuclear Fitzpatrick, LLC (James L. FitzPatrick Nuclear Power Plant), CLI-08-19, 68 N.R.C.251, 261-62 (2008).

Entergy may or may not be “deprived of an opportunity to challenge new evidence” but that is not the fault of NEC or the Board. Entergy had ample opportunity to request leave to reply to NEC’s filing of September 20, 2010; with full knowledge that Board’s generally favor such requests from the applicants (licensees) under analogous

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“Amplify” as in reply briefs means to enlarge, expand, or extend (a statement or other expression of idea in words) by addition of detail or illustration or by logical development; LBP-08-6, 67 NRC 241 (2008)

<sup>7</sup> See Licensing Board Memorandum and Order (Initial Prehearing Order) (Dec. 18, 2006) at 5 (unpublished); see also *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP- 05-4, 61 NRC 71, 78 (2005) (request to file reply to summary disposition answer granted).

See Also; LBP-08-2, 67 NRC 54 (2008); LBP-08-3, 67 NRC 85 (2008) a properly supported request to reply to a summary disposition response would seem to be a reasonable candidate for a favorable board discretionary decision permitting the filing; LBP-08-3, 67 NRC 85 (2008) ; LBP-08-2, 67 NRC 54(2008); permission to file must be requested from the board before the replies are due

circumstances. Entergy did not; but chose instead to file the present, and entirely without merit, Motion to Strike.

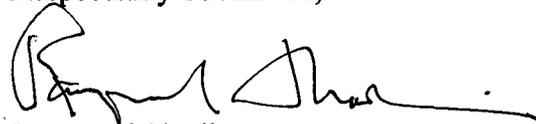
Entergy provides the requisite 10 CFR §2.323(b) certification; with the advice that “The NRC Staff supports the motion.”

### **III. CONCLUSION**

In anticipation of an NRC Staff “Answer” in support of Entergy’s Motion to Strike” NEC respectfully requests that, should such an “Answer” be forthcoming, NRC Staff will not be allowed to propose cures to deficiencies of basis and specificity, or any other deficiencies in Entergy’s Motion. If the Board accepts such a filing for consideration, then NEC respectfully requests in advance, as a matter of due process and simple fairness, an opportunity to reply.

For all of the foregoing good reasons, the Board should reject Entergy’s Motion to Strike as without merit and should for reasons of the Motion’s facetious character consider the levy of sanctions.

Respectfully Submitted,



Raymond Shadis  
Pro Se Representative  
New England Coalition  
Post Office Box 98  
Edgecomb, Maine 04556  
207-882-7801  
shadis@prexar.com

September 30, 2010

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

In the Matter of

Entergy Nuclear Vermont Yankee, LLC  
and Entergy Nuclear Operations, Inc.

(Vermont Yankee Nuclear Power Station)

Docket No. 50-271-LR

ASLBP No. 06-849-03-LR

**CERTIFICATE OF SERVICE**

I hereby certify that copies of "New England Coalition's Answer to Entergy's Motion to Strike the Declaration of Paul Blanch," dated September 30, 2010, 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 30th day of September, 2010.

\*Administrative Judge  
Alex S. Karlin, Esq., Chairman  
Atomic Safety and Licensing Board  
Mail Stop T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
Alex.Karlin@nrc.gov

\*Administrative Judge  
Dr. Richard E. Wardwell  
Atomic Safety and Licensing Board  
Mail Stop T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
Richard.Wardwell@nrc.gov

\*Office of Commission Appellate

Adjudication  
Mail Stop O-16 C1  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
OCAEmail@nrc.gov

\*Administrative Judge  
William H. Reed  
1819 Edgewood Lane  
Charlottesville, VA 22902  
whrcville@embarqmail.com  
Atomic Safety and Licensing Board  
Mail Stop T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

\*Secretary

Att'n: Rulemakings and Adjudications  
Staff

Mail Stop O-16 C1  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
hearingdocket@nrc.gov

\*Susan L. Uttal, Esq.  
\*Maxwell C. Smith, Esq.  
\*Mary B. Spencer, Esq.  
Office of the General Counsel  
Mail Stop O-15-D21  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
susan.uttal@nrc.gov;  
maxwell.smith@nrc.gov;  
Mary.Spencer@nrc.gov

\*Sarah Hofmann, Esq.  
Director of Public Advocacy  
Department of Public Service  
112 State Street – Drawer 20  
Montpelier, VT 05620-2601  
Sarah.hofmann@state.vt.us

\*Anthony Z. Roisman, Esq.  
National Legal Scholars Law Firm  
84 East Thetford Road  
Lyme, NH 03768  
aroisman@nationallegalscholars.com

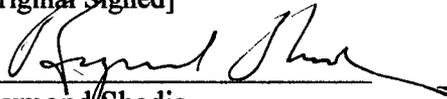
\* Matthew Brock, Esq.  
Assistant Attorney General  
Office of the Attorney General  
One Ashburton Place, 18<sup>th</sup> Floor  
Boston, MA 02108  
Matthew.Brock@state.ma.us

\*Peter L. Roth, Esq.  
Office of the New Hampshire Attorney  
General  
33 Capitol Street  
Concord, NH 03301  
Peter.roth@doj.nh.gov

\*Ann Hove, Law Clerk  
Atomic Safety and Licensing Board Panel  
Mail Stop: T-3F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
ann.hove@nrc.gov

David R. Lewis  
Matias F. Travieso-Diaz  
Pillsbury, Winthrop, Shaw, Pittman LLP  
2300 N Street, NW  
Washington, DC 20037-1128  
E-mail: david.lewis@pillsburylaw.com  
matias.travieso-diaz@pillsburylaw.com

[Original Signed]

  
Raymond Shadis  
New England Coalition  
Post Office Box 98  
Edgecomb, ME 04556  
shadis@prexar.com

# *New England Coalition*

VT NH ME MA RI CT NY

POST OFFICE BOX 545, BRATTLEBORO, VERMONT 05302

September 30, 2010

Office of the Secretary  
Attn: Rulemaking and Adjudications Staff  
Mail Stop: O-16C1  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

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

Please find attached for filing in the above captioned matter,  
NEW ENGLAND COALITION'S ANSWER TO ENTERGY'S MOTION TO STRIKE THE  
DECLARATION OF PAUL BLANCH

Thank you for your kind attention,

  
*for New England Coalition, Inc.*

Raymond Shadis  
*Pro Se* Representative  
Post Office Box 98  
Edgecomb, Maine 04556