


In the Matter of: Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3)	
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UNITED STATES
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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In re:

Docket Nos. 50-247-LR; 50-286-LR

License Renewal Application Submitted by

ASLBP No. 07-858-03-LR-BD01

Entergy Nuclear Indian Point 2, LLC,
Entergy Nuclear Indian Point 3, LLC, and
Entergy Nuclear Operations, Inc.

DPR-26, DPR-64

November 9, 2012

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STATE OF NEW YORK AND RIVERKEEPER, INC.
REVISED STATEMENT OF POSITION
IN SUPPORT OF
JOINT CONTENTION NYS-38/RK-TC-5

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INTRODUCTION

In accordance with 10 C.F.R. § 2.1207(a)(2) and the Atomic Safety and Licensing Board's ("Board") July 1, 2010, August 28, 2012, and September 28, 2012 Orders, the State of New York ("State") and Riverkeeper, Inc. ("Riverkeeper") hereby submit this Revised Statement of Position on Joint Contention NYS-38/RK-TC-5 concerning the adequacy of Entergy's proposed approach to manage age-related degradation of critical reactor components during the extended licensing term.

This Revised Statement of Position is supported by the accompanying Pre-filed Rebuttal Testimony of Dr. David J. Duquette Regarding Contention NYS-38/RK-TC-5 (Exhibit NYS000452), Pre-filed Rebuttal Testimony of Dr. Richard T. Lahey, Jr. Regarding Contention NYS-38/RK-TC-5 (Exhibit NYS453), Pre-filed Rebuttal Testimony of Dr. Joram Hopenfeld Regarding Contention NYS-38/RK-TC-5 (Exhibit RIV000134), and accompanying exhibits.¹ Today's submissions respond to arguments made in Entergy's Statement of Position Regarding Contention Joint Contention NYS-38/RK-TC-5 (ENT000520), Entergy's Pre-filed Testimony of Nelson F. Azevedo, Robert J. Dolansky, Alan B. Cox, Jack R. Stosnider, Robert E. Nickell, and Mark A. Gray (ENT000521), NRC Staff's Statement of Position Regarding Contention Joint Contention NYS-38/RK-TC-5 (NRC000147) and NRC Staff's Pre-filed Testimony of Dr. Allen L. Hiser, Mr. On Yee, and Dr. Ching Ng (NRC000148), and Pre-Filed Testimony of Dr. Allen L. Hiser and Mr. Kenneth J. Karwoski (NRC000161).

Contention NYS-38/RK-TC-5 is focused on the practice of Entergy and NRC Staff of allowing certain safety issues to be resolved between them *after* the NRC has issued an operating license and *outside* the framework of an Atomic Energy Act § 189 proceeding. This practice, if

¹ The exhibits that accompany today's filings are RIV000135 through RIV000141 and NYS000451 through NYS000464.

allowed in this proceeding, would frustrate the right of the State of New York and Riverkeeper to, obtain discovery about such issues, participate in the resolution of such issues, and present evidence to the Atomic Safety Licensing Board and the NRC Commissioners concerning such issues. This practice was made clear by the issuance of the August 2011 Supplemental Safety Evaluation Report (SSER) for Indian Point (NUREG-1930) and the interactive communications between Entergy and NRC Staff that led to that report. Entergy now proposes an approach -- but not a binding aging management program -- to take future, unspecified action concerning various components within the Westinghouse 44F steam generators and the reactor coolant pressure boundaries at Indian Point Unit 2 and Unit 3. Recent actions by Entergy in connection with the renewed operating license for Vermont Yankee further support intervenors' concerns.

ADDITIONAL FACTUAL BACKGROUND

It appears that the federal government may have begun to take seriously the concerns presented by the intervenors and their experts about synergistic age related degradation mechanisms on reactor pressure vessel internals and other safety related components. *See* Lahey Rebuttal PFT at 5, 7 (NYS000453). In the last fiscal year, the federal government appropriated \$25 million to support the Light Water Reactor Sustainability Program which is undertaking research into age-related materials degradation and instrumentation issues. *See* Fiscal Year 2012, 112 Cong., House Report 331, Title III, Dept. of Energy, at 25 ("The conference agreement includes \$25,000,000 for Light Water Reactor Sustainability.").

According to a *Nucleonics Week* article:

The highest research priority for the program relates to materials issues, [INL's Kathryn McCarthy] said, because "behind almost every other" issue being researched in the program, "there's a materials problem" for operators of aging LWRs to address. The NRC has been involved in the program "since its inception," and cooperation on the R&D "has been productive," Gene Carpenter, a program manager in NRC's Office of Nuclear Regulatory Research, said in an

interview February 6. The agency is coordinating its participation in the program under its memorandum of understanding with DOE, and conference calls are held twice a month between DOE and NRC staff to discuss progress, Carpenter said. . . . The program is also "leveraging industry activities" on LWR life extension, and the value of the industry's contribution to the R&D efforts is "much more" than the funding from the federal budget, McCarthy said. The industry is "very supportive" of the LWR Sustainability Program and related research, said Chris Earls, director of safety-focused regulation at the Nuclear Energy Institute. Quarterly meetings are held to coordinate R&D efforts among DOE, NRC, the Electric Power Research Institute, the national labs and power reactor licensees, Earls said in an interview February 7. He agreed with McCarthy that materials research is a priority for the program, to help ensure that aging of reactor internals and other components can be managed to ensure safe operation for more than 40 years.

Steven Dolley, *DOE plan coordinates R&D on extending LWR lifetimes*, Nucleonics Week, Vol. 53, Issue 6, Feb. 9, 2012 (Platts).

In a similar manner, steam generator vendors (such as Westinghouse), power reactor operators, the Electric Power and Research Institute (EPRI), the Nuclear Energy Institute (NEI), and NRC Staff have formed a task force to discuss steam generator issues. In some regards, the task force is akin to a federal agency advisory committee.² Representatives of the vendors, operators, EPRI, and NEI communicate with NRC Staff concerning steam generator matters, and

² In 1972, Congress enacted the Federal Advisory Committee Act, 5 U.S.C. Appendix 2, in part to open the advisory committee process to the public and prevent subjective influences that are not in the public interest from controlling such meetings. *Food Chemical News v. Department of Health and Human Services*, 980 F.2d 1468 (D.C. Cir., 1992) (quoting S.REP. NO. 92-1098, 92nd Cong., 2d Sess. 6 (1972)). Section 10 of FACA requires that: (1) "[e]ach advisory committee meeting shall be open to the public"; (2) "[i]nterested persons shall be permitted to attend, appear before, or file statements with any advisory committee"; (3) "records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection . . . until the advisory committee ceases to exist"; and (4) "[d]etailed minutes of each meeting of each advisory committee shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the advisory committee." FACA §§ 10(a)(1), (a)(3), (b), and (c). *Food Chemical News*, 980 F.2d at 1472. NRC promulgated regulations concerning advisory committees, 10 C.F.R. Part 7. *See also* 67 Fed. Reg. 79837-44 (Dec. 31, 2002).

the task force holds regularly scheduled meetings with USNRC Staff. According to a recent EPRI document:

SGTF Transition from NEI to EPRI SGMP

- The SGTF will be a working group under the SGMP Engineering & Regulatory Technical Advisory Committee and the SGMP Integration Committee will provide oversight and support to the SGTF
- The SGTF will continue to meet with the NRC bi-annually
 - Typically February and August
- The SGTF membership will remain the same
 - Jim Benson is the point of contact for the NRC
 - Helen Cothron will be the SGMP Project Manager
 - Jay Smith will continue to be the Utility SGTF Chair
 - SGTF members will continue to include Industry, vendor and NEI representation
 - SGTF members at-large will continue to be the same as before the transition
- Format and content of SGTF meetings with the NRC will remain unchanged
- End Result - Seamless transition of SGTF from NEI to SGMP

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EPRI presentation, Steam Generator Task Force / Nuclear Regulatory Commission Biannual Meeting, at slide 5 (ML12047A296)(Feb. 16, 2012) (NYS000392). However, unlike advisory committees, the task force communicates with NRC Staff outside of the presence of the State of New York – or Riverkeeper. Moreover, unlike meetings of the Advisory Committee on Reactor Safeguards or its subcommittees³ and other public meetings, no transcripts of those task force meetings with NRC have been disclosed to the State, nor have communications between the task force and NRC personnel been disclosed. Various Steam Generator Task Force submissions and handouts to NRC Staff have been designated as containing copyrighted or proprietary material. *See, e.g.*, ENT000524; NYS000463, NYS000392. In addition, it appears that USNRC Staff have

³ The ACRS and its subcommittees have agreed to comply with FACA. *See, e.g.*, 77 Fed. Reg. 64146-47 (Oct. 18, 2012) (Procedures for Meetings).

communicated with French and international utilities and regulatory agencies about steam generator divider plate and tube-to-tube sheet weld issues. NRC PFT at Q/A 34 (NRC000161). Those communications likewise were not disclosed to the State.

Entergy seeks to distinguish the steam generator tube rupture accident that took place at Indian Point Unit 2 on February 15, 2000. Entergy PFT at Q/A 159 (ENT000521). Far from diminishing that accident, the root cause analysis (ENT-000567) and the subsequent Inspector General report (NYS000457) confirm the critical importance of detailed inspections of steam generator components, especially those comprised of Alloy 600 or associated welds. That accident occurred when a corroded tube in one steam generator cracked and released radioactive water that then mixed with clean water on the secondary side of the reactor coolant pressure boundary.

All tolled, the plant remained offline for 11 months following the accident, which was avoidable. Con Ed and several other utilities had long before sued Westinghouse for providing deficient products, and Westinghouse, in turn, provided replacement generators. The other utilities installed the replacement generators, but Con Ed decided that it would be cheaper to make do with the original, defective ones. Ultimately, the deferral of inspections and the failure to conduct thorough inspections led to the steam generator tube rupture and loss of intended function.

Following the accident, NRC's Inspector General concluded both NRC own Staff and Con Edison mishandled an earlier inspection of the plant, finding that a more thorough operational assessment would have predicted an increased probability of tube leakage or rupture. Although Con Ed sought to quickly restart the reactor, the Commission rejected the request to reopen the plant for the summer months with the existing, degraded generators. Thereafter, Con

Ed elected to replace the four degraded generators at Unit 2 with the replacement generators – which it had kept in storage since the 1989. *See generally* NRC OIG Report, *NRC’s Response to the Feb. 15, 2000 Steam Generator Tube Rupture at Indian Point Unit 2 Power Plant*, Case No. 00-03S (Aug. 29, 2000) (NYS000457); Chart: *Steam Generator Replacements Completed*, (Oct. 8, 2009) (NYS000458).

Turning to the present Indian Point proceeding, the most recent version of the guidance document entitled *Generic Aging Lessons Learned (GALL, NUREG-1801)* identifies a need to verify and evaluate the effectiveness of the facility’s specific methods proposed to detect primary water stress corrosion cracking in Alloy 600 divider plates and associated welds. NYS000454 (comparison excerpt). Likewise, *GALL, Revision 2*, also identifies a need to verify and evaluate the effectiveness of the facility’s specific methods to ensure primary water stress corrosion cracking is not occurring in each steam generator’s tube to tube sheet welds. NYS000455 (comparison excerpt). Intervenors’ expert witnesses maintain their previously-expressed opinions that Entergy has not provided sufficient details with respect to its approach to aging management at the Indian Point reactors. Building off the lessons learned from the February 2000 steam generator tube rupture at Indian Point Unit 2, Entergy should be required to provide sufficient details now in this proceeding. Moreover, NRC should ensure that Entergy does not unilaterally change its proposals at some future date after this AEA § 189 proceeding is completed.

ARGUMENT

ENTERGY'S LICENSE RENEWAL APPLICATION SHOULD BE REJECTED BECAUSE IT FAILS TO PROVIDE SUFFICIENT DETAIL TO DEMONSTRATE THAT IT WILL PROPERLY MANAGE AGE-RELATED DEGRADATION AND BECAUSE IT FAILS TO COMMIT TO IMPLEMENT THOSE DETAILS OR SEEK A LICENSE AMENDMENT BEFORE MAKING ANY CHANGE TO THOSE DETAILS.

The State of New York and Riverkeeper are concerned about the relevance of Entergy's proposals in response to recognized age related degradation mechanisms that affect components that comprise the reactor coolant pressure boundary and steam generators. In their pre-filed testimony in opposition to Contention NYS-38/RK-TC-5, Entergy and NRC Staff reflect a fundamental misunderstanding of New York's basic arguments and of the Atomic Energy Act ("AEA"), Commission regulations and regulatory history, and legal precedents. The essence of Entergy and Staff's opposition is that New York, by demanding the level of detail sought in Contention NYS-38/RK-TC-5, is crossing the line between identifying an effective AMP and implementing an AMP, and is encroaching on the Staff's exclusive province to determine, after license renewal has been approved, whether Entergy has implemented the required AMP. *See* Entergy PFT at p 29, Q/A46 ("The fulfillment of particular commitments in Entergy's LRA, moreover, is an AMP implementation activity, which is beyond the scope of this hearing") and NRC Staff PFT at p 64, Q/A 103 ("Entergy has provided commitments to augment its existing program prior to the period of extended operation in order to be consistent with the GALL Report AMP X.M1 recommendations for environmentally-assisted fatigue and identifying additional locations. Thus, Staff believes that it is appropriate for the Staff to accept Entergy's commitments to augment its existing Fatigue Monitoring program").

However, New York does not argue that if Entergy had provided the details of an AMP,

and postponed the date on which it would implement those details, Entergy will have failed to meet the requirements of Part 54. Specifically, New York's position is that if Entergy fails to provide sufficient detail to enable the parties and the Board to know exactly what it will do in the future, the Board will be unable to determine whether Entergy has "demonstrated" that those future actions will, when implemented, provide the assurance required by 10 C.F.R. § 54.29(a). That regulation provides, in pertinent part, that in order to issue a renewed license the Board must find that "[a]ctions have been identified and have been or will be taken with respect to the matters identified in paragraphs (a)(1) and (a)(2) of this section, such that there is reasonable assurance that the activities authorized by the renewed license will continue to be conducted in accordance with the CLB." 10 C.F.R. § 54.29(a) Among the actions that must be taken are "managing the effects of aging during the period of extended operation on the functionality of structures and components that have been identified to require review under §54.21(a)(1)." 10 C.F.R. § 54.29(a)(1). Entergy and Staff argue that by promising to develop the required details in the future, Entergy has made a "commitment" that is enforceable by the Staff, and that Staff will be able to be certain that Entergy actually produces the details necessary to make the AMP sufficient to meet the requirements of 10 C.F.R. § 54.29.

This argument, as articulated by Entergy and Staff in their Direct Testimony, runs counter to the requirements of the Atomic Energy Act, the Commission's Part 54 regulations, the regulatory history of those regulations, and the Commission's Part 50 regulations.

First, many decades ago, the United States Supreme Court recognized that, pursuant to section 182(a) of the Atomic Energy Act (42 U.S.C. § 2232(a)), definitive safety findings must be made before issuance of an operating license. *Power Reactor Development Co. v. International Union of Elec., Radio and Mach. Workers, AFL-CIO*, 367 U.S. 396, 397 (1961)("It

is clear from this provision that before licensing the operation of PRDC's reactor, the AEC will have to make a positive finding that operation of the facility will 'provide adequate protection to the health and safety of the public.'"); *see also Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1451 (D.C. Cir.1984), *cert. denied*, 469 U.S. 1132 (1985) (holding that material licensing issues may not be excluded from a licensing hearing). The issue in *PRDC* is analogous to the issue presented here. In *PRDC* the trade union argued that definitive safety findings had to be made at the construction permit stage and that promises to provide the necessary proof of compliance with AEA safety standards only after construction was completed was unacceptable. The Supreme Court rejected the union's argument concluding the definitive safety finding requirement need only be made at the operating license stage and until operation was to be authorized, no definitive finding was required. Here, Entergy and Staff are basically asking the Board to treat this hearing as one for a construction permit where Entergy makes promises to fully develop an adequate AMP in the future but does not provide the details necessary to determine whether the AMP will in fact be adequate. Of course, this current proceeding is the operating license proceeding and this is the time when Entergy must prove its case or have its application rejected.

Second, as noted above, the regulatory language in § 54.29 obligates Entergy to prove that "actions have been *identified* and . . . will be *taken*" (emphasis added) such that Entergy demonstrates that it will be managing the effects of aging on critical safety components. All we have from Entergy, at this point, is their promise that what they develop and characterize as Aging Management Programs in the future will meet the § 54.29 tests. But, as the Commission has made clear, an Applicant's promise to develop the details of an adequate AMP in the future is not enough:

such a commitment does not absolve the applicant from *demonstrating*, prior to issuance of a renewed license, that its AMP is indeed consistent with the GALL Report. We do not simply take the applicant at its word. When an applicant makes such a statement, the Staff will draw its own independent conclusion as to whether the applicant's programs are in fact consistent with the GALL Report.

Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), CLI-10-17 at 45-46, ___ N.R.C. ___, ___ (July 8, 2010) (emphasis added).

Third, Entergy's reliance on the 1991 Statement of Considerations relevant to license renewal (Entergy PFT at 29, Q/A46) actually supports New York's position. The cited regulatory history emphasizes that the application for a new license must include "commitments to monitor, manage, and correct age-related degradation" Final Rule; Nuclear Power Plant License Renewal, 56 Fed. Reg. 64,943, 64,946 (Dec. 13, 1991), discussed in Entergy PFT at 29, Q/A 46 (ENT000521) . This is precisely what New York has argued is required as the Commission's *Vermont Yankee* decision makes clear, a commitment to make a commitment is not sufficient to "demonstrate" compliance with Part 54 requirements.

Fourth, when Entergy and Staff use the term "commitment" they do not mean what New York, Riverkeeper and the regulations require. Pursuant to 10 C.F.R. § 50.59(c)(2), the only time a commitment is meaningful is when the commitment is part of the FSAR or the Technical Specifications, because changes to the FSAR or Technical Specifications require an applicant to seek a license amendment. A commitment that does not get included in the FSAR or the Technical Specifications can be modified by the applicant without seeking an amendment and need only be identified to Staff in an end-of-year summary of all such non-regulated modifications. 10 C.F.R. § 50.59 provides in pertinent part:

(c)(1) A licensee may make changes in the facility as described in the final safety analysis report (as updated), make changes in the procedures as described in the final safety analysis report (as updated), and conduct tests or

experiments not described in the final safety analysis report (as updated) without obtaining a license amendment pursuant to §50.90 only if:

- (i) A change to the technical specifications incorporated in the license is not required, and
 - (ii) The change, test, or experiment does not meet any of the criteria in paragraph (c)(2) of this section.
- (2) A licensee shall obtain a license amendment pursuant to §50.90 prior to implementing a proposed change, test, or experiment if the change, test, or experiment would:

* * *

- (viii) Result in a departure from a method of evaluation described in the FSAR (as updated) used in establishing the design bases or in the safety analyses.⁴

Additionally, the “commitments” that Entergy and Staff now ask the Board to accept as adequate to meet the requirements of 10 C.F.R. § 54.29(a) are only meaningful if they are added to the FSAR and included in the Technical Specifications, constituting commitments that can be only be changed by going through the amendment process. Entergy resists making such “commitments” but, nonetheless, relies on these same “commitments” to “demonstrate” that what it claims are “aging management programs” will comply with NRC regulations. By relying on “commitments” to meet its obligations, Entergy is inviting the Board to rely on the “commitments” in reaching its decision. But, if the “commitments” can be changed without seeking a license amendment, which process would require review of the safety significance of the proposed change and independent analyses equivalent to those which are occurring in the license renewal hearing process, then the fundamental purpose of the current hearing process is thwarted. Under Entergy’s scenario, the Board’s findings are essentially of no importance because they are based on “commitments” that Entergy can change at will.

⁴ There are other tests that could require an amendment. However, unlike the ones cited, the other tests are replete with subjective criteria which essentially allow an applicant to keep changes from public scrutiny in the amendment process.

NRC Staff oversight of Entergy’s activities and future changes to AMPs does not absolve Entergy of the license amendment obligations imposed by the AEA and Commission Regulations for any changes that alter details of an AMP. Among the findings the Board must make to authorize a renewed license are that there is “reasonable assurance that the *activities authorized by the renewed license will continue to be conducted in accordance with the CLB . . . during the period of extended operation.*” 10 C.F.R. § 54.29(a) (emphasis added). Thus, the Board’s findings must necessarily address the entire period of extended operation and not just at the precise moment in time when the Board is reaching its conclusions. The Board is tasked with determining whether Indian Point can operate safely for twenty additional years. To do that, it must be able to evaluate the adequacy of safety measures that Entergy is proposing be implemented throughout the 20 year period. Unless Entergy commits now to maintain the safety measures upon which it asks the Board to rely, for the entire 20 years, and to not change those measures without seeking an amendment to its license, the Board cannot determine that 20 additional years of operation of Indian Point will provide adequate protection for the public health and safety. Without making those commitments, all Entergy “demonstrates” is that it has some plans, which it believes are adequate, which it can change if it wishes. Allowing such changes without preserving the public’s right to a hearing on such changes violates the rights guaranteed to the public by 42 U.S.C. § 2239 and makes a mockery of the hearing process..

The Commission Regulations provide Entergy with a procedure by which it can avoid a hearing on an amendment to its license – prior to the issuance of such an amendment. 10 C.F.R. §§ 50.90, 50.91, and 50.92 authorize NRC Staff to issue a license amendment without first holding a hearing where the Commission has determined that the proposed amendment involves “no significant hazard considerations.” *See* 10 C.F.R. § 50.91(a)(4):

Where the Commission makes a final determination that no significant hazards consideration is involved and that the amendment should be issued, the amendment will be effective on issuance, even if adverse public comments have been received and even if an interested person meeting the provisions for intervention called for in § 2.309 of this chapter has filed a request for a hearing. The Commission need hold any required hearing only after it issues an amendment, unless it determines that a significant hazards consideration is involved, in which case the Commission will provide an opportunity for a prior hearing.

If, as Entergy urges in its pre-filed testimony, its proposed AMPs meet the requirements of Part 54 because of the details and commitments presented by Entergy, then any proposed modification in those details and commitments must necessarily involve a “significant hazards consideration,” since without them Entergy has represented that its AMP will not meet the safety requirements of Part 54.⁵ If, on the other hand, Entergy believes that details and commitments it has provided are not essential to a finding that its AMP is adequate to meet the safety requirements of Part 54, it should make clear to the Board and the parties that the Board should not rely on those details and commitments in determining the adequacy of the AMP.⁶

Contention NYS-38/RK-TC-5 is premised on the basis that Entergy has not provided sufficient detail for its approach to manage the aging of the reactors’ coolant system and pressure boundary and certain steam generator components and that a “commitment” to provide those details in the future is no substitute for what is required by Part 54.

⁵ While Entergy and Staff may argue that if *they* conclude that the amendment does not involve a significant hazard, it must therefore not involve a “significant hazard consideration,” such an argument reads out of the regulations and the AEA the word “consideration.” A change to a detail or commitment upon which the Board relied in finding an AMP met the safety requirements of Part 54 necessarily involves a significant hazard *consideration* since, but for reliance on the detail or commitment, the Board would have been unable to make a required safety finding.

⁶ If Entergy were to make such a statement, the details and commitments to which the statement referred would be conclusive proof that the details and commitments which are not to be relied upon in determining the adequacy of an AMP are irrelevant to the proceeding and exhibits or testimony related to such details and commitments should not be accepted in the record. 10 C.F.R. § 2.333(b).

One recent experience with Entergy and proposed “commitments” underscores the importance of requiring Entergy to apply for an amendment to its license if it seeks to change any detail or commitment regarding an AMP upon which it asks the Board to rely, and upon which the Board does rely, in determining that an AMP meets the safety requirements of Part 54.

The Vermont Yankee Experience

As the State of New York previously explained both here in Contention NYS-38/RK-TC-5 and in other contentions, Entergy recently attempted to unilaterally change a commitment it made to US NRC Staff, the State of Vermont, and a citizen group concerning the monitoring of metal fatigue at the Vermont Yankee facility.

The license renewal process for Vermont Yankee underscores the importance of requiring Entergy to amend its license before changing any detail or commitment regarding an AMP. In the January 26, 2007 Vermont Yankee License Application, Entergy committed to using a computerized monitoring program known as “FatiguePro,” to determine metal fatigue. *See generally*, Letter, Richard J. Conte, Chief, USNRC NRR, to Mr. Christopher Wamser, Entergy Nuclear Operations, Inc., Vermont Yankee Nuclear Power Station—NRC Integrated inspection report 05000271-2011011 (Dec. 22, 2011), ML113560064 (NYS000459). However, on January 6, 2011 – after the conclusion of the Atomic Safety and Licensing Board hearings and before final Commissioner action – Entergy unilaterally removed FatiguePro from its commitment. *Id.* On March 21, 2011, the NRC Commissioners issued a renewed operating license for Vermont Yankee. NRC Information Digest, Appendix A (NRCR00086). Two months later, on May 19, 2011, Entergy informed the NRC that Entergy had changed Commitment 6. *Id.* In October 2011, NRC conducted an inspection of Vermont Yankee. In a December 22, 2011 report of that inspection, NRC Inspectors noted that “this change, in essence,

rescinded the commitment." *Id.* The next day, the Deputy Commissioner of Vermont's Department of Public Service raised concerns with the NRC over Entergy's rescinded commitments. Letter from S. Hoffman, Deputy Commissioner VT Dept of Pub. Service, to W. Dean NRC Region 1 Administrator, (December 23, 2011) (NYS000460).

On March 5, 2012, Entergy submitted a request to modify its license regarding the wording and implementation of commitments. BVY 12-015, Entergy Letter (March 5, 2012) ML12068A110. On March 12, 2012, Entergy submitted a another request to amend its license, in order to revise Commitment 6. BVY 12-016, Entergy letter (March 12, 2012), ML12079A031. Entergy's unilateral decision to rescind Commitment 6 prompted a letter from U.S. Representative Edward Markey to NRC Chairman Jaczko over NRC's handling of commitments. Letter from Congressman E. Markey to NRC Chairman Jaczko, (March 16, 2012) (NYS000461). On April 20, 2012, the NRC issued another letter and inspection report, describing the changed commitment. Letter, Richard J. Conte, Chief, USNRC NRR, to Mr. Christopher Wamser, Entergy Nuclear Operations, Inc., Vermont Yankee Nuclear Power Station--NRC Integrated inspection report 0500027/2012008 (April 20, 2012), ML12103A406 (NYS000462). On July 12, 2012, Commissioner Macfarlane responded to Congressman Markey's concerns. Letter from A. Macfarlane, Chairman, NRC, to E. Markey, U.S. Congressman, "Regulatory Commitments," encl. at 2-14 (July 12, 2012) (ENT000544).

Although Entergy and the NRC now claim that the commitment's rescission and amendment resulted in no harm, Entergy's disregard for process deprived both the Board and the parties of the opportunity to challenge the rescission of the commitment during the licensing hearing. Furthermore, this obstruction of process should not serve as precedent: changes to AMP

details, upon which an applicant relies for relicensing, cannot occur outside the amendment process without an opportunity for hearing.

Both Entergy and Staff argue here that industry guidance on which kinds of changes require NRC notice or approval will be followed. That position is not adequate as a matter of law. First, industry guidance, even if followed, does not act to modify the requirements of the AEA, the Administrative Procedure Act, and Commission Regulations. Second, with regard to Vermont Yankee, the Staff inspectors could not determine whether Entergy had met the expectations of the commitment change processes as specified in the license conditions of (1) the renewed Vermont Yankee license, (2) NRC-endorsed industry guidance or (3) Entergy's own commitment change procedures.⁷ *Id.* NRC Staff says this was "due to various possible interpretations of the two guidance documents, particularly on how the commitment was considered during the staff's review and the implementation timing of the commitment (scheduled for March 22, 2012)." *Id.*

The approach urged by intervenors in Contention NYS-38/RK-TC-5 (and in the State's Statements of Position in support of Contentions NYS-5, 6 and 7) would prevent the kind of unsupervised and unauthorized modifications to relevant "commitments" made by Entergy in support of license renewal and upon which the Board would rely in reaching a decision. It would require Entergy to identify the details needed to demonstrate that its AMP meets Part 54 safety requirements and to include those details in its FSAR and Technical Specifications, in turn requiring that Entergy seek a license amendment p before it can change any of those details. Since any detail of an AMP upon which Entergy relies to prove compliance with Part 54 safety

⁷ NEI 99-04 "Guidelines for Managing NRC Commitment Changes" (ML003680088), and Entergy procedure EN-LI-110, Commitment Management Program, Revision 4.

requirements necessarily involves a relevant and significant safety matter, proposed changes to that implicate Part 54 and involves a “significant hazards consideration.”

CONCLUSION

The State and Riverkeeper continue to assert that Entergy has not met its burden; that is, Entergy has not demonstrated that the effects of aging on the intended function(s) of steam generator components and other components in the reactor coolant system and reactor coolant pressure boundary will be adequately managed for the period of extended operation. For the above reasons Entergy’s application to renew the operating licenses for Indian Point Unit 2 and Unit 3 should be denied.

Respectfully submitted,

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