

November 22, 2010

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Commission

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

**ENTERGY’S ANSWER OPPOSING NEW ENGLAND
COALITION’S PETITION FOR COMMISSION REVIEW OF LBP-10-19**

Pursuant to 10 C.F.R. § 2.341(b)(3), Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (“Entergy”) hereby answer opposing the petition for Commission review filed by the New England Coalition (“NEC”) in the Vermont Yankee license renewal proceeding.¹ NEC seeks review of the Atomic Safety and Licensing Board’s (“Board”) October 28, 2010 Order² denying NEC’s eleventh-hour motion to reopen the proceeding to litigate a new contention.³ The Board properly denied NEC’s Motion because it failed to satisfy, *inter alia*, the requirements of 10 C.F.R. § 2.326(a)(1) and (3). The Commission should decline to grant NEC’s Petition for Review because (1) NEC has failed to identify any error of fact or law in that decision, and has not charged the Board with any procedural errors that might warrant Commission review; and (2) the Board’s decision was clearly correct.

¹ Petition for Commission Review of ASLBP Memorandum and Order (Ruling on New England Coalition Motion to Reopen and Proffering New Contention) (Nov. 12, 2010) (“NEC’s Petition”).

² Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-10-19, 72 N.R.C. __ (Oct. 28, 2010) (“LBP-10-19”).

³ New England Coalition’s Motion to Reopen the Hearing and for the Admission of New Contentions (Aug. 20, 2010) (“NEC’s Motion”).

A significant portion of NEC's Petition is devoted to claims that the NRC Staff and the Board are biased, derelict, and have treated NEC unfairly. These ad hominem attacks are unfounded and unseemly, and Entergy does not intend to dignify them with a further response. In addition, much of NEC's argument is predicated on its assertions that the Commission gave NEC free reign to submit new contentions (NEC's Petition at 7, 9-11), that as a pro se intervenor, it should be entitled to "slack" in the application of the standards for a motion to reopen (NEC's Petition at 2-3), and that in essence, all that should have been required of NEC was submission of a contention with sufficient merit to be heard (NEC's Petition at 19). These assertions should be rejected out of hand. The Commission in CLI-10-17 did not provide that NEC was free to file new contentions, as NEC claims, but rather noted that NEC could file a motion to reopen pursuant to 10 C.F.R. § 2.326. As the Commission has long held, the standards in 10 C.F.R. § 2.326 are applied strictly. See, e.g., AmerGen Energy Co. (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 N.R.C. 658, 668-69 (2008); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-05-12, 61 N.R.C. 345, 350 (2005). Otherwise, there would simply be no end to proceedings. AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 N.R.C. 235, 272 (2009).

That NEC is a pro se intervenor does not relieve it of compliance with these standards. "[T]he fact that a party may have personal or other obligations or possess fewer resources than others to devote to the proceeding does not relieve that party of its hearing obligations." Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 N.R.C. 452, 454 (1981). "[I]t has long been a 'basic principle that a person who invokes the right to participate in an NRC proceeding also voluntarily accepts the obligations attendant upon such participation,'" even pro se participants who are likely to have less available time and resources. Duke Energy Corp.

(Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 N.R.C. 328, 338-39 (1999) (citing Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-83-18, 17 N.R.C. 1037, 1048 (1983)); see also USEC Inc. (American Centrifuge Plant), CLI-06-10, 63 N.R.C. 451, 456 (2006) (“[T]hose participating in our proceeding[s] must be prepared to expend the necessary effort.”).

Moreover, strict application of these standards is particularly appropriate here, where this license renewal proceeding will soon enter its sixth year.⁴ As the Commission has stated, “applicants for a license are . . . entitled to a prompt resolution of disputes concerning their applications.” Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 N.R.C. 18, 19 (1998). NEC’s suggestion that the applicable standards should be ignored to permit it to further delay this proceeding and litigate an untimely and unsupported contention would eviscerate this policy. Accordingly, the Commission should not only deny NEC’s Petition, but should do so expeditiously.

As a final threshold matter, NEC’s Motion before the Board and NEC’s Petition before the Commission are often vague and conclusory, and in places very hard to understand. NEC now argues repeatedly on appeal that its claims were misunderstood. If any of NEC’s claims were misunderstood (and Entergy does not believe that this is the case), any such misunderstanding was of NEC’s own making. NEC should be held accountable for the vagueness in its pleadings. See Public Service Electric & Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 N.R.C. 43, 50 (1981) (“it is incumbent upon intervenors who

⁴ In contested license renewal proceedings, the Commission’s long-standing goal has been the issuance of a Commission decision in about two and one half years from the date that the application was received. Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant), CLI-98-14, 48 N.R.C. 39, 42 (1998); Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2 and 3), CLI-98-17, 48 N.R.C. 123, 126 (1998). In this proceeding, Entergy’s application to renew the Vermont Yankee operating license was filed in January 2006.

wish to participate in NRC proceedings to structure their participation so that it is meaningful, so that it alerts the agency to the intervenors' positions and contentions") (quotations and citation omitted). The Board "cannot be faulted for not having searched for a needle that may be in a haystack." Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-03, 29 N.R.C. 234, 241 (1989).

STATEMENT OF THE CASE

This proceeding concerns Entergy's application for renewal of the Vermont Yankee Nuclear Power Station operating license. Entergy submitted its License Renewal Application ("LRA") on January 25, 2006. The LRA included aging management programs ("AMPs") addressing electric cables, consistent with the NRC's Generic Aging Lessons Learned ("GALL") Report,⁵ including an AMP for Non-EQ Inaccessible Medium Voltage Cable⁶ consistent with Section XI.E3 of the GALL Report (Inaccessible Medium Voltage Cable Not Subject to 10 CFR 50.49 Environmental Qualification Requirements).⁷ NEC petitioned to intervene in the proceeding and submitted a number of contentions challenging portions of that LRA, but none that challenged the AMPs for electric cables. The Board granted NEC's petition to intervene and admitted some of NEC's contentions. Entergy Nuclear Vermont Yankee, LLC (Vermont

⁵ NUREG-1801, Generic Aging Lessons Learned (GALL) Report (Rev. 1, Sept. 2005).

⁶ LRA, App. B, § B.1.17.

⁷ As described in the GALL Report, this program applies to inaccessible (in conduit or directly buried) medium-voltage cables within the scope of license renewal that are exposed to significant moisture (defined as periodic exposure to moisture that lasts for more than a few days, such as standing water). This recommended AMP calls for both periodic actions to prevent cable exposure to significant moisture (such as inspecting for water collection in cable manholes and draining water as needed) and testing at least every ten years (with the first test to be completed before the period of extended operation). GALL Report at XI.E-7 to XI.E-8. The testing must be a proven method for detecting deterioration of the insulation system due to wetting, such as power factor, partial discharge, or polarization index, or other testing that is state-of-the-art at the time the test is performed. Id. at XI.E-7.

The NRC Staff is currently preparing a revision to the GALL Report, which will include extending the AMP applicable to Non-EQ inaccessible cable to low voltage power cable. As a result, on September 3, 2010, Entergy submitted a supplement to its LRA, modifying the Non-EQ Inaccessible Cable AMP, enhancing the program to include such low voltage cables. See Entergy's Answer, Exh. C. For a fuller discussion of the background leading to this change, see Entergy's Answer at 8-11.

Yankee Nuclear Power Station), LBP-06-20, 64 N.R.C. 131 (2006). After consulting with all the parties, the Board then issued a scheduling order to govern this proceeding, providing that a motion to admit any new contention would be deemed timely if filed within thirty days of the date on which the new information on which the contention is based first becomes available.⁸ Initial Scheduling Order (Nov. 17, 2006) at 7. On February 25, 2008, the NRC Staff issued its final Safety Evaluation Report,⁹ which was published as NUREG-1907 in May 2008.¹⁰

The Board held an evidentiary hearing regarding NEC's admitted contentions that remained in dispute and issued a Partial Initial Decision on November 24, 2008,¹¹ followed by a Full Initial Decision on July 23, 2009.¹² The Partial Initial Decision was appealed by the NRC Staff and the Full Initial Decision was subsequently appealed by NEC. On July 8, 2010, the Commission decided the appeals, and remanded the proceeding to the Board for the limited purpose of giving NEC the opportunity to submit a revised Contention 2 (concerning the adequacy of Entergy's AMP for metal fatigue).¹³ The Commission also denied a stay request by NEC, which the Commission found had nothing to do with the issue on appeal and was not specifically keyed to license renewal (CLI-10-17 at 9-10), but noted that, during the pendency of the remand, "NEC and Vermont are free to submit a motion to reopen the record pursuant to 10 C.F.R. § 2.326, should they seek to address any genuinely new issues related to the license

⁸ The 30-day requirement was the timeframe specifically advocated by NEC. See Prehearing Teleconference Transcript at 484 (Nov. 1, 2006).

⁹ See Letter from L. Subin to ASLB (Feb. 26, 2008), ADAMS Accession No. ML08570653.

¹⁰ NUREG-1907, Safety Evaluation Report Related to the License Renewal of Vermont Yankee Nuclear Power Station (May 2008), ADAMS Accession Nos. ML081430057 (Vol. 1) and ML081430109 (Vol. 2).

¹¹ Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-08-25, 68 N.R.C. 763 (2008).

¹² Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-09-9, 70 N.R.C. 41 (2009).

¹³ Entergy Nuclear Vermont Yankee, L.L.C. (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 N.R.C. ___ (July 8, 2010) ("CLI-10-17").

renewal application that previously could not have been raised.” Id. at 10 n.37. After the remand, the Board issued an order establishing August 20, 2010 as the deadline by which NEC would have to file a revised Contention 2 or a motion to reopen the record with any new contentions.¹⁴

On August 20, 2010, NEC filed its Motion to Reopen, declining to submit a revised Contention 2 but submitting one new contention. The contention, identified by the Board as Contention 7, alleged that:

Applicant has not demonstrated adequate aging management review and/or time-limited aging analysis nor does the applicant have in place an adequate aging management program to address the effects of moist or wet environments on buried, below grade, underground, or hard-to-access safety-related electrical cables, thus the applicant does not comply with NRC regulation (10 CFR § 54.21 (a) and guidance and/or provide adequate assurance of protection of public health and safety (54.29(a)). [sic]

NEC’s Motion at 8. NEC asserted that its Motion was timely because it was filed in response to an NRC Inspection Report published on May 10, 2010, and that the issue of submergence of electric cables was a significant safety issue of concern to the NRC and the industry.¹⁵ NEC’s Motion at 5-6. NEC’s Motion included a Declaration from Mr. Paul M. Blanch.

¹⁴ Licensing Board Order (Setting Schedule for Remand Filings) (July 12, 2010) at 2.

¹⁵ The NRC Inspection Report does not relate to inspection of any license renewal activities, but instead pertains to activities under Vermont Yankee’s current license. As discussed in Entergy’s Answer at 9-11, in response to NRC Staff recommendations that current licensees have a program for using diagnostic cable testing methods to assess cable condition and also make reasonable provisions to keep cables dry, Entergy has developed a fleet procedure to monitor cable, which it issued on December 31, 2009. As an initial step taken before this procedure was even issued, Vermont Yankee performed an inspection of underground access points on November 28, 2009 to assess the condition of cables and supports and determine if there was water intrusion. May 10, 2010 Inspection Report at 20. As discussed in the NRC Inspection Report, Vermont Yankee identified portions of certain safety-related cable that were submerged. Id.

The specifications for these cables indicated that they are suitable for both wet and dry conditions. Id. However, after consulting with its specialists, the NRC concluded that these specifications do not include continuously submerged conditions. Id. The NRC therefore determined that Vermont Yankee had not complied with 10 C.F.R. Part 50, Appendix B, Criterion III, “Design Control,” because the cables had not been selected for suitability in the submerged environment. Id. at 21. The NRC treated this occurrence as a non-cited violation because it “was of very low safety significance” and was entered into Entergy’s corrective action system. Id.

Entergy and the NRC Staff each filed answers opposing NEC's Motion and Contention 7 on numerous grounds.¹⁶ Both asserted that the Motion should be denied because it failed to meet the standards for a motion to reopen set forth in 10 C.F.R. § 2.326(a). See Entergy's Answer at 18-29; NRC Staff's Answer at 3-14. Specifically, both argued that the Motion was not timely, failed to address a significant safety issue, and failed to demonstrate that a materially different result would be likely if the information had been considered initially. 10 C.F.R. § 2.326(a)(1)-(3).¹⁷ NEC filed a reply to Entergy's and the NRC Staff's Answers, accompanied by another Declaration of Paul M. Blanch.¹⁸ Thereafter, Entergy filed a Motion to Strike the Declaration which accompanied NEC's Reply,¹⁹ and NEC filed an answer asserting that the Declaration should not be stricken.²⁰ The Board issued its ruling, LBP-10-19, on October 28, 2010, rejecting NEC's Motion to Reopen.

SUMMARY OF THE DECISION OF WHICH NEC SEEKS REVIEW

NEC's Petition seeks review of LBP-10-19, the Board's Order rejecting its Motion and new Contention 7. The Board analyzed NEC's Motion according to the regulatory requirements

The NRC observed that the cables "were still fully capable of performing their design functions." Id. The Inspection Report did fault Vermont Yankee for not pumping the manholes dry more expeditiously, but also found that Entergy had addressed this issue not only by dewatering the affected manholes but by developing a frequency for subsequent pump downs. Id. at 20.

¹⁶ Entergy's Answer Opposing New England Coalition's Motion to Reopen (Sept. 14, 2010) ("Entergy's Answer"); NRC Staff's Opposition to the New England Coalition's Motion to Reopen the Hearing and Answer to Proposed New Contention (Sept. 14, 2010) ("NRC Staff's Answer").

¹⁷ Both Answers also argued that NEC's Motion and Contention 7 should be rejected for failing to meet the requirements for filing a late contention set forth in 10 C.F.R. § 2.309(c) and the contention admissibility criteria of 10 C.F.R. § 2.309(f)(1). See Entergy's Answer at 29-39; NRC Staff's Answer at 14-31.

¹⁸ New England Coalitions Reply to NRC Staff and Entergy Nuclear Vermont Yankee Opposition to New England Coalitions Motion to Reopen the Hearing and Reply to NRC Staff's Answer to Proposed New Contention (Sept. 20, 2010) ("NEC's Reply").

¹⁹ Entergy's Motion to Strike the Declaration of Paul M. Blanch (Sept. 23, 2010).

²⁰ New England Coalition's Answer and Opposition to Entergy's Motion to Strike the Declaration of Paul Blanch (Sept. 30, 2010).

applicable to a motion to reopen offering a new contention and found that the Motion does not satisfy the standards in 10 C.F.R. § 2.326(a)(1) and (3). LBP-10-19 at 20-21.

Specifically, the Board found that the Motion was untimely, thus not meeting the criteria in 10 C.F.R. § 2.326(a)(1), because the potential for the submergence of electrical cables and the need to address and manage that issue had been apparent from the outset of the proceeding and was not newly revealed by the May 10, 2010 Inspection Report. LBP-10-19 at 23. In addition, the Board reasoned that if Entergy's AMP for cables suffers from the inadequacies alleged by NEC, then it has been inadequate since the beginning of the proceeding. Id. Because Contention 7 was based on information available since the beginning of the proceeding, the Board found that NEC's Motion to Reopen was not timely under 10 C.F.R. § 2.326(a)(1). Id. at 24.

The Board further found that NEC's Motion failed to satisfy 10 C.F.R. § 2.326(a)(3) because it did not show that it is more probable than not that NEC would prevail on the merits of the proposed new contention. Id. at 26. Instead, the Board held that NEC provided only conclusory assumptions and predictions as to what it thought the Board would have done. Id. at 27.

The Board also examined NEC's Motion and Contention 7 to assess whether the safety issues raised are significant, but ultimately concluded that such a determination was not necessary to its holding. Id. at 24-26. It found that Contention 7 raises a safety issue and that the general topic of the integrity of safety-related electrical cables in the context of wetting and submergence of such cables is significant, but declined to conclude whether the actual issues proposed in Contention 7 raise a significant safety issue as required by 10 C.F.R. § 2.326(a)(2).

Id. at 25-26. The Board determined that it did not need to decide this question because it held NEC's Motion deficient under 10 C.F.R. § 2.326(a)(1) and (3). Id. at 26.

Because it found that NEC's Motion failed to satisfy the requirements of 10 C.F.R. § 2.326(a)(1) and (3), the Board also found it unnecessary to consider the other factors which a motion to reopen proffering a new contention would have to meet, and determined that Entergy's Motion to Strike the Declaration which accompanied NEC's Reply was moot because, even assuming the admissibility of all statements contained therein, the Motion to Reopen would still be deficient. Id. at 27.

ARGUMENT

I. COMMISSION REVIEW SHOULD NOT BE EXERCISED BECAUSE NEC FAILS TO FULFILL THE STANDARDS WARRANTING SUCH REVIEW

Although the Board's Order specifically identified the regulations pursuant to which any petition for review of LBP-10-19 would need to be filed (see LBP-10-19 at 28 (referencing 10 C.F.R. §§ 2.1212 and 2.341(b))), NEC fails to sufficiently address, let alone satisfy, the applicable regulatory requirements. First, NEC's Petition fails to even address the requirements set forth in 10 C.F.R. § 2.341(b)(2) which are applicable to any such filing. Nowhere does it contain "(ii) [a] statement (including record citation) where the matters of fact or law raised in the petition for review were previously raised before the presiding officer and, if they were not, why they could not have been raised; (iii) [a] concise statement why in the petitioner's view the decision or action is erroneous; [or] (iv) [a] concise statement why Commission review should be exercised."²¹ 10 C.F.R. § 2.341(b)(2). Rather than being organized to present these items, as

²¹ At the beginning of its Petition, NEC asserts a laundry list of reasons that it alleges "Commission review of the Board Order is appropriate," including because "[t]he order is a mockery of NRC's perennial reassurance in public meetings and scoping sessions on license amendments and renewals that the public 'can always ask for a

plainly required by the regulation, NEC's Petition largely consists of irrelevant criticisms and complaints about the NRC Staff and the Board.²²

Second, the Petition fails to demonstrate that the considerations set forth in 10 C.F.R. § 2.341(b)(4) weigh in favor of Commission review. NEC was plainly aware of the applicability of these considerations because it lists them. See NEC's Petition at 9. However, instead of specifying how its Petition allegedly gives rise to any one of the considerations, NEC merely proclaims, without any explanation or support, that it "demonstrates one or more" of them. NEC's Petition at 9 (emphasis in original). This failure to specify precisely how the Petition gives rise to any of the applicable considerations is reason alone to deny the Petition because licensing board rulings are to be affirmed where the "brief on appeal points to no error or law or abuse of discretion that might serve as grounds for reversal of the Board's decision." Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-21, 52 N.R.C. 261, 265 (2000) (citation omitted); Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 N.R.C. 631, 637 (2004). It is NEC, as the proponent of the Petition, that bears responsibility for clearly identifying alleged errors in the decision below and providing sufficient information to support its claims. "A mere recitation of an appellant's prior positions in a proceeding or a statement of his or her general disagreement with a decision's result 'is no substitute for a brief that identifies and explains the errors of the Licensing Board in

hearing on genuine issues of concern.'" NEC's Petition at 2. It is not clear, however, whether any of these cryptic and unexplained reasons are offered to fulfill the requirement of 10 C.F.R. § 2.341(b)(2)(iv).

²² For example, NEC's Petition accuses the following: (i) the "NRC Staff's opposition could be more vigorous and mean-spirited than that of the licensee;" (ii) "the Board's choice is to cleave to the most stringent interpretation of the letter of the law rather than to the fair hearing spirit and assurance of public health and safety focus evident [sic] the Commission's Order;" (iii) "before this Board licensees get to back-and-fill and polish the application endless, [sic] irrespective of where we are in the process but the citizen intervenor must get it right the first time; one strike, you're out;" and (iv) the "Board's review repeatedly misses the point of NEC pleadings and witness testimony to the degree that the review sometimes appears to be deliberately obtuse." NEC's Petition at 4, 10, 11 and 14.

the order below.”” Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 N.R.C. 192, 198 (1993) (footnote omitted).

NEC’s failure to even attempt to fully address these regulatory requirements, despite the Board’s explicit identification of them, is akin to the failure of NEC to include with its Motion an affidavit that separately addresses each of the criteria in 10 C.F.R. § 2.326(a) and specifically explains why each has been met. Such an affidavit is plainly required by 10 C.F.R. § 2.326(b), and the Commission, in CLI-10-17, had explicitly noted that any motion by NEC to reopen the record must be submitted in accordance with 10 C.F.R. § 2.326. CLI-10-17 at 10 n.37. Even though NEC was put on explicit notice of the regulatory requirement, it failed to even attempt compliance.²³ The Declaration’s failure to separately address and provide factual or technical bases sufficient to satisfy the criteria in 10 C.F.R. § 2.326(a) was reason enough for the Board to reject NEC’s Motion and, as such, constitutes sufficient grounds to sustain LBP-10-19.²⁴ See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 N.R.C. 62, 76 (citing Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-89-1, 29 N.R.C. 89, 93-94 (1989)).

II. THE BOARD’S DECISION DENYING NEC’S MOTION TO REOPEN THE PROCEEDING PROFFERING A NEW CONTENTION IS CORRECT

In addition to its failure to satisfy the regulatory standards for seeking Commission review, NEC’s Petition should be denied and LBP-10-19 should be affirmed because the Board’s

²³ NEC claims that it “had no idea that [such information] was expected of a technical witness,” but the requirement is directly stated in the regulation explicitly identified by the Commission. See NEC’s Reply at 15. Accordingly, any ignorance of the requirement on NEC’s part is inexcusable.

²⁴ The Board did not rely on this failure, identified by both Entergy and the NRC Staff in their Answers opposing NEC’s Motion, as one of its grounds for rejecting the Motion to Reopen. See, e.g., Entergy’s Answer at 18 and NRC Staff’s Answer at 6. Entergy, nevertheless, asserts that the failure is a sufficient ground to sustain LBP-10-19. The successful party before a licensing board “may urge that its decision be sustained on any ground which finds support in the record, even where the ground has been rejected or disregarded below.” Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 N.R.C. 347, 357 (1975).

decision was clearly correct. The Board provided a thorough explanation of the regulatory requirements applicable to a motion to reopen that seeks to introduce a new contention (including the criteria set forth in 10 C.F.R. § 2.326(a), which require that the motion (1) be timely, (2) address a significant safety or environmental issue, and (3) demonstrate that a materially different result would have been likely); described in detail the arguments made by each party with respect to the criteria set forth in 10 C.F.R. § 2.326(a)(1)-(3) (including, for NEC, both those asserted in the actual Motion as well as the accompanying Declaration of Mr. Blanch); and properly concluded that NEC's Motion must be rejected because it failed to satisfy 10 C.F.R. § 2.326(a), explaining in full its reasoning.²⁵

A. The Board Properly Applied the Standards in 10 C.F.R. § 2.326(a)

NEC commences its argument by disparaging the Board for its discussion of Commission precedent indicating that motions to reopen are disfavored (see NEC's Petition at 10-11),²⁶ but the Board's discussion is completely consistent with the Commission's case law.

²⁵ The Board acknowledged that a number of other regulatory factors apply to any motion to reopen a proceeding to introduce a new contention, but determined that it need not analyze each of those factors because NEC's Motion failed to satisfy the initial requirements of 10 C.F.R. § 2.326(a)(1) and (3). LBP-10-19 at 2.

²⁶ NEC also complains that the Board should not have accepted Entergy's filing of an amendment to its LRA on September 3, 2010. See NEC's Petition at 8, 11. It is not clear to what, if anything, in Entergy's LRA amendment NEC objects. Indeed, that amendment extended Entergy's AMP to include low-voltage cables, a development which NEC's filings in this proceeding suggest that it would favor. Regardless, there is nothing in the Commission's regulations that prevents a license renewal applicant from filing an amendment to its application at any time, and in fact amendments to an application are both common and contemplated by the NRC rules. Virginia Electric and Power Co. (Combined License Application for North Anna Unit 3), LPB-10-17, 72 N.R.C. ___, slip op. at 14 (Sept. 2, 2010). Whether the adjudicatory record of a proceeding is open or closed is irrelevant. Further, the adjudicatory record of a proceeding is often closed early in a proceeding if a petitioner's contentions are dismissed, and NEC's position would mean that no amendment to an application in any such proceeding could occur. Moreover, NEC's Motion advocated amendment (see NEC's Motion at 13-14), so it is disingenuous for NEC to now claim that an LRA amendment was impermissible. In any event, if NEC believed that anything in Entergy's LRA amendment justified the filing of a new contention, it could have filed a motion to reopen the proceeding on that basis, requested the Board's leave to amend its motion to reopen and proposed a contention, or explained in NEC's Reply why the LRA supplement would affect its Motion and Contention 7. NEC did none of these.

As the Commission has held, the NRC “does not look with favor on amended or new contentions filed after the initial filing.” Millstone, CLI-04-36, 60 N.R.C. at 636 (quotation omitted).

[O]ur contention admissibility and timeliness rules require a high level of discipline and preparation by petitioners “who must examine the publicly available material and set forth their claims and the support for their claims at the outset.” There simply would be “no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements” and add new contentions at their convenience during the course of a proceeding based on information that could have formed the basis for a timely contention at the outset of the proceeding. Our expanding adjudicatory docket makes it critically important that parties comply with our pleading requirements and that the Board enforce those requirements.

Oyster Creek, CLI-09-7, 69 N.R.C. at 271-72 (footnotes omitted).

NEC is also wrong in characterizing the Board’s discussion as inconsistent with the Commission’s Order in CLI-10-17, which NEC inaccurately describes as “containing, in response to NEC’s concern for emerging issues, a proviso that during the period of pendency Vermont and NRC are free to file new contentions on genuinely new issues; subject to applicable regulation.” NEC’s Petition at 10 (emphasis in original). The Commission did not say that NEC was free to file new contentions. Instead, it simply remarked that NEC was free to file a motion to reopen pursuant to 10 C.F.R. § 2.326 (and its remarks had nothing to do with concern for emerging issues). CLI-10-17 at 10 n.37. The purpose of the Commission’s statement, as explained in the NRC Staff’s Answer, was to give the Board jurisdiction to consider any motion to reopen while the case was on remand to the Board because, once a petition for review is filed, jurisdiction passes from the Board to the Commission. See NRC Staff’s Answer at 10 & n.7. The Commission, therefore, rather than giving NEC permission to file new contentions, specifically directed that the requirements of 10 C.F.R. § 2.326 would apply to any motion to reopen which was submitted. Thus, the Board’s Order, which analyzed NEC’s Motion to

Reopen with respect to the criteria set forth in 10 C.F.R. § 2.326, was entirely consistent and in compliance with the Commission's statement. NEC's complaint to the contrary provides no basis for reviewing the Order.

B. NEC's Motion to Reopen Is Not Timely Under 10 C.F.R. § 2.326(a)(1)

As the Board correctly explains, the "timeliness of NEC's motion to reopen [under 10 C.F.R. § 2.326(a)(1)] depends primarily on an assessment as to when NEC first knew, or should have known, enough to raise the issues presented in Contention 7." LBP-10-19 at 21. In order to perform that assessment, the Board succinctly summarized its understanding of NEC's assertions regarding the inadequacy of Entergy's AMP, with explicit references to the portions of NEC's Motion in which each assertion is made.²⁷ Even NEC appears to agree with this characterization of its claims. See NEC's Petition at 12 (introducing the Board's quote with "The Board correctly states"). Having correctly identified NEC's claims (none of which were specified in the contention itself), the Board rightly concluded that NEC's Motion was not timely because the issues it raised are not new. LBP-10-19 at 23. The Board specifically found that the May 10, 2010 Inspection Report, which revealed that certain safety-related electrical cables had been exposed to submerged conditions, did not entitle NEC to belatedly raise a new issue since it did not present an unexpected revelation. Id. at 24. As the Board carefully explained, the fact that long-term submergence of safety-related electrical cables was possible has been apparent since the outset of the instant proceeding, as evidenced by the NRC's September 2005 GALL Report and Entergy's AMP. Id. at 23-24. Furthermore, the Board reasoned that if Entergy's

²⁷ See LBP-10-19 at 21 ("As we understand it, NEC asserts that the AMP is inadequate because it: (1) fails to provide for frequent enough monitoring and inspections of the cables (Motion at 13, 22, Blanch Declaration at 12), (2) fails to provide for appropriate and/or frequent enough testing of the cables (Motion at 13, 21; Blanch Declaration at 11), (3) fails to preclude the submergence of electrical cables (Motion at 13, 17, 19-20; Blanch Declaration at 9), and (4) fails to cover low-voltage cables (Motion at 9, 13, 20; Blanch Declaration at 10)") (emphases in original).

AMP suffers from the inadequacies alleged by NEC, then such inadequacies have been present since the beginning of the proceeding and could have been raised at that time. Id. at 23.

In its Petition, NEC now incorrectly and bizarrely argues that “NEC has nowhere claimed that wet cables was unexpected or new information.” NEC’s Petition at 17; see also id. at 13 (“NEC did not claim that the issue [of submerged electrical cables]...was new”). NEC’s claim that the Board somehow misunderstood its basis for using the May 10, 2010 Inspection Report to raise an issue at this late stage is belied by the statements made in NEC’s Motion. The Motion explicitly stated,

This contention is based on the fact the applicant has recently discovered safety related electrical cables, not qualified for wet conditions, submerged in water, thus providing a challenge to the integrity of cable insulation and cable operability exacerbated by aging and with adequate protections against such flooding nowhere contemplated in the license renewal application.

NEC’s Motion at 9 (emphasis added). See also id. at 13 (describing the “vulnerability of [Entergy’s] safety-related cables to wetting, submergence and a resulting increased rate of aging” as “newly discovered”). The Board was absolutely correct, therefore, in its understanding that NEC was basing its contention on the claim that the possibility of submergence was “newly discovered” and “nowhere contemplated in the license renewal application.”

Likewise, NEC’s confusing post-hoc argument that “what was new regarding Entergy Vermont Yankee aging management of safety-related electrical [sic] susceptible to submergence was new because it was only vaguely described or not described at all in the LRA” is simply obfuscation. NEC’s Petition at 13. As the Board held, “[i]f Entergy’s AMP suffers from the inadequacies enumerated by NEC, then it has been inadequate since the beginning of this proceeding.” LBP-10-19 at 23 (footnote omitted). The Commission’s regulations specifically contemplate that intervenors may file contentions alleging that applications are inadequate

because they fail to include necessary information. See 10 C.F.R. § 2.309(f)(1)(vi) (“if the petitioner believes that the application fails to contain information on a relevant matter as required by law, [it must include] the identification of each failure and the supporting reasons for the petitioner’s belief”). Because the alleged inadequacies in Entergy’s AMP are unrelated to and unaffected by the May 10, 2010 Inspection Report,²⁸ it does not provide any basis for NEC to assert objections to Entergy’s AMP at this late date. Instead, if NEC believes that the AMP fails to contain sufficient detail or required information, it should have raised this objection at the beginning of the proceeding.

Even if the May 10, 2010 Inspection Report did contain new information which provided a basis for the filing of Contention 7 – which it did not as explained above – NEC’s Motion would still be untimely because it was filed three and a half months after that Report was issued. See Entergy’s Answer at 18-19; NRC Staff’s Answer at 8-9. NEC attempts to explain away this lateness by asserting that the single report provided an “insufficient basis for a new contention” and that it sought additional information after the issuance of the Inspection Report. NEC’s Petition at 7; see also id. at 14 (“NEC could not immediately file a new contention on this issue because the information was insufficient to support a new contention”). NEC has failed to identify, however, any other information allegedly justifying its late-filing.²⁹ The Board’s initial

²⁸ NEC attempts to assert that the May 10, 2010 Inspection Report revealed faults with Entergy’s AMP. See NEC’s Petition at 6 (“NRC Inspection Report, which revealed to NEC for the first time that Entergy Vermont Yankee’s newly deployed (November 2009) AMP for cables susceptible to wetting or submergence had no provision for actually mitigating the effects of wetting or preventing the wetting of cables”). This assertion is inaccurate. As explained in Entergy’s Answer, the pertinent AMP will be implemented in 2012. See Entergy’s Answer at 8. The Inspection Report instead concerns Entergy’s current license activities. Id. at 10 (explaining that submerged cables were found during inspection undertaken as part of current license activities); see also note 15 supra. The AMP, however, has not yet been implemented and the discovery of the cables at issue in the Inspection Report is therefore incapable of revealing any deficiency in that AMP.

²⁹ Mr. Blanch’s Declaration referred to NUREG/CR-7000, Essential Elements of an Electric Cable Condition Monitoring Program (Jan. 2010), but that report predates the NRC Inspection Report. Further, the cable inspection procedures recommended in NUREG/CR-7000 are consistent with those required by Entergy’s AMP,

scheduling order in this proceeding specifically required that, to be considered timely, new contentions must be filed within thirty days of the date on which the new information first becomes available.³⁰ And, the Commission has held that a contention is not timely when filed two months after the new information on which it relies first became available. See, e.g., Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 N.R.C. ___, slip op. at 15 (Sept. 30, 2010). In this case, therefore, even if the Inspection Report did constitute new information providing a basis for Contention 7 (which it does not), NEC's Motion to Reopen, filed three and a half months after the Report became available, should still have been rejected as untimely.³¹

C. NEC's Motion to Reopen Fails to Satisfy the Criterion of 10 C.F.R. § 2.326(a)(3)

In addition to being untimely, the Board properly found that NEC's Motion failed to satisfy the requirement of 10 C.F.R. § 2.326(a)(3) because it did not demonstrate that “a materially different result would be or would have been likely had the newly proffered evidence been considered initially.” LBP-10-19 at 26. The Board explained that, to fulfill the requirement, NEC would have had to show that “it is more probable than not that NEC would have prevailed on the merits of the proposed new contention.” Id. The Board found that the

and thus cannot provide a basis for a new contention. Entergy's Answer at 38-39. NEC also referred briefly to an EPRI Report, Aging Management Program Guidance for Medium Voltage Cable Systems for Nuclear Power Plants (June 10, 2010), but made no showing that Entergy's AMP was inconsistent with any recommendation in that guidance. See NEC's Motion at 6. NEC's Petition at 14 now refers to August 2010 presentation slides, which NEC improperly raised for the first time on reply (see NEC's Reply at 7), but the statements on these slides to which NEC refers simply paraphrase the Foreword of NUREG/CR-7000. In any event, as the Board ruled, such information cannot properly be considered “new” since information has existed since the outset of this proceeding showing that there is a potential for the submergence of cables and that the NRC and the industry are concerned with the issue. See LBP-10-19 at 23-24.

³⁰ Initial Scheduling Order (Nov. 17, 2006) at 7.

³¹ Although the Board did not rely on this reason for the untimeliness of NEC's Motion, it was raised below by both Entergy and the NRC Staff, and Entergy asserts that it provides a sufficient reason to reject NEC's Motion. See Nine Mile Point, ALAB-264, 1 N.R.C. at 357.

measly two sentences in the Motion devoted to this requirement were “conclusory assumptions and predictions as to what NEC thinks that the Board would have done” which did not amount to a demonstration that NEC was likely to succeed on the issue. Id. at 27. Indeed, NEC merely asserted that “it is reasonable to assume” that the “Board would have rejected Entergy’s LRA....” NEC’s Motion at 7. The Board properly found that such bare assertions did not demonstrate that “it is likely that [NEC] would have prevailed on the merits of Contention 7.” LBP-10-19 at 27 (emphasis in original). Specifically, the Board held that nothing in NEC’s Motion or the accompanying Declaration made it appear likely that NEC is correct that the AMP contained in Entergy’s LRA was inadequate for the specific reasons alleged. The Board explained that a “motion to reopen requires more than a possibility. It requires a demonstration that the petitioner is likely to succeed,” something it accurately found lacking from NEC’s Motion. Id.

The Board was clearly correct in finding that NEC’s Motion was deficient in demonstrating that a materially different result would have been likely had the new information been considered initially. As the Board explained, the May 10, 2010 Inspection Report merely revealed that cables were actually submerged, but the potential for this occurring and the existence of it as a concern for the NRC and industry were apparent from the outset of this proceeding. Therefore, it is unlikely that the consideration of this information initially would have led to a materially different result. The two sentences of assertion and speculation provided in NEC’s Motion are simply not adequate to meet the high burden of demonstrating that a materially different result would have been likely. See, e.g., Oyster Creek, CLI-08-28, 68 N.R.C. at 674 (holding that bare assertions and speculation do not provide the support required

for a movant to meet its burden of demonstrating that 10 C.F.R. § 2.326(a)(3) weights in favor of a motion to reopen being granted).

The arguments made in NEC's Petition do not remedy the deficiencies in NEC's Motion on this issue. NEC simply quotes a portion of the Board's holding and then asserts that it has presented expert testimony and other authorities which "show that its proposed contention has merit sufficient to be heard." NEC's Petition at 19. NEC does not dispute that it has not met the standard asserted by the Board (that NEC must demonstrate that it is likely that it would have prevailed on the merits of Contention 7), complaining that "NEC cannot be expected to prove its case at this point for that would be an impossibly high standard; one negating the basic purpose of the hearing for which NEC is asking." NEC's Petition at 19. However, the Commission has long required that a motion to reopen be supported by a strong evidentiary showing of likelihood that consideration of the new contention would result in the denial or conditioning of the application. Oyster Creek, CLI-08-28, 68 N.R.C. at 673-76; Private Fuel Storage, CLI-05-12, 61 N.R.C. at 350. The Board's description of the demands of 10 C.F.R. § 2.326(a)(3) is consistent with the Commission's prior holdings, and NEC's failure to meet those demands properly compelled the Board to reject NEC's Motion.

D. NEC's Motion to Reopen Fails to Satisfy the Criterion of 10 C.F.R. § 2.326(a)(2)

Although the Board found it unnecessary to determine whether NEC's Motion met the criterion in 10 C.F.R. § 2.326(a)(2),³² the denial of NEC's Motion should also be sustained on

³² The Board discussed the requirement of 10 C.F.R. § 2.326(a)(2), that a motion to reopen must address a significant safety issue, and the parties' arguments with respect to this requirement. It ultimately concluded that Contention 7 raises a safety issue, that the general topic of the integrity of safety-related electrical cables in the context of wetting and submergence of such cables is significant, and that it had not determined whether the specific issues presented by Contention 7 raise a significant safety issue. LBP-10-19 at 25-26. The Board made clear that its decision to reject NEC's Motion was not dependent upon its findings with respect to whether a

the ground that NEC failed to demonstrate that its Motion addressed a significant safety issue.³³ In the Declaration accompanying NEC’s Motion, Mr. Blanch stated that failures of safety-related cables may result in accidents and loss of safety-related equipment. Blanch Decl. at ¶¶ 25-26. This statement is not sufficient to demonstrate that the Motion addresses a significant safety issue, however, because “binding case law establishes that a movant who seeks to reopen the record does not show the existence of a significant safety issue merely by showing that a plant component ‘perform[s] safety functions and thus ha[s] safety significance.’” Oyster Creek, CLI-08-28, 68 N.R.C. at 672 (emphasis in original) (footnote omitted). Furthermore, Mr. Blanch essentially ignored the existence of the AMPs to manage the effects of aging on cables contained in Entergy’s LRA and the fact that such AMPs are explicitly based on, and entirely consistent with, those recommended in the GALL Report. The Commission has held that programs consistent with the GALL Report provide reasonable assurance that the effects of aging will be adequately managed during the renewal period. AmerGen Energy Co. (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 N.R.C. 461, 468 (2008); CLI-10-17 at 44.

Similarly, Mr. Blanch’s assertion that “[i]n its description of its aging management program, Vermont Yankee has not proposed any methodology to precluded [sic] or detect the submergence of Medium Voltage Cables” (Blanch Decl. at ¶ 28), simply ignored the relevant

significant safety issue had been presented. Id. at 26 (“Given that we hold that the motion to reopen fails to satisfy 10 C.F.R. § 2.326(a)(1) and (3), it is unnecessary to decide the ‘significance’ prong of this regulation”). NEC’s Petition accuses the Board’s reasoning with respect to 10 C.F.R. § 2.326(a)(2) of being “ridiculous and unsupported” (NEC’s Petition at 18), but NEC’s meritless complaints – even if they were not meritless – do not provide grounds for review of the Board’s decision because LBP-10-19 made clear that the Board’s discussion of that regulatory requirement was irrelevant to its ultimate holding. Because NEC’s claims fail to address the Board’s actual grounds for refusing to grant the Motion to Reopen, they do not provide justification for Commission review. See Millstone, CLI-04-36, 60 N.R.C. at 637.

³³ As previously noted, a decision may be defended on any ground advanced below. See nn. 24 & 31, supra. For the reasons discussed in Entergy’s Answer at 29-39 and the NRC Staff’s Answer at 14-31, the denial of NEC’s Motion is also sustainable on the ground that NEC did not satisfy the lateness factors in 10 C.F.R. § 2.309(c), and did not meet the standards for an admissible contention in 10 C.F.R. § 2.309(f).

provisions of Entergy's AMP. The Program Description for the Non-EQ Inaccessible Medium-Voltage Cable Program (and GALL AMP XI.E3) explicitly states:

In this program, periodic actions will be taken to prevent cables from being exposed to significant moisture, such as inspecting for water collection in cable manholes and conduit, and draining water, as needed.

Entergy's Answer, Exh. C, Att. 1 at 2. See also GALL Report at XI.E-7. It further provides that the:

VYNPS inspection for water accumulation in manholes is conducted in accordance with a plant procedure. An evaluation per the Corrective Action Process will be used to determine the need to revise manhole inspection frequency based on inspection results.

Entergy's Answer, Exh. C, Att. 1 at 2. Thus, the LRA plainly commits to inspections to detect submergence, use of the results to adjust inspection frequency, and draining where necessary. Moreover, as a further measure to provide reasonable assurance that a cable will perform its intended function, the AMP also specifically requires tests to evaluate the condition of the conductor insulation, since the GALL Report concludes that inspection and draining actions alone cannot assure that non-EQ inaccessible cable will not be exposed to water. See GALL Report at XI.E-7. Mr. Blanch did not indicate any deficiency in these measures, and therefore did not demonstrate any significant issue with regard to the adequacy of Entergy's program to provide reasonable assurance that the non-EQ inaccessible cable will continue to perform its intended function.

Similarly, the discussion of safety significance in NEC's Motion itself also failed to satisfy the requirement of 10 C.F.R. § 2.326(a)(2). NEC merely quoted the regulation and asserted that "[f]or all of the good reasons evidenced in the foregoing, the Board must find that this is a significant safety issue." NEC's Motion at 6. This conclusory and unexplained

assertion certainly cannot meet the high burden required to open a closed record at such a late stage in this proceeding. Furthermore, none of the “foregoing” discussions in the NEC’s Motion - consisting of a reference to the May 10, 2010 NRC Inspection Report and quotations from an EPRI Guidance Document and NUREG/CR-7000 (see NEC’s Motion at 5-6) - supports that assertion. The NRC Inspection Report makes plain that it does not support the existence of a significant safety issue. It states:

The finding was determined to be of very low safety significance (Green) because it was a design or qualification deficiency which was confirmed to have not resulted in a loss of operability or functionality. Specifically, the continuously submerged cables...were still fully capable of performing their design functions.

May 10, 2010 Inspection Report at 21 (emphasis added). NEC quoted this language (see NEC’s Motion at 11), but neither it nor Mr. Blanch disputed the “very low safety significance” finding. The absence of a dispute with that finding shows that there is not a significant safety issue at issue. See Oyster Creek, CLI-09-7, 69 N.R.C. at 288-90 (finding no significant safety issue where a motion to reopen failed to dispute an NRC Staff Inspection Report’s lack of any safety significant findings). And, the quotes from the EPRI Guidance Document and NUREG/CR-7000 simply reflect that electrical cables are important components and increasing attention is being paid to the need for monitoring to maintain their reliability throughout their installed life. See NEC’s Motion at 6. These references, therefore, do not indicate any significant safety concern with the adequacy of the AMPs contained in Entergy’s LRA (which are endorsed in the GALL Report).

CONCLUSION

For the foregoing reasons, Entergy respectfully requests that the Commission deny NEC’s Petition for Review, and affirm LBP-10-19. In light of the very late stage of this

proceeding and the clear lack of merit in NEC's Petition, Entergy respectfully submits that the Commission should issue this denial expeditiously.

Respectfully Submitted,

/Signed electronically by David R. Lewis/

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November 22, 2010

November 22, 2010

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Commission

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Entergy's Answer Opposing New England Coalition's Petition for Commission Review of LBP-10-19, dated November 22, 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 22nd day of November 2010.

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