



OFFICE OF THE
GENERAL COUNSEL

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

November 17, 2005

Anthony Z. Roisman, Esq.
National Legal Scholars Law Firm, P.C.
84 East Thetford Road
Lyme, NH 03768

In the Matter of
Entergy Nuclear Vermont Yankee, LLC, *et al.*
(Vermont Yankee Nuclear Power Station)
Docket No. 50-271-OLA (Extended Power Uprate)

Dear Mr. Roisman:

I am writing in response to your letters, written on behalf of the Vermont Department of Public Service ("DPS"), to Sherwin Turk, dated October 3 and November 3, 2005, requesting production of certain documents listed, respectively, in the NRC Staff's September 29 and October 31, 2005, deliberative process privilege logs. In response to your requests, we have re-examined the Staff's determination to withhold the requested documents, and have determined that they were properly withheld and no showing has been made which would warrant their release at this time. Accordingly, the documents will continue to be withheld as originally determined. Each of your document requests is addressed, seriatim, below.¹

Letter Request of October 3, 2005.

In your letter of October 3, 2005, you did not indicate any reason why you believe that the deliberative process privilege does not apply to the documents you requested, other than making a generalized assertion that "none of the documents identified above meet the narrow criteria for application of the deliberative process privilege." Further, you did not state any reason – much less a compelling reason – why DPS needs to obtain the requested documents apart from stating that they contain information "that we do seek." Such generalized statements fail to demonstrate that the deliberative process privilege either does not apply or should be waived to permit the release of the requested documents. Nonetheless, the Staff has undertaken to reevaluate the eleven documents listed in your letter, and has determined that they will continue to be withheld, for the reasons set forth below.

¹ The general assertions presented in your letters, such as the Staff's alleged obligation to adhere to a previous agreement which has since been terminated, were addressed in the Staff's letters to you of September 23 and November 15, 2005, and are not addressed herein. Similarly, your assertion that the Staff is obliged to file the affidavit of a high ranking Staff employee either upon filing the privilege log or in response to your informal request, was addressed in the Staff's October 21, 2005, response to the Licensing Board's Order of September 30, 2005, and is not addressed herein.

1. Document 14-01: This document contains the preliminary results of a Staff member's revised risk evaluation of the credit for containment overpressure at the Vermont Yankee boiling water reactor (BWR) Mark 1 plant, as requested by an ACRS Subcommittee on July 29, 2005, and the author's opinion regarding the risk-related acceptability of such a credit under RG 1.174. Because the document contains the writer's opinions, and because the facts contained in the document are inextricably intertwined with such opinions, this document is part of the deliberative process. Further, the document is pre-decisional insofar as the author's evaluation and recommendations may be part of the process by which the agency is considering the extended power uprate (EPU) application filed by Entergy Nuclear Vermont Yankee, LLC, *et al* ("Applicant") and/or potential revisions to a generic NRC regulatory guide.

2. Document 14-02. This is an E-mail between Staff members in which one Staff member, after completing his analysis of large break loss-of-coolant-accident (LBLOCA) calculations, conveys his opinion regarding the acceptability of the Applicant's calculations. Thus, the document contains Staff deliberations that are predecisional to the Commission's decision regarding the Applicant's proposal.

3. Documents 14-07, 14-22, 14-23, 14-24, 14-31, and 14-41. These documents contain discussions of a variety of subjects associated with the EPU application, and contain the Staff's analysis, opinions, and recommendations regarding either the Applicant's responses to previous requests for additional information ("RAIs"), or the formulation of new RAIs to address the Staff's concerns. Such deliberations among the Staff concerning what information is or is not significant or necessary in their review and to reach a decision on the EPU application is exactly the kind of communication to which the privilege applies. Moreover, such communications are necessarily predecisional to the Commission's decision regarding the Applicant's proposal.

4. Document 14-08. This document contains the results of an agency inspector's inspection of Erosion-Corrosion/Flow-Accelerated-Corrosion Monitoring Program activities conducted from July 25 through July 29, 2005. The contents of the report represent the inspector's recommendations pursuant to his findings and are part of the deliberative process by which the Commission will ultimately decide whether to grant or deny the Applicant's EPU proposal.

5. Document 14-30. This document covers a variety of topics, including the Staff's discussion of procedural aspects of completing the draft safety evaluation; the need to obtain additional information from the Applicant to complete the Staff's review (open items); the overall status of the EPU review; and the potential impact of the ACRS's letter concerning RG 1.82 (which at the time of the communication had not been released). The document contains the Staff's pre-decisional deliberations over continuing issues associated with the Commission's ultimate decision on the Applicant's proposal and is thus privileged.

6. Document 14-43. This document contains a Staff's member's response to a request for a summary of the status of his portion of the review. It consists of his opinions and recommendations on a variety of issues (including the minimum critical power ratio, linear heat generation rate, shutdown margin, and reactivity void coefficient), all arising out of the Applicant's responses to Staff RAIs. This predecisional deliberative document is privileged and has properly been withheld, for the reasons described above with respect to items 1 through 5.

Letter Request of November 3, 2005.

Your letter of November 3, 2005, seeks the disclosure of twelve documents; these can be grouped into four categories, as set forth below. Within each category, we describe the documents, as well as the Staff's justification for continuing to withhold them.

1. Documents 15-05, 15-06, and 15-07. These three documents (all part of a chain of E-mails regarding the same topic), contain detailed back-and-forth deliberations between Staff members concerning the formulation of additional RAIs to the Applicant to enable the Staff to complete its review of the EPU application. You have asserted, without explanation, that no privilege applies to these particular documents; further, you have made no showing that DPS has any particular need for the documents. In fact, each of the documents contains ongoing deliberations by members of the Staff, concerning the application and the information necessary to permit the Staff to reach a determination on the EPU application; further, they are all pre-decisional in nature. Thus, the documents were properly withheld as privileged.

2. Documents 15-40, 15-41, 15-42, 15-43. These four documents (a chain of E-mail messages regarding the same topic) concern the Staff's deliberations over the wording and scope of the transient testing license condition that was ultimately presented to and agreed upon with the Applicant. You have suggested that, although the deliberative process privilege may apply to these documents, the Staff is obliged to satisfy some additional burden to support an assertion of the privilege; however, you have not suggested any compelling reason why DPS should have access to the documents. The final version of the license condition is available in the hearing file for these proceedings. (ADAMS No. ML052630053). Absent any showing that DPS has a compelling need to obtain the requested documents, they will continue to be withheld under the pre-decisional deliberative process privilege.

3. Document 15-30. This document consists of the Safety Programs Section of the Probabilistic Safety Assessment Branch's input to the Draft SER concerning the Staff's risk evaluation of the Vermont Yankee EPU application. With respect to this document, you have asserted that although it may in fact be privileged, DPS has a compelling need for the document because you believe that it may contain "underlying probabilistic [risk] analyses done by the Staff or Entergy . . . ," therefore making it important for you to "critically analyze the draft conclusions . . . in the SER." However, Section 2.13 of the Draft SER, which the Staff has previously made available to you (ADAMS No. ML 053010167), contains the final version of the Staff's preliminary risk evaluation. Any probabilistic risk analyses conducted by the Staff relevant to your contentions are contained in that document; in contrast, any prior drafts of the calculations were either replicated in or superseded by the Draft SER. Thus, since the information you seek is already available to you, a compelling need for the requested document has not been demonstrated.

4. Documents 15-31, 15-33, 15-35, and 15-36. These documents consist of a series of E-mails between Staff members regarding the possibility of imposing a license condition requiring the Applicant to submit a confirmatory risk-informed evaluation of its proposed credit for containment overpressure. In these documents, the Staff recommends language for a license condition to ensure that the Applicant conducts the appropriate evaluation. Again, you have asserted that although these documents may in fact be privileged,

DPS has a compelling need for them because you believe that they may contain "underlying probabilistic [risk] analyses done by the Staff or Entergy . . .," therefore making them important for you to "critically analyze the draft conclusions . . . in the SER." In fact, none of these documents contains a probabilistic risk analysis, but rather consist of deliberations between Staff members and management over the decision whether to propose a license condition regarding the Applicant's future obligation to conduct such an analysis. Therefore, the documents were properly withheld as privileged, and you have not shown a compelling need for these privileged documents.

As stated in our letter to you of November 15, 2005, the Staff recognizes that DPS has a valid interest in the proper conduct and outcome of this adjudicatory proceeding. As the Commission has frequently stated, however, the proper focus of licensing proceedings is on an Applicant's proposal -- not the NRC Staff's internal deliberation over the proposal. Thus, while we can appreciate your interest in perusing the Staff's internal discussions over various issues arising during the Staff's review, we are also cognizant of the need for unfettered and open deliberations among members of the Staff, in order to assure the integrity of the agency's decision-making process.

Please feel free to contact me, at (301) 415-8350, or Sherwin Turk at (301) 415-1533, if you have any additional questions or concerns that you would like to discuss.

Sincerely,

A handwritten signature in cursive script that reads "Sherwin E. Turk, for".

Jason C. Zorn
Counsel for NRC Staff

cc: Sara Hofmann, Esq.