

UNITED STATES
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

September 29, 2005 (7:25am)

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of)
)
ENTERGY NUCLEAR VERMONT)
YANKEE LLC AND ENTERGY NUCLEAR)
OPERATIONS, INC.)
(Vermont Yankee Nuclear Power Station))

Docket No. 50-271

ASLBP No. 04-832-02-OLA

VERMONT DEPARTMENT OF PUBLIC SERVICE MOTION FOR LEAVE TO
FILE A REPLY BRIEF IN SUPPORT OF ITS MOTION TO COMPEL

INTRODUCTION

The Vermont Department of Public Service (DPS) reluctantly files this Motion. Pursuant to 10 CFR § 2.323(c) in order to file a reply brief a party is required to make a showing of "compelling circumstances, such as where the moving party demonstrates that it could not reasonably have anticipated the arguments to which it seeks leave to reply." However, in order to make that showing the party is necessarily filing a reply brief since the test for leave to file the reply brief requires some discussion of the merits of the issues to which a reply is sought. Because of that dilemma and in order to not appear to be doing through the back door that which it is not allowed to do through the front door, DPS filed its previous Request for Oral Argument Or, Alternatively, for Leave to File a Request to File a Reply Brief. The NRC Staff response to this Request was to insist that DPS actually address the merits of its intended Reply as a prerequisite to seeking leave to file the Reply. Accordingly, at NRC Staff insistence (see attached correspondence between Turk and Roisman regarding these matters) DPS has been left with no choice but to file this Motion.

ARGUMENT

In two places in its Opposition to the Motion to Compel, the NRC Staff has made statements that are so utterly inconsistent with the law and the facts that DPS could not have contemplated they would be made and thus did not seek to address them in its initial brief.

First the Staff asserts that:

. . . DPS attempts to avoid its burden to demonstrate a special and overriding need for the information by arguing that the Staff has failed to prove that "disclosure [of its information] would compromise the deliberative process." This approach, however, would improperly require the Staff to justify its claim of privilege and show some specific harm that would be caused by the disclosure of information in each document - even before any request for disclosure has been received - and it ignores Commission precedent, which clearly establishes (a) that the burden of demonstrating a need for this information, once a privilege has been asserted, rests with DPS; and (b) only after the requestor satisfies its burden is a balancing of the agency's and requestor's interests to be undertaken. See Shoreham, 19 NAG at 1341, 1343-44, 1345-46.

Opposition Brief at 8. DPS would not have imagined NRC Staff would mischaracterize the argument of DPS and would not have imagined that NRC Staff would argue that by merely "asserting" the privilege, without making any showing that unless the privilege is honored the deliberative process would be compromised, NRC Staff could shift the burden to the requesting party to demonstrate a special need for the document. DPS would like the opportunity to respond to this extreme and unwarranted point of view.

Second, NRC Staff asserts:

Indeed, the Staff has, in the interests of openness and cooperation among the parties, accommodated even untimely challenges by DPS to the Staff's assertion of privilege, providing disclosure of some documents which were previously withheld under a claim of privilege. 7

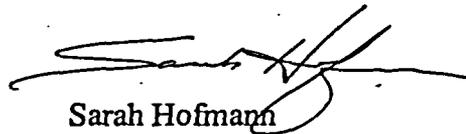
⁷ In two instances, for example, the Staff has, on request, reconsidered its claim of privilege and disclosed documents to the parties. See, e.g., Letter from Antonio Fernandez to Anthony Z. Roisman, dated August 24, 2005 (ADAMS Accession No. ML052370289); and Letter from Brooke D. Poole to Anthony Z. Roisman, dated August 3, 2005 (ADAMS Accession No. ML052200223).

Opposition Brief at 10. DPS could not have anticipated that NRC Staff would misrepresent the facts and assert that documents which were produced after timely filing of an objection to their being withheld would be claimed to have been produced in the face of alleged "untimely challenges", thus making the NRC Staff appear to be more generous than warranted. DPS would like the opportunity to set the record straight.

CONCLUSION

For the reasons stated, DPS requests leave to file a Reply Brief. Alternatively, DPS would be willing to advance its arguments during an oral argument.

Respectfully submitted,



Sarah Hofmann
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112 State Street - Drawer 20
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Dated at Montpelier, Vermont this 29th day of September, 2005.

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) Docket No. 50-271
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(Vermont Yankee Nuclear Power Station))

CERTIFICATION OF COUNSEL

Pursuant to 10 CFR §2.323(b) the undersigned counsel certifies that he has made a sincere effort to convince NRC Staff that a reply brief should be allowed to be filed with regard to Vermont Department of Public Service's pending Motion to Compel. Staff has not been willing to accept the principal that to provide the level of detail it demands to support a motion for leave to file such a reply would necessarily require filing a reply brief, thus defeating the purpose of the rule. Staff has not provided undersigned counsel with any persuasive reasons or legal precedents sufficient to convince him that the position of DPS is in error. Thus, the good faith efforts of Staff and undersigned counsel to resolve this matter without involvement of the Board have failed.


Anthony L. Roisman
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September 28, 2005

SEP 28 9 40 AM '05

STATE OF VERMONT
DEPT. OF PUBLIC SERVICE
MONROE CLERK, V.P.
05620-2601

RoismantoTurk.txt

From: Anthony Roisman [aroisman@nationallegalscholars.com]
Sent: Wednesday, September 21, 2005 3:40 PM
To: Sherwin Turk
Subject: RE: NRC Staff Answer to Vermont Department of Public Service -
VYEPU proceeding

I appreciated your brief but I think you do not see the quandry created by the rules. If I were to list the reasons why oral argument or a reply brief are necessary, I would be in effect filing the reply brief without permission. That is not appropriate.

You might want to suggest to those who wrote these regulations - many of whom may not have any litigation experience - that a rule that requires you to explain why you want to have a reply in order to have a reply is a self-defeating rule. I am just trying to play by the rules. Anyway, what do you have to be afraid of? :-) Tony.

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The content of this e-mail is privileged and confidential and for the exclusive use of the persons to whom it is sent. Any inadvertent receipt of this message by someone other than the intended addressee is not a waiver of the privilege and confidential status of this message.

-----Original Message-----

From: Sherwin Turk [mailto:SET@nrc.gov]
Sent: Wednesday, September 21, 2005 3:33 PM
To: lesrrr@comcast.net; shadis@ime.net;
aroisman@nationallegalscholars.com; Anthony Baratta; Alex Karlin;
Antonio Fernandez; SECY HearingDocket; Jason Zorn; Kathryn Winsberg;
Robert Weisman; Rick Ennis; douglas.rosinski@pillsburylaw.com;
jay.silberg@pillsburylaw.com; matias.travieso-diaz@pillsburylaw.com;
shadis@prexar.com; jonb@sover.net; sarah.hofmann@state.vt.us
Subject: NRC Staff Answer to Vermont Department of Public Service -
VYEPU proceeding

Attached is the "NRC Staff's Answer to Vermont Department of Public Service's 'Request for Oral Argument' or, Alternatively, for Leave to File a Request to File A Reply Brief" in the Vermont Yankee Extended Power Uprate (EPU) proceeding.

TurkReplies.txt

From: Sherwin Turk [SET@nrc.gov]
Sent: Wednesday, September 21, 2005 3:44 PM
To: aroisman@nationallegalscholars.com
Subject: RE: NRC Staff Answer to Vermont Department of Public Service
-VYEPU proceeding

Sorry, I just find nothing in the request to support it.
Sherwin

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In the Matter of)	
)	Docket No. 50-271
ENTERGY NUCLEAR VERMONT)	
YANKEE LLC AND ENTERGY NUCLEAR)	ASLBP No. 04-832-02-OLA
OPERATIONS, INC.)	
(Vermont Yankee Nuclear Power Station))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the Vermont Department of Public Service Motion for Leave to File a Reply Brief in Support of its Motion to Compel in the above captioned proceeding has been served on the following by deposit in the United States Mail, first class, postage prepaid, and where indicated by asterisk by electronic mail this 29th day of September, 2005.

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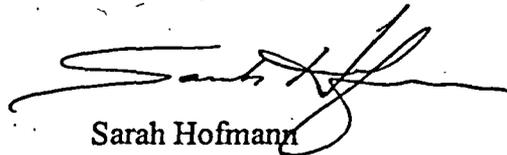
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Sincerely,



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