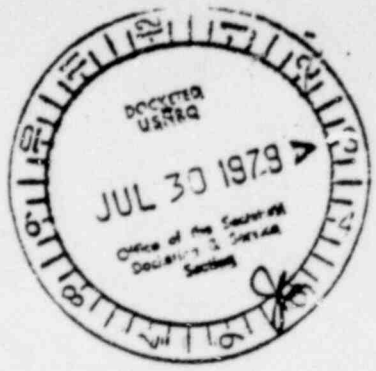

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of VIRGINIA ELECTRIC AND POWER COMPANY (North Anna Power Station, Units 1 and 2)	Docket Nos. 50-338 SP 50-339 SP (Proposed Amendment to Operating License NPF-4)

INTERVENORS' REPLY TO VEPCO'S AND NRC STAFF'S ANSWERS TO INTERVENORS' MOTION TO AMEND PETITION TO INTERVENE

This reply briefly addresses additional issues relating to the effect on this proceeding of the recent decision of the United States Court of Appeals for the District of Columbia Circuit in Minnesota v. Nuclear Regulatory Commission, No. 78-1269 (May 23, 1979). The Intervenors contend that the Virginia Electric and Power Company (VEPCO) and the NRC Staff, in their answers to the Intervenors motion of June 15, 1979, misconstrued the substance of that decision and its proper application to this proceeding. The Intervenors adhere to the legal arguments presented in their earlier motion.

In their answers VEPCO and the NRC Staff speculated variously as to whether the D.C. Circuit's ruling suggests that it might reverse the outcome of this proceeding, and whether it would be preferable for the Commission to

make the required findings of fact (as to when the existence of a satisfactory method for permanent disposal of spent nuclear fuel is reasonably assured) in the context of an adjudicatory or legislative-type hearing. The Intervenors have their own views on these issues which were stated earlier or are summarized below. However, there emerges from Minnesota one principle of law which is not subject to conscionable dispute:

> "prior to approval of a license amendment permitting expansion of a nuclear plant's spent fuel pool capacity, there must be a determination concerning future spent fuel storage. Specifically, there must be a determination whether it is reasonably probable that an offsite fuel repository will be available when the operating license of the nuclear plant in question expires." 1/

This legal determination was initially made by the Atomic Safety and Licensing Appeal Board (the Appeal Board) with its ruling in conjunction/that the finding in question had properly been made prior to the issuance of the operating license amendments in two lower proceedings. 2/ The Commission declined to review the Appeal Board's decision, thereby adopting it, in both aspects, as its own. It is hardly necessary to point out that under accepted principles of administrative law the Commission's ruling then became

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1/ Minnesota v. Nuclear Regulatory Commission, No. 78-1269 (D.C. Cir. 1979)(Tamm, J. concurring)(emphasis supplied).

2/ 7 NRC 41, 49 (Jan. 30, 1978).

binding on all Atomic Safety and Licensing Boards.

The legal force of the Commission's ruling was later vitiated by the Court of Appeals only with respect to the second aspect, i.e. the procedural validity of the finding relied upon. The court never so much as hinted that it disagreed with the legal conclusion that such a finding is required under the National Environmental Policy Act. The court simply found that the Commission has not satisfied this requirement, and remanded for the limited purpose of compliance, not for reassessment of the existence of the requirement.

The foregoing analysis can be neatly summarized:

- The Commission has ruled that (1) before permission to compact a spent fuel pool can be granted a finding on the permanent waste storage question must be made, and (2) such a finding was properly made in that case.
- Absent judicial reversal, all rulings of the Commission are binding on this Board.
- Since the Court of Appeals reversed ruling #2 but not #1, this Board continues to be obligated to make the finding called for under ruling #1.

This analysis is a generous one. It is perfectly clear that while the court was silent as to the former ruling in a blindly literal sense, it implicitly affirmed it. Obviously, if the court had disagreed with the Commission's interpretation of NEPA, it would not have remanded the case for compliance

with a non-existent legal duty. Therefore, in this proceeding, the requirement for a finding on the permanent storage question derives not only from the Commission but concurrently from the Court of Appeals.

The need for a determination on the permanent storage question is not a legal nicety but a matter of common sense. When the North Anna Station was designed and licensed the spent fuel pool was intended only for storage on an interim basis (roughly 150 days) prior to shipment offsite for re-processing or permanent disposal. The viability of "swimming pools" as a long-term storage technique was not considered at the time and has never been resolved. Since then, unforseen political circumstances have developed, and anticipated technical advances have not developed, thereby leading the Commission to adapt spent fuel pools for long-term use. This new purpose is implicit in the decision to allow modification of these pools for denser configurations. The Court of Appeals has simply directed the Commission to reasonably assure itself that these pools are reasonable safe for long-term storage, or that they are reasonably safe enough for use until such time as a satisfactory permanent disposal technology can reasonably expected to be available.

It would be inappropriate, indeed illegal, for the Board to entertain VEPCO's suggestion that it may permit the modification of the North Anna spent fuel pool subject to

administrative or some such limitations on the number of assemblies which may be placed in the pool. This would constitute a transparent attempt to evade the clear command of the court and the binding mandate of the Commission that a finding on the permanent disposal question precede this kind of operating license amendment.

Apparently the other parties have "psyched out" the court to conclude that since it did not reverse the issuance of the operating license amendments in that case, it would not do so on review of this case. This is a tactical assessment which, while it may be appropriate for counsel to a party, requires the Board to overlook the clear legal obligation to which it is now subject. While the Intervenors decline to engage in crystal ball gazing as to the likely fate of this proceeding on review, we will point out two critical distinctions between the proceedings reviewed in Minnesota and this one.

First, in its decision the court acknowledged pointedly that because the spent fuel pools were filled to capacity, unless the operating licenses at issue were left in effect the decision would have required the shutdown of the Vermont Yankee plant at once and the Prairie Island plant in the near future. Considering the massive adverse economic and

social impacts of such an outcome, the court understandably thought it unfair to inflict on the utilities and their ratepayers the costs of the Commission's misfeasance. The result does not reflect a lack of necessity for the evidentiary findings regarding long-term storage, but rather a natural exercise of the court's equitable power to avoid onerous remedies and to do justice. In this case, however, not a gram of spent fuel has been placed in the North Anna spent fuel pool. Shutdown of the plant is not reasonable possibility and will not be for a number of years. This makes it very difficult to predict that the court would exercise its equitable powers similarly.

Second, when the license amendments involved in Minnesota were issued, the Commission had reasonably, though erroneously, concluded that it was in compliance with the requirements of NEPA. Now, however, the Court has reprimanded the Commission and declared as a matter of law that spent fuel compaction may not proceed unless findings on the long-term storage question have been made. What was excused in Minnesota will not likely be excused again if based on a full and knowing disregard for the law. VEPCO is now on notice of this change in the law. It cannot be deemed an innocent victim of the Commission's mistake if it urges the result which is reached.

The correct view of Minnesota is not that the court has told the Commission that at some point it should take

a look at the long term disposal question. Rather, it ruled that an operating license amendment permitting spent fuel compaction is invalid under NEPA unless it is based on a proper finding that this is an appropriate storage method until such time as a permanent storage technology is reasonably assured to be available. The court's reluctance to shut down Vermont Yankee has little bearing on whether it would allow this Board and the Commission to continue issuing these amendments as if compliance with NEPA were discretionary. In any event, calculations of this kind are essentially tactical circumvention of the law, and are inappropriately undertaken by the Board.

Respectfully submitted,

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Dated this 26th day
of July, 1979

CERTIFICATE OF SERVICE

I hereby affirm that copies of the foregoing INTERVENORS' MOTION FOR LEAVE TO REPLY and INTERVENORS' REPLY TO VEPCO'S AND NRC STAFF'S ANSWERS TO INTERVENORS MOTION TO AMEND PETITION TO INTERVENE were served this 26th day of July, 1979, by deposit in the United States Mail, upon the following:

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