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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Robert M. Lazo, Chairman  
Peter A. Morris  
Cadet H. Hand

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In the Matter of )

Docket No. 50-309-OLA

MAINE YANKEE ATOMIC POWER COMPANY )

ASLBP No. 80-437-02 LA

Maine Yankee Atomic Power Station )  
\_\_\_\_\_) )

January 17, 1983

MEMORANDUM AND ORDER

(Concerning SMP's Motion for More Complete Disclosure by Applicant)

The Intervenor Sensible Maine Power (SMP) by a Motion and supporting memorandum asserts it has been denied its right to procedural due process and the benefits of "notice pleading" by the alleged failure of the Applicant to provide sufficient information concerning its proposed spent fuel pool expansion.<sup>1</sup> As a result, SMP moves this

<sup>1</sup> "SMP Motion for More Complete and Specific Disclosure By Applicant" ("Motion") and "Memorandum of Points and Authorities in Support of SMP Motion for More Complete and Specific Disclosure by Applicant" ("Memorandum") both documents are dated August 27, 1982.

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Board to order the Applicant to file a more complete and specific explanation of its proposed "d/r/c scheme."<sup>2</sup> SMP further requests that it be granted thirty days to file new contentions based upon the desired information, that the discovery schedule be delayed, and that it be granted an award of reasonable costs for bringing this Motion. The NRC Staff and the Applicant both urge the Board to deny SMP's Motion in its entirety.

In its response of September 16, 1982, the Staff asserts that (i) sufficient information is currently publicly available to put SMP on notice with respect to the nature of the Applicant's proposed license amendment, including the d/r/c scheme; (ii) the Motion, in effect, is a discovery request which is prematurely filed at this time; and (iii) the related relief sought is not provided for by the Commission's Rules of Practice and is otherwise inappropriate. The Applicant's September 7, 1982 short answer to SMP's Motion is that it is nothing other than a premature request for discovery.

On October 13, 1982, SMP filed a reply to the Staff and Applicant opposition to its Motion and a request for leave to file the same. We have carefully studied all of the filings and concluded that the SMP Motion must be denied.

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<sup>2</sup> The d/r/c scheme refers to the Applicant's plan to disassemble, reassemble and compact its spent fuel rods and assemblies.

## I

SMP maintains that the failure of the Applicant to declare or describe the means and methods by which it plans to pursue its proposed d/r/c scheme deprives SMP of being put on notice relative to Applicant's proposed license amendment and violates its due process right to participate meaningfully in this proceeding. However, it is clear that adequate information is currently available to put SMP on notice of the general nature of Applicant's proposal and to permit the drafting of contentions relative thereto. SMP's admitted Contentions 1, 5, 7 and 9 already challenge aspects of the proposed spent fuel pool expansion because of the d/r/c scheme. As noted by the Staff in its response to SMP's Motion, the Staff's safety evaluation report (SER) generally outlines the proposed license amendment and the radiological consequences of the d/r/c scheme. The SER sets forth twenty references which SMP could examine for further information. See SER at 24. In this regard, References 1 and 6, being letters from the Applicant to the Staff dated September 18, 1979 and October 5, 1981, respectively, contain sufficient descriptions of the d/r/c scheme to put SMP on notice with respect to what the Applicant proposed by its license amendment.

As has been emphasized by the Appeal Board, Intervenor's have an ironclad obligation to examine publicly available documents with sufficient care to enable them to uncover any information that could serve as a basis for a contention. Duke Power Company, et al. (Catawba Nuclear Generating Station, Units 1 and 2) ALAB-687, Slip Op. at 13 (August 19, 1982). In the instant case, the documents cited above are believed to

be more than adequate to put SMP on notice with respect to the d/r/c scheme and to permit the drafting of contentions based upon that scheme.

Finally, SMP has failed to explain how its procedural due process rights are being violated by the manner in which this litigation is proceeding. Since SMP currently has contentions relative to the d/r/c scheme, will be provided full discovery rights relative to those contentions, and has been granted the right to participate in an adjudicatory hearing on those contentions, SMP has not adequately explained how its constitutional rights are being trampled.

## II

SMP's motion is for all practicable purposes a discovery request for additional information beyond that which has been provided by Applicant in its licensing documents. But formal discovery in this proceeding has not yet begun.<sup>3</sup> Accordingly, the Motion is premature. During the discovery period which will be set by the Board, SMP may avail itself of the full complement of discovery tools provided by the NRC's Rules of Practice. See 10 C.F.R. § 2.740, et seq. If in the course of discovery SMP acquired new information which it deems warrants a new contention, it will be incumbent upon SMP at that time to meet the requirements imposed upon it by 10 C.F.R. § 2.714 for late filed

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<sup>3</sup> In its Memorandum and Order dated July 20, 1982, the Board established October 25, 1982 through January 24, 1983 as the time when parties may engage in discovery. However, on November 2, 1982 counsel for the Staff advised the Board by letter that all parties to this proceeding have agreed that the commencement of discovery should await the issuance of a Board Order ruling on Environmental Impact Appraisal (EIA) and SER related contentions.

contentions. Meanwhile in the absence of an explanation by SMP why the requested information could not be pursued during the discovery period to be scheduled, this Motion must be denied.

### III

SMP has also requested that: (1) Intervenor be given a right to file contentions within thirty days of receipt of information on the d/r/c scheme; (2) discovery be postponed until this process occurs; and (3) SMP be awarded the reasonable cost of this Motion.

Because the basis of the instant motion is incorrect - insufficient information on the d/r/c scheme to file contentions thereon - any timely contention based upon the d/r/c scheme should have already been filed. Indeed, as noted above, such contentions have already been filed by this very Intervenor. If further information is developed during discovery which SMP feels warrants a new contention, SMP may file the appropriate pleading. Therefore, there is no good reason why the discovery period should be postponed.

Lastly, there is no provision in the Commission's Rules of Practice for the award of costs to a movant when filing a motion directed against another party. cf. 10 C.F.R. § 2.730 and 2.740(f). Even assuming this Board had the authority to levy such costs on the party being moved against, it is a well settled rule of law that parties must bear the expense of their litigation. Alyeska Pipeline Service Co. v. Wilderness Society, et al., 421 U.S. 240, 247 (1975). This rule, known as the American Rule, has recently been applied to NRC licensing proceedings, and has been cited as the basis for denying costs and attorneys fees to intervenors. Northern Indian Public Service Co. (Bailly Generating

Station, Nuclear 1) ("Memorandum and Order (Issuing Proposed Order Terminating Proceeding)") (April 12, 1982). In Bailly, citing the Alyeska decision the Licensing Board held that "[a]bsent a statutory exception, the American Rule is not only binding upon the courts but upon administrative agencies as well. Turner v. FCC, 514 F. 2d 1354 (D.C. Cir. 1975)." Id. at 6-7. In view of the discussion set forth above, SMP's assertion that an exception should be made to the American Rule, is not persuasive.

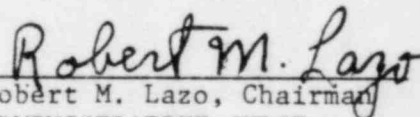
#### IV ORDER

For the foregoing reasons and in consideration of the entire record in this matter, it is this 17th day of January 1983

ORDERED

That the Motion filed by Sensible Maine Power for More Complete and More Specific Disclosure by Applicant is denied.

FOR THE ATOMIC SAFETY AND  
LICENSING BOARD

  
Robert M. Lazo, Chairman  
ADMINISTRATIVE JUDGE