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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

before the

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of VERMONT YANKEE NUCLEAR POWER CORPORATION (Vermont Yankee Nuclear Power Station)	Docket No. 50-271-OLA-4 (Construction Period Recapture)

REPLY OF VERMONT YANKEE TO STATE OF VERMONT'S ANSWER IN OPPOSITION TO MOTION TO COMPEL AND MOTION FOR LEAVE TO FILE THE SAME

Pursuant to 10 C.F.R. § 2.730(c), the Licensee, Vermont Yankee Nuclear Power Corporation ("Vermont Yankee"), moves for leave to file the within short reply to the "Answer in Opposition to Vermont Yankee Nuclear Power Corporation Motion to Compel and State of Vermont Application for Protective Order" (hereinafter "*Answer*"). In support of this motion, Vermont Yankee says that this reply is limited to points of a potentially recurrent nature and this reply may be of assistance to the Board in determining the proper rulings on the motions now before it.

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1. **Revelation of SOV's Regulatory Reliance.** The intervenor the State of Vermont ("SOV") completely misapprehends the thrust of the aspects of the motion to compel that it addresses under "Point I" of its argument. True enough this Board ruled that the *admissibility* of SOV's contention was not dependent upon SOV's ability to tie the contention to the asserted violation of a substantive NRC regulation. However, that does not obviate the obligation of SOV, in response to a proper interrogatory, now to identify all of the regulations that it contends will be violated, so that Vermont Yankee will have notice of what regulatory violations (if any) it must defend against. Likewise, this Board's ruling on admissibility does not obviate SOV's

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obligation, if SOV can identify no regulations beyond § 50.57(a)(3), of so admitting up front.[1]

2. **"We Don't Know Yet" Responses.** In "Point II" of its argument, SOV takes the position that it cannot be required to respond further than a truthful declination of knowledge permits—a point that was conceded in the motion to compel (at p. 2)—and then it undertakes to supplement its responses by an established schedule—which is exactly the relief sought by the motion to compel. So long as an obligation to supplement prior to the time that hearings commenced is imposed or assumed, this aspect of the motion to compel is satisfied.

3. **The "Legal Opinion" Objection.** It is far from clear what, if any, relief SOV seeks by the argument advanced under "Point III" of its opposition. Assuming that there is any legitimacy to an objection that an interrogatory calls for a statement of "legal opinion," clearly there is no merit to an objection to an interrogatory that asks what the party contends on a matter

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[1]Thus, SOV is entirely incorrect in its classification of the motion to compel as a reargument of a point on which, we concede, the Board ruled adversely at the contentions admission stage. Nonetheless, the issue will be faced again; SOV will ultimately have to take a stand on the regulations it contends are implicated; and Vermont Yankee is entitled to the notice provided by answers to interrogatories of what SOV will contend.

That said, we should point out that Vermont Yankee remains convinced that SOV's reliance upon § 50.57(a)(3) is legally unavailing. The applicable language (which SOV tends unduly to truncate) is as follows:

> "[An application for operating authority will be granted upon a finding that] [t]here is reasonable assurance (i) that the activities authorized by the operating license *can be* conducted without endangering the health and safety of the public, and (ii) that such activities *will be* conducted in compliance with the regulations in this chapter . . . ."

(Emphases added.) The imperative of § 50.57(a)(3)(i)—that the as-designed and as-constructed hardware be *capable* of being operated safely—is fully satisfied once it has been conceded (as SOV has done) that *some* maintenance program would be adequate. The imperative of § 50.57(a)(3)(ii)—as to *how* the facility that *can be* operated safely *will be* operated—is confined by the substantive regulations that the Commission has promulgated.

The concept that § 50.57(a)(3) authorizes the *ad hoc* imposition of operational requirements, such as the details of a maintenance program, that the Commission has determined not to impose by the promulgation of a regulation is contrary to what Vermont Yankee believes to be the law (as well as to the conceptual structure of NRC regulation).

on which it may ultimately ask the Board to make a finding or ruling after the evidence has been received. In short, any proposition—whether of fact or law or both or mixed or anything else—that SOV might legitimately advance in briefs or requested findings and rulings is a legitimate subject of discovery.[2]

4. **Interrogatory No. 2.** SOV contends, in response to the motion to compel a complete answer to Interrogatory No. 2, that such a motion is an improper vehicle by which to press for an answer to some different question than the one propounded. There can be no quibble with the correctness of this assertion, but it has no applicability here. The demand that SOV define what it contends is the "measure" of reasonable assurance was contained in the original question:

> "Please identify each of the "safety standards" that SOV contends is "applicable to this plant" as these terms are used by it in its Contention 7, *and please define the measure of "reasonable assurance" as the term is used by SOV in its Contention 7.*"

SOV answered the question as if the italicized words were omitted.

SOV's argument that "[t]he term 'measure' used in the original interrogatory is by no means synonymous with the term 'methodology' used in the argument in the motion to compel" isn't correct. According to Webster's, "measure" as a noun means:

> "1. the size, capacity, extent, volume, or quantity of anything, especially as determined by comparison with some standard or unit.
>
> "2. a standard of measurement; a definite unit of capacity or extent, fixed by law or custom, in terms of which the relative sizes and capacities of thins are ascertained and expressed, . . .
>
> "3. any standard of valuation, comparison, judgment, etc.; criterion.

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[2]A case in point is provided by SOV's own argument later in the same pleading, where it contends that it may not be asked its position on "'how weak is too weak'" in the context of a case in which SOV contends that certain identified weaknesses render the maintenance program too weak. The concept that SOV could advance a contention and secure its admission, and at least in theory later contend for the denial of operating authority, whilst at the same time be above having to take a position on the very same point, is absurd.

"4. *the act or process of measuring . . . .*"[3]

In the context of a contention that says, in essence, that something could be improved and therefore must be improved in order that the level of assurance obtained comes up to the level of "reasonable," the interrogatory legitimately asks SOV how it measures "reasonable assurance." Methodology is a fair synonym. (And regardless of one's views on synonymology, SOV has yet to answer the question as propounded.)

5. **A Final Note.** After presumably setting forth its position on each of the challenged interrogatory answers, SOV then appends a supererogatory in which it accuses Vermont Yankee of abuse of process and "scorched earth" tactics. It then seeks some poorly defined sort of special dispensation on account of the problems of a state with dwindling resources having volunteered to expend those precious resources in a complex regulatory exercise in a field already occupied by a comprehensive federal scheme. The accusation is without merit and the dispensation may not be granted.

First, it must be remembered that it was SOV that proffered a contention both vague and broad in scope, premised entirely on a document that reaches precisely the opposite of the conclusion for which SOV contends. Assuming that such a practice passes muster under the "old" NRC pleading rules (but see *Vermont Yankee Nuclear Power Corporation* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48-49 (1989)), it does so only because of the availability of discovery—by the party opposing the contention—to flesh out its merit (or lack thereof).[4] *Pacific Gas and Electric Co.* (Stanislaus Nuclear Project, Unit 1), LBP-78-20, 7 NRC 1038, 1040 (1978), *quoted with approval, Pennsylvania Power & Light Co.* (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 322 (1980). Thus what

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[3]Webster's New Twentieth Century Dictionary of the English Language (Second Edition, 1983) at 1115 (emphasis added).

[4]Vermont Yankee made precisely this point in its motion to compel (at p. 1). SOV seems to stand this proposition on its head in arguing that the *proponent* may offer vague contentions and then use the discovery process to see if their is any basis for them (or, perhaps, if there are better contentions around). That proposition—that an intervenor may use the discovery process to add basis and specificity to allegations otherwise lacking these necessary qualities—has been expressly rejected by the Commission. *Duke Power Company* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983). Similarly, SOV may not use the discovery process to seek out new issues for litigation. See *Vermont Yankee Nuclear Power Corporation* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 42 (1989), *aff'd on this point*, CLI-90-04, 31 NRC ____ (April 5, 1990).

SOV seems to think is poaching on its exclusive territory is in fact decreed fair game.

Second, SOV appears to have overlooked the pronouncement of the Appeal Board in response to virtually the same complaint and request. *Pennsylvania Power & Light Co.* (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 330-34 (1980).

> "We do not suggest that answering the applicants' interrogatories is a simple task. . . .
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> "Moreover, the interrogatories in large part inquired into the [intervenor's] own case. It is therefore not surprising that the Licensing Board gave a cool reception to a blanket refusal to answer even one of them on the grounds of 'undue burden.' Judicial tribunals have long recognized that the party being interrogated would have to gather such information before trial in any event; the only burden imposed is to advance that compilation to an earlier stage.
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> "The general lack of sympathy to claims of this kind stems from the nature of modern judicial and administrative litigation. 'Pleadings' and 'contentions' no longer describe in voluminous detail everything the parties expect to prove and how they plan to go about doing so. Rather, they provide general notice of the issues. It is left to the parties to narrow those issues through use of various discovery devices so that evidence need be produced at the hearing only on matters actually controverted. This is why curtailing discovery tends to lengthen the trial—with a corresponding increase in expense and inconvenience for all who must take part.
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> ". . . *We can find no fault in these circumstances with filing interrogatories designed to probe thoroughly the basis of the Coalition's case; it would have been imprudent not to have done so.* The assertion that applicants' interrogatories were filed simply for harassment is not well taken; they reflect the number and complexity of the issues raised, not an abuse of the discovery process."

Id., at 334-35 (emphasis added).

> "A litigant may not make serious allegations against another party and then refuse to reveal whether those allegations have any basis. . . . The [intervenor's] understanding of an intervenor's role is simply wrong. To be sure, the license applicant carries the ultimate burden of proof. But intervenors also bear evidentiary responsibilities. In a ruling that has received explicit Supreme Court approval, the Commission has stressed that an intervenor must come forward with evidence 'sufficient to require reasonable minds to inquire further' to insure that its contentions are explored at the hearing. *Obviously, interrogatories designed to discover what (if any) evidence underlies an intervenor's own contentions are not out of order.*"

Id., at 339-40 (emphasis added).

In short, the somewhat standard lament that is featured in SOV's "Final Note" has already been authoritatively rejected.

Respectfully submitted,

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Dated: May 16, 1990.

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Certificate of Service

I, R. K. Gad III, hereby certify that on May 16, 1990, I made service of the within reply and motion for leave, by mailing copies thereof, first class mail, postage prepaid, as follows:

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