UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

Before the

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket No. 50-309-OLA
	)	
MAINE YANKEE ATOMIC POWER STATION,	)	To Increase and Modify
	)	
(Maine Yankee Atomic Power Company),	)	Spent Fuel Storage and
	)	
Applicant.)		Systems; Compaction.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SMP MOTION FOR MORE COMPLETE AND MORE SPECIFIC DISCLOSURE BY APPLICANT

Chronological Statement of Material Facts

Applicant initiated these proceedings September 18, 1979, by an application for Commission approval to increase the storage of radioactive waste in its spent fuel pool to approximately 1545 assemblies of irradiated fuel. Subsequent thereto, SMP successfully petitioned for leave to intervene, filing specific contentions April 28, 1980. Applicant then (June 11,1980) sought and received a four months' delay in these proceedings. Nowhere in its original application, and at no time throughout this period did Applicant anywhere set forth any statement, description, or declaration of the means and methods by which it planned to pursue its proposed d/r/c scheme.

On or about September 30, 1980, Applicant filed a significantly enhanced application, resquesting Commission approval to store approximately 2,551 spent fuel assemblies in its waste fuel

8209010307 820827
PDR ADOCK 05000309
G PDR

pool through the year 2007. No description of the means or methods involved in such proposal were furnished, either to the NRC Staff or intervenors.

In due course this Board scheduled a Special Prehearing Conference for August 11, 1981. No disclosure upon the means and methods of pursuing its d/r/c scheme was made by Applicant before or during said Conference.

Also pending at the time of the Special Prehearing Conference were some thirty-two questions from the NRC Staff to and upon Applicant. SMP has not to date been informed as to what these questions are, whether they have ever been answered, and if so, to what result. During the pendency of these questions there has been no specification or description of the means and methods by which Applicant proposes to conduct its d/r/c scheme.

Applicant also propounded a "design refinement" reducing the spacing between spent fuel assemblies. Although this document was assertedly prepared July 28, 1981, no one other than Applicant's attorney had seen it prior to the Prehearing Conference. Nothing in this filing indicated the processes to be implemented by Applicant in carrying out its scheme.

During the Special Prehearing Conference Applicant promised, by and through its attorney, to submit a complete or final report upon its d/r/c scheme. Such was finally forthcoming on October 5, 1981, the very day on which intervenors were due to file specific contentions, but said report was neither final nor complete: Applicant propounded no statement, description or declaration whatever of the means and methods to be used in pursuit of its propcsed scheme.

The EIA and SER promulgated by Staff on June 16, 1982, also reflect this basic void, and today the status quo remains unchanged: In the three years since its original application, Applicant has not furnished any description or declaration of the means and methods to be used in its d/r/c scheme.

A R G U M E N T

The nature of the information here sought, and the clear need of intervenors for it, cannot reasonably be disputed. No complex, theoretical or arcane data is being pursued here — rather a plain factual declaration and description of the means and methods by which Applicant plans to pursue its proposed d/r/c scheme. In three years' worth of filings, applications and submittals, Applicant has nowhere set forth any direct, orderly statement of basic information describing the means and methods by which its proposed d/r/c scheme is to be pursued.[1]

By way of example only, the gaps and omissions created by Applicant thus include, in question form: Where does Applicant propose to carry out its scheme? If in the spent fuel pool, what means will be used to keep the d/r/c scheme and reracking safely separated from other spent fuel pool operations? Assuming Applicant cuts up old, irradiated storage components, how is such to be done? Mechanically? By torches? How? And if by torches, what of the heat, gaseous and other emissions generated by such process? All such basic information is conspicuous by its absence from the entire three-year-run of Applicant's filings, submittals and applications.

[1] Even the plain kind of statement referenced in the Federal Rules of Civil Procedure — Civil, Rule 8, on basic pleading, would at least be a beginning, and would furnish more information than has thus far been provided by Applicant.

There can also be little doubt as to intervenors' need for this information and the functional exclusivity of control exercised over it by Applicant. Does the Staff or the Commission know, or can they unerringly guess, the means by which Applicant plans to pursue its d/r/c scheme? Do intervenors know or can they fairly be burdened to guess the same? Clearly, this is rhetorical: Only one entity has this information — Applicant — and after three years of filings with the Commission, this subject area remains an unknown, speculative void.

SMP respectfully submits that the silence and omissions thus far practiced by Applicant should no longer be indulged, as they work disadvantages upon all parties to this proceeding: The Commission and this Board are disadvantaged by not being able to conduct efficient and expeditious proceedings such as to bring credit and credibility to themselves; intervenors are burdened with the violation of their legal and due process rights in and to proper, timely pleadings from Applicant, as more extensively developed below; Applicant itself loses, essentially by refusal, an opportunity to preliminarily develop an important, indeed basic, aspect of its case; and the public interest in full, fair and open inquiry into the unprecedented proposals pursued by Applicant is throttled into lifeless nonexistence. Given reasonable and timely disclosure by Applicant, there can be some viability and reality to these proceedings; given a protection of Applicant's silence and omissions, there will almost inevitably flow at least some disruption of these proceedings, disadvantages upon intervenors, and a general diminution or decrease of the value of these proceedings themselves.

While Applicant's protracted failure or refusal to disclose the noted information could support a finding of a fatally incomplete or misrepresentative application,[2] such is not the action here requested by SMP, nor the focus of this Motion: rather, we focus on something assumedly basic to the American legal system — the requirements of notice pleading, both legal and constitutional — and urge this Board to take such action that the Commission, Staff and intervenors will be informed, in a proper and timely manner, as to the very basics of Applicant's case.

Absent this timely disclosure upon the means and methods by which Applicant plans to pursue its proposed d/r/c scheme, intervenors are indeed burdened to plead in the dark or plead in a vacuum, and the Commission and Staff are also burdened to pursue their work with less than sufficient information, as certain inadequacies of the recent EIA and SER seem to show. Such burden upon intervenors is not only a violation of the basic right to clear, complete and responsible notice pleading, but also works a denial of constitutionally protected procedural due process rights against intervenors.

It is of course basic to such rights that they be measured in the context where they arise and that they be flexible to the needs and interests involved. In treating a situation where a plaintiff

[2]The Commission has for some time recognized and clearly disfavored the harms created by material omissions from an application: "In Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), CLI-76-22, 4 NRC 480 (1976), the Commission affirmed the Appeal Board's rulings supra and, in addition, held that silence (omissions) as to material facts regarding issues of major importance to licensing decisions is included in the Section 186 phrase "material false statements"since such an interpretation will effectuate the health and safety purposes of the act. Thus, the sanctions of Section 186 apply not only to affirmative statements but to omissions of material facts important to health and safety." NRC Practice and Procedure Digest, NUREG-0386, 1978, at 1-2.

milk supplier had been excluded from participation upon government contracts, and complained of a lack of prior notice and explanation, the United States Court of Appeals for the District of Columbia Circuit stated:

> "(D)ue process is flexible and calls for such procedural protections as the particular situation demands." More precisely, to identify the specific dictates of due process, three disctinct factors must be considered: "First, the private (nongovernmental) interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." Old Dominion Dairy Products, Inc. v. Secretary of Defense, 203 U.S.App.D.C. 371, 631 F.2d 953 (1980), at 385 and 967, respectively, citing Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1967).

Also closely applicable to licensing proceedings before a federal commission is Folkways Broadcasting Company v. Federal Communications Commission, 126 U.S.App.D.C. 123, 375 F.2d 299 (1967). There, in the face of insufficient administrative inquiry, the court held that "the Commission is entitled to insist upon more than conclusional allegations in applications", and went on to remand the matter for further, and factually more specific, proceedings.

In applying Old Dominion, supra, to the instant circumstances, it can be noted that all three factors favor the granting of this Motion: First, the nongovernmental interests here certainly include intervenors' right to be heard and the safe operation of Applicant's facility; second, continued silence by Applicant on the basics of its case would surely frustrate both interests, while disclosure from Applicant would protect both; and third, the fiscal or administrative burdens are not only nonexistent, but may in fact be lessened by the "procedural requirements" proposed.

Folkways, supra, is even more applicable here. Not only has Applicant proceeded by means of "conclusional allegations", glibly reassuring us that "all will be well", but has in fact omitted to state the very basics upon which those assertions are made. SMP respectfully submits that this Board is not only entitled, but has a duty, to insist upon more than conclusional allegations in this application. On the basis of the foregoing, then, SMP submits that there is both clear legal and constitutional cause for Applicant to furnish the requested information.

It also bears specific recognition here that the most appropriate time for providing such information is now, and not during any artificially restricted discovery period, since the information here sought is a basic element of Applicant's case-in-chief, and no amount of silence or avoidance can camouflage or disguise the truly essential nature of the information sought.

Upon this point SMP respectfully suggests that delaying disclosure of information sought would most probably lead to further delay and disruption in these proceedings. This is so because, given more than minor delay in disclosure of the requested information, additional pleading, repleading, and amendment of pleadings would be necessary on the part of intervenors. In such situation, and given the current schedule of these proceedings, all parties would then be burdened with a simultaneous pleading-and-discovery path of conduct: In plain application, the parties would be burdened to plead additional contentions (or defenses) while conducting discovery upon other contentions (or defenses) which might prove in direct contradiction, or at least at substantial variance, from what had gone before. This intervenor respectfully submits that

such self-created chaos is not the purpose of, nor should it be allowed in, these proceedings.

Fundamental fairness also favors full, prompt and specific disclosure by Applicant as to the means and methods it plans to employ in pursuing its proposed d/r/c scheme. Both Staff and Applicant have pressed a litany of "basis-and-specificity, specificity-and-basis", and they should now be held to that same standard; anything less constitutes unfair prejudice against intervenors; it is time, indeed arguably three years past time, for some very basic and specific disclosures by Applicant.

Last, a congeries of interests, which might best be described or identified as proprietary, also favors the granting of this Motion. No legal system can long endure without a recognition of its own authority or the continued good-faith participation of the parties practicing before it. In the instant case Applicant has practiced silence and avoidance — this intervenor urges disclosure; Applicant's nondisclosure leads toward delay and disruption of these proceedings — this intervenor urges an efficient and expeditious management of the issue; Applicant, by encouraging all participants to buy some kind of "pig in a poke", would embarrass these proceedings — while this intervenor would have that pig identified, at least to some degree, before any further investment is made; and, while Applicant's demonstrated conduct appears to favor silence, omission and uncertainty — this intervenor submits that the Commission, this Board, and the public interest all favor full, fair, open and timely inquiry into the unprecedented amendments being proposed.

On the basis of the foregoing SMP respectfully moves this Board to order:

1. That Applicant describe, in reasonably specific terms, the means and methods to be employed in conducting its proposed d/r/c scheme, and to do so within a reasonable period of time;

2. That intervenors shall file any contentions thereon within thirty days;

3. That commencement of discovery herein be put over proportionally to the foregoing; and

4. Based on Applicant's nondisclosure of such basic information over a period of three years, and upon SMP's inconveniences and efforts in here gaining correction of the same, that Applicant shall bear the reasonable costs of this Motion.

David Santee Miller

David Santee Miller
Counsel for SMP
Perkins Road
Boothbay Harbor, ME 04538
Telephone: (207) 633-4102

CERTIFICATE OF SERVICE

I hereby certify that I have mailed copies of the foregoing Motion and Memorandum to the following, first class regular mail postage prepaid, this 27th day of August, 1982:*

Robert M. Lazo, Esq., Chairman
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Dr. Cadet H. Hand, Jr., Director
Bodega Marine Laboratory
University of California
Post Office Box 247
Bodega Bay, CA 94923

Dr. Peter A. Morris
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Jay M. Gutierrez, Esquire
Office of Executive Legal Director
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Thomas G. Dignan, Jr., Esq.
Ropes and Gray
225 Franklin Street
Boston, MA 02110

Rufus E. Brown, Esquire
Deputy Attorney General
Dept. of Atty. General
State House Station No. 6
Augusta, Maine 04333

David Santee Miller

David Santee Miller
Counsel for SMP

*There is one mail a day out of Boothbay Harbor, at 4:45 p.m. Naturally, anything mailed between the hours of 4:45 and midnight will bear the next day's postmark.