

09/16/82

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
MAINE YANKEE ATOMIC POWER COMPANY ) Docket No. 50-309  
(Maine Yankee Atomic Power Station)) (Spent Fuel)

NRC STAFF RESPONSE IN OPPOSITION TO  
SENSIBLE MAINE POWER'S MOTION FOR MORE COMPLETE  
AND MORE SPECIFIC DISCLOSURE BY APPLICANT

I. INTRODUCTION

By a Motion and supporting memorandum filed on August 27, 1982, Sensible Maine Power (SMP) 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 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

1/ "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.

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

requests the related relief of being granted thirty days to file new contentions based upon the desired information, a commensurate delay in the discovery schedule and an award of reasonable costs for bringing this Motion. The NRC Staff respectfully submits SMP's Motion should be denied in its entirety since: (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.

## II. DISCUSSION

### A. 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

The incorrect factual premise which gives rise to SMP's Motion is the mistaken belief that "nowhere in all the filings and submittals of the past three years has Applicant anywhere declared or described the means and methods by which it plans to pursue its proposed d/r/c scheme." Motion at 1. It is maintained by SMP that this failure deprives it of being put on notice relative to Maine Yankee's proposed license amendment and violates its due process right to meaningfully participate in this proceeding. Memorandum at 5.

It cannot be seriously argued that SMP has not been given an abundance of information upon which to formulate contentions relative to the Applicant's proposed license amendment, including the d/r/c scheme. The fact that SMP's admitted Contentions 1, 3, 5, 7 and 9 already challenge

aspects of the spent fuel pool expansion because of the d/r/c scheme should alone be sufficient to dismiss the claim that inadequate information is currently available to put SMP on notice of the general nature of Maine Yankee's proposal and to draft contentions relative to the scheme. The Staff's safety evaluation report (SER) generally outlines the proposed license amendment and the radiological consequences of the d/r/c scheme. See SER, passim. Moreover, 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 proposes by its license amendment.

It has recently been emphasized by the Appeal Board that Intervenors 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 more than adequate to have put SMP on notice with respect to the d/r/c scheme and to have drafted contentions based upon that scheme. Moreover, the information supplied by Applicant in its application has satisfied NRC requirements.

Finally, SMP has utterly failed to explain how its procedural due process rights are being violated by the manner in which this litigation is proceeding. As SMP acknowledges, the constitutional protection of due process is flexible and only calls for such protections as the particular

situation demands. Memorandum at 6, citing Old Dominion Dairy Products, Inc. v. Secretary of Defense 631 F.2d 953 (D.C. Cir. 1980) and Mathews v. Eldridge, 424 U.S. 319 (1976).<sup>3/</sup> Since SMP currently has contentions relative to the d/r/c scheme, has been provided full discovery rights relative to those contentions and has been granted the right to participate in an adjudicatory hearing on those contentions, the Staff cannot determine, and SMP has not adequately explained, how its constitutional rights are being trampled.

B. SMP's Motion, in Effect, is a Discovery Request Which is Prematurely Filed at this Time \_\_\_\_\_

In effect, SMP's Motion is a discovery request for additional information beyond that which has been provided by Maine Yankee in licensing documents. This Board has established October 25, 1982 through January 24, 1983 as the time when parties may engage in discovery.<sup>4/</sup>

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<sup>3/</sup> The Staff notes that but for the general principle of law cited above the facts of Old Dominion and Mathews are clearly distinguishable from the instant case. The petitioner in Old Dominion, a dairy supplier, charged his due process rights had been violated when a government contracting officer determined he lacked the integrity to be awarded a contract without giving the supplier notice of the charge or any opportunity to respond. Mathews merely stands for the proposition that prior to terminating a recipient's disability benefits, due process requires the recipient be given notice and an opportunity for a hearing. Here, SMP has been granted not only notice and an adjudicatory hearing, but a discovery period as well.

The final case cited by SMP in support of its denial of due process claim is similarly inapposite. Folkways Broadcasting Company v. Federal Communications Commission, 375 F.2d 299 (D.C. Cir. 1967) is not even a due process case. The issue in Folkways was whether § 309(d) of the Federal Communications Act of 1934, 47 U.S.C. § 309(d), as amended, required a hearing be granted to a competing broadcast station prior to the issuance of an F.C.C. license. 375 F.2d at 300. The Court of Appeals never analyzed the case from a constitution perspective.

<sup>4/</sup> Memorandum and Order (Concerning Schedules for Further Proceeding) dated July 20, 1982.

During that period, 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 acquires 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 contentions. This approach is well established in NRC practice. However, without good cause shown, SMP would have this Board depart from both this approach and the specific prehearing schedule set by the Board solely upon the bold assertion SMP is somehow being procedurally deprived. In the absence of an explanation by SMP why the requested information could not be pursued during the scheduled discovery period, this Motion should be denied.

C. The Related Relief Requested in SMP's Motion is Inappropriate

In addition to the information sought on Maine Yankee's proposed amendment, SMP requests: (1) Intervenors again 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.

Since 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, it has been shown such contentions have already been filed by this very Intervenor. See SMP Contentions 1, 3, 5, 7 and 9. If further information is developed during discovery which SMP feels warrants a new



contention, at that time it will be the responsibility of SMP to file the appropriate pleading. Moreover, SMP has offered no good reason why the scheduled discovery period should be postponed. Indeed, one of the functions of discovery is to afford an intervenor an opportunity to learn more about the requested license amendment.

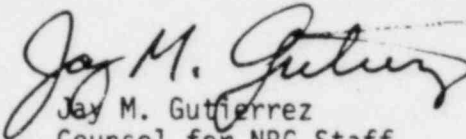
Lastly, there is no provision in the Commission's Rules of Practice for the award of costs to a movant when filing a motion directed against another party. cf. 10 C.F.R. § 2.730 and 2.740(f). Even assuming this Board had the authority to levy such costs on the party being moved against, it is a well 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 Indiana 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. SMP has cited no authority and offered no explanation why this established rule should be disrupted in this case. The Staff maintains none exist.

### III. CONCLUSION

For the reasons aforesaid, the NRC Staff respectfully submits that "SMP Motion for More Complete and Specific Disclosure By Applicant" and

the related relief set forth in its supporting memorandum should be denied in its entirety.

Respectfully submitted,

  
Jay M. Gutierrez  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 16th day of September, 1982.

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CERTIFICATE OF SERVICE

I hereby certify that copies of NRC STAFF RESPONSE IN OPPOSITION TO SENSIBLE MAINE POWER'S MOTION FOR MORE COMPLETE AND MORE SPECIFIC DISCLOSURE BY APPLICANT in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 16th day of September, 1982.

Robert M. Lazo, Esq., Chairman\*  
Administrative Judge  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Rufus E. Brown  
Deputy Attorney General  
Department of the Attorney General  
State House  
Augusta, ME 04333

Dr. Cadet H. Hand, Jr.  
Administrative Judge and  
Director, Bodega Marine Laboratory  
University of California  
P.O. Box 247  
Bodega Bay, CA 94923

David Santee Miller  
Counsel for Petitioner  
Perkins Road  
Boothbay Harbor, ME 04538

Peter A. Morris\*  
Administrative Judge  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Atomic Safety and Licensing  
Board Panel\*  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Thomas Dignan, Esq.  
Ropes & Gray  
225 Franklin Street  
Boston, MA 02110

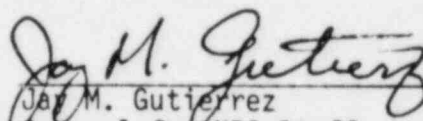
Atomic Safety and Licensing  
Appeal Board\*  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555



Stanley Tupper  
Tupper & Bradley  
102 Townsend Avenue  
Boothbay Harbor, ME 04538

Docketing and Service Section\*  
Office of the Secretary  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Mr. Raymond G. Shadis  
P.O. Box 76  
North Edgecomb, Maine  
04556

  
Jay M. Gutierrez  
Counsel for NRC Staff