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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
before the
ATOMIC SAFETY AND LICENSING BOARD

DOCKETED
USNRC

'90 DEC 17 P4:38

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRAND

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

STATE OF VERMONT REPLY TO NRC STAFF'S
RESPONSE TO VERMONT YANKEE'S FIFTH MOTION TO COMPEL

Pursuant to the Board's Memorandum and Order of December 5, 1990, the State of Vermont ("Vermont") replies to "NRC Staff Response to Licensee's Motion to Compel Production of Documents (Staff Response)," dated October 2, 1990.

I. The Implication that the Licensee is Hampered by not Knowing Vermont's Case because of Vermont's Objection to Document Production Requests 1 through 14 is Completely Unfounded and without Merit.

Were it not that the Licensee has required Vermont to respond to 262 interrogatories and document requests, many with multiple sub-parts, there might be a valid claim that licensee does not understand Vermont's case. However, Vermont has responded to 195 interrogatories which relate to the admitted sub-parts of Contentions VII and VIII¹. Among these 195 interrogatories, 62 specifically required identification of documents by the form question:

"Describe all of the evidence in SOV's possession or of which SOV has knowledge that SOV contends establishes each such fact," or

¹ The number of interrogatories that the Licensee has asked for each sub-part is as follows: VII-b, 12 interrogatories; VII-c, 27 interrogatories; VII-d, 7 interrogatories; VII-e, 3 interrogatories; VII-f, 8 interrogatories; VII-g, 9 interrogatories; VII-h(1), 12 interrogatories; VII-h(2), 8 interrogatories; VII-j, 16 interrogatories; VII-k, 20 interrogatories; VII-m, 35 interrogatories; VII-n, 8 interrogatories; VIII-l, 11 interrogatories; VIII-n, 15 interrogatories; and VIII-o, 4 interrogatories.

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"...and identify every fact and document that SOY contends supports each such reason,"

or a related form². Vermont has responded truthfully, factually, and acceptably to each of these interrogatories. Vermont is also committed to supplement with "additional information acquired by it during later stages of its case preparation (Memorandum and Order, July 20, 1990, at 4)" on a schedule to be determined by the Board (*Id.*, at 35). Finally, through supplementation, Vermont intends to identify each document not identified previously that it will use as evidence. Thus, the Licensee knows well, or will know well in a timely fashion through supplementation, Vermont's case related to the admitted sub-parts of Contentions VII and VIII³.

II. The Staff Miscites the Cases upon Which It Relies.

The Staff Response, at 2 and 5, states a concern about the integrity of the Commission's adjudicatory process. The Staff elaborates this concern with various

² Specifically convoluted are the Staff's statements at 4:

"[Vermont's] statement in its response to Licensee's Document Request 15 that 'documents which support Contention VII are those acquired from Vermont Yankee through discovery and those referenced in responses to Vermont Yankee Interrogatories,' is so vague as to not meet [Vermont's] discovery obligations under this Commission's Rules of Practice. A reference to specific documents on which [Vermont] intends to rely at hearing, rather than a reference to literally thousands of documents acquired from the Licensee, is needed to make this response meaningful."

It was the Licensee which chose to barrage Vermont with 62 interrogatories requiring document identification related to Vermont's case regarding the sub-parts. The Licensee, of course, bears the burden of assimilating the information from its own interrogatories, and it is clearly burdensome to request Vermont to reiterate this same information in another format.

³ The Staff Response implication, at 1, that "absent such identification [the Licensee] will be hampered in its efforts to resolve by summary disposition [Vermont's] allegations," has no basis since, through its interrogatories, the Licensee has already obtained this information. For the same reason, there is no basis to the Staff Response implication, at 1, that "[Licensee's] preparation for any subsequent evidentiary hearing will likewise be impaired."

citations which are off point. *Long Island Lighting Co.*, (Shoreham Nuclear Power Station, Unit 1), CLI-89-2, 29 NRC 211, 231 (1989) is cited as support. In Shoreham, at 231, it is stated:

"Their [the intervenors'] refusal to comply with the Board's orders or to continue with the proceeding in the manner prescribed by the Board strikes at the heart of the authority of the Board to conduct a duly authorized proceeding and *challenges the integrity of the Commission's adjudicatory process itself.*"

(emphasis added). Vermont's timely responses to Licensee requests and Board orders clearly demonstrates that the specifics of Shoreham are not, in any way, applicable here.

The Staff uses *Public Service Co. of New Hampshire*, (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988), to claim:

"It is only matters stated in the contention as elucidated in the bases of the contention which are subject to litigation."

(Staff Response, at 3 and note 2). However, as stated previously⁴, this is not a proper statement of the context of this citation.

The Staff states:

"[I]n *Public Service Co. of New Hampshire*, (Seabrook Station, Units 1 and 2), LBP-83-20A, 17 NRC 586, 589 (1983), it was emphasized that the discovery of the documentary basis of a contention is proper."

(Staff Response, at 4). In this case, the intervenors failed to respond to interrogatories and "to provide very basis information about its contentions such as specification of its concerns, *the bases for these concerns and documents which support its positions.*" Seabrook, at 589, emphasis added. This case was about "information" and not the "sub-parts" stated to secure admission of contention in accordance with 10 C.F.R. § 2.714. Since Vermont has been responsive to all interrogatories, the facts of this Seabrook case do not fit the present proceeding. *Kerr-McGee Chemical Corp.*, (West Chicago Rare Earths Facility), LBP-86-4, 23 NRC 75, 81 (1986), cited in the Staff Response at 4, is also about response to discovery rather than about the sub-parts of a contention, and is not applicable for the same reason as Seabrook above.

⁴ See "State of Vermont Answer in Opposition to Vermont Yankee Nuclear Power Corporation Fifth Motion to Compel..." at 7 and note 1.

The Staff Response at 4 states:

"In *Northern States Power Co.*, (Tyrone Energy Park, Unit 1), LBP-77-37, 5 NRC 1298, 1300-01 (1977), it was noted that it may be impossible for an applicant to meet its burden of proof absent intervenor response to document requests inquiring as to contention bases."

The statement from Tyrone, at 1300-01 is:

"Unless [the Applicants] can effectively inquire into positions of the intervenors, discharging [the Applicant's burden of proof] may be impossible. To permit a party to make skeletal contentions, keep the bases for them secret, then require its adversaries to meet any conceivable thrust at hearing would be patently unfair, and inconsistent with a sound record."

Vermont has not made a "skeletal contention", nor kept "the bases for them secret". The Licensee has availed itself to excess its ability to "effectively inquire into positions" with its 262 interrogatories and document requests, many with multiple sub-parts. The Tyrone citation is not germane to this present proceeding⁵.

III. The Role of the 10 C.F.R. § 2.752 Prehearing Conference

When Vermont filed Contention VII, it was in possession of certain evidence⁶ which demonstrated the inadequacy of the Licensee's maintenance program. This evidence was turned into bases for Contention VII as examples of why the maintenance program was inadequate. Now, as a result of discovery, Vermont has found additional evidence which corroborates its allegation. Obviously Vermont is

⁵ The licensee, in its "Answer of Vermont Yankee Nuclear Power Corporation to State of Vermont's Motion for Leave," quotes *Illinois Power Company*. (Clinton Power Station, Unit 1), LBP-81-61, 14 NRC 1735, 1737 (1981), to support its position on the use of bases. The quoted statement is dicta, which appears not to be the product of a briefed issue before the Board. Indeed, the intervenor in the case was not even represented by counsel.

⁶ Only a small subset of information can be available at the outset of a proceeding because the Licensee withholds much information from public scrutiny. See for example NRC Inspection Report 50-271/90-10, dated November 27, 1990, which issued two violations related to failure to maintain spent fuel pool cooling pump to meet safety standards applicable to the plant. These violations would not have been discovered except for the allegation of anonymous whistleblowers.

able to bring such evidence to the hearing to try its case. This does not constitute expanding the contention or its basis, but rather expanding the evidence.

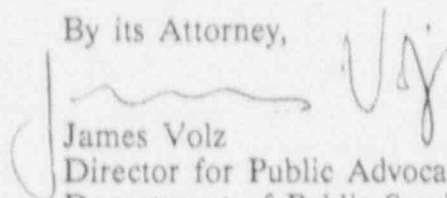
In the present discovery and case development stage, Vermont has not decided which evidence it will use for its case, nor is it required to have made this decision. However, a process is established by the regulations for telling what decisions have been made about the case and what evidence will be relied upon. This is the 10 C.F.R. § 2.752 prehearing conference process. At that time, Vermont will tell how it will try its case and what evidence will be used. It is possible that contentions will be redrafted or additional bases written⁷.

At this moment in time, Vermont has not taken the evidence it has discovered and tried to place it in cubbyholes according to the original sub-parts of the contention, nor does Vermont expect to make these distinctions.

Conclusion

WHEREFORE, for the reasons set forth above, the integrity of the Commission's adjudicatory process is certainly not affected by Vermont's objection to Document Production Requests 1 through 14. Vermont respectfully requests that the Board deny Vermont Yankee's Motion to Compel, and grant Vermont a Protective Order, as requested by Vermont's September 27, 1990, request.

By its Attorney,


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Dated: December 12, 1990

⁷ This is different from discovering a completely new contention, not related to maintenance inadequacies. An example of discovery of material related to a new subject is Vermont's late-filed Contention X.

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OF PUBLIC UTILITIES
Docket No. 50-271-OLA-4
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CERTIFICATE OF SERVICE

I hereby certify that on December 12, 1990, I made service of "State of Vermont Reply to NRC Staff's Response to Vermont Yankee's Fifth Motion to Compel", in accordance with rules of the Commission by mailing a copy thereof postage prepaid to the following:

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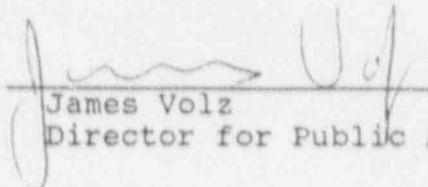
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Dated: December 12, 1990