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

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

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF SMP MOTION FOR CLARIFI-
CATION AND MODIFICATION OF ORDER UPON
ADMISSIBILITY OF CONTENTIONS

Preliminary Statement of Relevant Procedural Facts

The Specific Contentions here in issue were filed by SMP on October 5, 1981. Staff and Applicant subsequently filed objections to the same, including counter-proposals or counter-contentions which Staff and Applicant stated they would accept without objection. SMP responded to the stated objections on January 24, 1982. In said Response, SMP took the position that while it did not "out-of-hand reject this or any other (counter-contention) proposed", (SMP Response, n. 10, at 15, referring to one particular Contention), neither did SMP agree to the same, and in fact expressly requested an opportunity to resolve such differences as had been raised, by means of Stipulations amongst the parties, (SMP Response, at 23, "(2) Stipulations"). Subsequently, SMP counsel pursued such stipu-

lations by telephone calls to parties' counsel, essentially to no avail. On April 12, 1982, this Board issued an Order accepting nine of SMP's eighteen Contentions, some of which were accepted in a form substantially edited, redrawn or reconstructed from the original submissions. SMP here respectfully requests restoration of certain of its original language or addition of other language, clarification or modification of admitted Contentions, and further consideration or reconsideration upon three issues.

Preliminary Statement of Procedural Considerations

It may bear specific declaration at the outset that it is not the purpose of this pleading to create unnecessary work for either SMP counsel, for any parties responding hereto, or for this Board. Rather what is sought, in as plain a manner as possible, is some clarification of the scope and construction to be accorded contentions already admitted in this proceeding, and, where such seems appropriate, to urge the restoration of original, or the inclusion of additional, language, for the purpose of achieving a fuller, more detailed and more specific understanding of what is included, or not included, in any given subject area.

Second, certain of the rewritings performed upon SMP's admitted Contentions may work some unintended change upon the scope, purpose and function of these proceedings. More specifically, it is SMP's basic position, incorporated in its contentions from April 28, 1980, to the most recent filing of August 30, 1982, that central to this proceeding is that Staff and Applicant have a duty to assure the safe and unharmed conduct of Applicant's proposed d/r/c scheme, and the procedural duty in law to affirmatively demonstrate the

basis for such assurance in every subject area where contentions are properly pled, or upon which this Board deems further inquiry to be warranted. This central principle merits express acknowledgement and citation. Upon this point the Staff's practice manual¹ headnotes a leading case:

Under Commission practice, the applicant for a construction permit or operating license always has the ultimate burden of proof. 10 CFR §2.732. The degree to which he must persuade the board (burden of persuasion) should depend upon the gravity of the matters in controversy. Virginia Electric & Power Company (North Anna Power Station Units 1, 2, 3 & 4), ALAB-256, 1 NRC 10, 17 at n. 18 (1975).

SMP submits that given not only the gravity but also the wholly unique nature of Applicant's proposed scheme, this essential principle must not be compromised. Thus, insofar as certain of SMP's contentions as redrawn seem to lose this focus or function, a general exception is respectfully taken to the editing or reconstruction performed.

Third, SMP also respectfully submits that absent substantial showing or reasons to the contrary, the pleadings of this or any Intervenor should be accorded considerable verity, weight and value in this proceeding. In their objections to SMP's Specific Contentions and proffer of counter-contentions, Staff and Applicant often fail to demonstrate a significant basis for their amendments to or editing of SMP's pleadings sufficient to support the reduction of said pleadings thus far pursued by both parties. In corollary, the flexibility of almost all ordinary language is essentially in-

¹United States Nuclear Regulatory Commission Staff Practice and Procedure Digest, NUREG-0386, Digest No. 2, (1978), at 37.

evitable, and no less so here. Thus SMP submits that unless Staff or Applicant can show clear insufficiency or misconception in SMP's pleadings, and given the flexibility of and deference due its chosen language, the very words of those pleadings should be favored.

Fourth and last, SMP respectfully requests that the Board read and consider this Motion together with all prior filings upon contentions, expressly incorporating by reference its original contentions, the defense of the same, and its additional contentions filed August 30, 1982.

Discussion of Particular Contentions,
including Relief Sought

For the sake of a clearer presentation, this discussion will treat prior contentions somewhat out of order, beginning with SMP's admitted contention upon localized boiling. For the purpose of a complete citation, the numeration here adopted references contentions by their "new number" as admitted, followed by their "old number" as presented, set forth in a hyphenated form.

4-9: Localized Boiling: While brevity merits pursuit, such should not be had at the expense of either sound and comprehensive notice pleading, or at the compromise of an Intervenor's properly stated concerns. Here a rather detailed three-paragraph contention has been edited down to a single line not truly reflecting the concerns pled by SMP, which concerns cannot properly be excluded at this stage of the proceeding. More particularly, SMP's original contention was not limited to "(t)he design of the new racks", but in fact expressly contemplated "the spent fuel pool under (Applicant's) pro-

posed scheme" — thus including the final storage configuration, reduced center-to-center spacing, and the like. In their objections to SMP's contentions, neither Staff nor Applicant gave sufficient basis to support such reduction upon this point.

The second half of the contention as admitted also works some reduction of the original pleading, though admittedly of a lesser degree. The original contention expressly contemplated not only localized boiling, but also various means by which such might occur, the occurrence of related phenomena, and an enumeration of certain adverse effects likely to result therefrom. Here again, such assertions were not directly or sufficiently countered to merit their complete exclusion.

Prior to any particularized request for relief upon the issues here raised, SMP suggest that it may be appropriate to consider the degree of flexibility to be accorded to the pleadings in this case, meaning the contentions as actually admitted. A useful but ultimately troubling example can be drawn from Staff's objections to SMP's additional contentions, the seventh of which treats "Increased Fuel Handling Risks and Consequences". Said contention focuses at some length upon increasingly adverse working conditions in the pursuit of Applicant's proposed scheme, the increased risk of accidents created thereby, and the likelihood of excessive emissions relative to the "functional porosity" of the spent fuel pool building. Staff generously responds that "the concerns set forth in this proposed supplemental contention are encompassed by admitted SMP contention 7", and then essentially recommends the rejection of the new or additional contention. Plainly put, and with all proper respect to be

accorded Staff's responses, it is tempting to assume that such generosity or liberal construction of pleadings might prevail, but such assumption cannot validly be embraced unless and until it is applied to each admitted contention. In other words, and relative to Contention 4-9, is the final storage configuration under Applicant's proposed d/r/c scheme included in the subject area? Given the position propounded by Staff upon SMP's seventh additional or supplemental contention, the proper response would seem to be an inevitable "Yes", but a contrary response could be defended on the asserted basis that such contention is limited to "(t)he design of the new racks" - and clearly this concern could be multiplied numerous times relative to this and other contentions. In terms of practical application, the time is fast approaching when all parties will undertake discovery. Assuming SMP pursues discovery upon Applicant relative to the final storage configuration under Applicant's d/r/c scheme, upon center-to-center spacing of fuel assemblies, or upon spacing between racks or assemblies and the spent fuel pool liner, should Applicant then be heard to object to such inquiry as irrelevant?² The difficulty noted is one of many which might be avoided by the deliberate consideration, and warranted adoption, of the relief sought below. This Motion, and the concerns here presented, are intended by SMP to diminish, rather than to increase, such future procedural difficulties as may arise in this proceeding. SMP respectfully suggests that the greater the degree of care practiced in trying

²Neither SMP nor its counsel intends any insult in what might appear to be "guessing the homework for the other side". Rather what we here pursue is the reasonably foreseeable apprehension of probable procedural difficulties unless certain corrections are achieved.

this case, then the less time and effort will be required in correcting whatever mistakes as might occur, most of which can be avoided by adopting the relief sought.

On the basis of the foregoing, SMP respectfully urges this Board to reinstate the entirety of its original contention in this subject area; alternatively, SMP requests the Board to reinstate the first two paragraphs of its original contention, as submitted; by way of a second alternative, SMP urges the Board to expressly include in this contention the concerns stated in SMP's original contention, as more particularly discussed, supra, at 4-5, including at least the express acknowledgement of the changed storage configuration under Applicant's d/r/c scheme, changes in coolant flow, the occurrence of other uncontrolled high temperature phenomena, and any increased radiation releases. In the event that such alternatives are not expressly included, SMP respectfully requests an assurance from the Board that these concerns will not be excluded from consideration under this contention.

2-6(a): Emissions: SMP here urges the Board to restore this part of this contention as originally submitted. Not only do all the procedural considerations referenced above favor such restoration, but SMP respectfully submits that the language of its original pleading would serve to further identify the concerns here being presented. Alternatively SMP urges the Board to include the essence of this contention by way of supplementing that which has been admitted with the following:

This contention includes the showing that the liquid and gaseous radioactive emissions likely to result from the proposed d/r/c scheme, or adverse environmental effects from the same, will be kept within regulatory limits, in-

cluding alara. Harmful radioactive emissions most likely to occur are Iodine 131, Cesium 137, Strontium 90 and Tritium.

SMP also urges the Board against the inclusion of, or in the alternative against the functionally prohibitive application of, the word "normal" in referring to the operation of Applicant's spent fuel pool and the conduct of its d/r/c scheme. The reason for this concern can be fairly easily demonstrated: by way of example only, and as accepted in another contention, reduced coolant flow could lead to localized boiling which would likely result in excessive radioactive emissions — but under a prohibitive application of Applicant's "normal operation" concept Applicant might well assert that such phenomena are not "normal" and hence should not be considered. SMP respectfully submits that this Catch-22 style of argument must not be allowed to subvert either this contention or these proceedings. While some credit may properly be accorded the industry's oft-repeated defense — "The business of nuclear power is the generation of electricity, not the having of accidents" — SMP submits that such defense should not be allowed to bar this Board from making proper and responsible inquiry into reasonably foreseeable hazards created by Applicant's d/r/c scheme.

Thus SMP requests a further identification of the emissions to be treated here, and also requests that the Board expressly acknowledge some limitation upon the concept of "normal operation".

3-8: Loss of Cooling: SMP urges the Board to restore its original contention, either at the exclusion of, or in supplement to, the contention as admitted. As a third alternative, SMP respectfully requests some further express identification of the terms "reason-

able assurance" and "not inimical".

5-10: Materials Deterioration: SMP respectfully submits that here again brevity has been achieved at the expense of sound notice pleading. SMP urges the Board to restore its original contention as presented, either at the exclusion of, or in supplement to, the contention as admitted.

6-11: Seismic Durability: For the reasons propounded in support of its additional contentions, and for the reasons to be furnished in its Response to Staff's and Applicant's objections, due September 30, 1982, SMP urges that its original contention be accepted in full, including a reexamination of design basis criteria.

7-13: Fuel Assembly or Fuel Cask Drop: While such would be logically assumed under consideration of a deflection accident, SMP requests the express incorporation of "planing phenomena" in this contention, or alternatively the assurance that the consideration of such phenomena is within the scope of the admitted contention.

8-16: Criticality: While SMP may owe — and if necessary we here make — an apology for the length of the original contention, we nonetheless request either its restoration or an express assurance that the issues developed in the second paragraph are all within the scope of the admitted contention.

9-17: Applicant's Technical Qualifications: SMP urges the inclusion, although not necessarily under this contention, of the issues raised in the last paragraph of this contention relative to the disposal or storage of end plates, spacer grids and other waste fuel assembly components. This matter is also pursued in SMP's addition-

al contentions, (Contention 8(a), at 14). The substance of the concern is that neither Staff nor Applicant have yet sufficiently analyzed the means of dealing with or disposing of these highly irradiated materials. SMP respectfully submits that this issue merits inquiry and consideration by the Board, whether under this contention or elsewhere.

SMP respectfully requests the Board's further consideration, or reconsideration, of its original contentions posed in the following subject areas. The numeration here used is that of the original.

2: Prematurity and Need: Given the unprecedented and in fact nearly experimental nature of the pinpacking portion of Applicant's proposed d/r/c scheme, SMP requests the Board to reconsider its ruling upon this contention. While there may be "no regulatory requirement that the Licensee show an immediate need for an amendment", yet we submit that the Board has a duty, as implicitly recognized in Minnesota and Potomac Alliance, (Citations omitted.), to guard against the creation of a de facto long-term nuclear waste dump.

6(a) and (b): Heat Emissions: SMP requests the Board to read and consider these parts of this contention, in their NEPA aspects, as supporting the need for an Environmental Impact Statement in this proceeding.

15: Applicant's Financial Qualifications: SMP urges the Board to reconsider its ruling upon this contention. Insofar as the pursuit of Applicant's proposed d/r/c scheme would lead to the accumulation of vast amounts of highly radioactive waste fuel, which circumstance was not considered in the original licensing proceeding, no finding upon financial qualifications from that proceeding can lawfully or

validly operate as a bar to such inquiry here. Applicant's pursuit of its proposed d/r/c scheme would create significant additional economic burdens upon Applicant not previously examined, and which merit inquiry and consideration here. A prior proceeding based upon significantly different basic assumptions which no longer pertain cannot in law or logic bar the contention here proposed.

Conclusion

For the reasons set forth above, SMP requests this Board to grant the relief sought, in the interests of sound notice pleading, in protecting the right of Intervenor to be heard upon all matters properly within the scope of these proceedings, and in the public interest of full, fair and efficient administrative proceedings.



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