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Filed: October 7, 1988

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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before the
ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF THE SECRETARY
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20545

In the Matter of)	
)	
VERMONT YANKEE NUCLEAR)	Docket No. 50-271-OLA
POWER CORPORATION)	(Spent Fuel Pool
)	Expansion)
(Vermont Yankee Nuclear)	
Power Station))	

MOTION FOR RECONSIDERATION

Vermont Yankee Nuclear Power Corporation ("Vermont Yankee") respectfully moves that this Board reconsider that portion of its Memorandum and Order of September 27, 1988, that determined that Vermont Yankee's response (filed August 16, 1988) to Interrogatory No. 5 of the set of Interrogatories filed by NECNP on August 4, 1988 was inadequate.

I.

In its Memorandum and Order, this Board reached and published a conclusion that Vermont Yankee had, in its prior response to Interrogatory No. 5, breached its obligation to provide a complete answer. This conclusion was reached not on the basis of any argument or evidence offered by NECNP, to which Vermont Yankee might have responded, in the two rounds

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of briefing permitted.¹ Rather, the Board apparently engaged in its own search for what it perceived to be evidence, interpreted what it perceived to be evidence out of the context in which the purported evidence existed, and then reached and published its conclusion.²

Vermont Yankee was given no notice that the Board was considering the purported evidence in question, nor was it given notice of the interpretation that the Board was tending to place on the purported evidence, nor was it given any opportunity to respond to the purported evidence or to explain to the Board why the conclusion the Board was contemplating was erroneous. This procedure was defective, unfair, and a violation of Vermont Yankee's entitlement to due process. Cf. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 525 (1979) (advisory conclusion that "[b]efore any suggestion that a contention should not be entertained can be

¹NECNF's only argument on Interrogatory No. 5 was incredulity that Vermont Yankee would not have a schedule, incredulity that, for the reasons set forth in Vermont Yankee's "Further Answer," is entirely unwarranted. NECNP made no reference to the transcript of the public meeting between Vermont Yankee and the Staff of February 9, 1988, nor did NECNP (which, like the Board, was served a copy of this transcript by the Staff on February 16, 1988) apparently see anything in the transcript inconsistent with Vermont Yankee's initial response to the interrogatory.

²Although the Board's conclusion concerned the "adequacy" of Vermont Yankee's response, it clearly questioned "the good faith, if not the veracity of completeness" of that response and, hence, the responders. Memorandum and Order at 6-7.

acted upon favorably, the proponent of the contention must be given some chance to be heard in response."), cited in Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-88, 16 NRC 1355, 1356 (1982) ("[A]lthough Allens Creek is directly applicable only to the filing of timely contentions, we believe its implications are far reaching."); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 55-56 (1978) (reaffirming holding that "when the Board . . . elects to decide a case on a basis different from that on which it was brought and tried, it has a concomitant obligation to bring this fact to the attention of the parties before it and to afford them a fair opportunity to present argument and, where appropriate, evidence on the new issues.").

II.

Submitted herewith is Vermont Yankee's "Further Answer" to Interrogatory No. 5, sworn to under oath by a person having personal knowledge of the facts. As is demonstrated by this "Further Answer," the conclusion that the Board reached and published concerning the truthfulness and completeness of Vermont Yankee's prior answer to this interrogatory was erroneous. Vermont Yankee had no schedule of the sort in question on February 9, 1988, nor did it have any such schedule on August 16, 1988, nor does it have any

such schedule today.³

What this Further Answer also shows is that, had Vermont Yankee had notice of the Board's consideration of selected portions of the transcript of the public meeting of February 9th, it could have pointed out to the Board that the interpretation placed on those portions was not consistent with what, in fact, was the case at that time (and with the entirety of the presentation made to the Staff). It is true that the words attributed to Mr. McElwee in those portions of that transcript might give the impression that a definitive schedule existed. It is no less true that that impression would not be a true statement of the facts as they existed at the time.

III.

By itself, the question of schedules for the implementation of the proposed system enhancement committed to by Vermont Yankee's letters to the NRC Staff of April 24, 1988 and June 7, 1988 is unimportant since the contention addresses heat capacity and not implementation sequence or

³The Board's conclusion is, we respectfully submit, not only erroneous but illogical. For the reasons set forth below, the question of schedule is utterly irrelevant to any issue thus far raised, or that might be raised, under Contention 1. It therefore follows that, even if one were inclined to prevaricate the non-existence of an extant schedule, there could be no incentive for doing so here. To the contrary, the simplest, least costly, least burdensome, and least questionable response to the interrogatory would be "Yes, we have a schedule and it is available for inspection and copying" in all cases save ones where, as here, the obligation of truthfulness and candor requires a response of "No, we don't have a schedule."

timing. Given that the license amendment now requested is for storage of more than 2,000 spent fuel assemblies only if the enhanced system is in place, the question of whether the proposed amendment is to be approved or disapproved does not and cannot turn on the existence or substance of any schedule for the enhancement's implementation.

However, Vermont Yankee and its counsel have, for more than 20 years, maintained a reputation for the highest standard of candor and ethical conduct when dealing with all branches and departments of the Nuclear Regulatory Commission, including its adjudicatory boards. See, e.g., Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 533 (1973); Systematic Assessment of Licensee Performance (SALP) Report of the NRC, dated September 13, 1988, NVY-88-196, at 9, 39-41. The portion of this Board's memorandum and order of which reconsideration is sought, by one stroke of the pen, has impaired that reputation. For this reason, reconsideration of this aspect of the subject decision is required without regard to the substantive importance of the underlying matter.

IV.

Vermont Yankee therefore moves that this Board reconsider the subject portion of its memorandum and order and respectfully requests that the Board strike or modify the portion thereof dealing with Interrogatory No. 5 and

republish the same or publish as Appendix A to that decision
Vermont Yankee's "Further Answer" to Interrogatory No. 5.

By its attorneys,

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CERTIFICATE OF SERVICE

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I, Kathryn A. Selleck, hereby certify that on October 7, 1988, I made service of the within document in accordance with the rules of the Commission by mailing a copy thereof postage prepaid to the following:

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