

ORIGINAL

**UNITED STATES
NUCLEAR REGULATORY COMMISSION**

In the Matter of:

VERMONT YANKEE NUCLEAR POWER)	
CORPORATION)	Docket No.
)	50-271-OLA-2
(VERMONT NUCLEAR POWER STATION))	

Pages: 1 through 43

Place: Brattleboro, Vermont

Date: June 28, 1988

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1 UNITED STATES NUCLEAR REGULATORY COMMISSION
2 ATOMIC SAFETY AND LICENSING BOARD

3 In the Matter of:)
4)
5 VERMONT YANKEE NUCLEAR POWER) Docket No.
6 CORPORATION) 50-271-0LA-2
7)
8 (VERMONT NUCLEAR POWER STATION))
9)
10 PREHEARING STATUS CONFERENCE)

Tuesday,
June 28, 1988

U.S. District Court, Post
Office and Court House Bldg.
204 Main Street
Brattleboro, Vermont

11 The above-entitled matter came on for hearing,
12 pursuant to notice, at 2:57 p.m.

13
14 BEFORE: JUDGE CHARLES BECHHOEFER, CHAIRMAN
15 Atomic Safety and Licensing Board
16 U.S. Nuclear Regulatory Commission
17 Washington, D.C. 20555

18 JUDGE GLENN BRIGHT, MEMBER
19 Atomic Safety and Licensing Board
20 U.S. Nuclear Regulatory Commission
21 Washington, D.C. 20555

22 JUDGE JAMES CARPENTER, MEMBER
23 Atomic Safety and Licensing Board
24 U.S. Nuclear Regulatory Commission
25 Washington, D.C. 20555

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APPEARANCES:

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P R O C E E D I N G S

1
2 JUDGE BECHHOEFER: This is a prehearing conference
3 in the proceeding under which the applicant and/or licensee
4 is seeking relief from certain testing requirements for its
5 ECCS system and SLC system.

6 We have already issued an order indicating that
7 the two petitioners for intervention, the Commonwealth of
8 Massachusetts and the State of Vermont have standing to
9 participate.

10 They have jointly submitted a single contention.
11 The NRC staff offers no objection to our accepting that
12 contention. The applicant or licensee does.

13 I myself have a few questions to ask of the
14 applicant but I would ask first whether the petitioners
15 and/or the staff have any response to the applicant's
16 response first.

17 MR. MULLETT: Yes, Your Honor, if we may.

18 Did you want appearances in this proceeding?

19 JUDGE BECHHOEFER: Well, I think the Reporter can
20 indicate who the counsel are. I don't think we need, Counsel
21 -- I will note for the record that the Petitioners are the
22 Commonwealth of Massachusetts and the State of Vermont.

23 And the applicant/licensee, Vermont Yankee.
24 Nuclear Power Corporation is a party as is the NRC staff.
25 And all of them are represented.

1 So, Mr. Mullett, proceed.

2 MR. MULLETT: Thank you very much, Your Honor.

3 I just have a couple of very brief comments really
4 with respect to the response filed by Vermont Yankee.
5 Perhaps the first portion of the response can diffuse an
6 issue that I see as having been presented in that response.

7 And that is the issue of comparative safety. I
8 think we think it is explicit, or at the very least
9 implicit, in the contention which has been filed; the claim
10 that the proposed action is in fact inconsistent with
11 protection of the public safety, public health and the
12 environment.

13 This is not an attempt by the State of Vermont or
14 the Commonwealth of Massachusetts to engage in a theoretical
15 and lengthy debate about comparative safety.

16 It simply is a straight-forward assertion that the
17 proposed testing reduction may be inconsistent with the
18 public health and safety with the things the Commission is
19 required to protect under the terms of the Atomic Energy
20 Act.

21 So I think in a very real sense that the
22 comparative safety issue raised by the applicant rests on a
23 misunderstanding or misapprehension about the fundamental
24 nature of the contention.

25 The second point that I would make with respect to

1 the Yankee response is that much of it involves factual
2 questions that need to be resolved at a hearing. As Yankee
3 has pointed out, there was a similar amendment issued with
4 respect to the Millstone facility.

5 Certainly the factual considerations that
6 justified that amendment, maybe ones which Yankee would want
7 to raise in a hearing here.

8 But those are factual issues. It is very clear
9 under the Diablo Canyon Case that a contention is sufficient
10 if it alleges that a matter does pose a significant safety
11 problem.

12 That certainly is the intent and I think the plain
13 language of the contention here. I would not have any
14 elaborate comments beyond that.

15 Do you want to add anything, George?

16 JUDGE BECHHOEFER: Mr. Dean?

17 MR. DEAN: Commonwealth adheres to the remarks
18 made by the State of Vermont.

19 JUDGE BECHHOEFER: Ms. Hodgdon?

20 MS. HODGDON: Staff would rest on what it said in
21 its answer and the staff feels that part of the basis that
22 it quoted in itself states sufficient contention.

23 And the contention as stated is consistent with
24 the question that the staff asked the applicant, namely for
25 quantification.

1 Therefore, we would think that -- maybe not
2 "therefore". I should say "and". And we think that it
3 states a contention stated with sufficient basis as to be
4 admissible.

5 I have nothing further.

6 JUDGE BECHHOEFER: Okay.

7 Mr. Gad, I have some question about the
8 applicant's response.

9 First I wonder aren't you asking us to evaluate
10 the validity of the basis rather than determining whether or
11 not any basis is cited?

12 MR. GAD: Not really, Your Honor. The premise of
13 the opposition to this contention is the words of the
14 contention itself. Quote, "The contention", end of quote.
15 Stop.

16 What is stated in the basis affects whether or not
17 the Board admits a proposed contention. But at the risk of
18 being called a stuffy proceduralist, it is the contention,
19 not the basis, that governs the rest of our life in the
20 proceedings.

21 And indeed as we all know, the Boards have written
22 several time that the essence of a proceeding after the
23 admission of a contention is the contention itself, not the
24 basis.

25 And indeed it has been said half a dozen times or

1 so, the literal terms of the contention.

2 Now if I read what I have heard this afternoon
3 correctly, it is not that, the licensee's fundamental legal
4 premise, to wit the comparative licensing, is not the legal
5 standard that should be applied.

6 If I hear what I heard correctly this afternoon,
7 no one disagrees with that. The assertion made rather is
8 that Vermont Yankee may have misapprehended what the
9 contention was for -- let me put it in my terms -- for
10 failure to have picked up its implications by too much
11 focusing on these words.

12 I suppose if that is true, then all is well and
13 good. If the contention to be submitted to Your Honors gets
14 away from this notion of comparative safety and says if you
15 license something with this provision it would violate
16 either the Commission's regulations or render the facility
17 incapable of operating consistently with the public health
18 and safety in an area of a regulatory gap.

19 That is the way the contention can come in. We
20 would not oppose it. We would have thought it was a
21 contention doomed to failure but that's the merits.

22 So what I have heard this afternoon is that one
23 should interpret the contention as intended, not as written.

24 I happen to agree that if the contention had been
25 written as we heard it stated to be intended, it would be

1 admissible.

2 And perhaps the short and easy way to get out of
3 here and on the road home is to rewrite the contention
4 consistent with its intention.

5 JUDGE BECHHOEFER: Would you oppose a contention
6 which said applicant, you have proposed a change in your
7 tech specs based on an increase in safety and you haven't
8 alleged an increase in safety and you haven't established
9 it; therefore, perforce the amendment fails?

10 MR. GAD: Yes, Your Honor, for two reasons.

11 JUDGE BECHHOEFER: Just on the ground that your
12 proposal is not backed by the general statements that it
13 purports to rely on.

14 MR. GAD: For one, I do not think it is an
15 admissible contention to say you have improved your case.
16 Brackets, but if you had, your case would be okay. I don't
17 think that is a contention.

18 No. 2, the way Your Honor has framed it, the legal
19 standard against which this Board will measure the evidence
20 at the end is did you demonstrate a plus in safety.

21 Now, lest the room not misread the significance of
22 the technical/legal argument, by the time the evidence is
23 in, in this case, the Board will be satisfied that our
24 amendment does in fact increase safety.

25 And frankly Vermont Yankee would not have proposed

1 it if it had any doubts about that.

2 But that happens not to be the legal standard. An
3 amendment need not increase safety to be perfectly
4 legitimate. And that, you see, was the problem with the
5 contention as it was literally written.

6 I think the admissible contention ought to be
7 Vermont Yankee technical specifications as proposed to be
8 amended may not be licensed because, and somebody has to
9 decide what the "because" is so that I know what I am
10 litigating against and so that Your Honors know when you are
11 asked to bless the legal standard identified in the
12 contention so that Your Honors know whether it is worthy of
13 a blessing.

14 Now if the contention said because it would
15 violate 10 CFR 5055a(g), which happens to be the applicable
16 regulation, fine; then we know what we are litigating.

17 Now if I understand what I heard a few moments
18 ago, that is what the pleader intended. If that is what he
19 intended, I agree it is admissible. If that is what he
20 intended, that is not what he said. And what he said is not
21 admissible.

22 JUDGE BECHHOEFER: My other question is how does
23 the applicant or licensee read the requirements of 5055a(g)
24 as applied to a facility, the construction permit that was
25 issued at an early date like yours was?

1 And I raise this question because if you are
2 claiming that the ASME standards are sufficient by
3 themselves to indicate compliance with 55a(g), 5055a(g), you
4 have been relieved of some of those on the ground that they
5 are impractical.

6 And as I read a letter from the staff which you
7 have quoted in your application, that said that the ASME
8 standards, that it was okay to be relieved of certain of the
9 ASME standards.

10 But that the totality, your then current
11 regulations -- this was 1980, January tenth, 1980 -- your
12 then current standards when added to the ASME, the portion
13 of the ASME code that you would adopt, that would enhance
14 safety.

15 But it says you have got to go on and observe the
16 more conservative of either of the two and both of them
17 together add the safety, but either one or the other there
18 is no comment on.

19 In fact, I think your application for this
20 amendment perhaps somewhat overstates the import of this
21 particular letter, which it sites, I might say.

22 MR. GAD: I confess, Your Honor, it must be the
23 afternoon or the low horsepower in the air-conditioning
24 system but I am not sure I fully grasp the implication of
25 Your Honor's question.

1 Let me make two observations. No. 1, whether or
2 not continued adherence to the so-called alternate test
3 regime is in fact conservative, is in fact doubted. It is
4 unlikely.

5 That is to say, no testing is for free.

6 If it were, we would test everyday; we would test
7 every minute. That is the very issue in the case. That is
8 the merits in this case. Commonwealth

9 Does that testing system cost more than it gets
10 you in terms of liability of the ECCS and SLC systems.

11 My position in the case is that the legal
12 requirements for licensing insofar as they are there on
13 surveillance testing, are the sum of two things: one,
14 whatever 5055a(g) says for your plan, plus if somebody ca:
15 carry their burden of demonstrating that 5055a(g)
16 nonetheless has a regulatory gap, a burden I think
17 improbable but at least it is syllogistically possible.

18 Then whatever it takes to fill that regulatory
19 gap, that is the legal standard on which this application
20 would be judged if it were an OL application calling for
21 ASME Title 9 surveillance testing.

22 And I guess my legal argument to Your Honors is
23 nothing more complex than whatever the standard is for
24 original OL licensing, it is no different for an operating
25 license amendment.

1 Now in Your Honors' hypothesis that the-

2 JUDGE BECHHOEFER: I say it is a little different
3 depending on the age of the reactor, however.

4 MR. GAD: What 5055a(g) requires depends on the
5 vintage of the reactor. That is true, Your Honor. That is a
6 decision the Commission has made. That is the licensing
7 standard.

8 I trust we are not going to litigate in this room
9 whether the Commission was wise or not when it drew its
10 lines.

11 JUDGE BECHHOEFER: No. All I was pointing out is
12 that when the Commission first reviewed this, they said you,
13 Vermont Yankee, may be free of some of the ASME requirements
14 since they are impractical.

15 But you are only free of those if you continue to
16 adhere to all of the requirements that are already in your
17 license. That is how I read that January tenth, 1980,
18 letter.

19 And there was a license amendment that issued
20 along with it. The license amendment, all it did was freed
21 you of the so-called impractical items.

22 MR. GAD: I think what Your Honor is suggesting to
23 me is -- what Your Honor is asking me is, is there a shell
24 game going on here. The answer to that is no. But that,
25 too, is the merits.

1 The opposition we raised to this contention is
2 right now. I don't want anyone to walk out of here thinking
3 that we are unwilling to prove our case if there is a
4 properly framed contention.

5 The one thing I am striving to do, sort of because
6 you learn the hard way, the one thing I am striving to do is
7 to burden us with the contention that was admitted because
8 it was close enough to what might have been a good
9 contention but itself misses the mark.

10 And spend the next several years agonizing over
11 the words of the contention.

12 I guess my view on life is "let's clean it up".
13 At the outset, if the petitioners really mean to take on the
14 sufficiency of ASME testing to the extent required by
15 5055a(g), if the petitioners really mean to take on the
16 licensing strategy that is used in every other plant that
17 says the ASME Code 9 or Article 9 requirements by themselves
18 to the extent made applicable by 5055a(g), that that is not
19 enough to license a power plant, that is an admissible
20 contention.

21 It is one that isn't going to win, but it is an
22 admissible contention. If on the other hand what they mean
23 to say is that having in the ancient history adopted
24 something that was more restrictive than you had to back
25 then, you are forever locked into it, which is what this

1 contention says literally.

2 And I oppose it because that is not the licensing
3 standard by which you measure OL amendments.

4 It is nothing more complex. I may not have said
5 it very well, but it is nothing more complex than that.

6 I have been saying ASME Section 9. It is ASME
7 Section 11.

8 JUDGE BECHHOEFER: Yes. I was hearing 11.

9 (Laughter)

10 MR. GAD: That's the trouble with Roman numbers.
11 That is why the Romans gave up the system.

12 (Laughter)

13 JUDGE BECHHOEFER: Well, my next question, maybe
14 this would come in only if you get to the stage of having to
15 resolve a contention, but in 1980 were any of the ASME
16 provisions from which Vermont Yankee was granted relief, did
17 any of those have to do with testing of the ECCS and the SLC
18 systems?

19 MR. GAD: Normally or during an outage?

20 JUDGE BECHHOEFER: Anytime.

21 MR. GAD: I would have to find out the answer to
22 that question, Your Honor. I am not sure I can do it this
23 afternoon.

24 JUDGE BECHHOEFER: Well, I would think that if we
25 let the contention in, that is the kind of thing that would

1 have to be put on the record at some point.

2 MR. GAD: Well, I have a suspicion Your Honor was
3 probably on the right track when you said it is the merits.

4 JUDGE BECHHOEFER: It is the merits.

5 MR. GAD: And please don't misread what I am
6 saying. I not saying that if somebody wants to say you
7 missed the applicable legal criteria for an operating
8 license amendment, I am not contending that is a bad
9 contention.

10 A perfectly admissible contention. It is not
11 going to win, but it is perfectly admissible. And I am
12 saying that if the contention proceeds to describe the legal
13 standard and describes it wrong, as this one has, and I
14 gather there is no real argument to that.

15 Then if we admit it without amending it, we have
16 essentially all bound ourselves to the wrong legal standard.

17 JUDGE BECHHOEFER: Well, in my comments I have
18 some question about that legal standard because the legal
19 standard, the way I read it, is for these older reactors it
20 is whatever the ASME -- based on the letter of the staff in
21 1980, it is whatever you had before plus the additional ASME
22 standards that are applicable.

23 MR. GAD: I am not sure that is what is in the
24 regulations, Your Honor, but the easy solution to that is to
25 rewrite this contention so that it does not pre-empt a

1 description of what the legal standard is.

2 Write it so the contention says this proposed
3 amendment does not meet the legal criteria for an operating
4 license amendment. Period. Now we have got an axiomatically
5 admissible contention.

6 Now very shortly somebody is going to get an
7 interrogatory saying what do you think that standard is. And
8 the answer to that interrogatory might be to a motion for
9 summary disposition.

10 But my point -- and I hate to be hypertechnical
11 about it, particularly at this hour of a warm afternoon.
12 But my point is that we ought not to admit the contention,
13 that it self describes the legal standard.

14 And it does so in a fashion that is incorrect.
15 And at odds with what the pleader apparently intended.

16 JUDGE BECHHOEFER: Judge Carpenter is going to
17 have a question in a minute.

18 (Pause)

19 JUDGE BECHHOEFER: Well, while Judge Carpenter is
20 looking for something, the provision I was referring to when
21 I asked you whether even the contention as worded wouldn't
22 be acceptable, is it appears that 5055a(g)(6) -- I think I
23 got all my letters and numbers together there -- this deals
24 with the impracticality standards which are applicable to
25 your reactor by virtue of paragraph G-1.

1 (Pause)

2 JUDGE BECHHOEFER: Particularly the language,
3 "otherwise in the public interest".

4 Would we not be authorized to determine whether
5 deletion of any of the current requirements is otherwise in
6 the public interest?

7 MR. GAD: I think not, Your Honor.

8 JUDGE BECHHOEFER: Under G-1, that is.

9 MR. GAD: I think in the first instance what you
10 are required to do to determine whether or not with the
11 proposed amendment the Vermont Yankee surveillance -- the
12 resultant Vermont Yankee surveillance testing program meets
13 the requirements of 5055a(g), whichever the code section.

14 The answer is that it does not. Then the provision
15 that you have just referred to is an opportunity for the
16 operator to demonstrate either that the respect in which it
17 does it is of no consequence because for some reason for
18 this configuration that test won't tell you anything.

19 Or, that there are offsetting reasons why that
20 exception should nonetheless be accepted.

21 What you are proposing is to read that language in
22 the reverse fashion so that the ultimate legal standard for
23 what your surveillance testing requirement is, whatever
24 might suggest itself to the Board from time to time is
25 somehow or other in the public interest.

1 I don't think that is what the Commission
2 intended.

3 JUDGE BECHHOEFER: Isn't that an alternative to
4 full compliance with the ASME code?

5 If you complied in full, then this would not come
6 in.

7 MR. GAD: That's correct.

8 JUDGE BECHHOEFER: Then compliance with the code
9 might be enough.

10 MR. GAD: If we complied in full, then this drops
11 so far out of the equation that you can admit a contention
12 that says "notwithstanding your compliance in full".
13 Notwithstanding your compliance in full, you have got to do
14 this alternate program.

15 And that is what this contention is that is before
16 you today.

17 JUDGE BECHHOEFER: Right.

18 But you have already been relieved in part of some
19 of the ASME requirements.

20 MR. GAD: Correct.

21 JUDGE BECHHOEFER: Because it was a license
22 amendment back in 1980 that did that.

23 MR. GAD: Correct.

24 I assume you are correct. I am not sure that it
25 is correct. Let's assume at the moment that it is correct.

1 JUDGE BECHHOEFER: Well, I've got it with me, for
2 what it is worth.

3 I can't tell you what you were relieved of,
4 however, It was based on documents that I didn't have
5 before me. I am just reading the public record that you get
6 from the docketing file, just what I get when I punch my
7 computer and ask what is on the docket.

8 I get a copy of the docket. That is all I have at
9 the moment.

10 MR. GAD: And what Your Honor is hypothesizing is
11 to make up for that hole, fill it up, bring the level of the
12 vessel up to the same norm you would have if you didn't have
13 that hole. Then you need this little bit of testing
14 program.

15 That is not this contention either.

16 JUDGE BECHHOEFER: Well, based on this relief, the
17 staff, by that letter I quoted from, said that when it is
18 essentially in the public interest or it will enhance safety
19 for you to adopt ASME as long as you keep everything else,
20 and that -- pardon?

21 MR. GAD: That may be axiomatically true, but i

22 JUDGE BECHHOEFER: That's all the staff said.

23 MR. GAD: But that's not the negation of our
24 present contention which is that if you get rid of this
25 alternative testing program you also enhance safety.

1 Once again, that is not the contention that is on the
2 plate before Your Honor. The contention does not say you
3 have to hold onto this alternate testing program in order to
4 meet the standard of 5055a(g), which is a shorthand for
5 meeting the standard of that aspect of the 5055a(g) ASME
6 Section 11 regime that applies to your vintage plant.

7 The contention on the table literally before you
8 says you cannot change from what you've got unless you can
9 demonstrate it is a net plus. That simply is not the legal
10 standard.

11 Now we spent so much time on this that the rest of
12 the world is going to think that I am trying to put up all
13 sorts of defenses to keep this stuff secret.

14 That is not the mission at all. I just don't want
15 to see us burdened with the contention that the Court is to
16 state erroneously, contrary to the pleader's intent, what
17 the legal standard is that this Board will use when it
18 judges the facts and decides that this contention is either
19 being sustained or not.

20 (Pause while the Board confers)

21 JUDGE CARPENTER: Mr. Gad?

22 MR. GAD: Yes, Your Honor?

23 JUDGE CARPENTER: What I am fumbling with --

24 (Laughter)

25 -- looking back at the original December 7, 1987

1 application on page 3, the beginning paragraph under safety
2 considerations essentially makes the comparison that is
3 being challenged here.

4 I am trying to understand why the application is
5 in that format if that is not the legally proper approach.

6 It says that the frequency and test most presently
7 mandated by technical specifications "may defeat the
8 system's ability to perform and is in effect a reduction of
9 the plant's safety margin --

10 MR. GAD: "Compared" --

11 JUDGE CARPENTER: -- "compared to the changes
12 proposed by this amendment."

13 MR. GAD: Right.

14 JUDGE CARPENTER: So it sort of oriented the
15 reader to think comparatively.

16 MR. GAD: Well, you know, Your Honor, yes, Your
17 Honor is entirely correct. And that is the trouble with
18 having lawyers involved in these proceedings.

19 Because the fact of the matter is, my argument
20 here, Your Honors, is Vermont Yankee could if it wants to
21 legally march backwards so long as they did not march too
22 far.

23 And legally that is 100 per cent correct. Nobody
24 disputes that. The trouble is they wouldn't in the real
25 world. There would be no purpose for this amendment and my

1 folks wouldn't propose to support it unless they thought
2 that this existing requirement was in fact a serious
3 impediment to the level of safety they would like to
4 achieve.

5 So the paragraph then Your Honor has focused on is
6 the motivation for Vermont Yankee saying this is an
7 important thing to do. It has nothing to do with what is
8 the appropriate legal standard by which an operating license
9 amendment may be challenged.

10 JUDGE CARPENTER: Well how is it that the
11 contention the way it as presently written, as I read it, is
12 a direct challenge to the statement in that paragraph?

13 MR. GAD: The statement in that paragraph is a
14 revelation of the motivation of Vermont Yankee proposing,
15 sponsoring, vigorously advocating this amendment.

16 Vermont Yankee does not want it out of its tech
17 spec because it is useless. They don't want it out of its
18 tech spec because it is nice and maybe gets you something
19 but it costs a lot.

20 That is not why we are here. They want it out of
21 their tech spec because they have to include it; that it
22 gets in the way. That is what they told you in that
23 paragraph.

24 That is not the legal standard. The legal
25 standard is they couldn't ask to have it removed because it

1 is useless. They could ask to have it removed because it
2 may buy you a little safety but it is not worth the hassle
3 and it is, if you will "extracy" beyond the licensing
4 requirement.

5 So Your Honor is quite correct that the words you
6 quoted from are a comparative, but that is the motivation of
7 comparative. It did not purport to be and I certainly
8 remind you that it is not the standard -- the legal standard
9 by which the admissibility of the contention opposing an
10 operating license is judged.

11 Let me put it this way, Judge Carpenter. What Mr.
12 Murphy said in that paragraph could be wrong and the
13 amendment still granted.

14 And that is why negation of what Mr. Murphy said
15 in that paragraph is not the grounds for opposing the
16 amendment.

17 But let's just say that Warren had it wrong and
18 that taking this out would leave the level of safety --
19 again we have to assume safety is some kind of measurable
20 thing we can plug the meter in and out come numbers.

21 JUDGE CARPENTER: And there are bright lines for
22 safety margins.

23 MR. GAD: That's correct.

24 We will assume all that and you've got like the
25 applausemeter in those old shows on television.

1 Now Warren comes in here and he says -- Mr.
2 Murphy, I'm sorry -- and he comes in here and says you
3 unplug this and the safety number will go up.

4 That is what he said. He believes it, or else he
5 wouldn't be here.

6 But he does not have to prove that to get the
7 amendment authorized. And, you see, that is why when
8 someone comes along and argues the negative as a reason for
9 opposing it, it turns out that they have missed the legal
10 bus.

11 JUDGE BECHHOEFER: Well, if a contention is
12 potentially inadmissible because it does not allege the
13 appropriate licensing standard, then would not -- using
14 equivalent reasoning if you relied on the licensing standard
15 yourself in your amendment and your reasons for the
16 amendment were found not to exist -- isn't that good ground
17 for throwing out the amendment?

18 MR. GAD: No, Your Honor.

19 JUDGE BECHHOEFER: You are saying come back later
20 if you think that you meet the standard in some other way.
21 Come back later and try again.

22 MR. GAD: Absolutely not, Your Honor. Let me see
23 if I can do this by an analogy. Let us say that we were
24 licensing a school bus. And let us say that the school bus
25 required one-inch padding on the top of each seat that has a

1 passenger sitting behind it.

2 We have a school bus that has an inch and a half
3 padding. We then propose a license amendment and what we
4 want to do is to go from our existing inch and a half green
5 padding to an inch and a half of pink padding.

6 Well, okay. We didn't really do it to change the
7 color. We did it because somebody has decided that the pink
8 material gets you more for your inch and a half. It is
9 really spiffy stuff. You really want it. It gets you more
10 protection for your inch and a half than does the existing
11 green material.

12 So they write up an amendment saying the reason we
13 want to do this, the reason we are spending the money, the
14 reason we are spending the time is because this will be a
15 big improvement of the safety of those kids that may come
16 into contact with that rail.

17 Someone else comes along and they said wait a
18 minute, the pink is no better than the green. That is not
19 grounds for opposing this. It may be grounds for saying our
20 anticipated benefit isn't going to be quite what we thought
21 it was.

22 But the grounds for opposing this would only be
23 that you do not have half an inch -- I am forgetting my
24 numbers. One inch.

25 Murphy asserts in his letter that we will be doing

1 even better than we are today if this amendment is
2 allowed. Because that assertion is not required to be so,
3 even though it happens to be so, but it is not required to
4 be so in order for the amendment to be allowed, it
5 necessarily follows that the negation of that assertion is
6 not a valid grounds for opposing the amendment.

7 As stated differently, one could hypothesize the
8 negation of that necessary assertion and the appropriate
9 response is "so what?".

10 Now I have a suspicion I haven't done much better
11 in articulating this principle that I did in writing. I do
12 not know how to do it any differently.

13 JUDGE BECHHOEFER: Could we not find that you did
14 not prove an increase in safety but notwithstanding that you
15 nonetheless are in conformity with existing regulations and
16 therefore we permit it.

17 Based on this contention, wouldn't that be a
18 permissible way of doing it? Or based on the contention you
19 haven't proved safety but if you left out a part of your
20 proposal -- maybe if you tested everything to start out with
21 once it would help.

22 There are a lot of degrees where you could change
23 testing and if no particular degree of testing is called
24 for, then isn't there a lot of flexibility to define it
25 after the contention is admitted.

1 What I am saying is can't we admit this contention
2 as written and still reach a result which, even if we did
3 not think it improved safety, still was acceptable?

4 MR. GAD: I think it would be -- the answer to
5 the question would be no.

6 Now Your Honor hypothesized a scenario where you
7 found that -- you ultimately found after all the facts,
8 your ultimate conclusion was that the expectation of a
9 safety-plus as stated in the letter from which Judge
10 Carpenter quoted, was unfounded.

11 But nonetheless, it met the licensing requirements
12 and therefore what would the Board do?

13 Answer: the Board would be required to approve
14 the amendment.

15 Next question: could the Board approve the
16 amendment after having admitted this contention? Answer:
17 yes it could. But byu doing so it will validate the
18 proposition that this contention should not have been
19 admitted as written because, under Your Honor's hypothesis,
20 this contention as written would be sustained.

21 And the test for admitting a contention is if it
22 is sustained, is that a reason for granting the pleader what
23 he is asking for.

24 And what I am suggesting to Your Honor is --

25 JUDGE BECHHOEFER: I am not sure that is the test.

1 I think the test is if it is admitted, could it grant the
2 pleader what -- and perhaps it could. It could.

3 MR. GAD: This one could not, Your Honor. The
4 contention must have a regulatory basis.

5 JUDGE BECHHOEFER: Isn't the response to the
6 contention well, even if it doesn't increase safety it meets
7 the regulations. That is a response.

8 Then we hear it out and decide. Whether you meet
9 or do not meet the regulations would then be in the
10 proceeding whether or not the contention -- you use the
11 magic words 5055a(g).

12 MR. GAD: Let me see if I can approach it a
13 different way.

14 JUDGE BECHHOEFER: There is a common law pleading
15 in all those things.

16 MR. GAD: Well let me see if I can illustrate what
17 I am struggling, perhaps unsuccessfully, to say.

18 Let us take a situation where the regulations are
19 quite clear. I hope this is one of them. The regulations
20 say that you need two decent generators. And along comes a
21 prospective intervenor and he says this application should
22 be denied because it does not show that you have three
23 decent generators.

24 Well, I would come up before Your Honors and say
25 don't admit that contention because it lacks a regulatory

1 basis.

2 And I would go on to say even if he is right, that
3 is no reason to deny my application. Even if he is right
4 that I don't have three decent generators. Conceivably the
5 plant could have three even though it is only required to
6 have two.

7 Even if he is right that I don't have three decent
8 generators, I am not required to and therefore Your Honors
9 would be obliged either to exclude that contention or to
10 rewrite it down to two.

11 Indeed, said he with some trepidation, one might
12 go back to the lesson of the matter we were discussing this
13 morning when the question of 140 vs. 150 degrees came up and
14 the Appeal Board said wait a minute, you couldn't put the
15 contention in there of 140 because the legal standard
16 applicable to that was 150 degrees.

17 JUDGE BECHHOEFER: I could say notwithstanding
18 everything they said they are wrong. But be that as it may.

19 (Laughter)

20 MR. GAD: Your Honor could but I would not back
21 away from the argument.

22 And the difference between you and them was
23 whether it should be 140. You did not disagree with them
24 that the right number should be plugged in, not the wrong
25 number.

1 JUDGE BECHHOEFER: That's correct.

2 MR. GAD: And that is my point. And for diesel
3 generators, the right number should be two and not three.
4 And for this OLA, the right number should be the minimum
5 requirements for operating, licensing, insofar as they bear
6 on surveillance testing. The number that should not be in
7 there is whatever you have immediately before this
8 amendment.

9 That is the defect. And please understand, that
10 is the only defect in this contention as written.

11 Moreover, while this is a lot of fun, I don't know
12 what the issue is because if I heard the proponents of the
13 contention correctly earlier this afternoon, what they
14 intended to plead is what I am urging Your Honors it ought
15 to read.

16 And what they have expressly disclaimed in
17 pleading is what I am telling Your Honor this thing
18 impermissibly says, literally.

19 So the bottom line of what I am urging is simply
20 that we make the words conform to the intention. If that
21 were true, we would all agree that it is admissible and go
22 home.

23 JUDGE BECHHOEFER: Well, Mr. Mullett, Mr. Dean?

24 MR. MULLETT: Just a very brief response. I don't
25 want to quibble about language into the wee hours of the

1 evening.

2 But I think the contention clearly sets for the
3 standard, namely that the proposed amendment is inconsistent
4 with the protection of public health and safety and the
5 environment.

6 I think the plain meaning of the words articulated
7 therein will carry forth the message that we intended and I
8 think that is expressed in that contention.

9 Secondly, I think Mr. Gad in large measure
10 answered many of the concerns which he raised when he
11 indicated early on in his discourse that he could move for
12 summary disposition under Section 2.749 if at some point
13 during the proceedings it is shown that the contention is
14 without merit or that we cannot come up with anything to
15 support it.

16 And I think that is the bottom line of all of
17 this.

18 JUDGE BECHHOEFER: Ms. Hodgdon?

19 Would you rewrite the contention? Gather you
20 know that this Board is not completely adverse to rewriting
21 contentions.

22 (laughter)

23 MR. GAD: Only on the way up, Your Honor.

24 (Laughter)

25 MS. HODGDON: I wasn't quite clear whether,

1 listening to Mr. Gad, whether he would have the contention
2 rewritten in the direction of the tech spec change should
3 not be allowed because Vermont Yankee has not shown that
4 under the change it will be as safe as before.

5 That is not good enough. It is as safe as
6 required. So it is not really the comparative thing that
7 upsets him. It is -- I mean the comparative thing is a red
8 herring.

9 Well, it is a relationship to the requirements. So
10 I mean we got side-tracked on "safe, safer". That is not
11 really the issue.

12 He says that the contention should be, as I have
13 just stated, that it should not be allowed because Vermont
14 Yankee has not shown that under the amendment as proposed it
15 will be as safe as it is required to be by the regulations.

16 MR. GAD: A perfectly admissible and I must say
17 elegantly stated contention.

18 MS. HODGDON: Thank you.

19 JUDGE BECHHOEFER: Mr. Mullett, would you have any
20 problem if the contention were worded along those lines than
21 as it is currently worded?

22 MR. MULLETT: I better check with Mr. Dean so he
23 doesn't say one thing and I say the other.

24 JUDGE BECHHOEFER: Well, either one of you.

25 (Pause while counsel confer)

1 MR. MULLETT: Your Honor, we have caucused here
2 and a rewording of the contention along the lines which was
3 suggested by Ms. Hodgdon would be acceptable to the
4 intervenors provided, I think, that in terms of talking
5 about what is required that we would have the right to
6 litigate and to explore what in fact is required.

7 Like Mr. Gad, I am a little bit tongue-tied in
8 trying to explain this. But I think that is a critical
9 part. If we talk about comparing the amendment to
10 requirements, a part of that contention and a very necessary
11 part of that contention is the right to debate what in fact
12 those requirements are.

13 here may be some room for debate about that given
14 the difficulty of interpreting Section 5055a(g).

15 JUDGE BECHHOEFER: Mr. Mullet, what would you
16 think of a rewording that would take your present contention
17 and add these words and hence is inconsistent with governing
18 NRC requirements?

19 (Pause)

20 MR. GAD: Your Honor, may I inquire a point of
21 clarification?

22 JUDGE BECHHOEFER: Yes.

23 MR. GAD: Would that be in lieu of or --

24 JUDGE BECHHOEFER: It would be nothing. It would
25 be added at the end.

1 MR. GAD: See, the problem is the "in that"
2 language in the existing contention.

3 JUDGE BECHHOEFER: Well, that would put in the
4 contention the idea that unless you have requirements at
5 least as good as they are now, it can't be licensed.

6 That would be in the contention. That would not
7 necessarily be in the final result.

8 MR. GAD: But Your Honor has to pass judgment on
9 whether or not the contention at the admission stage,
10 whether or not that is the legal standard.

11 And I think counsel for the State of Vermont was
12 quite accurate a moment ago. There may be room for debate
13 as to what the legal standard is. We need not settle that
14 today.

15 And the only reason I am off my feet is because
16 the contention as originally drafted proposed to settle that
17 today, by the way, in an erroneous fashion.

18 Now the beauty of the rewording suggested by
19 counsel for the staff is that it incorporates by reference
20 without a finding or nailing down whatever the applicable
21 legal standard happens to be.

22 That is something with which no one ought to be
23 able to quibble. I don't.

24 MR. MULLETT: Your Honor, with your suggested
25 addition after the words "safety and of the environment" at

1 the third line of the contention.

2 JUDGE BECHHOEFER: I was just proposing you just
3 put it at the end, which would say, "is not outweighed by
4 any reduction in risk attributable to the testing changes
5 proposed by the amendment and hence is inconsistent with
6 government NRC regulatory requirements."

7 MR. DEAN: Your Honor, George Dean for the
8 Commonwealth.

9 I might suggest a way out of this.

10 JUDGE BECHHOEFER: Maybe the word "hence" should
11 be deleted and say "and is inconsistent".

12 MR. DEAN: Perhaps we could just, beginning on the
13 fourth line, strike the balance of the contention. Say it,
14 in essence, is inconsistent with the protection of the
15 public health and safety and the environment and therefore .
16 . ." your suggested language.

17 All we are doing really is striking out certain
18 factual statements which while add specificity is not
19 required for an admissible contention at this time.

20 It just broadens the number of things that the
21 parties may allege are the problem and it does not restrict
22 us in any way. I am just concerned that we keep the
23 language which appears in the first clause of that sentence
24 indicating that it is inconsistent with the public health
25 and safety and the environment.

1 JUDGE BECHHOEFER: Mr. Gad, what do you thing
2 about that?

3 MR. GAD: With due respect to all, I rather think
4 it is not so elegant as the phraseology of counsel for the
5 NRC staff but it is equally acceptable.

6 (Laughter)

7 JUDGE BECHHOEFER: Okay. The Board has a
8 proposal. See if you can follow all this.

9 The contention would word as follows. It would
10 say, "The license amendment proposed by Vermont Yankee is
11 inconsistent with the protection of the public health and
12 safety and of the environment and therefore is inconsistent
13 with governing NRC regulatory requirements."

14 That would be as stated.

15 And then -- I guess the "therefore" is not
16 needed. "...and..is inconsistent with governing NRC
17 regulatory requirements."

18 Then after the first -- probably after the first
19 paragraph of the basis at the end of the first paragraph,
20 the words, the factual statement in the contenti n itself
21 would be added to the basis.

22 The factual words would be, "The increase in risk
23 of failure of the subject system occasioned by the proposed
24 elimination of testing is not outweighed by any reduction in
25 risk attributable to the testing changes proposed by the

1 amendment.

2 That would be put into the basis. Just so that
3 part of the contention remained. But then the governing
4 legal standard would be whatever governing regulatory NRC
5 requirements are.

6 MR. GAD: Speaking hypothetically, of course, were
7 that change made, the licensee's position would be that the
8 contention is perfectly admissible, albeit not for that
9 reason in the basis.

10 JUDGE BECHHOEFER: Mr. Mullett, do either of you
11 have any objection to that approach or can you improve it a
12 little bit? I can't guarantee how it reads grammatically.
13 But it is an easy way out if we could do it.

14 MR. MULLETT: Not speaking hypothetically, that
15 would be acceptable to Massachusetts and Vermont.

16 JUDGE BECHHOEFER: Okay. How about the staff?

17 MS. HODGDON: There was no requirement that it be
18 grammatical.

19 (laughter)

20 JUDGE BECHHOEFER: Are you telling me something?

21 (Laughter)

22 MS. HODGDON: The staff does not object. It is
23 okay with the staff.

24 JUDGE BECHHOEFER: Okay. We will rule that it is
25 admitted on that basis.

1 Can we establish any sort of a schedule now for
2 discovery and further litigation?

3 MR. MULLETT: Your Honor, we would suggest a 90-
4 day discovery period to give the parties ample time to
5 explore all issues to the fullest extent possible.

6 MR. GAD: I have no problem with 90 days, Your
7 Honor. I would put something at the end of it, however, and
8 that might either be to scope out the normal procedures for
9 a hearing, filing testimony and the like, or it might be a
10 prehearing conference at the close of discovery to see where
11 we are and what remains to be battled over and then do a
12 hearing schedule.

13 MR. MULLETT: I think the latter suggestion is an
14 excellent one.

15 JUDGE BECHHOEFER: That would mean possibly
16 October/November for a prehearing if we did the latter
17 suggestion.

18 MR. GAD: I'm sorry, Your Honor?

19 JUDGE BECHHOEFER: I said I think that would be
20 October, possibly November, for another prehearing. Would
21 that be i

22 MR. GAD: I think that is exactly right and I
23 think it makes sense.

24 JUDGE BECHHOEFER: Okay. I don't think we will
25 try to set a date for a prehearing conference at this stage.

1 I would like to find out what the staff's review
2 schedule is. I know you've got some questions coming in
3 early July.

4 MS. HODGDON: Yes. I think that we were asked in
5 the Board's order at this prehearing conference to present
6 information about what our review schedule was.

7 We sent questions May eighth and ninth -- May
8 ninth -- and asked that responses be provided within 60
9 days. So that would be July.

10 And so after that our schedule is complete the
11 review by early October.

12 JUDGE BECHHOEFER: What about the susceptibility
13 of the staff to discovery prior to the issuance of your
14 document?

15 MS. HODGDON: We --

16 JUDGE BECHHOEFER: I know you would prefer not.

17 MS. HODGDON: It is staff people that are
18 involved. If it were I who had to answer the questions, I
19 would do it, but it is not. The staff people have to answer
20 the interrogatories and it is the same people that are
21 writing the documents.

22 And so they have just so much time. If they are
23 doing something, they can't do something else. It just
24 pushes them off the date in which their documents are due.

25 We don't like to answer interrogatories prior to

1 the issuance of our documents and as I say the rules don't
2 contemplate our doing that.

3 MR. MULLETT: Your Honor, if we might offer a
4 suggestion. We certainly will adhere to the 90-day discovery
5 schedule on the applicant now. Perhaps something in the
6 order of 45 days on the staff after receipt of the staff
7 documents if they in fact come as promised in October, that
8 would not appear to disrupt the Board's hopes of maybe
9 holding a prehearing say middle of November.

10 JUDGE BECHHOEFER: Okay. I guess we will
11 establish a discovery schedule which the 90 days between the
12 Commonwealth and State and the applicant and 45 days
13 following service of the SER for the staff, between the
14 staff and the intervenors.

15 We will contemplate a further prehearing
16 conference but it may prove to be unnecessary. We may just
17 decide we should come up and litigate. It won't take that
18 long to litigate whatever is left.

19 We are amenable to a prehearing conference but if
20 we do not need one, we won't do it. If the parties are
21 prepared to go to hearing shortly thereafter, we should.

22 MR. GAD: I think that makes eminent sense, Your
23 Honor.

24 JUDGE BECHHOEFER: Right. And of course obviously
25 and all that, I don't know whether this is the kind of issue

1 which is very susceptible to a summary disposition of
2 Perhaps it is.

3 But perhaps not. There may be some difference of
4 opinion because of the wording of the regulations as to
5 whether it is met. I don't know. I am hypothesizing at this
6 time.

7 I guess we better wait and see on that one.

8 Okay. We will adopt that schedule. Now I would
9 like to at least put on the record some of the concerns that
10 I had. I don't want to be asserting discovery requests, but
11 in responding to the various questions I think that some of
12 these things should be borne in mind.

13 And specifically whether any of the ASME in-
14 service testing requirements for ECCS or SLC valve
15 components, whether the testing of any of those was affected
16 by the relief which was granted in 1980 from certain ASME
17 requirements.

18 And we would like to have the record establish for
19 each of the various components for which tests are proposed
20 to be eliminated, what are the testing intervals under the
21 ASME in-service testing program.

22 I mean is it once a year, once a month? Is it
23 once a week? And how would the reduction in testing affect
24 what the other testing was.

25 And then whether there are any differences in the

1 types of tests done under the ASME program and under the
2 current requirement. I think these are just things that the
3 record will just have to reflect after we sign off on the
4 contention one way or the other.

5 Now this may or may not be called for by the
6 staff's questions but it may be, also. Historic, out-of-
7 service frequency for each valve or component as to which
8 testing would be eliminated by the proposed amendment.

9 And sort of related to that, the projected service
10 life in both time and number of occasions it is used for
11 each valve or component for which the testing would be
12 eliminated.

13 This would go to whether the testing program would
14 have a potential for adversely affecting the service life of
15 the components in question.

16 And yet another one which I came up with was
17 whether any of the valves for which specific testing is
18 proposed to be eliminated and ASME testing substituted, are
19 any of those valves something which is known as a check
20 valve within the meaning of INE bulletin 8303 which was
21 issued on March 10, 1983?

22 If it is not, then that question is irrelevant.
23 But that bulletin said that ASME testing of certain "check
24 valves" was inadequate.

25 But far be it from me to know whether any of these

1 valves are "check valves".

2 The staff may itself cover that in its own review.
3 I would expect it would. But be that as it may, these are
4 questions that I have come up with.

5 MR. GAD: With assurances that --

6 JUDGE BECHHOEFER: And by the way, I do not intend
7 to be filing interrogatories or anything like that. It is
8 just in terms of developing the record so that by the time
9 we have to rule, some of these things are on the record so
10 that --

11 I don't mean for any party to have to send answers
12 to questions to us.

13 MR. GAD: That is what I was going to inquire.
14 Let me assure the Board that one source of questions that
15 gets the most attention out of us is questions that come
16 from the Board.

17 And having demonstrated myself to be something of
18 a proceduralist, I would suggest that making sure that these
19 responses are in the prefiled testimony within the record is
20 the most orderly way of doing it.

21 JUDGE BECHHOEFER: Yes, that is what we have in
22 mind. We just want to make sure. For example, when we are
23 told that one testing is equivalent or as good as another,
24 we know what the testing involves.

25 And just from reading the application, you cannot

1 tell that. I guess I could do a lot of independent research
2 and try to find out but I am not sure I want to do that.

3 I just think the testimony can reflect that. So
4 not directly to us, but in the prepared testimony.

5 MR. GAD: Will do, Your Honor.

6 JUDGE BECHHOEFER: Or motions, as the case may be.

7 MR. GAD: Will do.

8 JUDGE BECHHOEFER: Okay.

9 Is there anything further that any of the parties
10 would want us to cover?

11 MR. MULLETT: Nothing from the intervenors, Your
12 Honor.

13 JUDGE BECHHOEFER: Before we adjourn, has anybody
14 walked in to make a limited appearance statement?

15 (No response)

16 JUDGE BECHHOEFER: Seeing none, I guess the
17 prehearing conference is adjourned.

18 (Whereupon, at 4:17 p.m., the prehearing
19 conference was adjourned)

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CERTIFICATE

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This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of:
Name: Vermont Yankee Nuclear Power Corporation

Docket Number: 50-271-OLA-2

Place: Brattleboro, Vermont

Date: June 28, 1988

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission taken stenographically by me and, thereafter reduced to typewriting by me or under the direction of the court reporting company, and that the transcript is a true and accurate record of the foregoing proceedings.

15/ Andrew M. Emerson

(Signature typed): Andrew M. Emerson

Official Reporter

Heritage Reporting Corporation