

October 27, 2000

Mr. John Moriarty
Director of Security
Vermont Yankee Nuclear Power Corporation
185 Old Ferry Road
P.O. Box 7002
Brattleboro, Vermont 05302

SUBJECT: VERMONT YANKEE NUCLEAR POWER CORPORATION AND DR. GEORGE IDELKOPE v. UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND WILLIAM SORRELL, ATTORNEY GENERAL OF THE STATE OF VERMONT, Case No. 00cv254 (D. Vt.)

This letter addresses various issues raised in the above-captioned litigation and results from an agreement between Mr. Peter Robb, Counsel for Vermont Yankee Nuclear Corporation, Mr. Paul Van de Graaf, Chief of the Civil Division for the Office of the United States Attorney for the District of Vermont, and Mr. Charles Mullins, a Senior Attorney in the Office of the General Counsel for the U.S. Nuclear Regulatory Commission (NRC).

I am the Branch Chief of the Operator Licensing, Human Performance, and Plant Support Branch (IOLB), which is part of the Division of Inspection Program Management, which in turn is part of the Office of Nuclear Reactor Regulation at the NRC. The immediate responsibility for enforcement of 10 C.F.R. Part 26 rests with the Reactor Safeguards Section, which is a part of the plant support function of the IOLB. Thus, as Branch Chief, my duties include the supervision and coordination of the overall inspection and enforcement program insofar as it relates to potential violations of the NRC's Fitness-for-Duty regulations found in 10 C.F.R. Part 26.

The U.S. Department of Justice and the Equal Employment Opportunity Commission (EEOC) have asked me to address three matters at issue in this case: (1) whether Vermont Yankee can comply with the Civil Investigative Demands served by the Attorney General of Vermont without violating NRC regulations; (2) whether a Medical Review Officer (MRO) has the authority to proscribe additional medications not prohibited by the NRC's regulations; and (3) whether an NRC licensee is required to terminate the employment of an individual who is determined to be "unfit" for duty. I have reviewed the Complaint filed in this case and other documents as further described below.

The first issue I will address is whether Vermont Yankee and the MRO, Dr. George Idelkope, can comply with the Civil Investigative Demands filed by the Vermont Attorney General without violating the applicable NRC regulations. I have been advised by NRC counsel assigned to this matter and have reviewed the Civil Investigative Demands filed by the Attorney General of the State of Vermont, which are the subject of Paragraphs 24 through 29, inclusive, of the Complaint, and the "Authorization to Investigate, Consent to Disclosure," submitted by the individual who has filed the underlying charge with the EEOC.

The “Authorization to Investigate, Consent to Disclosure” constitutes a “Release,” which allows Vermont Yankee to release any information related to this individual and relevant to this matter to the person designated in the Authorization. See 10 C.F.R. §26.29(b). Thus, I would not consider Vermont Yankee to be in violation of 10 C.F.R. §26.29 if it provides information relating to this individual to the Attorney General in compliance with the two Civil Investigative Demands at issue in this case.

In addition, the Civil Investigative Demand (CID) issued to Peter Robb, counsel for Vermont Yankee, seeks information about any other individuals who may have been employed at Vermont Yankee while taking a prescription narcotic drug or drugs. While the release of any information into the public domain that would allow members of the public to identify these individuals would be inconsistent with NRC regulations, the CID explicitly states that Vermont Yankee may redact the names of the individuals involved, if any, before responding to the CID. Thus, I would not consider Vermont Yankee to be in violation of 10 C.F.R. §26.29 if it provides the information related to any other individuals in compliance with the CID issued to Mr. Robb, as long as it first redacts any information that might be used to identify a particular individual, such as name, address, and job title.

Furthermore, I would not consider Vermont Yankee to be in violation of 10 C.F.R. §26.29 if it provides the Attorney General with the information that would be redacted (name, address, etc.), as long as the Attorney General first obtains a court order directing production of the information and that court order includes a protective order limiting disclosure of the information to only those persons involved in the review of the case. In that way, unauthorized release of this information may be punished through a contempt-of-court citation.

The second issue I will address is whether the Vermont Yankee FFD program may proscribe use of additional medications not prohibited by the NRC’s regulations. The NRC has not listed Methadone as a prohibited drug in Appendix A, Section 2.1(a), of Part 26. But 10 C.F.R. §26.24(b) specifically provides that “[l]icensees, at their discretion, may implement programs with more stringent standards (e.g., lower cutoff levels, broader panel of drugs).” Thus, the regulations allow Vermont Yankee to find that a person who is taking a drug that is not listed as a prohibited drug, such as Methadone, is not fit to perform their assigned duties.

However, the burden is on the licensee, specifically the MRO, to evaluate whether the use of any drug not listed in Part 26, Appendix A, Section 2.1(a), would result in an individual being “unfit” to perform his or her duties and, when they so find, to prepare a justification of that decision. I lack sufficient information to offer an opinion on the underlying question of whether the MRO made the correct decision with regard to this particular individual’s lack of fitness to perform his duties while taking Methadone. If the Attorney General attempts to order Vermont Yankee to reinstate this individual to a position that requires unescorted access to the protected area, the NRC will examine that request very closely. This letter does not constitute an agreement by the NRC that the Attorney General has the power to compel that action.

The third issue I will address is whether the NRC’s regulations required Vermont Yankee to terminate the individual involved in this case. The Complaint implies that Vermont Yankee was required to discharge the individual involved who lost his unescorted access status when the MRO determined that he was “unfit” to perform his duties. See generally, Complaint at ¶¶ 14-19. But NRC regulations do not require licensees to discharge employees who fail to meet the

fitness for duty requirements. Instead, NRC regulations only require that “[i]mpaired workers, or those whose fitness may be questionable, shall be removed from activities within the scope of this part and may be returned only after determined to be fit to safely and competently perform activities within the scope of this part.” 10 C.F.R. §26.27(b)(1).

As an alternative, the licensee may assign the employee to duties that do not require unescorted access to the “protected” areas of the facility. The licensee may also terminate the employee. But that decision (i.e., to terminate) is one made by the licensee on its own initiative, taking into account the particular circumstances of each case, its own requirements, and any applicable laws; it is not mandated by the NRC’s regulations.

I hope this letter assists Vermont Yankee in resolving the current dispute with the EEOC and the Vermont Attorney General. I re-iterate that while Vermont Yankee may comply with the CID’s without violating NRC regulations, the NRC does not concede -- at least at this point -- that the Attorney General has the authority to order the reinstatement of the individual involved to his original position. If the Attorney General attempts to order that result, the NRC will scrutinize that action very closely.

If you have any further questions about this matter, please direct them to either Mr. Garmon West of my staff at (301) 415-1044, or Mr. Charles Mullins of the Office of the General Counsel at (301) 415-1606.

Sincerely,

/RA/

Glenn M. Tracy
Operator Licensing, Human Performance
and Plant Support Branch
Division of Inspection Program Management
Office of Nuclear Reactor Regulation

cc: Peter Robb, Esq.
Katherine Hayes, Esq.
Kathleen Oram, Esq.
Paul Van de Graaf, Esq.
Mr. John White, NRC Region I
Richard Croteau, Project Manager

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