

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

YANKEE ATOMIC ELECTRIC COMPANY,

Plaintiff,

v.

UNITED STATES,

Defendant.

DEFENDANT'S REPLY TO YANKEE ATOMIC'S RESPONSE
TO DEFENDANT'S MOTION TO QUASH THE DEPOSITION
NOTICE FOR MARTIN J. VIRGILIO AND FOR A PROTECTIVE ORDER

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TABLE OF CONTENTS

	<u>Page</u>
DEFENDANT'S REPLY TO YANKEE ATOMIC'S RESPONSE TO DEFENDANT'S MOTION TO QUASH THE DEPOSITION NOTICE FOR MARTIN J. VIRGILIO AND FOR A PROTECTIVE ORDER	1
ARGUMENT	1
I. THE GOVERNMENT'S MOTION TO QUASH AND FOR A PROTECTIVE ORDER SHOULD BE GRANTED BECAUSE YANKEE IS IMPERMISSIBLY ATTEMPTING TO COLLATERALLY ATTACK THE NRC'S REGULATIONS REGARDING GREATER- THAN-CLASS-C LOW-LEVEL RADIOACTIVE WASTE	1
II. THE GOVERNMENT'S MOTION SHOULD BE GRANTED BECAUSE YANKEE SEEKS TO DEPOSE MR. VIRGILIO CONCERNING MATTERS THAT ARE EITHER PRIVILEGED OR ARE UNNECESSARY TO THE COURT'S DETERMINATION OF THE GOVERNMENT'S CLAIM OF DELIBERATIVE PROCESS PRIVILEGE ..	4
A. The Government's Motion Should Be Granted To Prevent Yankee From Deposing Mr. Virgilio About Information Protected By The Work Product And Attorney-Client Privileges	4
B. The Court Should Grant The Government's Motion Because Mr. Virgilio's Two Declarations Provide The Court With Sufficient Information To Decide The Government's Claim Of Deliberative Process Privilege	7
III. CONTRARY TO YANKEE'S ARGUMENT, "EXCEPTIONAL CIRCUMSTANCES" ARE NECESSARY TO DEPOSE MR. VIRGILIO, AND YANKEE HAS FAILED TO DEMONSTRATE THAT THEY EXIST	10
IV. YANKEE MISREPRESENTS THE GOVERNMENT'S POSITION CONCERNING THE EFFECT OF THE NRC'S <i>TOUHY</i> REGULA- TIONS WHILE CONTINUING TO ASSERT DIRECTLY CONTRA- DICTORY POSITIONS CONCERNING THE NRC'S STATUS IN THIS LITIGATION	12

TABLE OF CONTENTS (cont'd)

	<u>Page</u>
V. SHOULD THE COURT DENY THE GOVERNMENT'S MOTION TO QUASH, THE COURT SHOULD HOLD YANKEE TO ITS REPRESENTATIONS, AND ENTER A PROTECTIVE ORDER LIMITING THE DEPOSITION OF MR. VIRGILIO TO ONLY TOPICS RELATED TO HIS SEPTEMBER 5, 2002 SUPPLEMENTAL DECLARATION	13
CONCLUSION	14

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Alexander v. FBI</u> , 186 F.R.D. 71 (D.D.C. 1998)	2
<u>Beck v. University of Wisconsin Board of Regents</u> , 75 F.3d 1130 (7th Cir. 1996)	2
<u>Cabot v. United States</u> , 35 Fed. Cl. 442 (1996)	6
<u>Carl Zeiss, Stiftung v. V.E.B. Carl Zeiss, Jena</u> , 40 F.R.D. 318 (D.D.C. 1966), <u>affd</u> , 384 F.2d 979, <u>cert. denied</u> , 389 U.S. 952 (1967)	8
<u>Concerned Citizens of Nebraska v. NRC</u> , 979 F.2d 421 (8th Cir. 1992)	3, 4
<u>Consolidation Coal Co. v. United States</u> , Nos. 01-254C & 01-442C, slip op. (Fed. Cl. Aug. 14, 2002)	4
<u>Doebele v. Sprint Co.</u> , 168 F. Supp. 2d 1247 (D. Kan. 2001)	2
<u>Florsheim Shoe Co. v. United States</u> , 744 F.2d 787 (Fed. Cir. 1984)	13
<u>Franklin Savings Association v. Ryan</u> , 922 F.2d 209 (4th Cir. 1991)	8
<u>Herbert v. Lando</u> , 441 U.S. 153 (1979)	13
<u>Hickman v. Taylor</u> , 329 U.S. 495 (1947)	5
<u>Low v. Whitman</u> , 207 F.R.D. 9 (D.D.C. 2002)	11
<u>Mead Data Central, Inc. v. Department of the Air Force</u> , 566 F.2d 242 (D.C. Cir. 1977)	10

TABLE OF AUTHORITIES (cont'd)

<u>CASES</u>	<u>PAGE</u>
<u>Michigan v. United States,</u> 994 F.2d 1197 (6th Cir. 1993)	3
<u>Public Citizen v. NRC,</u> 901 F.2d 147 (D.C. Cir. 1990)	4
<u>Robinson v. Detroit News, Inc.,</u> 211 F. Supp. 2d 101 (D.D.C. 2002)	2
<u>Simplex Time Recorder Co. v. Secretary of Labor,</u> 766 F.2d 575 (D.C. Cir. 1985)	11
<u>Sparton Corp. v. United States,</u> 44 Fed. Cl. 557 (1999)	5
<u>Sprock v. Peil,</u> 759 F.2d 312 (3d Cir. 1985)	5
<u>Walker v. NCNB National Bank of Florida,</u> 810 F. Supp. 11 (D.D.C. 1993)	10
 <u>STATUTES AND REGULATIONS</u>	
28 U.S.C. § 2342	3
42 U.S.C. § 2239	3
42 U.S.C. § 5844	10
10 C.F.R. § 9.200	13
10 C.F.R. §§ 60.2 & 63.2	3
10 C.F.R. § 961.11	2
54 Fed. Reg. 27,579 (May 25, 1989)	3
RCFC 26	5, 13

INDEX TO THE SUPPLEMENTAL APPENDIX

<u>Document</u>	<u>Pages</u>
July 24, 2002 Declaration of Martin J. Virgilio.	1
September 5, 2002 Supplemental Declaration of Martin J. Virgilio	7
Excerpts from "Yankee Atomic's Motion To Compel Testimony Of Robert Campbell," filed July 3, 2002	12
Excerpts from "Yankee Atomic's Reply On Its Motion To Compel Testimony Of Robert Campbell And Opposition To The Government's Cross-Motion For A Protective Order," filed August 14, 2002	14

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

YANKEE ATOMIC ELECTRIC COMPANY,)	
)	
Plaintiff,)	
)	
v.	)	No. 98-126C
	)	(Senior Judge Merow)
THE UNITED STATES,)	
)	
Defendant.)	

DEFENDANT'S REPLY TO YANKEE ATOMIC'S
RESPONSE TO DEFENDANT'S MOTION TO QUASH THE
DEPOSITION NOTICE FOR MARTIN J. VIRGILIO AND FOR A PROTECTIVE ORDER

Defendant, the United States, respectfully submits this reply to "Yankee Atomic's Response to Defendant's Motion to Quash and for a Protective Order," which plaintiff, Yankee Atomic Electric Company ("Yankee"), filed September 26, 2002.

ARGUMENT

I. THE GOVERNMENT'S MOTION TO QUASH AND FOR A PROTECTIVE ORDER SHOULD BE GRANTED BECAUSE YANKEE IS IMPERMISSIBLY ATTEMPTING TO COLLATERALLY ATTACK THE NRC'S REGULATIONS REGARDING GREATER-THAN-CLASS-C LOW-LEVEL RADIOACTIVE WASTE

As part of Yankee's continuing effort to challenge virtually every claim of privilege raised by the Government, no matter how valid, Yankee seeks to depose Martin J. Virgilio, Director of the Office of Nuclear Materials Safety and Safeguards ("NMSS") of the Nuclear Regulatory Commission ("NRC"), concerning his September 5, 2002 supplemental declaration reaffirming his previous assertions of deliberative process privilege upon behalf of the NRC over certain documents relating to Greater-Than-Class-C low-level radioactive waste ("GTCC").¹ The

¹ Yankee also reasserts its argument that the Court should not consider Mr. Virgilio's supplemental declaration that it raised in its "Surreply to Defendant's Reply to Yankee Atomic's Opposition to Defendant's Motion for a Protective Order, and Request For A Hearing," attached

Government does not wish to belabor this point, but the Court should not lose focus of the fact that Yankee's entire line of inquiry concerning GTCC, including the challenges to our privilege claims, will not lead to the discovery of admissible evidence regarding GTCC. As we explained in detail in our cross-motion for a protective order, dated July 29, 2002,² and reply brief, dated September 5, 2002,³ the only issue relating to GTCC about which Yankee is seeking evidence here involves whether the NRC, "by rule," has defined GTCC waste as high-level radioactive waste ("HLW"). This issue is purely legal and is quickly resolved simply by reference to the

to Yankee's "Motion for Leave to File Its Surreply," filed September 13, 2002 ("Yankee Surreply"). This argument is without merit.

As stated in our "Reply to Yankee Atomic's Opposition to Defendant's Motion for a Protective Order," filed September 5, 2002 ("Reply"), although we believe his initial declaration was more than adequate, Mr. Virgilio's supplemental declaration responds to concerns raised by Yankee in its response. Reply, at 19. A party is permitted to respond to the other side's arguments in its reply brief. "Where the reply affidavit merely responds to matters placed in issue by the opposition brief and does not spring upon the opposing party new reasons for the entry of summary judgment, reply papers – both briefs and affidavits – may properly address those issues." Doebele v. Sprint Corp., 168 F. Supp. 2d. 1247, 1254 (D. Kan. 2001) (quoting Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130, 1134 (7th Cir. 1996)). Yankee tacitly acknowledges that the Government did not raise a new argument when it argues that Mr. Virgilio's supplemental declaration is substantively no different from his first declaration. Yankee Surreply at 4. In any event, in its surreply and "Yankee Atomic's Response to Defendant's Motion to Quash and for a Protective Order," Yankee has had the opportunity to respond to Mr. Virgilio's supplemental declaration and, therefore, removed any potential prejudice from this allegedly new argument. See Robinson v. Detroit News, Inc., 211 F. Supp.2d. 101, 113 (D.D.C. 2002) ("the standard for granting leave to file a surreply is whether the party making the motion would be unable to contest matters presented to the court for the first time in the opposing party's reply."); see also Alexander v. FBI, 186 F.R.D. 71, 74 (D.D.C. 1998) (permitting the filing of a surreply to allow a party an opportunity to respond to new arguments raised in the reply brief).

² "Defendant's Response to Yankee Atomic's Motion to Compel Testimony of Robert Campbell, and Defendant's Motion for a Protective Order," filed July 29, 2002.

³ "Defendant's Reply to Yankee Atomic's Opposition to Defendant's Motion for a Protective Order," filed September 5, 2002.

NRC's regulations and statements of consideration published in the Federal Register, all of which, spanning more than a decade, make clear, for clearly stated and public reasons, that the NRC has not established a requirement that GTCC be permanently isolated and does not consider GTCC waste to be high-level waste. See 10 C.F.R. §§ 60.2 & 63.2 (definitions of high-level waste); 54 Fed. Reg. 22,579 (May 25, 1989) (final rule on disposal of GTCC low-level radioactive waste). The views of subordinate employees of either the NRC or the Department of Energy ("DOE") are wholly irrelevant to this issue. Instead, the only relevant evidence upon this issue is the NRC's published rules themselves. We do not understand how Yankee could establish that GTCC waste is, in fact, HLW by reference to any evidence other than the NRC's published rules.

The only conceivable purpose of Yankee's current inquiry, and challenge to our privilege claims, that we can identify is that Yankee appears to be attempting a collateral attack upon the NRC's GTCC rulemakings. That is, Yankee somehow seeks through this litigation either to invalidate the NRC's published rules or challenge the procedure by which the rules were promulgated. However, this Court does not possess jurisdiction to consider such an argument. The appropriate forum for challenges to the substance of NRC rulemaking, if timely, is in a circuit court of appeals pursuant to 28 U.S.C. § 2342 (the Hobbs Act) and 42 U.S.C. § 2239. See Concerned Citizens of Nebraska v. NRC, 979 F.2d 421, 424-25 & n.6 (8th Cir. 1992) (finding that only circuit courts, not district courts, possessed jurisdiction to consider a challenge to NRC regulations); Michigan v. United States, 994 F.2d 1197, 1202 & 1204 (6th Cir. 1993) (holding that, pursuant to the Hobbs Act, district courts lack jurisdiction to consider challenges to NRC regulations). Had Yankee wanted to challenge the NRC's rules, it should have filed the

appropriate challenge in a circuit court of appeals in the time allowed for doing so. Yankee, if it desires, could still petition the NRC to change the regulations that define high-level waste, and Yankee could potentially then seek Federal appellate review of the agency's response to the petition. See, e.g., Concerned Citizens of Nebraska, 970 F.2d at 424 n.6; Public Citizen v. NRC, 901 F.2d 147, 152 (D.C. Cir. 1990). But in no case does a Federal trial court have authority to review NRC decisions on matters of public health and safety. A fortiori, there is no place under the law for the use of discovery to challenge the NRC's reasons for not defining GTCC waste as high-level waste.

This Court lacks jurisdiction to engage in the effort that Yankee apparently believes is appropriate. See Consolidation Coal Co. v. United States, Nos. 01-254C & 01-442C, slip op. at 5-6 (Fed. Cl. Aug. 14, 2002) (published opinion) (available at the United States Court of Federal Claims' website, <http://www.uscfc.uscourts.gov>). Yankee cannot rectify its failure to make that challenge by engaging in some "back door" collateral attack in this Court.

II. THE GOVERNMENT'S MOTION SHOULD BE GRANTED BECAUSE YANKEE SEEKS TO DEPOSE MR. VIRGILIO CONCERNING MATTERS THAT ARE EITHER PRIVILEGED OR ARE UNNECESSARY TO THE COURT'S DETERMINATION OF THE GOVERNMENT'S CLAIM OF DELIBERATIVE PROCESS PRIVILEGE

A. The Government's Motion Should Be Granted To Prevent Yankee From Deposing Mr. Virgilio About Information Protected By The Work Product and Attorney-Client Privileges

Even if this Court concludes that it has jurisdiction over Yankee's collateral attack on the NRC's regulations on GTCC waste, Yankee should not be permitted to depose Mr. Virgilio. In its response to our motion for a protective order, Yankee states that it wishes to depose Mr. Virgilio concerning whether guidelines provided to Mr. Virgilio by the NRC Chairman, Richard

Meserve, were created as part of the Government's "litigation strategy" and about the timing and substance of Mr. Virgilio's supplemental declaration.⁴ "Yankee Atomic's Response to Defendant's Motion to Quash and for a Protective Order," filed September 26, 2002 ("Pl. Resp.") at 3-4. The Court should quash the deposition notice and issuing a protective order because Yankee seeks information protected by the work product and attorney-client privileges. Yankee's request to depose Mr. Virgilio about whether something formed a part of the Government's "litigation strategy" appears to be nothing more than an impermissible attempt by Yankee to discover information protected by the work product privilege. Two types of attorney work product have evolved. The first type of work product provides for the qualified immunity from discovery for "documents and tangible things which were prepared in anticipation of litigation." RCFC 26(b)(2); see Sparton Corp. v. United States, 44 Fed. Cl. 557, 564-65 (1999). The second type – opinion work product – precludes discovery of the "mental impressions, conclusions, opinions or legal theories of an attorney." Sparton, 44 Fed. Cl. at 564; see Hickman v. Taylor, 329 U.S. 495, 511-12 (1947). Opinion work product "includes such items as an attorney's legal strategy," Sprock v. Peil, 759 F.2d 312, 316 (3rd Cir. 1985), and is afforded "nearly absolute protection from disclosure." Sparton, 44 Fed. Cl. at 565. Yankee is simply not permitted to inquire into whether something is part of the Government's "litigation strategy."

⁴ Although Yankee accuses the Government of disingenuousness concerning the basis for Mr. Virgilio's deposition, Pl. Resp. at 2, there was no indication of the topics about which Yankee wanted to depose Mr. Virgilio anywhere on the face of the deposition notice. Further, Yankee never responded to the Government's September 10, 2002 letter in which the Government requested that Yankee identify the areas upon which it sought to depose Mr. Virgilio.

Additionally, any deposition concerning the Government's litigation strategy risks disclosing attorney-client communications. The attorney-client privilege attaches to communications made by a client, or a person seeking to be a client, to an attorney outside the presence of third parties for the purpose of securing legal advice or services. Cabot v. United States, 35 Fed. Cl. 442, 444 (1996). Recognizing that much of Mr. Virgilio's knowledge about the Government's litigation strategy likely was acquired through conversations with attorneys, permitting Yankee to depose him concerning the Government's litigation strategy runs a very high risk of disclosing attorney-client communications. The Court should deny Yankee's attempt to depose Mr. Virgilio concerning privileged information.

The Government does not mean to infer that Yankee's baseless argument that Mr. Virgilio's declaration "constitutes pure litigation strategy," Pl. Resp. at 2, has any merit. Although the NRC's assertions of deliberative process privilege have been made in the context of this litigation, these assertions are not based upon reasons peculiar to this litigation. In his two declarations, Mr. Virgilio details the reasons these documents should be kept confidential and the harm that the NRC will suffer if they are not. See July 24, 2002 Virgilio Declaration, ¶¶2, 5-6, SA 2-6;⁵ see also September 5, 2002 Virgilio Supplemental Declaration, ¶¶2-4, SA 7-9.⁶ These

⁵ For the convenience of the Court, the Government has included a copy of Mr. Virgilio's July 24, 2002 declaration in the supplemental appendix attached to this reply. This July 24, 2002 declaration was originally included in the Appendix to "Defendant's Response to Yankee Atomic's Motion to Compel Testimony of Robert Campbell, and Defendant's Motion for a Protective Order," at 18-23.

⁶ For the convenience of the Court, the Government has included a copy of Mr. Virgilio's September 5, 2002 supplemental declaration in the supplemental appendix attached to this reply. This September 5, 2002 supplemental declaration was originally included in the Supplemental Appendix to "Defendant's Reply to Yankee Atomic's Opposition to Defendant's Motion for a Protective Order," at 48-52.

bases are not specific to this litigation, but rather, encompass general institutional concerns, such as the need to encourage “the free flow of ideas,” July 24, 2002 Virgilio Declaration, ¶2, SA 2; and the need to prevent the chilling of intra-agency and inter-agency exchanges. September 5, 2002 Virgilio Supplemental Declaration, ¶¶2-3, SA 7-9. The only relevant inquiry here is whether the Government’s invocation of the deliberative process privilege is outweighed by Yankee’s need. Any other inquiry, especially one whose admitted purpose is to obtain privileged information, is impermissible.

B. The Court Should Grant The Government’s Motion Because Mr. Virgilio’s Two Declarations Provide The Court With Sufficient Information To Decide The Government’s Claim Of Deliberative Process Privilege

Mr. Virgilio’s deposition is unnecessary to decide the Government’s claims of deliberative process privilege. Mr. Virgilio’s two declarations provide this Court with sufficient information to decide the Government’s claim of privilege.⁷ The declarations are complete and clear on their face, and establish that the documents that the Government has withheld are both pre-decisional and deliberative. See July 24, 2002 Virgilio Declaration. ¶5, SA 2-6; see also September 5, 2002 Virgilio Supplemental Declaration, ¶¶5-6, SA 9-11. The declarations also provide a full explanation of Mr. Virgilio’s decision to invoke the deliberative process privilege. See July 24, 2002 declaration, ¶¶2, 5, SA 2-6; see also September 5, 2002 Virgilio Supplemental

⁷ Yankee’s request to depose Mr. Virgilio is simply an effort to prolong the process of deciding the Government’s valid claim of deliberative process privilege. Yankee admits that it only wants to depose Mr. Virgilio if the Court is going to uphold the Government’s privilege claims. Pl. Resp. at 2. Rather than prolonging this process any further, the Court should grant the Government’s motion to quash, and bring an end to Yankee’s challenges of the Government’s privilege claims.

Declaration, ¶¶2-4, SA 7-9. His deposition is unnecessary, and Yankee is merely attempting to forestall the Court's decision on the Government's claim of privilege.

Moreover, the deposition of the head of an agency or department who asserts the deliberative process privilege is not contemplated by the case law. Yankee claims, without support, that it is "entitled" to depose the head of an agency or department who offers an affidavit asserting the deliberative process privilege upon behalf of an agency regarding either the substance and timing of the affidavit. Pl. Resp. at 4. To the contrary, the methods by which a decision is reached – in this case, the decision to assert the deliberative process privilege – as well as the matters considered and the contributing influences are simply not matters for judicial investigation:

The judiciary, the courts declare, is not authorized "to probe the mental processes of an executive or administrative officer. This salutary rule forecloses investigation into the methods by which a decision is reached, the matters considered, the contributing influences, or the role played by the work of others -- results demanded by the exigencies of the most imperative character. No judge could tolerate an inquisition into the elements comprising his decision -- indeed, "[s]uch an examination of a judge would be destructive of judicial responsibility" – and by the same token "the integrity of the administrative process must be equally respected."

Only where there is a clear showing of misconduct or wrongdoing is any departure from this rule permitted.

Franklin Savings Ass'n v. Ryan, 922 F.2d 209, 211 (4th Cir. 1991) (emphasis added; citations omitted) (quoting Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 325-26 (D.D.C. 1966), aff'd, 384 F.2d 979 (D.C. Cir. 1967)). Moreover, the process by which the NRC determined that it would assert the deliberative process privilege is, itself, subject to the

deliberative process privilege. Consistent with this precedent, the Court should not permit Yankee to depose Mr. Virgilio about his supplemental declaration.

Yankee's sole basis for seeking this deposition – its bald assertion that Mr. Virgilio's supplemental declaration is incredible – is based upon a misreading of the supplemental declaration and is an attempt on Yankee's part to create a conflict where none exists.

Mr. Virgilio personally considered and reviewed all of the documents over which the NRC asserted deliberative process privilege prior to executing his July 24, 2002 declaration asserting the privilege. July 24, 2002 Virgilio Declaration, ¶ 5, SA 2-6. After Mr. Virgilio received the September 5, 2002 guidelines from Chairman Meserve, Mr. Virgilio "reevaluated [his] July 24, 2002 assertions of deliberative process privilege" and, based upon that reevaluation, he "determined that the assertions of privilege identified in [his] July 24, 2002 declaration were correct and comply with the Chairman's guidelines." September 5, 2002 Virgilio Supplemental Declaration, ¶5, SA 9. It is irrelevant whether Mr. Virgilio went back and "re-reviewed" each and every document over which NRC was asserting the deliberative process privilege when he prepared his supplemental declaration. As he attested in his original and supplemental declarations, he has evaluated the guidelines that the NRC Chairman issued and made his privilege determinations based upon the substance of those guidelines. As Mr. Virgilio noted in his September 5, 2002 supplemental declaration, the Chairman's guidelines were "substantially similar to those that [Mr. Virgilio] applied in reaching [his] decision to assert the deliberative process privilege for those documents identified in [his] July 24, 2002 declaration." *Id.*, ¶5, SA 9. We are at a loss to understand the relevance of Yankee's current inquiries, given Mr. Virgilio's personal review of the documents at issue, as detailed in his July 24, 2002

declaration, and his review, adoption, and understanding of the Chairman's guidelines. Yankee's alleged desire to inquire into the "supplemental" review process would improperly place form over substance. See Mead Data Central, Inc. v. Dept. of the Air Force, 566 F.2d 242, 257 (D.C. Cir. 1977) (refusing to "exalt form over substance" in a dispute over the applicability of the deliberative process privilege).

Through the deposition of Mr. Virgilio, Yankee is seeking information that is either privileged or unnecessary for the resolution of the Government's claims of deliberative process privilege. As a result, the Court should grant the Government's motion to quash his deposition notice and issue a protective order precluding this unnecessary deposition.

III. CONTRARY TO YANKEE'S ARGUMENT, "EXCEPTIONAL CIRCUMSTANCES" ARE NECESSARY TO DEPOSE MR. VIRGILIO, AND YANKEE HAS FAILED TO DEMONSTRATE THAT THEY EXIST

Mr. Virgilio is the Director of NMSS, a department within the NRC created by Congress when Congress created the NRC. See 42 U.S.C. § 5844. Absent "exceptional circumstances," Yankee should not be permitted to depose Mr. Virgilio. Yankee's attempt to avoid this requirement, by arguing that the requirement does not apply to the deposition of Mr. Virgilio, is unavailing.

Yankee's argument that the requirement to show exceptional circumstances does not apply to an agency official like Mr. Virgilio is simply incorrect. See Pl. Resp. at 7-8. The requirement to show exceptional circumstances before taking the deposition of a senior agency official has been applied to the deposition of the Director of the Equal Employment Opportunity Commission's Office of Program Operations, see Walker v. NCNB National Bank of Florida, 810 F. Supp. 11, 12-14 (D.D.C. 1993), and the Deputy Chief of Staff of the Environmental

Protection Agency. See Low v. Whitman, 207 F.R.D. 9 (D.D.C. 2002). Moreover, in Simplex Time Recorder Co. v. Secretary of Labor, 766 F.2d 575 (D.C. Cir. 1985), the United States Court of Appeals for the District of Columbia upheld an administrative law judge's decision not to permit the deposition of the Solicitor of Labor, the Chief of Staff of the Secretary of Labor, the Regional Administrator for the Occupational Health and Safety Administration ("OSHA"), and OSHA's Area Director, because the refusal "fit within the rule . . . that top executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions." Id., at 586. Yankee's contention that the Court precluded the deposition of the high-level officials because their testimony would have been cumulative, Pl. Resp. at 7 n.7, confuses the testimony of Department of Labor officials with the testimony of witnesses who had already testified and misconstrues the actual decision in Simplex. See id.

Mr. Virgilio is at least as senior as these other officials for whom courts have required a showing of exceptional circumstances prior to their deposition being permitted. Many of the functions of the Mr. Virgilio's position – Director of NMSS – are set forth in the statute. Id. NMSS, among other things, develops and implements NRC policy for the regulation of activities involving the use and handling of radioactive materials. In this capacity, Mr. Virgilio manages and oversees the NRC's Division of Waste Management, which has, among other responsibilities, the responsibility for regulating the storage and disposal of GTCC in a manner consistent with protecting the public health and safety. Further, Mr. Virgilio is only two levels below the Commissioners of the NRC within the organizational structure of the NRC.

Recognizing the weakness of their argument that exceptional circumstances are not required, Yankee reiterates the reasons why it wants to depose Mr. Virgilio in a one-paragraph

effort to establish exceptional circumstances. Pl. Resp. at 7-8. However, as demonstrated above, see Sect. II, these reasons are inadequate to establish the need for any deposition, to say nothing of exceptional circumstances to depose a senior agency official. Consequently, the Court should grant the Government's motion and quash Mr. Virgilio's deposition notice and issue a protective order.

IV. YANKEE MISREPRESENTS THE GOVERNMENT'S POSITION CONCERNING THE EFFECT OF THE NRC'S *TOUHY* REGULATIONS WHILE CONTINUING TO ASSERT DIRECTLY CONTRADICTORY POSITIONS CONCERNING THE NRC'S STATUS IN THIS LITIGATION

Unencumbered by the need to take consistent positions, Yankee, in the same privilege dispute, has argued both that the NRC is a party to this litigation and that the NRC is not a party to this litigation. In two previous motions in this privilege dispute, while attempting to overcome the Government's claim of attorney-client and work-product privilege, Yankee has argued that the NRC "is neither a party to the Standard Contract nor a party to this litigation . . ." Yankee Atomic's Motion To Compel Testimony Of Robert Campbell, at 6 (July 3, 2002) (emphasis added) SA 13;⁸ see also Yankee Atomic's Reply On Its Motion To Compel Testimony Of Robert Campbell And Opposition To The Government's Cross-Motion For A Protective Order at 28 (August 14, 2002), SA 15. Now, when the argument that the NRC is not a party to this litigation has proved inconvenient, Yankee alleges that the NRC is attempting "to decide the circumstances under which evidence will be made available to an adverse litigant or a court in a civil proceeding." Pl. Resp. at 6. Yankee not only misrepresents the Government's argument, its

⁸ For the convenience of the Court, the Government has included copies of the relevant pages of the pleadings in which Yankee has argued that NRC is not a party to this litigation in the supplemental appendix attached to this reply.

current argument is in direct conflict with Yankee's previous argument. If, as Yankee argues, the NRC is not a party to this litigation, it cannot be an adverse litigant to Yankee in this litigation.

Yankee further alleges that the Government is attempting "to exempt itself from the jurisdiction and the rules of this Court with respect to the discovery process." Pl. Resp. at 4. The Government is doing no such thing. The Government acknowledges that, by the very terms of the NRC's Touhy regulations, if NRC is a party to this litigation, NRC's Touhy regulations cannot be invoked to withhold discovery. See 10 C.F.R. § 9.200. All the Government has requested is that the Court enforce consistency between Yankee's litigation position and its behavior in this litigation. To this end, should the Court agree with Yankee's assertion that the NRC is not a party to this litigation, the Court should require Yankee to comply with the NRC's Touhy regulations.

V. SHOULD THE COURT DENY THE GOVERNMENT'S MOTION TO QUASH, THE COURT SHOULD HOLD YANKEE TO ITS REPRESENTATIONS, AND ENTER A PROTECTIVE ORDER LIMITING THE DEPOSITION OF MR. VIRGILIO TO ONLY TOPICS RELATED TO HIS SEPTEMBER 5, 2002 SUPPLEMENTAL
DECLARATION

This Court possesses broad discretion to control the discovery process. Florsheim Shoe Co. v. United States, 744 F.2d 787, 797 (Fed. Cir. 1984). Rule 26 expressly empowers the Court to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . ." RCFC 26(c). Moreover, "[t]he discovery provisions, like all of the Federal Rules of Civil Procedure, are subject to injunction of Rule 1 that they 'be construed to secure the just, speedy and inexpensive determination of every action.'" Herbert v. Lando, 441 U.S. 153, 177 (1979). In view of these rules, "judges should not hesitate to exercise appropriate control over the discovery process." Id.

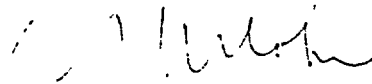
In its response, Yankee asserts that it only needs to “obtain information under oath from Mr. Virgilio with respect to the supplemental declaration.” Pl. Resp. at 2. Thus, should the Court permit the deposition of Mr. Virgilio to proceed, the Court should limit his deposition to the supplemental declaration, and not permit Yankee to undertake a wide-ranging deposition covering a variety of topics. Yankee has only asserted the need to depose Mr. Virgilio on the supplemental declarations, and the Court should hold Yankee to those representations.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court grant our motion to quash the deposition notice of Mr. Martin Virgilio and issue a protective order precluding his deposition.

Respectfully submitted,

ROBERT D. McCALLUM, JR.
Assistant Attorney General



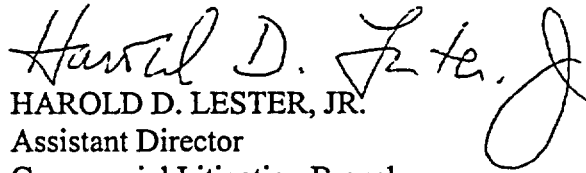
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October 10, 2002


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SUPPLEMENTAL APPENDIX

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

YANKEE ATOMIC ELECTRIC COMPANY)	
CONNECTICUT YANKEE ATOMIC POWER COMPANY)	
MAINE YANKEE ATOMIC POWER COMPANY)	
FLORIDA POWER & LIGHT COMPANY)	
NORTHERN STATES POWER COMPANY	)	Case Nos. 98-126C,
DUKE POWER, A Division of DUKE ENERGY CORP.	)	98-154C, 98-474C,
INDIANA MICHIGAN POWER COMPANY	)	98-483C, 98-484C,
SACRAMENTO MUNICIPAL UTILITY DISTRICT	)	98-485C, 98-486C,
SOUTHERN NUCLEAR OPERATING COMPANY, <u>et al.</u>	)	98-488C, 98-614C,
COMMONWEALTH EDISON COMPANY	)	98-621C, 99-447C,
BOSTON EDISON COMPANY	)	00-440C, 00-697C,
GPU NUCLEAR, INCORPORATED	)	00-703C, 01-115C,
WISCONSIN ELECTRIC POWER COMPANY	)	01-116C, 01-249C
POWER AUTHORITY OF THE STATE OF NEW YORK	)	01-551C
OMAHA PUBLIC POWER DISTRICT)	
NEBRASKA PUBLIC POWER DISTRICT	)	Judge Sypolt
TENNESSEE VALLEY AUTHORITY	)	(Discovery Judge)
PSEG NUCLEAR LLC,)	
)	
Plaintiffs,)	
)	
UNITED STATES,)	
)	
Defendant.)	

ASSERTION OF DELIBERATIVE PROCESS PRIVILEGE

1. I have been informed that, on July 3, 2002, Yankee Atomic Electric Company, Connecticut Yankee Atomic Power Company, and Maine Yankee Atomic Power Company (collectively, "the Yankees") filed a motion to compel testimony of Robert A. Campbell concerning communications from the United States Department of Energy ("DOE") to the United States Nuclear Regulatory Commission ("NRC"). Additionally, I have also been informed that, in response to discovery requests from the utility plaintiffs, the Department of Energy ("DOE") and the Nuclear Regulatory Commission ("NRC") have reviewed and produced thousands of documents referring or relating to DOE's delay in beginning acceptance of spent nuclear fuel or

high-level radioactive waste by January 31, 1998 and whether DOE was legally obligated to accept Greater Than Class C low-level radioactive waste ("GTCC") pursuant to the "Standard Contract For The Disposal Of Spent Nuclear Fuel And/Or High-Level Radioactive Waste" published at 10 C.F.R. § 961.11 ("the Standard Contract"), or the Nuclear Waste Policy Act, 42 U.S.C. §§ 10101-10270, and the NRC's regulations concerning GTCC.

2. The NRC has a policy of protecting its deliberative processes in order to assure free flow of ideas and candid discussion of alternatives, which are essential to its efficient operation.

3 Pursuant to a formal delegation from Chairman Richard A. Meserve of the NRC, pursuant to section 4 of the Reorganization Plan No. 1 of 1980 (5 U.S.C. Appendix 1), the Director of NRC's Office of Nuclear Materials Safety and Safeguards ("NMSS") also has responsibility for asserting the NRC's deliberative process privilege in cases involving the standard contract for the disposal of spent nuclear fuel (10 C.F.R. § 961.11) that are pending before the United States Court of Federal Claims.

4. I, Martin J. Virgilio, am the Director of NMSS. One of the divisions within NMSS is the Division of Waste Management. As Director, I have management and oversight responsibilities for the NRC's Division of Waste Management, which has among its responsibilities the responsibility for regulating the storage and disposal of GTCC in a manner consistent with protecting the public health and safety.

5. Accordingly, because questions concerning the NRC's regulation of GTCC are within the cognizance of NMSS, and as the delegate of Chairman Richard A. Meserve, I hereby assert the deliberative process privilege on behalf of the NRC for the following described

documents

- A. The document Bates Stamped HQR0540015 – HQR0540019 is a draft of a letter from Richard A. Meserve, Chairman, Nuclear Regulatory Commission (“NRC”), to Dr. Andrew C. Kadak, responding to Dr. Kadak’s October 24, 2000 letter. The document was provided to counsel in the Department of Energy’s Office of General Counsel (“DOE-OGC”) in conjunction with a request by the NRC, through the NRC’s Office of General Counsel (“NRC-OGC”), for legal services concerning an issue in litigation before the United States Court of Federal Claims at the time of the NRC’s receipt of Dr. Kadak’s letter, and to review the NRC’s response. The specific decisions at issue was the NRC’s response to Dr. Kadak’s request that the NRC redefine Greater Than Class C low-level radioactive waste (“GTCC”) as high-level radioactive waste (“HLW”), and how the DOE-OGC was going to respond to NRC’s request. The document includes recommendations from and the mental impressions of Anita Capoferri, DOE-OGC, concerning the NRC’s response to Dr. Kadak’s letter. The document reflects, and is a part of, the deliberations of the NRC on how to respond to Dr. Kadak’s request, and comprised part of the process by which NRC formulated its decision.
- B. The documents Bates Stamped HQR0540020 – HQR00540022, HQR0540485 – HQR0540490, HQR0540648 – HQR0540650, HQR0540693 – HQR0640696 are duplicates of a letter dated March 15, 2001, from Jane Taylor, DOE-OGC, to E. Neil Jensen, NRC-OGC, responding to a request by the NRC, through the NRC-OGC, for legal services concerning an issue in litigation before the United

States Court of Federal Claims relating to GTCC, and a facsimile cover sheet transmitting a copy of the document. The specific decision at issue was the NRC's response to Dr. Kadak's request that the NRC redefine GTCC as HLW. The documents are a part of the deliberations of the NRC and the DOE, provide DOE's input into the NRC's deliberations on how to respond to Dr. Kadak's request, and comprised part of the process by which NRC formulated its decision.

- C The document Bates Stamped HQR0540023 – HQR0540026 is a draft of a letter from Richard A. Meserve, Chairman, NRC, to Dr. Andrew C. Kadak, responding to Dr. Kadak's October 24, 2000 letter. The specific decision at issue was how to respond to Dr. Kadak's request that the NRC redefine GTCC as HLW. The document was provided to counsel in DOE-OGC in conjunction with a request by the NRC, through NRC-OGC, for legal services concerning an issue in litigation before the United States Court of Federal Claims at the time of the NRC's receipt of Dr. Kadak's letter, and to review the NRC's response for legal sufficiency. The document also includes a fax transmittal sheet to Bill Olsen of the Department of Justice. The documents reflect the deliberations of the NRC on how to respond to Dr. Kadak's request, and comprised part of the process by which NRC formulated its decision.
- D. The documents Bates Stamped HQR0540012 and HQR0540446 are multiple copies of a draft letter from Richard A. Meserve, Chairman, NRC, to Dr. Andrew C. Kadak, responding to Dr. Kadak's October 24, 2000 letter. The specific decision at issue was the NRC's response to Dr. Kadak's request that the NRC

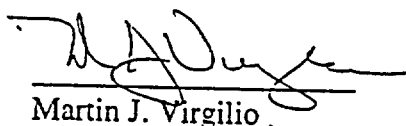
redefine GTCC as HLW. The documents reflect the deliberations of the NRC on how to respond to Dr. Kadak's request, and comprised part of the process by which NRC formulated its decision.

- E. The documents Bates Stamped NRC0020005 – NRC0020010 are different drafts of a letter from Richard A. Meserve, Chairman, NRC, to Dr. Andrew C. Kadak, responding to Dr. Kadak's October 24, 2000 letter, and facsimile cover sheets transmitting the drafts to DOE. The specific decision at issue was the NRC's response to Dr. Kadak's request that the NRC redefine GTCC as HLW. The documents reflect the deliberations of the NRC on how to respond to Dr. Kadak's request, and comprised part of the process by which NRC formulated its decision.
- F. The documents Bates Stamped NRC0020001 – NRC0020004 are a draft of a letter from Jane Taylor, DOE-OGC, to E. Neil Jensen, NRC- OGC, and a facsimile cover sheet, dated February 8, 2001, transmitting the document to Mr. Jensen and Mr. Jim Kennedy, NRC. The documents are responding to a request by the NRC, through the NRC-OGC, for legal services concerning an issue in litigation before the United States Court of Federal Claims relating to GTCC. The specific decisions at issue were the NRC's response to Dr. Kadak's request that the NRC redefine GTCC as HLW, and how DOE-OGC was going to respond to the NRC's request for legal services. The documents are a part of the deliberations of the NRC on how to respond to Dr. Kadak's request, and comprised part of the process by which NRC formulated its decision.

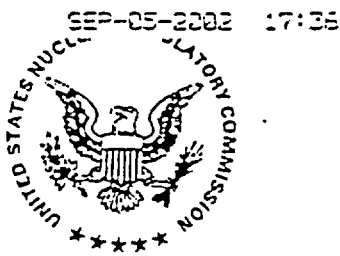
After personally reviewing each of the above described documents, and discussing them with my staff, I conclude that they all reflect NRC's deliberative processes and should be protected from disclosure.

6. Additionally, any communications between DOE and NRC concerning the NRC's request, made through the NRC-OGC, for legal services to assist in the NRC's response to Dr. Kadak's request that the NRC redefine GTCC as HLW were made for the purpose of assisting the NRC in formulating its response to Dr. Kadak's letter, and comprised part of the process by which NRC formulated its decision. Disclosure of these communications would reveal the NRC's deliberations on how it should respond to Dr. Kadak's letter. As a consequence, these communications would reveal the NRC's deliberative process and should be protected from disclosure.

I declare under the penalty of perjury, this 24th day of July, 2002, that the foregoing is true and correct to the best of my knowledge and belief.



Martin J. Virgilio
Director
Office of Nuclear Material Safety & Safeguards



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

YANKEE ATOMIC ELECTRIC COMPANY)	
CONNECTICUT YANKEE ATOMIC POWER COMPANY)	
MAINE YANKEE ATOMIC POWER COMPANY)	
FLORIDA POWER & LIGHT COMPANY)	
NORTHERN STATES POWER COMPANY	)	Case Nos. 98-126C,
DUKE POWER, A Division of DUKE ENERGY CORP.	)	98-154C, 98-474C,
INDIANA MICHIGAN POWER COMPANY	)	98-483C, 98-484C,
SACRAMENTO MUNICIPAL UTILITY DISTRICT	)	98-485C, 98-486C,
SOUTHERN NUCLEAR OPERATING COMPANY, <u>et al.</u>	)	98-488C, 98-614C,
COMMONWEALTH EDISON COMPANY	)	98-621C, 99-447C,
BOSTON EDISON COMPANY	)	00-440C, 00-697C,
GPU NUCLEAR, INCORPORATED	)	00-703C, 01-115C,
WISCONSIN ELECTRIC POWER COMPANY	)	01-116C, 01-249C
POWER AUTHORITY OF THE STATE OF NEW YORK	)	01-551C
OMAHA PUBLIC POWER DISTRICT)	
NEBRASKA PUBLIC POWER DISTRICT	)	Judge Sybolt
TENNESSEE VALLEY AUTHORITY	)	(Discovery Judge)
PSEG NUCLEAR LLC,)	
)	
)	
Plaintiffs,)	
)	
v.)	
)	
UNITED STATES,)	
)	
)	
Defendant.)	

SUPPLEMENTAL DECLARATION OF MARTIN J. VIRGILIO

1. I, Martin J. Virgilio, am the Director of the Office of Nuclear Materials Safety and Safeguards ("NMSS"): I offer this declaration as a supplement to my prior declaration dated July 24, 2002, in which I asserted the deliberative process privilege upon behalf of the Nuclear Regulatory Commission ("NRC"), based upon a delegation of authority to me from Richard A. Meserve, the Chairman of the NRC.

2. I understand that, in response to my assertion of privilege, an argument has been

raised that I have not provided any "precise and certain reasons" why this information should be kept confidential. Although I believe that I provided sufficient explanation in my July 24, 2002 declaration, I offer the following response to this new argument. The drafts that I identified in my July 24, 2002 declaration contain recommended language and revisions which set forth the opinion and advice of the drafter and others as to the proposed contents of the NRC's response to Mr. Kadak's letter. In conjunction with the NRC's process of developing a response to this letter, agency personnel proposed language which reflects internal deliberations and recommendations concerning the content of the final recommendations to the Chairman and the Chairman's decision and action upon those recommendations. As such, release of these draft documents would reveal the analysis and opinions of agency personnel prior to a final decision being reached as to the matters being considered. Moreover, the analysis and opinions are subject to further review and deliberation prior to a final decision being reached on the matter under consideration. If these drafts were publicized now, agency personnel would, in my opinion, be reluctant to set forth their positions. Thus, release would hamper the future intraagency exchange of opinions and ideas, and would have a "chilling effect" on the give-and-take involved in agency decisionmaking. It is in the public interest to insure that opinions and recommendations are expressed openly within the agency.

3. The same rationale applies to the documents identified in paragraphs 5.B & 5.F of my July 24, 2002 declaration. In conjunction with the NRC's process of developing a response to this letter, the NRC requested, through the NRC-OGC, legal services from DOE-OGC concerning Dr. Kadak's request that the NRC redefine GTCC as HLW. Release of these documents would reveal the analysis and opinions of received by agency personnel prior to a final decision being reached as to the matters being considered. The analysis and opinions are

subject to further review and deliberation prior to a final decision being reached on the matter under consideration. If these documents were publicized now, agency personnel would, in my opinion, be reluctant to seek out inter-agency opinions in the future, and other agencies would be reluctant to provide opinions to the NRC. Thus, release would hamper the future interagency exchange of opinions and ideas, and would have a "chilling effect" on the give-and-take involved in agency decisionmaking. It is in the public interest to insure that opinions and recommendations are expressed openly within the agency.

4. Similarly, depositions into the deliberations of the NRC concerning how to respond to the Dr. Kadak's request, including communications between the NRC and DOE concerning the NRC's response to Dr. Kadak, would also have a "chilling effect" on future agency deliberations and inter-agency communications for all of the reasons I have previously stated. As a consequence, these communications should be protected from disclosure.

5. By memorandum dated September 5, 2002, the Chairman provided me with a set of guidelines to use in evaluating whether to assert the deliberative process privilege with regard to any particular document. These guidelines are substantially similar to those that I applied in reaching my decision to assert the deliberative process privilege for those documents identified in my July 24, 2002 declaration. Nevertheless, based upon the Chairman's September 5, 2002 guidelines, I have reevaluated my July 24, 2002 assertions of deliberative process privilege. Based upon that reevaluation, in accordance with the guidelines established by the Chairman, I have determined that the assertions of privilege identified in my July 24, 2002 declaration were correct and comply with the Chairman's guidelines.

6. In renewing my review of the documents identified in my July 24, 2002 declaration, I have discovered an error in the description of one document identified in my July

24, 2002 declaration, the document with the Bates Stamp No. HQR0430023 - HQR0540026, identified in paragraph 5.C of my declaration. In my July 24, 2002 declaration, I stated that this copy of an NRC draft letter was sent by telecopy to William Olsen at the Department of Justice. However, upon further investigation, I have learned that although Mr. Olsen's name and telephone number are written on the bottom portion of a fax transmittal sheet, the written telephone number is not a fax number, and it appears that, in fact, this particular fax was not sent to Mr. Olsen. It appears that, after the document had been faxed to Anita Capoferri at the Department of Energy, an individual wrote Mr. Olsen's name and telephone number upon the document. In all other respects, the description of the document in my July 24, 2002 declaration is accurate. The document is a draft letter from Richard A. Meserve, Chairman, NRC, to Dr. Andrew C. Kadak, responding to Dr. Kadak's October 24, 2000 letter. The specific decision at issue was how to respond to Dr. Kadak's request that the NRC redefine Greater Than Class C low-level radioactive waste ("GTCC waste") as high-level radioactive waste ("HLW"). The document was provided by the NRC, at the request of NRC-OGC, to Robert Campbell at the Department of Energy's Office of Environmental Management ("EM"), who then provided it to Ms. Capoferri, an attorney within the Department of Energy's Office of General Counsel. The document involves the NRC's request for assistance from the Department of Energy ("DOE") in providing information and advice for use in the NRC's continuing deliberations regarding Dr. Kadak's letter. The misunderstanding of the specific manner in which this document had been transmitted has no effect upon my evaluation of the document, or upon my determination that the document should be protected from disclosure by the deliberative process privilege.

I declare under penalty of perjury, this 5th day of September, 2002, that the foregoing is true and correct to the best of my knowledge and belief.



Martin J. Virgilio
Director
Office of Nuclear Material Safety & Safeguards

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

YANKEE ATOMIC ELECTRIC COMPANY,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

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THE OFFICE OF THE CLERK
U.S. COURT OF FEDERAL CLAIMS

No. 98-126 C
(Senior Judge Merow)

**YANKEE ATOMIC'S MOTION TO COMPEL TESTIMONY OF
ROBERT CAMPBELL AND REQUEST FOR EXPEDITED CONSIDERATION**

Plaintiff Yankee Atomic Electric Company¹ hereby moves the Court to compel deposition testimony from Robert A. Campbell, listed as a fact witness for the government in its pretrial submissions. As initially discussed with the Court in a teleconference on June 14, Mr. Campbell has testified that he has knowledge of Department of Energy efforts to dissuade the Nuclear Regulatory Commission ("NRC") from reclassifying Greater-Than-Class-C ("GTCC") waste as high level radioactive waste, but government counsel has prohibited him from answering any questions on the substance of those efforts on the grounds of attorney-client privilege. However, since the NRC is an independent agency and neither a party to this litigation nor a client of DOE or DOJ attorneys, communications made by DOE lawyers to the NRC are not confidential and therefore the attorney-client privilege cannot apply.

Yankee Atomic's counsel discussed this issue with government counsel at the deposition in an effort to resolve this dispute. At that time the parties also enlisted the aid of the Court to

¹ This Motion should also be deemed applicable in *Connecticut Yankee v. United States*, No. 98-154C and *Maine Yankee v. United States*, No. 98-474C.

testifying about the substance of these efforts by DOE attorneys to lobby the NRC, asserting that the Department of Energy's attorneys not only represent DOE but also the NRC. *See* Ex. 3 at 383-84. These communications most likely present DOE's view of the consequences of NRC action on GTCC waste. In light of the parties' dispute over whether DOE has an obligation under the Standard Contract to accept GTCC waste for storage in the geological repository, the substance of these communications—as well as any NRC response—is highly probative. But for the government's claim of attorney-client privilege, this evidence is discoverable.

III. ARGUMENT

The communications in question cannot be protected by the attorney-client privilege because no attorney-client relationship exists between DOE's attorneys and the NRC. Several facts establish this point. First, the NRC is neither a party to the Standard Contract nor a party to this litigation: the Contract was made between Yankee Atomic and the Department of Energy, and Yankee Atomic could not maintain this action against the NRC, because NRC has no obligations pursuant to that Contract. Second, while attorney communications between government agencies sometimes can be protected by the attorney-client privilege, the agencies must share an absolute commonality of interest in the undertaking for which the communication was made in order for the privilege to apply. As demonstrated by the discussion below, that relationship does not exist between DOE and the NRC.

Claims of attorney-client privilege are strictly construed against the claiming party who must prove the following elements:

- (1) the asserted holder of the privilege is or sought to become a client;
- (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) *in connection with the communication is acting as a lawyer*;
- (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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OFFICE OF THE CLERK
U.S. COURT OF FEDERAL CLAIMS

YANKEE ATOMIC ELECTRIC COMPANY,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

No. 98-126 C
(Senior Judge Merow)

**YANKEE ATOMIC'S REPLY ON ITS MOTION TO COMPEL
TESTIMONY OF ROBERT CAMPBELL AND OPPOSITION TO THE
GOVERNMENT'S CROSS-MOTION FOR A PROTECTIVE ORDER**

JERRY STOUCK
Spriggs & Hollingsworth
1350 I Street, N.W., Ninth Floor
Washington, D.C. 20005
(202) 898-5800
(202) 682-1639 (fax)

Counsel for Plaintiff,
YANKEE ATOMIC ELECTRIC COMPANY

OF COUNSEL:
Robert L. Shapiro
Peter J. Skalaban, Jr.
Raymond Krncevic
SPRIGGS & HOLLINGSWORTH

August 13, 2002

As discussed above, no attorney-client relationship existed between the DOE attorneys and NRC. The government nevertheless asserts that the Department of Justice was exercising its “ability to control litigation and to develop a confidential and privileged relationship with both the NRC and DOE.” (Response, at 22). The government relies on a formalistic argument that the “United States as a whole” is a defendant in this litigation and that the Department of Justice can represent NRC in some instances. *Id.* The government is talking out of both sides of its mouth. On one hand, the government argues that this Court should rely on and defer to NRC’s May 21, 2001 response to Dr. Kadak’s letter in considering the government’s summary judgment and rely on NRC statements made in a rulemaking ongoing at the same time (undoubtedly for the very reason that NRC is an “independent” agency), but on the other hand this Court should preclude discovery of the government’s litigation team’s extensive efforts to lobby and control NRC’s actions at this time.

Moreover, the government has not established – and cannot – the requisite commonality of interests between NRC and the DOJ/DOE litigators.¹⁹ NRC also has, or should have, no interest whatsoever in the outcome of this litigation. It is not a party to the contract, and it is not being sued by Yankee Atomic.²⁰ Further, as an independent agency, NRC’s interest in

¹⁹ Indeed, it is well-established that different agencies within the executive branch can have distinct, even adverse, interests and can even maintain suit against one another. *See United States v. Interstate Commerce Comm’n*, 337 U.S. 426, 429-30 (1949) (allowing an inter-agency lawsuit even though the same assistant attorney general appeared on behalf of both plaintiff and defendant); *see also United States v. Nixon*, 418 U.S. 683, 693 (1974); *United States v. Federal Maritime Comm’n*, 655 F.2d 247, 252 (D.C. Cir. 1980); *Tennessee Valley Auth. v. United States*, 13 Cl. Ct. 692, 697 (1987).

²⁰ The government makes much of the fact that Yankee Atomic requested that the government produce relevant documents from the NRC. *See* Response, at 23-24. The NRC does have relevant documents to this dispute and it is entirely reasonable for plaintiff to request the government collect them. DOJ cannot create a “commonality of interest” regarding the underlying substantive issues simply by helping NRC respond to document requests, rather than allowing NRC’s own lawyers do that or requiring Yankee Atomic to subpoena the documents.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that, on this 10th day of October 2002, I caused to be placed in the United States mail (first class, postage prepaid) copies of "DEFENDANT'S REPLY TO YANKEE ATOMIC'S RESPONSE TO DEFENDANT'S MOTION TO QUASH THE DEPOSITION NOTICE FOR MARTIN J. VIRGILIO AND FOR A PROTECTIVE ORDER," addressed as follows:

JERRY STOUCK
Spriggs & Hollingsworth
1350 I Street, N.W.
Ninth Floor
Washington, D.C. 20005-3305

I further certify that I anticipate providing an additional copy of this filing to counsel for plaintiff by hand on Friday, October 11, 2002.