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September 28, 2005

Sherwin E. Turk  
Special Counsel for Litigation  
Mail Stop O-15 D21  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001

Re: VYUprate - Docket No. 50-271 (ASLBP No. 04-832-02-OLA)

Dear Sherwin:

This letter responds to your letter of September 23, 2005 which was sent to me by regular mail, not e-mail, and thus was not received by me until September 27, 2005. DPS will file its Motion to Compel with regard to the documents NRC Staff has refused to produce within the five days prescribed by the agreement reached between NRC Staff and DPS.

Your letter also asserts that you believe you are entitled to renege on an agreement reached between DPS and NRC Staff merely because you were not the attorney who made the agreement in the first instance. In particular, you allege that you are not comfortable with my "interpretation of those discussions which would, in effect, provide an extended time limit for . . . filing any motion to compel." Since those discussions between your predecessor and myself were reduced to writing and since my "interpretation" conforms in all respects with those

writings, you have absolutely no basis to insist that DPS discuss with you the obtaining of an extension of time to file Motions to Compel with regard to improper claims of a deliberative process privilege by NRC Staff. For your edification, I reproduce the relevant correspondence:

On July 19, 2005, Brooke Poole, who had entered an appearance as counsel of record for NRC Staff and was still functioning in that capacity at that time wrote the following:

Tony and Sara: This is to memorialize the brief conversation I had with Tony during a break in today's ACRS meeting, and to be certain we had a shared understanding on what I agreed to. I understand you have interest in some documents the Staff has designated as subject to withholding pursuant to the deliberative process privilege. I requested to Tony that, prior to the State's filing a motion to compel, that you provide me with a list of the documents you would be interested in seeing. The Staff will then consider whether any documents, or portions thereof, can be released.

Tony then asked if I would agree to "freeze" the deadline for filing a motion to compel (since 10 CFR 2.323(a) requires that motions be filed within 10 days of the initiating event). The Staff's last hearing file update, Supplement 10, was served on Thursday the 7th, and re-served on July 13. Notwithstanding the fact that all parties were served the electronic version of the filing on July 7th, I consider the service date as July 13, since the Staff made the error with the hard copies. The 10-day window for Supplement 10 is up on July 25 (as I count it). The Staff agrees to not challenge any subsequent motion to compel on the basis of timeliness of the motion, with respect to documents in Supplement 10 only, should the State file a motion to compel after we have discussed the documents.

To be clear, however, the Staff does not waive any timeliness arguments with respect to documents from previous hearing file supplements or the initial hearing file. Further, of course, we don't waive any substantive arguments that we would make with respect to Supplement 10 (or any other documents).

Thanks. I will look forward to receiving your letter on this topic, and the list of documents in which the State is interested.

If you have any questions, please call me.

Brooke  
301-415-1556

On July 20, 2005 I wrote a letter to Brooke Poole which included the following:

Consistent with our discussion yesterday during the lunch break at the ACRS Subcommittee meeting and your confirmatory e-mail this morning, I understand that the Staff agrees that the time for filing a motion with the ASLB regarding the failure to produce the identified documents will be extended until a reasonable time following a response to this letter from the Staff. I suggest the time be 5 business days from the date

of the response. I also propose the Staff provide its response to this letter request within the next two weeks. Since technically an "agreement" between us as to a filing deadline set by the Regulations is ineffective, I propose we agree that I may advise the ASLB of our agreement and that the Staff will not oppose any motion with regard to these documents that we file based on timeliness.

If my understanding of our agreement as to process is in error, please respond within the next two days so we can iron out any differences. Thank you for consideration of our request.

In a letter dated August 3, 2005, Ms. Poole, wrote the following:

Tony:

This responds to your voice mail of yesterday, August 2. As I understand it, DPS would like to enter into an arrangement regarding questions to the Staff's Deliberative Process Privilege Logs. We agree that an informal arrangement can be made with respect to future hearing file/mandatory disclosure supplements filed in this proceeding going forward. The following summarizes my understanding of the issue and the Staff's position.

To the extent that DPS challenges the Staff's decision to withhold certain documents pursuant to the deliberative process privilege, DPS would like to enter into an arrangement with the Staff to consult on certain documents prior to the filing by DPS of a motion to compel disclosure. Under such an arrangement:

(1) DPS would have ten (10) days from the date of service of the hearing file/mandatory disclosure update in question to provide to Staff counsel a list (in writing) of the documents challenged. The Staff requests that the DPS written request be transmitted via e-mail, with a conforming hard copy via U.S. mail.

(2) The Staff would have a reasonable period of time (I propose two weeks or ten business days) from the date of receipt of the e-mail to respond to the DPS request. The Staff would then respond in writing (by e-mail and hard copy, as described above) to DPS's request.

(3) To the extent DPS is not satisfied with the Staff's answer, it would then have five business days in which to file a motion to compel with the Licensing Board. In responding to the motion to compel, the Staff would not object to the motion on the basis of timeliness. (As I have previously stated, of course, the Staff does not waive any substantive objections that it would otherwise make, and it does not waive any timeliness objection with respect to documents provided in the initial disclosures or other, previous supplements, apart from the specific supplement in question.)

The Staff agrees that the consultative process described above would serve as the consultation required pursuant to 10 C.F.R. 2.323(b).

If this arrangement is amenable to you, let me know by return e-mail.

Thanks,  
Brooke Poole  
301-415-1556

I responded to that letter from Ms. Poole on August 9, 2005 stating, in part, as follows:

Consistent with our previous discussions, I understand that the Staff agrees that the time for filing a motion with the ASLB regarding the failure to produce the identified documents will be extended until a reasonable time following a response to this letter from the Staff. I suggest the time be 5 business days from the date of the response. I also propose the Staff provide its response to this letter request within the next two weeks. Since technically an "agreement" between us as to a filing deadline set by the Regulations is ineffective, I propose we agree that I may advise the ASLB of our agreement and that the Staff will not oppose any motion with regard to these documents that we file based on timeliness.

\* \* \*

Under the circumstances DPS intends to continue to abide by the agreement reached between it and NRC Staff and to file any Motions to Compel within 5 days of receipt of the NRC Staff response to DPS objections to the deliberative process designation of identified NRC Staff documents. Should you attempt to breach the agreement by raising timeliness objections to the Motion to Compel, other than those specifically preserved in the agreement, we will treat it as a violation of 10 CFR §2.314(a) and will ask the Hearing Board to invoke appropriate sanctions as authorized by 10 CFR § 2.314(c) against you and any of your superiors who approved your unwarranted disregard of an agreement reached with DPS by the NRC Staff.

Sincerely,

Anthony Z. Roisman

cc: Sarah Hofmann