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Filed: June 22, 1990

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

before the

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of VERMONT YANKEE NUCLEAR POWER CORPORATION (Vermont Yankee Nuclear Power Station)	Docket No. 50-271-OLA-4 (Construction Period Recapture)

RESPONSE OF VERMONT YANKEE NUCLEAR POWER CORPORATION TO STATE OF VERMONT'S "MOTION TO ENLARGE THE DISCOVERY PERIOD"

Pursuant to 10 C.F.R. § 2.730, Vermont Yankee Nuclear Power Corporation hereby responds to the "State of Vermont Motion to Enlarge the Discovery Period." Vermont Yankee says that, for the reasons set forth herein (but not for those set forth therein), so much of the motion as seeks a 25-day enlargement of the discovery period should be *allowed*, and the balance of the motion should be *dismissed as premature*.

I.

The pending motion is in fact two distinct requests for relief based on two distinct grounds. The first part seeks a discrete (25 days) enlargement of the discovery period on the grounds (i) that Vermont Yankee was granted enlargements of the time to answer interrogatories and (ii) that Vermont Yankee has assented to the allowance of this request for relief. The second request is for an indeterminate enlargement of the discovery period grounded on the asserted "failure [of Vermont Yankee] to provide responsive answers to Vermont's first set of interrogatories." *Motion* at 2.

The syllogism to the effect that, because Vermont Yankee was granted (with SOV's assent) a total of 25 days enlargement of the time for answering interrogatories, therefore SOV is entitled to identical enlargement of the time for propounding additional interrogatories is highly flawed. In the first instance, the syllogism assumes that the precise length of the discovery period was set by the Board on the assumption that no such enlargement as was

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granted Vermont Yankee would be sought; this isn't so as a matter of fact. The duration selected by the Board was essentially an arbitrary value, the suitability of which is primarily established by the fact that no party to the telephonic pre-hearing conference at which it was established argued for a different duration. Second, so much of the syllogism that implicitly contends that, perforce the enlargements of time to answer interrogatories, SOV has received less than either its due or the custom fails to account for the fact that the discovery period ordained (without opposition) by the Board is twice the custom. Most significantly, however, SOV's syllogism fails to account for (or even to acknowledge) that SOV was not diligent in serving the interrogatories in question. Rather, the first set of interrogatories was served on April 27, 1990, some 50 days after the pre-hearing conference on March 8, 1990, and some 91 days after the discovery period opened.[1] The second set was served on June 6, 1990, some 90 days after the pre-hearing conference and 131 days after the opening of discovery.[2] It therefore simply isn't true as a matter of fact that SOV has been harmed by the enlargements granted to Vermont Yankee of the time to answer.[3]

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[1]See *Memorandum and Order* (March 9, 1990) at 1 n.1.

[2]SOV thus waited until 59% of the discovery period (91/154) and 44% of the portion remaining after the pre-hearing conference (50/113) had elapsed before serving its first set of interrogatories and it waited until 85% of the discovery period (131/154) and 80% of the portion remaining after the pre-hearing conference (90/113) had elapsed before serving its second set of interrogatories.

[3]SOV does not explicate any rationale for its simple day-for-day calculation of the relief to which it believes itself entitled. Upon examination, however, the only rationale that is logical is that the enlargement of time for providing answers foreclosed the ability to propound so-called "follow up" questions. No such foreclosure occurred here, for had SOV propounded its interrogatories with diligence, it would have had months in which to propound "follow up" questions. Prescinding from this difficulty, SOV falls into the trap of seductive simplicity in adding the 14-day and 11-day, respectively, enlargements of time granted to Vermont Yankee. The enlargement of time for answering the first set of interrogatories (from May 16th to May 30th) left SOV an adequate opportunity (24 days, assuming service by mail) for propounding "follow up" questions, and SOV has yet to serve an "follow up" questions since those answers were filed. (Unless, of course, the second set is considered to be the "follow up" questions, in which case manifestly no harm befell SOV.) As to the second set, given their tardy propoundment, even if no enlargement of time for answering had been granted, SOV would have had only 2 days (assuming service of the answers by mail) to "follow up" and, therefore, at most it would only be "entitled" to a restoration of those 2 days.

That said, Vermont Yankee has previously advised SOV that it will not oppose the requested 25-day enlargement, as an accommodation of counsel and *not* on the ground of entitlement asserted. The 25-day enlargement should be granted by the Board, therefore, on the ground that the point is stipulated and therefore not contested by the parties.[4] The Board need not reach the rationale on which SOV claims such enlargement as a matter of right, and if it Board does reach that question, the Board should rule to the contrary.

II.

SOV's second request for an enlargement has as its predicate the asserted failure of Vermont Yankee to have answered its first set of interrogatories properly. That request has three defects, the first and dispositive of which is that it is premature. SOV has filed a motion to compel in respect of the first set, to which Vermont Yankee is preparing an answer. Unless and until this Board rules in SOV's favor on that motion, the *sine qua non* of this second request for relief does not exist. This second request is therefore fatally premature and should be dismissed on that ground.[5]

By its attorneys,

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Dated: June 22, 1990.

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[4]SOV was authorized by Vermont Yankee to represent to the Board that its request for a 25-day enlargement was not opposed by Vermont Yankee. Unfortunately, the manner in which this representation is effected in the *Motion* implies Vermont Yankee's acquiescence in the *Motion's* rationale, thus necessitating this response to an otherwise unopposed request for relief.

[5]*Cf., e.g., Public Service Company of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-883, 27 NRC 43, 50 n.21 (1988); *Long Island Lighting Company* (Shorhame Nuclear Power Station, Unit 1), LBP-86-36, 24 NRC 561, 573 (1986).

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Certificate of Service

I, R. K. Gad III, hereby certify that on June 22, 1990, I made service of the within response, by mailing copies thereof, first class mail, postage prepaid, as follows:

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