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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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In the Matter of

YANKEE ATOMIC ELECTRIC COMPANY

(Yankee Nuclear Power Station)

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Docket No. 50-029-DCOM

NRC STAFF'S RESPONSE OPPOSING
INTERVENORS' PETITION FOR REVIEW OF LBP-96-18

Marian L. Zobler
Eugene Holler
Counsel for NRC Staff

October 10, 1996

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PDR ADOCK 05000029
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INTRODUCTION

Pursuant to 10 C.F.R. § 2.786 of the Commission's regulations and the Commission's Order, dated October 2, 1996, the staff of the Nuclear Regulatory Commission (Staff) hereby responds to "Citizens Awareness Network's and New England Coalition on Nuclear Pollution's Petition for Review of LBP-96-18" (Review Petition), filed by Citizens Awareness Network and New England Coalition on Nuclear Pollution (Intervenors) on October 4, 1996. For the reasons set forth below, the Intervenors' Review Petition should be denied as it fails to present a substantial question for review as required by the Commission's regulations in 10 C.F.R. § 2.786(b)(4).

BACKGROUND

On July 31, 1996, on remand from the Commission, the Atomic Safety and Licensing Board (Board) designated in the above-captioned proceeding admitted a single contention. *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8 (1996). On September 3, 1996, Yankee Atomic Electric Company (YAEC) filed "Memorandum of Yankee Atomic Electric Company in Support of Motion for Summary Disposition," (YAEC Summary Disposition Motion) requesting summary disposition in its favor. The Staff filed a response in support of YAEC's motion on September 9, 1996, "NRC Staff's Response in Support of Summary Disposition Motion," and Intervenor filed "Citizens Awareness Network's and New England Coalition on Nuclear Pollution's Opposition to YAEC's motion for Summary Disposition" (Intervenors' Response) on September 10, 1996. Thereafter, on September 13, 1996, in accordance with the Board's schedule, YAEC filed "Reply Memorandum of Yankee Atomic Electric Company (Motion for Summary Disposition)" (YAEC's Reply). Intervenor also filed a motion for leave to reply to the Staff's supporting response with an accompanying reply pleading and supporting affidavit on September 13, 1996. On September 17, 1996, Intervenor filed a motion seeking leave to file an additional reply to YAEC's Reply, which was accompanied by the Intervenor's "Reply to YAEC's Reply Memorandum" (Intervenors' Surreply).

On September 27, 1996, the Board issued "Memorandum and Order (Granting Motion for Summary Disposition)," in which it granted YAEC's motion for summary disposition, granted the Intervenor's motion to reply to the Staff's supporting response, and denied the

Intervenors' motion to file the Intervenors' Surreply.¹ *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), LBP-96-18, 44 NRC ____, slip op. at 6-7 (September 27, 1996). On October 4, 1996, Intervenors filed their Review Petition.

DISCUSSION

In their Review Petition, Intervenors argue that the Board erred in ignoring or discounting significant evidence and committed procedural error by denying the Intervenors' motion to file the Intervenors' Surreply. Review Petition at 8, 10. Intervenors also argue that the novel and significant issues of law and policy raised in this proceeding merit Commission review. *Id.* at 9. As demonstrated below, the Intervenors' assertions do not raise a substantial question for review concerning the Board's decision in LBP-96-18.

A. Standards for Commission Review

Section 2.786 of the Commission's regulations requires that a petition for review must raise at least one of the following kinds of substantial questions to merit Commission consideration:

- (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;

¹ The Board stayed the effectiveness of its decision until October 9, 1996 in order to provide the parties with an opportunity to seek from the Commission any appropriate stay pending review. *Yankee*, LBP-96-18, slip op. At 37-38. On October 2, 1996, the Commission issued its Order in which it extended the Board's stay, subject to further order, pending its consideration of the instant stay motion and the Intervenors' petition for Commission review. The Commission further provided that any response to either the Stay Motion or petition for Commission review must be filed by October 10, 1996.

- (iii) A substantial and important question of law, policy or discretion has been raised;
- (iv) The conduct of the proceeding involved a prejudicial procedural error; or
- (v) Any other consideration which the Commission may deem to be in the public interest.

10 C.F.R. § 2.786(b)(4); *Babcock and Wilcox Company* (Pennsylvania Nuclear Service Operations, Parks Township, Pennsylvania), CLI-95-4, 41 NRC 248, 250-251 (1995).

B. The Board's Granting of Summary Disposition Was Not Contrary to Law.

Intervenors assert that the Board's rejection of their proffered evidence "unlawfully" shifted the burden of proof from YAEC to Intervenors. Review Petition at 3, 8. A party opposing a motion for summary disposition may not rely on a simple denial of material facts stated by the movant but must set forth specific facts showing that there is a genuine issue. 10 C.F.R. § 2.749(b); see *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-92-8, 35 NRC 145, 154 (1992) citing *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 249-50 (1986) (to avoid summary disposition intervenors had to present contrary evidence that was so "significantly probative" as to create a material factual issue). Thus, instead of shifting the burden of proof from YAEC to Intervenors, as Intervenors claim, the Board properly applied the regulations in 10 C.F.R. § 2.749(b). As discussed below, the Board carefully and fairly considered the Intervenors' evidence material to its resolution of YAEC's summary disposition motion and found that Intervenors failed to show a genuine issue as to any material fact that would require an evidentiary hearing. See *Yankee*, LBP-96-18, slip op. at 23-35.

Intervenors assert that the source of the Board's most "crucial errors" is the comparison of YAEC's and the Intervenors' dose estimates for YAEC's remaining "to go" decommissioning activities in that the Board ignored or discounted the Intervenors' evidence which created a

genuine dispute regarding YAEC's "to go" dismantling dose estimate of 91 person-rem. Review Petition at 3, 5. According to Intervenors, the Board erred by ignoring the Intervenors' evidence that YAEC's claims of accuracy in dose projections was unfounded and by discounting Intervenors' evidence that further dismantling activities, including decontamination of structures, would be dirty. *Id.* at 5-6. For support, Intervenors refer to the September 6, and 13, 1996 affidavits of Marvin Resnikoff, Ph.D. attached to Intervenors' Response and Intervenors' Surreply respectively. *Id.*

The Board, however, made a careful review of the parties' filings, including the "extensive" information provided by YAEC and Dr. Resnikoff's affidavits, and determined that only one issue raised by the Intervenors had any real significance, the concern about concrete contamination. *Yankee*, LBP-96-18, slip op. at 29. The Board appropriately discounted Dr. Resnikoff's one paragraph discussion of on the accuracy of long-term dose estimates as compared to short-term estimates in light of the extensive discussion provided by YAEC on the same issue. *Id.* at 28-29. The Board also appropriately concluded that the Intervenors' "bald assertion" that decontamination will provide unknown levels of exposure was "simple conjecture," unsupported by the Intervenors' expert, and, thus, did not establish a genuine issue of material fact. *Id.* at 31.² The Intervenors provide nothing in their Review Petition to support a claim of error in the Board's analysis of these issues.

Intervenors further claim that the Board erred when it determined that they had failed to support their assertion that the decommissioning process of the Yankee Rowe facility would take

² For the general proposition that, in the context of a summary judgment motion, unsupported expert opinion is insufficient, the Board cited *United States v. Various Slot Machines on Guam*, 658 F.2d 697, 700 (9th Cir. 1981) and *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 807 (9th Cir. 1988). *Yankee*, LBP-96-18, slip op. at 31.

another 2.5 years and that it could be estimated that the average dose during this time period would likely be 160 person-rem per year. Review Petition at 6. The Board, after reviewing the information offered by YAEC in support of its estimate, correctly concluded that the Intervenor's assertion that decommissioning of Yankee Rowe would take 2.5 years was a "rough estimate" based on the assertion that the decommissioning activities can be expected to proceed at the same pace as has been achieved since 1993 without any explanation of why, in light of YAEC's explanation, this would be true. *Yankee*, LBP-96-18, slip op. at 31-32. In their Review Petition, Intervenor's merely repeat the same argument they made before the Board. Review Petition at 6.

Finally, Intervenor's claim that the Board erroneously found that the Intervenor's estimate of 160 person-rem/year for the "to go" doses was speculative and based on a "proportionality theory." Review Petition at 7. Intervenor's assert that their evidence is not based on a proportionality theory.³ *Id.* at 7-8. As discussed above, the Board correctly determined that the evidence provided by Intervenor's to support their arguments was speculative and unsupported and, therefore, did not establish a genuine issue of material fact. *See Yankee*, LBP-96-18, slip op. at 29-32. Further, the Board correctly concluded that the Intervenor's estimate of 400 person-rem to go (based on 160 person-rem per year for 2.5 years, Resnikoff September 6, 1996 Affidavit at ¶ 32) was a variant of the proportionality theory in that Intervenor's assumed that

³ In their Review Petition, the Intervenor's expressly reject the "proportionality theory" which they had proffered in "Citizens Awareness Network's and New England Coalition on Nuclear Pollution's Response to Licensing Board Order of June 19, 1996," at 9-11. *See also Yankee Elec. Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 254-55 (1996). This theory was found to be the only basis for their contention. *See Yankee*, LBP-96-15, 44 NRC at 36. This fact alone could have been a basis to grant summary disposition in YAEC's favor.

the same amount of dose incurred to date would be incurred in the future without regard to a number of other factors affecting dose such as component location, size and complexity; radiation shielding; the quantity as well as the chemical and physical nature of the radionuclide; and the decommissioning operation phase. *See Yankee*, LBP-96-18, slip op. at 33. The Board correctly concluded that such a theory had been "thoroughly discredited" by YAEC and the Staff. *Id.* at 32. Based on the above discussion, LBP-96-18 was not erroneous and Intervenor's present nothing in their Review Petition to suggest otherwise.

Intervenor's also argue that the Commission should take review in order to address what Intervenor's characterize as the Board's "erroneous acceptance" of YAEC's estimate of dose associated with site cleanup without first requiring a full site characterization plan and site characterization report. Review Petition at 10. Intervenor's rely on a staff draft branch technical position as authority for this assertion. *Id.* It is well settled that staff guidance such as branch technical positions and regulatory guides are guidance and cannot prescribe requirements. *See Curators of the University of Missouri*, CLI-95-1, 41 NRC 71, 98 (1995) (Regulatory Guides, by their very nature, serve merely as guidance and cannot prescribe requirements). Nothing in the Commission's regulations requires a site characterization plan as part of a decommissioning plan. Even, the Intervenor's affiant acknowledges that "conformance with the Branch Technical Position on site characterization is not required of licensees." September 6, 1996 affidavit of Dr. Resnikoff at ¶ 50. As noted in its reply to the Intervenor's Response, YAEC submitted site characterization data prepared in conformance with the guidance for implementing radiological surveys during the decommissioning of nuclear facilities contained in NUREG/CR-5849 as part of its decommissioning plan (Section 3.1.2). YAEC's Reply at 9. Accordingly, the Board's acceptance of YAEC's dose estimates was not erroneous.

In sum, the Board carefully and fairly considered the Intervenor's evidence, and found that Intervenor failed to show a genuine issue as to any material fact that would require an evidentiary hearing. *Yankee*, LBP-96-18 slip op. at 25-32, 35. Thus, the Board's conclusion that YAEC was entitled to a decision in its favor regarding the merits of the admitted contention was not contrary to law and does not raise a substantial question for Commission review pursuant to 10 C.F.R. § 2.786(b)(4)(ii).

C. Intervenor's Have Not Raised Any Substantial Question Regarding Procedural Error.

Intervenor also seek review of the Board's decision pursuant to 10 C.F.R. § 2.786(b)(4)(iv), arguing that the Board committed procedural error in denying their motion for leave to file the Intervenor's Surreply. Review Petition at 3-5, 8. Although the Board acted well within its discretion (*See* 10 C.F.R. § 2.749, no reply to summary disposition permitted) not to grant the Intervenor's motion to file their Surreply, the Board correctly concluded that the motion and its attached filings contained no new relevant information or perspective and would not have changed its decision. *Yankee*, LBP-96-18, slip op. at 7 n.7. A review of those portions of its Surreply Intervenor reference in support of their Review Petition indicates that the Board's determination in this regard was correct. Accordingly, Intervenor fail to demonstrate procedural error in denying admission of the Intervenor's Surreply.

D. Intervenor's Have Not Raised Any Substantial Question of Law, Policy, or Discretion.

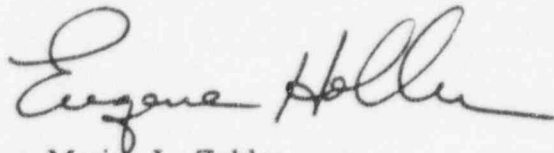
Intervenor further assert that the Commission should take review "because this case raises novel and significant issues of law and policy regarding the calculation and comparison of radiation doses under the DECON and SAFSTOR alternatives." Review Petition at 9. In support of this assertion, Intervenor claim that the Board either dismisses or leaves unaddressed significant dose contributors that are ignored by YAEC's decommissioning dose estimates, citing

paragraphs in the September 6, 1996 affidavit of Dr. Resnikoff. *Id.* The decision in LBP-96-18, clearly shows that the Board considered the Intervenor's concerns regarding the calculation and comparison of radiation doses under the DECON and SAFSTOR alternatives thoughtfully and fairly. *See Yankee*, LBP-96-18, slip op. at 22-25. Intervenor may not agree with the Board's resolution of these matters, but Intervenor fails to demonstrate that the Board ignored these dose contributors, that they are "novel" to the decommissioning of the Yankee Nuclear Power Station or to decommissioning in general, or that the Board's resolution was contrary to the Commission's regulations or policy. Thus, Intervenor fails to demonstrate a significant question raising novel and significant issues of law and policy meriting Commission review pursuant to 10 C.F.R. § 2.786(b)(4)(iii).

CONCLUSION

As demonstrated above, Intervenor has not raised a substantial question for review. Accordingly, the Intervenor's Review Petition should be denied as failing to satisfy the Commission's regulations in 10 C.F.R. § 2.786(b)(4).

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Eugene Holler".

Marian L. Zobler
Eugene Holler
Counsel for NRC Staff

Dated at Rockville, Maryland
this 10th day of October, 1996

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I hereby certify that copies of "NRC STAFF'S RESPONSE OPPOSING INTERVENORS' PETITION FOR REVIEW OF LBP-96-18" in the above-captioned proceeding have been served on the following by hand delivery or, as indicated by an asterisk, by facsimile transmission with a conforming copy served by United States mail, first class, this 10th day of October, 1996:

G. Paul Bollwerk III, Chairman
Atomic Safety and Licensing Board
Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Office of the Commission Appellate
Adjudication
Mail Stop: O16-G-15
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Jerry R. Kline
Atomic Safety and Licensing Board
Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Atomic Safety and Licensing Board
Panel (1)
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Franklin County Commission*
Courthouse - 425 Main Street
Greenfield, MA 01301-3330

Leslie B. Greer, Esquire*
Assistant Attorney General
Office of the Attorney General
Trial Division
200 Portland Street
Boston, MA 02110

Office of the Secretary (16)
Mail Stop: O16-G-15
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
Attn: Docketing and Service Branch

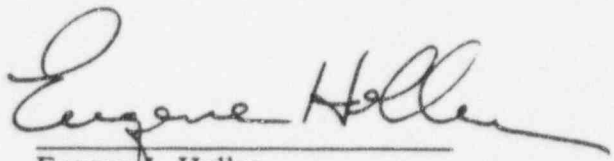
Diane Curran, Esquire*
Harmon, Curran, Gallagher & Spielberg
2001 S Street, N.W., Suite 430
Washington, DC 20009-1125

Jonathan M. Block, Esq.*
Main Street
P.O. Box 566
Putney, VT 05346-0566

Adjudicatory File
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dr. Thomas S. Elleman*
Administrative Judge
Atomic Safety and Licensing Board
Panel
704 Davidson Street
Raleigh, NC 27609

Thomas G. Dignan, Esquire*
R. K. Gad, III, Esquire
Ropes & Gray
One International Place
Boston, MA 02110-2624



Eugene J. Holler
Counsel for NRC Staff