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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 RESPONSE TO INTERVENORS'
MOTION FOR STAY OF LBP-96-18

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October 10, 1996

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NRC STAFF RESPONSE TO INTERVENORS' MOTION FOR STAY OF LBP-96-18

INTRODUCTION

Pursuant to 10 C.F.R. § 2.788 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 Motion for Stay of LBP-96-18" (Stay Motion), filed by Citizens Awareness Network and New England Coalition on Nuclear Pollution (Intervenors) on September 30, 1996. For the reasons set forth below, the Intervenors' Stay Motion should be denied.

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, 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 Yankee Atomic Electric Company's Motion for Summary Disposition," and the Intervenor filed, on September 10, 1996, "Citizens Awareness Network's and New England Coalition on Nuclear Pollution's Opposition to YAEC's Motion for Summary Disposition" (Intervenor's Response) in opposition. 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).

On September 27, 1996, the Board issued a "Memorandum and Order (Granting Motion for Summary Disposition)," (Board Order), in which it granted YAEC's motion for summary disposition.¹ *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), LBP-96-18, slip op. (September 27, 1996). On September 30, 1996, the Intervenor filed their Stay Motion.

DISCUSSION

Section 2.788 of the Commission's regulations provides that any party to a proceeding may file an application for a stay of the effectiveness of a decision or action of a presiding officer. 10 C.F.R. § 2.788(a). In determining whether to grant a stay request, the following four factors must be considered:

- 1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;

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 Intervenor's petition for Commission review.

- 2) Whether the party will be irreparably injured unless a stay is granted;
- 3) Whether the granting of a stay would harm other parties; and
- 4) Where the public interest lies.

10 C.F.R. § 2.788(e). *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 691 (1982). Although all factors should be considered, the most crucial factor is whether the party will be irreparably injured unless a stay is granted. *Alabama Power Co.*, (Joseph M. Farly Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795 (1981). If the movant for a stay fails to meet its burden on the first two factors, it is not necessary to give lengthy consideration to balancing the other two factors. *Sequoyah Fuels Corp and General Atomics* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 8 (1994). As demonstrated below, a balancing of these four factors indicates that the Intervenor's Stay Motion should be denied.

Because the second factor, whether the moving party will be irreparably injured unless a stay is granted, is the most crucial, it will be addressed first. A party must reasonably demonstrate, and not merely allege, irreparable harm. *Philadelphia Elec. Co.* (Limerick Generating Station, Units 1 and 2), ALAB-814, 22 NRC 191, 196 (1985). With respect to this factor, the Intervenor alleges that in the absence of a stay, YAEC could, within a week, resume decommissioning of Yankee Rowe. Stay Motion at 7. If this were allowed to occur, the Intervenor asserts that they will suffer irreparable harm because any action YAEC takes to resume decommissioning will "forever" preclude consideration of the SAFSTOR alternative advocated by the Intervenor and, thus, deprive them of any meaningful appeal. *Id.* at 8. Second, the

Intervenors allege an irreparable injury to workers and the public due to the exposure to radiation as a result of the implementation of the DECON decommissioning alternative. *Id.*

With respect to the Intervenors' first alleged injury, as a general matter, the "potential mooted of any appeal does not *per se* constitute irreparable injury; it also must be established that the activity that will take place in the absence of a stay will bring about concrete harm." *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-810, 21 NRC 1616, 1620 (1985), citing *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-794, 20 NRC 1630, 1635 (1984).² Thus, in the absence of any concrete harm to the Intervenors, the Intervenors' assertion that they will be irreparably injured because they will be unable to appeal LBP-96-18 does not support their Stay Motion. The only concrete harm the Intervenors allege in their Stay Motion is that absent a stay, the implementation of the DECON decommissioning alternative will result in irreparable radiation injuries to workers and the public. Stay Motion at 8-9. As discussed below, the Intervenors fail to meet their burden to demonstrate that

² With respect to their first alleged injury, the Intervenors reference *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-92-4, 35 NRC 69 (1992), for the proposition that irreparable harm can be demonstrated where the licensing action at issue could foreclose a decommissioning option. Stay Motion at 8. The Intervenors' reliance on CLI-92-4 is misplaced. The *Shoreham* decision, which involved a transfer of a possession only license, did not specifically address the issue of whether irreparable harm can be established because a licensee's action could foreclose a decommissioning option. Rather, the Commission held in *Shoreham* that the petitioners failed to establish irreparable harm where the action at issue was merely a transfer of a license from one entity to another, granting no new authority to the new licensee, including the authority to take action which would foreclose a decommissioning option. *Shoreham*, CLI-92-4, 35 NRC at 81. Thus, the *Shoreham* decision does not support the Intervenors' assertion that it would suffer irreparable harm if a stay were not granted.

this injury will occur. Thus, the mere possibility that their appeal may become moot if a stay is not granted, does not establish that the Intervenors will suffer irreparable injury.³

The Intervenors also fail to demonstrate an irreparable injury to workers at the Yankee Rowe facility and to the public. Specifically, the Intervenors claim that based on their "to go" estimate for the remainder of the Yankee Rowe decommissioning of 400 person-rem,⁴ an additional .30 to 1.2 latent cancer fatalities plus an equivalent number of health and genetic effects could be expected for workers at the Yankee Rowe facility. Stay Motion at 8-9. The Intervenors fail to take into account, however, that their own 400 person-rem "to go" dose estimate is based on the entire decommissioning of Yankee Rowe, which, according to the Intervenors, will take approximately 2.5 years. See Affidavit of Marvin Resnikoff, Ph.D., attached to Intervenors' Response, at ¶ 32. Even if that amount of time were less than 2.5 years, the Intervenors fail to demonstrate how the occupational exposure due to decommissioning activities performed during the pendency of the Commission's review of LBP-96-18 would total 400 person-rem.⁵ The

³ Further, the Intervenors fail to demonstrate that any decommissioning activities performed at Yankee Rowe during the pendency of the Commission's review will "forever" foreclose the SAFSTOR option so as to render any appeal moot, in light of the fact that the Intervenors assert that decommissioning of the Yankee Rowe facility will take an additional 2.5 years.

⁴ This number was properly rejected by the Board as "wholly inadequate to establish a material factual dispute" and supported by "nothing more than speculation." *Yankee*, LBP-96-18, slip op. at 31-32.

⁵ The Commission recently stated that it intends to issue a decision promptly on the petition for review. *Yankee Atomic Elec. Co. (Yankee Nuclear Power Station)*, slip op. at 2 (October 9, 1996) (unpublished).

Intervenors have, therefore, failed to establish that they will suffer irreparable injury if a stay were not granted.

Having failed to establish an irreparable injury if the stay were not granted, the Intervenors must make an "overwhelming showing" that they are likely to succeed on the merits. *Sequoyah Fuels*, CLI-94-9, 40 NRC at 7, citing *Kerr-McGee Chemical Corp.* (West Chicago Rare Earths Facility), ALAB-928, 31 NRC 263, 269 (1990)(absent a showing of irreparable harm, movant must demonstrate that the reversal of the licensing board is a "virtual certainty."). The Intervenors claim that the source of the Board's most "crucial errors" is the comparison of YAEAC's and the Intervenors' dose estimates for YAEAC's remaining "to go" decommissioning activities.⁶ Stay Motion at 2. As demonstrated below, the Board's Memorandum and Order was not erroneous and reversal of it is not a "virtual certainty."

The Intervenors assert that the Board ignored or discounted the Intervenors' evidence which created a genuine dispute regarding YAEAC's "to go" dose estimate for dismantlement of 91 person-rem. Stay Motion at 4. According to the Intervenors, the Board erred by ignoring their evidence that YAEAC's claims of accuracy in dose projections was unfounded and by discounting their evidence that further dismantling activities, including decontamination of structures, would

⁶ The Intervenors also complain that the Board erred in denying their Motion for Leave to Reply ("[CAN/NECNP]'s Motion for Leave to Reply to YAEAC's Reply Memorandum (Summary Disposition)") and ignoring the attached reply and second affidavit from Dr. Resnikoff. Stay Motion at 3. 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 Intervenors' Reply, 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 their Reply the Intervenors reference in support of their Stay Motion indicates that the Board's determination in this regard was correct.

be dirty. *Id.* at 5. The Intervenor refers to the affidavit of Marvin Resnikoff, Ph.D. attached to their Response for support. *Id.*

The Board, however, conducted a careful review of the evidence provided to it, including the "extensive" information provided by YAEC and Dr. Resnikoff's affidavit, and determined that only one issue raised by the Intervenor 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 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. The Board also appropriately concluded that the Intervenor's "bald assertion" that decontamination will provide unknown levels of exposure was "simple conjecture," unsupported by the Intervenor's expert, and, thus, did not establish a genuine issue of material fact. *Yankee*, LBP-96-18, slip op. at 31.⁷

The Intervenor further claims 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 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. Stay Motion at 5. 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"

⁷ 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.

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.

Finally, the Intervenor claim that the Board erroneously found that its estimate of 160 person-rem/year for the "to go" doses was speculative and based on a "proportionality theory." Stay Motion at 6. The Intervenor claim that their evidence is not based on a proportionality theory.⁸ *Id.* at 6-7. As discussed above, the Board correctly determined that the evidence provided by the Intervenor 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 25-32. In addition, 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 Affidavit at ¶ 32) was a variant of the proportionality theory in that the Intervenor assumed that the same amount of dose incurred to date would be incurred in the future without regard to the other factors enumerated by YAEC and the Staff. *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 the Intervenor have failed to demonstrate that it is a "virtual certainty" that it would be overturned on appeal. The

⁸ In their Stay Motion, the Intervenor 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.

Intervenors have, therefore, failed to demonstrate that the first factor should be balanced in their favor.

Thus, having failed to meet their burden on the first two factors, it is not necessary to give lengthy consideration to the remaining two. *Sequoyah Fuels Corp*, CLI-94-9, 40 NRC at 8. With respect to the third factor, harm to the other parties, the Intervenors assert that YAEC will not be harmed or even if harmed that harm is outweighed by the Intervenors' right to a hearing. Stay Motion at 9. Further any economic harm YAEC may suffer will be mitigated due to the expedited schedule in this proceeding. *Id.* at 10. Economic interests of the other parties may be considered when balancing this factor. *See Philadelphia Elec. Co.* (Limerick Generating Station, Units 1 and 2), ALAB-808, 21 NRC 1595, 1602-03 (1985). The Commission has recognized that a delay in decommissioning of Yankee Rowe could result in financial harm to YAEC. *See, e.g., Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-95-14, 42 NRC 130, 135-36 (1995). Thus, this factor weighs against the Intervenors.

With respect to the fourth factor, where the public interest lies, the Intervenors assert that it has raised significant questions regarding the occupational and public health impacts of YAEC's chosen decommissioning alternatives and thus, it is in the public interest for the Commission to act to ensure the integrity of the hearing process while the Commission makes its inquiry.⁹ Stay Motion at 10. Since, as discussed above, the intervenors have failed to demonstrate how the

⁹ The Intervenors also argue that the public interest requires a stay because they have raised issues regarding whether the Commission should accept licensee representations regarding site characterization. Stay Motion at 10. Since these issues were not part of the admitted contention, they were not within the scope of LBP-96-18, and thus, are irrelevant to the issue of whether LBP-96-18 should be stayed.

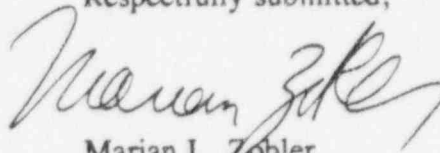
failure to grant a stay would moot any appeal the Intervenors might file, it is difficult to understand how the integrity of the hearing process would be endangered by the denial of their Stay Motion. The Intervenors' have, therefore, failed to demonstrate that this factor weighs in their favor.

In sum, the Intervenors have failed to meet their burden to demonstrate that a balancing of the four criteria articulated in 10 C.F.R. § 2.788 indicates that a stay of the effectiveness of LBP-96-18 beyond October 10, 1996 is warranted. Most notably, the Intervenors have failed to establish that they would suffer irreparable harm if a stay were not granted and that it is a "virtual certainty" that LBP-96-18 would be reversed by the Commission. The Intervenors' Stay Motion must, therefore, be denied.

CONCLUSION

For the reasons discussed above, the Intervenors' Stay Motion should be denied.

Respectfully submitted,



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

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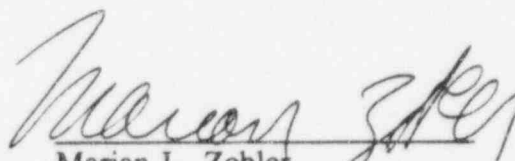
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