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United States of America
before the
Nuclear Regulatory Commission

In the Matter of YANKEE ATOMIC ELECTRIC COMPANY (Yankee Nuclear Power Station)	Docket No. 50-029-DCOM

RESPONSE OF YANKEE ATOMIC ELECTRIC COMPANY TO NECNP/CAN PETITION FOR REVIEW

Yankee Atomic Electric Company ("Yankee") responds herein to the petition of New England Coalition on Nuclear Pollution, Inc. and Citizen's Awareness Network ("NECNP/CAN" or "Intervenors") for review of an Initial Decision of an Atomic Safety and Licensing Board and says that, for the reasons set forth herein, the petition should be **denied**.

INTRODUCTION

There are at least four reasons why this matter is not worthy of discretionary Commission review:

- LBP-96-18 decides no novel or important legal or technical issues adversely to the petitioners;
- LBP-96-18 makes no close calls;
- LBP-96-18 announces or addresses no questions of important regulatory policy; and
- LBP-96-18 sets no precedent for future agency litigation.

Starkly to the contrary, LBP-96-18 is an exercise of routine grist for the adjudicatory mill (deciding whether an affidavit proffered in opposition to a motion for summary disposition is sufficient to create genuine issue of material fact necessitating an evidentiary hearing for resolution). LBP-96-18 arises in the context of a low-technology exercise routinely conducted every day in every nuclear plant in the nation

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(the estimation of the occupational exposure to be incurred doing construction-type work). LBP-96-18 reaches a conclusion palpably ineluctable (that an affidavit based on "assumption" and mindless extrapolation of a "thoroughly discredited" and logically bankrupt syllogism is insufficient to raise an issue about an otherwise complete engineering analysis the details of which are fully revealed and not themselves challenged raises no genuine issue necessitating an evidentiary hearing).

Moreover, LBP-96-18 arises in an adjudicatory context that is entirely vestigial (the application of now-repealed provisions of 10 C.F.R. § 50.82 to the approval of a decommissioning plan).

If, therefore, the concept of discretionary review embodied in 10 C.F.R. § 2.786 means that some decisions are worthy of Commission review and some are not,[1] then LBP-96-18 is a paradigm of the latter.

The Standards for Commission Review

We address the Petition for Review in terms of the standards set forth in 10 C.F.R. § 2.786(b)(4):

Erroneous or Conflicting Findings of Material Fact.

As LBP-96-18 was a ruling on a motion for summary disposition, the Licensing Board made no findings of fact.[2]

Legal Conclusion Without or Against Precedent.

The Licensing Board made one major and two subsidiary rulings of law.

The major ruling was that, given the affidavits submitted by Yankee and the Staff on the question of the estimates of "to go" exposures, the Intervenors' submission in response was insufficient to defeat summary disposition. This ruling was clearly correct.

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[1] *See Babcock & Wilcox Co.* (Pennsylvania Nuclear Service Operations, Parks Township, PA), CLI-95-4, 41 NRC 248 (1995).

[2] *E.g., Picciuto v. Dwyer,* 39 F.3d. 37, 40 (1st Cir. 1994); *In re Varrasso,* 37 F.3d 760, 763 (1st Cir. 1994) ("The validity *vel non* of a summary judgment entails a pure question of law").

There is no doubt that, when faced with a motion for summary disposition properly supported, a burden shifts to the opposing party to demonstrate a genuine issue of material fact. 10 C.F.R. § 2.749(b).[3] Here, the affidavits in support of summary disposition set forth in great detail both the methodology by which such estimates are made[4] and the documentation of the actual assessments done by Yankee. LBP-96-18 at 10-11, 28-29. The Intervenors made no serious attempt to critique these analyses.[5] Rather, the Intervenors and their witness, resurrecting what the Licensing Board aptly characterized as the "thoroughly discredited" "proportionality theory" (LBP-96-18 at 33), contended that the detailed engineering analyses should be ignored in favor of a simple extrapolation of (A) the supposed annual doses for the last three

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[3]"When a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of his answer; his answer by affidavits or otherwise provided in this section must set forth specific facts showing that there is a genuine issue of fact. If no such answer is filed, the decision sought, if appropriate, shall be rendered."

The Intervenors claim, without further explanation or citation of authority, that "the Board unlawfully shifted the burden of proof from YAEC to intervenors." *Petition* at 3. This claim, while too fleeting to rise to the level of argument (*Advanced Medical Systems* (Suspension Order), CLI-94-6, 39 NRC 285, 297-98 (1994)), is based on a misunderstanding of what summary disposition is all about. The Rules of Practice *do* impose a burden on the Intervenors, not *qua* intervenors, but *qua* parties opposing an otherwise properly supported motion for summary judgment.

[4]That is, an engineering analysis of the tasks involved and the exposure hours of the workers required to perform it, plus a survey of the dose fields in which the work will be performed, and a technical assessment of the dose-reduction techniques or devices that may be applied.

[5]As pointed out by the Licensing Board, the only critique of the engineering analyses essayed by the Intervenors' witness, relating to the demolition of contamination concrete, was flawed in its premises and speculative in its approach, and, in any event, did not even assert a numerical result that would have rendered it "material" for summary disposition purposes. LBP-96-18 at 29-31.

The Intervenors would have one believe that "[a]lthough YAEC may be reasonably accurate in projecting near-term activities through ALARA evaluations, it has been significantly inaccurate in longer-term predictions of decommissioning doses" (*Petition* at 5) and "[a]s intervenors demonstrated, YAEC has a history of inaccurately low dose projections" (*Petition* at 7). For these propositions, the Intervenors cite ¶ 30 of Dr. Resnikoff's September 6th affidavit and ¶ 3.f of Intervenors' "Statement of Material Facts." However, the rhetoric has outpaced the facts. Paragraph 30 of Dr. Resnikoff's earlier affidavit identified *one* estimate that proved to be too low (on account of the unanticipated factors described by Mr. Mellor in "Affidavit of Russell A. Mellor" (July 10, 1996), ¶ 8; "Supplemental Affidavit of Russell A. Mellor" (September 3, 1996), ¶ 8.b); Dr. Resnikoff put the frequency of even the phenomenon (for which he provided no additional examples) at "occasionally." Paragraph 3.f of the Statement of Material Facts (which, being not under oath, is not one of the material on the basis of which summary disposition may be opposed) refers to the same single estimate. The "history" of underestimation is thus based on a single (atypical) example.

years and (B) the supposed work progress rates for the last three years. LBP-96-18 at 31-32.

There are three fatal problems with such an approach, two of which the Licensing Board properly ruled rendered it an insufficient response to a summary disposition motion: (A) the extrapolations were without basis (as merely an "assumption" that ignored all of the known factors that go into occupational exposures, all of which were properly supported by affidavits of qualified witnesses, to which the Intervenors' made no response) (LBP-96-18 at 32-34);[6] (B) the extrapolation into the future for full-bore decommissioning "once resumed" (LBP-96-18 at 32) of the progress rates for a period in which decommissioning activities have been largely constrained by regulatory limits makes no sense; and (C) the witness made a simple error in extracting the historical "average" annual occupational exposure (LBP-96-18 at 34 n.16).[7] This ruling was amply supported by legal precedent (which the Board cited), sensible (if not plainly obvious)

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[6]By their failure to respond to the affidavits of Dr. Moeller and Mr. Mellor on this point, the Intervenors conceded as factually undisputed that "a reasonably accurate dose assessment requires consideration of a number of factors, including component characteristics (e.g., location, size and shape, shielding, and complexity); exposure conditions (e.g., internal or external); chemical and physical nature of the radionuclide and its quantity; radionuclide decay mode and emission energy; and decommissioning operation phase." LBP-96-18 at 33.

[7]Dr. Resnikoff observed an "average" of 160 person-rem/year from the following data drawn from Table 2 of his September 6, 1996, affidavit:

1992	93.952
1993	162.772
1994	156.010
1995	78.142
1996 (Half)	76.000

The average of these values, which are *total* exposure for the calendar year, not *decommissioning* exposure for that year, are 122.719 person-rem/year (for the full years 1992-1995), 132.308 person-rem/year (for the full years 1993-1995), and 134.264 person-rem/year (for the 3½-year period from 1993 through the middle of 1996). Dr. Resnikoff may have done "simple mathematics," as the Intervenors claim (*Petition* at 6), but he did not do even that well or fairly.

on its face, and not in conflict with any authority cited by the Intervenors. It provides no basis for discretionary review.[8]

The only other rulings of which the Intervenors complain are (A) the Board's rejection of a filing that the Intervenors acknowledge was irregular and (B) the Board's rejection of Dr. Resnikoff's "explosives" contention (later modified to a "dirty" contention). The former ruling, which simply held the Intervenors to a procedural requirement that the Board had authority to impose (10 C.F.R. §§ 2.718, 2.730(c)), that the Board had promulgated in its earlier decision (LBP-96-15 at 62-63)[9] and that had been presaged by the Board in a pre-hearing conference in open court (*Tr.* 407 (7/16/96)).[10] Moreover, the Intervenors have not demonstrated how this ruling, even if error, was harmful, and inasmuch as the Board reviewed the rejected filing, they could make no such showing. The latter ruling was, for the same reasons described in Yankee's response to the Motion for a Stay Pending Appeal, clearly correct.[11]

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[8]In their Petition for Review, the Intervenors claim that Mr. Mellor's "projection of 1.5 more years does not make sense." *Petition* at 7. Quite to the contrary, Table 2.3-5 of the YNPS Decommissioning Plan presents a schedule that indicates decommissioning will be completed within a 1½ year period. This estimate is based on the assumption that, once commenced, "major decommissioning" would proceed without the suspension that has marked the majority of the time contained in Dr. Resnikoff's historical period of 1993-through mid-1996. If one accepts (as the Intervenors do) that 60% of the craft hours required for the job have been completed, then 40% of those hours remain, and 40% of 1.5 years works out to 0.6 years (about 7½ months). Adding some time for remobilizing the forces that have been laid off renders Mr. Mellor's one year both reasonable and most certainly does "make sense." *See Affidavit of Russell A. Mellor* (9/13/96), ¶ 16. One year times an average of 130 person-rem/year compares favorably to Yankee's estimates of the "to go" exposure, particular when one adjusts for decay and source term removal.

[9]"Replies (other than the summary disposition filing described in section III.B above) are not permitted without preapproval of the Board. Board preapproval regarding pleading length and leave to reply must be sought in writing at least twenty-four hours before filing the motion or pleading. The preapproval request must indicate whether the other parties to the proceeding oppose or support the request."

[10]"CHAIRMAN BOLLWERK: All right. Be aware also I probably will be talking about page limitations on motions, probably no more than ten pages without approval, preapproval. Same with responses. No replies absent preapproval from the Board."

[11]It was also charitable. The fact of the matter is that Dr. Resnikoff, by failing to review the appropriate sections of the YNPS Decommissioning Plan, made the incorrect assumption that Yankee intended to demolish contaminated structures and to do so using explosives. His error was manifest and pointed out, following which he attempted a rather lame recovery.

In all events, prescinding for the moment from whether the Board's rulings of law were correct, they are the sort of garden-variety rulings that do not qualify for discretionary review under 10 C.F.R. § 2.786(b)(4)(ii).

A Substantial Question of Law, Policy or Discretion Has Been Raised.

As noted above, as a ruling on a motion for summary disposition, LBP-96-18 involved no findings of fact. For the same reason, it does not involve a question of discretion.

Whatever might be thought to be the important questions of regulatory policy raised by the Intervenors' petition to intervene, there are no policy implications raised by the motion for summary disposition or the Licensing Board's disposition of that motion. Summary disposition is a tried and true procedure that has existed in the Commission's Rules of Practice for more than 20 years and is drawn directly from the same procedure employed daily in the federal District Courts.[12]

Prejudicial Procedural Error.

None is claimed. While the Intervenors would have preferred more indulgence of their filing *faux pas*, they do not and cannot contend that the Licensing Board deviated from (or failed to publish) the ground rules, nor, as noted above, do they or could they establish prejudice.[13]

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[12]In fact, the only thing decided by the Licensing Board that falls into this category, which was decided in LBP-96-15 rather than LBP-96-18, was that for purposes of applying the "threshold" or "envelope" established by this Commission in CLI-96-1 to a partially decommissioned plant such as YNPS, the Board would look at the "total" occupational exposure estimate, rather than the prospective (or "to go") estimate, remitting to the "remedy phase" the fact that a substantial portion of the "total" exposure no longer has the capacity to be avoided by a change of options. *See* LBP-96-15 at 23-24 & n. 8. This ruling—which Yankee respectfully believes was erroneous for the reasons set forth in its "Reply Memorandum (Summary Disposition)" (filed 9/13/96) at 10-13—was in the Intervenors' favor, and it would enter into any Commission review, if at all, only in the context of an additional and alternative grounds for affirmance, since neither the Intervenors nor Dr. Resnikoff has ever contended that the "to go" occupational exposure approaches (much less exceeds) the 900 person-rem threshold. *Cf.* CLI-96-7 at 14 n.6.

[13]While not assigned, at least explicitly, as grounds for review, the Intervenors attempt subtly to suggest unfairness in their description of the schedule set down by the Licensing Board, but their enthusiasm overtakes the facts. The assertion that "Intervenors had only seven days to respond to YAEC's motion [for summary disposition], in contrast to the standard twenty days provided by the

Any Other Considerations Deemed to be in the Public Interest.

The Intervenors make no cognizable argument under this factor other than, since they believe in their cause, it must be right.

It is true that this proceeding has an unusual origin and that, to some extent,[14] it treads in what might be considered novel territory (the approval of decommissioning plans under former 10 C.F.R. § 50.82). In fact, however, neither of these propositions, to the extent of any continuing significance, is implicated by the decision of which review is sought by the present petition: LBP-96-18. That decision did not reject the Intervenors' contention as beyond the regulatory pale, nor did it establish a precedent of likely future application. That decision, rather, simply observed the failure of the party opposing a motion for summary disposition to supply an admissible and meaningful affidavit. The public interest is not implicated in a decision of such narrow and procedurally case-specific dimensions.

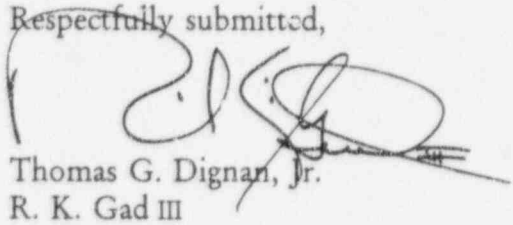
Commission's summary disposition rule" (*Petition* at 2) isn't correct: the summary disposition motion was filed July 10, 1996. What the Intervenors have in mind is Yankee's *supplement* to its pending motion, which was provided pursuant to the Licensing Board's schedule announced in LBP-96-15 (from which the Intervenors took no exception). Moreover, there was nothing in the supplement that had not already been provided to the Intervenors during "informal" discovery on August 7th and 8th (more than *thirty* days before the Intervenors response was due). All due process was done.

[14] *I.e.*, the ground covered in CLI-96-1 and CLI-96-7.

CONCLUSION

For the foregoing reasons, the petition for review of LBP- should be denied.

Respectfully submitted,

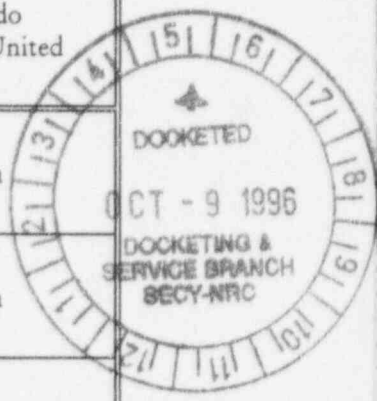


Thomas G. Dignan, Jr.
R. K. Gad III
Ropes & Gray
One International Place
Boston, Massachusetts 02110
(617) 951-7000

Dated: October 9, 1996.

Certificate of Service

I, Robert K. Gad III, one of the attorneys for Yankee Atomic Electric Company, do hereby certify that on October 9, 1996, I served the within pleading in this matter by United States Mail (as well, were indicated, by facsimile transmission) as follows:



Shirley Ann Jackson, Chairman U.S. Nuclear Regulatory Commission Washington, D.C. 20555	Kenneth C. Rogers, Commissioner U.S. Nuclear Regulatory Commission Washington, D.C. 20555
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Edward McGaffigan, Jr., Commissioner U.S. Nuclear Regulatory Commission Washington, D.C. 20555	Franklin County Commission Courthouse–425 Main Street Greenfield, Massachusetts 01301
G. Paul Bollwerk III, Esquire, Chairman Atomic Safety and Licensing Board Atomic Safety and Licensing Board Panel U. S. Nuclear Regulatory Commission Washington, D.C. 20555 FAX: 301-415-5599	Leslie B. Greer, Esquire Assistant Attorney General Office of the Attorney General Trial Division 200 Portland Street Boston, Massachusetts 02110 FAX: 617-727-3076
Dr. Jerry R. Kline Atomic Safety and Licensing Board Atomic Safety and Licensing Board Panel U. S. Nuclear Regulatory Commission Washington, D.C. 20555 FAX: 301-415-5599	Jonathan M. Block, Esquire Main Street Post Office Box 566 Putney, Vermont 05346 FAX: 802-387-2667
Dr. Thomas S. Elleman Atomic Safety and Licensing Board 704 Davidson Street Raleigh, North Carolina 27609 FAX: 919-782-7975	Eugene J. Holler, Esquire Office of the General Counsel U. S. Nuclear Regulatory Commission Washington, D.C. 20555 FAX: 301-415-3725
Diane Curran, Esquire Harmon, Curran, Gallagher & Spielberg 2001 S Street, N.W. Washington, D.C. 20009 FAX: 202-328-6918	Office of the Secretary U. S. Nuclear Regulatory Commission 11545 Rockville Pike Rockville, Maryland FAX: 301-415-1672 (Fed Ex)
Office of Commission Appellate Adjudication U. S. Nuclear Regulatory Commission Washington, D.C. 20555	

R. K. Gad III