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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 MOTION FOR STAY PENDING APPEAL

Yankee Atomic Electric Company ("Yankee") responds herein to the motion of New England Coalition on Nuclear Pollution, Inc. and Citizen's Awareness Network ("NECNP/CAN" or "Intervenors") for a stay pending appeal under 10 C.F.R. § 2.788 and says that, for the reasons set forth herein, the motion should be **denied**.

INTRODUCTION

The overall question before this agency is whether the decommissioning of Yankee Nuclear Power Station ("YNPS") should now be stopped, in favor of a long-term (30-years is advocated) "storage" option that has the capacity to save, at best, less than one-sixth of the occupational exposure already generically approved for early decommissioning of nuclear power plants.

The Intervenors' original proffered contentions were found inadmissible after a careful and detailed analysis by the Licensing Board, which this Commission then affirmed (albeit with leave to essay a "late-filed" contention on the basis of information not previously put forth).[1] The Licensing Board then admitted a "late-filed" contention on the strength of the so-called "proportionality theory,"[2] which the Intervenors

[1]The assertion in the Intervenors Petition for Review that "in CLI-96-7, the Commission *reversed* and remanded LBP-96-2" (*Petition* at 1 (emphasis added)) is simply in error.

[2]*Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-15, 44 NRC ___, ___ (7/31/96) (slip opinion at 47-52).

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passionately advocated before the contention was admitted and then abandoned.[3] After an opportunity for unlimited discovery,[4] the Intervenors' opposition to summary disposition of that contention was in crucial respects supported not by admissible data or analysis, but by another "assumption" that was utterly without basis and merely a resurrection of the "proportionality theory." The Licensing Board properly rejected this approach. LBP-96-18, slip opinion at 31-34, quoted *infra* at 4-5.

The Standards for a Stay Pending Appeal

The Intervenors acknowledge that no stay of the effectiveness of the Licensing Board's Initial Decision is appropriate without satisfaction of four standards of 10 C.F.R. § 2.788,[5] namely:

> "(1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
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> "(2) Whether the party will be irreparably injured unless a stay is granted;

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[3]As the Licensing Board has now determined, the "proportionality theory" stands "thoroughly discredited." *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-18, 44 NRC ___, ___ (9/27/96) (slip opinion at 33).

[4]In addition to the usual discovery methods, the Licensing Board strongly urged, and Yankee agreed, to a period of "informal discovery." LBP-96-18, slip opinion at 6, 27. This included a two-day session at the YNPS facility in which the Intervenors' and their witness were allowed to review all the documents they requested, received a tour of the facility and a detailed presentation of the basis for and status of Yankee's estimates of occupational exposures (including underlying documents), and were invited to and did pose all of the questions they wished, all of which were answered on the spot. Following this "informal discovery," the Board requested and received a telephonic status report at which the Intervenors' reported unqualified satisfaction with Yankee's production. Thereafter, as the Board notes, there was a bit of "formal discovery" but not a single motion to compel or discovery complaint was raised by the Intervenors. *Id.* at 27: "[The Intervenors] did not submit a motion to compel or any other complaint about the discovery information provided by YAEC. As a consequence, we have no cause to believe the intervenors were denied any information they requested regarding the nature of the remaining 'to go' activities. Having apparently failed fully to utilize the discovery afforded them, they cannot now interpose that shortcoming as the basis for a genuine material factual dispute."

[5]While there is little room for doubt that the approval of a Decommissioning Plan under 10 C.F.R. § 50.82 as interpreted by the Court of Appeals in *CAN v. NRC* is effectively a license or a license amendment of some sort (were it otherwise, the Court of Appeals would not have found CAN to have had hearing rights under section 189a of the Atomic Energy Act), it most certainly is not an initial construction permit or operating licensing within the meaning of 10 C.F.R. § 2.764. As a consequence, the Licensing Board's decision terminating this proceeding and authorizing the Staff once again to approve the Yankee Decommissioning Plan can be stayed, consistently with the Rules of Practice, if and only if the Commission were to determine that the 10 C.F.R. § 2.788 criteria have been satisfied.

"(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). *See Public Service Company of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 257 (1990).[6] The burden of proof on all four factors is on the moving party. *Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981). In fact, in the present circumstances, none of the standards is satisfied.

Likelihood of Success on Appeal

As noted above, the linchpin of the Intervenors' argument in avoidance of summary disposition was its claim to have proffered sufficient admissible evidence to have sustained a finding that the "to go" occupational exposure from completing the decommissioning of YNPS would be 400 person-rem. Without this, then even granting *arguendo* every other theory that the Intervenors advanced to the Licensing Board, summary disposition would still have been required. LBP-96-18, slip opinion at 34.

Yankee's showing on this issue consisted of two major parts. First, Yankee laid before the Board, in minute detail, the engineering analyses by which the various tasks to be performed had been identified and the number of exposure hours and the exposure rates estimated for each. LBP-96-15, slip opinion at 15 and submissions cited therein. The Intervenors took no quarrel with (but rather ignored) this data. Second, Yankee presented the expert testimony of two eminently qualified individuals (Dr. Moeller and Mr. Mellor), whose credentials the Intervenors did not challenge, explaining why the "proportionality theory" is neither a valid nor a reliable way of estimating occupational exposure (which, in fact, can only be done through engineering

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[6] "Stays are a part of the formal adjudicatory proceeding, and the criteria for consideration of a stay under § 2.788 of the Commission's regulations are the same as those which the courts apply in granting or denying a stay pending appeal. *See e.g., Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C.Cir. 1958)."

There is nothing untoward, or even unusual, in the notion that a Licensing Board decision may be given immediate effectiveness even though appellate review remains available or ongoing. This is, in fact, the rule in the federal courts: "when an Atomic Safety and Licensing Board authorizes the issuance of a license, that decision, like that of a trial court, need not await the completion of all appeals to become effective. (As with courts, the Commission's adjudicatory procedures allow a party to file a motion for a stay of an adverse decision.)" CLI-90-3, 31 NRC at 224.

analysis). The Intervenors, as noted above and by the Board, "made no attempt to defend" the proportionality theory, which, as the Board also found, is now "thoroughly discredited." LBP-96-18 at 33.

Rather, the entire basis for the claim of a 400 person-rem "to go" prospect was—*and was stated explicitly as*—an "assumption." Claiming (without explanation) that it was "reasonable to assume" (LBP-96-18 at 26) that it would take 2½ years to complete decommissioning and that the aggregate exposure would be 160 person-rem for each of the assumed 2½ years, Dr. Resnikoff simply multiplied.

It is difficult to improve on the language of the Licensing Board as to why this proffer is insufficient to stave off an otherwise properly supported summary disposition motion:

> "Finally, wholly inadequate to establish a material factual dispute is the intervenors' assertion that it is 'reasonable to assume' a 400 person-rem 'to go' figure based on an 'average' yearly 160 person-rem exposure rate over the purported two and one-half year duration of the project. Resnikoff Opposition Affidavit at 9. Initially, this assertion suffers from the problem that it is based on a 'rough estimate' that once resumed, 'it is reasonable to expect' completion of 'to go' decommissioning will take more than twice as long as the one-year the licensee has estimated. *Id.* In support of its one-year estimate, YAEC cites its decommissioning plan schedule (Table 2.3-5) indicating that approximately one and one-half years are required for dismantlement period activities, in conjunction with a decommissioning completion percentage of sixty percent. *See* Mellor Reply Affidavit at 7. The intervenors proffer their completion schedule based on the assertion that decommissioning activities can be expected to proceed at the same pace as has been achieved since 1993, without offering any reason why this is so (other than it is 'reasonable') or why the licensee's proposed schedule is deficient. In this context, the intervenors once again have provided nothing more than speculation, which is not sufficient to establish a genuine material factual dispute.
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> "Even more troubling, however, is the fact that at its core their 400 person-rem 'to go' dose argument is merely a variant of their 'proportionality' theory that the recently-filed licensee and staff analyses have thoroughly discredited and the intervenors have made no attempt to defend. As YAEC and the staff made clear in their summary disposition submissions, a reasonably accurate collective dose assessment cannot be done by simply assuming that there is a proportionality between the occupational exposure rate resulting from facility cleanup activities for a particular level of radioactivity and the exposure rate likely to accrue in

> decommissioning any additional radioactive inventory. Instead, 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.v *See* Mellor Supplemental Affidavit at 16-18; Moeller Affidavit at 3-10; Willis Affidavit at 3-4.
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> "The intervenors now would have us ignore all these factors and make the simplistic assumption that the 'to date' decommissioning activities are essentially identical to the remaining decommissioning activities so as to provide the same yearly 160 person-rem exposure rate during the time needed to complete 'to go' decommissioning. In the face of the uncontroverted evidence now before us demonstrating that because the 'proportionality' theory fails to account for these factors, it lacks any reasonable scientific basis for establishing a 'to go' figure, we are unwilling to do so. We thus conclude that the intervenors' 'average annual dose' variation on this theme, which incorporates the same analytical shortcomings as their proportionality 'theory,' does not create a genuine material factual dispute about the validity of the licensee's 'to go' estimate."

LBP-96-18, slip opinion at 31-34. The Board correctly cited and applied *United States v. Various Slot Machines on Guam*, 658 F.2d 697, 700 (9th Cir. 1981) (in the context of a summary judgment motion, an expert must back up his opinion with specific facts), and *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 807 (9th Cir. 1988) (expert's study based on "unsupported assumptions and unsound extrapolation" cannot be used to support summary judgment motion).[7]

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[7]The speculation rejected by the Licensing Board as insufficient to ward off an otherwise properly supported motion for summary judgment is virtually identical to the speculation held by this Commission to be an insufficient basis for the admission of a contention. *See* CLI-96-7, slip opinion at 36, 39, 51.

Two other things may be quickly observed. First, in blindly "assuming" that the rate of pace for decommissioning for the future would emulate that of the past, Dr. Resnikoff neither took into account nor appeared to recognize that for most of the past three years, Yankee has been under one injunction or another prohibiting "major" decommissioning activities. LBP-96-18 at 32 ("once resumed"). The Intervenors' myopia on this point perseveres in their stay motion: "if it took [Yankee] four and a half years to complete 60% of its decommissioning tasks, it will take another 2.5 years to finish." *Motion* at 6. This assertion is nonsensical unless one makes the further assumption (not acknowledged by the Intervenors but essential to their syllogism) that during the next "2.5 years" Yankee will remain under a prohibition against "major" decommissioning. Second, Dr. Resnikoff's claim that the "average" occupational exposure over the last three years has been 160 person-rem is simply contrary to the established record: "Dr. Resnikoff claims his estimate of 160 person-rem is representative of exposures

Beside its argument on the 400 person-rem "assumption," the Intervenors make only two other claims of purported Licensing Board error, neither of which is substantial. First, the Intervenors complain about the Board's failure to have allowed them to file a pleading that, they now admit, was irregular.[8] However, they make no attempt to demonstrate that, had this pleading—which the Licensing Board in fact reviewed—been accepted for filing, the outcome would have been altered (and the Board concluded that it would not have been). LBP-96-18 at 7 n.7. Second, the Intervenors claim error in the Board's rejection of Dr. Resnikoff's vague and unsupported assertion that "dismantling activities will be dirty" (*Motion* at 5), to which even Dr. Resnikoff did not attempt to assign a value in terms of person-rem (and which, therefore, cannot be said to be material to the "on the order of magnitude of 900 person-rem" standard). In fact, what Dr. Resnikoff had asserted was that Yankee intended (A) to demolish contaminated concrete structures and (B) to use explosives in doing so. *Resnikoff Aff.*, ¶ 31. This, however, was a flat-out error on Dr. Resnikoff's part (he was relying on something other than the YNPS Decommissioning Plan, which established that (A) concrete structures will be decontaminated before being demolished and (B) explosives will not be used.) LBP-96-18 at 30-31. As might be expected, Dr. Resnikoff's recovery from this predicament was unpolished; the Board's characterization of it as "conjecture" is, under the circumstances, understated.

Irreparable Injury Pending Appeal

The Intervenors' showing on irreparable injury consists of two arguments: a "prospect of mootness" argument and a half-hearted assertion of radiological injury to the public. Neither has merit.

The "Prospect of Mootness" Argument. The Intervenors' "prospect of mootness" argument simultaneously proves too much and too little. The claim is that "[i]f

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presented in Table 2 for the years 1993 through 1996 (noticeably absent is the non-decommissioning year of 1992), but in fact 160 person-rem represents the highest annual exposure. The average exposure for these years is about 130 person-rem per year." Supplemental Affidavit of Russell A. Mellor, ¶ 16 (9/13/96).

[8]The Intervenors' assertion that they overlooked this provision of the Board's written order itself overlooks the fact that the Board made the point with emphasis during the July oral argument. *Tr.* 407 (7/16/96).

[Yankee] is allowed to decommission major components and remove LLRW from the facility while intervenors' appeal is pending, . . . [Yankee's] actions will irreparably injure intervenors by forever precluding consideration of the SAFSTOR alternative advocated by petitioners . . . ." *Motion* at 7-8. However, by their own witness's "estimate" (actually an assumption without basis), the remaining decommissioning will take 2½ years. While one cannot with precision define how long it takes for an appeal under 10 C.F.R. § 2.786 to be resolved by this Commission, the units are clearly weeks or at best months, not years. The claim that during the pendency of an appeal Yankee will be able to clean up, close up and go home is rather grossly overstated.

On the other hand, it is always true—indeed, it is an inherent component of the immediate effectiveness rule—that there is *some* potential for *pro tanto* mootness during an appeal, but that factor, standing by itself, is not a basis for an exception to the rule. There are few, if any, cases in which the effect of the "immediate effectiveness" rule is other than to create the potential for some *pro tanto* mootness if an appeal is claimed and a stay pending appeal either denied or not sought. The Intervenors' argument thus applies with equal force to virtually every case in which an initial decision is entered and, if accepted, would require the granting of stays pending appeal virtually as a matter of right and upon no further showing. At bottom, the Intervenors' claim is that the rule should be changed, and that claim is advanced in the wrong procedural arena. *See CAN v. NRC*, 59 F.3d 284, 291 (1st Cir. 1995) (change of practice amounting to amendment of regulations requires compliance with APA procedures for amendment of regulations).

The Radiological Injury Argument. The Intervenors' claim that "failure to stay the Board's decision will result in irreparable radiation injuries to workers and the public." *Motion* at 8.

In the first instance, it should be clear beyond peradventure that the Intervenors' may not premise a claim of irreparable injury *to themselves* (which is what the regulation requires)[9] upon claimed injury to third parties. This is true even where, as

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[9]"Whether *the party* will be irreparably injured unless a stay is granted." 10 C.F.R. § 2.788(e)(2) (emphasis added). *See also, Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804 (1984), quoting *Westinghouse Electric Corp.* (Exports to the Philippines), CLI-80-14,

here, the Intervenors' have been allowed to advance a contention based on occupational exposure; the Commission did not confer upon the Intervenors' the power to assume for themselves all of the attributes of a group of persons whom they do not represent and with whose interests they are squarely in conflict. Under the judicial principles incorporated into § 2.788, the claimed irreparable injury must be to the person seeking the stay. *See, e.g., Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972).[10]

As for the persons whom the Intervenors' do represent, the Intervenors' do not even attempt to demonstrate any injury at all, much less the sort of real and direct injury necessary to ground a stay pending appeal—an effort they thus impliedly (and correctly) concede would be futile.[11]

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11 NRC 631, 662 (1980):

> "The most significant factor in deciding whether to grant a stay request is 'whether the *party requesting a stay* has shown that *it* will be irreparably injured unless a stay is granted.'"

(Emphasis added.)

[10]"But the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured."

[11]The radiological emissions of YNPS in its post-operations mode are, as legally required, continuously monitored and periodically reported in materials available on the public record. These records are summarized in the affidavit of Peter S. Littlefield submitted herewith. The records reflect emissions that are both *de minimis* and a minor fraction of the emissions of an operating plant, as well as declining even further with time. From gaseous effluent, the maximally exposed member of the public would have received a dose of approximately 2.2×10^{-3} mrem/yr, and from the liquid effluent, the maximally exposed member of the public would have received a dose of approximately 1.6×10^{-3} mrem/yr. There is nothing in the record to permit one to determine how much less dose any of the Intervenors' five affiants, who are alleged to live four to 10 miles from the plant, would receive, though of necessity it would be less. Likewise, there is nothing in the record to permit one to determine what fraction of this dose would be attributable to the difference between modified DECON versus SAFSTOR, the only issue in this proceeding, except that axiomatically that fraction is less than one.

At the same time, the natural background radiation level in the vicinity of the plant (conservatively measured outdoors so as to ignore the effect of trapped naturally occurring radon) is about 69 mrem/yr, with an average annual variation of ±18 mrem/year (2 s.d.). Thus, the radiological dose that any of the affiants might receive as a consequence of allowing the Licensing Board's now-affirmed rulings to become effective is on the order of 1/100,000th of the natural background dose and 1/10,000th of the average annual *variation* in natural background radiation. Needless to add, all of these exposures are orders of magnitude below any regulatory or aspirational standard for public exposure to radiation.

Such an exposure—so low as to be undetectable in the real world—is manifestly insufficient to demonstrate a real and substantial irreparable injury. *E.g., Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 747 (1985), quoting *Cuomo v. NRC*, 772 F.2d 972, 976 (D.C. Cir. 1985), which in turn quoted *Wisconsin Gas Co.* v. *FERC*, 758 F.2d 669, 674

The Intervenors have thus failed to show irreparable injury, the "most crucial" factor on a motion for a stay pending appeal. *Public Service Company of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-77-27, 6 NRC 715, 716 (1977).

Injury to Other Parties

The Intervenors' primary address to this required showing is to claim an excuse for not making it, an excuse that is palpably inapt. *Motion* at 9.[12] Beyond this, the Intervenors offer simply an *ipse dixit*, which does not rise to the level of argument and, upon a moment's reflection, is so manifestly in error that it cannot have been meant to be taken seriously. The inability to resume decommissioning costs Yankee daily for the continuation of work crews that cannot be employed on the critical path activities, as well as for the supervision and overhead that must be retained though only skeleton craft crews are at work, and it creates and enlarges the continuing (and daunting) risk of losing an off-site repository for LLRW (now that the Commonwealth has withdrawn its effort to site such a repository within Massachusetts). Likewise, the Intervenors ignore entirely the workers who, on account of this proceeding, have been laid off, who have lost their livelihoods and income, and whose return to employment the Intervenors now ask this Commission to defer further. The assertion that no harm will come other parties if the Intervenors' request is granted is frivolous.

Wherein Lies the Public Interest?

On the fourth of the stay standards, the Intervenors make no comprehensible statement other than, since they believe they will ultimately win on the merits, the public interest lies in a stay entering now.

While concededly the fourth factor may often be less directly affected than the other three, this factor properly reminds the tribunal that the consequences of granting

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(D.C. Cir. 1985): "As the Court of Appeals for the District of Columbia Circuit has twice emphasized in recent months '[a] party moving for a stay is required to demonstrate the injury claimed is "both certain and great."'"

[12]By reference to this Commission's quoted statements in CLI-95-14, the Intervenors would equate the question of relief after remand from a *found error* to the question of whether a stay pending appeal should be granted from an unreversed and *presumptively correct decision*.

a motion such as this transcend the private interests of the parties. Any assessment of the public interest must take into account the following:

- There is no controversy that there presently lies in Rowe, Massachusetts a set of structures and facilities that require decommissioning. Yankee is ready, willing, and able to undertake that decommissioning now, at known costs and on known schedules, and, in fact, it has already successfully completed a large measure of this effort. In the absence of a compelling reason to do so, any decision that postpones this decommissioning and subjects it to the risks and uncertainties of the unknowable future is contrary to the public interest.

- The Commission's Licensing Board has carefully and diligently reviewed all of the papers placed before it and made a decision that is reasonable on its face, and the Commission has a regulation duly promulgated and in place to the effect that, absent circumstances out of the ordinary, such a decision is to be effective upon rendition. It is in the public interest that, absent a far more substantial showing than the Intervenors have essayed here, the Licensing Board decision be deemed presumptively correct and the immediate effectiveness regulation be observed.[13]

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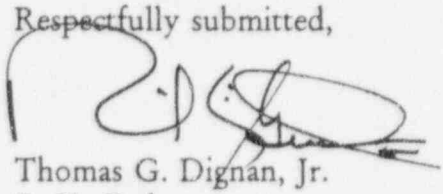
[13]The Intervenors' repetitive reminders of the procedural affront done to them once before notwithstanding, since the issuance of CLI-95-14 the Intervenors have been afforded every procedural opportunity to make their case that the Rules of Practice provide for, including a healthy measure of indulgence in the remand ordered in CLI-96-7 and admission of a late-filed contention on a doubtful basis in LBP-96-15. (*See supra* at 2 and nn.3 & 3. If, in fact, the admission of the late-filed contention was erroneous, then axiomatically its dismissal on any grounds cannot be prejudicial.) The Intervenors have lost the ability to blame their failures to prevail on procedural shortcomings.

CONCLUSION

For the foregoing reasons, the motion for a stay pending appeal should be denied.

Respectfully submitted,



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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:	
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