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UNITED STATES OF AMERICA

before the

NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
VERMONT YANKEE NUCLEAR POWER CORPORATION	)	Docket No. 50-271-OLA
(Vermont Yankee Nuclear Power Station)	)	(Spent Fuel Pool Expansion)

MOTION FOR RECONSIDERATION
(CLI-90-4)

Pursuant to 10 C.F.R. § 2.771 and the Commission's inherent authority,[1] the licensee, Vermont Yankee Nuclear Power Corporation, respectfully moves that the Commission reconsider so much of its decision dated April 5, 1990 and known as CLI-90-4 as remands the matter of the approval of the operating license amendment to the Appeal Board.

In support of this motion, the licensee says that the remand is directed in CLI-90-4 to obtain factual information (*i.e.*, on the probability of accident scenarios) in a case in which a proposed contention was excluded for lack of a sufficient pleaded basis. For the reasons set forth herein, such a remand is neither necessary to the disposition of the last remaining issue in this matter nor appropriate for consideration in this contested operating license proceeding.

1. In the decision below (ALAB-919), the Appeal Board determined that the *Sierra Club* decision[2] did not mandate a different result than the Appeal Board had previously reached in ALAB-869 and ALAB-876.[3] In CLI-90-4, the Commission endorses this conclusion. CLI-90-4, slip opinion at 2. Consequently, this aspect of ALAB-919 and CLI-90-4 does not warrant a

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[1]See, *e.g.*, *Florida Power & Light Company* (St. Lucie Nuclear Plant, Unit No. 2), CLI-81-12, 13 NRC 838, 839 n.1 (1981).

[2]*Sierra Club v. NRC*, 862 F.2d 222 (9th Cir. 1988).

[3]*Vermont Yankee Nuclear Power Corporation* (Vermont Yankee Nuclear Power Station), ALAB-869, 26 NRC 13, *reconsideration denied*, ALAB-876, 26 NRC 277 (1987).

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remand.

2. In ALAB-919, the Appeal Board held that the intervenor (NECNP) was obliged to defend (or fail to defend) the contention (Environmental Contention 1) that it had submitted to the Licensing Board, and that it could not rely on appeal on a different contention. See *Vermont Yankee Nuclear Power Corporation* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 44-45 (1989).[4] In CLI-90-4, the Commission endorses as correct the requirement that the intervenor be bound to the contention it had drafted. CLI-90-4, slip opinion at 3-4 & n.2. Consequently, this aspect of ALAB-919 and CLI-90-4 does not warrant a remand.

3. In ALAB-919, the Appeal Board ruled that the documents cited by the intervenor did not (and could not) fulfill the intervenor's obligation of providing a basis for Environmental Contention 1 as pleaded, because the documents did not address the accident scenario on which the pleaded contention was premised. ALAB-919, 30 NRC at 44-45. In CLI-90-4, the Commission reaches the same conclusion. CLI-90-4, slip opinion at 3.[5]

4. The foregoing propositions, on which the Appeal Board and the Commission are in agreement and which do not depend upon the results of any further proceedings on remand, are sufficient by themselves to warrant—indeed, to compel—affirmance of ALAB-919.

5. Contrary to the foregoing, CLI-90-4 seems to conclude that the Appeal Board reversed the admission of the contention in question, at least in part, because the Appeal Board:

(i) considered accident scenarios other than those contained in NECNP's Environmental Contention 1,

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[4]Pointing out that the documents cited by NECNP refer to scenarios *other than* the scenario depicted in the NECNP contention as drafted by NECNP, and that the documents therefore fail to provide a basis for the contention *as pleaded*.

[5]"Although certain parts of the accident sequence—for example, the zircaloy-clad fire—are discussed in the documents cited by Intervenors, the entire accident sequence is not. Specifically, the documents cited by Intervenors as a basis for the contention do not address how likely it would be that hydrogen combustion as a result of a reactor accident would lead to irreparable loss of spent fuel cooling. Thus the record at this point contains no information on the likelihood or plausibility of the specific accident which is the subject of the actual contention formally filed by the intervenors."

(ii) assessed the probability of those other accidents at 10^{-6}, and

(iii) then ruled as a matter of law that a potential event the probability of occurrence of which was 10^{-6} was "remote and speculative" and therefore not something of which NEPA consideration is required by statute.

CLI-90-4, slip opinion at 3[6] and 4 n.2. The licensee respectfully submits that the Appeal Board did *not* reverse the admission of Environmental Contention 1 on that basis. Rather, the Appeal Board limited the intervenor to the intervenor's pleaded scenario. (Point 2, above.) It then determined that scenario to be necessarily premised upon the occurrence of a severe, beyond design basis reactor accident involving significant core damage and off-site consequences (though wholly undefined as to the nature of the initiating severe reactor accident). (30 NRC at 43.) It then ruled that "when a postulated accident scenario provides the premise for a contention, a causative mechanism for the accident must be described and some credible basis for it must be provided." (30 NRC at 44).[7] It then looked to the documentation that NECNP claimed fulfilled this obligation and found that the documents did *not* supply a basis for the Environmental Contention 1 accident scenario because they did not discuss that scenario. (30 NRC at 45-46.) The Appeal Board made no ruling or finding on the probability or remoteness of any accident scenarios. Rather, discussion by the Appeal Board of the documents discussing (only) other accident scenarios was limited to the holding by the Appeal Board (not questioned in CLI-90-4) that those documents did not "describe[] and [provide] some credible basis" for the Environmental Contention 1 accident sequence. (Because the documents did not discuss the Environmental Contention 1 sequence, they could and did offer no information in support of the probability of occurrence of that sequence.) The

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[6]"We note in this regard that Intervenors suggest before the Appeal Board that their contention should be broadened to include *other reactor accident sequences* as a cause for a major loss of spent fuel cooling water. We recognize that the documents cited by Intervenors indicate that the upper limit on the probability of *such events* is on the order of 2.6×10^{-4} per reactor year and that the Appeal Board in effect found probabilities of this magnitude to be so low as to be remote and speculative for NEPA purposes." (Emphases added.)

[7]Citing *Metropolitan Edison Company* (Three Mile Island Nuclear Station, Unit No. 1), CLI-80-16, 11 NRC 674, 675 (1983); *Philadelphia Electric Company* (Limerick Generating Station, Units 1 and 2), ALAB-765, 19 NRC 645, 653-54 (1984), *petition for review denied sub nom. Anthony v. NRC*, 770 F.2d 1066 (3d Cir. 1985). NECNP did not deny that the burden of establishing a basis for the contention lay on its shoulders.

Appeal Board neither established nor relied upon any numerical standard for "remote and speculative."[8]

6. Because this is a contested operating license amendment proceeding, remand is consistent with the Commission's Rules of Practice only to the extent that the product of the remand has the capacity to be material to the decision on the licensing application implicated by the contention in question. 10 C.F.R. § 2.760a. Environmental Contention 1 was limited by the Appeal Board to consideration of an accident scenario initiated by a severe reactor accident, and it was disposed of on the legal sufficiency of the NECNP pleadings (including the insufficient scope of the documents referred to therein), on principals established by this Commission and not reversed, overruled or even questioned in CLI-90-4. The licensee respectfully submits that if and to the extent that the Commission desires to acquire factual information on the probabilities (or other aspects) of any particular accident scenario hypotheses, such factual information should be obtained outside the scope of this contested licensing proceeding.[9]

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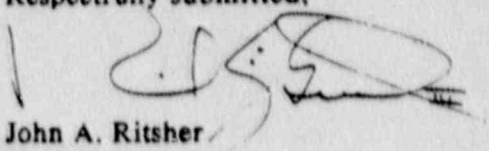
[8]Because the initiating sequence—that in the absence of which the Environmental Contention 1 accident cannot occur—is a severe reactor accident with significant core damage and offsite consequences (perforce the failed containment), the compound probability of the contention accident cannot be greater than the probability of a severe reactor accident. Indeed, it must axiomatically be less. It is no doubt for this reason that the documents cited by the intervenors did not discuss this scenario. It is for the same reason that the licensee respectfully suggests that the data that might be obtained by the remand in question is not worth the effort that the remand would entail.

We add only that the Environmental Contention 1 accident sequence is controlled by those judicial decisions (*e.g., San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1297-1301 (D.C. Cir. 1984), *aff'd en banc*, 789 F.2d 26, *cert. denied*, 107 S. Ct. 330 (1986)) holding severe reactor accidents to be outside of the scope of NEPA's statutory requirements, as well as by this Commission's Policy Statement (45 Fed. Reg. 40,101) on the consideration of severe reactor accidents in Environmental Impact Statements prepared for other reasons. Thus, to open this proceeding to the receipt of information on, and contest over, the probability of the Environmental Contention 1 accident scenario is to jettison the sound principals of those decisions and that Policy Statement. There is no legal justification—and no factual or policy-based justification contained in NECNP's unsupported Environmental Contention 1—for so radical a departure from settled principals.

[9]Moreover, the final approval of the operating license should not be held up pending the obtaining of such additional and categorically immaterial information.

7. For the foregoing reasons, the licensee respectfully suggests to the Commission that CLI-90-4 be reconsidered, that so much of that decision as mandates a remand for further consideration by the Appeal Board be withdrawn, and that so much of that decision as affirms the Appeal Board's rulings that (i) the intervenor is limited to the contention as pleaded and (ii) the documents referred to by the intervenor do not supply a basis for the contention as pleaded be affirmed.

Respectfully submitted,



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Dated: April 13, 1990.

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Certificate of Service

I, R. K. Gad III, hereby certify that on April 13th, 1990, I made service of the within "Motion for Reconsideration (CLI-90-4)" by mailing a copy thereof, first class mail, postage prepaid, as follows:

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