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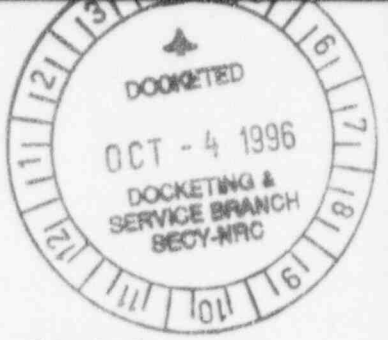

UNITED STATES OF AMERICA
Before the
NUCLEAR REGULATORY COMMISSION

Yankee Atomic Electric Company	)	
	)	Docket No. 50-029
(Yankee Rowe Nuclear Power Station)	)	Decommissioning
	)	October 4, 1996

CITIZENS AWARENESS NETWORK'S AND NEW ENGLAND COALITION ON NUCLEAR POLLUTION'S PETITION FOR REVIEW OF LBP-96-18

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.786, intervenors, Citizens Awareness Network ("CAN") and the New England Coalition on Nuclear Pollution ("NECNP"), hereby seek review of LBP-96-18, Memorandum and Order (Granting Motion for Summary Disposition) (September 27, 1996).

II. FACTUAL BACKGROUND

In 1995, in response to the First Circuit's decision in Citizens Awareness Network v. NRC and YAEC, 59 F.3d 284 (1st Cir. 1995), the Commission offered the public an opportunity to request a hearing on Yankee Atomic Electric Company's ("YAEC's") decommissioning plan. CLI-95-14, 42 NRC 130 (1995). Intervenors submitted a number of contentions, all of which the Licensing Board rejected in LBP-96-2. 43 NRC 61, 91-92 (1996). On appeal, in CLI-96-7, the Commission reversed and remanded LBP-96-2 for an inquiry into whether intervenors could justify admission of a contention to the effect that the dose differential between the DECON and SAFSTOR alternatives for Yankee Rowe exceeds the 900 person-rem threshold established by the Commission in CLI-96-1, 43 NRC 235 (1996). The Board admitted such a contention in LBP-96-15, 44 NRC 8, 22 (1996).

Pursuant to the Commission's directive in CLI-96-7, the

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Board established an extremely truncated litigation schedule, which included four weeks for discovery and a total of a week and a half for summary disposition pleadings. LBP-96-15, Appendix 1. Intervenors had only seven days to respond to YAEC's motion, in contrast to the standard twenty days provided by the Commission's summary disposition rule, 10 C.F.R. § 2.749. Three days later, YAEC's reply was due, and the Board scheduled its own ruling two weeks after that, on September 27.

In summary judgment filings, YAEC asserted that the estimated total decommissioning dose for its preferred DECON alternative is 580 person-rems, including a remaining or "to go" dose of 140 person-rems. Affidavit of Russell A. Mellor, submitted in support of YAEC's Motion for Summary Disposition (September 3, 1996) (hereinafter "Mellor Aff."). Intervenors demonstrated that a more reasonable estimate of the decommissioning dose is 1,184 person-rems, including a "to go" dose of 400 person-rems. Affidavit of Marvin Resnikoff, Ph.D (September 6, 1996), submitted in support of Citizens Awareness Network's and New England Coalition on Nuclear Pollution's Opposition to YAEC's Motion for Summary Disposition (September 10, 1996).

In its Reply Memorandum and supporting affidavit, filed September 13, 1996, YAEC attempted to demonstrate that intervenors' opposition did not raise legitimate disputes over material facts. In particular, YAEC claimed that Dr. Resnikoff's assertions are contradicted by information in YAEC's Decommissioning Plan or other documents that YAEC produced during the brief discovery process. In this way, YAEC sought to create a false impression that Dr. Resnikoff ignored key information allegedly disclosed to

the intervenors. In order to dispel this impression and explain why the information provided by YAEC had not resolved their concerns, Intervenors moved for leave to reply to YAEC. The Board rejected intervenors' motion, however, on the procedural ground that intervenors had incorrectly filed a Reply at the same time they filed the motion for leave to file the reply. CAN's and NECNP's Motion for Leave to Reply to YAEC's Reply Memorandum (Summary Disposition) (September 17, 1996) (hereinafter "Leave Motion"); LBP-96-18, slip op. at 7-8, note 7. On September 27, the Board issued LBP-96-18, granting summary disposition against intervenors.

III. THE BOARD ERRED IN GRANTING YAEC SUMMARY DISPOSITION.

The central focus of LBP-96-18, and the source of the Board's most crucial errors, is the comparison of YAEC's and intervenors' dose estimates for YAEC's remaining "to go" decommissioning activities. The Board either completely ignored or unreasonably discounted intervenors' material factual evidence which plainly undermines YAEC's claim that the "to go" dismantling dose is 91 person-rems.[1] As a result, the Board unlawfully shifted the burden of proof from YAEC to intervenors. In particular, the Board made the following errors:

A. The Board Committed Procedural Error.

First, the Board erred in denying CAN's and NECNP's Leave Motion. LBP-96-18, slip op. at 7-8 note 7. The Board faulted intervenors for filing their surreply (CAN's and NECNP's Reply to

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[1] YAEC's total "to go" estimate is 140 person-rems. The dismantling portion of this "to go" dose is 91 person-rems. See Column 5 of table attached to the Mellor Affidavit.

YAEC's Reply Memorandum (hereinafter "Surreply")) on the same day as their Leave Motion, in contravention of the Board's order in LBP-96-15 that leave must be requested before filing a surreply. Id.

Intervenors submit that the error was both excusable and harmless, and indeed appeared to have been excused by the Licensing Board. Upon receiving YAEC's Reply Memorandum on September 13, intervenors sought to reply to YAEC's unwarranted attacks upon their expert witness's credentials, as well as YAEC's new arguments that intervenors' Opposition to YAEC's Motion for Summary Disposition ignored or misinterpreted information regarding decommissioning doses which YAEC allegedly provided in discovery. Aware that they must reply quickly if they were to have any input to the decision due September 27, intervenors worked quickly and, under immense pressure, inadvertently overlooking the Board's instruction to file the Leave Motion before the Surreply.

Not only was this error understandable in light of the extraordinary time constraints the Board's schedule placed on intervenors, but the Board appeared to excuse it in an Order issued two days after intervenors filed their pleadings. Order (Prior Board Approval of Further Summary Disposition-Related Filings) (September 19, 1996). The Order stated that "[a]ny party wishing to make a further filing" relating to YAEC's summary disposition motion must obtain prior Board approval. Id. (emphasis added). Intervenors reasonably interpreted the Board's reference to "furtner filings," and its failure to reject or make any mention at all of intervenors' Surreply, to mean that the

Board did not intend to reject intervenors' Surreply merely because it had been filed jointly with the Leave Motion. Indeed, given the tight constraints on the decisionmaking schedule, it would have been a futile gesture for intervenors to withdraw the Surreply pending the Board's decision on the Leave Motion. Moreover, intervenors' error was harmless. The Board was free to ignore intervenors' Surreply in considering the Leave Motion. Thus, the Commission should reverse the Board's rejection of intervenors' Leave Motion and order the lodging of the Surreply.[2]

B. The Board Ignored or Discounted Significant Evidence.

In several key respects, the Board ignores or discounts intervenors' evidence which creates a genuine issue of material fact in dispute with YAEC's "to go" dismantling dose estimate of 91 person-rems. First, in defending YAEC's dose estimate methodology, the Board ignores intervenors' evidence that YAEC's claims to accuracy in dose projections are unsupported. Although 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. Affidavit of Marvin Resnikoff, Ph.D., par. 30 (September 6, 1996) (hereinafter "Resnikoff Aff."); Intervenors' Statement of Material Facts in Dispute, par. 3.f (September 10, 1996).

Second, the Board erroneously discounts the intervenors' evidence that further dismantling activities will be dirty, or

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[2] The Board claims that even if admitted, the Surreply would not have affected its decision. LBP-96-18, slip op. at 8, note 7. As demonstrated below, this determination is also in error.

the ground that YAEC intends to decontaminate structures before it dismantles them, thereby minimizing contamination. Id., slip op. at 29-31. The Board simply ignores the fact that "decontamination," as YAEC defines it in the Decommissioning Plan, involves such obviously dusty and dirty activities as "carbon dioxide blasting," "hydro blasting," and "abrasive blasting." Second Reply Affidavit of Marvin Resnikoff, Ph.D, par. 15 (September 17, 1996) (hereinafter "Second Resnikoff Aff."), citing YAEC Decommissioning Plan, Table 2.3-2.

Third, the Board erroneously claims that intervenors did not to support their assertion that the decommissioning process is likely to take another 2.5 years rather than YAEC's estimate of 1.5 years. The Board also erroneously dismisses intervenors' claim that based on the pattern of past experience, the average dose during this period is likely to be about 160 person-rems/year. Id., slip op. at 32-34. With respect to the time frame, YAEC itself states that decommissioning activities are 60% complete at Yankee Rowe. Supplemental Affidavit of Russell A. Mellor, par. 16 (September 13, 1996). YAEC does not base this estimate on a percentage of doses or residual radioactivity, but on the percentage of time spent on decommissioning activities. Supplemental Affidavit of Russell A. Mellor, par. 7 (September 3, 1996). Applying simple mathematics to Mr. Mellor's assertion, Dr. Resnikoff correctly and reasonably estimates that if it took YAEC four and a half years to complete 60% of its decommissioning tasks, it will take another 2.5 years to finish these tasks.

Resnikoff Reply Affidavit, par. 17. Thus, intervenors demonstrated that by Mr. Mellor's own calculation, a projection of 1.5 more years does not make sense, and the Board's conclusion to the contrary is in error.

The Board also erroneously claims that the intervenors' estimate of 160 person-rems/year for "to go" dismantling activities is "speculative," and based on a "proportionality" theory. LBP-96-18, slip op. at 28. As intervenors demonstrated, YAEC has a history of inaccurately low dose projections. These projections are only improved when consideration is restricted to ALARA reviews for near-term activities. Resnikoff Aff. par. 30, Second Resnikoff Aff. par. 16. Moreover, the documents provided in discovery, which show that for a number of important activities, information on hours and dose rates is either "preliminary" or absent, belie YAEC's assertion that it has provided detailed dose information regarding all its "to go" activities. Resnikoff Reply Affidavit, par. 13. Significantly, intervenors' evidence is not based on a "proportionality" theory.[3] Rather, it is based on: (a) the pattern established by YAEC's decommissioning activities[4], (b) the fact that YAEC has done nothing to demonstrate that its long-term dose estimates are

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[3] Intervenors note that the "proportionality" theory originated not with intervenors but with YAEC, in trying to justify pre-plan-approval decommissioning activities. Letter from Andrew C. Kadak to William T. Russell at 5 (January 29, 1996). Intervenors did not use it in the summary disposition proceeding.

[4] Notably, in the first half of 1996, when YAEC was allegedly engaged in only "minor" decommissioning activities, YAEC incurred over 78 person-rems. See CLI-96-6, 42 NRC 123, 131-132 (1996); Resnikoff Affidavit, Table 2.

any less speculative than they were in 1993, and (c) the nature of anticipated decommissioning activities. Resnikoff Aff. pars. 29-33, Second Resnikoff Aff. pars. 12-18. As such, contrary to LBP-96-18, intervenors provide ample evidence to controvert YAEC's assertions and warrant a trial on the merits.

IV. COMMISSION REVIEW OF LBP-96-18 IS WARRANTED.

Under the standard set forth in 10 C.F.R. § 2.786(b)(4), Commission review is warranted in this case. As demonstrated above, the Board's pivotal finding of material fact in LBP-96-18 -- i.e., that intervenors failed to demonstrate the existence of a genuine material dispute regarding the adequacy of YAEC's "to go" dose estimates -- is clearly erroneous, and based on the Board's disregarding intervenors' evidence of material facts in dispute. Although YAEC bears the burden of proof as a matter of law, the Board's decision shifts the burden to intervenors, requiring them to "prove" that YAEC's dose estimates were wrong rather than submit material evidence raising a genuine dispute.[5] Moreover, in refusing to admit intervenors' Surreply, which controvert YAEC's attacks on the first Resnikoff Affidavit, the Board committed prejudicial procedural error.

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[5] For instance, the Board held that any dose parameters for which intervenors did not submit actual numerical estimates were "immaterial" to its decision. LBP-96-18, slip op. at 23, note 11. Essentially, the Board faulted intervenors for failing to extract enough information from YAEC during discovery to calculate the figures. This holding unreasonably shifts the burden of proof from YAEC to intervenors. As demonstrated in the Resnikoff Affidavit, intervenors examined the information provided by YAEC. However, YAEC itself did not collect sufficient data to allow a calculation. See, for example, discussions of inhalation doses, hot particles and soil contamination in Resnikoff Aff., pars. 34-38, 39, and 50-51.

Furthermore, 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. In reaching its decision, the Board either dismisses or leaves unaddressed significant dose contributors that are ignored by YAEC's decommissioning dose estimates. These missing contributors include, but are not limited to, high public doses during transportation, inhalation doses, operation and maintenance doses, doses incurred directly following plant closure, and hot particle doses. Resnikoff Aff., pars. 34-39, 43-51.

For example, in CLI-96-1, the Commission announced that the dose differential between DECON and SAFSTOR is not legally cognizable unless the dose difference is on the order of 900 person-rems. 43 NRC 1, 9 (1996). In their summary disposition pleadings, intervenors established that the doses from public exposure during transportation are significantly higher than presumed in the 1988 GEIS, and thus should be included in an evaluation of the dose differential. See Resnikoff Aff., pars. 43-46. However, the Licensing Board restricted its consideration to occupational doses alone. LBP-96-18, slip op. at 23. The Commission should formally recognize the significant contribution of public doses, which were not recognized in the GEIS.

Similarly, the Board ignored operating and maintenance doses under the DECON alternative, apparently accepting YAEC's argument that such doses are not contemplated in the GEIS. Id.

LBP-96-18 ignores the fact that yearly O&M or "continuing care" doses appear in Table 4.3-2 of the GEIS for the SAFSTOR alternative, thus leading to the conclusion that the comparable yearly O&M should also appear as a component of exposure to workers under DECON. See CAN's and NECNP's Statement of Material Facts in Dispute at 4 (September 10, 1996). The Commission should address these significant dose contributors that have been ignored by the Board.[6]

Finally, the Commission should take review in order to address the Licensing Board's erroneous acceptance of YAEC's assertions regarding site cleanup doses without first requiring a full Site Characterization Plan and Site Characterization Report. The NRC's Draft Branch Technical Position on Site Characterization for Decommissioning (November 1994), recommends that these reports be submitted before the filing of a decommissioning plan. Resnikoff Aff., par. 50. Not only is this a prudent and conservative means of assuring an adequate basis for dose estimates, but in this case, some of YAEC's data show contamination levels increasing with depth, thus demonstrating the need for further study of the full extent of site contamination. Id., par. 51.

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6 Although the Board attempts to dismiss the dose contributors for parameters ignored or underestimated by YAEC as inconsequential in comparison to the disputed "to go" dismantling dose [LBP-96-18, slip op. at 24-25 and note 12], in fact they make a substantial contribution to the DECON dose estimate for Yankee Rowe. Leaving aside intervenors' "to go" estimate of 400 person-rems, the dose contributors advanced by intervenors (and rejected or ignored by the Licensing Board) raise YAEC's decommissioning dose estimate by over 50%, from 580 person-rems to 877 person-rems. See LBP-96-18 at 25, note 12.

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V. CONCLUSION

For the foregoing reasons, the Commission should take review of LBP-96-18.

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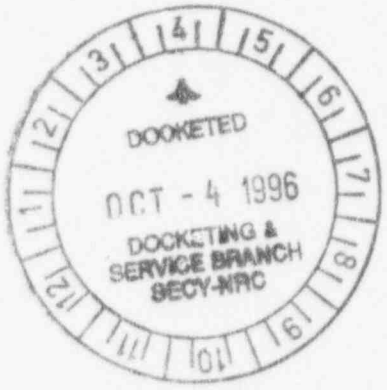
October 4, 1996

CERTIFICATE OF SERVICE

I, Diane Curran, certify that on October 4, 1996, copies of the foregoing CITIZENS AWARENESS NETWORK'S AND NEW ENGLAND COALITION ON NUCLEAR POLLUTION'S PETITION FOR REVIEW OF LBP-96-18 were served by first class mail or as otherwise designated on the following:



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