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Filed: 7/7/88

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

before the

ATOMIC SAFETY AND LICENSING BOARD

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

LICENSEE'S RESPONSE TO
"JOINT MOTION OF THE
COMMONWEALTH OF MASSACHUSETTS AND
NEW ENGLAND COALITION ON NUCLEAR [POLLUTION]
FOR AN ORDER STAYING THE EFFECTIVENESS OF
LICENSE AMENDMENT NO. 104 . . . ."

Under date of June 13, 1988, the intervenors, the Commonwealth of Massachusetts and New England Coalition on Nuclear Pollution (hereinafter, the "Movants") submitted the captioned motion (hereinafter the "Joint Motion"). On June 24, 1988, the Board granted the assented-to motion of Vermont Yankee Nuclear Power Corporation ("Vermont Yankee") to enlarge the time within which it might respond to this motion through July 7, 1988, effecting a concomitant enlargement of the Staff's time for response through July 12, 1988. On June 24, 1988, the State of Vermont, participating in this operating license amendment proceeding as an "interested state," joined in the Joint Motion.

In the midst of the status pre-hearing conference convened on June 28, 1988, the Movants orally moved for an "emergency stay" of like tenor, to take effect between the pre-hearing conference and the time of the Board's



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ruling on the Joint Motion. After oral argument, the Board denied this "emergency stay" motion. *Tr.* 316 (June 28, 1988).[1]

Vermont Yankee submits herewith its response to the Joint Motion and says that the Joint Motion must be denied because this Board lacks jurisdiction to grant the requested relief, that it must be denied because the Movants have failed to make the showing requisite to the consideration of such a motion, and that it should be denied because at bottom the requested relief makes no sense and would be severely detrimental to the public interest.

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[1]The Joint Motion, to which this pleading responds, seeks only an order purporting to suspend the effectiveness of License Amendment 104. During the pre-hearing conference, the Movants first made an oral motion for an order that would have purported to enjoin Vermont Yankee from installing the new racks in the pool, and then withdrew this request. *Tr.* 267, 270-71. We presume, therefore, that no such request is now pending before this Board, and we prescind, therefore, from setting forth the additional reasons why the entry of such an order would be doubly beyond the jurisdiction of this Board.

**Statement of the Case**

Vermont Yankee is the owner and operator of Vermont Yankee Nuclear Power Station ("VYNPS"). The operating license for VYNPS was issued in 1972, and provided, *inter alia*, for authority to store up to 600 spent fuel assemblies in the VYNPS spent fuel pool. The operating license was amended in 1977 to increase the maximum number of spent fuel assemblies that might be stored in the spent fuel pool to 2,000. *Vermont Yankee Nuclear Power Corporation* (Vermont Yankee Nuclear Power Station), ALAB-455, 7 NRC 41 (1978), *aff'g* LBP-77-54, 6 NRC 436 (1977).

On April 25, 1986, Vermont Yankee applied to the Commission for an additional operating license amendment. *Letter of Warren P. Murphy to U.S.N.R.C.*, dated April 25, 1986. The purpose of this amendment was to expand the capacity of the pool to 2,870 spent fuel assemblies. The means by which this will be accomplished is by re-racking the spent fuel pool with higher density racks (*i.e.*, racks in which the spent fuel assemblies are closer together, so that more assemblies can be stored in a given amount of floor space). An operating license amendment was required, however, only because of the 2,000 spent fuel assembly limit contained in the VYNPS Technical Specifications; correlatively, the only amendment actually sought involves this Technical Specification provision.[2]

Following a Staff determination that the proposed amendment involves no significant hazards considerations, the receipt of requests for hearing and proposed contentions, and decisions by this Board and by the Appeal Board, a single contention ("Contention 1") has been admitted in this proceeding. That contention involves the adequacy of the heat carrying capacity of the

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[2]"Because Section 5.5 of [VYNPS's] Technical Specifications currently limits the number of spent fuel assemblies allowed to be stored in the spent fuel pool, an amendment to this licensed storage capacity is required." Murphy, *op. cit. supra*, at 2; see also *id.*, attachment 1 (proposed amended page 189 of the VYNPS Technical Specifications).

spent fuel pool cooling system.[3] The single admitted contention remains pending.

Vermont Yankee originally requested that the amendment be granted on or before November 15, 1986, to avoid certain consequences, Murphy, *op. cit. supra.* at 9, but that did not happen.[4] In early 1988, with the approach of the second regularly scheduled refueling following submission of the amendment application, Vermont Yankee was faced with the necessity of deciding whether to defer at least the re-racking portion of the proposed action yet again; this time, however, the consequences would be much greater.[5]

As a result, Vermont Yankee notified the Staff in the early part of 1988 that it intended to install the new racks pursuant to the authority conferred upon it by its existing operating license for VYNPS and 10 C.F.R. § 50.59.[6] The Staff requested that Vermont Yankee defer the installation for a time, to which (after informing the Staff that a decision had to be made by approximately June 1, 1988, to accommodate the next refueling) Vermont Yankee acquiesced. On May 20, 1988, the Staff then issued

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[3]The admitted contention asserts (erroneously) that the heat transfer capacity of the spent fuel pool cooling system (assuming a single active failure) is inadequate to accommodate the decay heat load of the spent fuel pool, so that reliance upon one of the two trains of the reactor Residual Heat Removal System ("RHR") is required to maintain the spent fuel pool temperature at 150°F for a number of days following restart of the reactor, and this, in turn, renders the spent fuel pool cooling system not "single active failure" proof during the period between reactor restart and when the single train of spent fuel pool cooling again becomes adequate.

[4]And, as a consequence, a not insubstantial economic penalty was paid by the ratepayers whom VYNPS serves. *Tr.* 286-87 (June 28, 1988). (Note that what is rendered in the transcript as "$000,000" is a typographical error for $300,000.)

[5]See Affidavit of Warren P. Murphy, dated July 7, 1988, submitted herewith, *passim.*

[6]"The holder of a license authorizing operation of a production or utilization facility may . . . make changes in the facility as described in the safety analysis report . . . without prior Commission approval, unless the proposed change . . . involves a change in the technical specifications incorporated in the license or an unreviewed safety question." 10 C.F.R. § 50.59(a)(1). Substitution of the new racks for the old racks neither requires a change in the Technical Specifications nor involves an unreviewed safety question as defined in 10 C.F.R. § 50.59(a)(2).

License Amendment 104, purporting to authorize the rack swap but not the use of any spent fuel pool capacity above the 2,000 assembly limit currently contained in the VYNPS operating license. License Amendment 104 became immediately effective perforce 10 C.F.R. § 50.58(b)(5).[7]

The Movants waited for three weeks and then filed the motion at bar with this Board.

Citing only 10 C.F.R. § 2.718(m)[8] as authority for the Board to take jurisdiction over the motion and grant the requested relief, the Joint Motion seeks to have this Board stay, not its own order,[9] but the action of the Staff granting an immediately effective partial operating license amendment

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[7]"The Commission . . . may make the amendment immediately effective, notwithstanding the pendency before it of a request for a hearing from any person, in advance of the holding and completion of any required hearing, where it has determined that no significant hazards consideration is involved."

It bears noting that this determination, upon which immediate effectiveness follows, is explicitly not reviewable: "No petition or other request for review of or hearing on the staff's significant hazards consideration determination will be entertained by the Commission. The staff's determination is final, subject only to the Commission's discretion, on its own initiative, to review the determination." *Id.*, § 50.58(b)(6).

[8]"A presiding officer has the duty to conduct a fair and impartial hearing according to law, to take appropriate action to avoid delay, and to maintain order. He has all powers necessary to those ends, including the power to . . . [t]ake any other action consistent with the Act, this chapter, and sections 551-558 of Title 5 of the United States Code." Perforce 10 C.F.R. § 2.704(a), the term "presiding officer," in the present context, means this Board.

[9]The power of Licensing Boards to issue stays is dealt with, comprehensively, by the Commission's regulation at 10 C.F.R. § 2.788. That regulation authorizes Licensing Boards to issue stays only of their own orders. That regulation, moreover, limits the purpose for which a stay may be granted to stays "pending filing of and a decision on an appeal or petition for review." 10 C.F.R. § 2.788(a). Not only have the Movants not sought any form of stay *pending appeal*, but "appeal" of the action they challenge (and wish this Board to review) is explicitly prohibited by the Commission's regulations. 10 C.F.R. § 50.58(b)(6). Conspicuously absent from section 2.788 is any delegation of power to Licensing Boards to stay actions of the NRC Staff upon the ground of asserted legal error in the Staff's action. Thus: "Because the petitioners did not challenge any Licensing Board or Appeal Board decision *neither Board had jurisdiction to hear the stay request.*" *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 4 (1986) (emphasis added).

in a matter that is subject to the so-called "Sholly regulations."[10] Vermont Yankee contends that this Board has no jurisdiction to review the Staff's determination that License Amendment 104 should be effective pending the completion of hearings in this matter; that the requested stay would amount to a futility because Vermont Yankee possesses the authority to install the new racks entirely *de hors* License Amendment 104; and that, in any event, the Movants have failed to demonstrate satisfaction of the stay criteria even were this Board invested with jurisdiction to entertain the motion.

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[10] 10 C.F.R. §§ 2.105, 50.58, 50.91 and 50.92, as inserted or amended by 51 Fed. Reg. 7744 *ff.* (March 6, 1986).

## ARGUMENT

### I. THIS BOARD LACKS JURISDICTION TO ENTERTAIN THE JOINT MOTION.

Atomic Safety and Licensing Boards of the Nuclear Regulatory Commission are adjudicatory tribunals of limited subject matter jurisdiction. They have, in fact, only the jurisdiction and power that the Commission has delegated to them. *E.g., Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Units 1 and 2), ALAB-739, 18 NRC 335, 339 (1983); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, 565 (1980); *Commonwealth Edison Co.* (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 426 (1980); *Commonwealth Edison Co.* (Carroll County Site), ALAB-601, 12 NRC 18, 24 (1980); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-577, 11 NRC 18, 25, *reversed on other grounds, in part*, CLI-80-12, 11 NRC 514 (1980); *Public Service Company of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167 (1976); *New England Power Co.* (NEP, Units 1 and 2), LBP-78-9, 7 NRC 271, 279 (1978). In a license amendment proceeding, the jurisdiction of the Board is limited to resolution of admitted contentions relating to the proposed amendment:

> "In a license amendment proceeding, a licensing board has only limited jurisdiction. The board may admit a party's issues for hearing only insofar as those issues are within the scope of matters outlined in the Commission's notice of hearing on the licensing action. . . ."

*Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Units 1 and 2), ALAB-739, 18 NRC 335, 339 (1983). Even in more plenary proceedings, in all respects in which the proposed licensing action is uncontested, it is within the exclusive province of the Staff to act for the Commission. *Public Service Company of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-854, 24 NRC 783, 791 (1986):

> "[O]nce an operating licensing board has resolved any contested issues and any issues raised *sua sponte* [by the Board], the decision as to all other matters which need to be considered prior to the issuance of the requested license is the responsibility of the staff *and it alone*."

(Emphasis added.) See also *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), ALAB-85[illegible] 24 NRC 532, 545 (1986); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-830, 23 NRC 59, 60 (1986) (effectively overruling *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 2 and 3), LBP-85-26, 22 NRC 118 (1985)); *Consolidated Edison Company of New York* (Indian Point, Units 1, 2 and 3), ALAB-319, 3 NRC 188, 190 (1978).

The Movants, whose burden it is to show that the Board has jurisdiction to entertain their motion, point only to 10 C.F.R. § 2.718(m) (quoted *supra* at note 8). That section, however, relates only to the *powers* possessed by a Board for the discharge of its jurisdiction; as stated in that regulation, the powers described extend only as "necessary to those ends," which refers to the exercise of the Board's jurisdiction and obligation to resolve the admitted contentions. Section 2.718 is not a grant of any jurisdiction, and therefore nothing in § 2.718 can be properly interpreted to confer upon this Board any authority to exercise any of the § 2.718 powers except in the course of resolving Contention 1. Since the subject matter of the Joint Motion relates neither to Contention 1, nor, indeed, to the requested license amendment, § 2.718 avails the Movants naught. Rather, the subject of the Joint Motion is an uncontested matter, at best, and to entertain it would be for the Board to transgress the solemn line demarking the respective jurisdictions of the Board and the Staff, as set forth in ALAB-854. Moreover, the Commission simply did not intend that Licensing Boards have the role of deciding what amounts to "immediate effectiveness" questions with regard to "immediately effective" license amendments issued by the Staff under the Sholly regulations.

**A. This Board Lacks Jurisdiction over the Joint Motion because the Replacement of Racks is not Within the Scope of the License Amendment Application.**

As noted above, the only additional authority sought by the operating license amendment application now pending before the Commission relates to the number of spent fuel assemblies that may be stored in the VYNPS spent fuel pool at any one time. VYNPS presently holds an outstanding operating license. That license authorizes Vermont Yankee to maintain a spent fuel

pool and to store up to 2,000 spent fuel assemblies in that pool at any one time. Nothing in the VYNPS operating license purports to dictate the design of the racks in which the assemblies are stored, nor the center-to-center distance between assemblies, nor whether the racks now in the pool must remain there forever. The only amendment sought is one that revises the number "2,000" on page 189 of the VYNPS Technical Specifications to "2,870."

It therefore follows that the authority on which VYNPS relies to replace the PAR racks with NES racks is the existing operating license, over which the Commission has invested this Board with no jurisdiction. See *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-674, 15 NRC 1101, 1102-03 (1982).[11] It *may* be true that Vermont Yankee might only undertake the rack substitution in anticipation of the approval of the pending amendment. It *may* therefore be true that, were the Staff required to engage in any environmental cost/benefit balancing, that assessment might

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[11]In *Midland*, an intervenor appealed from the denial by an operating license Licensing Board of a motion to suspend ongoing construction pending resolution of one of his concerns. The Licensing Board had ruled that the subject matter of the concern was not related to any admitted contention and therefore denied the requested relief. The Appeal Board affirmed that result, noting:

> "The Licensing Board memorandum explains why, in its view, the *substance* of the EMP issue is beyond the scope of this licensing proceeding. We think the better answer, however, is that the intervenor has requested a *remedy* that the Board is not authorized to grant -- *i.e.*, stopping the construction already under way at Midland and effectively suspending the previously issued construction permit, pending resolution of the EMP issue.
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> "A licensing board for an operating license proceeding, such as the one involved here, is limited to resolving matters that are raised therein as legitimate contentions by the parties or by the board *sua sponte*. 10 C.F.R. § 2.760a; . . . . Pursuant to that mandate, a board can authorize or refuse to authorize the issuance of an operating license. It does not, however, have general jurisdiction over the already authorized ongoing construction of the plant for which an operating license application is pending, and it cannot suspend such a previously issued permit."

*Id.* (emphases in the original; footnote omitted). The proposition is *a fortiori* vis-a-vis the lack of authority of an operating license amendment Board to suspend a previously issued operating license.

be required to take into account any environmental implications of the racks themselves. From this it may follow that, in undertaking the rack substitution before the amendment has been finally approved, Vermont Yankee acts at the risk of not being able to realize the anticipated value of its efforts. It does *not* follow that Vermont Yankee's authority to engage in the rack substitution is something this Board has been authorized to withhold or suspend.

**B. This Board Lacks Jurisdiction over the Joint Motion because the Replacement of Racks is not Within the Scope of the Contentions Admitted in the Proceeding.**

Even were the question of whether to authorize installation of the new racks within the scope of the license amendment sought, it is still not within the scope of this contested proceeding. To the contrary, in this proceeding, the jurisdiction of this Board is limited to the resolution of Contention 1.[12] That contention raises only, as a matter of radiological health and safety, issues concerning the capacity and redundancy of the spent-fuel pool cooling system. It does not involve the design of the new racks, nor does it involve anything having to do with environmental cost/benefit balancing. Resolution of the contention will involve the granting or withholding of authority to store more spent fuel assemblies in the pool, not the installation of racks in which to hold assemblies.

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[12]The Board also, necessarily, has the jurisdiction to pass on any late-filed requests for the admission of contentions, 10 C.F.R. § 2.714a, and to admit any issues that it determines meet the standards for *sua sponte* review. Since, however, there are no requests for late-filed contentions and no issues suggested by anyone as meeting the tests for *sua sponte* issues before the Board, these additional powers are not relevant to the pending motion. Most assuredly *not* a proper basis for entertaining a request is the prospect of a late-filed contention that may be filed someday in the future (*cf. Tr.* 293 (6/28/88); indeed, we respectfully submit that so to reason would be to flout the holding of ALAB-869.

C. **This Board Lacks Jurisdiction over the Joint Motion because the Commission's Regulations Do Not Contemplate ASLB Review of Staff Actions Taken under the Sholly Regulations Except by Initial Decisions Disposing of Contentions.**

The so-called Sholly regulations, 10 C.F.R. §§ 2.105, 50.58, 50.91 and 50.92, as inserted or amended by 51 Fed. Reg. 7744 *ff.* (March 6, 1986), and the procedures they specify, take their jargon name from *Sholly v. NRC*, 651 F.2d 780 (D.C. Cir. 1980), *rehearing denied*, 651 F.2d 792 (D.C. Cir. 1981), *vacated and remanded*, 459 U.S. 1194 (1983), *vacated and remanded*, 706 F.2d 1229 (D.C. Cir. 1983). In the 1980 decision, the D.C. Circuit had held that section 189a of the Atomic Energy Act requires the Commission to commence and complete a hearing, if requested, prior to the issuance of *all* operating license amendments. Congress responded by enacting P.L. 97-415, 96 Stat. 2067, which amended section 189a of the Atomic Energy Act so as to authorize the Commission to issue an immediately effective license amendment, given a Commission finding of "no significant hazards considerations," notwithstanding the pendency of a request for a hearing and prior to the resolution of any admitted contentions.

The Sholly regulations promulgated by the Commission dictate the procedure to be employed in minute detail. As described by the Commission itself:

> "Under this new system, the Commission requires an applicant requesting an amendment to its operating license (1) to provide its careful appraisal on the significant hazards issue, using the standards in [new] § 50.92 (and whatever examples are applicable) . . . .
>
> "When the staff receives the amendment request, . . . it makes a preliminary decision -- called a 'proposed determination' -- about whether the amendment involves no significant hazards considerations. Normally, this is done before completion of the safety analysis or evaluation. . . .
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> "At this stage, if the staff decides that no significant hazards consideration is involved, it can issue an individual Federal Register notice or list this amendment in its periodic -- biweekly -- publication in the Federal Register . . . (a) providing a description of the amendment and of the facility involved, (b) noting the proposed no significant hazards consideration determination, (c) soliciting public comment on the determinations which have not been previously noticed, and (d) providing for a 30-day comment period.

"While it is awaiting public comment, the staff proceeds with the safety analysis. After the public comment period, the Commission reviews the comments, if any, considers the safety analysis, and makes its decision on the amendment request. If it decides that no significant hazards consideration is involved, it either may publish an individual 'notice of issuance' under § 2.106 or, normally, a notice of issuance in its system or periodic Federal Register notices, thus closing the public record. . . . [The Commission] does not normally make and publish a 'final determination' on no significant hazards consideration, unless there is a request for a hearing as well as an NRC decision to make the amendment immediately effective before the hearing. . . .

"If it receives a hearing request during the comment period and the staff has decided that no significant hazards consideration is involved, it prepares a 'final determination' on that issue which considers the request and the public comments, makes the necessary safety and public health findings, *and proceeds to issue the amendment*. The hearing request is treated the same way as in previous Commission practice, that is, by providing any requisite hearing *after the amendment has been issued*. As explained above, where the Commission has determined that no significant hazards consideration is involved, the legislation permits the Commission to make an amendment immediately effective in advance of the holding and completion of any required hearing, notwithstanding the pendency before it of a request for a hearing."

51 Fed. Reg. 7759-62 (emphases added). The Commission makes explicit the proposition that, while the Sholly legislation and regulations authorize pre-hearing issuance of an amendment that involves no significant hazards consideration, exercise of this power is a matter of Commission discretion:

"The staff could also receive an amendment request with respect to which it finds that it is in the public interest to offer an opportunity for a prior hearing. In this case, it would use its present individual notice procedure to allow for hearing requests. . . ."

51 Fed. Reg. 7763.

In all of this minute detail, there is not a hint that a Licensing Board has been delegated any power to review or revise either the determination that an amendment request involves no significant hazards or that the amendment should be made effective prior to the completion of any hearings. The Movants, however, necessarily contend that the Commission intended such a delegation, merely having forgotten to mention so important a provision in either the careful and detailed regulations or the careful and

detailed Federal Register explanation of them. This argument is based on nothing, and its persuasive force should be measured by its basis.

That the Commission carved no role for the Licensing Board in the administration of the Sholly procedures is manifest from the purpose, the structure and the context of those regulations. The manifest purpose of the so-called Sholly regulations was to authorize the Staff to issue immediately effective license amendments even where the amendment was squarely the subject of an admitted contention, which Staff action was to be subject only to the Board's final determination -- in the form of an initial decision -- on the merits of the contention. At the core of the Commission's concern was delay:

> "The Commission . . . believed that, since most requested license amendments involving no significant hazards consideration are routine in nature, prior hearings on such amendments could result in unnecessary disruption or delay in the operations of nuclear power plants by imposing regulatory burdens unrelated to significant safety matters."

51 Fed. Reg. 7746. It is precisely such delay that the Movants by the Joint Motion urge this Board to impose. It is, however, plainly the Commission's intent that the question of whether there is to be delay in the effectiveness of an amendment is to be made by it and the Staff. Where that determination has been made -- and manifest by the issuance of the amendment -- the question of "staying" the effectiveness of an amendment pending the outcome of proceedings before a Licensing Board has already been made.

That no review role was intended for Licensing Boards is also plainly revealed by the inevitable consequences of the position for which the Movants contend. If this Board had jurisdiction over the more remote issue raised by the Joint Motion, then there cannot be a single case conducted under the Sholly Regulation procedures in which a motion to stay the effectiveness of the Staff's action could not be made. Such motions, indeed, can be clearly foreseen to be *de rigueur* in all such cases, leading to inevitable questions concerning the form of the motion, the time within which the motion is to be filed, the standards by which the motion is to be judged, and the manner and means of appellate review. It is incomprehensible that, if the Commission contemplated that Licensing Boards might entertain motions that, if permissible, become routine, the regulations

spelling out the Sholly procedures in such detail would omit all reference to such a practice. The omission is stentorian, and its genesis lies in the fact that the Commission, of course, had nothing of the sort in mind. To the contrary, Board authority to adjust Staff actions under the Sholly procedures by other than final decisions is the antithesis of what the Commission sought to accomplish by its promulgation.

This conclusion is confirmed by the Commission's own observation in *Diablo Canyon*, where similar requests to stay Staff issuance, under the Sholly regulations, of a pre-hearing amendment had been presented to, and denied by, both a Licensing Board and an Appeal Board:

> "Because the petitioners did not challenge any Licensing Board or Appeal Board decision *neither Board had jurisdiction to hear the stay request.*"

*Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 4 (1986) (emphasis added). It bears emphasis that this holding on the Boards' lack of jurisdiction included a lack of jurisdiction to entertain a stay request premised on environmental claims.

## II. THE REQUESTED STAY WOULD BE A FUTILITY, BECAUSE VERMONT YANKEE HAS THE AUTHORITY TO INSTALL THE RACKS IN QUESTION UNDER 10 C.F.R. § 50.59.

More than once during the hearing before this Board on June 28th, the Movants analogized their motion to a traditional motion for preliminary injunctive relief and this Board to a traditional court sitting in equity. Prescinding from whether the institutional limits on this Board's jurisdiction permit such an analogy, one of the most time-honored precepts of equitable jurisdiction is that "Equity will not engage in a futility."[13] Lying behind this hoary maxim is the important notion that the courts do not permit their

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[13] "A court of equity will not do a useless or vain thing . . . Accordingly, even though the court has jurisdiction, it will not lend its powers to accomplish a useless purpose . . ." C.J.S. Equity §16; *United States v. General Motors Corp.*, 234 F. Supp. 85, 89 (S.D. Cal. 1964), *rev'd on other grounds*, 384 U.S. 127 (1966). "Courts also refuse to grant equitable relief where, if granted, one of the parties may nullify the action so taken by the exercise of a discretionary right which either the law or his contract has conferred on him." C.J.S. Equity §16; *Koss v. Continental Oil Co.*, 52 N.E.2d 614, 616 (Ind. 1944); *American Savings Bank of Marengo v. Willenbrock*, 228 N.W. 295 (Iowa 1929).

authority to be employed except where doing so will clearly vindicate some right of a party. A court of equity would not suspend License Amendment 104, even if it thought its rectitude demonstrably dubious, where that suspension would, because of Vermont Yankee's independent right to continue installing the new racks, be a futile act.

Certainly, even assuming this Board to have equitable powers, which surely it does not, this Board should be no less insistent that its authority not be invoked in a futile fashion. Because Vermont Yankee has the authority to install the new racks without reliance on License Amendment 104, the motion to stay the effectiveness of that amendment should be denied. This is true even if the Board had power to stay its effectiveness, which it does not, and even if the erroneous nature of that amendment had been demonstrated, which it has not.

## III. ON ITS MERITS, THE JOINT MOTION SHOULD BE DENIED BECAUSE THE APPLICABLE STANDARDS HAVE NOT BEEN MET.

### A. The Standards.

Whether what is sought by the Joint Motion is considered a preliminary injunction, a stay pending appeal in the common law sense, or a stay issued pursuant to 10 C.F.R. § 2.788, the standards are essentially the same. The party seeking such extraordinary relief is required to make four affirmative showings:

> "(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 [moving] party will be irreparably injured unless a stay is granted;
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> "(3) Whether the granting of a stay would harm other parties; and
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> "(4) Where the public interest lies."

10 C.F.R. § 2.788(e). See also, *e.g.*, *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (standard in federal appellate courts); *Public Service Company of Oklahoma* (Black Fox Station, Units 1 and 2), ALAB-505, 8 NRC 527, 529, *reconsideration denied*, ALAB-508, 8 NRC 559 (1978) (standard in the NRC prior to the promulgation of section 2.788); *LeBeau v. Spirito*, 703 F.2d 639, 642 (1st Cir. 1983) (standard for preliminary

injunctions in the federal trial courts). The standards of section 2.788 are what the Commission itself applies in considering a supervisory stay of Staff action under the Sholly regulations. *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 5 (1986) (emphasis added).

The burden of persuasion as to 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), and a failure to address all four of the standards may be fatal. *Kansas Gas & Electric Co.* (Wolf Creek Generating Station, Unit 1), ALAB-412, 5 NRC 1415, 1417 (1977). The "irreparable injury" standard, however, is the most significant. *Metropolitan Edison Company* (Three Mile Island Nuclear Station [illegible]), CLI-84-17, 20 NRC 801, 804 (1984), quoting *Westinghouse Electric [illegible] Exports to the Philippines)*, CLI-80-14, 11 NRC 631, 662 (1980).[14] Speculative assertions of injury inevitably fail:

> "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 that the injury claimed is "both certain and great."'"

*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 (D.C. Cir. 1985). Notably, continued expenditures by a utility (for such things as engineering and procurement) cannot be the basis for an irreparable injury showing, because the utility could continue doing this even if a stay were to issue. *Long Island Lighting Co.* (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-521, 9 NRC 51, 52-53 (1979).

Where such a motion is grounded upon facts not of record, which it must almost inevitably be in order to carry the burdens of points (2) (irreparable harm to the movant if order denied) and (3) (lack of harm to

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[14]See also *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 746 (1985); *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-794, 20 NRC 1630, 1633 (1984); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-789, 20 NRC 1443, 1446 (1984).

the respondent if order granted), it must be accompanied by affidavits of competent witnesses. 10 C.F.R. § 2.788(b)(4).

A motion for extraordinary relief must be presented in timely fashion; in the case of a motion for a stay, the motion must be presented within ten days of the order of which a stay is sought. 10 C.F.R. § 2.788(a).

### B. The Movants Have not Demonstrated a Likelihood of Success on the Merits.

#### 1. Likelihood of Success on What?

One normally begins by identifying the question, generally an appellate claim of error below, on which the movant claims the required prospect of success. Talismanic of the unusual -- indeed, unique -- nature of the Joint Motion is the fact that no such issue is identified by the Movants.

Only three possibilities come to mind, though the Movants cannot be determined to have a reasonable probability of success on any. The first is reversal of the rejection of former Contention 2; the second is reversal of the rejection of former Contention 3. Finally, it may be the Movants' contention that the making of the "no significant hazards consideration" finding by the Staff was in error, the probability of their convincing this Board of which supplies the foundation for ancillary relief.[15] We labor through each of these ill-defined hypothetical paths to the requisite likelihood of success *seriatim*.

#### 2. The Movants Cannot Demonstrate Likelihood that Exclusion of Contention 2 was Error.

The Appeal Board has ruled that admission of Contention 2 was error and reversed. *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-869, 26 NRC 13 (1987), *reconsideration denied*, ALAB-876, 26 NRC 277 (1987). This Licensing Board is bound by that ruling. *South Carolina Electric & Gas Co.* (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140, 1150 (1981); *Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 465 (1982).

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[15]See Joint Motion at 8-9, pars. 24-25.

### 3. The Movants Cannot Demonstrate Likelihood that Exclusion of Contention 3 was Error.

The Appeal Board has ruled that admission of Contention 3 was error and reversed. *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-869, 26 NRC 13 (1987), *reconsideration denied*, ALAB-876, 26 NRC 277 (1987). This Licensing Board is bound by that ruling. *South Carolina Electric & Gas Co.* (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140, 1150 (1981); *Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 465 (1982).

### 4. The Movants Cannot Demonstrate that Conclusion of "No Significant Hazards Considerations" was Error.

The Commission's regulations declare that the "no significant hazards consideration" made by the Staff is not reviewable, save only by the Commission at its own initiative. Vis-a-vis the rest of us, including this Board, that finding is "final." 10 C.F.R. § 50.58(b)(6). It therefore follows that this Board cannot even assess, much less reject, the appropriateness of the Staff's finding, and it therefore follows in turn that such a theory cannot supply the requisite likelihood of success on the merits.[16]

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[16]There is an additional reason why the Movants could not sustain their "likelihood of success on the merits" burden on this score. Doing so would require the demonstration that the VYNPS spent fuel pooling cooling system lacks sufficient heat transfer capability (assuming a single active failure) to avoid the necessity of reliance upon the RHR system -- as a matter of fact (as opposed to simply as a matter of allegation; see Joint Motion at 8, par. 24). The Movants have offered no affidavits, and thus have abjured such a factual showing entirely. This, no doubt, was for good reason: The heat load on the spent fuel pool following a 1/3 core refueling, with a maximum of 2,000 spent fuel assemblies in the pool, is $8.12 \times 10^6$ BTU/hr, and, with a maximum of 2,870 spent fuel assemblies in the pool, is $9.1 \times 10^6$ BTU/hr. The heat transfer capability of the existing VYNPS spent fuel pool, after an hypothesized single active failure, is $9.1 \times 10^6$ BTU/hr (pool temperature = 150°F), and the heat transfer capability of the enhanced VYNPS spent fuel pool cooling system, which will be in place prior to reliance upon any authority to increase the population of the pool above 2,000 assemblies, after an hypothesized single active failure, is $11 \times 10^6$ BTU/hr. (pool temperature = 150°F). Regardless, the burden is upon the Movants; it has neither been carried nor even attempted; and on this ground alone the motion must be denied.

### C. The Movants Have not Demonstrated Irreparable Harm.

The Movants make no claim that they will suffer *any* harm -- irreparable or otherwise -- from the re-racking itself. Rather, the only claim of harm is that accomplishment of the re-racking will load sufficient "sunk costs" onto any subsequently performed environmental cost/benefit balance as to alter the likely outcome. As the hypothesis goes:

1) The Staff will eventually issue its environmental assessment on the increase of the spent fuel pool capacity.

2) In that assessment, the Staff will identify some significant environmental costs of the re-racking with higher density racks that might possibly be avoided by some alternative means of dealing with the lack of adequate spent fuel pool capacity.

3) At the same time, in that assessment, the Staff will identify some alternative to re-racking with higher density racks that yields a significantly lesser environmental cost.

4) The Applicant will respond that the alternative should be rejected because its environmental benefits do not outweigh its economic costs.

5) The Staff will conclude that the Applicants' argument is correct taking into account the sunk costs incurred following denial of the motion for a stay, but would not be correct had the stay motion been granted and those sunk costs not been incurred.

See *Tr.* 266-67 (June 28, 1988).

This argument is thrice fatally flawed: (i) the incurring of incremental sunk costs is categorically excluded as a basis for grounding stays before the Commission; (ii) the hypothesized harm is not immediate and irreparable, but rather speculative and remote; and (iii) the hypothesized harm is not irreparable at all, but rather self-correcting.

#### 1. A Stay of Licensing Authorization May not be Predicated on the Incurring of Incremental "Sunk Costs" by the Licensee.

The rule before the Commission is that continued expenditures by a utility (for such things as engineering and procurement) cannot be the basis for an irreparable injury showing, because the utility could continue doing this even if a stay were to issue. *Long Island Lighting Co.* (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-521, 9 NRC 51, 52-53 (1979).

See also *Long Island Lighting Co.* (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-481, 7 NRC 807, 808 (1978).

**2. The Asserted Harm is not Immediate, but Rather Remote and Speculative.**

As is detailed above, the asserted harm is, in fact, the product of a number of uncertain events. The probability of many of the events is low, and the concurrent probability of all of the events is nil.

We start, as we must, with the lessons of history. The Commission has entertained about 100 applications for spent fuel pool expansions, and none has been denied.[17] Nor has any one of them been determined to involve even enough environmental impacts to require the preparation of an environmental impact statement.[18] Consequently, no assessment of alternatives has been either required[19] or meaningful.[20] All of this the Commission has

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[17]See 51 Fed. Reg. 7753-54 (March 6, 1986). As of that date, the Commission had received 96 applications for spent fuel pool expansion by reracking with high density racks, of which 85 had been granted and the balance were in process. "As of now, every operating reactor except Big Rock Point has received approval for at least one reracking or had the closer spacing storage method approved with their initial license." *Id.*

[18]Under 10 C.F.R. § 51.20(a)(1), only those actions constituting "a major Federal action significantly affecting the quality of the human environment" require the preparation of an environmental impact statement. Section 51.22(c)(9) categorically exempts from the set of actions potentially constituting such a major federal action operating license amendments which the Commission has determined (i) involve no significant hazards considerations, (ii) involve no "significant change in the types or significant increase in the amounts of any effluent that may be released offsite," and (iii) involve "no significant increase in individual or cumulative occupational radiation exposure." The Movants make no claim of any increase in effluent or occupational exposure. Rather, they claim only that the Commission has erred in classifying the amendment one involving "no significant hazards consideration." This, however, the Commission has determined, both for License Amendment 104 and for the spent fuel pool expansion itself. Thus, inevitably the Joint Motion seeks to have this Board review and reverse a "no significant hazards consideration" determination, something this Board has been explicitly denied jurisdiction to do.

[19]Under 10 C.F.R. § 51.30(a)(1)(ii), a discussion of alternatives in a matter not requiring the preparation of an environmental impact statement is required only to the extent "required by section 102(2)(E) of" the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(E). The statute, in

confirmed in its 1979 *Generic Environmental Impact Statement on Handling and Storage of Spent Light Water Power Reactor Fuel*, NUREG-0575.[21] It necessarily follows that, if the probability of finding *any* environmentally preferable alternative borders on zero, the probability that an environmental cost/benefit balance would be affected by the expenditure of "sunk costs" is even less.

This remote possibility of any harm at all is independently sufficient to defeat the Joint Motion.

> "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 that the injury claimed is "both certain and great."'"

*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 (D.C. Cir. 1985). The asserted harm is not certain, but rather remote (at best). The asserted harm is not great, but rather minute (at best). The prerequisite does not exist; the motion must be denied.

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turn, requires such an assessment of alternatives only for proposals which involve "unresolved conflicts concerning alternative uses of available resources." *Id.* There is neither the assertion nor the basis for an assertion that the re-racking involves such a resource conflict.

[20]The utility, if any, in a discussion of alternatives is the potential for identifying an alternative that yields the same non-environmental benefit at a significantly lesser environmental cost. If the environmental cost of the proposal in question is itself negligible, then the possibility of the existence of one with significantly lesser environmental costs (regardless of its non-environmental utility) is remote. Sometning cannot be significantly smaller than essentially zero.

[21]See, *e.g.*, *id.*, Volume 1, Text, § 4.1.1.1: "Increasing the number of assemblies stored in existing nuclear power plant fuel pools will not cause any new environmental impacts. The amount of waste heat emitted by the plant will increase slightly (less than one percent), resulting in *no measurable increase in impact upon the environment*." (Emphasis added.) Also: "The storage of [light water reactor] spent fuels in water pools has an insignificant impact on the environment, whether at [at reactor] or at [away from reactor] sites." *Id.*, Volume 1, Text, § 8, Finding 4.

### 3. The Asserted Harm is Not Irreparable; to the Contrary, It is Self-Correcting.

It is, for the reasons set forth above, at best a remote possibility that the Staff might eventually determine, on the basis of an environmental cost benefit balance, that some alternative to spent fuel pool expansion would have been preferable *but for* the incremental expenditure by Vermont Yankee of additional "sunk costs" following the issuance of License Amendment 104. Indeed, even the remote probability event appears to be impossible when it is remembered that the bulk of the expenditures were, in fact, made *prior to* the issuance of License Amendment 104. If, notwithstanding all of these compound improbabilities, we nonetheless assume the event were to occur, it still does not -- and cannot -- result in irreparable harm. This is so because, were it to be determined that the intervening expenditure of "sunk costs" had tilted the environmental cost/benefit balance, and were it to be further determined that these expenditures shouldn't have been made, then the harm is entirely self-correcting: the environmental cost/benefit balance can be struck without considering those expenditures. Harm that can be undone by a simple fiat is the antithesis of irreparable harm.

On June 28th this Board denied the motion for an immediate stay upon its ruling "that irreparable injury has not been shown by the moving parties." *Tr.* 316 (June 28, 1988). The Joint Motion requires no less in the way of irreparable injury, but the Movants have offered no more than they did previously.

### D. The Movants Have not Demonstrated that the Requested Stay Would Not Harm Vermont Yankee, and, in fact, Great Harm Would Result to Vermont Yankee and the Ratepayers if the Stay Were Granted.

One of the required demonstrations that must be made in support of a request such as the Joint Motion is that its allowance will not cause significant injury to the party against whom the request would work. This factor is even more important before this agency, which, unlike its judicial counterparts deciding cognate requests, does not have the apparent authority to require Movants to bond an obligation to make good the damage done.

Compare Fed. R. Civ. P. 65(c).[22] The Joint Motion does not even address this point, while at the pre-hearing conference the Movants seemed to treat the question as trivial and offered only a speculation based on a premise that turned out to be demonstrably false.[23]

Submitted herewith is the affidavit of Mr. Warren P. Murphy, whose testimony as to the nature of the dilemma faced by Vermont Yankee, and the consequences of its having elected the path the Movants would now thrust upon it, stands in stark contrast to the Movants' muteness on this important criterion.

As the circumstances have been rehearsed in some detail in the pre-hearing conference, we are prepared to let Mr. Murphy's affidavit speak largely for itself. It suffices to observe the obvious: from the perspective of when Vermont Yankee's decision to proceed with the re-racking was made, to have made any different decision would have been groundless, at best, and potentially irresponsible. The new racks are equally functional whether or not the nearly certain eventual approval of the spent fuel pool expansion occurs, while their costs have, as a matter of practical necessity, largely already been incurred. On the other hand, the course advocated by the Joint Motion would visit concrete economic and other penalties upon Vermont Yankee, upon the ratepayers whom it serves, upon the personnel who work at the plant, and upon the environment at large. These realities, essentially undeniable and, on this record, entirely undenied, compel the denial of the Joint Motion. See *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 13-14 (1986).

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[22]"No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. . . ."

[23]See note 4, *supra*.

**E. The Movants have not Demonstrated that the Stay is in the Public Interest.**

During the pre-hearing conference, the Board propounded to the Commonwealth of Massachusetts an astute question, which the Commonwealth never answered:

> "Mr. Dean, would you -- would [the] Commonwealth find it preferable for Vermont Yankee to install a certain number of the old style racks, enough to accommodate the next refueling and full core offload? To the extent they could do so, would you find that preferable to them putting in the new racks?

*Tr.* 278 (June 28, 1988). This is a reasonable framing of the important question: Would it be in the public interest for this motion to be granted (assuming in all other respects it was susceptible of being granted)?

While the Movants are free to avoid the question, as they have in the Joint Motion and did at the pre-hearing conference, this Board should not. Nor is the answer in any genuine doubt. For the same reasons as are set forth in Mr. Murphy's affidavit, granting this Joint Motion (were its grant sufficient to interrupt the on-going re-racking) would produce certain and near-certain adverse impacts to the public. These include, but are not limited to, the wasting of other people's money. They extend to the unnecessary and duplicative movement of spent fuel assemblies, the generation of unnecessary waste, the exposure of plant personnel to unnecessary radiation doses, and the necessity of dealing with situations for which solutions presently exist that won't be available at a later time (the off-site shipment of low-level waste and the temporary storage of fuel assemblies once sufficient empty cavities to permit an orderly fuel movement have been lost).

To be sure, none of these adverse public consequences is, by itself, earth shaking. It is conceivable that incurring them could be worth some greater good. But one has to ask: What greater good? That question hasn't been answered. We submit it cannot be answered, and for that reason alone the Joint Motion should be denied.

## Conclusion

For the foregoing reasons, the Joint Motion should be denied.

Respectfully submitted,

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Dated: July 7, 1988.

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CERTIFICATE OF SERVICE

I, R. K. Gad III, hereby certify that on July 7, 1988, I made service of the within document in accordance with the rules of the Commission by mailing a copy thereof postage prepaid to the following:

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