UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

before the

ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

ON A RULING REFERRED BY THE
ATOMIC SAFETY AND LICENSING BOARD

BRIEF OF THE LICENSEE, VERMONT YANKEE NUCLEAR POWER CORPORATION

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BRIEF OF THE LICENSEE, VERMONT YANKEE NUCLEAR POWER CORPORATION

ISSUES PRESENTED FOR REVIEW

Whether, on the occasion of the Ninth Circuit's decision in *Sierra Club* or otherwise, the Licensing Board has jurisdiction to disregard the direction provided to it by this Appeal Board in ALAB-869 and ALAB-876?

Whether, on the occasion of this "referral" or otherwise, this Appeal Board now has jurisdiction again to reconsider the questions settled in ALAB-869 and ALAB-876, which have long since become final agency action.

Whether, in a case not subject to judicial review in the Ninth Circuit, the Commission is obliged to admit for litigation a contention to the effect that the Commission is required to prepare an environmental impact statement to consider the enhanced consequences that a proposed license amendment allegedly would entail in the event of a beyond design-basis, severe accident?

Whether, in the event the Commission is not so obliged, this Appeal Board may or should conclude that such a contention should be admitted as a matter of discretion?

STATEMENT OF THE CASE

A. Prior Proceedings

On April 25, 1986, Vermont Yankee Nuclear Power Corporation (the "Licensee"), the holder of a license to operate Vermont Yankee Nuclear Power Station ("VYNPS"), submitted an application for a license amendment. The amendment was for a truly garden-variety spent fuel pool expansion, to be accomplished by "re-racking" the pool with new racks that would permit, by means of a closer spacing of spent fuel assemblies, more assemblies to be stored in the same physical pool. The Commission has received about 100 of these applications from its licensees, and not one has ever been denied or the subject of an environmental impact statement ("EIS") thought to be required by the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* ("NEPA") or suitable for preparation (optionally) under the Commission's Policy Statement on NEPA.[1]

Following certain procedures not relevant to this appeal, New England Coalition on Nuclear Pollution, Inc. ("NECNP") and the Commonwealth of Massachusetts ("Commonwealth") intervened in opposition to the approval of the proposed license amendment. Each filed proposed contentions seeking to litigate either the safety or environmental implications of an ill- or not at all defined, but undeniably beyond design-basis, hypothesized accident (sometimes referred to as a "severe accident" or a "Class 9 accident") at VYNPS; the theory of the proposed contentions was *not* that the proposed amendment would alter the remote *probability of occurrence* of such an accident at VYNPS, but rather that, because of the closer spacing of the spent fuel assemblies, the proposed amendment would increase the potential *consequences* of such an accident (in the unlikely event it were to occur).

On May 26, 1987, the Licensing Board admitted a contention created by combining and redrafting various portions of the NECNP and Commonwealth proposed contentions. This contention became known as "Contention 2" and it read as follows:

> "The proposed amendment would create a situation in which consequences and risks of a hypothesized accident (hydrogen detonation in the reactor building) would be greater than those previously evaluated in connection with the Vermont Yankee reactor. This risk is sufficient to constitute the proposed amendment as a 'major federal action significantly affecting the quality of the human environment' and requiring the preparation and issuance of an [EIS] prior to approval of the amendment."

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[1] "Nuclear Power Plant Accident Considerations Under the National Environmental Policy Act of 1969," 45 Fed. Reg. 40,101 (June 13, 1980) (hereinafter "NEPA Policy Statement").

Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), LBP-87-17, 25 NRC 838, 864 (1987). The Licensing Board recognized that severe accident contentions are not admissible on the so-called "radiological health and safety" side of NRC licensing litigation,[2] and it appears to have recognized, as well, that the preparation of an EIS to assess the environmental risks and consequences of a severe accident is not required by NEPA. Nonetheless, the Licensing Board admitted the contention on the apparent rationale that: (i) the Commission did not bar *environmental* consideration of severe accidents in its Severe Accident Policy[3] and (ii) the Commission had exercised its discretion in its NEPA Policy Statement to consider such environmental consequences.[4] In essence, the Licensing Board drafted a contention to the effect that the Commission had elected as a matter of discretion to prepare an EIS to consider the environmental consequences of operating license amendments, and this election was binding upon the Staff.

On appeal under 10 C.F.R. § 2.714, this Appeal Board reversed the admission of Contention 2. *Vermont Yankee Nuclear Power Corporation* (Vermont Yankee Nuclear Power Station), ALAB-869, 26 NRC 13, *reconsideration denied*, ALAB-876, 26 NRC 277 (1987). Noting that the environmental consequences of the hypothesized accident upon which the contention was founded had never been assessed for the Vermont Yankee operating license,

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[2]LBP-87-17, 25 NRC at 846-47. As the Licensing Board noted, "The accident scenario that is sought to be considered is clearly a 'beyond design basis accident.' There is no allegation (in this contention) that the proposed license amendment fails to meet one or more safety standards (regulation or other criteria). The Commission's Policy Statement on Severe Reactor Accidents, 50 Fed. Reg. 32,138, 32,144 (Aug. 8, 1985), explicitly removes plant-specific reviews of control or mitigation of severe accidents from the review of operating license applications. The same policy 'also applies to any hearing proceedings that might arise for an operating reactor' -- such as the instant proceeding. . . . Litigation of NECNP Contention 1 as a safety-based contention seeking denial of the proposed amendment as a means of controlling or mitigating the alleged enhanced consequences of a beyond-design-basis accident clearly is proscribed by the Policy Statement." (Footnote omitted.)

[3]LBP-87-17, 25 NRC at 854-55.

[4]LBP-87-17, 25 NRC at 855. Note that the proposition denoted as (i) in text above does not justify admitting the contention. Rather, the contention is admissible, logically, only on the strength of the proposition denoted as (ii) in text above, which proposition this Appeal Board squarely reversed in ALAB-869. Thus, the Licensing Board's lament that its initial rationale had been ignored by this Appeal Board is without basis.

and were not required to be,[5] this Appeal Board held: (i) that as a matter of law the preparation of an EIS was not required by NEPA,[6] (ii) that as a matter of the Commission's discretion, the Commission had not elected to prepare an EIS where not required (only to discuss in an EIS already required certain matters the discussion of which was not required),[7] and (iii) that, as a matter of the Commission's discretion, the NEPA Policy Statement to which the Licensing Board had referred did not apply to license *amendments*.[8] On reconsideration, this Appeal Board reiterated its holdings:

> "[O]ur primary conclusion, which we reaffirm now, is that the particularly contention involved here -- premised on a beyond design-basis reactor accident -- is not admissible because (1) as a matter of law, NEPA does not require the Commission to consider the risks of such severe accident scenarios, and (2) as a matter of discretion under its NEPA Policy Statement, the Commission has not authorized the consideration of such [a] contention in a license amendment proceeding."

ALAB-876, 26 NRC at 285.

Petitions for Commission review of the exclusion of Contention 2 effected by ALAB-869 were filed by the intervenors and renewed following

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[5]ALAB-869, 26 NRC at 30.

[6]ALAB-869, 26 NRC at 30-31, citing, *inter alia*, *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287 (D.C. Cir. 1984), *aff'd en banc*, 789 F.2d 26, *cert. denied*, 107 S. Ct. 330 (1986); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 697, 698 (1985), *aff'd in part and review declined*, CLI-86-5, 23 NRC 125 (1986); *Public Service Electric and Gas Co.* (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 62-63 n.29 (1981), *aff'd sub nom. Township of Lower Alloways Creek v. Public Service Electric and Gas Co.*, 687 F.2d 732 (3d Cir. 1982).

[7]ALAB-869, 26 NRC at 31: "[B]y its terms, the [Commission's NEPA Policy Statement] applies to those cases where there has already been a determination that a major federal action significantly affecting the environment is involved and hence an EIS is necessary; it therefore directs what should be included in the EIS (i.e., consideration of the environmental impacts of a severe accident), not whether the EIS is required in the first place. . . . Thus, before the NEPA Policy Statement is even invoked, there must be some basis for requiring an EIS *other than* a claim of increased risk from a beyond design-basis accident scenario." (Emphasis in original; citation omitted.)

[8]ALAB-869, 26 NRC at 31.

the rendition of ALAB-876. After extended consideration, the Commission denied review, and these decisions became final agency action on March 11, 1988.[9]

One might have thought such dispositive treatment to have forever interred Contention 2. However, it proved more hardy.

Thus, the same contention (rechristened "Environmental Contention 1") came back to the Licensing Board a second time. Coupled with an argument to the effect that in ALAB-869 all this Board had done was hold Contention 2 to be premature, the intervenors re-proffered the contention upon the occasion of the publication of the Staff's Environmental Assessment. The Licensing Board rejected (properly) the "premature" ruse and it ruled (properly) that the inadmissibility of the contention had been conclusively established by the prior decisions of this Appeal Board, by which it was bound. *Vermont Yankee Nuclear Power Corporation* (Vermont Yankee Nuclear Power Station), LBP-88-26, 28 NRC 440 (1988).[10] In a concurring opinion, the Chairman of the Licensing Board indicated his disapproval of this Board's decisions but acknowledged that the question was no longer open at the licensing board level.[11]

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[9]"Memorandum for Board and Parties," by Samuel J. Chilk, Secretary of the Commission, dated March 17, 1988.

[10]The Licensing Board took note of the fact that, on reconsideration of ALAB-869, the proponents of the rejected contention had argued to this Appeal Board that their hypothesized accident was not beyond design-basis (an argument that had not been presented to the Licensing Board initially), which argument was now pressed to the Licensing Board under the guise of re-proffering the contention on account of the publication of the Staff's Environmental Assessment. LBP-88-26, 28 NRC at 444. The Licensing Board concluded that, on its face, the accident upon which the contention was premised is a beyond design-basis accident. *Id.* at 444.

[11]In his concurrence, the Chairman began by noting his agreement both that the Licensing Board was bound by ALAB-869 and ALAB-876, and that the assertion that the hypothesized accident could occur within the VYNPS design basis was untenable. "What I disagree with is the conclusion in ALAB-869 and ALAB-876 that the original Contention 2 is not litigable, either as a matter of law or of Commission discretion. I believe that both original Contention 2 and the essentially similar Environmental Contention 1 are litigable, as least as a matter of discretion, under applicable Commission Policy Statements." LBP-88-26, 28 NRC at 451-52. While Judge Bechhoeffer apparently agrees that severe accidents are not required to be analyzed under NEPA, 28 NRC at 452, or by the Commission's NEPA Policy Statement, 28 NRC at 453, he now (compare *supra* at nn. 3 & 4 & n.4) apparently views their consideration to be required by the Commission's Severe Accident

On November 30, 1988, the Court of Appeals for the Ninth Circuit rendered a curious decision the effect of which was to reverse an Appeal Board decision affirming the exclusion of a severe accident environmental contention. *Sierra Club v. NRC*, 862 F.2d 222 (9th Cir., Nov. 30, 1988).[12] The rationale of the *Sierra Club* decision, as is set forth below, is not pellucid and, for this reason, its application to other cases is something of a mystery.[13]

Policy Statement. *Id.* In Judge Bechhoeffer's view, the Commission's safety Policy Statement was intended as a means of amending the scope of the Commission's NEPA policy statement, so as to render admissible an *environmental* severe-accident contention that would be inadmissible under the NEPA Policy Statement as issued: "In sum, by incorporating the methodology of the NEPA Policy Statement, the Severe Accident Policy Statement did not also incorporate the limitations on applicability of the NEPA statement." 28 NRC at 454.

While the Licensing Board in its most recent decision articulates the complaint that this Appeal Board "did not directly focus on our rationale for accepting the severe-accident contention under the authority of the Commission's then recently issued Severe Accident Policy Statement," LBP-89-6, Slip Opinion at 11, the fact is that the Appeal Board was fully aware of the Licensing Board's rationale as set forth in LBP-87-17. See ALAB-869, 26 NRC at 29. What this Appeal Board did in ALAB-869 was to reject this rationale when it ruled that the Commission considers the environmental implications of severe accidents only under (and to the extent and in the circumstances dictated by) its NEPA Policy Statement. It does not apparently seem obvious to the Licensing Board Chairman that, had this Appeal Board elided so crudely over a Commission-intended amendment to its NEPA Policy Statement, the Commission is not likely to have allowed ALAB-869 and ALAB-876 to stand without further review.

[12]On February 12, 1989, the Court of Appeals modified its decision in one respect (concerning footnote 6 on the "late-filed contention" standards) not material to the matter now before this Appeal Board.

[13]The Court of Appeals nowhere rejects the legal proposition that preparation and publication of an EIS to consider the environmental implications of severe accidents is not required by NEPA; neither does it reject nor even does it cite the plethora of decisions to this effect. Nor does that decision appear to reject (or, again, even to cite) the time-honored requirement of the Commission (in emulation of the courts) that litigants are obliged to plead something upon which (if the allegations are sustained at trial) relief can be granted, as a condition upon obtaining a hearing (and as means of avoiding wasting the tribunal's time with futile litigation). If these propositions are intact, then so is the disposition of the contention at issue

Predictably, the perennial contention then surfaced for yet a third time. This time the Licensing Board was requested to treat the prior rulings of this Board as effective nullities, perforce the Ninth Circuit decision. On February 2, 1989, the Licensing Board, republishing its disapproval of the substance of this Appeal Board's prior rulings, granted the requested relief. At the same time, it referred its interlocutory rulings to this Board.[14] *Vermont Yankee Nuclear Power Corporation* (Vermont Yankee Nuclear Power Station), LBP-89-6, 29 NRC ____ (February 2, 1989).

In LBP-89-6, the Licensing Board dismissed as merely "technical" the argument, advanced both by the Staff and the Licensee, that it remained as bound by ALAB-869 and ALAB-876 as it had on the occasion of the second presentation of the same contention:

> "The [Licensee] and the NRC Staff each challenge, on technical grounds, the applicability of the *Sierra Club* decision to this proceeding. As they observe, the Vermont Yankee reactor is not located within the confines of the Ninth Circuit. Moreover, the only case before the Ninth Circuit was the *Diablo Canyon*

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by ALAB-869 and ALAB-876.

Whilst one hesitates to speculate, it appears from the face of the Ninth Circuit's decision that it may have labored under the impression that the *only* requirement traditionally imposed upon would-be intervenors in NRC proceedings is that their contentions be set forth with "specificity," together with the impression that, in ALAB-880, the proffered contention was rejected solely on account of a want of the required "specificity." On this view of things, the Court may have concluded either that the contention was rejected improperly because of some requirement not normally imposed on intervenors, or it was rejected improperly because it was adequately specific. If this be so, then the Ninth Circuit has simply misunderstood what one had thought to be the holding of ALAB-880, and what certainly was the holding of ALAB-869 and ALAB-876: namely, that the contention was sufficiently specific to demonstrate a request to litigate something categorically non-litigable under the Commission's judicially-approved governing rules of decision.

[14]See 10 C.F.R. § 2.730(f): "No interlocutory appeal may be taken to the commission from a ruling of the presiding officer. When in the judgment of the presiding officer prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense, the presiding officer may refer the ruling promptly to the Commission . . . ." Under 10 C.F.R. § 2.785(b)(1) "the Atomic Safety and Licensing Appeal Board will also exercise the authority and perform the functions which would otherwise have been exercised and performed by the Commission under §§ . . . 2.730."

> ruling by the Appeal Board (ALAB-880). Further, the 'law of the case' in this proceeding -- specifically, the holding in ALAB-869 and ALAB-876 -- was not directly modified by the *Sierra Club* ruling.
>
> "Although these observations are accurate, we do not subscribe to the view of the [Licensee] and Staff that they prevent our acceptance of the proffered contention. . . .
>
> "For reasons set forth below, we believe that the *Sierra Club* decision seriously undercuts the rationale of the Appeal Board in ALAB-869 and ALAB-876 and, in addition, is consistent with our ruling in LBP-87-17. In particular, *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-880, 26 NRC 449 (1987), which was reversed by the *Sierra Club*, had relied in substantial part on ALAB-869 and ALAB-876. 26 NRC at 460-62. Moreover, the rulings in ALAB-869 and ALAB-876 did not directly focus on our rationale for accepting the severe-accident contention under the authority of the Commission's then recently issued Severe Accident Policy Statement. . . ."

LBP-89-6, Slip Opinion at 10-11 (footnotes omitted). Rather than simply observing that the intervenors had sought relief in the wrong place, as it should have done, the Licensing Board determined to admit the proffered contention and then referring its ruling "*inter alia*, to the Appeal Board . . . ." *Id.* at 12.[15]

It is thus that this matter comes now before this Appeal Board.

B. Facts

VYNPS is an 540 MW(e) boiling water reactor located in Vernon, Vermont. It received a full-power, full-term operating license in 1973. *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-179, 7 AEC 159 (1974), *rev'd sub. nom. Natural Resources Defense Council, Inc. v. NRC*, 547 F.2d 633 (D.C. Cir. 1976), *reversed sub. nom. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), *on remand sub. nom. Natural Resources Defense Council, Inc. v. NRC*, 685 F.2d 459 (D.C. Cir. 1982), *rev'd sub nom. Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462

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[15]It is interesting to note that the Licensing Board did not in LBP-89-6 engage in any extended analysis of *Sierra Club* leading to a conclusion that that decision mandated the acceptance for litigation of Environmental Contention 1. As is set out more fully *infra*, *Sierra Club* does not support the rationale employed by the Licensing Board to admit a beyond design-basis accident contention.

U.S. 87 (1983). At the time of initial licensing, the capacity of the VYNPS spent fuel pool was 600 spent fuel assemblies.

In 1977, the Licensee received an operating license amendment increasing the authorized capacity of the VYNPS spent fuel pool to 2,000 spent fuel assemblies. *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-455, 7 NRC 41 (1978), *aff'd (in relevant part), Minnesota v. NRC*, 602 F.2d 412 (D.C. Cir. 1979). The spent fuel pool expansion was effected by "rack swapping," replacing the existing racks with racks design to hold spent fuel assemblies in greater density.

In 1986, again faced with an impending loss of spent fuel pool capacity, the Licensee submitted another operating license amendment application to the Staff. This amendment, also to be accomplished by rack swapping, would increase the capacity of the spent fuel pool to 2,870 spent fuel assemblies.

The Staff issued a "no significant hazards" finding on May 20, 1988, and it issued a partial operating license amendment (authorizing the rack swapping but not the use of the new racks beyond the existing 2,000 spent fuel assembly storage authorization) at the same time. Actual swapping of racks began in June, 1988, and by December 31, 1988, all of the old racks had been removed, destroyed, and shipped off-site for disposal. All but three of the new racks had been installed by that date, and the three remaining racks are scheduled for installation following the next refueling outage.

ARGUMENT

I. AS THE LICENSING BOARD REMAINED BOUND BY ALAB-869 AND ALAB-876, IT LACKED JURISDICTION TO ADMIT THE CONTENTION IN QUESTION, AND SUCH IS THE RULING THIS APPEAL BOARD SHOULD MAKE OF LBP-89-6.

It is an interesting question whether, in an unrelated proceeding, a licensing board might have elected not to follow ALAB-869 and ALAB-876, either because the hypothetical licensing board thought those decisions incorrect, or because the hypothetical licensing board considered those decisions "inoperative" on account of some intervening Court of Appeals decision. One need not plumb the depths of inter-board *stare decisis*, however, where what is at issue is the effective reversal by a licensing board of a prior decision of the Appeal Board in the same case.

This Appeal Board has previously held the contention in question to be inadmissible as a matter of law. It has directed the subordinate board to exclude the contention. Right or wrong, in fact or in perception, that ruling and that direction are binding upon the Licensing Board in this proceeding unless and until they are reversed by the Commission or vacated by this Appeal Board itself. *Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 465 (1982); *South Carolina Electric & Gas Co.* (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140, 1150 (1981). A Licensing Board simply has no power to declare itself released from the duty of obeisance to Appeal Board orders, regardless of the grounds on which emancipation might be thought to have been effected.[16] Nor is this a mere "technicality;" it is, rather, a jurisdictional limitation intrinsically, inexorably and necessarily concomitant of the hierarchical tribunal structure of which licensing boards and appeal boards are a part:

> "Finally -- and most important to the orderly functioning of the adjudicatory process -- licensing boards are bound to comply with appeal board directives, whether they agree with them or not. The same is true with respect to Commission review of appeal board action and judicial review of agency action. Any other

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[16]It hardly needs saying, but not only does disagreement with the Appeal Board's legal reasoning not warrant subordinate board disobedience, neither does criticism of the Appeal Board's failure to "directly focus" on the unpersuasive rationale below. "Licensing Boards -- in common with trial courts -- have not been given the function of passing their own judgment on the soundness or propriety of the rulings and instructions of a reviewing appellate tribunal, let alone the power, in effect, to nullify them if not to the boards' liking." *South Carolina Electric & Gas Co.* (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140, 1150 (1981).

alternative would, in our view, be unworkable and unacceptably undermine the rights of the parties."

South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-710, 17 NRC 25, 28 (1983).

The Licensing Board's unauthorized assumption of jurisdiction for the purpose of admitting of the contention and then "referring" its decision to this Appeal Board violates both the letter and spirit of the Commission's procedural regulations. LBP-89-6 should be reversed.[17]

II. THE "REFERRAL" OF THE ERRONEOUS RULING SHOULD NOT BE USED TO EFFECT RECONSIDERATION OF ALAB-869 (AGAIN) AND ALAB-876, AFTER THIS APPEAL BOARD HAS LOST JURISDICTION AGAIN TO RECONSIDER THOSE DECISIONS.

Since the intervenors' grievance is with prior decisions of this Appeal Board in ALAB-869 and ALAB-876, it appears anomalous for the intervenors to have sought further relief from the Licensing Board. The reason for the invocation of the convoluted procedure of asking the Licensing Board to reconsider this Appeal Board's decisions no doubt lies in the intervenors' recognition that this Appeal Board would lack jurisdiction to reconsider its prior decisions on a direct request.

This Board rendered its decision in ALAB-869. Petitions for review were filed with the Commission while at the same time reconsideration was sought from this Board. The Commission stayed its consideration; this Board "reaffirmed" its decision; and the Commission then denied review. The disposition of Contention 1 became final agency action nearly a year ago.[18]

It is a settled proposition that, after an Appeal Board has disposed of a given matter, there then comes a time when the Appeal Board no longer has jurisdiction to revisit the same matter. Appeal Board jurisdiction does not end precisely upon rendition of a decision, for Appeal Boards have the power to entertain motions for reconsideration. *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), ALAB-166, 6 AEC 1148, 1150 n.7 (1973). However, once the time for Commission review has elapsed, the jurisdiction of the Appeal Board to deal with the matter theretofore before

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[17]In an apparently unpublished order, the Commission has expressed its "conviction that a stable and predictable regulatory process requires that Licensing Boards adhere to both the letter and spirit of the Commission's procedural regulations and the authoritative case law which as applied those regulations." *Commonwealth Edison Company* (Braidwood Nuclear Power Station, Units 1 and 2), Order of December 5, 1985.

[18]See note 9, *supra*.

it expires. See 10 C.F.R. § 2.717(a); *Washington Public Power Supply System* (WPPSS Nuclear Project Nos 3 & 5), ALAB-501, 8 NRC 381, 382 (1978). And the Commission has held that an appeal board has no jurisdiction to reopen a matter over which it has otherwise lost jurisdiction on the ground of an assertion to the effect that, based on new matters, the appellate process may have been tainted. *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), CLI-86-18, 24 NRC 501, 504 (1986). *A fortiori*, the Commission would not approve of a post-final-agency-action reconsideration by an Appeal Board of one of its decisions thought to have lost potency on account of a subsequently rendered judicial decision in another case.

These principles apply equally where a singular proceeding has been divided into parts. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), ALAB-766, 19 NRC 981, 983 (1984):

> "Under settled principles of finality of adjudicatory action, once we have finally determined discrete issues in a proceeding, our jurisdiction is terminated with respect to those issues, absent a remand order by the Commission or a court issued [order] during the course of its review of our decision. . . . It is clear that where, as here, the Commission declines to review our decision, the final agency determination has been made resulting in the termination of our jurisdiction."

The Appeal Board affirmed this principle in *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-782, 20 NRC 838, 841 (1984), pointing out that jurisdiction over a decided issues ceases "even when other issues may still be before us."[19] See also *Louisiana Power & Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1329-30 (1983); *Public Service Company of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-539, 9 NRC 261, 262 (1979); *Public Service Company of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-513, 8 NRC 694, 695-96 (1978).

Given that the disposition of Contention 2 became final nearly a year ago, and that there is no apparent nexus between the admissibility of Contention 1 and the remaining issues to be litigated in this operating license proceeding, this Appeal Board lacks jurisdiction to reconsider, yet again, the dispositions effected in ALAB-869 and ALAB-876. In the absence of jurisdiction in this Board to engage in such reconsideration, the convoluted procedure of a "referred" ruling by a Licensing Board purporting to effect precisely the same reconsideration cannot be allowed to supplant the jurisdictional want. *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-579, 11 NRC 223 (1980). In *St. Lucie*, intervenors

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[19]In *Diablo Canyon*, the Appeal Board noted that judicial review is not necessary to render the decision final agency action. *Id.* at 841 n.8.

similarly propounded a request for reconsideration after the Appeal Board had lost jurisdiction over the issue. The intervenors recognized the want of jurisdiction in the Board to which they petitioned, but urged that the jurisdictional void could be circumvented by certifying the substantive question to the Commission -- essentially the same course as that invited here and adopted by the Licensing Board. The Appeal Board declined to certify; rather, it simply (and properly) denied the motion and left the intervenors to any other remedies that might be available.

The Licensing Board lacked jurisdiction to reconsider the admission of this previously excluded severe accident contention, and for that reason LBP-89-6 must be reversed. This Appeal Board similarly lacks jurisdiction to reconsider the same question, and for that reason, after reversing LBP-89-6, this Board should not proceed to reconsider its prior rulings in its own right.

III. IF RECONSIDERED IN LIGHT OF THE SIERRA CLUB DECISION, ALAB-869 AND ALAB-876 SHOULD BE RE-AFFIRMED.

The prior decisions of this Appeal Board followed inexorably from two propositions:

> That the Commission is not obliged to prepare an EIS to consider allegedly enhanced consequences of a beyond design-basis accident in connection with the allowance of an operating license amendment; and
>
> That it is an intervenor's burden to plead a contention that is litigable under the Commission's substantive rules of decision, or, stated in the converse, it is the duty of an adjudicatory board to exclude a proposed contention where the pleader reveals that the subject he wishes to convene a hearing upon is non-litigable.

On the admissibility of "Environmental Contention 1" (nee "Contention 2"), a result different from that previously reached by this Appeal Board in ALAB-869 and ALAB-876 can be reached only by abandoning one or both of these long-standing precepts. Given that (i) there is eminent logic in both, (ii) there is judicial endorsement of both, and (iii) both correctly interpreted the Commission's rules for pleading contentions and its policy of excluding those contentions, including environmental contentions, that hypothesize beyond design-bases accidents, such abandonment is tolerable only if compelled by a governing judicial decision. It is not.

A. **The Sierra Club Decision Neither Does nor Purports to Reverse the Rule that NEPA does not Require an EIS to Consider the Environmental Effects of a Beyond Design-Basis Accident.**

NEPA is applied with a "rule of reason." *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 834 (D.C. Cir. 1972). One specific application of the rule of reason -- recognized universally, including in the Ninth Circuit -- is that NEPA does not require the preparation of an EIS to consider (and does not require the consideration, in an EIS prepared for other reasons, of) possible events that are "remote and speculative." *Environmental Defense Fund, Inc. v. Andrus*, 619 F.2d 1368, 1375 (10th Cir. 1980); *Environmental Defense Fund, Inc. v. Hoffman*, 566 F.2d 1060, 1067 (8th Cir. 1977); *Carolina Environmental Study Group v. United States*, 510 F.2d 796, 799 (D.C. Cir. 1975); *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974); *Environmental Defense Fund, Inc. v. Corps of Engineers*, 348 F. Supp. 916, 933 (N.D. Miss. 1972), *aff'd*, 492 F.2d 1123 (5th Cir. 1974).

As applied in NRC proceedings, so-called "beyond design-basis" accidents, sometimes also called "Class 9 Accidents," are events that are "remote and speculative" and, hence, need not be addressed for NEPA purposes. See, *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);[20] *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 697, 698 (1985), *aff'd in part and review declined*, CLI-86-5, 23 NRC 125 (1986); *Public Service Electric and Gas Co.* (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 62-63 n.29 (1981), *aff'd sub nom. Township of Lower Alloways Creek v. Public Service Electric and Gas Co.*, 687 F.2d 732 (3d Cir. 1982); *Carolina Environmental Study Group v. United States*, 510 F.2d 796, 799-800 (D.C. Cir. 1975).[21]

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[20]It is imperative to note that this rule does not depend upon a finding of fact regarding probabilities in any given case. Rather, it is a matter of a Commission conclusion regarding a class of accidents, which will be upheld as discharging the Commission's NEPA obligation so long as it is reasonable:

> "We conclude, therefore, that the Commission was under no obligation to supplement the Diablo Canyon EIS with a discussion of Class Nine accidents *if* the Commission reasonably believed that such accidents were highly unlikely to occur."

751 F.2d at 1301.

[21]For those of a mathematical bent, risk may be expressed by the equation:

$$R = P_E \times C_E,$$

The *Sierra Club* decision does not purport to jettison these well established principles. Indeed, while Licensing Board in this case concludes without any illuminating discussion that the *Sierra Club* decision supports its rationale that, under the Commission's Severe Accident Policy Statement the preparation of an EIS is required, the Court of Appeals explicitly stopped short of deciding the substantive question. *Sierra Club*, 862 F.2d at 228. Moreover, as noted above, the Court of Appeals not only does not reverse the long-standing NEPA rule that remote and speculative events need not be considered in deciding whether to prepare (or in preparing) an EIS, the Court of Appeals does not even *cite* any of the cases the effective overruling of which is required if ALAB-869 and ALAB-876 are to be reversed.

Nor does the rationale of LBP-89-6 commend itself for adoption (wholly apart from its utter lack of support from *Sierra Club*). As described above, in LBP-89-6 the Licensing Board essays the proposition that, in an off-hand reference to its existing policy on NEPA consideration of severe accidents, the Commission intended what amounts not only to a major amendment of

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where R is the quantification of the risk, P_E is the probability of a given event occurring and C_E is the environmental consequences of the event (if it occurs). This equation demonstrates that, generally, comprehension of risk requires comprehension of both the probability of occurrence and the consequences of occurrence. However, in a case where P_E is extremely low (and approaching zero), R will be sufficiently small as not to warrant practical consideration even where C_E might be argued to be high. Likewise, in such a case, a change in C_E effects no significant change in R. Where P_E may properly be modelled as zero, then:

$$P_E \times C_E = P_E \times 2 \times C_E.$$

Here, the intervenors did (and could) argue only that the proposed amendment would effect a change in environmental consequences, not a change in the probability that the triggering accident would occur.

In NRC practice, all beyond design-basis accidents are considered to be "remote and speculative." This is so because the Commission has, by regulation, promulgated those substantive safety standards deemed necessary to prevent the occurrence of such accidents; any challenge to the classification of a given accident scenario as "remote and speculative" is effectively a challenge to the Commission's substantive licensing regulations and may not normally be maintained in a licensing proceeding. Those who would contend that the design basis for nuclear power plants should be changed must petition the Commission to amend its substantive regulations. See *Pacific Gas and Electric Company* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-880, 26 NRC 449, 458 (1987).

that policy, but, indeed, the flat reversal of that policy, so as to remove "the jurisdictional limitations of the early NEPA statement." LBP-89-6 at 13. Given the purpose, the commandment and the emphasis of the Severe Accident Policy -- which, after all, *restricted* the consideration of severe accidents in licensing proceedings -- it would be hopelessly anomalous to construe the Commission as having intended to effect so abrupt a reversal of its long-standing environmental policy by such unusual indirection. And the Commission's own pronouncements on the purpose and effect of the Severe Accident Policy Statement firmly belie the distended interpretation of the Licensing Board. See *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), CLI-86-5, 23 NRC 125, 127 (1986).

In short, there exists today not a whit of authority for the proposition that the preparation of an EIS can be required in connection with NRC licensing on account of the risk of severe accidents. So long as that proposition remains valid and binding on the Commission's adjudicatory boards, admission of a contention to the effect that such preparation is required for the very same reason would be an utter futility.

B. The Sierra Club Decision Neither Does nor Purports to Reverse the Commission's Requirement that an Intervenor Plead a Litigable Contention.

As is set forth more fully in section C(2) *infra*, the *Sierra Club* decision is replete with manifest errors concerning the "usual" NRC pleading procedure the supposed deviation from which is the *sina qua non* of that decision. In fact, the pleading rules upon which ALAB-869 and ALAB-876 are based are well-established.

Indeed, even the intervenors in this proceeding, in their pleadings based on *Sierra Club*, seem to concede the point:

> "In determining whether a contention is reasonably specific, the proper inquiry is whether it . . . improperly raises nonjusticicable issues . . . and whether it raises issues that are appropriate for litigation in the particular proceeding."[22]

It is difficult to find a more apt description for what was done in ALAB-869 and ALAB-876: this Appeal Board merely concluded that the contention, as pleaded by the intervenors, "improperly raises non-justiciable issues" and "raise[d] issues that are inappropriate for litigation in the particular proceeding" in question.

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[22]"Joint Motion of New England Coalition on Nuclear Pollution and the Commonwealth of Massachusetts for Reconsideration or, in the Alternative, to Certify the Question to the Appeal Board," December 30, 1988, at 7.

However, it is crucial to observe that, even taking *Sierra Club* at face value, all that it apparently requires is that the NRC accept an intervenor's assertion that an hypothesized accident can occur within the plant's design-basis. Had the Licensing Board here accepted the intervenors' assertion that the accident forming the predicate for their contention could occur within the VYNPS design-basis, or, more particularly, had the Licensing Board concluded that it could not look into the merit of that assertion, *Sierra Club* might have been cited as authority. *This, however, is not what happened.*

Rather, the Licensing Board expressly determined the predicate accident to be a beyond design-basis accident,[23] and it expressly determined a beyond design-basis accident-based contention to be admissible.[24] *Sierra Club* cannot be cited for this result, nor for this rationale. To the contrary, we respectfully submit that the occasion of the *Sierra Club* decision has merely been employed by the Licensing Board as a license for preferring its legal judgment to that of this Appeal Board, on an issue not decided by *Sierra Club.*

C. If Construed as Mandating the Abandonment of Sound Commission Precedent in the Case Before the Court, Sierra Club Need not be and Should not be Followed in a Case Involving Vermont Yankee.

A judicial opinion may elicit a following either of two ways: it may be commanded by the effect of a mandate (in the precise case before the Court) or it may be induced by the persuasive appeal of the Court's *ratio decidendi.* The former does not apply in this case (which is not subject to the jurisdiction of the Court of Appeals for the Ninth Circuit) and the latter is demolished by the Court's manifest non-comprehension of the substantive and procedural regulations at issue.

1. Adherence to the Sierra Club Decision in not Mandatory in the Case of VYNPS.

Under the applicable statutes,[25] review of appealable final actions of the Commission may be sought either in the United States Court of Appeals for the District of Columbia Circuit or in the United States Court of Appeals for the Circuit within which the petitioner resides. The intervenors in this

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[23]Interestingly, in so doing, the Licensing Board seems to have violated the only clear holding (however erroneous) of *Sierra Club.*

[24]On the basis of its republished analysis of the effect of the 1985 Severe Accident Policy Statement, which this Appeal Board rejected in ALAB-869 and ALAB-876.

[25]42 U.S.C. § 2239; 28 U.S.C. 2342; 28 U.S.C. 2343.

proceeding reside in the jurisdiction of the United States Court of Appeals for the First and Second Circuits. The United States Court of Appeals for the Ninth Circuit has not be empowered to set binding precedent in any of these other circuits. Even were *Sierra Club* read to be inconsistent with ALAB-869 and ALAB-876, which we submit would be a misreading of that decision, the Commission is not obliged to follow it. *E.g., Neilson Lithographic Co. v. NLRB*, 854 F.2d 1063, 1066-67 (7th Cir. 1988):

> "The Supreme Court, not this circuit or even all twelve circuits that have jurisdiction to review orders of the Labor Board, is the supreme arbiter of the meaning of the laws enforced by the Board. . . . This circuit is not authorized to interpret the labor laws with binding effect through the whole country, and the Board therefore is not obliged to accept our interpretation."

From this precept, three results would appear to flow. First, *Sierra Club* is not binding upon the Commission and need not be followed (at least in a case not within the jurisdiction of the Ninth Circuit) should the Commission determine it not be good law. Second, for this reason, the rendition of *Sierra Club* does not supply a warrant for the extraordinary display of independence from superior authority that the Licensing Board has here engaged in. Third, we respectfully submit that the question of formulating, as a matter of Commission policy, the response that the Commission will take to the *Sierra Club* decision is not a matter in which this Board should engage.[26]

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[26]That an EIS need not be prepared in the circumstances of the contention here at issue is not only the square holding of two decisions of this Appeal Board, it is an aspect of consistent Commission policy, manifest not simply by the Commission's declination of review in this case but also by the Commission's consistent position in the Court, including the *Diablo Canyon* case. As the Appeal Board has held, its duty of obeisance to the dictates of the Commission is no less than that owed by a licensing board to those of an Appeal Board, *Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 465 (1982), including on the question of the treatment to be afforded decisions of the Courts of Appeals. *Mississippi Power & Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1732 (1982) (Commission directive "to act as if the District of Columbia Circuit's decision . . . is currently of no operative effect" binding on the Appeal Board). We therefore suggest that, if the decision is to be made to adopt the unusual requirements seemingly imposed by the *Sierra Club* decision, the Commission must be the one to make it.

The Licensing Board advances argument to the effect that, by seeking reconsideration as to only a part of the *Sierra Club* decision, the Commission has manifested an election to adopt the balance of that decision as Commission policy. LBP-89-6, Slip Opinion at 10-11. This argument reflects a

Rather, based on the legal correctness as well as the binding effect of ALAB-869 and ALAB-876, this Board should reverse LBP-89-6 and leave to the Commission, should the Commission so elect (which we suggest is extremely doubtful), the question of whether the dubious principles, and the dubious result, of *Sierra Club* should be acquiesced in beyond the extent required by the mandate in that case.[27]

2. Adherence to the Sierra Club Decision is not Commended by the Rationale of the Court's Opinion, which is Replete with Errors.

With all due respect to the Court of Appeals for the Ninth Circuit, it is plain on the face of its November 30, 1988 decision in *Sierra Club* that the Court did not comprehend the Commission's regulatory structure. Thus, for instance, the Court appears to conclude that the remote possibility of a severe accident, the consequences of which would (by definition) exceed the site boundary limitations that are a part of the design basis of the plant, would amount to a violation of a safety regulation. *Sierra Club*, 862 F.2d at 227. The fact of the matter is that all the Commission's regulations require, both in general and in Part 20 (specifically referred to by the Court of Appeals) is that the site boundary limitations not be exceeded for operations within the design basis. (Other regulations provide the assurance, which need not be (and never could be) absolute, that the design basis conditions

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profound misapprehension of the proper office of a motion for reconsideration, which does *not* lie to reargue all of the points with which a party disagrees, but only those points on which the party believes the tribunal may have misapprehended what was before it. *E.g.*, Fed. R. App. P. 40(a) ("The petition [for rehearing] shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended . . . ."). See also *Mississippi Power & Light Co.* (Grand Gulf Nuclear Station, Unit 1), LBP-84-23, 19 NRC 1412, 1414 (1984). True to these precepts on appropriate advocacy, the NRC limited its motion to an aspect of the Court's opinion where, "[i]n counsel's judgment . . . the Court's opinion improperly overlooks a material point of law." *Motion for Reconsideration* (February 5, 1989) at 1. The point in question concerned an issue not briefed by any of the parties, thus supplying legitimate warrant for seeking reconsideration. To conclude from this that the Commission has acquiesced in the wholesale revision of fundamental principles of NRC regulation is to make too great a leap.

[27]See *Consolidated Edison Company of New York* (Indian Point, Unit 2), CLI-85-15, 16 NRC 27, 34 (1982) (pointing out that the Commission possesses "inherent supervisory power over the conduct of adjudicatory proceedings, including the authority to provide guidance on the admissibility of contentions before licensing boards").

will not be exceeded. See *Pacific Gas and Electric Company* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-880, 26 NRC 449, 458 (1987).) The Ninth Circuit's conclusion that the severe-accident contention stated a violation of a substantive Commission regulation, *Sierra Club*, 862 F.2d at 227, is a plain error.

This error, in turn, led to the Court of Appeals' erroneous rejection of the Appeal Board's holding on the lack of a "causal scenario." *Sierra Club*, 862 F.2d at 227. What the Appeal Board held in ALAB-880 was that (i) insofar as the contention there at issue proposed to litigate the consequences of a beyond design-basis accident, it was proscribed as a matter of law, and (ii) insofar as the proponents of the contention might be arguing that the same consequences could flow from a within design-basis sequence of events, they had failed to articulate a plausible within design-basis accident that could trigger the required hydrogen generation. Contrary to the Court of Appeals' understanding, the BNL Report did *not* supply the missing "causal scenario" because the BNL Report *assumed* the happening of a beyond design-basis accident.

Likewise, the Court of Appeals plainly misunderstood the Commission's practice of judging the admissibility of a proposed contention without prejudgment of its merits. Citing *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525 (1986), the Court applies the famous *Allens Creek* rule[28] to mean that an adjudicatory board reviewing the admissibility of a contention must blind itself *both* to (i) the probability (however intuitively remote) that a contention can be sustained as a matter of fact *and* (ii) whether the contention states a legally cognizable subject under the Commission's substantive regulations. *Sierra Club*, 862 F.2d at 226. In fact, the *Allens Creek* rule requires only the former. No tribunal of which we are aware, including the federal courts, requires a trial on a claim that fails to state a claim as matter of law.[29] The Court of Appeals' conclusion, necessary to its resolution of the appeal before it, that the *only* pleading requirement ever imposed by the Commission on intervention aspirants is pleading with enough specificity to put others on notice of the claim, *Sierra Club*, 862 F.2d at 227, is simply wrong as a matter of law. The

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[28]*Houston Power and Light Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542 (1980).

[29]It was, respectfully submit, the failure to comprehend this rule, so widely followed in all tribunals but nonetheless lost sight of here, that led the Court of Appeals into the manifestly incorrect equation of the "specificity" of the Hosgri fault contention and the "specificity" of the beyond design-basis accident contention, see *Sierra Club*, Slip Opinion at 14,733-34, though with the benefit of hindsight it may be observed that "specificity" is perhaps not the least ambiguous label that might have been assigned to the deficiency of the contention rejected in ALAB-880.

conclusion that follows (and depends upon this error) that "the Appeal Board failed to follow its own standards when it rejected the contention" is equally in error.

Conclusion

For the foregoing reasons, LBP-89-6 should be reversed.

Respectfully submitted,

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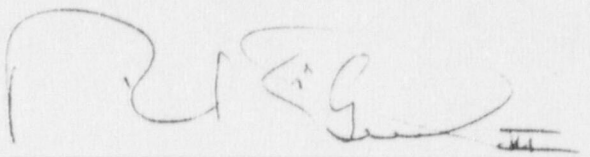

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