

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 9/10/99

COMMISSIONERS:

SERVED 9/10/99

Greta Joy Dicus, Chairman
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

Docket No. 50-029-LA

In the Matter of)
)
YANKEE ATOMIC ELECTRIC COMPANY)
)
(Yankee Nuclear Power Station))
)
_____)

CLI-99-24
MEMORANDUM AND ORDER

The Commission grants the motion of licensee Yankee Atomic Electric Company ("Yankee Atomic" or "licensee") to terminate without prejudice its pending appeal of the Licensing Board's Memorandum and Order (LBP-99-14, 49 NRC 238, reconsid'n denied, LBP-99-17, 49 NRC 375 (1999)) in which the Board admitted four contentions. The Commission also vacates both Board orders as moot.

BACKGROUND

This proceeding concerns a license amendment application in which Yankee Atomic sought approval of its License Termination Plan ("LTP") for the Yankee Nuclear Power Station ("Yankee Rowe"). On May 26, 1999, in a pleading supported by the NRC staff, Yankee Atomic submitted to the Licensing Board a motion seeking leave to withdraw its LTP application without prejudice and, in the same filing, asked that the Commission dismiss without prejudice Yankee Atomic's pending appeal of LBP-99-14. Responding to the latter request, intervenors Citizens Awareness Network ("CAN"), the New England Coalition on Nuclear Pollution ("NECNP") and the Franklin Regional Council of Governments ("FRCOG") agreed that the Commission should dismiss the pending appeal, but asked that the dismissal be "with prejudice."

In parallel filings before the Board, intervenors similarly argued that the Board should terminate the entire proceeding "with prejudice."⁽¹⁾ They also asserted that the Board should require Yankee Atomic to reimburse CAN's and NECNP's litigation expenses and provide intervenors with various kinds of information regarding the decommissioning of Yankee Rowe. On July 28, 1999, the Board issued LBP-99-27, 50 NRC ____, rejecting these arguments and terminating, without prejudice or conditions, all portions of the proceeding -- except for the instant pending appeal. Intervenors chose not to petition for Commission review of LBP-99-27.⁽²⁾ Consequently, the only remaining portion of this proceeding is Yankee Atomic's appeal of LBP-99-14 -- a matter we have held in abeyance pending the August 17th conclusion of the appeal period for LBP-99-27. For the reasons set forth below, we dismiss the appeal without prejudice (as moot) and vacate both LBP-99-14 and LBP-99-17.

DISCUSSION

1. REQUESTED DISMISSAL OF APPEAL WITH PREJUDICE

Intervenors' request that we dismiss Yankee Atomic's appeal with prejudice suffers from two serious flaws. First, the dismissal of an appeal with prejudice (similar to termination of a proceeding with prejudice) generally implies that we have ruled on the merits of the appeal -- clearly not the situation here. See Philadelphia Elec. Co. (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 973 (1981).

Second, dismissal with prejudice (again like termination with prejudice) is a severe sanction reserved for unusual situations involving substantial prejudice to an opposing party or to the public interest in general. See Puerto Rico Elec. Power Auth. (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1132-1133 (1981); Fulton, 14 NRC at 978-79 and n.14. We see here no prejudice (much less substantial prejudice) to either the intervenors' or the public's interest. The admitted contentions were focused on alleged deficiencies and inadequacies of the withdrawn LTP. Moreover, the intervenors will be in precisely the same position in any subsequent proceeding as if they had prevailed not only on their instant appeal but also on the subsequent merits portion of this proceeding, i.e., they will be faced with Yankee Atomic returning to the Commission in the future with a second proposed LTP which intervenors may oppose if they wish.⁽³⁾

For these reasons, we decline to dismiss the appeal with prejudice. Rather, we dismiss it as moot.

2. VACATION OF LBP-99-14 AND LBP-99-17

We exercise our inherent authority over adjudications and vacate LBP-99-14 and LBP-99-17. As we indicated in *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-5, 47 NRC 113, 114 (1998):

While unreviewed Board decisions do not create binding precedent, where as here the unreviewed rulings "involve complex questions and vigorously disputed interpretations of agency provisions," the Commission chooses as a policy matter to vacate them and thereby eliminate any future confusion and dispute over their meaning or effect. Cf. *Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility)*, CLI-96-2, 43 NRC 13, 15 (1996). Our decision to vacate the Board orders "does not intimate any opinion on their soundness." *Id.*

CONCLUSION

For the reasons given above, the Commission (1) grants Yankee Atomic motion to withdraw without prejudice its pending appeal of the Licensing Board's Memorandum and Order (LBP-99-14) and (2) vacates LBP-99-14 and LBP-99-17.

Therefore, the proceeding is terminated.

IT IS SO ORDERED.

For the Commission
[Original signed by Annette L. Vietti-Cook]

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 10th day of September, 1999.

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1. NECNP later clarified that it was not asking the Board to dismiss the proceeding with prejudice. NECNP's Reply to LBP-99-22, dated June 24, 1999, at 2 n.2.
 2. The Commission is also declining to take review sua sponte of the Licensing Board's Memorandum and Order (LBP-99-27) terminating, without prejudice or conditions, all portions of the proceeding except for the instant appeal of LBP-99-14.
 3. "[T]he possibility of future litigation with its expenses and uncertainties ... is precisely the consequence of any dismissal without prejudice. It does not provide a basis for departing from the usual rule that a dismissal should be without prejudice." *North Coast*, 14 NRC at 1135 (emphasis in original), citing *Jones v. SEC*, 298 U.S. 1, 19 (1936), and 5 *Moore's Federal Practice* 41.05[1] at [pages] 41-72 to 41-73 (2d ed. 1981). See also *Fulton*, 14 NRC at 979 ("it is well settled that the prospect of a second lawsuit -- or, in this case, another application to construct a nuclear reactor at Fulton -- does not provide the requisite quantum of legal harm to warrant dismissal with prejudice" (citing *Jones*, supra)). (Both *North Coast* and *Fulton* are decisions of the Atomic Safety and Licensing Appeal Board, an entity which the Commission abolished in 1991. However, despite its defunct status, the Appeal Board's decisions still carry precedential weight. *Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site)*, CLI-94-11, 40 NRC 55, 59 n.2 (1994).)