

March 8, 1996

MEMORANDUM FOR: John F. Cordes, Acting Director
Office of Commission Appellate Adjudication

FROM: John C. Hoyle, Secretary /s/

SUBJECT: STAFF REQUIREMENTS - AFFIRMATION SESSION, 4:00 P.M.,
THURSDAY, MARCH 7, 1996, COMMISSIONERS'
CONFERENCE ROOM, ONE WHITE FLINT NORTH,
ROCKVILLE, MARYLAND (OPEN TO PUBLIC ATTENDANCE)

I. SECY-96-033 - Cleveland Electric Illuminating Co. -- Licensee's Petition for Review of LBP-95-17

The Commission, by a 3-0 vote, approved an order granting review of LBP-95-17 and setting a schedule for the parties to file briefs.

II. SECY-96-047 - Yankee Atomic Electric Company (Yankee Nuclear Power Station), Docket No. 50-029-DCOM

The Commission, by a 3-0 vote¹, approved an order denying these requests for disqualification. The order also stated that the Commission planned to review the Licensing Board's March 1 decision and keep in place the current stay of the Board's decision, pending Commission review.

(Subsequently, on March 7, 1996, the Secretary signed the orders.)

cc: Chairman Jackson
Commissioner Rogers
Commissioner Dicus
OGC
OCAA
OCA
OIG
Office Directors, Regions, ACRS, ACNW, ASLBP (via E-Mail)
PDR - Advance
DCS - P1-24

¹ Commissioner Dicus did not participate in Part A of the order dealing with the motion for recusal of Chairman Jackson and Commissioner Rogers.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Shirley Ann Jackson, Chairman
Kenneth C. Rogers
Greta J. Dicus

_____))
CLEVELAND ELECTRIC))
ILLUMINATING COMPANY))
_____))
(Perry Nuclear Power Plant,) Docket No. 50-440-OLA-3
Unit 1))
_____))
_____)

CLI-96-4

ORDER

Pursuant to 10 C.F.R. § 2.786(b), the Cleveland Electric Illuminating Company (Cleveland Electric) has petitioned the Commission for review of Atomic Safety and Licensing Board order LBP-95-17, 42 NRC 137. The Licensing Board's order granted the motion for summary disposition submitted by intervenors Ohio Citizens for Responsible Energy, Inc. (OCRE) and Ms. Susan L. Hiatt, and terminated this proceeding. The intervenors oppose review of the decision. The NRC staff does not oppose review. The staff's position is that LBP-95-17 misinterprets NRC regulatory requirements and exceeds the scope of the proceeding.

The Commission has decided to grant review of LBP-95-17. The parties to the review proceeding shall be Cleveland Electric, the intervenors, and the NRC staff.

1. Within 30 days after service of this order, Cleveland Electric and the NRC staff may file their briefs, which shall be limited to 25 pages each.
2. Within 30 days after service of Cleveland Electric's and the NRC staff's briefs, the intervenors shall file their responsive brief, which shall be limited to 35 pages.
3. Within 15 days after service of the responsive brief, Cleveland Electric and the NRC staff may file a reply brief, which shall be limited to 10 pages each.

In addition to the arguments the parties choose to present, the Commission directs all parties to address the significance for this case of 5 U.S.C. §§ 551(8) and (9)(defining "license" and "licensing").

Any brief in excess of 10 pages must contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes, regulations, and other authorities cited, with references to the pages of the brief where they are cited. Page limitations on briefs are exclusive of pages containing a table of contents, table of cases, and of any addendum containing statutes, rules, regulations, etc.

It is so ORDERED.

For the Commission

John C. Hoyle
Secretary of the Commission

Dated at Rockville, Maryland
this day of March, 1996.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Shirley Ann Jackson, Chairman
Kenneth C. Rogers
Greta J. Dicus

In the Matter of:)
)
YANKEE ATOMIC ELECTRIC COMPANY) Docket No. 50-029-DCOM
) Decommissioning Plan
Yankee Nuclear Power Station)
_____)

MEMORANDUM AND ORDER

CLI-96-5

I. Introduction.

The petitioners in this expedited proceeding, the Citizens Awareness Network ("CAN") and the New England Coalition on Nuclear Pollution ("NECNP") (collectively "petitioners"), challenge the adequacy of the decommissioning plan prepared by the Yankee Atomic Energy Corporation ("YAEC") for its shutdown nuclear power reactor near Rowe, Massachusetts ("Yankee NPS"). On March 1, 1996, the Atomic Safety and Licensing Board ("Licensing Board") issued a 58-page decision dismissing petitioners' request for a hearing on the ground that petitioners had failed to proffer a litigable contention. See Yankee Atomic Electric Company (Yankee Nuclear Power Station), LBP-96-02, 43 NRC ____ (March 1, 1996) ("LBP-96-02").

Currently before the Commission are two motions filed by petitioners: one seeking clarification and modification of a February 27 stay order issued by the Commission² and one seeking reconsideration and rescission of the Commission's January 16 decision referring

²On February 21 the Board had announced from the bench its intent to issue an order dismissing the proceeding in its entirety by about March 1. On February 27 the Commission issued an anticipatory order staying the effectiveness of the Board's impending decision.

petitioners' five proposed contentions to the Licensing Board and providing guidance on certain legal and policy questions. See Yankee Atomic Electric Company (Yankee Nuclear Power Station), CLI-96-01, 43 NRC 1 (1996) ("CLI-96-01"). The latter motion also seeks recusal of two Commissioners and disqualification of the NRC Staff from further participation in the case.

In the instant Memorandum and Order, the Commission: (1) declines to disqualify two Commissioners or the NRC staff from participating in the case; (2) indicates that it plans to review the Licensing Board's March 1 decision and suggests appropriate areas of inquiry for the parties' briefs; and (3) keeps in place the current stay of the Board decision, pending Commission review of the Board decision.

II. Background of CLI-96-01.

On January 16, we issued CLI-96-01, in which we referred petitioners' petition to intervene and related pleadings to the Licensing Board with: (1) instructions to treat the petition as a request for a hearing; (2) guidance on selected issues including petitioners' proposed Contention A; and (3) a proposed expedited schedule. At the same time, the Secretary issued a separate document, entitled "Notice of Appointment of Adjudicatory Employee and of Communication Covered by 10 C.F.R. § 2.781(c)" ("Notice"), which advised the parties: (1) that a member of the NRC Staff had been appointed as an adjudicatory employee; and (2) that there had been a communication in violation of the separation of functions restrictions contained in 10 C.F.R. §2.781(a) and that this communication was being placed on the record in accordance with 10 C.F.R. §2.781(c).

The Notice informed the parties that the communication had occurred between a member of the NRC Staff and a member of the Office of the General Counsel ("OGC"), which was advising the Commission on the preparation of CLI-96-01. In addition, the Notice advised

the parties that the communication related to petitioners' proposed Contention A and attached a memorandum describing the communication. Finally, the Notice stated that the communication did not affect the advice OGC rendered to the Commission, did not result in a change to the language in any proposed draft of CLI-96-01, and was itself not communicated to the Commissioners or any of their personal staffs before the Commission issued CLI-96-01.

On January 26, 1996, petitioners filed their motion for reconsideration and rescission of CLI-96-01. First, petitioners challenge the guidance we provided to the Licensing Board on proposed Contention A, arguing that we "prejudge[d] contested facts," Motion for Reconsideration at 1, based "on ex parte communications and other factual information which petitioners have not had the opportunity to controvert." Id. at 2. As a result, petitioners contend, the Commission has "grievously prejudiced [their] opportunity for a full and fair hearing" Id. See generally id. at 7-15. Moreover, argue petitioners, because the guidance was based upon "an ex parte communication,"³ the Commission should rescind that guidance. Id. at 15-18.

Second, petitioners argue that, based upon the facts as stated in the Notice, the Commission should issue an Order directing the Staff to show cause why it should not be dismissed as a party from the proceeding as a sanction for the conduct identified in the Notice. See generally id. at 18-19. Third, the petitioners argue that Chairman Jackson and Commissioner Rogers should recuse themselves from any further consideration of this case because the guidance on proposed Contention A prejudged factual issues and rested on an

³The communication at issue took place in violation of the Commission's Rules on "separation of functions," not its rules against "ex parte communications," as the petitioners mistakenly state. The Notice identified a communication between (1) an NRC employee who was participating in an adjudicatory proceeding on behalf of the Staff and (2) an NRC employee who was advising the Commission regarding its adjudicatory functions. Accordingly, the communication violated the "separation of functions" restrictions of 10 C.F.R. §2.781(a), not the ex parte restrictions of 10 C.F.R. §2.780(a)-(c). The latter provision applies to communications from outside the NRC; the former applies to communications from within the NRC.

improper communication (despite the Notice's statement to the contrary). See generally id. at 20-21.

III. Analysis.

A. Commission Recusal.

We begin with an analysis and discussion of the third issue, whether Chairman Jackson and Commissioner Rogers should recuse themselves from further proceedings in this matter.⁴

(1) Separation of Functions Violation.

We first address the separation of functions violation as an asserted ground for recusal. Petitioners offer no facts supporting their motion to recuse because of the separation of functions violation other than those apparent from the Notice. For the reasons stated below, the facts as stated by the Notice do not warrant recusal by the Commissioners from this proceeding.

On January 16, the same day that CLI-96-01 and the Notice were issued, the Commission's Office of the General Counsel ("OGC") forwarded the Notice to the Acting Inspector General of the Commission for any appropriate action. OGC also provided a copy of the petitioners' motion to the Office of the Inspector General ("OIG"). The Commission's OIG has the duty and obligation to conduct independent audits and investigations under the

⁴Commissioner Dicus took office on February 15, 1996, well after the events which serve as grounds for petitioners' request for recusal transpired. Commissioner Dicus took no part in those events, did not participate in CLI-96-01, and, accordingly, presumes that petitioners' motion for recusal is not addressed to her. Therefore, Commissioner Dicus did not participate in Part A of this discussion.

In accordance with Commission practice, Chairman Jackson and Commissioner Rogers decided the recusal motion for themselves. Therefore, Part A is the joint decision of Chairman Jackson and Commissioner Rogers. See Joseph J. Macktal, CLI-89-18, 30 NRC 187, 169-70 (1989) (following an identical practice responding to a request for recusal). Parts B and C represent a collegial Commission decision.

Inspector General Act of 1978, as amended, Pub. L. 95-452, 5 U.S.C. App. See generally 10 C.F.R. §1.12(d). The OIG promptly initiated an investigation into the circumstances of the communication at issue and completed that investigation on February 23, 1996.

The OIG's Report of Investigation provides a complete record as to how and why that communication occurred.⁵ As is clear from the Notice and confirmed by the Report, the communication was not provided -- either directly or indirectly -- to Chairman Jackson or Commissioner Rogers, or to any of their personal staffs, prior to the decision to issue CLI-96-01. See generally OIG Report at 12; 13. Thus, there is no factual support for petitioners' assertion that the communication was "implicitly relied on." Motion for Reconsideration at 16. A prohibited communication "is not a concern if it does not reach the ultimate decision maker." Press Broadcasting Co., Inc. v. F.C.C., 59 F.3d 1365, 1369 (D.C. Cir. 1995), citing ATX, Inc. v. U.S. Dept. of Transportation, 41 F.3d 1522, 1527 (D.C. Cir. 1994), and Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers, 714 F.2d 163, 170-171 (D.C. Cir. 1983).

Moreover, we would also observe that an essential thrust of the NRC Staff communication -- that the ALARA doctrine should not be applied in reviewing a licensee's choice of decommissioning option -- is inconsistent with the Commission's assumption in CLI-96-01 that an ALARA challenge to a licensee's decommissioning option choice can properly be made if an adequate basis is provided. See CLI-96-01, slip op. at 7.

In sum, because the communication was made only to the General Counsel and had no apparent influence on either OGC's advice to the Commission or on the Commission's decision, it provides no grounds for the recusal of Chairman Jackson or Commissioner Rogers.

(2) Alleged Prejudgment of Contested Facts.

⁵A copy of the Report of Investigation has now been released to the public and has been provided to the parties with this Memorandum and Order.

Petitioners also argue that Chairman Jackson and Commissioner Rogers should be disqualified because they have improperly prejudged contested facts, particularly on the question whether the SAFSTOR decommissioning option results in significant dose savings. As explained below, this argument is premised on a misreading of CLI-96-01 and, because no prejudgment of contested facts took place, does not call for recusal. One will search CLI-96-01 in vain, for example, for any "factual" finding regarding the projected SAFSTOR dose savings for the Yankee facility.

It is clear and uncontestable from the rulemaking record supporting the Commission's decommissioning rule, and from the GEIS⁶ in particular, that the dose estimates in the rulemaking record associated with DECON and SAFSTOR are based on generic estimates for plants larger than Yankee Rowe which have undergone no prior decommissioning. It is no prejudgment for the Commission merely to observe in CLI-96-01 that different dose estimates "may" be expected for Yankee Rowe, and that the dose differences between SAFSTOR and DECON are "likely" to be lower and "could" be less than 900 person-rem -- or "perhaps" not much at all given Yankee Rowe's smaller size and the fact that Yankee Rowe has already been partially decommissioned. It is also no prejudgment for the Commission to note the obvious uncertainties attending these estimates.

The Commission also offered guidance in CLI-96-01 that a challenge to the licensee's choice of the modified DECON option cannot be based solely on differences in estimated collective occupational doses on the order of magnitude of the estimates in the rulemaking GEIS. This is not a finding of fact; it is an interpretation of the NRC's decommissioning and ALARA regulations and rests on an analysis of the regulatory policies underlying those

⁶The Generic Environmental Impact Statement, or "GEIS," is NUREG-0586, issued in August, 1988, in conjunction with the promulgation of 10 C.F.R. §§ 50.75 and 50.82. See generally 57 Fed. Reg. 24,051 (June 27, 1988).

regulations. As CLI-96-01 notes, those regulations treat DECON as a generally acceptable alternative despite the acknowledged likelihood of reduced occupational dose under SAFSTOR, and call for a weighing of various factors in addition to the magnitude of estimated exposure in deciding ALARA.

Although not necessary for the decision, the Commission also noted that its guidance was consistent with its current policy judgment that exposures are considered ALARA when further dose reduction would cost more than one or two thousand dollars for each person-rem reduction achieved. Such policy judgments do not prejudge contested facts. Further, the use of cost estimates appearing in petitioners' own pleadings merely constitutes an analysis of the basis proffered for a contention and does not constitute a merits conclusion on the validity of those estimates.

Finally, the Commission stated in CLI-96-01 that its guidance regarding the regulatory significance of a dose reduction on the order of 900 person-rem associated with switching to SAFSTOR was not applicable if "there is some extraordinary aspect to the case not apparent to us from the pleadings that the Licensing Board may uncover on its own review." CLI-96-01, slip op. at 10. This statement alone puts to rest any concern about prejudgment since it left sufficient leeway for the Licensing Board to reach its own initial conclusion if the record so warranted.

In sum, regulatory interpretations and policy judgments, and tentative observations about dose estimates that are derived from the public record, are not factual prejudgments. Furthermore, the Commission provided the Licensing Board with sufficient flexibility to consider the matters in dispute consistent with the Commission's rules. Thus, petitioners' allegations of prejudgment constitute no basis for recusal of Chairman Jackson or Commissioner Rogers.⁷

⁷As explained below, however, as part of its review of LBP-96-02, the Commission will

(continued...)

B. Dismissal of Staff as a Party.

Petitioners offer no facts beyond the "Notice" to support their argument that the Staff should be dismissed from the proceeding. But there are no facts in the Notice from which we could reasonably conclude that the communication was made with any corrupt motive or was other than a simple mistake. Moreover, the OIG Report confirms that an innocent mistake was made and that the Staff is not guilty of any actual wrongdoing. See generally OIG Report at 7-12; 13. We are unwilling to order a dismissal of the Staff from the proceeding on the basis of a mistake that ultimately did not affect the proceeding. Thus, petitioners' request for the Commission to order Staff to show cause why it should not be dismissed as a party to the proceeding is denied.

C. Commission Appellate Review of LBP-96-02 and the February 27th Stay Order.

Under 10 C.F.R. §2.714a(a), petitioners have the right to appeal the Licensing Board's March 1 decision to dismiss their contentions, LBP-96-02, and we anticipate that they will do so. On appeal, the parties' briefs may address all issues bearing on the Licensing Board's decision, including the applicability of the Commission's guidance in CLI-96-01 and any issues related to reconsidering that guidance not decided in today's order. See note 6, supra.

Because of the complex and novel decommissioning issues involved in this case, we issued a anticipatory stay of LBP-96-02 on February 27th and now have decided, wholly as a matter of discretion,⁸ to keep that stay in effect pending completion of Commission review of the Licensing Board's decision. See Sacramento Municipal Utility District (Rancho Seco Nuclear

(...continued)

consider petitioners' arguments that its guidance was unsound on its merits. See, e.g., Motion for Reconsideration and Rescission, at pp. 9-15.

⁸YAEC argues that the traditional stay factors under 10 C.F.R. § 2.788 do not support a stay in this case. See Licensee's Response to NECNP/CAN's "Motion for Clarification and Modification of Commission's February 27, 1996 Stay Order," filed March 1, 1996. As we do not act under § 2.788, we intimate no view on this question.

Generating Station), CLI-93-03, 37 NRC 135, 152 (1993). In addition, if the Commission affirms LBP-96-02, it will follow its customary practice of issuing a short housekeeping stay to facilitate orderly judicial review. See, e.g. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 61 (1992).

IV. Conclusion.

For the foregoing reasons, petitioners' Motion for Reconsideration and Partial Rescission is denied insofar as it seeks Commission recusal and Staff disqualification. The Commission will review LBP-96-02 after appeal and briefing under 10 C.F.R. §2.714a. The effectiveness of LBP-96-02 is hereby stayed pending that review.

It is so ORDERED.

For the Commission,

John C. Hoyle
Secretary of the Commission

Dated at Rockville, Maryland
this ___ day of March, 1996.