

RAS 8860

LBP-04-27  
**DOCKETED 11/22/04**  
**SERVED 11/22/04**

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Alan S. Rosenthal, Chairman  
Dr. Richard F. Cole  
Dr. Charles N. Kelber

In the Matter of

YANKEE ATOMIC ELECTRONIC COMPANY  
(Yankee Nuclear Power Station LTP)

Docket No. 50-29-OLA

ASLBP No. 04-831-01-OLA

November 22, 2004

MEMORANDUM AND ORDER  
(Granting Hearing Request)

INTRODUCTION

On June 22, 2004, the NRC Staff published in the Federal Register a notice providing an opportunity for hearing with regard to a license amendment sought by the Yankee Atomic Electric Company (Licensee) with reference to its Yankee Nuclear Power Station located in Rowe, Massachusetts (Yankee-Rowe). 69 Fed. Reg. 34,707 (June 22, 2004). More specifically, the amendment addressed a license termination plan (LTP) that the Licensee had submitted to the Staff. Upon receiving Staff approval, the LTP would then be incorporated into the license as a new license condition.

In response to this notice, on August 20 Citizens Awareness Network (CAN) filed a hearing request in which it set forth the basis for its claim of standing and advanced six separate contentions. The first contention mirrored the substance of a contemporaneously-filed motion seeking a determination that the Federal Register notice was defective, with the consequence that a new notice should be issued. The other five contentions went to the merits of the LTP and were said to be supported by the declaration of a hydrogeologist that was appended to the hearing request as Exhibit 3.

In September 14 and 20 responses, respectively, the Licensee and NRC Staff opposed the granting of the hearing request. Although conceding CAN's standing to challenge the LTP, both maintained that the contentions set forth in the hearing request failed to satisfy the requirements of the Commission's Rules of Practice regarding admissibility.

The challenge to the adequacy of the Federal Register notice was undertaken by the Commission itself and, pending its ruling on the matter, the appointment of a licensing board to consider the remainder of the hearing request was held in abeyance. On October 7, the Commission rejected that challenge (CLI-04-28, 60 NRC\_\_ (2004)) whereupon, on October 19, this Board was established.

A preliminary review of the written submissions of the parties led the Board, by order of November 1, to schedule a prehearing conference with the parties to consider further certain questions that the submissions appeared to present. The conference was held on November 8 and was stenographically recorded.<sup>1</sup>

On its full consideration of the parties' submissions, both in writing and oral, and for the reasons set forth below, the Board is satisfied that CAN has fulfilled the requirements for the grant of its hearing request.

#### BACKGROUND

1. The Yankee-Rowe facility was permanently shut down in 1992 and is currently being dismantled. In accordance with 10 C.F.R. § 50.82(a)(9), all power reactor licensees must submit an application for termination of their licenses for facilities undergoing dismantlement and decommissioning. The application must be accompanied or preceded by a license termination plan. Section 50.82(a)(9)(ii) is most specific in setting forth the required content of that plan. Among other things, the plan must include –

(A) A site characterization

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<sup>1</sup> "Tr. at\_\_" will be employed when referring to pages of the transcript.

- (B) Identification of remaining dismantlement activities
- (C) Plans for site remediation
- (D) Detailed plans for the final radiation survey.

The significance of a license termination plan in the overall decommissioning process was made abundantly clear by the Commission in a 1998 decision involving this very reactor. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185 (1998). That proceeding involved a challenge by CAN and two other organizations to a prior LTP that the Licensee had submitted in 1997 for the Yankee Rowe facility. The case reached the Commission on an appeal by the petitioners from a licensing board determination that each lacked standing.

In the course of deciding that CAN and one of the other two petitioners had the requisite standing to question the sufficiency of the LTP then under consideration, the Commission had this to say (id. at 206-7 (emphasis supplied)):

The NRC's approval of the LTP would entitle Yankee Atomic to proceed with its final decommissioning activities secure in the knowledge that, absent extraordinary circumstances, the NRC would not later (at the license termination stage) second-guess Yankee Atomic's site survey methodology. . . . The LTP stage . . . is Petitioners' one and only chance to litigate whether the survey methodology is adequate to demonstrate that the site has been brought to a condition suitable for license termination. They are precluded from doing so at the license termination stage.

In short, the time to obtain a hearing on license termination decisions comes at the LTP stage, as our rules unambiguously provide.<sup>2</sup>

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<sup>2</sup> On the basis of its ruling that two of the petitioners had standing to challenge the Licensee's LTP, the Commission remanded the proceeding to the Licensing Board to determine whether the petitioners had any admissible contentions that would entitle them to a hearing. On remand, the Board accepted four of the contentions advanced jointly by the two petitioners and granted the hearing request. LBP-99-14, 49 N.R.C. 238 (1999). While the appeal of LBP-99-14 was pending before the Commission, the Licensee withdrew its LTP, indicating it would file another substantially different LTP at another date, and moved to terminate the proceeding. The Licensing Board granted the requested withdrawal and terminated the proceeding. LBP-99-27, 50 N.R.C. 45 (1999). The Commission then granted the Licensee's motion to terminate without prejudice its appeal of LBP-99-14. CLI-99-24, 50 N.R.C. 219 (1999).

2. In 10 C.F.R. § 2.309, the Commission's Rules of Practice detail the requirements that must be met in order to obtain the grant of a hearing request or petition for intervention in an NRC adjudicatory proceeding. In a nutshell, the petitioner must establish its standing in the manner stipulated in paragraph (d) of that section and, additionally, set forth at least one admissible contention meeting the requirements set forth in paragraph (f) of the section.

It being undisputed that CAN has satisfied the standing requirement,<sup>3</sup> the focus of this decision is necessarily on the contentions requirements. According to paragraph (f), with respect to each contention sought to be admitted, the hearing request or petition to intervene must

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding; and
- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding.

In addition, the requester or petitioner must provide a concise statement of the alleged facts or expert opinions supporting its position, together with references to the specific sources and documents upon which it intends to rely as furnishing that support (paragraph (v)), as well as provide sufficient information to show the existence of a genuine dispute with the applicant/licensee on a material issue of law or fact (paragraph (vi)).

As above noted, apart from its now academic first contention that challenged the sufficiency of the Federal Register notice, CAN advanced five contentions addressed to

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<sup>3</sup> Given the Commission's determination that CAN had standing to challenge the prior (later withdrawn) license termination plan for this facility (CLI-98-21, supra), it is not surprising that its standing is not in dispute here. Nonetheless, standing being a jurisdictional matter, the Board has undertaken an independent examination of CAN's showing on that matter in its hearing request and is satisfied that showing fulfills the requirements of Section 2.309(d).

whether the current LTP complied with applicable Commission regulations, all of which contentions were said to be supported by the appended declaration of hydrogeologist Robert J. Ross. With respect to each contention, albeit not necessarily on common ground, both the Licensee and the NRC Staff opposed its admission for failure to meet the requirements of Section 2.309(f) of the Rules of Practice.

#### ANALYSIS

1. Given the requirement that at least one of CAN's contentions meet the standard for admission prescribed in Section 2.309(f), the Board decided to concentrate in the first instance upon the acceptability of the second contention, which at first blush appeared to be possibly the most substantial. That contention stated that the LTP was deficient in that the Licensee had "failed to provide documentation of the source, cause and plan for remediation of the current high levels of tritium contamination in the ground water on site," in claimed violation of 10 C.F.R. Part 20, subpart E, §§ 50.52, 50.82. The contention went on to make reference to the asserted fact that samples collected in 2003 from a monitoring well following the emptying of the facility's spent fuel pool had disclosed "an extremely high concentration of tritium (e.g.>45,000pCi/L. . .)." According to the contention, there was a need for, among other things, a plan "for cleaning up the contamination." [CAN's] Request for Hearing, Demonstration of Standing, Discussion of Proceeding and Contentions (August 20, 2004) at 10 [hereinafter August 20 Hearing Request].

As support for the contention, CAN referred to the attached declaration of hydrogeologist Ross. Noting that he had reviewed several documents pertaining to the ground water situation at the Yankee Rowe site, Mr. Ross explained in some detail the basis for his conclusion that the LTP was deficient insofar as assuring that there would not be public exposure to tritium in concentrations above the EPA action levels.

In urging in its September 14 response that Contention 2 be rejected, the Licensee maintained that the contention “fails to challenge the adequacy of the LTP.” Ans. of [Yankee Atomic Electric Company] to [CAN’s] Request for Hearing and Petition to Intervene [hereinafter September 14<sup>th</sup> Response]. This was said to be so because the “LTP is not defective simply because characterization work described in the LTP identifies the need for further characterization and remediation . . . as discussed above, license termination activities represent an ongoing process. That process will continue until the appropriate criteria are satisfied.” Ibid. The same thesis was repeated on the following page of the response: “[C]haracterization of the scope and significance of the tritium contamination continues as part of the ongoing decommissioning process.” Id. at 12. And, in wrapping up its assault upon the tritium contamination contention, the Licensee offered this: “At bottom, this proposed contention does not assert how the Yankee LTP is an inadequate plan to meet the regulations or the NRC guidance documents. It merely faults the LTP because the process described in the LTP is not complete.” Id. at 14.

One difficulty with that line of attack upon the contention became apparent when consideration was given to the teachings of CLI-98-21, supra. Obviously, it would be far preferable for CAN to ventilate its tritium contamination concerns following the completion of the “ongoing process” of site characterization and the development of any remediation measures determined to be necessary on the basis of the characterization. As the Commission has squarely stated, however, such an opportunity will not be available to CAN. Once the LTP receives approval, the further activities of the Licensee leading to the termination of its Yankee Rowe license will be beyond scrutiny in an adjudicatory proceeding at the behest of CAN or any other member of the public. See p. 3, supra.

That being so, it seemed to us that, at least insofar as the matter of tritium contamination was concerned, acceptance of the Licensee's thesis would make a mockery of the opportunity for a hearing that ostensibly had been provided to CAN by the Federal Register notice. For at bottom, when taken in the context of CLI-98-21, that thesis came down to this: CAN cannot raise any questions regarding tritium contamination at this point. This is because the characterization of the scope and significance of that contamination is still ongoing, with the consequence that the matter and nature of possibly necessary remediation measures is likewise beyond present determination. Once that characterization has been completed, however, CAN will not have an opportunity to be heard regarding the results of the characterization in terms of the need for remediation of the tritium contamination.

In the circumstances, we scheduled the November 8 telephone prehearing conference for the purpose of further exploring the matter with counsel for the respective parties. At the conference, we raised with Licensee's counsel the question whether the short answer to the "ongoing process" response was to be found in the terms of Section 50.82(a)(9)(ii). As we have seen, in so many words, that section requires license termination plans to contain, among other things, both "[a] site characterization" and "[p]lans for site remediation." Manifestly, if that information is contained in the LTP, there is much greater reason for ruling, as the Commission has, that the LTP – and it alone – is subject to a hearing request.

Licensee's counsel's response to our inquiry would have us rewrite the section so as to have it require the inclusion in the LTP of only a methodology for site characterization and the development of remediation plans (Tr. at 9-11, 15-18). That response was manifestly far wide of the mark. Apart from the fact that we are not empowered to alter the terms of Commission regulations (or even to interpret ones that lack any apparent ambiguity), counsel called our attention to nothing in the Statement of Consideration accompanying Section 50.82(a)(9)(ii) that

might lend support to such a drastic change in its facial meaning. In a word, it seemed clear to us then (as it does now) that, had the Commission meant that a LTP include simply a methodology for a site characterization, rather than the characterization itself, it presumably would have said so.

The significance of the Licensee's failure to have held the submission of the LTP in abeyance until after it had completed the site characterization, and thus was in a position to determine what, if any, remediation plans were in order, is also manifest. It is quite true, as its counsel maintained (Tr. at 13, 17), that a substantial amount of site characterization already has been accomplished. It also is quite possible that it will eventually be justifiably concluded that no remediation measures will be required insofar as the tritium contamination is concerned. But, on the basis of what is now before us, no such confident conclusion might be reached.

Sections 2.7 and 2.8 of the September 2, 2004 Draft Revision of the LTP describe the continuing investigations of groundwater contamination and the continuing characterization activities. With respect to the ongoing investigations, recently collected information established that some of the new monitoring wells had tritium concentrations that were higher than those measured in older existing wells – indeed, in one case, the concentration exceeded the Environmental Protection Agency's standard for drinking water. *Id.* at Section 2.7.4. The Licensee is continuing its investigations, indicating that, as they progress, "actions will be taken, including further analyses or possibly remediation, to ensure that the site release criteria are met." *Ibid.* (emphasis supplied).

The short of the matter thus is that, by its own admission, because the site characterization remains incomplete the Licensee is unable to state with assurance at this point that remediation of the tritium contamination will not be required. Yet, in addition to the characterization of the site, the LTP must contain any remediation plans found to be necessary

in order to address the contamination disclosed during the characterization activities. See pp. 2-3, supra.

In light of these considerations, there is little room for doubt that CAN's second contention is admissible insofar as it challenges the LTP on the ground that it does not fulfill the requirements of 10 C.F.R. § 50.82.<sup>4</sup>

2. CAN's third and fourth contentions assert the absence of adequate site characterization regarding, respectively, the ground water under the site and the vertical extent

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<sup>4</sup> As refined by its counsel during the November 8 conference, the position of the NRC Staff respecting the admissibility of the second contention requires relatively little discussion. When asked whether the Staff regarded the LTP as meeting the regulatory requirement that it contain a site characterization as well as plans for site remediation, counsel responded that her client "had not reached a decision on that." Tr. at 23. She then stated that the Staff's opposition to the contention "is purely procedural." Ibid. By way of elaboration, she noted that the contention referred to "the source and cause of the tritium contamination" which is "not generally a part of a site characterization." Id. at 23-24. Additionally, counsel noted that, although the contention referred to the need for a plan for remediation, the Licensee had represented in the LTP that no such plans will be necessary in order to meet site release criteria. Id. at 24. Finally, when asked whether the Staff agreed "that the site characterization with respect to tritium is not yet completed," counsel responded that "there is a complete characterization in the sense that [the Licensee] has recognized the contamination." Id. at 25. She went on to note the Staff's expectation that the Licensee would continue the characterization to refine and to confirm what was already known "but not to find additional contamination." Ibid.

As thus seen, despite the fact that the LTP had already been in the Staff's hands for several months, its counsel was not prepared to state without equivocation that the document satisfied the requirements of Section 50.82(a)(9)(ii) pertaining to what must be included in a license termination plan. At the same time, however, she conceded that, as the Licensee itself has stressed, site characterization activities would continue (although, for reasons not given, the Staff is said not to believe that additional tritium contamination would be found). In the circumstances then, the Staff is compelled to base its opposition to the contention upon a hyper-technical reading of what was drafted by a layperson in advance of CAN's retention of counsel. Such a reading is not required by the applicable Rules of Practice. Rather, it is enough that the contention clearly sets forth CAN's concern with the tritium contamination on site and the basis for its belief that the LTP does not adequately address that concern. Moreover, even if the Staff is right that site characterization need not be concerned with the source and cause of the contamination, the contention also refers to the remediation plans that must also be included in the LTP. Although the Licensee and Staff might believe that no such plans will be required with regard to the tritium contamination, that remains to be seen once the site characterization is completed.

of subsurface soil contamination beneath facility structures. August 20 Hearing Request at 11-12. Because of their close relationship, we have elected to combine them into a single contention to the effect that the LTP is deficient in that it does not characterize ground water and subsurface soil contamination on the site to the extent necessary to provide the required assurance that 10 C.F.R. Part 20 standards will be met.

As with regard to the second CAN contention, the Licensee stresses in opposing the third contention that site characterization is an “on-going process.” September 14 Response at 15. For the reasons already stated in connection with the second contention, reliance upon that consideration does not advance the Licensee’s cause. The Licensee further insists, however, that the fourth contention lacks the required specificity. *Id.* at 18-19. That claim equally does not withstand analysis.

Once again, what CAN is asserting is that there has not been the complete site characterization that it believes the regulations require be included in the LTP. We do not understand the Licensee to dispute that the characterization has not been completed. Nor could it. Apart from the emphasis in its response upon the ongoing nature of the characterization process, Part 2 of the LTP, entitled “Site Classification,” contains a mixture of historical and survey data and then identifies continuing activities, including in Section 2.8 “Continuing Characterization Activities.” That being so, the challenge to the now combined third and fourth contentions squarely presents the same issue that was raised by the second contention: namely, whether the LTP had to contain a full site characterization, combined with any plans for remediation that might be required as a result of the characterization. That the Licensee, and possibly the Staff as well, might disagree with CAN’s answer to that question hardly makes the contention any less specific.

3. The fifth contention, which addresses the Licensee's asserted failure to identify and to characterize mixed waste in the ground water on site, is plainly inadmissible because it raises matters outside of the scope of the proceeding. It is clear from Subpart E of 10 C.F.R. Part 20 that this Commission's concern with regard to license termination is limited to radiological matters. Issues pertaining to the non-radiological ground water quality, such as those raised in the fifth contention, are within the purview of other governmental agencies.

4. The sixth contention is a collection of the respects in which the hydrological sampling and studies were assertedly deficient. The contention lacks the required specificity with respect to the significance of the alleged deficiencies. For this reason, we agree with the Licensee and the Staff that the contention is inadmissible.

#### CONCLUSION

For the reasons stated above, Citizens Awareness Network's August 20, 2004 hearing request is hereby granted.<sup>5</sup> As provided in 10 C.F.R. § 2.311(c), a party other than the hearing requestor may appeal this order to the Commission on the question as to whether the hearing request should have been wholly denied. The appeal must be taken within ten (10) days after service of the order and conform to the provisions of paragraph (a) of that section. As further stipulated in paragraph (a), any party who opposes the appeal may file a brief in opposition within ten (10) days of service of the appeal.

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<sup>5</sup> We do not now pass upon CAN's motion addressed to the present unavailability of the Commission's Agencywide Documents Access and Management System (ADAMS). As the parties were informed at the November 8 conference (Tr. at 46), we expect them to deal themselves with the matter of obtaining assurance that CAN has access to all relevant, non-sensitive material during the period of ADAMS unavailability.

It is so ORDERED.

FOR THE ATOMIC SAFETY  
AND LICENSING BOARD <sup>6</sup>

*/RA/*

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Alan S. Rosenthal, Chairman  
ADMINISTRATIVE JUDGE

*/RA/*

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Dr. Richard F. Cole  
ADMINISTRATIVE JUDGE

*/RA/*

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Dr. Charles N. Kelber  
ADMINISTRATIVE JUDGE

Rockville, MD  
November 22, 2004

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<sup>6</sup> Copies of this memorandum order were sent this date by Internet electronic mail transmission to counsel for the parties.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
)  
YANKEE ATOMIC ELECTRIC CO. ) Docket No. 50-29-OLA  
YANKEE NUCLEAR POWER STATION, )  
FRANKLIN COUNTY, MASSACHUSETTS )  
)  
(Operating License Amendment) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (GRANTING HEARING REQUEST) (LBP-04-27) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Docket No. 50-29-OLA  
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HEARING REQUEST) (LBP-04-27)

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[Original signed by Evangeline S. Ngbea]

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
this 22<sup>nd</sup> day of November 2004