UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
YANKEE ATOMIC ELECTRIC COMPANY	)	Docket No. 50-29-OLA
	)	
(Yankee Nuclear Power Station LTP)	)	ASLBP No. 04-831-01-OLA
	)	

NRC STAFF'S NOTICE OF APPEAL OF LBP-04-27, ORDER GRANTING HEARING, AND ACCOMPANYING BRIEF

Shelly D. Cole
Counsel for NRC Staff

December 2, 2004

December 2, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)		
	)		
YANKEE ATOMIC ELECTRIC COMPANY	)	Docket No.	50-29-OLA
	)		
(Yankee Nuclear Power Station LTP)	)	ASLBP No.	04-831-01-OLA
	)		

NRC STAFF'S NOTICE OF APPEAL OF LBP-04-27, ORDER GRANTING HEARING, AND ACCOMPANYING BRIEF

INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(c), the NRC Staff ("Staff") hereby files its notice of appeal and accompanying brief appealing the decision of the Atomic Safety and Licensing Board ("Board") granting Citizens Awareness Network's ("CAN") request for a hearing on the License Termination Plan ("LTP") for Yankee Nuclear Power Station ("Yankee"), finding that CAN has demonstrated standing and proposed two valid contentions. LBP-04-27, 60 NRC __ (November 22, 2004). As discussed below, the Board erred in admitting the two contentions, and the Order admitting the contentions should be reversed and the request for hearing denied.

BACKGROUND

Yankee was permanently shut down in 1992 and is currently undergoing dismantlement. *See* Yankee Atomic Power Company, Yankee Atomic Power Station (Rowe); Notice of Receipt and Availability for Comment of License Termination Plan ("Notice of Receipt"), 69 Fed. Reg. 24,695 (May 4, 2004). In accordance with 10 C.F.R. § 50.82(a)(9), all power reactor licensees must submit an application for termination of their license for facilities undergoing dismantlement and decommissioning. The application for termination must be accompanied by or preceded by an LTP. 10 C.F.R. § 50.82(a)(9). In accordance with § 50.82(a)(9), Yankee Atomic Electric Company

("YAEC" or "the licensee") filed an LTP for Yankee on November 24, 2003 (ADAMS Accession No. ML033450398).[1] On May 4, 2004, the Staff published a Notice of Receipt of the Yankee LTP in the *Federal Register*. 69 Fed. Reg. 24,695. On June 22, 2004, the Staff published a Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing for the Yankee LTP in the *Federal Register*. 69 Fed. Reg. 34,707-08 (June 22, 2004).

On August 20, 2004, CAN filed a request for a hearing.[2] The Staff and YAEC filed responses to CAN's hearing request,[3] and CAN filed a reply to each of the responses.[4] On September 8, 2004, the Board held a prehearing conference to discuss the admissibility of contentions. On November 22, 2004, the Board issued a Memorandum and Order, LBP-04-27, granting CAN's Hearing Request and admitting two contentions. The Staff now appeals LBP-04-27.

---

[1] YAEC supplemented its LTP on December 10, 2003 (ADAMS ML033530147); December 16, 2003 (ADAMS ML041110261); January 19, 2004 (ADAMS ML040280024, ML040280028, ML040280031, ML040280036, ML040280140); January 20, 2004 (ADAMS ML040330777); February 2, 2004 (ADAMS ML040420388); February 10, 2004 (ADAMS ML041100639); and March 4, 2004 (ADAMS ML040690034). *See* 69 Fed. Reg. 24,695 (May 4, 2004). In response to Staff Requests for Additional Information, YAEC filed a revised LTP on November 19, 2004 (ADAMS ML043240450).

[2] *See* [CAN]'s Request for Hearing, Demonstration of Standing, Discussion of Scope of Proceeding and Contentions ("Hearing Request"). On the same day, CAN also filed its Motion to Dismiss Proceedings as Improperly Noticed or Clarify and Re-notice the Proceedings. The Commission denied the Motion to Dismiss in CLI-04-28, 60 NRC __, slip op. (Oct. 7, 2004).

[3] *See* NRC Staff Response to CAN's Request for Hearing and Proposed Contentions (September 20, 2004) ("Staff Response"); Answer of [YAEC] to [CAN]'s Request for Hearing and Petition to Intervene (September 14, 2004) ("YAEC Response").

[4] *See* CAN's Reply to [YAEC]'s Answer (September 21, 2004); CAN's Reply to the NRC Staff Answer (September 27, 2004) ("CAN Reply").

DISCUSSION

A. Summary of LBP-04-27

In LBP-04-27, the Board concentrated its review on contention 2, which states:

> The LTP should not be approved at this time because Yankee Atomic has 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 violation of 10 C.F.R. Part 20, subpart E, §50.52, §50.82. The samples collected in 2003 following the draining and emptying of the fuel pool still show an extremely high concentration of tritium (e.g., >45,000 pCi/L in monitoring well MW-107C). The LTP does not resolve the question as to whether this high level of contamination was previously overlooked or whether it relates to a new or recent release connected with work on the fuel pool in 2003. A supplemental Environmental Report and supplemental EIS should be prepared to explain the source and cause of the contamination, demonstrate that it is contained within the site, and provide a plan for cleaning up the contamination.

In reviewing this contention, the Board focused primarily on the licensee's argument that site characterization is an on-going process and that the LTP is not defective simply because characterization work described in the LTP identifies the need for further characterization and remediation. *See* YAEC Response at 11. The Board rejected the licensee's argument that a contention, to be admissible, cannot merely fault the LTP because the process described in the LTP is not complete, noting that CAN will not have an opportunity to challenge the site characterization in a later proceeding after approval of the LTP. LBP-04-27 at 6-7. The Board also held that § 50.82 requires that the LTP include more than a methodology for site characterization and the development of remediation plans.[5] LBP-04-27 at 7-8. The Board concluded that "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." *Id*. at 8.

---

[5]Section 50.82(a)(9) requires that the LTP include: (1) a site characterization; (2) identification of remaining dismantlement activities; (3) plans for site remediation; (4) detailed plans for the final radiation survey; (5) a description of the end use of the site, if restricted; (5) an updated site-specific estimate of remaining decommissioning costs; (6) a supplement to the environmental report, pursuant to 10 C.F.R. 51.53, describing any new information or significant environmental change associated with the licensee's proposed termination activities; and (7) identification of parts, if any, of the facility or site that were released for use before approval of the LTP.

The Board relegated to a footnote the Staff's arguments on the requirements of 10 C.F.R. § 2.309(f), dismissing the Staff's arguments as a hyper-technical reading of CAN's contentions.[6] LBP-04-27 at 9, n. 4.

The Board thereafter elected to combine CAN's contentions 3 and 4 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." LBP-04-27 at 10. In rewriting and admitting this contention, the Board dismissed the licensee's arguments regarding the on-going nature of the site characterization for the reasons stated in contention 2. LBP-04-27 at 10. The Board also rejected the licensee's argument that the contentions lacked the required specificity. *Id*. The Board did not address the Staff's arguments that neither contention contains sufficient information to raise a genuine dispute with the licensee and neither is adequately supported by fact or expert opinion. *See* Staff Response at 12-13.

The Staff maintains that, as discussed below, none of the contentions proffered by CAN meets the requirements of section 2.309(f). For this reason, the Board erred when it admitted the contentions.

B. <u>The Board Erred When It Admitted CAN Contention 2</u>

The Staff opposed admission of contention 2 because CAN failed to show that the source and cause of the contamination is material to the findings that the NRC must make, failed to establish a genuine dispute with the licensee with respect to its plan for remediation and supplemental Environmental Report ("ER"), and is premature with respect to its request for a supplemental Environmental Impact Statement ("EIS"). *See* Staff Response at 10-11. The Board

---

[6]The Board also seemed particularly concerned that the Staff has not yet completed its substantive review of the LTP. *See* LBP-04-27 at 9, n. 4. However, whether the Staff's substantive review the LTP is complete is immaterial to the threshold inquiry of whether a contention is admissible.

ruled that "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." LBP-04-27 at 9, n. 4.

Under Commission regulations, however, that is not enough. In addition to providing a specific statement of the issue and an explanation of the basis, the regulation is clear: a petitioner must also demonstrate that the issue raised is material to the findings the NRC must make and must provide sufficient information to show a genuine dispute exists with the licensee on a material issue of fact or law. 10 C.F.R. § 2.309(f)(1)(vi). To show a genuine dispute, the petitioner must include references to specific portions of the application that the petitioner disputes along with the supporting reasons for the dispute or identify each failure of the application to contain information on a relevant matter required by law and supporting reasons for its belief that there is a failure. *Id*.

While the Board may feel that the Staff's reading of section 2.309 is "hyper-technical,"[7] the Commission has repeatedly made clear that its contention rule is "strict by design."[8] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 213 (2003); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001); *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, 3), CLI-99-11, 49 NRC 328, 334-35 (1999). In 1989 the Commission toughened its contention rule in a conscious effort to raise the bar for an admissible contention. *Duke Energy Corp*., 49 NRC at 334. It "seeks to ensure that the adjudicatory process is used to address real, concrete,

---

[7]*See* LBP-04-27 at 9, n. 4.

[8]A revision of 10 C.F.R. Part 2 moved the contention standards from § 2.714(b) to § 2.309(f). *See* Changes to Adjudicatory Process, 69 Fed. Reg. 2182 (Jan. 14, 2004). This revision did not result in substantive changes to the standards for admission of a contention. *See* Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004) ("Paragraphs (f)(1) and (2) of § 2.309 incorporate the longstanding contention support requirements of former § 2.714 . . . ."). Thus previous decisions interpreting § 2.714(b) remain applicable to the interpretation of § 2.309(f).

specific issues that are appropriate for litigation. The Commission should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing." Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004). In its *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18 (1998) ("1998 Policy Statement"), the Commission emphasized that the opportunity for a hearing should be a meaningful one that focuses on genuine issues and real disputes and emphasized its expectation that Boards would enforce adherence to the hearing procedures in 10 C.F.R. Part 2.

CAN's contention 2 raises an issue regarding the source and cause of tritium contamination without explaining how that concern is material to the findings that the Staff must make. CAN alleges generally that this is "in violation of 10 C.F.R. Part 20, Subpart E, § 50.52, § 50.82." Request for Hearing at 10. CAN fails, however, to point to any requirement that a site characterization document the source and cause of contamination already on the site. In fact, the purpose of the LTP is to describe future activities a licensee proposes to perform in order to ensure that the remainder of decommissioning activities will be performed in accordance with the regulations, will not be inimical to the common defense and security or to the health and safety of the public and will not have a significant effect on the quality of the environment. 10 C.F.R. § 50.82(a)(10). CAN must provide some explanation in order to demonstrate that this issue is material to the findings the staff must make. Because CAN does not do this, contention 2 should not have been admitted.

CAN's contention 2 also challenges the LTP for failing to provide a remediation plan for tritium contamination. Despite the fact that the licensee, in section 4.2.3 of the LTP, addresses remediation of tritium contamination and concludes that a remediation plan will not be necessary to meet the site release criteria, CAN does not point to any specific aspect of this portion of the LTP

this it takes issue with.[9] In fact, in his affidavit, CAN's expert does not dispute this conclusion.[10] Thus the Licensing Board erred when it admitted contention 2.

Finally, contention 2 asserts that the licensee should prepare a supplemental ER and the NRC should prepare a supplemental EIS. The Board did not specifically address this portion of the contention in its decision, and the Staff interprets this to mean that the Board did not intend to admit this portion. The Staff agrees that this portion of the contention is not admissible. If the Commission determines that the Board did intend to admit this portion of the contention, the Staff believes that such admission would be an error. With respect to a supplemental ER, YAEC did provide a supplement to its ER, in Section 8 of its LTP, as required by § 50.82(a)(9). CAN makes reference to no portion of the ER that it disputes, nor does it provide supporting reasons for believing that the ER fails to contain information required by law. Thus, under § 2.309(f)(1)(vi), this contention is not admissible. With respect to a supplemental EIS, the Staff is preparing an EA and will determine based on the EA whether an EIS is necessary. *See* Staff Response at 11. This portion of CAN's contention is premature.

In its decision, the Board also makes reference to the fact that CAN's contentions were drafted by a layperson. LBP-04-27 at 9, n. 4. While it is true that a layperson may not always be held to the same high standards as a lawyer, that person is still expected to comply with the Commission's basic procedural rules. *Yankee Atomic Electric Co.* (Yankee Nuclear Power

---

[9]The Board emphasizes a statement in the LTP that indicates further actions will be taken, including "possibly remediation." LBP-04-27 at 8. However, a contention's proponent, not the Board, is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement. 1998 Policy Statement at 22. Even had CAN pointed to this particular statement, its contention 2 still would not have been admissible without additional properly supported explanation of how it called into question the conclusions in the LTP.

[10]In fact, CAN's expert never mentions the remediation plans (or lack thereof) in the LTP. He mentions clean up only when he makes the general assertion that the Environmental Report should be supplemented to "fully explain how YAEC intends to clean up the contaminated aquifers at Yankee Rowe." Ross Decl. ¶20 (attached to Hearing Request).

Station), CLI-98-21, 48 NRC 185, 201 (1998) *citing Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1247 (1984), *rev'd in part on other grounds*, CLI-85-2, 21 NRC 282 (1985). The right of participating as a pro se representative carries with it the corresponding responsibility to comply with and be bound by the same agency procedures as all other parties. *Metropolitan Edison Co.*, 19 NRC at 1247, *citing Statement of Policy on Conduct of Licensing Proceedings,* CLI-81-8, 13 NRC 452, 454 (1981) ("1981 Policy Statement"). In the 1981 Policy Statement, the Commission noted that a Board should take account of the special circumstances faced by any participant, including that a party has limited resources, but such circumstances do not relieve a party of its hearing obligations. 1981 Policy Statement at 454. While a Board may appropriately view a petitioner's support for its contention in a light that is favorable to the petitioner, the Board cannot do so by ignoring the requirements set forth in § 2.714(b)(2). *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998) *citing Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991). Thus CAN's failure to comply with the requirements is not excused merely because the contentions were drafted by a layperson.

C. <u>The Board Erred When It Admitted CAN Contentions 3 and 4</u>

The Board erred when it combined contentions 3 and 4 and admitted them as one contention. As discussed below, neither contention meets the requirements of 10 C.F.R. § 2.309(f) individually and combining the two does nothing to remedy this deficiency.

CAN's contention 3 alleges that YAEC has failed to adequately characterize several possible contaminated zones within the groundwater. Hearing Request at 11. The Board erred in admitting this contention because CAN failed to cite to specific portions of the LTP as inadequate and because it was based on an expert opinion that merely stated a conclusion without providing a reasoned basis or explanation.

Under 10 C.F.R. § 2.309(f)(1)(vi), to establish a genuine dispute with the licensee on a material issue a petitioner must point to a specific portion of the application that it disputes and give supporting reasons or identify each failure of the application to contain information required by law and give supporting reasons. CAN does not argue that no characterization of groundwater was done, only that the characterization was "inadequate." But it fails to point to any section of the LTP that it disputes. For this reason contention 3 should not have been admitted.

In addition, both the contention and the expert affidavit offer only vague, conclusory statements. Mr. Ross asserts that his review "indicates several possible contaminated zones that were not fully characterized," and goes on to give examples of areas where tritium contamination was found and no permanent wells were installed. Ross Decl. ¶15. Mr. Ross fails to explain why the samples that were collected were inadequate or in what way the LTP is inadequate because of this. Mr. Ross does not assert that it is necessary to install permanent wells in every location where tritium contamination is found, nor does he explain why it is important to install permanent wells in the locations he mentions. "The intervenor must do more than submit 'bald or conclusory allegation[s]' of a dispute with the applicant." *Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001). Neither mere speculation nor bare or conclusory assertions, even by an expert, alleging that a matter should be considered will suffice to allow the admission of a proffered contention. *Exelon Generation Company, LLC* (Early Site Permit for Clinton ESP Site), LBP-04-17, slip op. at 6 (Aug. 6, 2004) *citing Fansteel, Inc.* (Muskogee, Oklahoma, site), CLI-03-13, 58 NRC 195, 203 (2003). "[A]n expert opinion that merely states a conclusion . . . without providing a reasoned basis or explanation for that conclusion is inadequate . . . ." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 181 (1998). Because CAN provides no more than conclusory assertions, this contention should not have been admitted.

CAN's contention 4 alleges that the LTP does not completely characterize the vertical extent of subsurface soil contamination beneath facility structures. Hearing Request at 11. The Board erred in admitting this contention because CAN did not establish a genuine dispute with the licensee on a material issue and because the contention is not supported by expert opinion or fact.

The Hearing Request and Mr. Ross's affidavit allege that subsurface contamination has not been "completely" characterized. Neither asserts that the LTP completely fails to address subsurface contamination,[11] nor does either point to a specific section of the LTP that is "incomplete." Thus CAN has failed to establish a genuine dispute with the licensee on a material issue. For this reason, contention 4 should not have been admitted.

In addition to failing to establish a genuine dispute with the licensee, contention 4 is not adequately supported by expert opinion or fact. Mr. Ross merely repeats the contention without providing any explanation as to why he believes the characterization is inadequate. Ross Decl. ¶16. As discussed above, a contention must be supported by more than bare assertions and conclusory statements. *Exelon Generation Company, LLC*, LBP-04-17 at 6; *Private Fuel Storage, L.L.C.*, 47 NRC at 181. Thus, contention 4 should not have been admitted.

CONCLUSION

For the foregoing reasons, the Staff respectfully requests that the Commission reverse the Board's decision and deny the Petitioner's request for hearing.

Respectfully submitted,
/RA/

Shelly D. Cole
Counsel for NRC Staff

Dated at Rockville, Maryland
this 2nd day of December, 2004

---

[11]CAN's reply seems to allege that the LTP does not address the issue of subsurface contamination at all. CAN Reply at 6. YAEC's Response, at 18, asserts that subsurface contamination is addressed in sections 5.6.3.2.2 and 2.6 of the LTP. CAN does not dispute the adequacy of these sections to address subsurface contamination under structures.

December 2, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
YANKEE ATOMIC ELECTRIC COMPANY	)	Docket No. 50-29-OLA
	)	
(Yankee Nuclear Power Station LTP)	)	ASLBP No. 04-831-01-OLA

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF NOTICE OF APPEAL OF LBP-04-27, ORDER GRANTING HEARING, AND ACCOMPANYING BRIEF" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class; or as indicated by an asterisk (*), by deposit in the Nuclear Regulatory Commission's internal mail system; and by e-mail as indicated by a double asterisk (**), this 2nd day of, December 2004.

Administrative Judge Alan S. Rosenthal, Chair* **
Atomic Safety and Licensing Board Panel
US Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, DC 20555
E-mail: rsnthl@comcast.net
src2@nrc.gov

Administrative Judge Dr. Richard F. Cole* **
Atomic Safety and Licensing Board Panel
US Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, DC 20555
E-mail: rfc1@nrc.gov

Office of the Secretary* **
ATTN: Rulemaking and Adjudications Staff
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, DC 20555
E-mail: HEARINGDOCKET@nrc.gov

Office of Commission Appellate Adjudication*
Mail Stop: O-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge Dr. Charles N. Kelber* **
Atomic Safety and Licensing Board Panel
US Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, DC 20555
E-mail: cnk@nrc.gov

Atomic Safety and Licensing Board Panel
Adjudicatory File*
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, DC 20555

Jonathan M. Block, Esq.**
94 Main Street
P.O. Box 566
Putney, VT 05436-0566
E-mail: jonb@sover.net

Deborah B. Katz **
P.O. Box 3023
Charlemont, MA 01339-3023
E-mail: deb@nukebusters.org

David A. Repka, Esq.**
William A. Horin, Esq.**
Winston & Strawn LLP
1400 L Street, N.W.
Washington, DC 20005-3502
E-mail: drepka@winston.com
whorin@winston.com

Respectfully submitted,

/***RA***/

_____
Shelly D. Cole
Counsel for NRC Staff