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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

BEFORE THE COMMISSION

*In the Matter of*

YANKEE ATOMIC ELECTRIC COMPANY

(Yankee Nuclear Power Station LTP)

Docket No. 50-29-OLA

ASLBP No. 04-831-01-OLA

December 13, 2004

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**CITIZENS AWARENESS NETWORK'S BRIEF IN OPPOSITION TO  
YANKEE ATOMIC ELECTRIC COMPANY'S NOTICE OF APPEAL OF  
LBP-04-27, ORDER GRANTING HEARING, AND BRIEF**

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**I. INTRODUCTION**

Pursuant to 10 C.F.R. § 2.311, the Citizens Awareness Network ("CAN") hereby files its brief in opposition to the Yankee Atomic Electric Company ("YAEC") 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 Rowe"), finding that CAN has demonstrated standing and proposed two valid contentions. LBP-04-27, 60 NRC \_\_ (November 22, 2004). As discussed below, YAEC fails to meet the standard for interlocutory review and its argument concerning the Board decision is meritless. The Board did not err in admitting the two contentions, the Order admitting the contentions should be sustained, the request for hearing affirmed, and the case returned to the Board for a hearing on the merits of the admitted contentions.

## II. BACKGROUND FACTS AND ISSUES.

Yankee Rowe was permanently shut down in 1992 and is currently undergoing decommissioning. *See Yankee Atomic Electric Company* (Yankee Nuclear Power Station, Rowe); Notice of Receipt and Availability for Comment of License Termination Plan, 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. An LTP must accompany or precede the application for termination of the license. 10 C.F.R. § 50.82(a)(9).

Theoretically in accordance with § 50.82(a)(9), Yankee Atomic Electric Company (“YAEC” or “the licensee”) filed its first LTP for Yankee Rowe May of 1997, with Rev. 1 in December of 1997 becoming the LTP considered in the first LTP proceeding. *Yankee Atomic Electric Company* (Yankee Nuclear Power Station), License Termination Plan, Atomic Safety and Licensing Board, “Prehearing Conference Order Ruling On Contentions,” Docket No. 50-029-LA-R, ASLBP No. 99-754-01-LA-R, 49 NRC 238, 260 at n.2 (March 17, 1999). Although the intervenors’ initial filings were thrown out for lack of standing, on appeal the Commission reinstated the proceeding and reconstituted the Board for consideration of intervenors’ contentions. *See generally, for discussion of factual background, Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185 (October 23, 1998) and *Yankee Atomic Electric Company* (Yankee Nuclear Power

Station), License Termination Plan, Atomic Safety and Licensing Board, *supra*, 49 NRC 238-241.

Several months after a number of intervenors' contentions were accepted for hearing, following the NRC Staff's filing of an EA on the License Termination Plan, one of the intervenors, New England Coalition [on Nuclear Pollution], filed "NEPA contentions" challenging the EA. PDR Accession Number 9905190080 (990517). These contentions relied, in part, on a supporting declaration by hydrogeologist Robert Ross. *See attachment to id.* Mr. Ross's declaration on the first LTP faulted several of the same issues that remain problematic in an LTP submitted six years later. By 1999--but likely as early as 1995--YAEC and the NRC Staff were on notice of an extensive, undocumented release of radioactive tritium contaminating the groundwater and the Sherman spring. Compare *id.* with Ross Declaration (2004), attached to CAN's Hearing Request as Exhibit 3.

Confronted, among other matters, with the prospect of the Board's admission of NEC's NEPA Contentions on the hydrogeological inadequacies in the LTP, YAEC withdrew the first license termination plan, claiming the need to use a different methodology [MARSSIM] and telling the Board that it would submit an LTP sometime in the next decade or more. *Yankee Atomic Electric Company* (Yankee Nuclear Power Station), License Termination Plan, Atomic Safety and Licensing Board, "Memorandum and Order," Docket No. 50-029-LA-R, ASLBP No. 99-754-01-LA-R, 49 NRC 481, 482-483 (June 14, 1999).

Until July 2003, neither the NRC Staff nor YAEC took any substantive action on the tritium release. In July 2003, NRC staff permitted YAEC to drain the fuel pool into the Deerfield River, ostensibly to eliminate the “cause” of the tritium, by then found to have penetrated and contaminated at least three aquifers beneath the Yankee Rowe site.<sup>1</sup>

The LTP under consideration at this time still does not contain a definitive statement of the source of the tritium contamination, the extent of that contamination, a plan to remediate the contamination, or a justification for the absence of a remedial action plan. The Atomic Safety and Licensing Board noted this absence during the “prehearing” hearing on the admissibility of the contentions and related issues and the Order admitting two contentions. *Compare* Tr.<sup>2</sup> at 40-43 *generally* with Board Order (Scheduling, etc.) (Nov. 1), Board Memorandum and Order (Admitting Contentions) (November 22, 2004), and Memorandum/Order (implementing stay)(December 6, 2004).

Again, theoretically in accordance with § 50.82(a)(9), YAEC filed a second LTP for Yankee Rowe (resulting in the instant matter) on November 24, 2003 (ADAMS Accession No. ML033450398).<sup>3</sup> On May 4, 2004, the Staff published a Notice of Receipt of the

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<sup>1</sup> Oral communication, unidentified YAEC staff member, at a public meeting of the Franklin County Regional Planning Commission, YAEC, U.S. EPA, Region I, representatives of Massachusetts Department of Environmental Protection, other state agencies, and an environmental concern hired by the Planning Commission to review LTP “brown field” issues (March 31, 2004).

<sup>2</sup> Henceforth, “Tr. at \_\_\_”.

<sup>3</sup> 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



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.<sup>4</sup> The Staff and YAEC each filed an 'Answer' to CAN's hearing request,<sup>5</sup> and CAN filed a reply to each of the answers.<sup>6</sup> On November 8, 2004, the Board held a "pre-hearing" hearing to discuss the admissibility of contentions. The Board indicated to YAEC, CAN and the NRC that it has specific concerns about the applicability of a portion of *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185 (October 23, 1998), to issues involved in determining the admissibility of the contentions in this case. Board Order, "Scheduling Telephone Conference and Identifying the Matters to be Considered Thereat" at 2-4 (November 1, 2004). The Board suggested to the parties that in their consideration of the Commissions determinations in CLI-98-21 they "might wish to focus particularly upon CAN's contention

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filed a revised LTP on November 19, 2004 (ADAMS ML043240450), which version is not the subject of the matter before the Commission.

<sup>4</sup>See CAN's Request for Hearing, Demonstration of Standing, Discussion of Scope of Proceeding and Contentions ("Hearing Request") (August 20, 2004).

<sup>5</sup>See NRC Staff Response to CAN's Request for Hearing and Proposed Contentions (September 20, 2004) ("Staff Answer"); Answer of [YAEC] to [CAN]'s Request for Hearing and Petition to Intervene (September 14, 2004) ("YAEC Response").

<sup>6</sup>See CAN's Reply to [YAEC]'s Answer (September 21, 2004); CAN's Reply to the NRC Staff Answer (September 27, 2004) ("CAN Reply").

two and the basis of the Licensee's objection to it." *Id.* at 2. The Board viewed the contention as challenging "the sufficiency of the Licensee's LTP for Yankee-Rowe" on the ground that it asserted that YAEC violated

certain specified Commission regulations, [because] the Licensee '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.'" August 20 Hearing Request at 10. As a basis for the contention, CAN relie[d] on averments in the declaration of a hydrogeologist that was appended to the hearing request as Exhibit 3.

Board Order, Scheduling [Prehearing] (November 1, 2004). YAEC, the Board pointed out, "insists that [CAN] 'fails to establish an admissible issue' because it 'fails to challenge the adequacy of the LTP.'" *Id.* (citing YAEC's Answer at 11). The Board then turned to the crux of its difficulties on this point, stating that YAEC's rationale for this statement was that the

"LTP is not defective simply because characterization work described in the LTP identifies the need for further characterization and remediation. That process will continue until the appropriate criteria are satisfied." In short, the Licensee would apparently have it that, given that "characterization of the scope and significance of the tritium contamination continues as part of the ongoing decommissioning process", CAN is precluded at this point from raising its concerns regarding that contamination.

What that line of reasoning leaves open, however, is the question of what, if any, remedies might be available to CAN at a later date if dissatisfied with the results of the Licensee's tritium contamination remediation efforts undertaken in the course of the implementation of the LTP. Specifically, acting on behalf of its members whose proximity to the Yankee-Rowe site gives rise to the organization's conceded representational standing in this proceeding, will CAN be provided a fresh opportunity to ventilate any remaining concerns on that score before the NRC Staff approves the termination of the Yankee-Rowe license? Stated otherwise, if (as the Licensee maintains) the sufficiency of the LTP respecting tritium contamination remediation is not subject to inquiry at CAN's behest today, will there be a time when such inquiry becomes permissible?

Although the filing's of the parties are silent on the subject, our reading of *Yankee Atomic Electric*, CLI-98-21, *supra*, suggests that a further hearing opportunity will not

be available to CAN or anyone else. If that reading is correct, it would seem to follow perforce that this proceeding is the only mechanism whereby CAN might raise questions respecting the adequacy of what the Licensee plans to do by way of ensuring that the tritium now on site does not pose a threat to the public health and safety. Should that be the case, there is at least a surface unattractiveness to the Licensee's "on-going process" line of argument in resisting the grant of a hearing on contention two. For its adoption would appear to leave the matter of Licensee compliance with Commission regulations pertaining to the remediation of the tritium contamination entirely in the hands of the NRC Staff, without any possible public involvement in the inquiry

. . . .

[I]t would seem that whatever conclusion might ultimately be reached could be applied with equal force to the Licensee's like rejoinder – i.e. that an on-going process is involved – to contention three, which asserted the failure of the Licensee to characterize adequately several possible contaminated zones within the ground water under the site. *See* August 20 Hearing Request at 11; September 14 Answer at 15.

*Id.* at 2-4 (emphasis added).

At the hearing on November 8th, the Board inquired of NRC Staff counsel concerning the Staff position on several points at issue in determining the appropriateness of granting interlocutory review and the substance of the issues the Staff raise in their review Brief. In pertinent part, the Board

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.

Board Memorandum and Order at 7. The Board went on to state that

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.

Board Memorandum and Order at 7-9 (November 22, 2004).

After reviewing the LTP and related documents, conducting the above described “prehearing”, further reviewing of the information obtained at that hearing and in the pleadings of the NRC Staff, YAEC and CAN, the Board, on November 22, 2004, issued a Memorandum and Order, LBP-04-27. The Order granted CAN’s Hearing Request and admitted two contentions. The Staff filed a notice of appeal of LBP-04-27 and appeal brief via e-mail to CAN’s counsel after close of business (at 5:18 PM) on December 2, 2004. That same day, at 11 PM, YAEC served via e-mail to CAN’s counsel a Motion for Stay, Notice of Appeal of LBP-04-27 and Appeal Brief.

### III. ARGUMENTS.

#### A. THE PROPER SUBJECT OF INTERLOCUTORY REVIEW IN THIS CASE (IF TAKEN UP AT ALL) IS SOLELY THE LEGAL QUESTION WHETHER 10 CFR 50.82(a)(9)(ii)(A) REQUIRES THAT AN LTP INCLUDE A COMPLETE SITE CHARACTERIZATION.

##### 1. Interlocutory review is not favored.

The Licensee and the NRC Staff seek the Commission’s *de novo* review of the Atomic Safety and Licensing Board’s decision in this case to admit some of Citizens Awareness Network’s contentions at hearing. The Staff does so without asking for it overtly; rather, it just attempts to recycle the arguments it made to the Board in its Answer and at the prehearing hearing. The Licensee actually states that it is entitled to *de novo* review. YAEC Brief at 10. Citizens Awareness Network contends that *de novo* review is not the proper standard. The Board based its decision on narrow grounds that CAN had articulated a

“legal” contention supported by its expert and the plain language 10 CFR 50.82(a)(9)(ii)(A), requiring an LTP to include a site characterization (rather than a mere “status report” on ongoing site characterization activities).<sup>7</sup> Given that the Board’s decision derives from its interpretation of a Commission regulation, the proper scope of the review is the narrowest ground upon which review may be taken (if at all)<sup>8</sup> rather than a broad-based revisiting of the entire decision. This is consistent with Commission practice.

The Commission's general policy has been to minimize the use of interlocutory review. *See, e.g., Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant)*, CLI-00-11, 51 NRC \_\_\_, slip op. at 2 (June 20, 2000); *Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site)*, CLI-94-11, 40 NRC 55, 59 (1994). Ordinarily the Commission’s practice has been to take interlocutory review where the referred ruling “either threatens the adversely affected party with ‘immediate and serious irreparable harm’ or ‘affects the basic structure of the proceeding in a pervasive or unusual manner’.” *Private Fuel Storage, LLC.*

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<sup>7</sup>The Board’s interpretation is consistent with that of the Board in *Connecticut Yankee Atomic Power Company* (Haddam Neck Plant), Docket 50-213-OLA, LBP-01-21 (ASLBP No. 01-787-02-OLA), 54 NRC 33, 58-63 (July 9, 2001), discussed *infra*.

<sup>8</sup>Unquestionably, the NRC Staff’s attempt to use this interlocutory proceeding to overturn the Panel’s refusal to accept the NRC Staff’s position on the admissibility of the contentions is not appropriate. The standard for interlocutory review has always been predicated upon deference to the Panel’s conclusions “only where the referred ruling either threatens the adversely affected party with ‘immediate and serious irreparable harm’ or ‘affects the basic structure of the proceeding in a pervasive or unusual manner’.” *In The Matter Of Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), Docket No. 72-22-ISFSI, Nuclear Regulatory Commission, CLI-00-13, 52 NRC 23, 28 (August 1, 2000).

The NRC Staff makes no such showing in its brief. Rather, it uses the brief to argue to the Commission the very same points addressed and rejected by the panel. While one may concede that a different initial determination by the Panel on the NRC Staff’s position would have lead to a different outcome, it is the same issue that the NRC Staff would not take a position on, i.e., the proper interpretation of the site characterization requirement in 10 CFR 50.82, that is the only legal issue that conceivably has a broad

(Independent Spent Fuel Storage Installation), Docket No. 72-22-ISFSI, CLI-00-13, 52 NRC 23, 28 (August 1, 2000) (emphasis added). Neither consideration is evident in this case. Neither the NRC Staff nor the Licensee has made or can make a showing of “immediate and serious irreparable harm” were the proceeding to go forward. Neither the NRC Staff nor the Licensee has or can make a showing that the decision at issue “affects the basic structure of the proceeding in a pervasive or unusual manner” as a Board in at least one other case (*Connecticut Yankee, infra*) resolved contentions based upon the Board’s interpretation of regulations. That interpretive decision had none of the ‘generic’ consequences that would warrant the Commission taking interlocutory review in this case.

However, interlocutory review *may* be appropriate if a Board’s ruling involves a question or law with *generic* implications and the issue has not been previously addressed. *See, e.g., Advanced Medical Systems, Inc.* (One Factory Row, Geneva, OH 44041), ALAB-929, 31 NRC 271, 279 (1990). Here, the issue was addressed without consequences by another Board. Moreover, in this case an extremely experienced Board--despite the Commission’s encouragement in the *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 23 (1998)--chose not to view the ruling at issue as one presenting a ‘novel question’ that ‘could benefit from early resolution’ by certifying the issue to the Commission.

There is no doubt that the sweep of Commission discretion includes undertaking *de*

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implication for other adjudications and the NRC Staff’s enforcement of the regulation.

*novo* review where appropriate; ordinarily, however, the Commission gives weight to the Presiding Officer's "evaluation of the evidence and ... disposition of the issues" and does not "second guess" the Presiding Officer's "reasonable findings." *Hydro Resources*, CLI-00-12, 52 NRC 1, 3 (2000)(quotations and citations omitted). The reason for this deference to the Presiding Officer's decisions is that they are based upon review of the record in detail, assisted by at least one technical advisor. *Id.* (There were two in this case.) Thus, where the Presiding Officer's findings and conclusions are on "matters involving fact-specific issues" or "where the affidavits or submissions of experts must be weighed", the Commission is "generally disinclined to upset" the Presiding Officer's decision. *Id.* Such considerations certainly apply in this case.

**2. Deficiencies in the prehearing argument and Staff and YAEC Answers.**

Only Citizens Awareness Network provided the Board with an expert declaration in support of its position. The Board reviewed that expert declaration in finding some of Citizens Awareness Network's contentions acceptable. The Board also examined the Licensee's application. *See generally*, the discussion and question of all three judges contained in the prehearing transcript. The Licensee chose not to address Citizens Awareness Network's contentions "head on" with its own expert declaration. *See generally*, the Licensee's 'Answer'. In fact, not until this appeal has the Licensee really presented detailed arguments concerning its position with citation to its application. Significantly, the NRC Staff took the same tact. *See generally*, NRC Staff's 'Answer'. In the absence of any



countervailing expert opinion, at hearing on the admissibility of the contentions, the Presiding Officer questioned the licensee about Citizens Awareness Network's contention two. Tr. at 9-44. In particular, the Presiding Officer--and the rest of the Board--were interested to know why the licensee had not submitted a site characterization, as the LTP only includes a status report on state site characterization prior to June of 2004. *Compare* Tr. at 9-18, 22-44, *with* LTP, "Site Characterization Status Report" (June 4, 2004).

Significantly, the contention at issue focuses on the absence from the LTP of a determination of the source, extent and remediation plan for the extensive tritium contamination at the Yankee Rowe site. Neither the Licensee nor the NRC Staff provided any countervailing evidence or opinion to Citizens Awareness Network's expert hydrogeologist Robert Ross on this deficiency. In fact, the NRC Staff told the Board that they had not completed an evaluation of the License Termination Plan. Tr. at 22-27, 31.

The NRC Staff took a position on the contention that the Board called "hypertechnical" because the Staff chose to focus on such things as the contention's inclusion of the need to document the cause and source of the pollution. Tr. at 22-24. However, this is precisely the type of information that a "site characterization" is supposed to include in order to develop a remediation plan, as is developed below in the next argument section.

The Licensee took the position that "site characterization" was an on-going process and that, therefore, no "site characterization" was required, merely a plan to undertake

continuing characterization of the site. Tr. at 9-17. On this point, the Board differed with the Licensee. *See id. and* Memorandum and Order (Nov. 22, 2004). The Board took the position that CAN's contention two was a "legal" contention based upon a strict reading of 10 CFR 50.82(a)(9)(ii)(A). Tr. at 39-43. This position is not at all unorthodox. The Board in Connecticut Yankee was called upon to make a determination that the same regulation had the implicit requirement the Board in this case believes that it does.

Despite the strong desire of both the Licensee YAEC and the NRC Staff to have an opportunity at this juncture to completely re-litigate their respective cases, neither has provided the Commission with a scintilla of evidence that the Board's decision in this case rises to the level of the interlocutory appeal review standard. Thus, review should be denied.

**B. REASONABLE, PLAIN LANGUAGE INTERPRETATION LEADS TO THE CONCLUSION THAT 50.82(a)(9)(ii)(A) REQUIRES THE LICENSEE TO SUBMIT A COMPLETE SITE CHARACTERIZATION WITH THE LTP.**

In the event the Commission decides to take review of this case, CAN contends that such review should focus solely on the Board's interpretation of 50.82(a)(9)(ii)(A) for the reasons articulated above. Making its interpretation, CAN respectfully submits that the Commission should utilize the same canons of interpretation it has relied upon in the past. CAN also submits that using this approach, the Commission will simply arrive at the same place that the Board in Connecticut Yankee and this case arrived at: that 50.82(a)(9)(ii)(A), within the constellation of the rest of the regulations and guidance documents suggesting the

application of the regulation, requires a completed Site Characterization with the submission of an LTP.

The Supreme Court has long held that in any case concerning interpretation of a statute, the language of the statute itself must be the “starting point” of any analysis. *Lewis v. United States*, 445 U.S. 55, 60 (1980); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979); *Southeastern Community College v. Davis*, 442 U.S. 397, 405 (1979). Moreover, as the Commission has recognized:

The starting point in interpreting any regulation is not ... the consideration of “over-arching,” albeit unwritten, principles. Rather, we must begin with the language and structure of the provision itself. In undertaking this task, we must bear in mind the elementary canon of construction that the regulation should be interpreted so as not to render any part inoperative; the whole of the regulation must be given effect. Further, ‘[a]lthough administrative history and other available guidance may be consulted for background information and the resolution of ambiguities in a regulation’s language, its interpretation may not conflict with the plain meaning of the wording used in that regulation’.”

*Kerr-McGee Chemical Corporation* (West Chicago Rare Earths Facility), 33 N.R.C. 81, 132-133 (1991). As the Atomic Safety and Licensing Board reasoned in *Shoreham*:

As is the case with statutory construction, interpretation of any regulation must begin with the language and structure of the provision itself. Further, the entirety of the provision must be given effect. Although administrative history and other available guidance may be consulted for background information and the resolution of ambiguities in a regulation’s language, its interpretation may not conflict with the plain meaning of the wording used in that regulation.

*Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 288, review declined, CLI-88-11, 28 NRC 603 (1988).

The regulation at issue, 10 CFR 50.82(a)(9)(ii)(A), states that a License Termination Plan requires a "site characterization." The site characterization is part of the list of requisite items that the LTP must contain. As there is no additional definition of the requirement in the regulation, we can reasonably look to the Statement of Consideration in the Final Rule to see if the Commission revealed anything further about the meaning of "site characterization."

In the Final Rule, responding to a comment, the Commission states:

The site characterization, description of the remaining dismantlement activities and plans for site remediation are necessary for the NRC to be sure that the licensee will have adequate funds to complete decommissioning and that the appropriate actions will be completed by the licensee to ensure that the public health and safety will be protected.

Final Rule, "Decommissioning of Nuclear Power Reactors," 69 FR 39278, 39289 (July 29, 1996). The sole ambiguity in the provision resides in whether the requisite "site characterization" is a final document or a continuing activity. Licensees conduct "site characterization" in order to arrive at a sufficient level of characterization of the site to be able to: (1) identify the nature, source, and extent of contaminants; (2) plan for necessary remediation of contaminants; (3) accurately project the cost of these clean-up activities. That state of identification should result in site characterization that takes the form of a relatively fixed road map of conditions on site. This is consistent with the sole relevant statement in the Final Rule concerning "site characterization" quoted above. Of the list of items required by 50.82(a)(9)(ii)(A), none is used as a gerund. All have the finality equivalent to the use of the article 'A' before the words 'site characterization', again implying a completed product.

The plain language of the regulation supports the notion that “a site characterization” may be taken as equivalent to a completed document.

Turning to other sources for understanding the meaning of “a site characterization”, the NRC Staff Regulatory Guidance and the NUREG Standard Review Plan for License Termination Plans may illuminate the matter. An Atomic Safety and Licensing Board used the later approach in the *Connecticut Yankee Atomic Power Company* [CYAPCo] case.

In *Connecticut Yankee Atomic Power Company* (Haddam Neck Plant), Docket 50-213-OLA, LBP-01-21 (ASLBP No. 01-787-02-OLA), 54 NRC 33, 58-63 (July 9, 2001), CYAPCo’s attorney argued that site characterization was a continuing process and one could not attack the adequacy of the site characterization, but only the way it was used to classify portion of the site under NUREG-1575, MARSSIM. *Id.* at 58. The CYAPCo Attorney went on to argue that, at bottom, the site characterization is identical with the MARSSIM classifications based on site characterization data. *Id.* (The NRC Staff appears to be taking the same position in this case, see Tr. at 21.) The Board in *Connecticut Yankee* rejected CYAPCo’s argument on this point after analyzing the meaning of ‘characterization’ and applying the interpretive canons recommended in *Shoreham*, ALAB-900, 28 NRC 275, 288 (1988). The Board then looked to the definitions in NUREG-1700, *Standard Review Plan for Evaluating Nuclear Power Reactor License Termination Plans -- Final Report* (April 2000). Therein, with cautious acknowledgment of the limitations inherent in utilizing “guidance” documents, the Board noted the following as consonant with its plain-language

reading of 50.82(a)(9)(ii)(A). *Id.* at 6. The Board examined the same criteria using the 2000 version of the Standard Review Plan as is undertaken below using the 2003 Rev. 1 version.

NRC documents are quite plain about the relationship between the development of a site characterization and the process required of a licensee to meet the conditions for license termination. First and foremost, a site characterization is “required” (in whatever sense that has meaning given the “guidance” standard applies to the document) to be part of the Licensee’s License Termination Plan. NUREG-1700, Rev. 1, Standard Review Plan for Evaluating Nuclear Power Reactor License Termination Plans at 4, 8 (April 2003). The site characterization document is described as:

information . . . provided to determine the extent and range of radioactive contamination on site, including structures (on a structure by structure basis and as necessary on a room by room basis), systems, components, residues, soils, and surface and ground water. On the basis of the site characterization, the licensee designs final radiation surveys to evaluate all areas in which contamination previously existed, remains, or has the potential to remain.

*Id.* at 8-9 (emphasis added). The NRC Staff is supposed to conduct a review “to ensure that the site characterization presented in the LTP is complete” and to verify “that the licensee obtained the data using sufficiently sensitive instruments and proper quality assurance procedures.” *Id.* This is necessary in order to “obtain reliable data . . . relevant to determining whether the site will meet the decommissioning limits if characterization data is used as final survey data.” *Id.* at 9. Ultimately, the “acceptance criteria” upon which the NRC Staff is supposed to base its decision as to the acceptability of the LTP include the

following considerations:

The LTP site characterization is sufficiently detailed to allow the NRC staff to determine the extent and range of radiological contamination of structures, systems (including sewer systems and waste management systems), floor drains, ventilation ducts, piping and embedded piping, rubble, ground water and surface water, components, residues, and environment, including maximum and average contamination levels and ambient exposure rate measurements of all relevant areas (structures, equipment, and soils) of the site (including contamination on and beneath paved parking lots).

The LTP describes in detail the areas and equipment that need further remediation to allow the reviewer to estimate the radiological conditions that will be encountered during remediation of equipment, components, structures, and outdoor areas.

*Id.* at 9-10 (emphasis added). These are precisely the items faulted by the Board as missing from the LTP Yankee Atomic Electric Company submitted in this case. See generally the prehearing transcript and the Memorandum and Order (November 22, 2004).

When the NRC Staff reviews an LTP it is supposed to “consider whether the licensee has met each of the requirements set out below and whether the plan provides an adequate basis for each of the following findings identified below and these findings are founded on the Acceptance Criteria . . . of this SRP” [Standard Review Plan]:

[Has] [t]he licensee met the objective of providing an adequate site characterization as required by 10 CFR 50.82(a)(9)(ii)(A).

[Has] [t]he licensee adequately described its plans for site remediation, as required by 10 CFR 50.82(a)(9)(ii)(C).

*Id.* at 17-18. As it is plain that “plans for site remediation” cannot be complete without an adequate “site characterization”, the contention at issue reasonably raises the questions regarding source, extent, and site remediation as being the kind of information that should be

included in Yankee Atomic Electric Company's site characterization.

The Reg. Guide is even more explicit in describing the "site characterization" required under 10 CFR 50.82(a)(9)(ii)(A):

For the most part, the LTP will contain a final site characterization, dose assessment, identification of the remaining remediation activities and supporting plan, and final survey plan.

Introduction, Regulatory Guide 1.179 - *Standard Format and Content of License Termination Plans for Nuclear Power Reactors* (January 1999). This language could hardly be more explicit: the characterization is expected to be "final"--not in flux, not a "status report" (as submitted in this case)--but a final site characterization. Moreover, there should also be "identification of the remaining remediation activities and supporting plan"--not a "snapshot" of what may be the remaining activities and clean-up plan, not a supposition that remediation may be needed (as in this case)--but specific "identification" of the remaining remediation activities and a plan for carrying them out.

The three highly experienced and distinguished<sup>9</sup> members of the Atomic Safety and

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<sup>9</sup> Their credentials are described this way at the NRC website, <http://www.nrc.gov/what-we-do/regulatory/adjudicatory/panel-members> :

Cole, Richard F., B.S.C.E., Drexel University (1959), M.S.S.E., Massachusetts Institute of Technology (1961), Ph.D., University of North Carolina (1968). Dr. Cole has been a full-time member of the Panel since 1973. In addition to publishing numerous articles on water, wastewater treatment, and international training of environmental engineering, Dr. Cole has held teaching, administrative, and engineering positions in the United States and Guatemala with the University of North Carolina, Pennsylvania State University, and the State of Pennsylvania. He has held several leadership positions and committee assignments with numerous professional associations, and is a Diplomat of the American Academy of Environmental Engineers.

Kelber, Charles N., Ph.D. University of Minnesota. Before joining the Panel as a full-time member in 1990, Dr. Kelber was the Panel's Senior Technical Advisor from 1988 to 1990. He also served in various senior technical management positions in the Office of Nuclear Regulatory Research at the Atomic Energy



Licensing Board Panel who comprise the Board in this case were unable to find this information in Yankee Atomic Electric Company's LTP. Instead, the Board found that there was no final site characterization, no definitive identification of the source and extent of the tritium plumes in the ground water under the Yankee Rowe site, and only a tentative conclusion, subject to revision upon completion of further site characterization, that no remediation of the tritium contamination would be necessary. *See generally* the prehearing transcript and the Memorandum and Order (November 22, 2004). This, quite reasonably, the Board found to be less than 10 CFR 50.82 requires, and admitted contention two (upon which, the hybrid contention the Board formed of submitted contentions 3 and 4 naturally follows upon the absence of a final site characterization in the LTP).

Any reasonable interpretation of the meaning of 10 CFR 50.82(a)(9)(ii)(A) leads to the conclusion that the Board in this case was on solid ground in rejecting YAEC's and the Staff's position concerning CAN's contention two. As the Board described in its Memorandum and Order, the additional hybrid contention formed from CAN's proffered contentions three and four flows naturally from the conclusion that YAEC has not provided a

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Commission and at the NRC. Before joining the Commission in 1973, Dr. Kelber was a senior scientist at Argonne National Laboratory for 18 years. He is a Fellow of the American Nuclear Society and the American Physical Society. Dr. Kelber was awarded the Commission's Meritorious Service Award in 1976.

Rosenthal, Alan S., A.B., University of Pennsylvania (1948), LL.B., Yale University (1951). Judge Rosenthal has been a part-time member of the Panel since 1999. Previously, he served as a member and chairman of the Personnel Appeals Board of the General Accounting Office; as chairman and chief administrative judge of the AEC/NRC Atomic Safety and Licensing Appeal Panel; and as assistant chief of the Appellate Section of the Civil Division of the Department of Justice. Immediately following law school graduation, he was the law clerk to a judge of the U.S. Court of Appeals for the District of Columbia Circuit. He has taught a seminar in nuclear law and regulation at the University of Pennsylvania Law School.

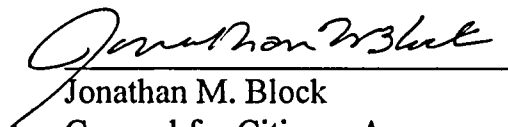
sufficiently final site characterization to address the source and extent of the tritium contamination (and therefore cannot--and did not--provide a remediation plan). If the Commission is inclined to grant the petitions for review at all, focusing on the core issue raised by the Board's decision in this case, it is apparent from the foregoing that the Board's plain language understanding of the regulation is consistent with that of the Connecticut Yankee Board and NRC Staff guidance documents. Thus, the Board reasonably identified the legal contention CAN proffered and the related contention which it admitted. The Board decision in this case should be upheld.

#### IV. CONCLUSION

For the foregoing reasons, CAN respectfully requests the Commission to either reject the appeal and send the case back to the Board or take review and affirm the Board's decision granting CAN's request for hearing.

Dated at Putney, Vermont, this 13th day of December 2004.

Respectfully submitted,



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cc: Service List

December 13, 2004

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

NUCLEAR REGULATORY COMMISSION

*In the Matter of*  
YANKEE ATOMIC ELECTRIC COMPANY

(Yankee Nuclear Power Station LTP)

Docket No. 50-29-OLA

ASLBP No. 04-831-01-OLA

I hereby certify that copies of "Citizens Awareness Network's Brief In Opposition To Yankee Atomic Electric Company's Notice Of Appeal Of LBP-04-27, Order Granting Hearing, And Brief" in the above-captioned proceeding have been served on the following by deposit in the United States mail first class; within twenty four hours of this date, and by e-mail as indicated by a asterisk (\*), this 13th day of, December 2004.



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Counsel for Citizens Awareness Network

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Commissioner McGaffigan  
Commissioner Merrifield  
U.S. Nuclear Regulatory Commission  
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Administrative Judge Alan S. Rosenthal, Chair\*  
Administrative Judge Dr. Richard F. Cole\*  
Administrative Judge Dr. Charles N. Kelber\*  
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December 13, 2004

Secretary  
United States Nuclear Regulatory Commission  
Washington, DC 20555-0001  
ATT: Rulemakings and Adjudications Staff

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

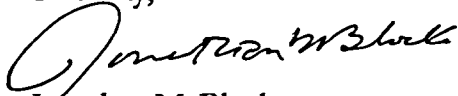
Docket No. 50-029-OLA  
ASLBP No. 04-831-01-OLA

Dear Rulemakings and Adjudications Staff:

Enclosed for filing on behalf of Citizens Awareness Network in the above referenced matter please find the original and two copies of CAN's opposing briefs to the NRC Staff's and Yankee Atomic Electric Company's petition to the Commission for interlocutory review of LBP-04-27 in the above referenced matter. In addition, there is also a response to Yankee Atomic's Motion for Stay.

Thank you for your cooperation in this matter.

Sincerely,



Jonathan M. Block  
Attorney for Citizens Awareness Network

cc: Service List