

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

**CITIZENS AWARENESS NETWORK'S BRIEF IN OPPOSITION TO
NRC STAFF'S NOTICE OF APPEAL OF LBP-04-27, ORDER
GRANTING HEARING, AND ACCOMPANYING BRIEF**

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December 13, 2004

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I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(c), the Citizens Awareness Network ("CAN") hereby files its response to the NRC Staff ("Staff") 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 Staff fails to meet the standard for interlocutory review and its arguments concerning the Board decisions are factually and legally incorrect. The Board did not err in admitting the two contentions, the Order admitting the contentions should be sustained, and the request for hearing affirmed and returned to the Board for hearing.

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.¹

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. This absence was noted by the Atomic Safety and Licensing Board during the "prehearing" hearing on the admissibility of the contentions and related issues and the Order admitting two contentions. *Compare Tr.*² 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).³ On May 4, 2004, the Staff published a Notice of Receipt of the

¹ 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).

²Henceforth, "Tr. at ___".

³ 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), which version is not the subject 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.⁴ The Staff and YAEC each filed an 'Answer' to CAN's hearing request,⁵ and CAN filed a reply to each of the answers.⁶ 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 two and the basis of the Licensee's objection to it." *Id.* at 2. The Board viewed the

matter before the Commission.

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

⁵See 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").

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

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. CAN'S ARGUMENTS

A. THE STAFF'S FAILURE TO ADDRESS THE STANDARD OF REVIEW FOR AN INTERLOCUTORY APPEAL IS FATAL, AS IS ITS STATEMENT TO THE BOARD THAT IT DID NOT TAKE A POSITION ON THE INTERPRETATION OF SECTION 50.82(a)(9)(ii)(A), THUS, THE APPEAL SHOULD BE DENIED.

Although the NRC Staff Brief consists almost entirely of a rehash of the arguments made in its [NRC Staff] Answer (September 20, 2004), nowhere in the Brief is there any attempt to qualify the interlocutory appeal under the Commission standards regarding acceptance of such appeals. Unlike the Licensee's Brief, which at least in its own rehash is forced to reiterate and attempt to rationalize the basis for the positions regarding the meaning of 50.82(a)(9)(ii)(A), the NRC Staff brief does not even attempt to dispose of the one issue that may warrant the Commission disturbing the Licensing Board's adjudication on the merits.

CAN respectfully submits that the Commission should take note that the Board judges--who are three of the most experienced judges on the Panel--did not see fit to certify the question to the Commission; they felt comfortable with a plain language reading of the regulation. The NRC Staff, however, wrote itself out of reasonable consideration of its

appeal. The appeal does not at any point squarely confront the Board reasons for rejecting the Staff positions. Any reasonable reading of the Prehearing Transcript reveals that the Board tried to get the Staff to articulate a position on the issues, but was left with the understanding that the Staff did not have a position--other than the absurdly unscientific one that, although the site characterization of the source and extent of the tritium contamination is admittedly incomplete, the Staff trusts that YAEC will not find any more contamination. It is difficult to make that position credible in any way. As YAEC and the Staff both admitted to the Board that the characterization of the tritium contamination was not complete, and the Board had a declaration by an expert in hydrogeology who offered the same opinion as well as the opinion that the extent of the contamination had yet to be determined -- including whether the contamination was escaping off site -- how could the NRC Staff expect the Board to take seriously the Staff focus purely on the formal adequacy of the contentions at issue? Tr. at 12-18, 22-27, 36-37. Moreover, even with extensive cuing from the Board, the NRC Staff did not reasonably respond to the suggestion that contention 2 could readily be interpreted as posing a 'legal' contention. Tr. at 39-43.

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*. (Independent Spent Fuel Storage Installation), Docket No. 72-22-ISFSI, CLI-00-13, 52 NRC 23, 28 (August 1, 2000) (citing 10 CFR 2.786(g)). 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 Panel’s in many other cases have permitted resolution of contentions based upon Panel interpretation of regulations later faulted and overturned by the Commission.

Given the Staff’s position and the fact that it does not address the criteria for an acceptable interlocutory review, the Staff’s appeal should be denied on its face.

B. THE BOARD DID NOT ERR IN ADMITTING CAN’S CONTENTION TWO AND A HYBRID CONTENTION COMPRISED OF ELEMENTS FROM CONTENTIONS THREE AND FOUR.

In the event the Commission is inclined to permit take up the Staff appeal despite the issues raised above against that decision, CAN offers the following argument against the issues argued in the Staff Brief.

1. The Board’s Analysis Is Correct.

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.

(Emphasis added.) The Board was primarily concerned, in its review of the contention, with YAEC argument that 10 CFR 50.82(a)(9)(ii)(A) does not require a final site characterization and that site characterization is an on-going process. *Compare* Board Order and Transcript of Prehearing *with* YAEC Answer at 11. The Board rejected the YAEC's argument, noting with concern that neither CAN nor any other aggrieved person will not have an opportunity to challenge the site characterization in a later proceeding once the LTP has been approved. LBP-04-27 at 6-7. Thus, a "moving target" site characterization completely fails to provide a hearing opportunity on the adequacy of the LTP in regard to both the final site characterization and the purpose of that final site characterization: preparation of plans for remediation and a final site survey.

The Board also held 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. The Board deservedly relegated to a footnote the Staff's arguments on the requirements of 10 C.F.R. §2.309(f), and, deservedly, dismissed

the Staff's arguments as a "hyper-technical" reading of CAN's contentions.⁷ LBP-04-27 at 9, n. 4; Tr. at 22-25, 24

The Board elected to combine CAN's contentions three and four 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. The Board dismissed the licensee's arguments about the on-going nature of the site characterization for the reasons stated in contention two. LBP-04-27 at 10. The Board also rejected the licensee's argument that the contentions lacked specificity. *Id.* The Board viewed the Staff's arguments that the contentions do not contain sufficient information to raise a genuine dispute with the licensee and lack factual support or expert opinion within the context of the Staff's hypertechnical criticism of the contentions--a position which failed to grasp that contention two is a 'legal' contention based upon the regulatory requirements of 10 CFR 50.82(a)(9), and supported generally by the opinions of CAN's expert hydrogeologist Mr. Ross.

The Staff insist upon reading the supporting declaration of hydrogeologist Robert Ross as if each sentence were an abstract proposition divorced from reference to the LTP.

⁷The Board was concerned that the Staff has not yet completed its substantive review of the LTP, LBP-04-27 at 9, n. 4, because that meant the Staff could offer the Board no opinion on the issue of whether the LTP met the requirement of 50.82(a)(9)(ii)(A), and the Staff declined to offer such an opinion. It also meant that the Staff was placed in the position of defending YAEC's predictions concerning the future status of the site and need for site remediation without having finished examining the status of site characterization data in the LTP.

Mr. Ross stated that he had reviewed the LTP and related hydrogeological materials obtained from YAEC. Significantly, Mr. Ross was the only expert opinion available to the Board in this case, as neither the Staff nor the Licensee provided the Board with document or declarations supporting their positions.

2. The Board properly admitted CAN's contention 2.

The Staff opposed admission of contention two because it claimed that 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 Answer at 10-11. The Board Order 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.

With good reason, the Board concluded that the Staff’s reading of section 2.309 is “hyper-technical.”⁸ Although the Commission has repeatedly made clear that its contention rule is “strict by design.”⁹ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 213 (2003); *Dominion Nuclear Connecticut, Inc.*

⁸See LBP-04-27 at 9, n. 4.

⁹A 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

(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), the Board also the authority to recast contentions and join contentions as discussed below.

The NRC Staff argue that “CAN’s contention two 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.” The Staff faults CAN for failing “to point to any requirement that a site characterization document the source and cause of contamination already on the site.” The Staff cannot understand CAN’s point in this regard because, despite telling the Board that it did not take a position on the interpretation of the site characterization requirement in 10 CFR 50.82(a)(9)(ii)(A), the Staff has, in fact, accepted the Licensee’s interpretation. In its brief the Staff states, in pertinent part, that:

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, the quality of the environment. 10 C.F.R. § 50.82(a)(10).

Staff then stated that “CAN must provide some explanation in order to demonstrate that this issue is material to the findings the staff must make” and that for that reason, Contention two should not have been admitted. CAN contends that the correct meaning of 10 CFR 50.82(a)(9)(ii)(A) is that a final site characterization is required at the LTP stage. The Staff’s

previous decisions interpreting § 2.714(b) remain applicable to the interpretation of § 2.309(f).

own guidance document states as much--and addresses in so stating--the issue of the contention stating that the failure to provide a remediation plan is also a defect in the LTP.

(The Board emphasized, the LTP indicates that remediation is a 'possibility'. LBP-04-27 at 8. The reason is that it plainly indicates that the conclusion that no remediation is required in surface or ground waters is based upon an incomplete characterization, viz., "data available to date". This lack of discussion in the LTP of the actual situation is incredible in the light of the evidence in the LTP and supporting documents Mr. Ross describes as showing tritium contamination in at least three aquifers. Using that data, how does YAEC reach the conclusion that "no remediation" will be required? There is no explanation in the LTP because there is no final site characterization in the LTP.)

CAN's contention two also challenges the LTP for failing to provide a remediation plan for tritium contamination because the site characterization is not complete and at this stage there is data not addressed in the LTP that indicates extensive tritium contamination in at least three aquifers below the site. Here, the Staff argue that it is acceptable for YAEC to state that no remediation will be required, while acknowledging that the characterization of the source and extent of the tritium contamination is not yet complete. This the Board quite reasonably, as is discussed in the Background Facts and Issues section, *supra*, found to be an untenable position. Board Memorandum and Order at 9, n.4.

Finally, the Staff argue that the assertion in contention two that YAEC should prepare a supplemental ER and the NRC should prepare a supplemental EIS is unfounded. Yet, the

supplemental ER the NRC Staff refer to does not address the tritium contamination. Again, neither CAN nor its expert can point to something that does not exist. As the Staff has yet to prepare an EA addressing the ER and LTP, CAN's contention two contains the basis for a "NEPA" contention dealing with the adequacy of the NRC Staff's EA (and YAEC's ER). Although the Board did not specifically address this portion of the contention in its decision, CAN interprets this to mean that the Board understood that admitting contention two meant rejecting the LTP as premature. This view is supported by the Board's Memorandum of December 6th. In any event, were a hearing to go forward on contention two without rejecting the LTP, as soon as the NRC Staff files its EA, assuming it takes the same positions the Staff took in its Brief, at prehearing hearing and in its Answer, CAN will file additional contentions on the EA concerning the need for a supplemental EIS to deal with the tritium contamination and related issues.

The Staff's complaining about the Board taking any cognizance of the fact that the contentions were submitted by a layperson is not worthy of extensive reply. Suffice it to say, the Board conduct of its prehearing hearing and its Order speak volumes about how inside the bounds any such consideration might have been. This Board did nothing different than the Board in the first LTP case as it has a higher responsibility to substance, i.e., assuring the public health and safety goals of the Atomic Energy Act, than it has to procedure. Perhaps this is why it viewed the Staff's complaints as "hypertechnical".

Similar consideration applies to Staff complaints about the Board's recasting of contentions three and four. A Licensing Board is not precluded from recasting contentions to make them acceptable. *Pennsylvania Power & Light Co.* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-6, 9 NRC 291, 295-296 (1979). As in the case at bar, a presiding officer is free to recast two contentions into one. *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 22 (1996). Moreover, a Licensing Board may consolidated contentions otherwise inadmissible with an admitted contention(s) involving the same subject matter--so long as consolidation does not require the licensee to defend on a substantially different or expanded basis from that required by the admitted contention(s). *Long Island Lighting Co.* (Shoreham Nuclear Power station, Unit 1), LBP-89-1, 29 NRC 5, 33-34 (1989). Significantly, neither the Staff nor the Licensee complain that the Board's recasting of contentions 3 and 4 into a single contention has prejudiced either of their interests.

3 The Board properly admitted CAN contentions 3 and 4.

CAN's contention 3 alleges that YAEC has failed to adequately characterize several possible contaminated zones within the groundwater. Hearing Request at 11. The NRC Staff claim that the Board erred in admitting the contention because CAN allegedly failed to cite to specific portions of the LTP as inadequate and the supporting expert opinion allegedly states a conclusion without providing a reasoned basis or explanation. The NRC Staff argues that 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*. Again, the Staff misses the point, stating that “CAN does not argue that no characterization of groundwater was done, only that the characterization was ‘inadequate.’” It is impossible to point to something that does not exist. If the completed site characterization were there, CAN would have “pointed” to it. The Licensing Board understood this. They bothered to read the Ross Declaration as a whole rather than piecemeal. Mr. Ross’s Declaration is careful, thoughtful, and does suggest the ways in which the site characterization is lacking due to its lack of finality. Had YAEC completed the site characterization, the information Mr. Ross cannot find in it might just be there. Absent that information, contention 3 was properly admitted.

CAN’s contention four alleges that the LTP does not completely characterize the vertical extent of subsurface soil contamination beneath facility structures. CAN’s Hearing Request at 11. Significantly, this is the same failing that Mr. Ross noted in his declaration concerning YAEC’s 1997 LTP. *Compare* Ross Declaration accompanying CAN’s contentions in this case at Exhibit 3, *with* Ross Declaration accompanying New England Coalition on Nuclear Pollution’s NEPA Contentions (PDR Accession Number 9905190080) (990517).

The NRC Staff argues that CAN’s Hearing Request and Mr. Ross’s declaration state that subsurface contamination has not been “completely” characterized, and that “neither

asserts that the LTP completely fails to address subsurface contamination.” Of course, the Staff misses the point again. If a final site characterization is required, the statement that the subsurface contamination has not been “completely” characterized refers to the fact that there are no definitive characterizations in the LTP. There is no place to refer to where the licensee has fulfilled its obligation to provide a final site characterization.

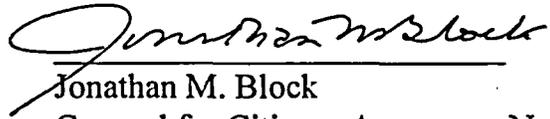
The references the NRC Staff provide are to more equivocations, status reports on continuing characterization, and tentative, soft, adjustable conclusions. Plainly, since the Staff and the Licensee believe that what they are referring to satisfies the requirement of a final site characterization in this regard and, plainly, too, CAN and its expert do not, there is, in fact, a genuine issue in dispute with the licensee in contention four *and* it is adequately supported by expert opinion or fact. Mr. Ross believes the characterization is inadequate because the final characterization is not there. Ross Decl. ¶16. Thus, the contention is supported by more than bare assertions and conclusory statements, and contention 4, when combined with contention 3, should have been admitted.

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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December 13, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

NUCLEAR REGULATORY COMMISSION

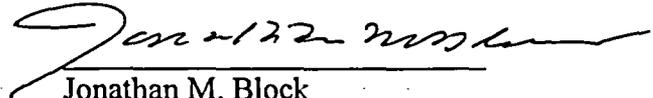
In the Matter of
YANKEE ATOMIC ELECTRIC COMPANY

(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 The NRC Staff'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 an asterisk (*), this 13th day of, December 2004.



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December 13, 2004

Secretary
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ATT: Rulemakings and Adjudications Staff

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

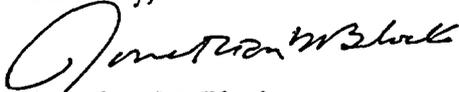
Docket No. 50-029-OLA
ASLBP No. 04-831-01-OLA

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