

United States of America  
Nuclear Regulatory Commission  
before the  
Atomic Safety and Licensing Board

DOCKETED  
USNRC

'98 MAY -4 P3:05

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

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF  
Docket No. 50-029-LA

ASLBP No. 98-736-01-LA

MOTION OF  
YANKEE ATOMIC ELECTRIC COMPANY  
TO STRIKE UNAUTHORIZED PLANNING BOARD PLEADING  
AND CONDITIONAL MOTION FOR LEAVE TO REPLY THERETO

Motion to Strike

This Board's Order of March 25, 1998, provided for the filing, by the petitioners for a hearing, of "amendments" to their petitions, and for the filing by the Licensee and the Staff of responses to any such amendments. The Order did not authorize any other filing and, in particular, it did not authorize the filing of responses to the Licensee and Staff authorized filings. Nor did the Planning Board move for leave to file an additional pleading submitting additional documentation before simply doing so under date of April 28, 1998. Under the circumstances, the Planning Board's unauthorized filing should be stricken.

Motion to Leave to Reply

In the event that the Planning Board's filing of April 28, 1998, is not stricken, Yankee moves for leave to submit the within short reply:

1. *Timeliness.* The Planning Board asserts, without any citation to authority, that the Notice of Opportunity for a Hearing published by the Commission on January 28, 1998 (63 Fed. Reg. 4308, 4328) "can be interpreted to allow an interested party to request a hearing and at a later date, once a hearing has been granted, petition to intervene to gain party status." *Planning Board Reply* at 2. Such a view would stand more than 30 years of NRC jurisdiction on its head. First, a "request for a hearing" unaccompanied by a petition for leave to intervene is a nullity. *E.g., Duquesne Light*

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Co. (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 425-27 (1984) and the other authorities cited by Yankee in its Response to the Planning Board's Amendment at 8-9. Second, the Federal Register notice, which is jurisdictional and controlling, requires no "interpretation" as to when petitions for leave to intervene must be filed:

"By February 27, 1998, . . . any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's 'Rules of Practice for Domestic Licensing Proceedings' in 10 CFR Part 2. Interested persons should consult a current copy of 10 CFR 2.714 which is available at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC and at the local public document room for the particular facility involved. If a request for a hearing or petition for leave to intervene is filed *by the above date*, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

". . . .

"A request for a hearing or a petition for leave to intervene *must be filed* with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attention: Rulemakings and Adjudications Staff, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, *by the above date*. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, and to the attorney for the licensee.

"Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for a hearing will not be entertained absent a determination by the Commission, the presiding officer or the Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of factors specified in 10 CFR 2.714(a)(1) (i)-(v) and 2.714(d)."

*Id.* at 4308-09 (emphases added). Since the Planning Board admittedly did not file a petition for leave to intervene until March 25, 1998, its petition was untimely in a way not curable by "interpretation" of the Notice of Opportunity for Hearing. Finally, the

notion that the rules applicable to untimely petitions for leave to intervene are optional or discretionary was interred by *Duke Power Company* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983), *rev'g in part* ALAB-687, 16 NRC 460 (1982), many years ago.

2. *The Charter.* In support of its alternative request for “interested state” status under 10 C.F.R. § 2.715(c) (in the event that a hearing is granted on someone else’s petition), the Planning Board submits for the first time at this late hour the text of what is supposed to be its “charter.” Prescinding from the lack of authentication, a review of the document attached to the Planning Board’s most recent filing confirms the defects that Yankee had previously pointed out in the Planning Board’s standing to act as (or for) Franklin County (or its successor). Rather, the municipal corporation is the “Franklin Regional Council of Governments.” § 2.1. The Franklin Regional Council of Governments (“FRCOG”), alone among all of the entities named in the charter, has “the power . . . to sue and be sued,” *i.e.*, the capacity under Massachusetts law to be a party to litigation. § 2.2.4(e). Likewise, it is the FRCOG, not the Planning Board, that has “[t]he powers of regional planning agencies and economic development areas as previously conferred upon the County of Franklin . . . [and] [t]he power to exercise any powers, authorities or duties which may be assigned by general law or administrative rule to regional planning agencies or counties.” § 2.2.4(j) & (o).

The legislative body of the FRCOG is the “Council,” to which the Planning Board has the power of appointing *one* of more than 26 members. § 3.1. The executive function of the FRCOG is lodged in the “Executive Committee,” comprising five members of which the Planning Board has the power to nominate *one*. § 4.1.1. Both the Council and the Executive Committee operate on the time-tested principle of majority rule. §§ 3.1.6, 3.1.7 (Council), 4.1.6, 4.1.7, 4.2.2 (Executive Committee). By definition under the charter (as well as under generally accepted principles of longstanding law), the Planning Board acting unilaterally is not the government of the former Franklin County.

Finally, the charter confirms that the Planning Board is limited to an advisory function. §§ 7.1, 7.3.1.

3. *Funding.* Apparently coming to the realization that this Board is without authority to provide the Planning Board with an "initial" grant of \$100,000, the Planning Board falls back to a request that this Board order *Yankee* to pay it \$100,000. *Planning Board Reply* at 6. Needless to say, the Planning Board cites no authority for such an unusual request, and none exists.

### Conclusion

For the foregoing reasons and those previously set forth, the Planning Board's filing of April 28, 1998, should be stricken, the petition of the Planning Board to intervene should be denied as untimely and for lack of standing, and the request of the Planning Board for "interested state" status (in the event a hearing is otherwise granted) should be denied for lack of municipal status.

Respectfully submitted,



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Dated: April 30, 1998.

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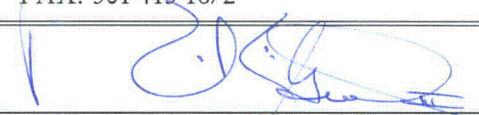
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CERTIFICATE OF SERVICE

I, Robert K. Gad III, one of the attorneys for Yankee Atomic Electric Company, do hereby certify that on April 30, 1998, I served the within pleading in this matter by United States Mail (and also where indicated by an asterisk, by facsimile transmission) as follows:

OFFICE OF SECRETARY  
RULEMAKING AND  
ADJUDICATIONS STAFF

The Hon. James P. Gleason, Chairman * Administrative Judge Atomic Safety and Licensing Board Panel U.S.N.R.C. Washington, D.C. 20555 FAX: 301-415-5599	The Hon. Thomas D. Murphy * Administrative Judge Atomic Safety and Licensing Board Panel U.S.N.R.C. Washington, D.C. 20555 FAX: 301-415-5599
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R. K. Gad III