

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

DOCKETED
USNRC

'98 MAY -4 P3:07

In the Matter of

YANKEE ATOMIC ELECTRIC COMPANY

(Yankee Nuclear Power Station)

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

ASLBP No. 98-736-01-LA

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

Motion to Strike

Like the Planning Board, NECNP has arrogated to itself permission to file an unauthorized pleading without so much as seeking leave, and, like the Planning Board, its unauthorized pleading should be stricken.¹

Motion to Leave to Reply

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

1. *Spent Fuel as an LTP Issue.* Because spent fuel accidents are the sole basis on which its sole designated member claims the standing-required prospect of potential injury, NECNP strives to convince us that spent fuel management and disposition are subjects that are litigable in an LTP approval license amendment proceeding. NECNP ignores the fact that the Commission has stated that "[T]he NRC definition of decommissioning excludes interim storage of spent reactor fuel."² NECNP ignores the fact that the Commission has declared that spent fuel management is an operational

¹The only difference between the Planning Board and NECNP in this regard is that NECNP has previously been remonstrated with for the essentially the same offense. *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-18, 44 NRC 86, 91 n.7 (1996)

²61 Fed. Reg. 39,278, at 39,293 (July 29, 1996), cited and quoted in Yankee's Response of April 13, 1998, at 19.

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issue.³ NECNP ignores the fact that Yankee already possesses a license under 10 C.F.R., Part 50 sufficient to authorize continued use of the existing spent fuel pool, and it already possesses a general license under 10 C.F.R. § 72.210 to move fuel to approved dry casks (when, as and if Yankee decides that such movement should be made). NECNP ignores that the Commission has defined the function of LTP approval in terms that do not include spent fuel issues.⁴ These must all be ignored because there is no response.

Rather, NECNP cites 10 C.F.R. §§ 50.92 and 72.218, supposedly for the proposition that spent fuel issues are litigable in an LTP proceeding. *NECNP April 28, 1998 Filing* at 5. The former is merely the general rules for construction permit and operating license amendments, while the latter has to do with terminating dry cask storage licenses. (Section 218 applies only to “spent fuel stored under this general license,” which necessarily means fuel stored in dry casks; Yankee has no such fuel presently on site.) Likewise, NECNP refers to 10 C.F.R. § 50.54(bb),⁵ which required Yankee to submit, many years ago, a spent fuel management program “by which the licensee intends to manage and provide funding for the management of all irradiated fuel at the reactor following permanent cessation of the of operation of the reactor until title to the irradiated fuel and possession of the fuel is transferred to the Secretary of Energy”⁶ NECNP omits to note, however, (i) that Yankee’s spent fuel

³61 Fed. Reg. 39,278 at 39,292 (July 29, 1996), cited and quoted in Yankee’s Response of April 13, 1998, at 19-20.

⁴“The requirement for submittal of a termination plan is retained in the final rule because the NRC must make decisions, required in the current rule on the decommissioning plan, regarding (1) the licensee’s plan for assuring that adequate funds will be available for final site release; (2) radiation release criteria for license termination, and (3) adequacy of the final survey required to verify that these release criteria have been met.” 61 Fed. Reg. 39,278 at 39,289 (July 29, 1996), cited and quoted in Yankee’s Response of April 13, 1998, at 19.

⁵*NECNP April 28, 1998 Filing* at 8.

⁶The full text of § 50.54(bb) is:

“(bb) For nuclear power reactors licensed by the NRC, the licensee shall, within 2 years following permanent cessation of operation of the reactor or 5 years before expiration of the reactor operating license, whichever occurs first,

management program has previously been submitted and approved,⁷ and that approval of Yankee's 50.54(bb) plan is not included within the scope of the Notice of Opportunity for Hearing published in this proceeding.

2. *The LTP as a Chance to Relitigate Opposition to the Decommissioning Plan.* NECNP, which unsuccessfully opposed the approval of the YNPS Decommissioning Plan,⁸ apparently views the filing of the LTP as a chance to relitigate any questions regarding the decommissioning of the facility. *NECNP April 28, 1998 Filing* at 3-4. It forgets that, at its instance, the Commission deemed the approval of a decommissioning plan to be a license and, given that that license was issued, it is now not subject to suspension, revocation, or revisitation in a later proceeding other than one commenced for such a purpose by an appropriate Notice under 10 C.F.R., Part 2, Sub-part A.

submit written notification to the Commission for its review and preliminary approval of the program by which the licensee intends to manage and provide funding for the management of all irradiated fuel at the reactor following permanent cessation of operation of the reactor until title to the irradiated fuel and possession of the fuel is transferred to the Secretary of Energy for its ultimate disposal in a repository. Licensees of nuclear power reactors that have permanently ceased operation by April 4, 1994 are required to submit such written notification by April 4, 1996. Final Commission review will be undertaken as part of any proceeding for continued licensing under part 50 or part 72 of this chapter. The licensee must demonstrate to NRC that the elected actions will be consistent with NRC requirements for licensed possession of irradiated nuclear fuel and that the actions will be implemented on a timely basis. Where implementation of such actions requires NRC authorizations, the licensee shall verify in the notification that submittals for such actions have been or will be made to NRC and shall identify them. A copy of the notification shall be retained by the licensee as a record until expiration of the reactor operating license. The licensee shall notify the NRC of any significant changes in the proposed waste management program as described in the initial notification."

⁷See 59 Fed. Reg. 10,267, 10,268 n.1. In fact, the spent fuel management plan was contained in Section 3.3.1 of the YNPS Decommissioning Plan, which has since been approved finally.

⁸*Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1 (1996) (guidance on admissibility of contentions); *after remand*, LBP-96-2, 43 NRC 61 (1996) (all contentions excluded), *aff'd but remanded for consideration of late-filed contention*, CLI-96-5, 43 NRC 53 (1996); *after remand*, LBP-96-14, 44 NRC 3 (1996) (single contention admitted), and LBP-96-18, 44 NRC 86 (1996) (sole admitted contention dismissed on summary disposition), *appellate review denied*, CLI-96-9, 44 NRC 112 (1996).

There is obviously no merit to NECNP's contention that either § 189a of the Atomic Energy Act or the authority of *CAN v. NRC*, 59 F.3d 285 (1st Cir. 1995), mandates that NECNP be given an opportunity to relitigate issues that it previously litigated to finality and lost.

NECNP asserts that relitigation of decommissioning issues must be open in the LTP, for, if not, it asks rhetorically, "What is?"

"In fact, if, as [Yankee] argues, everything is already included in the 'license' granted by approving the Decommissioning Plan, why did it bother to take any actions at all?"

NECNP April 28, 1998 Filing at 10. There are two answers to this question. First, as the Commission itself has declared, the Commission must make decisions regarding funding, site release criteria, and site survey plans.⁹ More fundamentally, the approval of the decommissioning plan authorizes Yankee to take any and all actions described in the decommissioning plan, which involves the complete dismantlement of the facility. In fact, Yankee is authorized to decontaminate the site, though doing so in the absence of an approved LTP would run the risk of maybe having to do it again. The only thing that Yankee is not authorized to do, absent approval of the LTP (and implementation of its content), is to declare the site open to the public and walk away.¹⁰

Conclusion

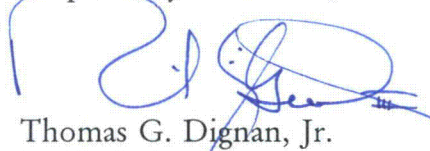
⁹See note 4, *supra*. Two of these issues are, in the present case, largely foreclosed: funding (by *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 80-84, *aff'd on this point*, CLI-96-7, 43 NRC 235, 258-68 (1996)), and release criteria selection (by the promulgation of 10 C.F.R. § 20.1402, as promulgated by 62 Fed. Reg. 39,058 (July 21, 1997)).

¹⁰For some reason, NECNP disputes that LTP approval is the grant of a license amendment. *NECNP April 28, 1998 Filing* at 3. Its argument on this point is obscure, and the significance attached by NECNP to the conclusion that an LTP approval is not a license amendment is inscrutable. Nonetheless, NECNP is wrong on the point. As a general matter, were the LTP approval not a license, then there would be no opportunity for a hearing, since § 189a of the Atomic Energy Act attaches only to licensing actions. More particularly, an LTP approval is a license amendment because the Commission has said so. 10 C.F.R. § 50.82(a)(10). Likewise, if the approval of a decommissioning plan under the prior version of § 50.82 were not held to be licensing action, the Court of Appeals would not and could not have held that § 189a entitled the appellants to a hearing.

NECNP premises its standing to intervene in this LTP proceeding on the claim that one of its members may be injured by actions taken by Yankee in the management and handling on site of spent fuel between now and when the spent fuel is turned over to DOE. Since no outcome of this LTP proceeding, one way or another, can have any effect on the license authority of Yankee to take such actions with respect to spent fuel, the expressed fears do not arise out of and cannot be cured by any result of this proceeding, in which case NECNP and its member have failed to demonstrate standing to intervene in this proceeding.

For the foregoing reasons and those previously set forth, NECNP's filing of April 28, 1998, should be stricken, and the petition of NECNP to intervene should be denied for lack of standing.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Tom Dignan, Jr.", is written over the typed name.

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Dated: May 1, 1998.

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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 May 1, 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:

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