

DOCKETED
USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'98 JUL 15 P12:12

BEFORE THE COMMISSION

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATION STAFF

In the Matter of)
)
YANKEE ATOMIC ELECTRIC COMPANY) Docket No. 50-029-LA
)
(Yankee Nuclear Power Station))
)

NRC STAFF'S RESPONSE TO
FRANKLIN REGIONAL PLANNING BOARD'S
APPEAL OF LBP-98-12

Ann P. Hodgdon
Counsel for NRC Staff

July 14, 1998

SECY-036

DS03

19314

July 14, 1998

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
)
YANKEE ATOMIC ELECTRIC COMPANY) Docket No. 50-029-LA
)
(Yankee Nuclear Power Station))
)

NRC STAFF'S RESPONSE TO
FRANKLIN REGIONAL PLANNING BOARD'S APPEAL OF LBP-98-12

INTRODUCTION

On June 29, 1998, Franklin Regional Planning Board (FRPB) filed an appeal from the Atomic Safety and Licensing Board's "Memorandum and Order (Decision on Standing)," LBP-98-12, dated June 12, 1998. Pursuant to 10 C.F.R. § 2.714 a (a), the staff of the Nuclear Regulatory Commission (Staff) files this response. As discussed below, the Staff opposes FRBP's appeal and urges the Commission to deny it and to affirm the Licensing Board's decision in LBP-98-12.

BACKGROUND

On January 28, 1998, the Commission published a notice of opportunity for a hearing concerning Yankee Atomic Electric Company's License Termination Plan (LTP) for its Yankee Nuclear Power Station (YNPS). *Biweekly Notice: Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations, Yankee Atomic Electric*

Company, Docket No. 50-029, Yankee Nuclear Power Station, Franklin County, Massachusetts, 63 Fed. Reg. 4308-09, 4328 (1998).

On February 27, 1998, FRPB wrote a letter to the Commission's Secretary, in which FRPB requested a hearing. On March 6, 1998, the Secretary referred FRPB's request, along with three other letter requests, to the Atomic Safety and Licensing Board Panel's Chief Administrative Judge for appropriate action. On March 9, 1998, the Panel's Chief Administrative Judge established a Licensing Board to rule on the referred requests for hearing. 63 Fed. Reg. 13077 (1998).

On March 11, 1998, Yankee Atomic Electric Company (YAEC) filed its "Answer to Petition to Intervene and Request for Hearing of Franklin Regional Planning Board"; on March 16, 1998, the NRC Staff filed its "Response to Requests for Hearing."

On March 25, 1998, the Licensing Board issued a Memorandum and Order authorizing amended petitions to intervene and on April 6, 1998, FRPB filed such an amended petition, "Amendment to Franklin Regional Planning Board's Request for Hearing." YAEC filed a response on April 13, 1998, "Response of Yankee Atomic Electric Company to Amendments to Petition to Intervene," and, on April 20, 1998, the Staff filed its response, "NRC Staff's Response to Amendment to Franklin Regional Planning Board's Request for Hearing."

On June 12, 1998, the Licensing Board issued its Memorandum and Order (Decision on Standing), LBP-98-12, *Yankee Atomic Electric Co. (Yankee Nuclear Power Station)*, 47 NRC _____. On June 29, 1998, FRPB filed its appeal.

DISCUSSION

In its brief on appeal, FRPB argues that the Licensing Board erred in denying it standing. Brief at 1. A licensing board's determination regarding standing is entitled to substantial deference absent an error of law or an abuse of discretion. *International Uranium (USA) Corp.* (White Mesa Uranium Mill, Alternate Feed Material), CLI-98-6, 47 NRC 11, 118 (1998) *citing* *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 116 (1995). The Licensing Board neither committed an error of law nor abused its discretion in LBP-98-12. The Commission should, therefore, deny FRPB's appeal and affirm LBP-98-12.

In its decision, the Licensing Board considered FRPB's arguments regarding organizational and representational standing, its participation under 10 C.F.R. § 2.715(c) of the Commission's regulations and "discretionary standing." With regard to organizational standing, the Board concluded that FRPB had not established that its purported organizational interests (planning for the district within its mandate to protect public health and safety) would be adversely affected by the acceptance of the License Termination Plan. LBP 98-12, slip op. at 17. The Board found FRPB's allegations regarding harm to its interests from the proposed action to be far from particularized and to be offsite concerns tied to the plant's past operation and current decommissioning, both activities that are already licensed and not within the scope of the proceeding. *Id.*

With regard to representational standing, the Board found that FRPB's affiant, Daniel B. Hammoch, had not demonstrated that he had suffered or would suffer harm from the proposed

action likely to be redressed by a favorable decision. LBP 98-12 at 19. Thus, FRPB had not shown that it had standing on a representational basis. *Id.*

With regard to participation under 10 C.F.R. § 2.715(c), the Board pointed out, among other things, that the provision is applicable to participation by a person not a party. In light of the failure of New England Coalition on Nuclear Pollution (NECNP) and Citizens Awareness Network (CAN) to demonstrate their standing under 10 C.F.R. § 2.714 to cause a hearing to be held, the Board concluded that there would be no proceeding in which FRPB could participate pursuant to § 2.715(c). LBP 98-12 at 20.

With regard to “discretionary standing,” the Board, applying the standards set forth in *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 616 (1976), found that FRPB had not shown that it could make a valuable contribution to the decision-making process and that, with regard to the other factors in the *Pebble Springs* test, FRPB had not provided sufficient information to allow for a conclusion regarding those factors. LBP-98-12 at 22-23. Thus, the Board denied FRPB’s request for “discretionary intervention.” *Id.*

On appeal, FRPB points to five instances of what it regards as Licensing Board error with respect to the Board’s disposition of FRPB’s standing claims. Contrary to FRPB’s assertions, none of the Board actions of which FRPB complains constitutes reversible error on the Board’s part in regard to FRPB’s standing claims.

1. It was not error for the Board to consider the letter of March 26, 1998 of Brad C. Councilman, Chair of the Franklin Regional Council of Governments, to Judge Gleason.

FRPB states that the Board erred in accepting and giving weight to the unsolicited correspondence of Brad C. Councilman, Chair of the Franklin Regional Council of Governments (FRCOG), dated March 28, 1998, to Judge James P. Gleason. Brief at 1. FRPB states that the ASLB erred in considering the letter's representations as a basis to deny the FRPB standing as an organization and a government entity. Brief at 2. With regard to organizational standing, FRPB is simply mistaken. The Licensing Board treats that matter at pages 16-17 of its decision. Nowhere in those pages does it refer to Chairman Councilman's letter. The Board treats representational standing at pages 17-18 of LBP-98-12 and, similarly, nowhere in its discussion of this matter does the Licensing Board refer to Chairman Councilman's letter.

The Licensing Board does reference Chairman Councilman's letter in the context of discussing FRPB's participation pursuant to 10 C.F.R. § 2.715(c). The Board states:

Even assuming the FRCG [Franklin Regional Council of Governments] could be considered a section 2.715(c) government entity, we do not find the affidavit attached to the FRPB Petition to be a delegation of authority to the FRPB to represent the interest of the Franklin Regional Council of Governments. The Licensing Board received a letter, dated March 26, 1998 from Brad C. Councilman, Chair, Franklin Regional Council of Governments, which informed the Board that the FRPB is an advisory board and is not acting on behalf of the Council of Governments. Such a delegation of authority would require a clear and convincing showing that the delegation was legal and within the power of the delegating authority to delegate. No such showing has been made and accordingly the Board denies standing under this provision of the regulations. LBP-98-12 at 20.

In the Board's analysis, FRPB, being an advisory body, could not on its own satisfy 10 C.F.R. § 2.715(c) standards for participation and could represent the Council of Governments only if clearly authorized to do so, which, according to Chairman Councilman, it was not.

The Board's finding that no other petitioner had standing to cause a hearing to be held assured that there would be no participation under 10 C.F.R. § 2.715(c). Although FRPB's argument regarding Chairman Councilman's letter is far from clear, FRPB concedes the letter's accuracy. Given FRPB's concession regarding the accuracy of the letter, it is difficult to see how the Board's reliance on the letter could be error.

2. It was not error for the Licensing Board to reject unauthorized pleadings.

FRPB states that it was error for the Board not to consider the Conditional Motions that were filed or to have at least considered the FRPB's pleading that confirmed its initial filings as to its role in properly representing the Franklin County region in this matter. Brief at 2.

Contrary to FRPB's argument, the Licensing Board had no obligation to consider the barrage of unauthorized replies and motions filed in this proceeding. Petitioners were permitted by the Board to file amended petitions to intervene, all of the petitioners having failed to conform to the clear directions in the *Federal Register* notice providing that "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.*" 63 Fed. Reg. 4308. (Emphasis added.)

Thus, although the Licensing Board might well have denied petitioners' requests for a hearing for failure to file the petitions to intervene required by the Notice, the Licensing Board authorized the filing of amendments to the initial filings. Other than responses to those filings,

all subsequent filings were without leave of the Board and were, as the Board noted in LBP-98-12, not provided for in the Commission's Rules of Practice. LBP 98-12 at 3-4. In light of the above, the Board did not either abuse its discretion or commit an error of law by not considering unauthorized filings.

3. The Licensing Board did not err in characterizing FRPB's representations regarding its role.

FRPB complains that the Licensing Board improperly cites FRPB's role as only "promoting" public health, safety and welfare, but that its role includes "protecting" these values. Brief at 3.

Contrary to FRPB's characterization of the Board's treatment of its organizational standing claims, the Board quotes from FRPB's amended petition regarding FRPB's role: that FRPB's purpose and objective "shall be to promote and *protect* public health, safety and welfare. . . ." LBP-98-12 at 16. (Emphasis added.) The Board notes that FRPB represents that its purpose mandates that it "protect" not only the people and property at the Yankee Rowe site, but also the peoples and property within the ten mile evacuation zone. *Id.* The Board further quotes from FRPB's amended petition as stating that FRPB is mandated by law to promote economic development while "protecting" the country's natural and cultural resources. *Id.* The Board concludes, however, that FRPB does not explain how its responsibilities are interests within the Atomic Energy Act or the National Environmental Policy Act and how its organizational interests (planning for the district within its mandate to protect the public health and safety) would be adversely affected by the acceptance of the LTP. LBP-98-12 at 17. FRPB may not like the Licensing Board's Decision on Standing. However, as noted above, the Board did not focus on

FRPB's promotion role at the expense of ignoring FRPB's protection role. The Board's characterization of FRPB's role is consistent with FRPB's representations in its pleadings regarding its role. The Board did not commit error in its consideration of this matter.

4. FRPB may not appeal the Board's denial of standing to NECNP and CAN.

FRPB argues that it was "shortchanged" in that in denying NECNP and CAN's standing the Board prevented FRPB's participation pursuant to 10 C.F.R. § 2.715(c). Brief at 4. FRPB should not be heard to complain of alleged errors that have no direct effect on its interests.

5. It was not error for the Licensing Board to dismiss FRPB's complaints concerning inadequacy of the public meeting notice.

FRPB states that the Licensing Board erred in not addressing the adequacy of the public meeting notices and the Licensee's failure to provide documentation for the Public Document Rooms in a timely manner. Brief at 4. The Licensing Board did address this matter. The Board correctly characterizes such concerns as outside the jurisdiction of the Board, citing *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB 316, 3 NRC 167 (1976) for the proposition that licensing boards are delegates of the Commission and exercise only those powers which the Commission has given them. LBP 98-12 at 3. The Board further notes that any requests for redress should be addressed to the Commission. The Board's disposition of this matter is correct and consistent with NRC practice.

CONCLUSION

For the reasons discussed, the Commission should deny Franklin Regional Planning Board's appeal and should affirm the Licensing Board's decision in LBP 98-12.

Respectfully submitted,

Ann P. Hodgdon
Ann P. Hodgdon
Counsel for NRC Staff

Dated at Rockville, Maryland
this 14th day of July, 1998

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE COMMISSION

'98 JUL 15 P12:13

In the Matter of)

YANKEE ATOMIC ELECTRIC COMPANY)

(Yankee Nuclear Power Plant))

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF

Docket No. 50-029-LA

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO FRANKLIN REGIONAL PLANNING BOARD'S APPEAL OF LBP-98-12" in the above-captioned proceeding have been served on the following through deposit in the Nuclear Regulatory Commission's internal mail system, or by deposit in the United States mail, first class, as indicated by an asterisk this 14th day of July, 1998:

James P. Gleason, Chairman
Administrative Judge
Atomic Safety and Licensing Board
Mail Stop T 3-F-23
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Thomas D. Murphy
Administrative Judge
Atomic Safety and Licensing Board
Mail Stop T 3-F-23
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Adjudicatory File (2)
Atomic Safety and Licensing Board
Mail Stop T 3-F-23
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dr. Thomas S. Elleman*
Administrative Judge
Atomic Safety and Licensing Board
704 Davidson Street
Raleigh, NC 27609

Office of the Commission Appellate
Adjudication
Mail Stop: O 16-C-1
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Office of the Secretary
ATTN: Rulemaking and
Adjudications Staff
Mail Stop: O 16-C-1
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Atomic Safety and Licensing Board
Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555

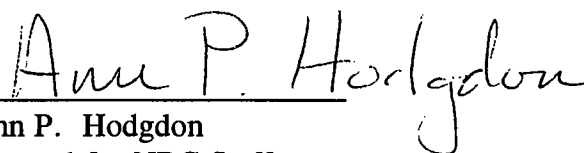
Jonathan M. Block, Esq.*
New England Coalition on Nuclear
Pollution, Inc.
Main Street
P.O. Box 566
Putney, Vermont 05346-0566

Deborah B. Katz, President*
Citizens Awareness Network, Inc.
P.O. Box 3023
Charlemont, MA 01339-3023

Adam Laipson, Chairman*
Franklin Regional Planning Board
425 Main Street
Greenfield, MA 01301

Thomas G. Dignan, Jr.*
R. K. Gad, III
Counsel for Licensee
Ropes & Gray
One International Plaza
Boston, MA 02110

Diane Curran
Harmon, Curran, Spielberg
& Eisenberg, LLP
New England Coalition on Nuclear
Pollution, Inc.
2001 "S" Street, NW, Suite 430
Washington, DC 20009



Ann P. Hodgdon
Counsel for NRC Staff