United States of America
before the
Nuclear Regulatory Commission

In the Matter of

YANKEE ATOMIC ELECTRIC COMPANY

(Yankee Nuclear Power Station)

Docket No. 50-029-LA

ON APPEAL UNDER 10 C.F.R. § 2.714A
BY NEW ENGLAND COALITION ON NUCLEAR POLLUTION, INC., FROM A
MEMORANDUM AND ORDER OF THE ATOMIC SAFETY AND LICENSING BOARD
DENYING STANDING TO INTERVENE

BRIEF OF THE LICENSEE
YANKEE ATOMIC ELECTRIC COMPANY

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STATEMENT OF THE CASE

Prior Proceedings.

On January 28, 1998, the Commission published a notice of opportunity for hearing under 10 C.F.R. § 2.105 in respect of the approval of the License Termination Plan ("LTP") for Yankee Nuclear Power Station ("YNPS") submitted by Yankee Atomic Electric Company ("Yankee"). 63 Fed. Reg. 4308, 4328. On February 26 and 27, 1998, four petitions to intervene or requests for hearing were filed: by Citizens Awareness Network, Inc. ("CAN"), by New England Coalition on Nuclear Pollution, Inc. ("NECNP"), by Nuclear Information and Resource Service ("NIRS") and by Mr. Adam Laipson, the Chairman of the "Franklin Regional Planning Board" ("Planning Board").

On March 11, 1998, Yankee filed an answer to each of these pleadings, contending (i) that in each case the pleader had failed to demonstrate the standing requisite to a request for a hearing or intervention and (ii) that in each case the pleading had identified one or more "aspects" of the proceeding that were, in fact, beyond the scope of an LTP approval proceeding. On March 16, 1998, the Staff filed an answer to the four pleadings of similar tenor. On March 25, 1998, the Planning Board filed a "Response to Yankee Atomic Electric Company's Answer to Request for Hearing of Franklin Regional Planning Board."

On March 9, 1998, a Licensing Board was convened by order of the Atomic Safety and Licensing Panel, and on March 25, 1998, the Board issued an Order establishing the deadlines for the submission of amendments to the four petitions and responses thereto. On motions, these deadlines were enlarged. Amendments were served by the Planning Board, CAN, and NECNP on April 6, 1998.[1] Yankee filed a consolidated response on April 13, 1998, and the Staff filed responses on April 14, 17 and 20, 1998. Certain additional pleadings were then filed.

On June 12, 1998, the Board issued its Memorandum and Order concluding that none of the petitioners had demonstrated the required standing. *Yankee Atomic Electric*

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[1]On the same date, NIRS filed a "notification" of its withdrawal from the proceeding and request to be removed from the service list.

Co. (Yankee Nuclear Power Station), LBP-98-12, 47 NRC ___ (June 26, 1998) ("LBP-98-12").

After securing an enlargement of time, NECNP filed its "Notice of Appeal" and "Brief," which were served on Yankee by mail on July 10, 1998.

The Facts.

Yankee notified the Commission of the permanent cessation of operation of YNPS and its permanent defueling in 1992.

In 1993, Yankee submitted a "decommissioning plan" (the "Decommissioning Plan") under the prior version of 10 C.F.R. § 50.82. The Decommissioning Plan was approved by the Staff in early 1995. 60 Fed. Reg. 9870 (Feb. 22, 1995).

In *CAN v. NRC,* 59 F.3d 284 (1st Cir. 1995), the Court of Appeals held, in essence, that a change of opinion by the Commission on the point at which dismantlement activities were impermissible absent approval of a decommissioning plan constituted a "license" under the Atomic Energy Act and, therefore, entitled CAN to an opportunity for a hearing. In *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-95-14, 42 NRC 130 (1995), the Commission determined that, on remand from the Court of Appeals decision, a new opportunity for hearing should be offered on the approval of the Decommissioning Plan itself, and NECNP filed a request for hearing and petition to intervene.[2] Eventually, a single contention was admitted in that proceeding, *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8 (1996), and that contention was then disposed of (adversely to NECNP) by summary disposition. *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-18, 44 NRC 86 (1996). Commission review was denied. *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-9, 44 NRC 112 (1996). NECNP did not

[2]Prior to 1995, the Commission did not view approval of a decommissioning plan to be a "license" within the meaning of § 189a of the Atomic Energy Act, and no notice of an opportunity for a hearing had been issued. While CAN pressed repeatedly for a hearing on certain pre-approval dismantlement activities, it never explicitly sought a hearing on the Decommissioning Plan itself. Nonetheless, the Commission construed the logic of the Court of Appeals' holding to apply to the Decommissioning Plan and elected to apply it retroactively.

seek judicial review. The Decommissioning Plan was therefore "approved" a second time.

In July, 1996, the Commission amended § 50.82. 61 Fed. Reg. 39,278 (July 29, 1996). One effect of the amendment was to eliminate any requirement of Commission approval as a condition precedent to a licensee's authority to engage in decommissioning and dismantlement. For plants (such as YNPS) as to which decommissioning plan approval proceedings were on-going, the Commission decreed:

> "For power reactor licensees whose decommissioning plan approval activities have been relegated to notice of opportunity for a hearing under subpart G of 10 CFR part 2, the public meeting convened and 90-day delay of major decommissioning activities required in paragraphs (a)(4)(ii) and (a)(5) of this section shall not apply, and any orders arising from proceedings under subpart G of 10 CFR part 2 shall continue and remain in effect absent any orders from the Commission."

10 C.F.R. § 50.82 (Introduction) (1996). No Commission order otherwise affecting the scope of the approval of the Decommissioning Plan has ever been issued.

NECNP did not seek judicial review of the promulgation of amended 10 C.F.R. § 50.82.

In July, 1990, the Commission amended 10 C.F.R., Part 72 to provide for a general license to store spent fuel on site in dry casks to "persons authorized to possess or operate nuclear power reactors under part 50 of this chapter." 10 C.F.R. § 72.210, as promulgated by 55 Fed. Reg. 29,181 (July 18, 1990).[3] NECNP did not appeal the promulgation of this regulation providing for such a general license.

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[3]This regulation was promulgated in implementation of a Congressional directive "to establish a spent fuel storage development program with the objective of establishing one or more technologies that the NRC might approve for use at civilian nuclear power reactor sites without, to the maximum extent practicable, the need for additional site-specific approvals by the Commission." 55 Fed. Reg. 29,181, referring to §§ 218(a) and 133 of the Nuclear Waste Policy Act of 1982 (NWPA), 42 U.S.C. § 10101 *et seq.* *See Kelley v. Seldin*, 42 F.3d 1501, 1504 (6th Cir. 1995).

ARGUMENT

I. THE LICENSING BOARD CORRECTLY APPLIED THE PROPER LEGAL STANDARDS IN RULING THAT NECNP HAD NOT DEMONSTRATED THAT ITS MEMBER VAN ITALLIE HAD STANDING TO INTERVENE IN THIS PROCEEDING.

In this case, NECNP sought to establish standing for the organization by demonstrating standing on the part of one of its members (Jean-Claude van Itallie). "Representative" standing recognizes that an incorporated advocacy group may have standing to intervene to represent, not its own interests, but the interests of members who have an interest which will be affected. *Florida Power & Light Co.* (St. Lucie Nuclear Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989); *Public Service Company of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-322, 3 NRC 328 (1976). To achieve "representative" standing, the petitioner must identify by name and address at least one member who wishes to be represented by the organization and who has the necessary interest. *Virginia Electric & Power Co.* (North Anna Nuclear Power Station, Units 1 and 2), ALAB-536, 9 NRC 402, 404 (1979); *Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), LBP-79-1, 9 NRC 73, 77 (1979). NECNP sought to carry its factual burden[4] of demonstrating a member's standing by submitting two affidavits. One, the affidavit of Jean-Claude van Itallie, established that he is a member of NECNP and resides about 6 miles from the YNPS site. In his affidavit, Mr. van Itallie complained of two types of harms to himself: radiation injury (or fear thereof) and diminution of property values. These, he asserted, he fears on account of two sources: (i) spent fuel management and disposal and (ii) "ineffectual clean up of Yankee Rowe site." *van Itallie Aff.* ¶¶ 6, 7. *See also NECNP Amended Petition* at 12-14, which is devoted exclusively to spent fuel issues.

Mr. van Itallie did not claim any qualifications to opine that there is, in fact, any risk to himself or his property; that function, rather, was delegated by him and NECNP to Mr. David Lochbaum, whose affidavit was submitted by NECNP in order

[4] *Consumers Power Co.* (Midland Plant, Units 1 and 2), LBP-78-27, 8 NRC 275, 277 (1978).

to satisfy its acknowledged burden of demonstrating, in its own words, that "[t]he threat posed to Mr. van Itallie . . . is not merely speculative . . . ." *NECNP Amended Petition* at 13. However, Mr. Lochbaum's affidavit was limited to matters involving spent fuel disposal and management only. *Lochbaum Aff., passim.*[5] Thus the only *claimed* injury-in-fact to an NECNP member that was *supported* as being "non-speculative" related to on-site spent fuel management.

In addition to a section on "standing," the *NECNP Amended Petition* contained an extended (if somewhat disorganized) section on "aspects" of the proceeding into which NECNP wished to intervene.

A. The Licensing Board Correctly Ruled that NECNP May Not Predicate Standing Based on Potential Impacts Allegedly Arising Out of the On-Site Storage of Spent Fuel.

NECNP's affiants' primary concern before the Board, as well as before this Commission, relates to the on-site storage and handling of spent fuel:

> "[T]here is a continued threat of an irradiated fuel accident. Such an accident would likely involve the release of radiation into the local environment. Living close to the reactor site boundary, the continued potential for such releases of radiation profoundly affects my life and is a continuing source of concern to me. . . . There is still irradiated fuel at the Yankee site which will be transferred into dry cask storage. This means that a very real potential exists for accidental release of radiation into the local environment."

van Itallie Aff., ¶¶ 7, 9. However, as the Licensing Board correctly ruled, these "concerns" do not sum to standing, because the approval or disapproval of the LTP has

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[5]After a description of qualifications and assignment, the substance of Mr. Lochbaum's affidavit is contained in paragraphs 8 and 9. Paragraph 8 declares that "the following significant safety issues remain for persons living in close proximity" to YNPS: (a) "[c]ontrols do not appear to adequately preclude damage to the fuel storage racks" on account of a hypothesized heavy load drop on the racks; (b) "neither the [LTP] nor the FSAR describe how irradiated fuel can or will be safety removed from the spent fuel pit;" and (c) "[t]he [LTP] and complementary FSAR do not define the instrumentation and controls needed to detect potential problems in the spent fuel pit." Paragraph 9 declares that "[b]ecause . . . the above safety concerns addressed in paragraph 8 remain" at YNPS, persons living in proximity to the plant "are at a risk of suffering the effects of the potential accidents described above." In fact, the affidavit does not address how, even if they occurred, the postulated accidents could result in any off-site consequences, given the actual inventory of the YNPS spent fuel pool.

no effect on what Yankee does or may do concerning the on-site management of spent fuel. *LBP-98-12* at 7, 12. This Commission itself has stated:

> "[T]he NRC definition of decommissioning excludes interim storage of spent reactor fuel."

61 Fed. Reg. 39,278, at 39,293 (July 29, 1996). The LTP regulation, 10 C.F.R. § 50.82(a)(9)(ii), does not require the LTP to contain any information regarding spent fuel management. In promulgating revised § 50.82, the Commission described the function of the LTP approval in these terms:

> "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). The absence of any review of spent fuel management was intentional:

> "The existing rule, as well as the proposed rule, consider the storage and maintenance of spent fuel as an operational consideration and provide separate part 50 requirements for this purpose. Regarding maintaining the capability to handle the fuel for dry cask storage, these requirements are maintained in 10 CFR part 72."

Id. at 39,292.

Approval of the LTP would not give Yankee, and Yankee does not need, any additional license or authority for spent fuel management: Yankee already possesses a license under 10 C.F.R., Part 50 sufficient to authorize continued use of the existing spent fuel pool,[6] 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). Yankee already also has authority to move "heavy loads" over the

[6]Certain modifications to the spent fuel pool (removing its dependence on other plant systems) were previously approved when the Decommissioning Plan was approved or were performed under the authority of 10 C.F.R. § 50.59 and, in any event, have already been implemented. Yankee's existing Part 50 license also authorizes the storage of GTCC waste on site.

spent fuel pool.[7] Should Yankee decide in the future to seek a separate Independent Spent Fuel Storage Installation license under 10 C.F.R. § 72.40, the Regulations provide that an application must be filed and a notice of opportunity for hearing will issue on that application, but no such application has yet been filed (or prepared). In short, whether the LTP were to be approved or disapproved will work no change in either Yankee's existing license authority or its management of spent fuel.

As a consequence, none of the "accidents" that the Lochbaum affidavit purports to validate for NECNP's member's "concern" amount to an "injury [that] is likely to be redressed by a favorable decision." *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996).[8] Mr. van Itallie therefore has failed to demonstrate his standing to litigate spent fuel issues, for want of which NECNP has failed to demonstrate standing as his representative to litigate those issues.

On appeal, NECNP attacks the Licensing Board's ruling on two grounds, neither of which contends at bottom that the Board misapplied the governing regulations. First, NECNP contends, in essence, that the Commission should eliminate the "general license" provision of Part 72, which (it is contended) denies NECNP hearing rights bestowed upon it by the Atomic Energy Act. The Commission has long ago dealt with such an assertion:

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[7]Letter, Morton B. Fairtile to Frederick N. Williams, dated June 17, 1998, re: "Issuance of Amendment No. 149 to Facility Operating License (Possession only) No. DPR-3 - Yankee Nuclear Power Station (TAC No. M99529" and enclosures; 63 Fed. Reg. 35,986, 36,002. A notice of opportunity for hearing on this Technical Specification amendment was published over ten months ago. *See* 62 Fed. Reg. 54,866, 54,879 (October 22, 1997). The time for filing requests for hearing and petitions to intervene on that amendment expired November 21, 1997. *Id.* at 54,867. NECNP did not request a hearing or petition to intervene in that matter.

[8]The Commission employs judicial concepts of "standing" for purposes of seeking intervention in adjudicatory proceedings. *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614 (1976). "To have 'standing in court', one must satisfy two tests. First, one must allege some *injury* that has occurred or will probably *result from the action involved.*" *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613 (1976) (emphasis added). The test is "whether a cognizable interest of the petitioner might be adversely affected if the proceeding has one outcome rather than another." *Public Service Company of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 439 (1980).

"1. Comments. Elimination of public input from licensing of spent fuel storage at reactors under the general license was discussed in 237 letters of comment and 52 of the commenters were opposed to the rule for this reason. Many of these comments were opposed to the NRC allowing dry cask storage without going through the formal procedure currently required for a facility license amendment that requires public notification and opportunity for a hearing. One commenter stated that the proposed rule does not guarantee hearing rights mandated by the Atomic Energy Act, and, therefore, the proposed rule must be amended to provide for site-specific hearing rights before it can be lawfully adopted. Another commenter stated that, by proposing to issue a general license before determining whether license modifications are required in order to allow the actual storage of spent fuel onsite, the NRC apparently intends to circumvent the requirement for public hearings on individual applications for permission to use dry cask storage. This comment continued that this approach would violate the statutory scheme for licensing nuclear power plants, in which the NRC must approve all proposed license conditions before the license is issued. This comment further stated that the NRC cannot lawfully issue a general license for actual onsite storage of the waste without also obtaining and reviewing the site-specific information that would allow it to find that the proposed modification to each plant's design and operation are in conformance with the Atomic Energy Act (the Act) and the regulations.

"Response. This rule does not violate any hearing rights granted by the Act. Under 10 CFR parts 2, 50, and 72, interested persons have a right to request a formal hearing or proceeding for the granting of a license for a power reactor or the granting of a specific license to possess power reactor spent fuel in an independent spent fuel storage installation (ISFSI) or a monitored retrievable storage installation (MRS). However, hearing processes do not apply when issues are resolved generically by rulemaking. Under this rule, casks will be approved by rulemaking and any safety issues that are connected with the casks are properly addressed in that rulemaking rather than in a hearing procedure."

55 Fed. Reg. at 29,182. Moreover, as the Commission noted then:

"There is a possibility that the use of a certified cask at a particular site may entail the need for site-specific licensing action. For example, an evaluation under 10 CFR 50.59 for a new cask loading procedure could require a part 50 license amendment in a particular case. In this event the usual formal hearing requirements would apply. However, generic cask approval (issuance of a certificate of compliance) would, in accordance with section 133 of the Nuclear Waste Policy Act of 1982 (NWPA), eliminate the need for site-specific approvals to the maximum extent practicable."

Id. In the case of YNPS, precisely such a license amendment was required in order to remove a restriction upon the use of the spent fuel pool crane to load spent fuel into casks, and such an amendment was duly applied for and granted *without* any request for a hearing or intervention by NECNP (or anyone else). *See supra* at 6 & n.7. NECNP's lament, therefore, is tears for a self-inflicted injury.

Second, NECNP contends that this Commission should apparently ignore its own regulation in order to "enforce LBP-96-2."[9] On its face, this argument is silly, because the only aspect of an adjudicatory decision that is capable of being "enforced" is the order, and the order of LBP-96-2 was that NECNP's contentions be dismissed. Moreover, NECNP misreads LBP-96-2. The Board in that case promised nothing; it merely observed that, as a matter of law, the outcome of *that* case would have no effect on whether Yankee could or would employ dry cask storage technologies.

NECNP's protest that it has been done in by LBP-98-12 is equally wide of the mark. That for which it blames the Licensing Board—namely, that Yankee (or any other general licensee under § 72.210) doesn't need to apply for a license that it already enjoys—was not a fiat by the Licensing Board in this case but merely a reading of a regulation that has been on the books for 8 years, of which NECNP never sought judicial review, and which NECNP is as capable of reading as the Licensing Board was.[10] NECNP's claim that it has "lost" "hearing rights" is based on NECNP's failure to recognize that, under the Atomic Energy Act, "hearing rights" attach to licensing actions, not licensee actions. NECNP's "rights" under AEA § 189a with respect to a

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[9]Referring to *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61 (1996).

[10]Moreover, as the Court in *Kelley* held, "petitioners' argument is essentially an attack on the policy choice made by the Congress, and embodied in the NWPA, to have the NRC consider, to the extent practicable, the licensing of onsite spent nuclear fuel storage at civilian nuclear power facilities through rulemaking. If petitioners are to obtain such relief, it must come from the Congress, either in the form of the repeal or amendments to the NWPA, and not from the courts." 42 F.3d at 1521.

license under 10 C.F.R. § 72.40[11] will become ripe when, as and if Yankee applies for such a license (which it has not yet done and may never do); NECNP's "rights" under § 189a with respect to the general license under 10 C.F.R. § 72.210 were exhausted when the Commission promulgated that rule; and NECNP's "rights" under AEA § 189a with respect to the heavy loads Technical Specification amendment were exhausted when the Commission published a notice of opportunity for a hearing and NECNP elected to let the issue go by.

Finally, on this point NECNP misreads CLI-98-12 as certainly as it misread LBP-96-2, for the point is not what the Licensing Board said about *when* a hearing might or might not occur with respect to dry cask storage (should that option ever be availed at YNPS). The point, rather, is that spent fuel management and disposal is not an LTP issue. Prescinding entirely from the wisdom or efficacy of 10 C.F.R. § 72.210, the fact of the matter for present purposes is that one may not posit standing based on the impact of Proceeding A, which does not result in permission to do Action B, by contending that some *other* regulation that obviates any requirement of such permission is invalid. Even if § 72.210 were not on the books—that is to say, were it repealed tomorrow or had it never been promulgated—approval of *the LTP* would not authorize any storage of any spent fuel by any means.

It need hardly be added that, were this Commission to yield to NECNP's demand that, notwithstanding its promulgated regulation to the contrary, "[t]he Commission should clarify that [Yankee] is not entitled to proceed with dry cask storage absent licensing of an ISFSI under 10 C.F.R.[,] Part 72 . . ." (*NECNP Br.* at 23), the Commission would violate precisely the same legal duty for which it was criticized in *CAN v. NRC*, 59 F.3d 284 (1st Cir. 1995).

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[11]Which rights have been altered by the Nuclear Waste Policy Act in the case of any "application for a license, or for an amendment to an existing license, filed after January 7, 1983, to expand the spent nuclear fuel storage capacity at the site of a civilian nuclear power reactor, through the use of . . . dry storage capacity, or by other means . . . ." 42 U.S.C. § 10154.

B. The Licensing Board Correctly Ruled That NECNP had Not Demonstrated That Concerns about "Ineffectual Cleanup" were Related to the LTP Approval and Therefore Could Not Ground Standing to Intervene on That Subject.

Apart from the spent fuel accident claim, the essence of NECNP's claim to standing was that its member might be denied access to the YNPS site if the decommissioning of YNPS failed to achieve the site release criteria stated in the LTP, with the result that its member might not be able to enjoy access to the site. However, approval of the LTP does not involve the question of performance; the function of LTP approval is to lay out for approval the site release criteria and the survey plan for demonstrating that the criteria have been met:

> "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). Unlike CAN,[12] NECNP did *not* contend below that the LTP's site release criteria do not meet the regulations, and NECNP did not contend below, and none of its affiants purport to demonstrate, any inadequacy of the site survey plan or potential for injury to them *from that plan*. In substance, NECNP contended that its member would be injured, *not* if the plan were to be implemented, but only if it were *not* implemented; this did not demonstrate (but rather negated) any potential for redress if the plan were to be approved.[13]

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[12]Which has since abandoned the claim; *see* "Brief of the Licensee Yankee Atomic Electric Company" in CAN's appeal, at 9 & n.12.

[13]Before the Licensing Board, NECNP's entire contribution to the critical issue of redressability consisted of the following *ipse dixit*:

> "Finally, it is plain from Mr. Van Itallie's declaration that there are a number of outcomes to this proceeding which would mitigate or eliminate the harms he now suffers."

To the contrary, not only was this issue not "plain," it was (and is) a mystery.

II. NECNP HAS FAILED TO DEMONSTRATE THAT THE LICENSING BOARD ERRED IN FAILING TO ACCORD NECNP STANDING ON THE BASIS OF INJURY THAT ITS MEMBER WOULD SUSTAIN BY REASON OF SOME INNOMINATE INSUFFICIENCY IN THE SITE SURVEY PLAN.

It is certainly true that, *if* articulated with sufficient specificity, and *if* supported as required by 10 C.F.R. § 2.714, a contention to the effect that some specific aspect of the site survey plan is insufficient to accomplish the purpose of the plan would be an admissible contention. It does not follow, however, that every imagined possible insufficiency in the a plan demonstrates "distinct and palpable"[14] harm to Mr. van Itallie, and it most certainly does not follow that a Licensing Board is obliged to ferret out of a mish-mash of non-conclusory and entirely unsupported enumerations some theoretically possible harm to anyone. And most certainly, it does not follow that a Licensing Board is obliged to perceive "standing" based on concerns that the petitioner himself did not rely upon to establish his standing. NECNP elides too quickly over these fatal defects in propounding its argument that the Licensing Board committed legal error in not detecting such harm in this case.

One starts with the fact that there is not a whiff of a contention that Mr. van Itallie might be injured on account of the site survey plan in either of the affidavits submitted to the Licensing Board below. The Lochbaum affidavit, as NECNP concedes, was confined to spent fuel matters. *NECNP Br.* at 10-11. The van Itallie affidavit was dominated by spent fuel concerns, embellished with the phrase "ineffectual clean up of Yankee Rowe site." *van Itallie Aff.* ¶¶ 6. That "ineffectual cleanup" is to be equated with a plan deficiency—as opposed to just another statement of the spent fuel contention or a concern about sufficiency of plan *implementation*—is a leap of *post hoc* faith on NECNP's part.

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[14] *Transnuclear Inc.*, CLI-77-24, 6 NRC 525, 531 (1977).

> "The complainant must allege an injury to himself that is 'distinct and palpable,' *Warth* [*v. Seldin*, 422 U.S. 490, 501 (1975)], as opposed to merely '[a]bstract,' *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974), and the alleged harm must be actual or imminent, not 'conjectural' or 'hypothetical.' *Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983)."

Whitmore v. Arkansas, 495 U.S. 149, 155 (1990).

One adds the fact that neither affiant even claimed to be sufficiently qualified to opine that a given site survey plan deficiency could result in harm to Mr. van Itallie, which no doubt explains why neither affidavit (i) identified any particular part of the site survey plan thought to be insufficient, (ii) described the nature of the supposed insufficiency, (iii) described the significance of the supposed insufficiency, or (iv) purported to relate any supposed insufficiency to harm to Mr. van Itallie that might be obviated by disapproval of the LTP. The conclusion to which one is drawn is that, whatever Mr. van Itallie wanted to litigate once he was admitted into the proceeding, he did *not* intend that any supposed site survey plan insufficiency was his standing-based ticket to admission. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 244 (1996) (once obtained, standing authorizes an intervenor to litigate any issue that might lead to defeating the application).

What then of that portion of NECNP's amended petition to intervene as purports to enumerate, with great prolixity and little substance, the "specific aspects of the subject matter of the proceeding into which [NECNP] wished to intervene?"[15] As the Licensing Board observed, the evolution of the intervention rule has rendered somewhat vestigial this required component of an intervention petition—which is stated in the regulations as something quite distinct from "the interest of the petitioner in the proceeding [and] how that interest may be affected by the results of the proceeding."[16] *LBP-98-12*, slip op. at 4-5. Nonetheless, NECNP appropriately sought to satisfy this aspect of the regulation:

> "NRC regulations at 10 CFR 2.714(a)(2) require a petitioner to set forth 'the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene. . . . NECNP takes the position that the application for a license amendment, the LTP, all aspects of the LTP, the extent of compliance the the [sic] and LTP with NRC regulations, and the extent of application and LTP compliance [sic] with the Atomic Energy Act, National Environmental Policy Act, Nuclear Waste Policy Act, and other relevant statues, reasonably comprise the subject matter of the instant proceeding as noticed in the Federal

[15] 10 C.F.R. § 2.714(a)(2).

[16] *Id.*

Register. In this context, NECNP offers the following in satisfaction of 10 CFR 2.714(a)(2):"

NECNP Amended Petition at 17. There then follows 21 pages of rambling that the Licensing Board charitably labelled "nonconclusory," and for which, in any event, there was no basis at all in the affidavits. All of this was under a first-level section heading of:

"III. Aspects of Proceeding On Which NECNP Seeks to Intervene."

NECNP Amended Petition at 17.

Moreover, all of this "aspect" material was preceded by a section in which NECNP sought to establish its "standing," *NECNP Amended Petition* at 8-17, which is under a first-level section heading that read as follows:

"III. NECNP Has Standing to Intervene in this Proceeding."[17]

It is a reasonable, indeed a compelling, inference that on page 17 of its amended petition, NECNP's "standing" submission had ended and its "aspects" submission started.

Thus everything on which NECNP now relies on appeal to establish that it had made (and the Licensing Board ought to have perceived) a standing-through-plan-insufficiency demonstration below was, in fact, offered below for an entirely different purpose! NECNP comes to this Commission impermissibly advancing an argument not raised below. An appellant may not predicate error on the Licensing Board's failure to take what NECNP offered below as "aspects" and find in it "standing" that NECNP itself did not contend for below. *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 260 & n.19 (1996).

Assuming NECNP could surmount this hurdle, the fact of the matter is that the material in NECNP's "aspects" section of its intervention petition falls far short of meeting the requirements for demonstrating a "distinct and palpable" injury to Mr. van

[17]Sic: there were two sections numbered "III."

Itallie. NECNP's submission was divided into two parts, an "outline" and a "discussion." The "outline" is, as the Licensing Board observed, entirely "nonconclusory." While NECNP disparages the significance of this admittedly correct description, the fact of the matter is that the "outline" is nothing other than a list of topics. There is no assertion, much less a demonstration sufficient to demonstrate a genuine, non-speculative threat to Mr. van Itallie, in any of the "outline" material.

As for the "discussion," this was the product of neither Mr. van Itallie nor of the purported expert, despite NECNP's recognition (in the standing section) of its obligation to supply something sufficient to demonstrate that fears were "non-speculative." Rather, the "discussion" portion of NECNP's "aspects" submission was "provided" by an unnamed "representative of the Board of Trustees of petitioner NECNP." *NECNP Amended Petition* at 23 n.15. The qualifications of this mystery witness, if any, were not disclosed.

NECNP focusses on appeal on the site survey plan. However, the "discussion" section of its "aspects" submission below contain only two brief references to the site survey plan. The first was entirely hypothetical and speculative:

> "Site characterization and survey *may* not be complete unless extended to local public landfills to which YAEC sent large volumes of unmonitored trash over the years. Recently it has come to public attention that administrative radiological control barriers between the radioactive and 'non-radioactive' sides of the site were breached at two of the other Yankee facilities, Maine Yankee Atomic and Connecticut Yankee Atomic,[18] and radioactive materials, presumed to be clean, had been sent offsite. It is, thus, reasonable to *suspect* that such control weakness are [sic] generic, and dumps used by YAEC for materials from the Yankee Rowe facility should be subjected to radiological survey."

[18]What NECNP means by this reference is unclear; the Commission may take judicial notice that the two other facilities in question are owned and operated by someone other than Yankee.

NECNP Amended Petition at 36 (emphases added). Prescinding from its obvious errors, and prescinding further from its lack of regulatory nexus to the LTP,[19] such speculation about theoretical matters is utterly insufficient to demonstrate "injury-in-fact." *Compare Sequoyah Fuels Corp.* (Gore, Oklahoma, Site), CLI-94-12, 40 NRC 64 (1990).[20] To contend otherwise is to reduce the standing requirements to a meaningless exercise in draftsmanship. *See United States v. Students Challenging Regulatory Agency Procedures,*

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[19]The LTP relates to the release, free of radiological controls, of the YNPS *site*. If, in fact, materials were thought to have been historically released off-site in contravention of NRC regulations plant procedures, remediation for such a situation would be a question of enforcement, and would be required entirely independently of decommissioning and license termination.

At Connecticut Yankee (to which NECNP refers and which NECNP blithely assumes must be extrapolated to other plants), materials were apparently historically released on the basis of either insufficient survey and documentation or lack of presently retrievable documentation; the problem was in the failure to survey or document, not the level of radioactivity in the materials. Moreover, the entirely speculative nature of NECNP's extrapolation of the CY situation to YNPS is enhanced by the fact that, as a matter of public record, the NRC has concluded, based on a review of procedures and records dating back for 37 years, that "the removal of bulk radioactive materials from the [YNPS] site, in the time period from start-up through March 1998[,] was properly performed, using the appropriate plant procedures in force at the time." IR 50-29/98-01 & 50-29/98-02 (June 24, 1998), at 5-6.

The LTP's site survey plan is limited to the site, and its adequacy to demonstrate satisfaction of the site release criteria of 10 C.F.R. § 20.1401 is entirely unaffected by whether historical violations of screening or documentation requirements for materials going *off the site* may have occurred in the past.

[20]In *Sequoyah*, this Commission held:

> "The alleged injury, which may be either actual or threatened, must be both concrete and particularized, not 'conjectural,' or 'hypothetical.' As a result, standing has been denied when the threat of injury is too speculative."

40 NRC at 72 (citations and footnote omitted). In that case, standing was found to exist based on affidavits that described a non-speculative mechanism by which injury might result:

> "To support Mr. Henshaw's assertions, NACE provided affidavits from Mr. Timothy P. Brown, a professional hydrogeologist. Mr. Brown examined data regarding the flow paths of groundwater in the area and concluded from the available data that one could not rule out the possibility that contaminated groundwater could migrate from beneath the SFC site and contaminate groundwater and eventually the well water on the Henshaw property. Mr. Brown provided examples of flow paths that lead to the Henshaw property and asserted that migration of contamination into these paths could not be ruled out without further testing."

Id. By contrast, NECNP's submission on any issue other than spent fuel management is utterly speculative and, therefore, deficient. Indeed, were NECNP's argument on appeal correct, the Commission in *Sequoyah* would not have had to address the Brown affidavit and NECNP would not have had to submit the Lochbaum affidavit.

412 U.S. 669, 688 (1973) ("pleadings must be something more than an ingenious exercise in the conceivable").

The second explicit reference to the site survey plan is even more obscure:

> "In the Final Status Survey Plan on Page A-19, YAEC determined (by fiat?) that certain portions of the site are to be designated as 'Non-Impacted Area' and no radiological surveys need take place in such areas. Bit much, is it not, to assume that there is nothing to be learned in those areas? NECNP understands that a site survey is intended to determine *if* there is contamination, as well as how much, rather than developing ways to avoid such determinations."

NECNP Amended Petition at 37 (emphasis in original). In fact, the assignment of "non-impacted" areas makes great sense, given that the "YNPS property" consists of some 2,200 acres, of which only a small portion was ever within the radiological control boundary, occupied by the plant or disturbed by plant construction or operations. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 252 (1996); Decommissioning Plan, Environmental Report, p.1-1. Nor does NECNP fairly portray this provision, which NECNP would cavalierly condemn as arbitrary; what the cognizant provisions of the Plan actually say is as follows:

> "**Unaffected Areas:** These areas have a low potential for radioactive contamination, based on a knowledge of site history and previous survey information. Average measurements for average total surface contamination, and for average concentrations of radionuclides in soil or asphalt are expected to be less than 25% of the applicable guideline value or less than the [minimum detectable concentration] for the equipment used to perform the survey, whichever is larger. Previous remediation precludes a survey area from being initially classified as unaffected.
>
> "**Non-Impacted Areas:** Those areas of YNPS property that are outside of unaffected areas will be classified as non-impacted and will not be surveyed. These areas have an insignificant potential for residual contamination. (Reference 9 [*i.e.*, Draft NUREG-1505, A Nonparametric Statistical Methodology for the Design and Analysis of Final Status Decommissioning Surveys, dated August 1995])."

Site Survey Plan, p. A-19 (found in the appendix to the LTP). Thus, "Unaffected Areas" is defined in terms of a class of locations that, based on historical data and prior

surveys,[21] can be rationally evaluated to be unlikely to have more than a fraction of the site release criteria activity, but which will still be surveyed, and "non-impacted areas" are those lands owned by Yankee that are outside the "unaffected areas." To call such careful judgments "(by fiat?)" signals that the undisclosed author of this passage did not even read the material he was criticizing. Contrary to NECNP's snide observation, the designation of "Non-Impacted Areas" described in the LTP is not arbitrary and does not involve "assuming" anything.

Prescinding from the validity of this aspect of the site survey plan, however, the quoted assertion simply lacks any assertion or demonstration of any non-speculative impact on NECNP's affiant. A petitioner's standing burden is not satisfied simply by making snide remarks.

On appeal, NECNP relies primarily on stretching a bit of *dictum* from *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 286 (1995), beyond its limits of elasticity. *Georgia Tech* involved the renewal of a reactor operating license, a petitioner who lived half a mile from the reactor, and the uncontested fact that during routine operations permitted releases of Argon-41 could extend half a mile from the facility. *Id.* at 287. In the process of reciting its decision, the Licensing Board stated (but had no need to rely upon) the following:

> "Furthermore, in determining standing, we must 'accept as true all material allegations of the [petition], and must construe the [petition] in favor of the [petitioner].' *Warth v. Seldin, supra*, 422 U.S. at 501; *Kelley v. Seldin*, 42 F.3d 1501, 1507-08 (6th Cir. 1995)."

Id. at 286. As NECNP translates this, the mere allegation that its member is a member of the public, who may someday come on the site, and that he has made "an assertion regarding his concern for his health and safety in the event that cleanup of the Yankee

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[21] *See LTP* at § 2.1: "Surveys performed at YNPS during decommissioning have been conducted using guidance from NUREG/CR-5849 (Reference 2-1). Scoping surveys, whose purpose it is to identify the potential radionuclide contaminants at the site, the relative ratios of these radionuclides, and the general extent of contamination, were performed at YNPS during 1992 and 1993. The results of these surveys are summarized in Section 3.1 of the Decommissioning Plan (Reference 2-2). Site characterization surveys, which more precisely defined the extent and magnitude of contamination, began in 1994 and are currently ongoing."

Rowe site is 'ineffectual'" is, by itself, "more than sufficient to demonstrate injury-in-fact." *NECNP Br.* at 16. Indeed, if NECNP is correct, then the standard for standing—the same precept as is employed by the Courts and vindicates the Article III "case or controversy" limitation of constitutional import—is truly no more than a meaningless exercise in trying to chant the right phrase.[22]

Fortunately (for the law), NECNP is not correct. Standing is not something that a petitioner may establish by his own *ipse dixit*. As this Commission has articulated:

> "In order to establish standing to intervene in a proceeding, a petitioner must demonstrate that (1) it has suffered a distinct and palpable harm that constitutes injury-in-fact within the zone of interests arguably protected by the governing statute; (2) that the injury can fairly be traced to the challenged action; and (3) that the injury is likely to be redressed by a favorable decision. *See, e.g., Cleveland Electric illuminating Co.* (Perry Nuclear Power Plant), CLI-93-21, 38 NRC 87, 92 (1993). *See generally Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136 (1992); *Dellums v. NRC*, 863 F.2d 968, 971 (D.C. Cir. 1988)."

Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996). Likewise, as applied over the years, standing has never been a "take what I say because I say it" proposition: it has not been sufficient for a prospective intervenor simply to *allege* injury. "Standing to intervene, unlike the factual merits of contentions, may appropriately be the subject of an evidentiary inquiry before intervention is granted." *Consumers Power Co.* (Midland Plant, Units 1 and 2), LBP-78-27, 8 NRC 275, 277 (1978). How, then, does one reconcile the quotation from the Licensing Board in *Georgia Tech* (purporting to rely on the Supreme Court of the United States)?

The vice lies (as is often the case) in the ellipsis. What the Supreme Court actually said in *Warth v. Seldin* was as follows:

> "One further preliminary matter requires discussion. For purposes of ruling on a *motion to dismiss* for want of standing, both the trial and reviewing courts must accept as true all material allegations *of the complaint,* and must construe *the complaint* in favor of the complaining

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[22]A form of revival of trial by compurgation. *See Lipinski v. New York*, 557 F.2d 298, 293 n.6 (2d Cir. 1977).

> party. *E.g., Jenkins v. McKeithen,* 395 U.S. 411, 421-422 (1969). At the same time, it is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, *further particularized allegations of fact* deemed supportive of plaintiff's standing. If, after this opportunity, the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed."

422 U.S. at 501-02 (emphases added). It is not, therefore, the standing assertions of a "petition" that must be accorded the facial acceptance given a complaint in federal court, but rather a *complaint.* It is not sufficient for the pleader simply to say "I will be harmed" in some speculative, undescribed way. Rather, what is required are "particularized allegations of fact" demonstrating the nexus between the complaint (in this case, for instance, that "the LTP is bad") and the harm. It is the latter that is missing here, and the NECNP's version of the *Georgia Tech* shibboleth will not supply it (or eliminate its requirement). After all, *George Tech* relies on the same decision in *Kelley v. Seldin* that held that:

> "Petitioners' injury must be 'distinct and palpable,' . . . not merely a hypothetical or imagined detriment."

Kelley v. Seldin, 42 F.3d 1501, 1508 (6th Cir. 1995). As NECNP would strain the *Georgia Tech* quotation, hypothetical or imagined detriment *would* be sufficient because it could not be questioned. And, after all, the petitioners in both *Warth v. Seldin* and *Kelley v. Seldin* were found *not* to have demonstrated standing.

The distinction between accepting as true the nature of the *complaint* and nonetheless requiring a concrete demonstration of injury to the petitioner, a distinction recognized by the Licensing Board in LBP-78-27, is in fact ably demonstrated in Justice Powell's opinion in *Warth v. Seldin.* The allegation of wrongful conduct in that case *was* accepted at face value, but this was insufficient to demonstrate injury-in-fact to the petitioner:

> "With these general considerations in mind, we turn first to the claims of petitioners Ortiz, Reyes, Sinkler, and Broadnax, each of whom asserts standing as a person of low or moderate income and, coincidentally, as a member of a minority racial or ethnic group. We must assume, taking the allegations of the complaint as true, that Penfield's zoning

> ordinance and the pattern of enforcement by respondent officials have had the purpose and effect of excluding persons of low and moderate income, many of whom are members of racial or ethnic minority groups. We also assume, for purposes here, that such intentional exclusionary practices, if proved in a proper case, would be adjudged violative of the constitutional and statutory rights of the persons excluded. *But the fact that these petitioners share attributes common to persons who may have been excluded from residence in the town is an insufficient predicate for the conclusion that petitioners themselves have been excluded, or that the respondents' assertedly illegal actions have violated their rights.* Petitioners must *allege and show* that *they personally have been injured,* not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent. Unless these petitioners can thus demonstrate the requisite case or controversy between themselves personally and respondents, 'none may seek relief on behalf of himself or any other member of the class.'"

422 U.S. at 502. Moreover, in *Warth*, unlike the case at bar,[23] the petitioners *had* addressed the question of a connection between the allegedly unlawful behavior and impact on themselves. Conclusory allegations, however, did *not* have to be accepted and were *not* sufficient to mount the "standing" hurdle:

> "In their complaint, petitioners Ortiz, Reyes, Sinkler, and Broadnax alleged in conclusory terms that they are among the persons excluded by respondents' actions. None of them has ever resided in Penfield; each claims at least implicitly that he desires, or has desired, to do so. Each asserts, moreover, that he made some effort, at some time, to locate housing in Penfield that was at once within his means and adequate for his family's needs. Each claims that his efforts proved fruitless. We may assume, as petitioners allege, that respondents' actions have contributed, perhaps substantially, to the cost of housing in Penfield. *But there remains the question whether petitioners' inability to locate suitable housing in Penfield reasonably can be said to have resulted, in any concretely demonstrable way, from respondents' alleged constitutional and statutory infractions. Petitioners must allege facts from which it reasonably could be inferred that, absent the respondents' restrictive zoning practices, there is a substantial probability that they would have been able to purchase or lease*

[23]Of course, NECNP's Amended Petition made no attempt to connect the items in its laundry list of "aspects" to any particular harm to Mr. van Itallie because, by the time a reader got to that portion of the Amended Petition, its "standing" offering had ended and the document was on to a different point.

in Penfield and that, if the court affords the relief requested, the asserted inability of petitioners will be removed."

Id. at 503 (emphasis added). The denial of standing to NECNP was correct because NECNP did not put forth facts from which it could be reasonably inferred that Mr. van Itallie had or would be injured in any concretely demonstrable way and that, if this Commission were to disapprove the LTP, the injury to him would be removed.

In short, NECNP, on appeal trying to find error in the rejection of an argument not made below, finds it necessary to lower the bar too far.

III. THE LICENSING BOARD'S RULING THAT NECNP FAILED TO ESTABLISH STANDING WITH RESPECT TO COST ESTIMATES MAY BE SUSTAINED ON AN ADDITIONAL GROUND.

On appeal, NECNP spends a good deal of focus on the question of cost estimates, a subject buried in the unparticularized "menu" of "aspects" identified by NECNP below. Prescinding from the fact that not a word was devoted in either of NECNP's "standing" affidavits to the question of cost estimates, nor was there any basis on which the Board might have deemed either of the affiants qualified to make (had they ventured to do so) any statement about cost estimates, nor was the "cost estimate" material even included in the "standing" section of NECNP's amended petition, this issue is insufficient to ground standing for an entirely different reason.

As this Commission held previously, in this context a contention that a cost estimate is in some respects inaccurate or incomplete is not meaningful in the absence of a connection to the likelihood that the costs (whatever they turn out to be) will not be paid. *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 259 (1996); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 8-9 (1996). "[A] contention challenging the reasonableness of a decommissioning plan's cost estimate provisions should not be litigable if the only relief available would be a 'formalistic redraft of the plan with a new estimate.'" *Id.* The proposition is *a fortiori* where the burden of the petitioner is to demonstrate that, on account of supposed cost estimate "errors," he will suffer harm that is "distinct and palpable" to him and different from any impact on the public generally. *Transnuclear*

Inc., CLI-77-24, 6 NRC 525, 531 (1977).[24] Not only did the papers before the Licensing Board make no such effort, they completely ignored the prior holdings of this Commission and the Licensing Board in the prior case that the Power Contracts provide more than reasonable assurance that the YNPS decommissioning costs will be paid. CLI-96-7, 43 NRC at 259-60.[25] NECNP's *post hoc* attempt to convert a vaguely stated "aspect . . . of the subject matter of the proceeding into which the petitioner wishes to intervene" into a demonstration of redressable injury-in-fact is unavailing.

CONCLUSION

Insofar as it denied standing to intervene as a party to NECNP, LBP-98-12 should be affirmed.

Respectfully submitted,

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[24]"One focus of the 'injury in fact' test is the concept that a claim will not normally be entertained if the 'asserted harm is "a generalized grievance" shared in substantially equal measure by all or a large class of citizens' . . . . Thus, even if there is a generalized asserted harm, the Petitioners must still show *a distinct and palpable harm to them.*" (Emphasis added.)

[25]"Moreover, the 'Power Contracts' on which the licensee is relying are not mere unsupported promises, but firm contractual agreements, and offer solid evidence that the necessary funds will be available when needed. A recent decision by the Federal Energy Regulatory Commission, as we shall describe below, has further confirmed the very high level of assurance that the funds for decommissioning the plant will be forthcoming."

Certificate of Service

I, Robert K. Gad III, one of the attorneys for Yankee Atomic Electric Company, do hereby certify that on July 17, 1998, I served the within brief in this matter by United States Mail (and also where indicated by an asterisk, by facsimile transmission) as follows:

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