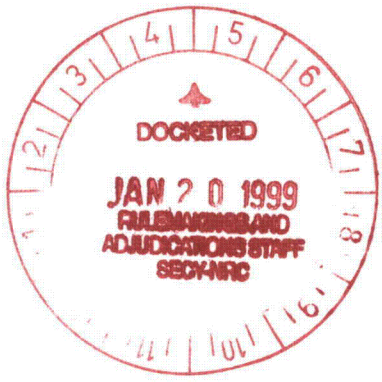

United States of America
Nuclear Regulatory Commission
before the
Atomic Safety and Licensing Board

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

Docket No. 50-029-LA-R

ASLBP No. 98-736-01-LA-R

RESPONSE OF YANKEE ATOMIC ELECTRIC COMPANY TO CAN PROPOSED CONTENTIONS

Pursuant to 10 C.F.R. § 2.714 and this Board's "Memorandum and Order (Schedules for Remanded Proceeding; Prehearing Conference)" of October 27, 1998, as amended by this Board's "Change in Filing Schedules and Date of Prehearing Conference" of November 30, 1998, Yankee Atomic Electric Company ("Yankee") responds to the proposed contentions of Citizens Awareness Network, Inc. ("CAN")[1] as follows:

I. Legal Standards

Proposed contentions are governed by 10 C.F.R. § 2.714(b)(2), as amended, which in material part provides as follows:

> "(2) Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide the following information with respect to each contention:
>
> "(i) A brief explanation of the bases of the contention.
>
> "(ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the

[1] "Citizens Awareness Network Contentions," dated January 5, 1999.

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petitioner intends to rely to establish those facts or expert opinion.

"(iii) Sufficient information (which may include information pursuant to paragraphs (b)(2)(i) and (ii) of this section) to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. The petitioner can amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's document."

The requirements for contentions were amended in 1989 to provide for a "higher contention admission standard." *Baltimore Gas and Electric Co.* (Calvert Cliffs Nuclear Power Plant, Unites 1 and 2), LBP-98-26, 48 NRC ___, ___ n.8 (Oct. 16, 1998), *citing Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248-49 (1996).[2] "A contention may be refused if it does not meet the requirements of section 2.714(b) or if the contention, even if proven, would 'be of no consequence in the proceeding because it would not entitle the petitioner to relief.'" *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 142 (1993).[3]

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[2]The 1989 amendments to 10 C.F.R. § 2.714 were upheld as consistent with § 189a of the Atomic Energy Act in *Union of Concerned Scientists v. NRC*, 920 F.2d 50 (D.C. Cir. 1990).

[3]"The revised rule does, however, overturn the holdings of *Mississippi Power and Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 425-26 (1973) and *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 546-49 (1980). The Appeal Board found in those cases that the current language of 10 CFR 2.714 does not require a petitioner to describe facts which would be offered in support of a proposed contention. The new rule will require that a petitioner include in its submission some alleged fact or facts in support of its position

Contentions are necessarily limited to issues that are germane to the application pending before the Board and the decisions that the Commission must make in order to approve it. *E.g., Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC ___, ___ & n.7 (Oct. 23, 1998) (slip opinion at 15 & n.7); *Pacific Gas & Electric Co.* (Stanislaus Nuclear Project, Unit No. 1), ALAB-400, 5 NRC 1175, 1177-78 (1977). With respect to this type of proceeding (approval of a License Termination Plan submitted in advance of a request for termination of the license), the decisions the Commission must make relate to:

> "(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); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC ___, ___ & n.8 (Oct. 23, 1998) (slip opinion at 16 & n.8). With respect to the first of these issues, a contention is not sufficient if it merely challenges the *amount* of a cost estimate; to be admissible, a contention must contend that there is a want of reasonable assurance that the costs will be paid. *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 9 (1996). Moreover, in this particular proceeding, the first of these issues has been foreclosed by prior litigation between the same parties. *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 258-67 (1996).[4]

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sufficient to indicate that a genuine issue of material fact or law exists." 54 Fed. Reg. at 170.

Also overruled by the 1989 amendments to § 2.714 was the "tentative" *dicta* of *Houston Power & Light Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 524 (1979), to the effect that a prospective intervenor had the right to reply to responses to proposed contentions. ALAB-565 was written at a time when, as the Commission acknowledged, § 2.714 did not expressly address how proposed contentions were to be responded to; that subject is expressly addressed now by § 2.714(c), which omits to provide any right of reply.

[4]The decommissioning cost estimate in this proceeding is the same as the one involved in CLI-96-7, and the funding mechanism relied upon here is the same as that relied upon in that case. On the facts before it there, the Commission concluded that the circumstances eliminated "virtually all remaining risk" that the costs would not be paid (43 NRC at 267), a demonstration that transcends the required "reasonable assurance."

Specifically not within the scope of an LTP approval proceeding is any contention relating to "spent fuel (including storage, management and removal),"[5] any contention to the effect that the site release criterion values are to be applied on any basis other than the "average member of the critical group" basis stated in the regulation and defined in NUREG/CR-5512, and any contention that the site release criteria should be other than those specified in 10 C.F.R. § 20.1402 (which "prescribes the pertinent standards for termination of the Yankee Rowe reactor license, and is not subject to challenge or litigation in an adjudication.") *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC ___, ___ n.14 (Oct. 23, 1998).

II. CAN's Proffered Contentions.

CAN's Failure to Include A "Specific Statement of the Issue of Law or Fact to be Raised or Controverted" for Each Contention

CAN has not put forth its proposed contentions in any readily cognizable form. Contrary to the explicit command of 10 C.F.R. § 2.714(b)(2) that "[e]ach contention must consist of a specific statement of the issue of law or fact to be raised or controverted," CAN's proffering—which is not even stated in terms of "contentions" but rather in terms of "CAN's Identification Of Subject Matter Aspects Of The Proceeding On Amending The Part 50 License For YR To Include The Proposed LTP"[6]—consists of long-winded, multi-subject exegeses loosely organized under entirely unhelpful titles such as "Site Release."

This is not a matter of mere form. Beside being a blatant failure to submit what the Commission's regulations require (alone a sufficient basis for excluding all of CAN's proffered "contentions"), CAN's failure to comply with the rules makes the

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[5] *CLI-98-21*, slip opinion at 28. Likewise precluded is any contention relating to "the general ISFSI license currently available to Yankee Atomic pursuant to 10 C.F.R. § 72.210" and "any possible future application by Yankee Atomic for a site-specific license to establish and operate an ISFSI pursuant to 10 C.F.R. § 72.40." *Id.*

[6] *CAN Contentions* at 2. Though the quoted words do not appear to make sense, they have been accurately transcribed.

effort required to respond (by Yankee and the Staff) and to evaluate (by this Board) at least severalfold more difficult and burdensome. Thus, instead of responding to CAN's proposed "specific statement of the issue of law or fact to be raised or controverted," Yankee, the Staff, and ultimately this Board will each be required to sift through CAN's pleading seeking to formulate the contentions for CAN that CAN should have formulated for itself. This is not fair to Yankee (or the Staff), in part because it places the Board in the awkward position of having simultaneously to be advocate for CAN and judge of the adequacy of CAN's advocacy.

Likewise CAN has defaulted on its obligations to provide a concise statement of the alleged facts on which it relies, or a reference to the specific portions of the application that the petitioner disputes and the supporting reasons for each dispute. (One of the things that the 1989 amendments were designed to pretermit was the pleading of contentions on the basis of "I simply don't believe it" or "there may be something else.")

CAN may seek to be excused from following the rules because it has chosen to be represented in this proceeding by a layman. Any such excuse would distend the Rules of Practice, for while *pro se* petitioners will be held to a less rigid standard of pleading, a totally deficient petition such as CAN has now proffered will be rejected. *Public Service Electric & Gas Co.* (Salem Nuclear Generating Station, Units 1 and 2), ALAB-136, 6 AEC 487 (1973); *Houston Lighting & Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 546 (1980). See also *Kansas Gas & Electric Co.* (Wolf Creek Generating Station, Unit 1), ALAB-279, 1 NRC 559, 576-77 (1975). After all, the "specific statement of the issue of law or fact to be raised or controverted" requirement is neither esoteric nor novel, and a *pro se* litigant is obliged to become familiar with the Rules of Practice, *Pennsylvania Power & Light Co.* (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-563, 10 NRC 449, 450 n.1 (1979). As the Commission has recently reiterated in this very proceeding, even a *pro se* litigant "is still expected to comply with our basic procedural rules." *Yankee Atomic Electric*

Company (Yankee Nuclear Power Station), CLI-98-21, ___ NRC ___ (1998) (slip opinion at 11).[7]

In short, CAN has entirely ignored a plain and easily comprehended requirement of long-standing in a way that substantially impedes the functioning of the hearing process. For this reason, this Board should reject CAN's filing in its entirety on this ground.

CONTENTION A(1).

Statement of the Proposed Contention:

Site Release

Yankee's Response:

As best one can tell, the crux of this contention is contained in this passage:

> "YAEC states that site release criteria is 15 mrem/year above background radiation. However, YAEC's calculations [sic] in actuality compute to between 43 and 87m/r per year [sic] above background on site. NRC requirement for 15 mrem per year above background posits a family farm with a garden. YAEC's calculations for 15 mrem/ year above background require the family farm to be inhabited no more than 8 hours a day by an adult male."

CAN Contentions at 2. This is precisely—indeed, *in hæc verba*—the contention that CAN urged as one of its bases for "standing" in this proceeding[8] and that the

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[7]Indeed, any claim by CAN that its *pro se* status should somehow exempt it or partially exempt it from the heightened requirements of the 1989 amendments to § 2.714 should be rejected, as one of the reasons for the amendments to § 2.714 was to eliminate the circumstance where, as often occurred under the pre-1989 rules, "*[p]ro se* litigants' contentions were held to even lower standards of clarity and precision. . . . The result of this pre-1989 approach was that the actual hearings were delayed by months and even years of prehearing conferences, negotiations and rulings on motions for summary disposition. . . . This problem drove the Commission to revise its rules by promulgating the current version of section 2.714, which was designed 'to raise the threshold for the admission of contentions.'" *Yankee Atomic Electric Company* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248 n.7 (1998), *quoting* 54 Fed. Reg. at 33,168.

[8]*See* CAN's April 6, 1998, supplemental filing, which asserted that "[Yankee]'s calculations in actuality compute to between 43 and 87 m/r per year [sic] above background on the site." *CAN 4/6/98 Filing* at 22. CAN arrives at these values by simplistically multiplying 5 and 10 μR/h by 8766, thus:

Commission ruled is not litigable in this proceeding. *Yankee Atomic Electric Company* (Yankee Nuclear Power Station), CLI-98-21, ___ NRC ___ (1998) (slip opinion at 25 n.14).[9] It must therefore be rejected by this Board.

While the foregoing should be sufficient to dispose of Contention A(1), two further observations should be made. First, CAN's challenge throughout is *not* to

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$$5\times10^{-6} \times 8{,}766 = 43.83\times10^{-3};$$
$$10\times10^{-6} \times 8{,}766 = 87.66\times10^{-3}.$$

Down even to the typo (and the rounding error), this is precisely the contention that the Commission held in CLI-98-21 was *not* admissible.

[9]CAN's failure, then and now, is its unwillingness to recognize that the 25 (or 15) mrem/yr site release criterion is *not* applied to every member of the hypothesized population that might ever venture onto the site, but rather is applied to the *average* member of the critical population. The very fact that the value applies to the *average* member of this population necessarily implies that some members of the population might receive a higher dose (and, of course, some would receive less).

Likewise, while CAN disavows any reliance on the "worst case," both then and now it is clear that it has calculated its posited values based on bounding conditions, *i.e.*, 8,766 hours per year exposure at the stated dose rate. "Bounding case" and "worst case" are synonymous.

While in general it is not necessary to defend the wisdom of Commission regulations before its adjudicatory boards, two additional observations may be in order. First, the Commission's site release criteria already account for the fact that some members of the critical population group may receive more than the average exposure. As the Commission made clear in promulgating the rule, the actual standard for human health is not 25 mrem/yr, but 100 mrem/yr., the widely accepted (both in the United States and internationally) standard for public exposures. *See* 62 Fed. Reg. 39,058 (1997). Applying a lower value to the average member of the critical group insures a margin of conservatism that accounts for off-normal situations, including exposure to multiple sources. In short, if (as CAN apparently desires) one were to retain the lower 25 mrem/yr value while applying it to a more rigorous screen (such as most highly exposed member of the critical population group), this would render the 100 mrem/yr standard meaningless. Second, as the Commission also observed, the decision tree on standards setting is not one-sided; there are high social costs to be paid from setting a standard that is so low that the drain it imposes on finite resources is not worth the benefit (if any) obtained. As the Commission observed, "the appropriate course of action should not result in net public or environmental harm from a cleanup, and it is not clear that it is beneficial if resources are spent in a manner prohibitive in relation to other benefits which could be achieved, or if a licensee is put into a financial position where it cannot continue to perform the cleanup safely." *Id.* at 39,071. At the same time, the Commission accepted that the benefits of reducing exposures below the levels implicit in the site release criteria are debatable at best: "The health effects resulting from even a dose of 1 mSv (100 mrem) are uncertain. The BEIR Committee stated in its 1990 report (BEIR V) that 'Studies of populations chronically exposed to low-level radiation, such as those residing in regions of elevated natural background radiation, have not shown consistent or conclusive evidence of an associated increase in the risk of cancer.'" *Id.* at 39,062. In short, the Commission, in legislating the site release criterion, has already rejected the arguments that CAN now presses on this Board. This Board is not the forum, however, by which to seek legislative revision of Commission promulgations.

Yankee's implementation of the approved methodology for applying the 25 (or 15) mrem/yr standard. Rather, CAN's lament is that the standard is not sufficient. Such a challenge to the Commission's regulations does not frame an admissible contention. *CLI-98-21*, slip opinion at 25 n. 14; 10 C.F.R. § 2.758. Second, CAN's dramatic presentation must be leavened by this realization: the stark and dire consequences that CAN predicts are predicted to be caused by residual levels of radiation that are not only below prevailing background levels of radiation, but entirely masked by annual *variations* in background radiation.[10] In a sentence, even if one could hypothetically decree that the residual contribution of YNPS were to be zero, one could never posit and never measure any diminution in the exposure of the population in the area. At the levels of which CAN complains (fractions of the background and variation in the background), nothing this Board could decree could provide CAN with relief, and, therefore, there is nothing to litigate.

Finally, like NECNP, CAN seeks to relate the computation of TEDEs to the average member of the critical group to the measurement for screening purposes of direct β-γ readings, which is neither the prescribed or the proposed methodology for determining whether the Commission's site release criteria have been met. *See* "Response of Yankee Atomic Electric Company to NECNP Proposed Contentions," at 8-9. (The direct β-γ readings to which CAN refers are used as a screen to detect areas that may warrant further investigation, and they do not necessarily exclude all background (*i.e.*, non-plant-related) sources of radiation. The fallacious "calculation" is thus CAN's fallacious calculation, not Yankee's.)

CONTENTION A(2).

Statement of the Proposed Contention:

Soil Remediation.

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[10]"To provide some perspective on the conservatism of considering dose criteria in the range of 0.15-0.25 mSv/y (15-25 mrem/y), it should be noted that, as described in the Final GEIS (NUREG-1496) prepared in support of this rulemaking, these levels are small when compared to the average level of natural background radiation in the United States (about 3 mSv/y (300 mrem/y)) and the variation of this natural background across the United States." 62 Fed. Reg. 39,058, 39,062 (July 21, 1997).

Yankee's Response:

As best one can tell, this collection of observations seems to raise three issues:

- That as a matter of law Yankee is obliged to modify its calculations of *on-site* soils remediation in order somehow to account for alleged *off-site* historical releases. How CAN contends the calculation is supposed to be modified is neither stated nor obvious (and cannot, of course, be found in the missing materials required under 10 C.F.R. § 2.14(b)(2)(ii) and (iii)).
- That as a matter of law, Yankee is obliged to modify its "mean life" value based on speculation that actual radionuclide distribution might be different from what was assumed in arriving at that value. Once again, how the value is supposed to be modified is neither stated nor obvious.
- That the Commission should impose upon Yankee some vague notion of civil liability to third parties in the future.
- That the Commission should perform or commission some studies to be performed by someone other than Yankee.

As for the ultimate and penultimate points, it suffices to observe (i) that the Commission has no authority to impose civil liability on a licensee and (ii), while Yankee has no objection to the Commission performing any studies the Commission might deem cost-justified, it cannot deny LTP approval on a want of studies that are not required to have been done (and which CAN insists be done by someone other than Yankee).

As for the first two points:

The contention that calculations of *on site* remediation should be modified to account for *off site* releases is both a *non sequitur* and does not state a valid basis for disapproving the LTP. The amount of remediation that is required by the site release criteria is the amount that is required to reduce *the site* to the point where it meets those criteria. By definition, whether this value eventually works out to be 1 cubic

yard or a million cubic yards, it will be the same without regard to what levels of radioactivity may have been released *off site* in years past.

With respect to CAN's uncareful assertion that "[Yankee] states it will use a mean life of 26 years to bound the actual radionuclide distribution," *CAN Contentions* at 7, CAN appears to have made the same error as NECNP. *See Yankee's Response to NECNP's Contentions* at 21-22 & n.24. The Final Status Survey Plan does not use "mean half lives;" it uses a mean life, a term that CAN appears not to understand.[11] (Moreover, the Survey Plan does not use this value "to bound the actual radionuclide distribution on the site," but rather to calculate the total dose effect of the radionuclides on the site.) *See Yankee's Response to NECNP's Contentions* at 21-22 & n.24. CAN has offered no basis for its implied assertion that calculating the TEDE using a longer time span would produce a different result, a critical requirement of demonstrating a basis for admitting this (or any) contention.

CONTENTION A(3).

Statement of the Proposed Contention:

> NRC Oversight and abdication of authority.

Yankee's Response:

In consistent fashion, this "contention" is a collection of amorphous observations. Here, however, it can be determined with relatively little effort that the entire contention is substantively inadmissible.

First, the underlying premise of the contention is stated by CAN to be:

> "The proposed site release plan for YNPS does not adequately describe YAEC's planned decommissioning activities or its controls and limits on procedures and equipment, in violation of 10 C.F.R. § 50.82 (b)."

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[11]The mean life of an isotope is the period of time that captures *all* of the dose impact of the isotope when multiplied by the dose rate at time zero.

CAN Contentions at 15. However, 10 C.F.R. § 50.82(b) is not applicable to YNPS.[12]

Second, each of the elements of this collection of observations relates to the on-site management or off-site disposal of spent nuclear fuel (or other GTCC). As the Commission has held, this topic is categorically beyond the scope of this proceeding. CLI-98-21, slip opinion at 15-17:

> "[W]e agree fully with the Board that these two petitioners' major concern—spent fuel management—is off-limits in this proceeding, which is confined to a review of the matters specified in 10 C.F.R. § 50.82(a)(9) and (10), such as the plans for site remediation and for the final radiation survey. . . .
>
> "We find unpersuasive petitioners' arguments for considering spent fuel storage questions in the context of LTP approval. Contrary to petitioners' view, the requirement in 10 C.F.R. § 72.218(b) (that an application for termination of a Part 50 license include a description of how spent fuel stored under the general license will be removed from the reactor site) is unrelated to the requirement in section 50.82(a)(9) for submission of an LTP. Section 72.218(b) requires Yankee Atomic, at the time it files its license termination request, to submit a description of how spent fuel will be removed. By contrast, section 50.82(a)(9) specifically provides that the LTP may be filed in advance of the submission of the license termination request.
>
> "Likewise, CAN and NECNP err in concluding that the scope of this proceeding is determined by the Commission's regulation requiring the submission of a plan for management and removal of the spent fuel (10 C.F.R. § 50.54(bb))—for that regulation nowhere mentions the LTP. Rather, the scope of the LTP application (and therefore the scope of this proceeding) is defined solely by the terms of 10 C.F.R. § 50.82(a)(10), as read in light of the filing requirements of 10 C.F.R. § 50.82(a)(9)(ii)(A)-(G). Importantly, sections 50.82(a)(9) and (10) do not refer to spent fuel management. This omission in our decommissioning rule was intentional. . . .
>
> "We thus conclude that, quite apart from the LTP, Yankee Atomic already possesses the necessary license authority for both continued use of the spent fuel pool pursuant to its existing Part 50 license and the movement of spent fuel from the pool to NRC-approved dry casks in an on-site ISFSI pursuant to 10 C.F.R. § 72.210, if and when Yankee Atomic decides that such movement should be made. (We also agree

[12] 10 C.F.R. § 50.82(b) by its terms is applicable only to the decommissioning of non-power reactors.

> with Yankee Atomic that it has authority to move heavy loads over the spent fuel pool pursuant to Amendment 149 to its Part 50 POL—a conclusion petitioners do not contest.) Yankee Atomic's existing licensing authority and the Commission's current regulatory structure thus combine to place the issue of spent fuel management beyond the scope of this proceeding."

CAN, which nowhere addresses how its present proposals for litigation could be admitted in view of the Commission's rulings—and which, in fact, nowhere adverts even to the existence of CLI-98-21—cannot disregard the Commission's rulings so cavalierly.

CONTENTION A(4).

Statement of the Proposed Contention:

> Security.

Yankee's Response:

That of which CAN complains in this section appears to be that Yankee has expressed its intention possibly to invoke its powers under 10 C.F.R. § 72.210 some day in the future.

This is more spent fuel management. As the Commission has already observed, "Yankee Atomic already possesses the necessary license authority for both continued use of the spent fuel pool pursuant to its existing Part 50 license and the movement of spent fuel from the pool to NRC-approved dry casks in an on-site ISFSI pursuant to 10 C.F.R. § 72.210, if and when Yankee Atomic decides that such movement should be made." CLI-98-21, *loc. cit. supra.* Whether or not Yankee should do so is not an issue that is before this Board in this proceeding. "[I]f the Board does grant CAN and NECNP a hearing, . . . [i]t will consider neither . . . the general ISFSI license currently available to Yankee Atomic pursuant to 10 C.F.R. § 72.210, nor . . . any possible future application by Yankee Atomic for a site-specific license to establish and operate an ISFSI pursuant to 10 C.F.R. § 72.40." *CLI-98-21*, slip opinion at 28.

CONTENTION A(5).

Statement of the Proposed Contention:

Monetary Security

Yankee's Response:

In this section, CAN seems to make two observations, quite unrelated to one another.

The first is that if Yankee employs the general license granted under 10 C.F.R. § 72.210, the Commission will be out some $4.8 million in regulatory fees. Prescinding entirely from the basis for such calculations, it is neither clear nor obvious what relief CAN seeks, what relief this Board might grant,[13] and what standing CAN has to act as the Commission's Cincinnatus at the Fiscal Bridge. In any event, this class of contention has been explicitly excluded from the scope of this proceeding by the Commission. *CLI-98-21*, slip opinion at 28.

The second lament is that Yankee may have underestimated in some respect the ultimate cost of decommissioning, including the costs of spent fuel management. Once again, prescinding from the basis for this assertion, it does not arise to a litigable contention now for the same reason that the Commission held it did not arise to a litigable contention earlier:

> "Third, regarding Contention C, we considered [CAN's] argument that YAEC's updated cost estimate was not reasonable. We found that the 'essential purpose' of the estimate requirement 'is to provide 'reasonable assurance' of adequate funding for decommissioning.' 43 NRC at 9. We therefore concluded that, to receive relief, Petitioners would need to demonstrate 'not only that the estimate is in error but that there is not reasonable assurance that the amount will be paid.' *Id.* 'Thus, a contention that a licensee's estimate is not "reasonable," standing alone, would not be sufficient in and of itself because the potential relief would be the formalistic redraft of the plan with a new estimate.' *Id.*"

[13]Since nothing short of repealing § 72.210 would appear to address the point.

Yankee Atomic Electric Company (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 245 (1996), *quoting Yankee Atomic Electric Company* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1 (1996).

Here, CAN does *not* couple any criticism of the Yankee cost estimate with an assertion that the cost will not be paid. This, no doubt, is not mere oversight, but rather CAN's recognition that, in the case of this licensee, that showing cannot be made, as the Commission has also previously ruled in two respects.

First, insofar as CAN contends the cost estimate is burdened by uncertainties regarding the ultimate disposal of high level waste, the Commission has held:

> "We cannot agree with this argument. The factors cited by [CAN], of course, represent uncertainties. However, that fact does not, without more, make the plan unsound. A decommissioning plan by its very nature deals with a myriad of uncertainties, and our regulations cannot be construed to require the plan to do the impossible, *i.e.*, predict the future with precision."

CLI-96-7, 43 NRC at 257.

Second, in the case of this plant, the Commission has already ruled, in a proceeding to which CAN was a party, that the requisite "reasonable assurance" has been demonstrated by the Power Contracts that require the several utilities that own Yankee to pay the full costs of decommissioning, whatever they turn out to be. CLI-96-7, 43 NRC at 258-67.

> "[T]he '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. Again, the standard to be applied is whether there is 'reasonable assurance' of adequate funding, not, as [CAN] suggest[s], whether that assurance is 'ironclad.' Appeal at 31. . . . Accordingly, Petitioners have failed to meet the burden of coming forward that the NRC's contention rule requires . . . ."

43 NRC at 260. Indeed, in the context of decommissioning funding for YNPS, the Commission has already ruled, in a matter to which CAN (and NECNP) were parties, that the Power Contract circumstances have eliminated "virtually all remaining risk" that the costs would not be paid. *Op. cit.* note 4, *supra.*

Now, as then, and for precisely the same reason, CAN's "cost estimate" contention raises no litigable issue of fact and is, therefore, inadmissible.

CONTENTION A(6).

Statement of the Proposed Contention:

Waste Issues.

Yankee's Response:

In this section, CAN asserts that an Environmental Impact Statement ("EIS") under the National Environmental Policy Act ("NEPA") is required as a condition to approval of the LTP "due to the existence of both documented and undocumented contamination on the Yankee Rowe site." According to CAN, "[t]he study is necessary to determine the sources, extent and the potential for plumes of contamination (including tritium) under the surface of the soil if the site is to be released for unrestricted use." *CAN Contentions* at 20-21. This does not state an admissible contention.

First, CAN fails to understand what an EIS is. An EIS is not a document that an agency is required to prepare whenever it encounters real or imagined contamination. Rather, an EIS is a document that is related to federal governmental decisionmaking, and it is required if, and only if, a proposed governmental action—here, the approval of the LTP—amounts to a "major Federal action[] significantly affecting the quality of the human environment." NEPA § 102(2)(C). CAN does not contend that approval of the LTP, the implementation of which will necessarily *reduce* the environmental impact of the existing site, qualifies.

Moreover, the Commission has already published a Final Generic EIS for decommissioning, which includes all of the potential effects to which CAN refers and

which is sufficient to meet the Commission's NEPA obligations for any site that meets the site release criteria for unrestricted access:

> "The Generic Environmental Impact Statement (GEIS) prepared by the Commission on this rulemaking evaluates the environmental impacts associated with the remediation of several types of NRC-licensed facilities to a range of residual radioactivity levels. The Commission believes that the generic analysis will encompass the impacts that will occur in most Commission decisions to decommission an individual site where the licensee proposes to release the site for unrestricted use. Therefore, the Commission plans to rely on the GEIS to satisfy its obligations under the National Environmental Policy Act regarding individual decommissioning decisions that meet the 0.25 mSv/y (25 mrem/y) criterion for unrestricted use. However, the Commission will still initiate an environmental assessment regarding any particular site, for which a categorical exclusion is not applicable, to determine if the generic analysis encompasses the range of environmental impacts at that particular site."

62 Fed. Reg. 39,058, 38,086 (July 21, 1997).

A contention to the effect that a supplement is required of a GEIS must make two showings: (i) that the federal action is one that would require an EIS in its own right, and (ii) that for some specific reason, the conclusions of the GEIS are not applicable to the particular licensing action in question. CAN has not attempted any such showing.[14]

Indeed, where an EIS has been prepared (and where the contention is that a supplement is required), the only admissible contention is not that the application should be denied or a supplemental EIS is required, but, rather, that the EIS must be modified in some specific way. A Licensing Board lacks jurisdiction to determine that a supplement to an EIS is required and to order the Staff to prepare and circulate a supplement. *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units

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[14]On its face, CAN alleges only that an EIS is required because there are or may be contaminants on the site. That fact, though, is true of every nuclear power plant site in decommissioning; were it otherwise, decommissioning would not be required. Thus, if CAN's vague and speculative pleading were sufficient, decommissioning would amount to a categorical inclusion within the meaning of 10 C.F.R. § 51.20. The Commission, however, has concluded to the contrary and has not included decommissioning in the § 51.20 list.

2 and 3), LBP-83-36, 18 NRC 45, 48-49 (1983), citing *New England Power Co.* (NEP, Units 1 and 2), LBP-78-9, 7 NRC 271 (1978). Rather, upon the admission of a sufficiently specific contention (which CAN hasn't even attempted) that the EIS is deficient, the record of the hearing itself constitutes a modification of the EIS. *New England Coalition v. NRC*, 582 F.2d 87, 93-94 (1st Cir. 1978); *Citizens for Safe Power v. NRC*, 524 F.2d 1291, 1294 & n.5 (D.C. Cir. 1975); *Ecology Action v. AEC*, 492 F.2d 998, 1000-02 (2d Cir. 1974)).

CONTENTION A(7).

Statement of the Proposed Contention:

> Investigation of Illegal Handling of Rad Waste

Yankee's Response:

In this rather confusing section, CAN seems to contend that because contaminated materials were or "may" have been stored on site, an EIS is required. As noted above, this is a *non sequitur:* the fact that there may be contamination on site is why decommissioning and site survey are required. To say that the fact or suspicion of contamination equates with the necessity of an EIS is simply to distort the NEPA statute and Commission's regulations (neither of which CAN cites) beyond all recognition.

CONTENTION A(8).

Statement of the Proposed Contention:

> Waste Contamination Investigation: Groundwater, Soil, and River Sediment Contamination.

Yankee's Response:

In this section, CAN appears to contend that, because there may have been historical releases of tritium, it is not sufficient to the LTP to propose a survey of *existing* levels of tritium, but rather a study should be required of what *historical* levels of tritium may have been. How this relates to the Commission's site release criteria

is not spelled out by CAN—a daunting task, since by definition mitigation of *existing* levels so as to comply with the site release criteria is all that is required of the LTP.

NECNP Contentions

In addition to submitting its own contentions, CAN "me too's" the proffered contentions of NECNP. *CAN Contentions* at 1.[15] CAN does not purport to offer any additional support to the "adopted" contentions, and therefore no additional response is required.[16]

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[15]"In addition, CAN accepts the contentions advanced by the New England Coalition on Nuclear Pollution (NECNP) in this matter; CAN signs on to NECNP's Contentions and attaches them and includes them as ours."

[16]In the event that one or more of NECNP's contentions is admitted, and this Board concludes that CAN should be granted intervenor status on the basis of NECNP's efforts, to which CAN contributed nothing, NECNP and CAN should be consolidated for purposes of such contention(s) under 10 C.F.R. § 2.715a, with NECNP designated the lead intervenor. *See Statement of Policy on Conduct of Licensing Proceedings*, 13 NRC 452, 455 (1981):

> "In accordance with 10 CFR 2.715a, intervenors *should* be consolidated and a lead intervenor designated who has 'substantially the same interest that may be affected by the proceedings and who raise[s] substantially the same questions. . . . .' . . . [S]ingle, lead intervenors should be designated to present evidence, to conduct cross-examination, to submit briefs, and to propose findings of fact, conclusions of law, and argument. Where such consolidation has taken place, those functions should not be performed by other intervenors except upon a showing of prejudice to such other intervenors' interest or upon a showing to the satisfaction of the board that the record would otherwise be incomplete."

(Emphasis added.) Where one intervenor has simply "adopted" the proposed contentions of another intervenor, having made no independent effort to support such a contention, it is manifest that adopting intervenor's interest in the adopted contention is exactly the same as that of the proponent intervenor. *See Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), LBP-83-29A, 17 NRC 1121, 1129-30 (1983). (Note that in this case, the "adopting" intervenor had in fact propounded and supported what the Board concluded was the same contention; LBP-83-29A does *not* stand for the proposition that a formulaic "me, too, whatever he says" is sufficient to satisfy the requirements of 10 C.F.R. § 2.714.)

Conclusion.

For the foregoing reasons, none of CAN's proffered "contentions" is admissible; none should be admitted; and CAN's petition for leave to intervene should be denied.

Respectfully submitted,

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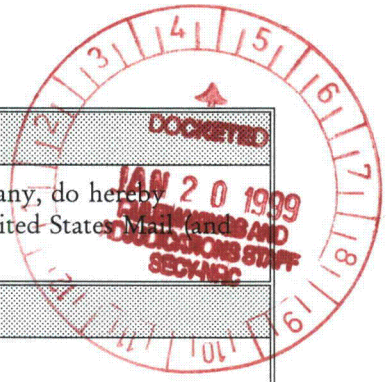
Dated: January 20, 1999.



CERTIFICATE OF SERVICE

I, Robert K. Gad III, one of the attorneys for Yankee Atomic Electric Company, do hereby certify that on January 20, 1999, I served the within pleading in this matter by United States Mail (and also where indicated by an asterisk, by facsimile transmission) as follows:

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