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UNITED STATES OF AMERICA
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NUCLEAR REGULATORY COMMISSION

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REGULATORY AND
ADJUDICATION DIVISION

In the Matter of

YANKEE ATOMIC ELECTRIC COMPANY
(Yankee Nuclear Power Station)

Docket No. 50-029-LA-R

License Termination Plan

***ON APPEAL FROM A PREHEARING
CONFERENCE ORDER OF THE
ATOMIC SAFETY AND LICENSING BOARD
ISSUED MARCH 17, 1999 (LBP-99-14)***

REPLY BRIEF OF INTERVENOR
NEW ENGLAND COALITION ON NUCLEAR POLLUTION

SECY-021

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STATEMENT OF THE CASE

The Atomic Safety and Licensing Board ["Licensing Board" or "Board"] issued a Prehearing Conference Order in this case. *Yankee Atomic Electric Company* (Yankee Nuclear Power Station) License Termination Plan, Docket 50-029-LA-R, ASLBP No. 99-754-01-LA-R, LBP-99-14, ___ NRC ___ (March 17, 1999) ["Decision"]. Therein, from would-be intervenors New England Coalition on Nuclear Pollution, Inc., [NECNP] and Citizens Awareness Network, Inc. [CAN], sixteen contentions and some forty bases, the Licensing Board fashioned four contentions for litigation in the proceeding. Decision at 7-41, 42. At the same time, the Licensing Board admitted NECNP and CAN as intervenors and also granted 10 C.F.R. § 2.715 status to the Franklin County Planning Board of the Franklin Regional Council of Governments. Decision at 42.

On April 1, 1999, Yankee Atomic Electric Company, the licensee in this matter [YAEC], filed by mail service upon the Secretary of the United States Nuclear Regulatory Commission [Commission] an Appeal from the Decision ["Appeal" or "YAEC's Appeal"].

This Reply to YAEC's Appeal is filed on behalf of NECNP, a non-profit, federally recognized 501(c)(3) corporation, incorporated under the laws of the State of Vermont, with principal place of business in Brattleboro, Vermont, and members throughout New England.

The dispute in this matter centers on approval of YAEC's License Termination Plan [LTP] for the Yankee Nuclear Power Station [Yankee Rowe], as submitted to the Commission on May 15, 1997, and revised by a submission on December 18, 1997. The prehearing proceeding, which resulted in the Decision YAEC has appealed, followed upon litigation of the issue of intervenors' standing which the Commission ultimately resolved in favor of the intervenors. *Yankee Atomic Electric Company* (Yankee Nuclear Power Station) License Termination Plan, Memorandum and Order, CLI-98-21, 48 NRC 185 (October 23, 1998) ["Memorandum and Order" or "CLI-98-21"].

The Licensing Board, in its Decision, admitted for litigation four contentions, each of which states an issue in conformance with CLI-98-21. The four contentions are narrowed by the criteria set forth in 10 C.F.R. § 50.82 and CLI-98-21. In particular, the Licensing Board Panel carefully used the word "methodology" to focus of the admitted contentions to a review, under 10 C.F.R. 50.82, of the adequacy and sufficiency of the LTP's methodologies. Decision at 40-41.

Argument

I. LBP-99-14 Should be Upheld Because the Board Utilized a Correct Regulatory Standard to Formulate Contentions.

Despite YAEC's breezy portrayal of the Board's efforts as fundamentally flawed, proper weight should be given to the Board's determinations at this stage

of the case (even though not yet at the merit-driven evidentiary portion the proceeding). The Board made reasoned factual determinations concerning the admitted contentions and bases which should be accorded some weight. *See, although dealing with the evidentiary stage, e.g., Niagra Mohawk Power Corp.* (Nine Mile Point Nuclear Power Station, Unit 2), ALAB-264, 1 NRC 347, 357 (Commission may modify or reject Board's findings only after giving the Board's decision the probative force it intrinsically commands); *see also Hamlin Testing Laboratories v. A.E.C.*, 357 F.2d 632, 637 (6th Cir. 1966); *F.C.C. v. Allentown Broadcasting Corp.*, 349 U.S. 358, 364 (1955). Moreover (again, however, relying on case support in the evidentiary context) it should be considered that a decision to reverse a Licensing Board's factual determinations must be supported by "substantial record evidence." *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2, ALAB-355, 4 NRC 397, 403 (1976). In the instant matter, the Board's redrafting and acceptance of four contentions was based upon a factual record supported by expert opinion and numerous references. *See generally*, supporting analysis in the Decision detailed *supra* at 8-9.

The Board in this case is comprised of highly experienced Atomic Safety and Licensing Board Administrative Law Judges. Before reaching a decision on the admissibility of the proffered contentions, the judges reviewed all of the submissions of the intervenors, all of the oppositions of YAEC and the NRC Staff,

and took a day and a half for oral argument. They also listened to an evening filled with thirty five limited appearance statements, including a letter of concern from the EPA which Carl Dierker, General Counsel for EPA Region I, Boston, read into the record. The Board then took forty-eight (48) days to hand down a decision on the admissibility of the contentions. The decision and order comprise some forty-three pages. In fine, this is not an ill-considered and hastily handed-down decision. It is a decision based upon a thorough review of the facts and an application of the law embodied in Commission regulations and the controlling case, CLI-98-21.

The Board's Decision cites the Commission's Memorandum and Order, CLI-98-21, as setting forth "standards for contentions in this particular proceeding" and notes that beyond those "generally applicable in all formal proceedings, see 10 C.F.R. § 2.714(b) and (d), they must relate to the LTP for which YAEC is seeking approval." Decision at 5. The Board adds that, "As stressed by the Commission, "the scope of this proceeding is ... coextensive with the scope of the LTP itself." *Id.* (citing Memorandum and Order, CLI-98-21, 48 NRC at 204). The Board then notes the regulatory standards governing the LTP under 10 C.F.R. §50.82, and clarifies the narrow interpretation given to this section by citation to the limitations the Commission placed upon the proceeding. *Id.* at 5-6. Finally, before passing on to the contentions, the Board took note of the

Commission's allowance that the LTP has at least one future consequence which "must be litigated now or never -- the site survey methodology." *Id.* at 6-7. The

Board quotes the Commission's language:

[T]he LTP stage ... is Petitioners' one and only chance to litigate whether the survey methodology is adequate to demonstrate that the site has been brought to a condition suitable for license termination. They are precluded from doing so at the license termination stage.

Decision at 6-7 (*quoting* Memorandum and Order, CLI-98-21, 48 NRC at 206-207). Thus, YAEC's assertion that the Board failed to use the correct regulatory standard in this evaluating the contention proffered is a demand that the Commission completely ignore the substance of the Decision.

YAEC also argues that because it has "voluntarily" agreed to leave a contamination level of 15 millirem/yr on site, that the LTP cannot be evaluated under existing regulations. Appeal at 5. This, of course, is utter nonsense, cast from the same mold used to mint arguments of the kind the Commission previously rejected. CLI-98-21, Slip op. at 23, 27-28. If YAEC's argument were correct, all of the NRC's licensees would volunteer to meet standards higher than the Commission requires, and, in that way, put their operations completely outside the Commission's jurisdiction. Of course, YAEC's argument in this regard is not correct. In fact, CLI-98-21 specifically states that the LTP is subject to scrutiny under 10 C.F.R. § 20.1402:

Section 20.1402 (the Commission's recent rule on site release criteria) prescribes the pertinent standards for termination of the Yankee Rowe reactor license, and is not subject to challenge or litigation in an adjudication.

CLI-98-21, Slip op. at 40. The Board's Decision directly relies upon and applies the Commission's position. Decision at 17-20. Moreover, the very section of the Board's Decision which YAEC cites as the eye of this tempest in a teapot states that, "Because the LTP in fact commits to the 15 mrem/yr dose criteria that is consistent with 10 C.F.R. § 20.1402, we will also treat that standard as governing (as well as the SDMP release criteria)." Appeal at 5 (quoting the Decision at 17-18) (emphasis added). The emphasized language says it all: it is not the licensee's "voluntary" commitment that is the basis for the Board's decision, but the fact that the standard is consistent with 10 C.F.R. § 20.1402. Finally, the Board reasonably and sensibly, in conformance with CLI-98-21 and the LTP, states that the "commitment" consistent with §20.1402 will be treated as a "governing" standard along with the SDMP release criteria. *Id.* YAEC has no valid complaint on this score, it just wants to both possess and to consume its cake.

II. The Licensing Board Followed 10 C.F.R. § 2.714(b)(2) in Drafting and Admitting the Contentions.

YAEC claims that the Board failed to follow regulations. Appeal at 7-9. YAEC rests this claim on the allegation that no statement of law or fact, no brief explanation of the bases of the contention, and no concise statement of alleged

facts or expert opinion has been provided. *Id.* at 7-8. This is an outrageous and completely unfounded claim.

First, as is plain from reading the Board's decision, there are rather complete explanations of the decision and bases for finding and admitting contentions, as well as clear indications of the bases supporting the admitted contentions. *See* Decision at 7-9 (discussing the Board's reason for taking up a contention dealing with the methodology for determining background radiation and indicating the documents and facts which provide the basis for the contention; 9-11 (noting why the Board *rejected* basis A.2); 11-20 (rejecting numerous portions of proffered contentions, but finding a basis, at 18-20, for the Board's Contention 4, and referencing the contention to the LTP in contrast to regulations and NUREG 1500); 20-23 (fashioning a contention dealing with inadequate methodologies for dealing with subsurface contamination from two NECNP bases and three CAN contentions, rejecting issues dealing with costs and other matters, reviewing the methodologies described in the Final Site Survey Plan, at 21-22, and finding them inadequate under 10 C.F.R. 50.82(a)(9)(ii)(D), and, at 23, under 10 C.F.R. § 50.82 (a)(11)(ii), stating that the basis is as set forth in NECNP contention basis A.5 and, later in the Decision at 30-31, adding support from the relevant portion of NECNP contention C at the indicated page numbers of NECNP's contention filing); 24-25 (finding an admissible contention concerning

the inadequacy of YAEC's methodology for detecting alpha-emitters on site, relying upon the bases provided in NECNP contention bases A.6 and H.2); 25-28 (scrutinizing and rejecting NECNP bases A.7, A.8, A.9, and A.10); 29-30 (scrutinizing and rejecting NECNP contentions B, D, G, and CAN contentions 3, 4, and 5, but carefully preserving, at intervenors' written and oral requests, potential appellate rights concerning fuel storage related issues); 30-31 (scrutinizing NECNP's contention C and finding in it, at 31, support for the Board's contention based upon A.5); 31 (reviewing and rejecting NECNP's contention E, bases E.1 and E.2); 32-33 (reviewing and rejecting NECNP's contention F and basis H.5 concerning ALARA and cost-benefit analysis, and complete inadequacy of YAEC's ALARA portion of the LTP); 33-35 (reviewing NECNP contention H and bases H.1, H.2, H.3, H.4, H.5, and Additional Bases, rejecting Contention H).¹

Second, the Board specifically recognized the expert contribution to NECNP's (and, hence, CAN's) submitted contentions. Decision at 11-12. Neither YAEC nor the NRC Staff provided any expert opinion by declaration or affidavit to refute NECNP's (or CAN's) proffered contentions. Moreover, although YAEC personnel and qualified NRC staff were in attendance at the hearing, none

¹ Note that throughout the above summary of the Board's actions it made reference to rejection of proffered contentions and bases under 10 C.F.R. §2.714(b)(2). YAEC's assertion that the Board failed to properly apply the §2.714(b)(2) standard conveniently ignores the Board's numerous uses of the standard to reject proffered contentions.

provided any opinions or conclusions to refute the contentions. *See generally*, Transcripts of the Prehearing Conference. Examination of the record shows that NECNP's proffered contentions and bases were supported by expert opinion, in addition to citations to the LTP and many other documents.

Therefore, YAEC is wrong in asserting that the Board did not properly apply § 2.714(d)(2), and the Board decision, in this regard, should be upheld.

III. The Board Adopted a Correct Regulatory Standard, Complied Fully with 10 C.F.R. § 2.714(d)(2); hence, the Contentions Are Admissible.

That the Licensing Board adopted a correct regulatory standard, and complied fully with 10 C.F.R. § 2.714(d)(2) has been addressed above. Below, NECNP addresses the basis in the record for the admission of each of the contentions.

A. There is a basis in the record for admission of Contention 1: Contrary to the requirements of 10 C.F.R. § 50.82, the methodology YAEC employs in its LTP Final Site Survey Plan to determine background radiation is not adequate to demonstrate that the LTP will assure the protection of public health and safety.

As demonstrated above, *infra* at 8-9, the Board properly crafted and admitted the Contentions, and, in particular, Contention 1 from the contentions proffered by NECNP (and CAN). In its Decision, the Board reviewed NECNP's Contention A, basis A.1, which states that "YAEC's LTP does not adequately

characterize the site's background radiation." Decision at 7 (interpreting "characterize" as "describe"). The Board then finds, based upon the documents NECNP cited to the Board in its proffered Contentions and Bases and the written and oral arguments of YAEC and the NRC Staff, that there is an admissible contention within NECNP's basis A.1. Decision at 8-9. The Board later finds that an additional basis for the redrawn Contention 1 exists in part of NECNP's proffered Basis for its Contention C (and as NECNP conceded at argument, *see* Tr. 146). Decision at 30-31. Both of the Bases the Board uses to, respectively, construct and support Contention 1 rest upon citations to documents and the expert opinions and conclusions of Dr. Resnikoff. *See* NECNP's Contentions (January 2, 1999) at 2-4, 19-20.

YAEC's protestations to the contrary notwithstanding, as illustrated above, there is a lawful and factual basis for Contention 1 in the record of the proceeding at issue. Moreover, the admitted contention provides an opportunity, if granted, to for the Board to give NECNP relief. The Board could do so by ordering YAEC to amend the LTP to employ a methodology to account for background radiation as described in NECNP's submitted Contentions. Hence, contention 1 was properly admitted.

- B. There is a basis in the record for admission of Contention 2: Contrary to the requirements of 10 C.F.R. § 50.82, the methodology YAEC employs in its LTP Final Site Survey Plan to determine subsurface soil contamination is not adequate to**

demonstrate that the LTP will assure the protection of public health and safety.

As the Board stated in its prehearing order issuing Contention 2, "10 C.F.R. § 50.82(a)(9)(ii)(D) requires '[d]etailed plans for the final radiation survey'." The Board added that a plan "that does not address the general strategy for measurement of the subsurface radioactivity cannot be viewed as adequately meeting the requirement of 10 C.F.R. § 50.82." In this regard, YAEC's protestations that it has set forth an adequate general strategy is squarely at odds with the facts. NECNP, in its submitted contentions and supporting bases, and at the prehearing, referred the Board to NUREG 1500, upon which YAEC's LTP theoretically relies. NECNP stated in the basis for its Contention A:

YAEC has not estimated the full extent of subsurface contamination on the site. Meter surveys over the site cannot determine the contamination depth. YAEC needs to take core samples, particularly near the Potentially Contaminated Area (PCA), a warehouse used for storage of low-level waste prior to shipment,² and the decon pad (which is located in the decon room).³ The few preliminary borings YAEC has taken near the PCA warehouse show concentrations of cobalt-60 and cesium-137 increasing with depth. See Table 2, Appendix to Contentions at APP-2. This means that YAEC has never determined the full extent of soil contamination on the site, and, therefore, cannot accurately determine the full costs for remediating the site. NECNP contends that the YAEC site characterization must determine the full extent of subsurface contamination for the following reasons: i) The computer model DandD, employed in NUREG-1500, requires as input a total radioactive inventory in order to determine the full extent of ground water contamination; ii) The guidance values YAEC is employing

² YAEC, Yankee Rowe Final Safety Analysis Report at 252-1.

³ LTP, Fig. 2-3.

assume no residual radioactivity below 15 cm in soil;⁴ NUREG-1500 cautions: "Licensees using these tables should verify that the assumptions of the scenarios are appropriate to the site, including no residual radioactivity below 15 cm in soil."

Id. at 9-10 (emphasis added); *see also id* at 31-33 (Contention H). Although the Board created its Contention 2 from material supplied in NECNP's bases A.5 and H.1, the supporting documentation and references, available to YAEC in the original contentions, meet (if not exceed) the requirements of 10 CFR § 2.714(b)(2). In particular, YAEC's protestation to the contrary merely further evidence that there is a "genuine dispute exists with the applicant on a material issue of law or fact." 10 C.F.R. § 2.714(b)(2)(iii). Moreover, the admitted contention provides an opportunity, if granted, to for the Board to give NECNP relief. The Board could do so by ordering YAEC to amend the LTP to employ a methodology to account for subsurface contamination as described in NECNP's submitted Contentions. Hence, Contention 2 was properly admitted.

C. Contention 3 is germane to the proceeding.

The third contention which the Licensing Board admitted reads as follows:

Contrary to the requirement of 10 C.F.R. § 50.82, the methodology YAEC employs in its LTP Final Site Survey Plan to determine alpha emitting radioactivity is not adequate to demonstrate that the LTP will assure the protection of public health and safety.

⁴ NUREG-1500 at 17.

Decision at 41 (emphasis added). The Board found an ample and adequate basis for this contention. Decision at 24-25 (utilizing NECNP Contention bases A.6 and H.2). NECNP's Contentions, basis A.6, states:

YAEC has not detected all α -emitters likely to be present at the Yankee Rowe site. In order to maintain the total effective dose equivalents (TEDE) less than 15 mr/y, all radioactive materials, including α -emitters, must be determined. When ingested or inhaled, α -emitters contribute to the TEDE. YAEC is not surveying for α -emitters, such as plutonium isotopes and americium-241. NECNP contends that YAEC should take soil samples and specifically, measure for gross α . Further, YAEC should conduct an α -spec for all α -emitters on soil samples YAEC takes from over the entire 2000-acre site. A study has revealed that α -emitters, such as plutonium-241, have been detected in Yankee Rowe piping⁵ and are, therefore, likely to be present elsewhere on the site.

Id. at 10; *see also* 33-34 (providing reference to the Final Site Survey Plan). The Board found the references, expert support, and substance of the contention bases sufficient to permit an admissible contention. The Board based the admission of the contention upon the requirements of 10 C.F.R. 50.82(a)(11)(ii), meaning, in this context, that no Final Site Survey could be adequate when based upon a methodology which failed to adequately account for alpha-emitting radiation on site. This, the Board opined is due to the fact that "the bottom line is the validity and acceptance of the final site survey which will be the final basis for terminating the license." Decision at 24-25. This is consistent with the Commission's

directions to the Board in CLI-98-21. Moreover, the admitted contention provides an opportunity, if granted, to for the Board to give NECNP relief. The Board could do so by ordering YAEC to amend the LTP to employ a methodology to account for alpha-emitters as described in NECNP's submitted Contentions.

Hence, Contention 3 was properly admitted.

D. Contention 4 Is Sufficiently Specific to Be Admitted.

Contention 4 states:

Contrary to the requirements of 10 C.F.R. § 50.82, the methodology YAEC employs in the LTP for the selection of applicable scenarios for the calculation of its final release doses is not adequate to demonstrate that the LTP will assure the protection of the public health and safety.

Decision at 41. As argued above, YAEC initially asserted that, in fashioning this contention, the Board illegally bound YAEC to an otherwise "voluntarily" standard not found in the regulations. That argument fell in the face of the Board's basing the contention upon dose criteria in 10 C.F.R. § 20.1402. *Id.* at 17. The criteria which the Commission directed were applicable in this case. CLI-98-21, Slip op. at 40-41. The Commission noted that "Yankee has already agreed in its LTP to meet the 15-millirem criterion." *Id.*

⁵ A. Mancini and R. Applebaum, "Decontamination of Large Components - Test Case," paper presented at ANS Winter Meeting, Washington, D.C. (November 10-14, 1996).

As to YAEC's "void for vagueness" argument, YAEC ridicules the Board for noting, at the very end of its careful consideration of the admissibility of a contention such a Contention 4, that, were the contention proven, the LTP would have to be "amended to define the average member of the critical group to be a gardener." Appeal at 14 (quoting Decision at 20). YAEC omits any detailed discussion of the issues raised and addressed prior to the quotation it ridicules. See Decision at 11-20. Within these nine pages, the Board carefully weighs NECNP's proffered Contention A.3, A.4, E.1, H.4, and CAN's Contention 1. *Id.* The Board found all of the bases it examined susceptible to classification as challenging governing regulations⁶ except a portion of NECNP Contention basis A.3. *Id.* at 18. Upon this one basis, the Board reexamined the material it had excluded, noting a consistent thread, further explained at the prehearing conference. Decision at 19

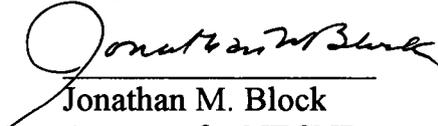
⁶ NECNP believes that the Board erred in finding that NECNP contended for some higher standard to be applied to acceptable exposure to children who would comprise a portion of the critical group living on site. NECNP contends that its Contentions specifically eschewed any challenge of the regulations under Part 20, Subpart E. Rather, NECNP's Contentions assert that the rulemaking underlying Subpart E refers to the ICRP-60 radiation protection standards underlying the rule as adopted. Hence, the NRC Staff (and licensees submitting LTPs) should be examining the composition of the "critical group" to be sure that the "average" takes account of doses to children *in utero*, infancy, and during the early growing years when children are so often on the ground playing in the dirt. Surely the potential denizens of the released YAEC site will have children. Hence, the "average" must account for doses to the children as members of the critical group. Merely accounting for doses to a "reference man" will not reflect the average dose to members of the critical group. Moreover, the dose differential for women bearing children, staying home and caring for and nursing children, should also be properly accounted for in arriving at the "average" member of the critical group. Failure to do so not only violates existing regulations, it constitutes invidious discrimination against women, children, and families. NECNP Contentions at 7-8

(quoting prehearing transcripts at TR 52 and 67). The Board then found support in NUREG-1500 for the decision to allow intervenors to contend and attempt to prove the reasonableness of the use of an "alternative" exposure scenario. Decision at 19-20. Such a scenario might reasonable include a family living on site engaged in subsistence agriculture for the greater part of the year -- what the Board denominated a "gardener." This is neither vague nor unreasonable under the Commission's rules and the guidance it has provided for the application of those rules. Moreover, if granted, the admitted contention provides the Board an opportunity to give NECNP relief. The Board could order YAEC to amend the LTP to employ a methodology that accounts for exposures during subsistence agriculture on site as described in NECNP's Contentions. Hence, Contention 4 was properly admitted to the proceeding.

CONCLUSION

LBP-99-14 should be upheld. The proceeding should go forward.

Respectfully submitted:


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Dated: April 16, 1999

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Certificate of Service

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I, Jonathan M. Block, attorney for New England Coalition on Nuclear Pollution, do hereby certify that on April 6, 1999, I served the within pleading in this matter by United States Mail as follows:

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