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

MOTION FOR LEAVE TO REPLY (RECONSIDERATION OF A PORTION OF PREHEARING CONFERENCE ORDER)

Pursuant to 10 C.F.R. § 2.730(c), Yankee Atomic Electric Company ("Yankee") moves for leave to submit the within short reply to the responses of New England Coalition on Nuclear Pollution, Inc. ("NECNP") and Citizens Awareness Network ("CAN") to Yankee's "Motion for Reconsideration" of a portion of LBP-99-14, which Yankee believes may be of assistance to the Board in ruling on the motion.

1. **Site Release Criteria.** NECNP's first response is to seek (in an untimely way) reconsideration of a different aspect of LBP-99-14, namely the portion that recognized that the License Termination Plan ("LTP") for Yankee Nuclear Power Station ("YNPS") is governed by the SDMP criteria and *not* the 25 mrem/yr TEDE criterion of 10 C.F.R. § 20.1402. NECNP urges this Board in effect to excise from the Commission's duly promulgated *regulation* the part that says that the SDMP criteria (and not the § 20.1402 criteria) apply to "sites which . . . [h]ave previously submitted and received Commission approval [of] a . . . decommissioning plan that is compatible with the SDMP Action Plan Criteria." 10 C.F.R. § 20.1401(b)(2).[1] The YNPS

[1]Note that, contrary to CAN's suggestion (*CAN Response* at 7), the exemption that applies to YNPS perforce the prior approval of its Decommissioning Plan extends to § 20.1401(d), a general provision applicable § 20.1402: § 20.1401(b) says that "[t]he criteria *in this subpart* do not apply . . . ."

To the extent that CAN believes that it remains an open issue whether the Decommissioning Plan site release criteria are consistent with the SDMP criteria (*see CAN Response* at 5), the fact of the matter is that any contention to the contrary is doubly barred: it is barred by the finality of the decision approving the Decommissioning Plan (as a result of a contested proceeding to which CAN was a party), and it is barred by the fact that the time for submitting any new contentions in this proceeding has elapsed.

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Decommissioning Plan, which has been previously approved twice, contained a set of site release criteria that were consistent with the SDMP and, therefore, are the governing criteria for the present proceeding perforce the Commission's *regulation*.[2] By disclaiming only the application of § 20.1401(b)(3), NECNP ignores (and asks this Board to ignore) § 20.1401(b)(2). It would be better for the Board not to ignore the Commission's regulation and published intent.[3]

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[2]Attached hereto is a copy of § 4.1.1 of the YNPS Decommissioning Plan, which contains the approved YNPS Site Release Criteria. Note that, to the extent the Decommissioning Plan included a TEDE analysis: (i) the set pass value was 30 mrem/yr., and (ii) the analysis is to be based on the methods described in NUREG/CR-5512. This Decommissioning Plan was approved (for the second time) on October 28, 1996 (*see Yankee Atomic Electric Company* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 196 (1998)), *following* the completion of an adjudicatory proceeding to which NECNP and CAN were parties and in which neither of them even sought admission of a site release criterion contention. (CAN seems to think that the approval of the Decommissioning Plan was only partial or tentative, *CAN Response* at 5, but the approval was, of course, final and applicable to the entire plan.)

To the extent that NECNP, and perhaps CAN, argue in opposition to the Motion for Reconsideration that § 20.1401 either provides or envisions that this Board may adopt site release criteria for YNPS *ad hoc*, they are manifestly in error. To the extent that they complain that the SDMP criteria were never promulgated in a regulation, they ignore the prior approval of the Decommissioning Plan, to which they never objected on this ground. (Of course, NECNP and CAN were and are necessarily familiar with the Decommissioning Plan, since they were parties to the proceeding as a result of which it was approved. *And see Duke Power Company* (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982), *rev'd in part (on other grounds) and aff'd in part (including this ground)*, CLI-83-19, 17 NRC 1041 (1983).) The Commission *did* provide by duly promulgated regulation that plants of the class that includes Yankee will be governed by their Decommissioning Plans, not the § 20.1402 criteria, which is sufficient to satisfy the Administrative Procedures Act (and to bind the Commission's adjudicatory boards).

[3]NECNP makes an obscure argument about the "conjunctive" of the disjunctive form. *NECNP Response* at 3. Presuming this to assert that the word "or" at the end of § 20.1401(b)(2) should be read to mean "and," if one did so the resulting regulation would make no sense, since the three members of the disjunctive set in § 20.1401(b) are mutually exclusive. Moreover, the resulting rule would be harshly discordant with the Commission's intent:

> "Section 20.1401(b) of the proposed rule indicated that the criteria do not apply to sites already covered by a decommissioning plan approved by the Commission before the effective date of the final rule and in accordance with the criteria identified in the SDMP Action Plan of April 16, 1992 (57 FR 13389).
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> "The Commission continues to believe that sites being decommissioned under previously approved decommissioning plans should be grandfathered from the provisions of the final rule. Similarly provisions should apply to licensees whose decommissioning plans are in the final stages of preparation or of NRC review. From a health and safety perspective, the NRC believes the criteria identified in the SDMP Action Plan are reasonably consistent with the final rule's dose criteria. The contamination levels defined in the SDMP Action Plan

2. **Reconsideration of the Exclusion of the Most Affected Members Contention.** NECNP uses its response to Yankee's motion to launch a second motion for reconsideration of its own, namely the rejection of its contention that a TEDE-based site release criterion should be applied to women and/or children, who are assertedly more susceptible of adverse effects of residual radiation than the average member of a population. This request is procedurally out of order and it remains substantively inadmissible both as a challenge to the Commission's regulations and as a failure to recognize that in setting the numerical value of 25 mrem/yr., the Commission has already taken into account individual variations in radiation susceptibility.

3. **Lack of Basis for a "Critical Group of Gardeners" Population.** Yankee posited its request for reconsideration on the ground, *inter alia*, that neither NECNP nor CAN had provided a *basis* for their *claim* that people in the Rowe area are qualitatively different in their gardening habits, on average, than those subsumed in the NUREG-1500 "residential" scenario. In its response, NECNP repeats the *claim* and acknowledges that *basis* is a matter for the future. *Response* at 8.[4]

> are within the range of measurable values that could be derived through the site-specific screening and modeling approaches defined in guidance supporting this final rule. The Commission believes the grandfathering approach will facilitate the timeliness of decommissioning and ensure licensees that resources spent to develop and implement a decommissioning plan are justified."

To the extent that NECNP argues that the criteria to be applied to a "grandfathered" site such as YNPS are whatever criteria the Board decides to apply *ad hoc*, the foregoing should be sufficient to dispel such an unusual notion.

[4]"*Evidence at a hearing* will provide *the basis* for a reasonable 'gardening' scenario." (Emphasis supplied.) For its part, CAN fails to understand why Yankee should wish to retract from a commitment once intervenors have invited this Board to ratchet the commitment to something greater than Yankee committed to and this Board appears to have accepted the invitation. *CAN Response* at 5. The short answer to CAN's response is that, yes, Yankee may have committed in the LTP to a pass value of 15 mrem/yr. TEDE based on the methodology set forth in its plan (which invoked the "residential" scenario of a published guidance document), but Yankee never committed to a site release criterion based on a hypothetical scenario of most exposed gardeners based on parameters to be furnished only after contentions have been admitted in an evidentiary hearing. Yankee is, in fact, entirely willing to perform pursuant to the commitment *it* made (15 mrem/yr. TEDE to an average residential group), but there is no reason on earth why Yankee should be willing to have that laudable and gratuitous undertaking converted into evidentiary hearings and the application of a very different and amorphous standard. In

4. **The Anomaly of Contentions Challenging Voluntary Undertakings (*i.e.*, Demanding More than the Rules Require).** As Yankee pointed out, penalizing licensees and applicants who volunteer to do more than the rules require is bad policy. NECNP offers no rebuttal. Rather, NECNP and CAN in their responses endorse such penalization.

It would appear that both NECNP and CAN confuse, inadvertently or otherwise, the difference between enforcing a commitment once a commitment has been made *and a license has been issued in reliance upon it*, on the one hand, and penalizing a licensee who *proposes* to do more than license standards would require by threatening to *deny him a license* on inapplicable grounds, on the other hand. If, as the Board previously recognized, the § 20.1402 criteria do not apply to Yankee, there is no rational basis for denying Yankee a license based on its supposed failure to meet those criteria (whether or not it has volunteered to meet them, or some portion of them).

5. **The 15- *versus* 25-mrem/yr Issue.** Even if the § 20.1402 criteria were applicable to YNPS, all they would require is meeting the 25 mrem/yr. standard.

The contention this Board framed and admitted was premised on the notion that, *if* Yankee applied its stated criteria and demonstrated a dose of 15 mrem/yr. to the average member of a "critical group" of residents (who *on average* garden for the amount of time defined in NUREG-5512), *then* a different "critical group" of gardeners might receive more than 15 mrem/yr. However, such a contention is legally impermissible, for there is no requirement of demonstrating a dose equal to or less than 15 mrem/yr. to *any* group. Rather, even on the theory on which the Board created and admitted this contention, it must be that the Yankee methodology could result in a "critical group" of gardeners receiving a dose of more than *25* mrem/yr.—a proposition for which the record is utterly devoid of any basis (and on which the Board did not even purport to find basis). Seeking reconsideration, Yankee pointed out that the Board had apparently overlooked and misapprehended this requirement of basis—

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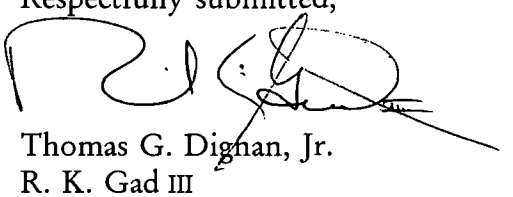
short, Yankee tried to do a good thing, but if there is to be a penalty for that, then we shall revert to the rules.

required of any contention—even on the theory on which the Board admitted it. NECNP does not address the point in its response.

Conclusion.

For the foregoing reasons and those set forth in its Motion for Reconsideration, Yankee respectfully objects to so much of *LBP-99-14* as created and then admitted "Contention 4," requests that this Board reconsider the same and requests that, upon reconsideration, "Contention 4" be excluded.

Respectfully submitted,



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Dated: April 12, 1999.

CERTIFICATE OF SERVICE

I, Robert K. Gad III, one of the attorneys for Yankee Atomic Electric Company, do hereby certify that on April 12, 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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