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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

OFFICE OF THE CHIEF OF STAFF
RULEMAKING AND
ADJUDICATION STAFF

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

Docket No. 50-029-LA

NRC STAFF RESPONSE IN SUPPORT OF
YANKEE ATOMIC ELECTRIC COMPANY'S
APPEAL OF LBP-99-14

INTRODUCTION

On April 1, 1999, pursuant to 10 C.F.R. §2.714a, Yankee Atomic Electric Company (Yankee) filed an appeal of LBP-99-14, the Atomic Safety and Licensing Board's (Board's) prehearing conference order admitting four contentions and admitting New England Coalition on Nuclear Pollution (NECNP) and Citizens Awareness Network (CAN) as intervenors.

For the reasons discussed below, the NRC staff (Staff) supports Yankee's appeal and urges the Commission to reverse LBP-99-14.

STATEMENT OF THE CASE

The procedural history leading to the filing of Yankee's appeal is as follows.

In a Memorandum and Order dated October 23, 1998, CLI-98-21, the Commission determined, among other things, that NECNP and CAN had standing to intervene in this proceeding. Subsequently, pursuant to a Board order of November 30, 1998, NECNP and CAN filed contentions on January 2, 1999, and January 5, 1999, respectively. NECNP and CAN each filed eight

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contentions. On January 20, 1999, Yankee and the Staff filed responses to the petitioners' contentions.

The Board conducted a prehearing conference and, on March 17, 1999, issued LBP-99-14, its prehearing conference order. Although the Board did not admit any of NECNP or CAN's contentions as submitted, it admitted four "consolidated" contentions fashioned by the Board from various bases offered in support of the contentions submitted by NECNP/CAN and from remarks made at oral argument.

On March 29, 1999, Yankee filed a motion in which it sought reconsideration of LBP-99-14 insofar as it renumbered and restated various bases submitted by NECNP and CAN, and combined them with arguments advanced at the prehearing conference, to formulate Contention 4. Objection to and Motion of Yankee Atomic Electric Company for Reconsideration of Prehearing Conference Order, March 29, 1999.

On April 1, 1999, Yankee filed its appeal.

DISCUSSION

As admitted by the Board, the four contentions read as follows:

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.
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.
3. Contrary to the requirements 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. Contrary to the requirements of 10 C.F.R. § 50.82, the methodology YAEC employs in its 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.

Yankee argues that LBP-99-14 should be reversed because 1) the Board used an incorrect regulatory standard in formulating the four contentions it admitted and 2) the contentions drafted by the Board do not satisfy the criteria in 10 C.F.R. § 2.714 (b) (2) regarding contentions. For the reasons discussed below, the Staff agrees.

I. Contrary To Contentions 1, 2, 3 And 4 As Drafted By The Board, Yankee's License Termination Plan (LTP) Need Not Satisfy The Criteria That Those Contentions Reference.

Yankee argues that in LBP-99-14 the Board used an incorrect regulatory standard in formulating the contentions admitted and, thus, ran afoul of the basic precept that an applicant can be required to do, and put to hearing regarding, only what the regulations require. Licensee's Brief on Appeal from a Prehearing Conference Order of the Atomic Safety and Licensing Board Issued March 17, 1999 (LBP-99-14) at 6, *citing Maine Yankee Atomic Power Company* (Maine Yankee Atomic Power Station), ALAB-161, 6 AEC 1003, 1005-1010 (1973), *aff'd*, *Citizens for Safe Power v. NRC*, 524 F.2nd 1291 (D.C. Cir. 1975); *accord*, *Public Service Company of New Hampshire* (Seabrook Station Units 1 and 2), ALAB-422, 6 NRC 33, 42-43 (1977).

Although Yankee does not separately address the contentions in light of that precept, the Staff believes, as discussed below, that all of the contentions relate to regulations that are not germane to the instant proceeding.

A. Contention 1: Inadequacy of methodology for determining background radiation

The Board states that the basis on which it is accepting NECNP/CAN's Basis A.1., redrafted by the Board as Contention 1, is that NECNP/CAN raise a valid question of "whether the LTP adequately plans to determine background radiation necessary to determine radiation and radioactivity levels required to meet the requirements of 10 C.F.R. §50.82(a)(11)(ii)." LBP-99-14 at 9.

The Board's Contention 1, in invoking Section 50.82(a)(11)(ii), invokes a regulation that is not germane to the instant proceeding. The Commission addressed the scope of the instant proceeding in CLI-98-21; the Commission stated that the scope of Yankee's LTP application (and therefore the scope of this proceeding) is defined solely by the terms of 10 C.F.R. § 50.82(a)(10)¹ as read in the light of the filing requirements of 10 C.F.R. § 50.82(a)(9)(ii)(A) - (G).² *Yankee Atomic Electric Company* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 204-205 (1998).

¹ Section 50.82(a)(10) establishes the following standard for approval of an LTP:

If the license termination plan demonstrates that the remainder of decommissioning activities (1) will be performed in accordance with the regulations in this chapter, (2) will not be inimical to the common defense and security or to the health and safety of the public, and (3) will not have a significant effect on the quality of the environment and after notice to interested persons, the Commission shall approve the plan, by license amendment, subject to such conditions and limitations as it deems appropriate and necessary and authorize implementation of the license termination plan.

48 NRC 185 at 197.

² Section 50.82(a)(9) (ii) requires that the following be included in the LTP:

(A) A site characterization;

(B) Identification of remaining dismantlement activities;

(C) Plans for site remediation;

(D) Detailed plans for the final radiation survey;

(E) A description of the end use of the site, if restricted;

(F) An updated site-specific estimate of remaining decommissioning costs; and

(G) a supplement to the environmental report, pursuant to § 51.53, describing any new information or significant environmental change associated with the licensee's proposed termination activities

48 NRC 185 at 197.

B. Contention 2: Inadequacy of LTP methodology for determining subsurface soil contamination

Like Contention 1, Contention 2 depends on the Board's erroneous assumption that contentions alleging a failure to meet 10 C.F.R. § 50.82(a)(11)(ii) are appropriate for litigation in this proceeding. Regarding the basis for Contention 2, the Board states that on the basis of its review of the LTP and the argument of the parties and petitioners, it has determined that NECNP/CAN have raised a specific and valid question whether LTP adequately plans to determine onsite subsurface contamination to the extent necessary to meet the requirements of 10 C.F.R. § 50.82(a)(11)(ii). LBP-99-14 at 23. As discussed above, the Board's determinations in this matter are at odds with CLI-98-21 regarding the scope of the proceeding.

C. Contention 3: Inadequacy of LTP methodology for determining alpha emitters

Like Contentions 1 and 2, Contention 3 depends on the Board's erroneous determination concerning the scope of the proceeding and that 10 C.F.R. § 50.82(a)(11)(ii) is germane. As discussed above, the regulations regarding this matter are clear, as is the Commission's guidance in CLI-98-21; 10 C.F.R. § 50.82(a)(11)(ii) is not germane to the approval of the LTP and, thus, to this proceeding.

D. Contention 4: Inadequacy of LTP's methodology in selecting applicable scenarios for calculating final release doses

Contention 4 imposes 10 C.F.R. § 20.1402, based on the Board's reasoning that the criteria of that section are "consistent" with Yankee's commitment to a dose of 15 mrem/yr total effective dose equivalent (TEDE). LBP-99-14 at 17. Yankee argues that a litigable contention may not be grounded upon an applicant's or licensee's voluntary commitment to go beyond the regulations. Brief at 7. Although Yankee committed to meet a dose of 15 mrem or less TEDE, Yankee's LTP must satisfy the SDMP Action Plan criteria. 10 C.F.R. § 20.1401(b). Thus, an admissible contention

would need to challenge the LTP's ability to satisfy the SDMP Action Plan criteria. Nothing in Contention 4 challenges the LTP's ability to satisfy the SDMP Action Plan criteria.

II. The Four Contentions Drafted By The Board Do Not Satisfy The Requirements Of 10 C.F.R. § 2.714(b)(2).

In its appeal brief, Yankee sets out 10 C.F.R. § 2.714(b)(2) concerning requirements for contentions and argues that the Board's contentions fail to satisfy these requirements. Brief at 7-9. Yankee further relies on the Statement of Consideration on Procedural Changes in the Hearing Process, 54 Fed. Reg. 33168 (August 11, 1989), for the proposition that a presiding officer shall not admit a contention if the *intervenor* fails to set forth a contention with reasonable specificity or establish a basis for the contention. Brief at 9, n.7 (Emphasis in Brief). The Staff agrees that NECNP/CAN failed to set forth contentions with reasonable specificity or establish a basis. The Commission's recent policy statement reiterates that it is the petitioner for intervention who must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998). The Commission also points out in its policy statement that it is a contention's proponent, not the licensing board, that is responsible for formulating the contention. *Id.*³

³ The Commission, in a decision issued on April 15, 1999, explicitly stated that in 1989 it "toughened its contention rule in a conscious effort to raise the threshold bar for an admissible contention and ensure that only intervenors with genuine and particularized concerns participate in NRC hearings." *Duke Energy Corp.*, (Oconee Nuclear Station, Units 1, 2, and 3) CLI-99-11, slip op. at 6 (April 15, 1999). The Commission further stated that a contention must, at the outset, have some factual basis and contentions should not be admitted "where an intervenor has no facts to support its position and [instead] contemplates using discovery or cross-examination as a fishing expedition which might produce relevant supporting facts." *Id.* at 7-8, quoting 54 Fed. Reg. at 33,171.

A. Contention 1 lacks basis.

Yankee points out that Contention 1 based on misreading of NUREG/CR-5849. Brief at 11. Yankee correctly points out that intervenors' contention concerned the necessity for taking background readings several miles from the site and that the contention was based on a misreading of NUREG/CR-5849, which actually states that offsite readings are necessary only where no onsite areas unaffected by licensed operations are available. Brief at 11. Whether or not such offsite readings will prove to be necessary is, according to Yankee, a matter of implementation, and the Board has ruled that implementation issues are not germane to this proceeding. *Id. citing* LBP-99-14 at 9. The Staff agrees. In addition, as discussed above, to the extent that Contention 1 is based on the Board's mistaken impression that 10 C.F.R. § 50.82(a)(11)(ii) is germane to this proceeding, Contention 1 lacks basis.

B. Contention 2 lacks basis.

Regarding Contention 2, Yankee argues generally that the Board's rationale for Contention 2, that the LTP lacks the *detailed* plans that 10 C.F.R. § 50.82 (a)(9)(ii)(D) requires, lacks basis because it fails to state what required details are missing. Brief at 12. Yankee points out that details concerning plans for subsurface soil sampling are in the LTP. *Id.* The Staff agrees that Contention 2's allegation that the LTP's subsurface soil sampling methodology lacks adequate basis. In addition, as discussed above, to the extent that Contention 2 is based on the Board's mistaken impression that 10 C.F.R. § 50.82(a)(11)(ii) is germane to this proceeding, Contention 2 lacks basis.

C. Contention 3 lacks basis.

Yankee points out that the Board's Contention 3 depends on 10 C.F.R. § 50.82(a)(11)(ii) as a regulatory basis and that the Commission has ruled that § 50.82(a)(11)(ii) is not germane to this proceeding. Brief at 13. As discussed above, the Staff agrees. Removing reliance on 10 C.F.R. § 50.82(a)(11)(ii) as a basis for this contention leaves Contention 3 without any basis.

D. Contention 4 lacks basis.

Yankee objects to Contention 4 on the basis that it is "hopelessly vague." Brief at 14. Yankee states that there is no basis, regulatory or otherwise, for a contention that the average member of the critical group is a gardener or even that there is a critical group made up of gardeners. Brief at 14-15. In formulating its Contention 4, the Board challenges Yankee's residential farmer scenario without supplying the number of hours the Board's postulated gardener engages in the activities that define his gardening role, much less information about how those hours add up to a greater dose than that incurred by the average member of the residential farmer group. Contention 4 as drafted and admitted by the Board does not meet the requirements of 10 C.F.R. § 2.714(b)(2) regarding basis and specificity; it does not appear to be based on fact or expert opinion; and it does not raise a material issue of law or fact within the scope of the proceeding.⁴

⁴ The Board's error in reformulating Contention 4 is further demonstrated by the fact that the proponent of the contention on which it is founded, NECNP, believes that the Board misunderstood its contention. Although NECNP did not seek reconsideration, in responding to Yankee's Motion for Reconsideration, NECNP stated that the Board misinterpreted the contention and asked that the Board reconsider its findings on this issue. New England Coalition on Nuclear Pollution's Opposition to Yankee Atomic Electric Company's Motion to Reconsideration Part of Prehearing Conference Order at 6-7.

CONCLUSION

For the reasons discussed, the Commission should grant Yankee's appeal and reverse the Board's decision in LBP-99-14.

Respectfully submitted,

Ann P. Hodgdon

Ann P. Hodgdon
Counsel for NRC Staff

Dated at Rockville, Maryland
this 16th day of April, 1999.

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OFFICE OF SPECIAL
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE IN SUPPORT OF YANKEE ATOMIC ELECTRIC COMPANY'S APPEAL OF LBP-99-14" in the above-captioned proceeding have been served on the following through deposit in the Nuclear Regulatory Commission's internal mail system, or as indicated by an asterisk, by first-class mail this 16th day of April, 1999:

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

Dr. Thomas S. Elleman*
Administrative Judge
Atomic Safety and Licensing Board
704 Davidson Street
Raleigh, NC 27609
FAX: (919) 782-7975

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

Thomas G. Dignan, Jr.*
R. K. Gad, III
Counsel for Licensee
Ropes & Gray
One International Plaza
Boston, MA 02110
FAX: (617) 951-7050

Samuel H. Lovejoy*
Franklin Regional Council of Governments
425 Main Street
Greenfield, MA 01301
FAX: (413) 774-3169

Jonathan M. Block, Esq.*
New England Coalition on Nuclear
Pollution, Inc.
Main Street
P.O. Box 566
Putney, Vermont 05346-0566
FAX: (802) 387-2646

Atomic Safety and Licensing Board
Panel
Mail Stop T 3-F-23
U.S. Nuclear Regulatory Commission
Washington, DC 20555

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

Office of the Secretary
ATTN: Rulemaking and
Adjudications Staff
Mail Stop 0 16-C-1
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Deborah B. Katz, President*
Citizens Awareness Network, Inc.
P.O. Box 3023
Charlemont, MA 01339-3023
FAX (413) 339-8768

Office of the Commission Appellate
Adjudication
Mail Stop 0 16-C-1
U.S. Nuclear Regulatory Commission
Washington, DC 20555


Ann P. Hodgdon
Counsel for NRC Staff