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UNITED STATES OF AMERICA
before the
NUCLEAR REGULATORY COMMISSION

OFFICE OF THE CHIEF OF STAFF
RULEMAKING AND
ADJUDICATION STAFF

_____)
In the Matter of)
)
YANKEE ATOMIC ELECTRIC COMPANY)
(Yankee Nuclear Power Station))
)
License Termination Plan)
)
_____)

Docket No. 50-029-LA-R

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

BRIEF OF THE LICENSEE¹

¹This appeal has been filed even though the Licensing Board has *sub judice* an objection and motion of Yankee Atomic Electric Company (the Appellant) to reconsider one of the contentions admitted in the Prehearing Conference Order from which this appeal is taken. The applicable regulations 10 C.F.R. §§ 2.714a, 2.752(c) do not provide for any stay of the running of the ten-day appeal period by virtue of the filing of the objection and motion with the Licensing Board. The Commission may wish to delay substantive consideration of this Appeal until the objection and motion for reconsideration has been ruled upon by the Licensing Board. However, the relief sought by the motion and the appeal insofar as the single contention involved in both is the same; the exclusion of the contention. Of course, the remaining contentions are unaffected by the motion before the Licensing board. The status of the proceeding before the Licensing Board is as follows: In a telephonic conference, the Licensing Board has granted other parties until April 9, 1999, to respond to Yankee's motion; it has set a schedule which calls for discovery to open on April 9, 1999, and last for 60 days; it has indicated a disinclination to entertain summary disposition motions in conformity with the Commission's Statement of Policy on that matter and has tentatively set the hearing for September 27, 1999 to October 1, 1999.

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STATEMENT OF THE CASE

On March 17, 1999, the Atomic Safety and Licensing Board (ASLB or Licensing Board) issued a Prehearing Conference Order in the above-referenced docket denominated LBP-99-14 (hereafter the Decision), in which the Licensing Board admitted for litigation in this License Termination Plan (LTP) proceeding four contentions drafted by the Licensing Board itself. It also admitted two intervenors, New England Coalition on Nuclear Pollution (NECNP) and Citizens Awareness Network (CAN), the filings of which formed the basis of the Board's draftsmanship. The decision also granted 10 C.F.R. § 2.715 status to an entity known as the Franklin Regional Council of Governments (FRCOG). This Brief is filed on behalf of Yankee Atomic Electric Company (YAEC, Yankee, Licensee or Applicant), the holder of the possession-only operating license for the facility in question, Yankee Nuclear Power Station (YNPS), in support of its appeal.

The proceeding at bar addresses the LTP submitted by Yankee to the Commission on May 15, 1997, as amended.² Under the provisions of 10 C.F.R. §§ 20.1401 *et. seq.*, and as acknowledged by the Board,³ the Yankee LTP is governed by the regulatory standards set out in the Site Decommissioning Management Plan Action Plan (SDMP) published by the United States Nuclear Regulatory Commission (NRC or Commission) on April 16, 1992.⁴ The SDMP

²68 Fed. Reg. 4308, 4320 (Jan. 28, 1998)

³LBP-99-14, Slip Op. at 16-17.

⁴57 Fed. Reg. 13389.

adopts by reference certain site release criteria set forth in documents specifically referenced in the SDMP as follows:

1. Options 1 and 2 of the Branch Technical Position "Disposal or Onsite Storage of Thorium or Uranium Wastes from Past Operations" (46 FR 52601; October 23, 1981).

2. "Guidelines for Decontamination of Facilities and Equipment Prior to Release for Unrestricted Use or Termination of Licenses for Byproduct, Source, or Special Nuclear Material," Policy and Guidance Directive FC 83-23, Division of Industrial and Medical Nuclear Safety, November 4, 1983.

3. "Termination of Operating Licenses for Nuclear Reactors," Regulatory Guide 1.86, June 1974, Table 1, for surface contamination of reactor facility structures. Also Cobalt-60, Cesium-137, and Europium-152 that may exist in concrete, components, and structures should be removed so the indoor exposure rate is less than 5 microrentgen per hour above natural background at 1 meter, with an overall dose objective of 10 millirem per year (cf. Letter to Stanford University from James R. Miller, Chief, Standardization and Special Projects Branch, Division of Licensing, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, April 21, 1982, Docket No. 50-141).

4. The Environmental Protection Agency's (EPA's) "Interim Primary Drinking Water Regulations," 40 CFR part 141 (41 FR 38404; July 9, 1976). In accordance with FC 83-23, the maximum contaminant levels for radio nuclides in public drinking water as established by the EPA should be used as reference standard for protection of groundwater and surface water resources.

5. The EPA's "Persons Exposed To Transuranium Elements In The Environment" (42 FR 60956; November 30, 1977). This document provides guidelines for acceptable levels of transuranium elements in soil."

In the Decision, the Licensing Board admitted for litigation four contentions, none of which states any issue, specific or otherwise, under the SDMP criteria. The four broadly worded contentions are 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."⁵

The breadth and lack of specificity in the contentions, as drafted and admitted by the Licensing Board, are further exacerbated by the omission of any meaningful description of what was deemed to be the basis for each contention in the record and a lack of any precise enumeration of the alleged facts or expert opinion which the Licensing Board perceived as supporting each contention and upon which the intervenors CAN and NECNP would be able to

⁵*LBP-99-14*, Slip Op. at 40-41.

rely in proving the contentions which the Board had drafted for them. As to the regulatory standard which supposedly is at issue under the contentions, the only apparent regulatory basis recited by the Board is at pages 17-18 of the Decision, where, after stating that: "[i]n reviewing all [the] proposed contentions, it is apparent that the governing regulatory standard for the LTP here is that set forth in the SDMP", the Licensing Board went on to turn a voluntary commitment by Yankee into a regulatory standard by which admissibility of contentions would be judged. The Licensing Board stated:

"the Licensee additionally has committed, in the LTP, to site-release criteria that require the TEDE to the average member of the critical population group from residual contamination be maintained at less than 15 mrem/yr, criteria that we recognize would conform to the dose criteria set forth in 10 C.F.R. § 20.1402. LTP, § 4.1 at p. 4-1. Those criteria define dose to a critical group. 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)."

It is somewhat mystifying that the Licensing Board decided to make a regulatory standard out of a voluntary commitment on the part of the Applicant. Indeed, the Hearing Board exacted a double penalty, first by holding the LTP to the criteria of 10 C.F.R. §§ 20.1402 in addition to the SDMP and then by employing the 15 mrem/yr voluntary standard rather than the 25 mrem/yr standard that actually appears in 10 C.F.R. § 20.1402. This was done despite the Licensing Board's clear recognition in another part of its decision that it has no authority to admit a contention that would, if proven, require an applicant to meet a

standard higher than that required by the regulations themselves as opposed to voluntary commitments.⁶

ARGUMENT

I. **LBP-99-14 Should be Reversed Because the Board Utilized an Incorrect Regulatory Standard in Formulating the Contentions Admitted.**

As seen above, the Licensing Board operated under the premise that a valid contention could be put forth in this proceeding on the basis that the regulatory standard that must be met was the voluntary commitment that Yankee had adopted (which, if met, results in site release criteria more stringent than that required by applicable regulations). In adopting this concept, the Licensing Board ran afoul of one of the basic precepts of nuclear licensing law: "an applicant can be required to do only what the regulations require." Over twenty-five years ago, this Commission's predecessor, the U.S. Atomic Energy Commission (AEC), made clear that an applicant or licensee before this agency may only be put to hearing upon regulatory standards that are in the Commission's Regulations, *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.2d 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) ("Insofar as safety considerations are concerned, the Atomic Energy Act and the

⁶*LBP-99-14*, Slip Op. at 34-35 (contention that Yankee's voluntary commitment to assume a background radiation level of zero for Cs¹³⁷ for disturbed soil areas (including asphalt) be actually incorporated in the Final Site Survey Plan rejected because there is no such regulatory requirement even though Yankee has committed to making the assumption in its analyses).

references to those specific sources and documents of which the petitioner is aware and on which the 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."

As noted earlier, the four contentions admitted were drafted by the Licensing Board itself. The Prehearing Conference Order does not contain for each of the contentions, "a brief explanation of the bases of the contention." Nowhere is there "[a] concise statement of the alleged facts or expert opinion which support the contention." Furthermore, the Prehearing Conference order is bereft of references to "specific portions of the application" which are disputed. Finally, neither the Licensing Board contentions, nor the Intervenor filings upon which they are putatively based, reference any of the criteria adopted in the SDMP. It would seem that in drafting contentions the Licensing Board should be held to the same standards of draftsmanship that a putative intervenor would in order that a licensee-applicant will know what it must defend against. Here the Licensing Board strung together various narrow bases

which the intervenors offered up in support of their deficient contentions and, out of these threads, quilted four broad contentions which bid fair to open for litigation every and any issue that can be conjured up in the mind of man having to do with the LTP. This approach complies with neither the letter nor the spirit of the Commission's Rules of Practice since they were modified in 1989 in order to prevent the very evil which these broad contentions will further if allowed to stand.⁷

Section 2.714(d)(2)(ii) of the Commission's Regulations also states that a contention should be rejected if:

"The contention, if proven, would be of no consequence in the proceeding because it would not entitle the petitioner to relief."

As noted in the "STATEMENT OF THE CASE", *supra*, the Licensing Board itself recognized that in the event there was no regulatory requirement that an applicant include something in an LTP, 10 C.F.R. § 2.714(d)(2)(ii) precluded litigation of a contention, the goal of which was to require insertion of a non-required element into the LTP. As set forth in Section I of this Argument, the Licensing Board apparently drafted the contentions it admitted utilizing an erroneous regulatory standard derived from an applicant's voluntary commitment rather than a regulation of the Commission. This being the case, 10 C.F.R. § 2.714(d)(2)(ii) provides a separate and second regulatory basis for reversing the actions of the Licensing Board.

⁷"The new rule provides that in ruling on the admissibility of a contention, the presiding officer shall not admit a contention to the proceeding if the *intervenor* fails to set forth a contention with reasonable specificity or establish a basis for the contention." **Rules of Practice for Domestic Licensing Proceedings -- Procedural Changes in the Hearing Process**, 54 Fed. Reg. 33168 (Aug. 11, 1989) (emphasis supplied).

III. Even if the Licensing Board had Adopted a Correct Regulatory Standard, and had Complied Fully with 10 C.F.R. § 2.714(d)(2), the Contentions Still Were Not Admissible.

A. There is no basis in the record for Contention 1.

The First Contention drafted and admitted by the Board is:

"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."

The theory on which the Licensing Board drafted and admitted this contention is laid out on page 9 of the Slip Opinion. There the Board starts by acknowledging that the intervenors are not permitted to challenge in this proceeding whether the LTP has been, or is being, adequately implemented. However, the Board went on to say that the intervenors are permitted to challenge methodology and, in particular, "whether the LTP adequately plans to determine background radiation." The Final Status Survey Plan (FSSP) contained in the LTP unequivocally states that in conformity with NUREG/CR-5849, § 2.3.1 at p. 2.6 (cited and quoted by the Board on page 9), that "background measurements will be performed on surfaces unaffected by licensed activities,"⁸ and sets out in detail how the measurements will be made, describes the instrumentation which will be used, and how the background measurement populations will be verified.⁹ In addition, § 4.5.3 of the FSSP states:

⁸FSSP § 4.5.1.

⁹*Id.* §§ 4.5.2 - 4.5.6; Table 4.1 at p. A-37.

"Soil and sediment samples will be collected from areas unaffected by licensed operations in order to establish the background levels of man-made radionuclides not resulting from plant operations. The background samples will be collected at locations similar to their respective on-site sampling locations."

There is nothing in the record of the proceeding or even any allegation of any intervenor which challenges the information set out in the LTP. The contention for which the Intervenors pressed was one to the effect that in establishing "background" radiation values, it is necessary as a matter of law to take readings several miles from the site.¹⁰ This is based on a misreading of the only document the Licensing Board cited,¹¹ which stated not that offsite readings had to be taken, but, rather, that offsite readings should be taken only *if necessary* to establish background levels because no onsite areas unaffected by licensed operations were available. So the contention should have been excluded, period. The LTP's statement of the background undertaking is fully consistent with this obvious proposition; whether or not it will be necessary, as a matter of implementation fact, to travel offsite to find areas unaffected by plant operations in order to establish background levels is something that can and will be determined during plan implementation. The Licensing Board itself has ruled that issues of implementation are not germane to this proceeding.¹² In short, there simply is no basis for the contention drafted by the Licensing Board.

¹⁰*LBP-99-14*, Slip Op. at 8.

¹¹NUREG/CR-5849 cited at p. 8 of the slip opinion.

¹²*LBP-99-14*, Slip Op. at 9

B. There is no basis in the record for Contention 2.

The second contention drafted and admitted by the Licensing Board is:

"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."

The theory on which the Licensing Board issued Contention 2 is set out at pages 21-22 of the Slip Opinion as follows:

"The Board has reviewed the FSSP of the LTP. At Section 4.4.4, YAEC provides some information on surface soil sampling but, as asserted by the Petitioners, criteria for subsurface soil sampling do not appear to be demonstrated. In that regard, 10 C.F.R. § 50.82(a)(9)(ii)(D) requires '[d]etailed plans for the final radiation survey' (emphasis supplied). A plan that does not address the general strategy for the measurement of subsurface radioactivity cannot be viewed as adequately meeting the requirements of 10 C.F.R. § 50.82. We are thus admitting a contention on subsurface soil sampling."

The guideline values for subsurface soil are set out in § 3.4.2 of the FSSP; how samples to a depth of 15 cm. will be taken is detailed in § 4.3.3, and in § 4.4.4 it is stated that: "[s]ampling at greater depths will be done in areas where site characterization or other information indicates potential contamination at depths greater than 15 centimeters." If the challenge is to the concept that initial sampling of some areas will be for the top 15 cm. only, there is nothing in the record to indicate that selection of that depth is not conservative and sufficient to protect public health and safety. And, indeed, in the LTP itself, the basis for the selection of the

Commission's implementing regulations establish basic standards which, if met, entitle an applicant to a construction permit."). *See also, Statement of Policy: Further Commission Guidance for Power Reactor Operating Licenses, CLI-81-14, 14 NRC 14 (1977), passim.* Neither the AEC nor this Commission has ever wavered from that standard, which means, in the present setting, that a litigable contention may not be grounded upon an applicant's or licensee's voluntary commitment to go beyond the regulations. The faithful adherence for over twenty-five years to this principle is not surprising. If licensees were to believe that voluntary commitments to exceed regulatory *minima* would have the effect of subjecting them to otherwise unnecessary adjudicatory proceedings, voluntary commitments would very quickly become a thing of the past. This would be bad policy as well as bad law.

II. In Drafting and Admitting the Contentions, the Licensing Board Ignored the Provisions of 10 C.F.R. § 2.714(b)(2).

Section 2.714(d)(2)(i) of the Commission's Regulations states that a proffered contention should be rejected if:

"The contention and supporting material fail to satisfy the requirements of paragraph (b)(2) of this section."

The "paragraph (b)(2)" referred to, 10 C.F.R. § 2.714(b)(2), 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

15 cm. depth is spelled out and is based upon extensive subsurface soil sampling already done during the site characterization phase.¹³ Again, there is no basis for the contention.

C. Contention 3 is not germane to the proceeding.

The third contention drafted and admitted by the Licensing Board is:

"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."

The Licensing Board drafted and admitted this contention on the theory that the alleged failure properly to deal with alpha-emitters states a contention which has as its regulatory basis 10 C.F.R. § 50.82(a)(11)(ii).¹⁴ The Commission has already ruled that the only matters that are germane to this proceeding are "the matters listed in 10 C.F.R. § 50.82(a)(9) and (10)."¹⁵ The Commission also ruled out of bounds any issues pertaining to "any future application by Yankee Atomic to terminate its Part 50 license."¹⁶ Subparagraph 11 of 10 C.F.R. § 50.82(a) sets forth the standards for termination of a license *after the Licensee has fully implemented the LTP*, and is, therefore, not germane here.

¹³*LTP* at §§ 2.4.2 - 2.4.3. *See also LTP* § 4.2.2.

¹⁴*LBP-99-14*, Slip Op. at 24.

¹⁵*Yankee Atomic Electric Company* (Yankee Nuclear Power Station), CLI-98-21, ___ NRC ___, ___, Slip Op. at 20 (Oct. 23, 1998).

¹⁶*Id.* ___ NRC at ___, Slip Op. at 28.

D. Contention 4 is hopelessly vague.

The fourth contention drafted and admitted by the Licensing Board is:

"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."¹⁷

The Licensing Board's explanation for the admission of this contention is set forth on page 20 of the Prehearing Conference Order and is that one of the bases which NECNP asserted in support of its partially accepted Contention A:

". . . sets forth an acceptable contention which, if proved, would require the LTP to be amended to define the average member of the critical group to be a gardener."

If there be any meaning at all to the concept that contentions be specific and capable of resolution in an adversary proceeding, this contention must fail. What is a gardener? Does he or she stay in the garden 24 hours per day - if so, how is he or she an "average" member of the critical group. Most people do not sleep in their gardens. What kind of gardener? A keeper of a vegetable patch or a truck farmer with many acres under cultivation? And what basis has been stated for the concept that the Yankee site is ideal for gardening of such an unusual nature.¹⁸ There simply is no basis, regulatory or otherwise, for a contention that the average

¹⁷It is this contention that is also the subject of Yankee's motion now pending before the Licensing Board.

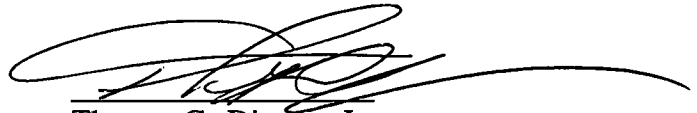
¹⁸Note that as NECNP, CAN and the Licensing Board observed, the residential scenario adopted in the LTP contemplates *some* gardening time by the average member of the residential population: about ninety hours per year, which works out to about four hours per week on average for that portion of a New England year in which gardening might be said to be feasible. This is in addition to other time (33.7 hours) per week) spent outdoors. Plainly

member of the critical group is a gardener or even that there is a critical group made up of gardeners.

CONCLUSION

LBP-99-14 should be reversed. The proceeding should be dismissed.

Respectfully submitted



Thomas G. Dignán, Jr.
R. K. Gad III
Ropes & Gray
One International Place
Boston, MA 02110-2624
(617) 951-7000

Dated: April 1, 1999

therefore, what NECNP has in mind was some form of *unusual* "gardening" but the parameters of this unusual undertaking were specified neither by NECNP nor the Licensing Board, rendering the contention hopelessly unmanageable.

CERTIFICATE OF SERVICE

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I, Thomas G. Dignan, Jr., one of the attorneys for the applicant herein, hereby certify that on April 1, 1999, I made service of the within document in conformity with the Commission's Regulations upon:

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OFFICE OF THE SECRETARY
ADJUDICATION STAFF

The Hon. Charles Bechhoefer
Administrative Judge
Atomic Safety and Licensing Board Panel
U. S. Nuclear Regulatory Commission
Washington, DC 20555
FAX: 301-415-5599

The Hon. Thomas D. Murphy
Administrative Judge
Atomic Safety and Licensing Board Panel
U. S. Nuclear Regulatory Commission
Washington, DC 20555
FAX: 301-415-5599

The Hon. Thomas S. Elleman, Ph.D.
Administrative Judge
704 Davidson Street
Raleigh, NC 27609
FAX: 919-782-7975

Ann P. Hodgdon, Esquire
Office of the General Counsel
U. S. Nuclear Regulatory Commission
Washington, DC 20555
FAX: 301-415-3725

Office of Commission Appellate
Adjudication
U. S. Nuclear Regulatory Commission
Washington, DC 20555
FAX: 301-415-1672

Office of the Secretary
U. S. Nuclear Regulatory Commission
Washington, DC 20555
FAX: 301-415-1672

Jonathan M. Block, Esquire
P.O. Box 566
Putney, VT 05346
FAX: 802-387-2646

Ms. Deborah B. Katz
Citizen's Awareness Network, Inc.
P.O. Box 3023
Charlemont, MA 01339
FAX: 413-339-8768

Samuel H. Lovejoy, Esquire
c/o Franklin Regional Council of
Governments
425 Main Street
Greenfield, MA 01301
FAX: 413-774-3169



s/ Thomas G. Dignan, Jr.
Thomas G. Dignan, Jr.