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

MOTION FOR LEAVE TO REPLY (INTERVENORS' JUNE 23, 1999, AND JUNE 24, 1999, FILINGS)

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 pleadings filed by the Consolidated Intervenors under dates of June 23, 1999, and June 24, 1999:

1. In the pleading filed by NECNP, it is asserted that Yankee has "state[d] that it may disobey orders of this Panel if it does not agree with them." *June 24 Filing* at 2 n.1. It would appear that the Intervenors do not comprehend that *conditions* imposed on allowance of a motion to terminate a proceeding without prejudice are *conditions*, not *orders*. Under the structure of FED. R. CIV. P. 41, which structure was the apparent basis for 10 C.F.R. § 2.107, "[i]f the conditions are too onerous, the plaintiff need not accept the dismissal on those terms." 9 Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 2366, at 303, and authorities previously cited in Yankee's filing of June 14, 1999, at 5 n.5. Concluding that a *condition* that one is not obliged to accept is unacceptable is not an act of disobedience.[1]

[1]It is, rather, the making of an election under an option given to you by the rules. What the Intervenors seem yet to understand is that, under the Federal Rules, once conditions have been dictated on any dismissal without prejudice, it is up to the plaintiff to decide whether he wants to accept the conditions (and get the dismissal) or reject the conditions (and continue trying to stave off defeat). The plaintiff will only accept the conditions if he concludes that they are less onerous than continuing the litigation.

This model has no application here because, unlike the plaintiff in civil litigation, Yankee has no interest in whether the proceeding is terminated or continues (without Yankee's participation), since the former LTP is no longer the plan that Yankee envisions for license termination and disapproval of that

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2. The Intervenors appear to be of the view that this proceeding is, or was, about "public knowledge of actual site conditions (which knowledge this Board has found to be appropriate in its ruling on the admissibility of contentions and setting of a discovery schedule)." *June 23 Filing* at fourth unnumbered page. What Intervenors refer to, of course, is the results of *implementation* of the Final Status Survey, which this Board not only did *not* "[find] to be appropriate" for this proceeding, but rather expressly and correctly found to be *dehors* the scope of this proceeding, which was limited to the *methodology* of the Final Status Survey. Intervenors cannot be prejudiced in any sense by their failure to obtain via the proceeding something that was never within its scope.

3. It should be obvious that, whatever other action it may take, this Board has no jurisdiction or authority: (i) to prejudge the question of standing in any future proceeding, (ii) to prejudge the admissibility of contentions in any future proceeding; (iii) to dictate to the Commission that it may not make amendments to the substantive or procedural regulations that may be applicable to any future proceeding; or (iv) to order Yankee to file an LTP prior to the time an LTP is required to be filed by the Commission's regulations, all of which are suggested in the *June 23 Filing*.

4. Both of the Intervenors' filings include a number of speculations that the Intervenors ask this Board to accept as fact. While the disputes are not material, Yankee represents to this Board as follows:

a. No schedule for the submission of another LTP has been set, and therefore, it is categorically false to assert that Yankee "will" file within any given time or not before the elapse of any given time. *E.g.*, *June 24 Filing* at 3-4. The decision about filing a new LTP simply requires too many issues that have not even yet started to be assessed for *anyone* (including Yankee) to make such a prediction.

b. It most certainly is *not* true that Yankee "had considerable advance knowledge" that the MARSSIM conversion would be made (*June 23 Fil-*

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plan would be a nugatory act. As a consequence, there is no set of conditions that are less onerous than the alternative and, therefore, acceptable.

ing at third unnumbered page), or that the conversion was made to avoid having to answer interrogatories about site survey implementation data of which, per the Intervenors' speculation, Yankee feared publication. In point of fact, the decision to convert to MARSSIM was made the day before the first of the Board Notifications was sent (on May 13, 1999), and Yankee felt itself obliged to advise the Board and parties of this decision promptly,[2] which it did. But prescinding from everything else, the Intervenors' syllogism is fatally flawed by the fact that this Board has previously (and properly) ruled "implementation" results to be *dehors* the record. Yankee had concluded that it would respond to those interrogatories and document requests (or parts thereof) that sought implementation results with a simple objection—long before any MARSSIM decision was made.

Conclusion

For the reasons previously submitted, the Board should enter an order terminating this proceeding, without prejudice and without conditions.

Respectfully submitted,

Thomas G. Dignan, Jr.
R. K. Gad III
Ropes & Gray
One International Place
Boston, Massachusetts 02110
(617) 951-7000
Attorneys for Yankee Atomic Electric Company

Dated: June 29, 1999.

[2]*See Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-143, 6 AEC 623, 625-26 (1973). In particular, Yankee was concerned that no one continue expending any effort on a matter that had become moot.

CERTIFICATE OF SERVICE

I, Robert K. Gad III, one of the attorneys for Yankee Atomic Electric Company, do hereby certify that on June 29, 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:

Commission:

Licensing Board:

The Hon. Charles Bechhoefer ←*
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S.N.R.C.
Washington, D.C. 20555
FAX: 301-415-5599

The Hon. Thomas D. Murphy ←*
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S.N.R.C.
Washington, D.C. 20555
FAX: 301-415-5599

The Hon. Dr. Thomas S. Elleman ←*
Administrative Judge
704 Davidson Street
Raleigh, North Carolina 27609
FAX: 919-782-7975

Parties:

Jonathan M. Block, Esquire ←*
Post Office Box 566
Putney, VT 05346
Fax: 802-387-2667
Attorney for NECNP

Ms. Deborah B. Katz ←*
Citizens Awareness Network, Inc.
Post Office Box 3023
Charlemont, MA 01339
Fax: 413-339-8768
On Behalf of CAN

Ann P. Hodgdon, Esquire ←*
Marian L. Zobler, Esquire
Office of the General Counsel
U. S. Nuclear Regulatory Commission
Washington, D.C. 20555
FAX: 301-415-3725
Attorneys for the NRC Staff

Mr. Samuel H. Lovejoy ←*
c/o Franklin Regional Council of Governments
425 Main Street
Greenfield, MA 01301
Fax: 413-774-3169
On Behalf of FRCOG

Others:

Office of Commission Appellate Adjudication
U. S. Nuclear Regulatory Commission
Washington, D.C. 20555

Office of the Secretary ←*
U. S. Nuclear Regulatory Commission
Washington, D.C. 20555
FAX: 301-415-1672

R. K. Gad III