July 6, 1999

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
YANKEE ATOMIC ELECTRIC COMPANY	)	Docket No. 50-029-LA
	)	
(Yankee Nuclear Power Station)	)	
	)	

NRC STAFF RESPONSE TO YANKEE ATOMIC ELECTRIC COMPANY'S MOTION TO TERMINATE PROCEEDING

INTRODUCTION

On May 26, 1999, Yankee Atomic Electric Company (Yankee) filed with the Commission "Board Notification (Withdrawal of Application) and Motion to Terminate Proceeding and Dismiss Appeal" ("Motion to Terminate").[1] In response to that filing, on June 7, 1999, New England Coalition on Nuclear Pollution ("NECNP"), on behalf of the consolidated intervenors, itself and Citizens Awareness Network ("CAN"), filed with the Licensing Board "Opposition to Yankee Electric Company's Motion to Terminate and Proposed Form of Order for Expenses, Fees and Responses to Discovery" ("Opposition"). On June 14, 1999, Yankee filed a motion for leave to respond to Intervenors' Opposition ("Leave to Respond"). Also, on June 14, 1999, the Licensing Board issued LBP-99-22, "Memorandum and Order (Requesting Replies to NECNP Response to Termination

[1] In a "Response of Yankee Atomic Electric Company to LBP-99-22," filed June 17, 1999, Yankee states that it intended to file its Motion to Terminate, filed May 26, 1999, with the Licensing Board but because of a drafting error chose the Commission caption.

Motion)," in which the Board invited parties to reply to Intervenors' Opposition and to the response that Yankee filed with the Commission on June 7, 1999, "Yankee's Response to Intervenors' 'Motion in Support of [Yankee's] Motion for Dismissal of Appeal.'"[2] On June 17,1999, Yankee, having already responded to Intervenors' Opposition in its Motion for Leave to Respond, filed "Response of Yankee Atomic Electric Company to LBP-99-22."

For the reasons discussed below, the NRC staff ("Staff") supports Yankee's Motion to Terminate. The Staff also addresses Intervenors' Opposition, Yankee's Motion for Leave to Respond, LBP-99-22 and Yankee's Response to LBP-99-22, all filed before the Licensing Board, as well as two additional pleadings, filed before the Commission: NECNP's "Motion in Support of Yankee Atomic Electric Company's Motion for Dismissal of Appeal," June 5, 1999, and "Yankee's Response to Intervenors' 'Motion in Support of [Yankee's] Motion for Dismissal of Appeal,'" June 7, 1999.[3]

BACKGROUND

On October 23, 1998, the Commission issued CLI-98-21, in which it reversed, in part, LBP-98-12, a Licensing Board memorandum and order. In CLI-98-21, the Commission

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[2] It appears that the Board's "Memorandum and Order" and Yankee's "Leave to Respond," both dated June 14, 1999, crossed in the mail.

[3] The Staff has received copies of three responses to the Board's questions: "Franklin Regional Council of Governments' Response to Board's Request for Answers to Questions and Other Matters," June 22, 1999; "NECNP's Reply to LBP-99-22," June 24, 1999; and "CAN's Reply to Board's Order of June 14, 1999," June 23, 1999. The Staff addresses these filings below. Also, the Staff has received a copy of Yankee's "Motion for Leave to Reply (Intervenors' June 23, 1999, and June 24,1999, Filings)," June 29, 1999. The Staff does not object to the Board's considering Yankee's Reply.

determined, among other things, that NECNP and CAN had standing to intervene. A reconstituted Licensing Board conducted a prehearing conference on January 26-27, 1999, to consider contentions filed by NECNP and CAN. On March 17, 1999, the Licensing Board issued LBP-99-14, in which it admitted four contentions and admitted NECNP and CAN as consolidated intervenors. Yankee filed an appeal of LBP-99-14, which was pending before the Commission at the time Yankee filed its Motion to Terminate. On April 6, 1999, the Licensing Board issued a Notice of Hearing. 64 Fed. Reg. 17689 (April 12, 1999).

Pending before the Licensing Board are NECNP's late-filed contentions based on the Staff's April 1, 1999 Environmental Assessment (EA) on Yankee's proposed License Termination Plan ("LTP"). No responses to the late-filed contentions have been filed as Yankee withdrew its application for a license amendment before responses became due.

On May 13, 1999, Yankee notified the Board of its determination to modify its LTP so as to employ "MARSSIM" (Multi-Agency Radiation Survey and Site Investigation Manual, NUREG-1575) survey methodology in lieu of the NUREG/CR-5849 methodology on which the now-withdrawn LTP is based. Subsequently, on May 26, 1999, Yankee filed before the Commission its "Board Notification (Withdrawal of Application) and Motion to Terminate Proceeding and Dismiss Appeal." NECNP filed before the Commission a "Motion in Support of Yankee Atomic Electric Company's Motion for Dismissal of Appeal" on June 5, 1999, by which NECNP supported Yankee's motion to dismiss the appeal but asked the Commission to dismiss the appeal with prejudice. On June 7, 1999, Yankee filed with the Commission "Yankee's Response to Intervenors' 'Motion in Support of [Yankee's]

Motion for Dismissal of Appeal,'" in which Yankee urged that, because dismissal with prejudice would amount to a determination on the merits, the appeal should be dismissed as moot. The NRC staff filed its response on June 15, 1999, "NRC Staff Response Concerning Yankee Atomic Electric Company's 'Board Notification,'" in which it noted that, on the previous day, the Board had issued an order assuming jurisdiction over the termination of the proceeding and, in those circumstances, the Commission should hold in abeyance any action on Yankee's motion to dismiss the appeal pending Licensing Board action.

DISCUSSION

A. Questions Posed in LBP-99-22

In LBP-99-22, issued June 14, 1999, the Licensing Board assumed jurisdiction over Yankee's Motion to Terminate, filed on May 26, 1999, with the Commission, and asked the parties to address several questions. As noted above, on June 15, 1999, the Staff filed with the Commission a response to Yankee's Motion to Terminate in which it, among other things, addressed Yankee's request that the Commission dismiss the appeal of LBP-99-14 as moot. Taking into consideration NECNP's filing of June 5, 1999,[4] and Yankee's response of June 7, 1999,[5] the Staff suggested that, although the Commission could act on Yankee's request to dismiss the appeal as moot, it might be more appropriate for the Commission to

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[4] In this pleading, NECNP urged the Commission to grant Yankee's motion to dismiss the appeal but to attach prejudice to the dismissal.

[5] Here Yankee opposed the attachment of prejudice to the dismissal of the appeal.

hold in abeyance Yankee's request to dismiss the appeal pending Licensing Board action on the motion to terminate the proceeding before that Board.

One of the questions posed to parties in LBP-99-22 concerns Yankee's opposition to termination with prejudice. At 6. At the time the Board issued LBP-99-22, the only opposition from Yankee was its response to NECNP's motion, filed with the Commission. It was dismissal of the appeal with prejudice, not termination of the Licensing Board proceeding with prejudice, that Yankee opposed. In its Motion for Leave to Respond, filed with this Board,[6] Yankee asserted that since the filing of an LTP is required by the Commission's regulations and that, therefore, withdrawal of the application pursuant to 10 C.F.R. § 2.107(a) cannot be with prejudice. Motion for Leave to Respond at 10 -12.

In LBP-99-22, Licensing Board also requested parties to comment on the impact of a dismissal with prejudice on the Commission's rulings concerning NECNP's and CAN's standing. At 6. Ordinarily, when an appeal is moot, the Commission dismisses the appeal without prejudice and vacates the unreviewed Licensing Board decisions that are before it on appeal. *Louisiana Energy Services, L. P.* (Claiborne Enrichment Center), CLI-98-5, 47 NRC 113 (1998); *Kerr-McGee Chemical Corporation* (West Chicago Rare Earths Facility), CLI-96-2, 43 NRC 13 (1996). No party has asked the Commission to vacate CLI-98-21, the decision in which the Commission determined that NECNP and CAN had the requisite standing to cause a hearing to be held and to intervene concerning Yankee's

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[6] As noted above, this motion was filed on June 14, 1999 before the Board issued LBP-99-22 on that same day.

proposed LTP. Thus, Intervenors will be entitled to whatever benefits that decision confers on them in any future proceeding.[7]

The general rule is that petitioners for intervention in Commission proceedings must demonstrate standing. For representational standing, a group must identify at least one of its members by name and address and demonstrate how that member may be affected (such as by activities on or near the site) and show (preferably by affidavit) that the group is authorized to request a hearing on behalf of the member. *Houston Lighting and Power Co. (South Texas Project, Units 1 & 2)* ALAB-549, 9 NRC 644, 646-47 (1979). However, the Commission has held that under certain circumstances a petitioner who has successfully established standing in one proceeding need not formally reiterate its standing in another related proceeding. *See Consumers Power Company* (Midland Plant, Units 1 and 2), CLI-74-3, 7 AEC 7, 12 (1974) (Recognizing that the proceeding in which standing was at issue was related to prior proceedings pertaining to the licensee's ability to comply with the Commission's quality assurance regulations, the Commission determined that the Sierra Club, under these circumstances, need not reiterate its interest in order to intervene.) *But see Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-92-27, 36 NRC 196, 198 (1992), where a licensing board stated that a petitioner's standing in an earlier proceeding does not automatically grant standing in subsequent proceedings even

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[7] In a "Reply to LBP-99-22," filed June 24, 1999, NECNP takes the position that dismissal of the appeal with prejudice would have no effect on the continued validity of CLI-98-21. The Staff agrees and notes that dismissal of the appeal without prejudice would also have no effect on the validity of CLI-98-21.

if the scope of the earlier and later proceedings is similar, *citing Cleveland Electric Illuminating Co.*(Perry Nuclear Power Plant, Unit 1), LBP-92-4, 35 NRC 14, 125-26 (1992).[8]

B. Intervenors' Opposition

In their Opposition, Intervenors state that they oppose granting Yankee's withdrawal motion unless the Board mitigates the prejudice to Intervenors' interests by imposing certain conditions. Intervenors propose: (1) that Yankee be required to pay all expenses and attorneys' fees; (2) that Yankee be ordered to perform "proper" hydrogeological tests and report the results to the Intervenors and the public; and (3) that Yankee be ordered to answer the interrogatories and provide the documents sought in discovery. Opposition at 1,4. Intervenors request is that the Board impose these conditions on Yankees's withdrawal motion before it allows termination without prejudice. The request assumes that the option of granting the withdrawal motion with prejudice is an option available to the Board in this instance.

Dismissals "without prejudice" signify that no disposition on the merits was made; a dismissal "with prejudice" suggests otherwise. *Philadelphia Electric Co.* (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 973 (1981), *citing Jamison v*

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[8] Yankee notes in its "Response. . .to LBP-99-22," "whether NECNP or CAN, or any other person, for that matter, can or does demonstrate standing to participate in any future proceeding will depend upon the nature of that proceeding, the then-current state of the law on standing, and the nature of the submission made by the putative participant at the time." In their Opposition, Intervenors state that they will need to demonstrate standing in any future proceeding on an LTP submitted by Yankee. At 2, n. 2. The staff does not disagree with either of these statements.

Miracle Mile Rambler, Inc., 536 F. 2d 560, 564 (3d Cir. 1976); 5 Moore's Federal Practice # 41.05 [2] at 41-75 (2d ed. 1981). In the captioned proceeding, there has been no disposition on the merits; therefore, dismissal should not be with prejudice. Beyond that, as Yankee has pointed out in its Leave to Respond (at 10-12), dismissal cannot be with prejudice in the ordinary sense of the term, as the Commission's regulations in 10 C.F.R. § 50.82 require Yankee to file a proposed License Termination Plan as a license amendment application. Furthermore, dismissals for mootness are ordinarily without prejudice. *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-5, 47 NRC 113 (1998); *Kerr-McGee Chemical Corporation* (West Chicago Rare Earths Facility), CLI-96-2, 43 NRC 13 (1996).

Intervenors offer a number of federal court decisions under Federal Rule of Civil Procedure 41 (a)(2) in support of their proposed conditions. However, none of these decisions helps their cause, as these decisions concern the alternative of dismissal without prejudice but with conditions to assure that restarting the action is not unfair to defendants. In the Rule 41 (a) (2) decisions cited, the alternative to dismissal without prejudice but with conditions is that the trial continues.[9] That is not the case here.

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[9] *See, e.g., Holbrook v. Anderson Corp.,* 130 F.R.D. 516 (1990), cited by Intervenors at 11. In *Holbrook*, the court denied plaintiff's motion for dismissal without prejudice, where the plaintiff wanted to bring the same action against a window manufacturer for injury to a minor, and ordered the matter to proceed to trial as scheduled. Such a result is not an option in the instant proceeding where the Board may not refuse to dismiss the proceeding but may prescribe appropriate conditions on the termination.

It is not clear whether a presiding officer in an NRC proceeding may refuse to terminate a proceeding where termination pursuant to 10 C.F.R. § 2.107 (a) is sought. In *Sequoyah Fuels Corporation*, CLI-95-2, 41 NRC 179 (1995), the Commission considered an appeal from a Presiding Officer's decision permitting the licensee to withdraw its renewal request for its nuclear fuel processing facility without conditions and terminating the proceeding. The Commission affirmed the Presiding Officer's decision, leaving open the question under what circumstances a presiding officer might deny a request to withdraw an application. The Commission did not foreclose the possibility that, in limited instances, denial might be appropriate where, for example, a materials licensee sought to withdraw a license renewal application but, in fact, continued to conduct some production activity. 41 NRC at 192. The circumstances where a presiding officer might refuse to withdraw an application are not present here, where Yankee's reactor operating license does not permit it to operate the reactor and where refusal to terminate the proceeding would have no effect on the activities Yankee is authorized to conduct at its Yankee Rowe site.

Thus, for the reasons discussed, this Licensing Board should neither dismiss with prejudice nor place conditions on dismissal without prejudice; it should simply terminate the proceeding. All that 10 C.F.R. § 2.107 (a) empowers a presiding officer to do is to prescribe conditions where appropriate. As discussed below, no appropriate conditions have been proposed in this proceeding.

1. Attorneys' Fees and Other Costs

As stated above, Intervenors oppose granting Yankee's withdrawal motion unless the Board imposes conditions, the first of which is that Yankee be required to pay Intervenors' costs and attorneys' fees.

The Commission's regulations provide that, after a Notice of Hearing, withdrawal of an application shall be on such terms as the presiding officer may prescribe. 10 C.F.R. § 2.107 (a). Intervenors argue that because 10 C.F.R. § 2.107(a) tracks Federal Rule of Civil Procedure 41 (a)(2), Rule 41 (a)(2) cases should be followed by NRC licensing boards in prescribing 10 C.F.R. § 2.107 (a) conditions of termination. Opposition at 8-12. Intervenors cite a number of cases where the court imposed on a plaintiff the payment of defendant's costs as a condition of dismissal without prejudice. *Id.* However, those cases concern conditions designed to protect defendants from the legal harm of an unconditional

dismissal without prejudice.[10] Such cases are inapposite here where Intervenors have not suffered legal harm from Yankee's withdrawal of its application.

When Yankee files its application using the MARSSIM methodology, and as Yankee points out, it must file such an application,[11] interested persons will have an opportunity to intervene and request a hearing, the same opportunity they would have had if Intervenors had prevailed in the proceeding Yankee now seeks to terminate. The possibility of another hearing does not justify the imposition of conditions on a withdrawal without prejudice. The

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[10] For example, Intervenors rely on *LeBlang Motors, Ltd. v Subaru of America, Inc.* 148 F. 3d 680 (1998). In *LeBlang*, appellant LeBlang explicitly agreed to pay costs of appellee Subaru's trial preparation in an action regarding alleged misrepresentation about planning volume as a condition of voluntary dismissal, which LeBlang had sought nine days prior to trial, and on appeal disputed the amount of the fees due to Subaru. The court of appeals affirmed the trial court, finding the amount due to Subaru was within the district court's discretion.

Intervenors also cite *American Cyanimid Co. v. McGhee*, 317 F 2d 295, 298 (5th Cir. 1963) for the proposition that awarding costs and attorneys' fees is within a tribunal's discretion. However such was not the outcome in *American Cyanimid,* where on defendant's appeal in a product liability case the only issue was whether a voluntary dismissal by order of court after an initial voluntary dismissal of the same suit by notice in a state court barred the filing of a third suit in federal court under the provisions of Rule 41 (a). In the district court, plaintiff had moved for dismissal under Rule 41 (a)(2), and the court had dismissed without prejudice conditional on plaintiff's payment of defendant's costs and reasonable attorney's fees. On defendant's appeal, the court upheld the trial court's determination that plaintiff could bring the action a third time on the payment of defendant's expenses in the second action.

As the Licensing Board pointed out in *Duke Power Co.*(Perkins Nuclear Station, Units 1, 2 and 3), LBP-82-81, 16 NRC 1128 (1982), while the cases under Rule 41 (a)(2) are helpful, they do not completely cover issues involved here. The Board in *Perkins* also noted that Duke Power did not seek out the intervenors as adversaries, nor did it sue for a judgment against them. 16 NRC at 1136.

[11] Yankee has a wide range of options as to when to file. Motion for Leave to Respond at 3-4, 12.

possibility of future litigation with its expenses and uncertainties is precisely the consequence of *any* dismissal without prejudice. *Puerto Rico Electric Power Authority* (North Coast Nuclear Plant, Unit 1, (ALAB-662, 14 NRC 1125 at 1135 (1982). The Appeal Board in *North Coast* left open the question of whether withdrawal of an application upon payment of the opposing parties' expenses might be within the Commission's powers and otherwise appropriate where the expenses incurred were substantial and intervenors developed information that cast doubt on the merits of the application. *North Coast*, 14 NRC at 1135, n. 11. In any event, that situation does not exist in the captioned proceeding. Even if Intervenors have incurred substantial costs, no discovery was ever had and Intervenors developed no information of any kind, much less information casting doubt on the merits of the application.

2. Intervenors' Request that the Board Order Yankee to Perform Hydrological Tests as a Condition of Withdrawal Without Prejudice

Intervenors assert that the Board owes a duty to the public to order Yankee to address each of the matters raised in the affidavit of Intervenors' expert hydrogeologist, Dr. Ross, filed in support of Intervenors' late-filed NEPA contentions, submitted on May 17, 1999. Opposition at 13. Further, Intervenors ask the Board to direct Yankee to provide Intervenors and the Local Public Document Room with copies of the scientific and technical reports supporting Yankee's statement that it has taken adequate steps to remedy the problems Dr. Ross described. *Id.*

There are many problems with Intervenors' request regarding this matter, not the least of which is that Yankee has withdrawn its application for approval of its LTP as a license amendment that would allow Yankee to implement the LTP as the document controlling Yankee's final radiation survey. Thus, the application is moot; Yankee has abandoned the LTP that is the subject of the captioned proceeding.

Beyond that, Intervenors' late-filed NEPA contentions, which were never answered by either Yankee or the Staff, much less admitted by the Board, were based on the Staff's environmental assessment. Further, not having admitted any of Intervenors' environmental contentions, the Board has never ordered discovery on those contentions. Indeed, the contentions relate to a Staff document and any discovery concerning them, had they been admitted, would have been directed to the Staff. Thus, even if the application were not moot, there is no basis for the Board to order Yankee to perform hydrological tests, the relief Intervenors claim they are due because of Yankee's withdrawal of its application.

3. Intervenors' Request that the Board Order Yankee to Produce the Discovery Intervenors Have Sought

Intervenors ask the Board to order Yankee to produce, as a condition of the Board's allowing Yankee to withdraw pursuant to 10 C.F.R. § 2.107 (a), the discovery Intervenors have sought concerning the four contentions admitted by the Board. Opposition at 4.[12]

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[12] In "CAN's Reply to Board's Order of June 14, 1999," CAN reiterates its request that the Board order Yankee to answer Intervenors' discovery, notwithstanding Yankee's request to withdraw. At [unnumbered] page 3. As noted below, the Commission's regulations in 10 C.F.R. § 2.740 (b)(1) limit discovery to matters in controversy. Here, the (continued...)

Intervenors state that the material will be useful in providing some reassurance to the Intervenors and the public concerning the nature and extent of contamination at the Yankee Rowe site and satisfy the need to redress the harm that dissolution of the proceeding will cause the public. As stated above with regard to Intervenors' request that the Board order hydrogeological studies, Yankee's current application is moot; the LTP as proposed is abandoned. There is nothing in controversy. Discovery under the Commission's regulations is limited to matters in controversy. 10 C.F.R. § 2.740 (b)(1). Further, Intervenors have not suffered legal harm; they have achieved exactly what they represented they were seeking, a situation where Yankee will need to submit a new LTP. As regards Intervenors' representations regarding Region I of the EPA and the Franklin Regional Council of Government Planning Board's serious interest in the resolution of the issues of this case, Opposition at 12, consolidated Intervenors NECNP and CAN do not represent either of those entities. [13] Intervenors state that the Board would be disserving the public if it allowed

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[12](...continued)
LTP application is moot and discovery regarding it would not serve the purpose of the Commission's regulations regarding discovery.

[13] On June 22, 1999, Franklin Regional Council of Governments ("FRCOG") filed a "Response to Board's Request for Answers to Questions and Other Matters" in which it raised a number of concerns relating to alleged offsite leakage and alleged offsite contamination. None of these matters was at issue in this proceeding, which concerned the adequacy of Yankee's LTP to satisfy the Commission's regulations concerning license termination.

Also, FRCOG responds to the Board's question concerning standing, taking the position that Intervenors will be forced to be subjected to a second proceeding when Yankee files an LTP at some time in the future. As noted above, NECNP and CAN are not in the (continued...)

Yankee to withdraw without answering the questions and concerns raised at the limited appearance session conducted by the Board on January 26, 1999, in Greenfield, MA. *Id.* The public's concerns expressed in limited appearance statements and Intervenors' discovery requests are two different matters. As noted above, discovery is limited to matters in controversy. 10 C.F.R. § 2.740 (b)(1). It is also limited to parties to a proceeding. *Id.* Appearances pursuant to 10 C.F.R. § 2.715 (a) are limited to persons who are not parties.

CONCLUSION

For the reasons discussed, the Licensing Board should grant Yankee's motion to withdraw its application and terminate the proceeding. The termination should be without prejudice and without conditions.

Respectfully submitted,

Ann P. Hodgdon

Ann P. Hodgdon
Counsel for NRC Staff

Dated at Rockville, Maryland
this 6th day of July 1999

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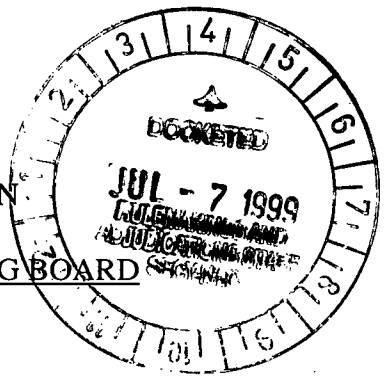
[13](...continued)
position of defendants in civil suits. They were not forced into this proceeding. Nor will they be forced into any proceeding that might be held on a future application filed by Yankee.



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In the Matter of	)	
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YANKEE ATOMIC ELECTRIC COMPANY	)	Docket No. 50-029-LA
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(Yankee Nuclear Power Station)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO YANKEE ATOMIC ELECTRIC COMPANY'S MOTION TO TERMINATE PROCEEDING" 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 6th day of July, 1999:

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