

April 9, 1999

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'99 APR -9 P4:03

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

OFFICE OF THE
GENERAL COUNSEL
ADJUTANT GENERAL

NRC STAFF RESPONSE TO YANKEE ATOMIC ELECTRIC COMPANY'S
OBJECTION TO AND MOTION FOR RECONSIDERATION OF
A PORTION OF PREHEARING CONFERENCE ORDER

INTRODUCTION

On March 29, 1999, Yankee Atomic Electric Company (YAEC) filed "Objection to and Motion of Yankee Atomic Electric Company for Reconsideration of a Portion of Prehearing Conference Order," in which YAEC objected to and sought reconsideration of as much of LBP-99-14, the Atomic Safety and Licensing Board's (Board's) Prehearing Conference Order (Ruling on Contentions), dated March 17, 1999, as admitted the contention restated and renumbered by the Board as Contention 4. As discussed below, the NRC staff supports YAEC's motion and urges the Board to grant YAEC the relief it requests.

BACKGROUND

Insofar as it is relevant here, the background underlying YAEC's motion is as follows.

Pursuant to a Board Order of November 30, 1998, New England Coalition on Nuclear Pollution (NECNP) and Citizens Awareness Network (CAN) filed contentions on January 2, 1999, and January 5, 1999, respectively. NECNP and CAN each filed eight contentions.

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On January 20, 1999, YAEC and the NRC staff filed responses to petitioners' contentions.

The Board conducted a prehearing conference on January 25-26, 1999, and, on March 17, 1999, issued LBP-99-14, its prehearing conference order, in which it did not admit any of NECNP or CAN's contentions as submitted but 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.

As noted above, on March 29, 1999, YAEC 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. On April 1, 1999, YAEC also appealed LBP-99-14 to the Commission pursuant to 10 C.F.R. § 2.714a.

DISCUSSION

As admitted by the Board, the contention at issue, Contention 4, reads as follows:

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

LBP-99-14, slip op. at 41. Although Contention 4 as written is very broad, the Board explains its rationale for Contention 4 at pages 17-20 of LBP-99-14, and concludes that Contention 4, if proved, would require the LTP to be amended to define the average member of the critical group to be a gardener.

A. YAEC's proposal need not satisfy regulations that are not applicable to its site.

YAEC objects to the Board's admission of Contention 4 insofar as it would impose a regulatory requirement not applicable to the Yankee Rowe site, namely 10 C.F.R. § 20.1402. Section 20.1402 provides that a site will be acceptable for unrestricted use if the residual radioactivity that is distinguishable from background radiation results in a total effective dose equivalent (TEDE) to the average member of the critical group that does not exceed 25 mrem per year. YAEC correctly asserts that its site is exempt from this regulatory requirement by virtue of its being governed by 10 C.F.R. § 20.1401(b), that is, by Yankee Rowe's being a plant governed by the criteria in the Site Decommissioning Management Plan (SDMP) Action Plan. Motion at 3. YAEC notes that LBP-99-14 acknowledges as much. Motion at 3, *citing* LBP-99-14 at 17.

The Staff agrees with YAEC. The regulations in 10 C.F.R. § 20.1401(b) exempt the Yankee Rowe site from "the criteria in this subpart," i.e., Subpart E of Part 20. Any doubt about the applicability of 10 C.F.R. § 20.1402 to the Yankee Rowe site can be resolved by referring to the Statement of Consideration on the adoption of the final rule, Radiological Criteria for License Termination, 62 Fed. Reg. 39058 (July 21, 1997) at 39080, concerning "Grandfathering Sites with Previously Approved Plans (Proposed Rule 20.1401 (b))":

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). . . . The final rule has retained the grandfathering provision. However, it has been modified to include facilities whose plans are in the final stages of decommissioning plan preparation and decision.

YAEC argues further that, in stating that "Because the LTP . . . commits to the 15 mrem/yr [TEDE] dose criteri[on] 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),*" Motion at 4, *citing* LBP-99-14 at 17-18

(emphasis added by YAEC), the Board is in effect permitting a challenge to a voluntary undertaking. YAEC's voluntary commitment to a dose of 15 mrem/yr TEDE or less to the average member of the critical group should not cause this commitment to be subject to the standards of 10 C.F.R. § 20.1402.

YAEC also argues that compliance with the Commission's regulations, i.e., the SDMP Action Plan requirements, is a sufficient basis for granting a license and that the Board's admission of contentions must be limited to challenges to YAEC's compliance with applicable Commission regulations. Motion at 4-5, *citing Statement of Policy: Further Commission Guidance for Power Reactor Operating Licenses*, CLI-81-16, 14 NRC 14, 17 (1980)) (Commissioners Ahearne and Hendrie, Concurring); *Public Service Company of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33,42-43 (1977); *Maine Yankee Atomic Power Company* (Maine Yankee Atomic Power Station), ALAB-161, 6 AEC 1003, 1005-10 (1973), *aff'd*, *Citizens for Safe Power v. NRC*, 524 F.2d 1291 (D.C. Cir. 1975). The Staff agrees that in order for YAEC to be granted the license amendment it now seeks its application must meet applicable regulations. Applicable regulations do not include 10 C.F.R. § 20.1402 and the Staff can find no support for the proposition that, in offering to do more than is required, YAEC has become subject to regulations that are not otherwise applicable.

B. Contention 4 impermissibly attacks 10 C.F.R. § 20.1402.

YAEC argues that, even if 10 C.F.R. § 20.1402 were applicable, Contention 4 as restated and admitted by the Board challenges 10 C.F.R. § 20.1402, in that the regulation is based on a dose to the "average member of the critical group" while consolidated Contention 4 is based on the dose to "one particular individual with non-average parameters." Motion at 7 (emphasis in the original). This approach was specifically rejected by the Commission in its Statement of Consideration on the

adoption of Subpart E to Part 20. *See* 62 Fed. Reg. 39058 at 39067-68, “Average Member of the Critical Group.” It was, also, as pointed out by YAEC, rejected by the Board itself in rejecting NECNP’s contention asserting that YAEC should have considered the dose to children. *See* Motion at 7, *citing* LBP-99-14 at 18. The Board should reconsider its determination to accept Contention 4 and reject it as constituting a challenge to a regulation. A challenge to a regulation may only be attempted pursuant to 10 C.F.R. § 2.758.

C. Contention 4 lacks basis.

YAEC argues that Contention 4 is not supported by the type of basis 10 C.F.R. § 2.714 requires. Motion at 8. YAEC points out that Contention 4 appears to rely for its basis on the assertion made by CAN, in oral argument, that the residential scenario adopted by YAEC in its LTP “has no relevance to our community.” Such an assertion, without more, falls far short of the requirement for specificity as set forth in 10 C.F.R. § 2.714(b)(2)(ii) (which requires “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 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”). The Staff agrees that Contention 4 does not satisfy the specificity standards in 10 C.F.R. § 2.714(b) and that the Board should on reconsideration reject Contention 4.

D. Contention 4 is impermissibly vague.

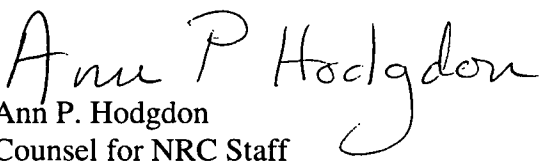
YAEC describes Contention 4 as “hopelessly vague” in failing to identify the specific issue of law or fact to be raised or controverted that 10 C.F.R. § 2.714(b)(2) requires. Motion at 9. The Staff agrees. The Statement of Consideration on the adoption of the final rule on Radiological Criteria for License Termination, 62 Fed. Reg. 39058, makes clear that the dose limit is to the

average member of the critical group within the assumptions of a particular occupancy scenario. At 39067-68. What the Board has done is to allow a challenge to YAEC's residential farmer scenario without providing the necessary assumptions underlying the gardener scenario. For example, Contention 4 does not supply the number of hours the postulated gardener engages in the activities that define his gardening role, much less information concerning whether and how those hours add up to a greater dose than that incurred by the average member of the residential farmer group. In this context, a lack of numbers is a lack of specificity. Without these numbers, YAEC would be unable to calculate a dose based on the scenario. Thus, as YAEC correctly argues, there is no way it can prove or disprove the contention at trial. The Staff agrees with YAEC that Contention 4 is so vague as not to provide an opposing party with notice of what it must defend against. On reconsideration the Board should reject Contention 4 for this reason.

CONCLUSION

As discussed above, the Staff agrees with YAEC's arguments supporting its motion for reconsideration. The Board should grant the motion.

Respectfully submitted,


Ann P. Hodgdon
Counsel for NRC Staff

Dated at Rockville, Maryland
this 9th day of April, 1999.

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OFFICE OF THE
RULEMAKING
ADJUDICATION STAFF

Docket No. 50-029-LA

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO YANKEE ATOMIC ELECTRIC COMPANY'S OBJECTION TO AND MOTION FOR RECONSIDERATION OF A PORTION OF PREHEARING CONFERENCE ORDER" in the above-captioned proceeding have been served on the following by hand-delivery, or by facsimile transmission, as indicated by an asterisk, or through deposit in the Nuclear Regulatory Commission's internal mail system, as indicated by a double asterisk, this 9th day of April, 1999:

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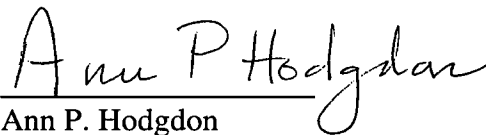
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