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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
Before the
ATOMIC SAFETY AND LICENSING BOARD

Administrative Judges:
Charles Bechhoefer, Chairman
Dr. Thomas S. Elleman
Thomas D. Murphy

In the Matter of

YANKEE ATOMIC ELECTRIC COMPANY
(Yankee Nuclear Power Station)

License Termination Plan

Docket No. 50-029-LA-R

ASLBP No. 99-754-01-LA-R

June 24, 1999

NECNP'S REPLY TO LBP-99-22

On June 14, 1999, the Atomic Safety and Licensing Board Panel for this proceeding directed the parties to respond to issues raised by recent filings in the case. LBP 99-22 at 6. Pursuant to the Order, NECNP hereby replies to the questions and issues raised therein and related matters. LBP-99-22 requests our response to YAEC's Opposition to Termination with Prejudice (filed with both the Panel and Commission on May 26, 1999). In pertinent part, the Order asks the parties to address the impact of a dismissal with prejudice on the Commission's rulings concerning NECNP's and CAN's standing to participate, particularly with respect to a proceeding involving a future LTP submitted by or on behalf of YAEC. *Id.* at 6. Because YAEC took the opportunity to

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respond twice¹ to our Opposition (of June 7, 1999), we have taken the liberty of providing the panel with a few comments concerning YAEC's June 14, 1999 response.²

We ask the Panel to allow these few additional comments made in the course of answering its questions.

¹ YAEC replied twice to the Intervenor's Opposition and Proposed Order (June 7, 1999). On June 14, 1999, this Panel issued LBP 99-22. On that day, YAEC faxed a reply. Receiving LBP-99-22, YAEC interpreted it to permit further reply in the context of answering LBP-99-22. On June 17th YAEC replied again. Several times during the course of YAEC's June 14th filing, YAEC states that it may disobey orders of this Panel if it does not agree with them. E.g. "The Intervenor's request is entirely impractical, since Yankee will not accept any of the proposed 'conditions'[]" *Id.* at 6; "What happens if the Board imposes conditions on a termination and Yankee doesn't accept them?" *Id.* at 13, n16; "Finally, as is pointed out in prior context, Yankee would not accept such a condition." *Id.* at 19. Plainly, YAEC is threatening to disobey orders of this Panel with which it disagrees. We trust the Panel will take appropriate action in response to YAEC's blatant attempt to coerce a decision by threatening disobedience to any decision of the Panel in this regard that is not to YAEC's liking.

² There are many points in YAEC's June 14, 1999, filing with this Panel which NECNP could respond to at length, if the Panel would find such response helpful. For example, YAEC consistently misstates the nature of our reliance upon an analogy to the Federal Civil Rules, as well as misstating the basis of our citations to cases such as *Stevenson* and *LeBlang*. NECNP believes that if the Panel carefully reads our submission and refers to the cases we have cited, YAEC's deliberate distortions of the propositions for which we have cited the cases and referred to the rule will be dispelled. The same applies to YAEC's feigned incredulity at our citation to a 1928 opinion of Judge Learned Hand as not referring to the Federal Civil Rules. As YAEC is well aware, however, since it quotes the case, the Board in *Sequoyah Fuels* (also cited in our filing) refers to what it viewed as the narrow, common law rule concerning withdrawal of litigation. See *Sequoyah Fuels Corporation*, LBP-93-25, 38 NRC 304, 315-16 (1993). Thus, the appropriateness of a pre-Federal Rules citation by an esteemed Federal Jurist with a broader view than the Atomic Safety and Licensing Board panel in *Sequoyah Fuels*. YAEC's grossest distortion is the imputation that NECNP views dismissal with prejudice as a remedy available to the Panel in this case. We do not state so. We do not believe so. If we had, we would have stated so. Dismissal with prejudice may be appropriate as a *sanction* (e.g., as we suggested to the Commission, under the prejudicial circumstances described in our motion to the Commission). The purpose of such a sanction is to prevent recurrent repellant circumstances. For this Panel, however, the sole available remedy (if it finds that the Intervenor's have been prejudiced by YAEC's withdrawal of the LTP application) is the imposition of conditions, fees, and expenses. The fact is, unless NRC regulations change, YAEC must re-file and get Commission approval of an LTP in order to terminate its Part 50 license. The LTP is unlike a construction permit case. There, dismissal with prejudice could be used to prevent reapplication for use of a particular (inappropriate) construction site. Hence, nowhere in the Opposition do we suggest dismissal with prejudice as a remedy in this case. The sole remedy is imposition of conditions, including attorneys' fees and expenses.

NECNP believes that this Panel can (and will) find that we have correctly stated the facts and law in our Opposition and Proposed Order. If the Panel requests a full reply to YAEC's June 14, 1999, filing, NECNP will provide one.

NECNP takes the position that the Commission's dismissal of YAEC's appeal with prejudice has no effect upon the continued validity of the Commission's standing decision in CLI-98-21, 48 NRC 165 (1998). NECNP also contends, however, that the decision merely provides a basis to argue for standing in any subsequent LTP proceeding. The only exception to that rule would arise if this Panel maintained jurisdiction over the LTP (or orders some other kind of like special relief). Without such extraordinary measures, NECNP and CAN (and any other future would-be intervenor) will be required to demonstrate standing to participate in the next LTP proceeding.

Between now and YAEC's next LTP application, the world will change. In the ten or twenty years YAEC may wait to submit another plan, YAEC, NECNP, CAN, FRCOG-PB -- even the U.S. Nuclear Regulatory Commission -- may cease to be. It is also likely that harms connected with the Yankee Rowe site will change. So, too, may the residences of members of CAN and NECNP (who may decide to move away from the reactor site rather than live with the continued uncertainties regarding the extent of radioactive contamination of the site and off-site migration of such contamination). Thus, it is not reasonable to presume the standing of current interested persons in the next LTP proceeding. Rather, this Panel could preserve standing through an order maintaining party status and jurisdiction over the revised LTP. Even that avenue is impractical unless YAEC agrees to submit the new LTP within a reasonable time (e.g., twenty four (24) months). As this Panel knows, and as YAEC states in its Motion to Terminate (May 26, 1999), YAEC does not intend to submit a new LTP for at least a

decade. YAEC also implies that it may not submit the next LTP until sometime around 2019 -- and that is twenty (20) years away; YAEC even suggests that it could simply let its license expire in 2052! YAEC's Reply to Intervenor's Opposition (June 14, 1999). That is why, absent this Panel's imposition of conditions (including attorneys' fees and expenses), the Intervenor in this case suffer legal prejudice by YAEC's withdrawal of the application.

Plainly, this is not a case in which, within a reasonable period of time, there will be a trial on the merits of issues identical to those now before this Panel. Quite the opposite is true. YAEC must issue a new LTP. It will be based upon a different, novel methodology. YAEC will submit it sometime in the next 20 years. In this regard, it is important for this Panel to recall that the Commission limited admissible contentions in this matter to those concerning YAEC's LTP methodology. Thus, in this case, revision of the methodology completely changes the entire case. It necessitates that in the next LTP approval process, any would-be intervenor will have to submit entirely new contentions. This state of affairs negates all of the Intervenor's efforts to date.

There can hardly be greater legal prejudice.

Yet, this prejudice is further compounded by the fact that until there is another LTP, the legitimate and serious issues interested parties raised concerning the nature and extent of the radioactive contamination of the Yankee Rowe site and local environment will remain unanswered. This will mean nagging uncertainty not only for the Intervenor and other interested persons, but for thousands of people throughout Franklin County,

Massachusetts, and nearby Vermont. This is not a question of getting a "prize" as YAEC cynically suggests, it is a question of being given a chance to find some peace of mind and assure quiet enjoyment of one's property and the natural environment.'

The fact is, however, in all likelihood under the circumstances of this case, there will be no second chance for the Intervenors.

This Panel's imposition of fees, costs, and the conditions is the only way to even begin to redress the legal prejudice and genuine harm the public interest and the Intervenors have and will suffer as a result of YAEC's actions.

That is why this Panel should grant the relief Intervenors have requested.

Respectfully submitted:

NEW ENGLAND COALITION ON NUCLEAR POLLUTION

BY: 

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Dated: June 24, 1999

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Certificate of Service

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I, Jonathan M. Block, attorney for New England Coalition on Nuclear Pollution [NECNP], do hereby certify that on June 24, 1999, I served NECNP's "Reply To LBP-99-22" upon parties and others listed below by United States Postal Service, pre-paid First Class mail:

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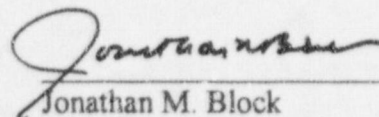
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