**United States of America**
before the
**Nuclear Regulatory Commission**

In the Matter of

YANKEE ATOMIC ELECTRIC COMPANY

(Yankee Nuclear Power Station)

Docket No. 50-029-LA

ON APPEAL UNDER 10 C.F.R. § 2.714A
BY FRANKLIN REGIONAL PLANNING BOARD FROM A
MEMORANDUM AND ORDER OF THE ATOMIC SAFETY AND LICENSING BOARD
DENYING STANDING TO INTERVENE

# BRIEF OF THE LICENSEE YANKEE ATOMIC ELECTRIC COMPANY

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U.S. NUCLEAR REGULATORY COMMISSION
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1. **Introduction.**

This proceeding involves the application of Yankee Atomic Electric Company ("Yankee") for approval of the License Termination Plan ("LTP") for Yankee Nuclear Power Station ("YNPS"), a facility in decommissioning and which already has a Decommissioning Plan approved under a prior version of 10 C.F.R. § 50.82. *See* 10 C.F.R. § 50.82, as it read prior to 61 Fed. Reg. 39,279 (July 29, 1996).

"Franklin Regional Planning Board" ("Planning Board"), acting through its Chairman, sought:

- Intervention, as a full party, as a matter of right. The Licensing Board denied this request, and the Planning Board assigns a number of supposed errors with respect to this ruling.

- Intervention, as a full party, as a matter of discretion. The Licensing Board denied this request, and the Planning Board does not address it in its appeal brief (and has therefore waived the point).[1]

- "Interested state" status pursuant to 10 C.F.R. § 2.715(c). The Licensing Board deemed this request moot on the failure of any other party to obtain a hearing, and the Planning Board assigns no error with respect to this ruling (and has therefore waived the point).

2. **This Appeal is Untimely and Should be Dismissed as Such.** The Planning Board's appeal purports to lie under 10 C.F.R. § 2.714a, which provides that

> "[A]n order of [the ASLB] designated to rule on petitions for leave to intervene and/or requests for hearing may be appealed, in accordance with the provisions of this section, to the Commission within ten (10) days after service of the order."

10 C.F.R. § 2.714a(a). LBP-98-12 was served on the Planning Board on June 12, 1998, by facsimile, followed by mailing of a paper copy of the same decision. The Planning Board's notice of appeal and brief were therefore required to be filed and served on or

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[1] *Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Units 1 and 2), ALAB-739, 18 NRC 335, 338 n.4 (1983).

before June 22, 1998. By June 29th, the date on which the Planning Board served its "Brief to Support Appeal," this deadline had passed several days earlier.[2]

The Planning Board may be relying upon the "extra time" provision of 10 C.F.R. § 2.710.[3] The purpose of this rule is to take into account the time between mailing and receipt, so that a party's time for action is not running while the party has no notice of the event to which it is permitted or obliged to respond. Neither by its terms nor by its logic does § 2.710 apply where the predicate paper was served by fax. The Planning Board's appeal is therefore untimely and it should be dismissed on that ground.[4]

3. **The Planning Board's Petition for Leave to Intervene was Untimely Before the Licensing Board, and Its Denial Should be Affirmed on that Separate Ground.** Though the Licensing Board did not address the point, the Planning Board's petition for leave to intervene in this matter was not filed within the time provided in the Notice of Opportunity for a Hearing, and the Planning Board made no effort to satisfy the "late-filed" criteria. The Licensing Board should, therefore, have denied the Planning Board's petition on timeliness grounds, and the Commission should affirm the Licensing Board's decision on that ground.[5]

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[2]The Planning Board has *never* filed or served a "notice of appeal." *See* 10 C.F.R. § 2.714a(a): "The appeal shall be asserted by the filing of a notice of appeal and accompanying supporting brief."

[3]"Whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper upon him or her and the notice or paper is served upon by mail, five (5) days shall be added to the prescribed period."

[4]While service by fax is not specifically enumerated in 10 C.F.R. § 2.712(c), it is specifically recognized as an accepted means of servcie in § 2.712(d)(1).

[5]This Commission adheres to the federal "any ground in support of affirmance" rule, under which the prevailing party is free to urge any ground in defending the result, including grounds rejected by the Licensing Board. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-832, 23 NRC 135, 141 (1986); *Commonwealth Edison Co.* (Byron Nuclear Power Station, Units 1 and 2), ALAB-793, 20 NRC 1591, 1597 n.3 (1984); *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 357 (1975). *Accord, Public Service Company of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 202 (1978); *Public Service Company of Oklahoma* (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 789 (1979), *vacated in part on other grounds*, CLI-80-8, 11 NRC 433 (1980).

On January 28, 1998, the Commission published a notice of opportunity for hearing under 10 C.F.R. § 2.105 in respect of the approval of the LTP. 63 Fed. Reg. 4308, 4328. That notice gave 30 days for the filing of requests for a hearing and petitions to intervene.

The Planning Board's first filing in response to the Notice of Opportunity for Hearing was dated February 26, 1998. That pleading was obscure as to the relief sought by the Planning Board. In its March 25, 1998 filing, however, the Planning Board declared that it had *not* previously petitioned for leave to intervene:

> "A review of our filing with the Nuclear Regulatory Commission ('NRC') will *clearly demonstrate* that the FRPB *never requested* intervenor status in the proceeding."[6]

Then, in its April 6, 1998 "amendment," the Planning Board changed its mind. "Amendment to Franklin Regional Planning Board Request for Hearing" (4/6/98) at 6: "The FRPB seeks formally to intervene in the above entitled case." Given that its prior filings were not—indeed, "clearly" not—a petition for leave to intervene, its April 6th filing was necessarily the Planning Board's *first* petition to intervene, and that first petition to intervene came too late. That is to say: prior to the running of the time established in the Federal Register notice for petitions to appeal, in its own words "the FRPB *never requested* intervenor status in the proceeding." The Planning Board made no effort to demonstrate a case for late-filed intervention under 10 C.F.R. § 2.714(a)(1)—nor upon the face of things was there any conceivable basis on which a

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[6] *Planning Board 3/25 Filing* at 2 (emphases added). In the same pleading, the Planning Board declared (i) that it did not intend to file contentions, (ii) that it nonetheless did request a hearing, and (iii) that it sought status as an "interested state" under 10 C.F.R. § 2.715(c).

"good cause" finding might be made.[7] Therefore, insofar as the Planning Board sought intervention as a party, its request was required to be denied as untimely.[8]

4. **The Licensing Board's Treatment of the Councilman Letter Did Not Prejudice the Planning Board.** In seeking intervention as a full party, obliged to satisfy the Commission's "standing" requirements, the Planning Board made no effort to demonstrate any potential injury to itself or any property it owned.[9] Rather, the Planning Board sought to leverage "standing" based on its status as some sort of a governmental body. The Planning Board elected, however, to furnish the Licensing Board with no legal authority for its existence, function, powers or responsibilities—all of which are questions of state law. *Public Service Company of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-862, 25 NRC 144 (1987). Yankee, on the other hand, furnished the Board with not only the citation, but also the text, of the

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[7]"Good cause" for not having made a timely showing is the most important of the late-filed criteria under § 2.714(a)(1), *e.g.*, *Virginia Electric & Power Co.* (North Anna Station, Units 1 and 2), ALAB-289, 2 NRC 395, 398 (1975), and the burden is on the petitioner to satisfy the standards for late intervention. *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2&3), ALAB-615, 12 NRC 350, 352 (1980). Almost by definition, a conscious decision not to intervene, later reconsidered, can never amount to good cause.

[8]*See Duke Power Company* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045 (1983), *rev'g in part* ALAB-687, 16 NRC 460 (1982) (the five factors for untimely filings *must* be satisfied or the filing excluded). While it is true that the Licensing Board granted leave for "amendments" to petitions, in this context "amendment" must mean leave to improve what was at least denominated and intended at the time to be a petition to intervene (however deficient the original pleading may have been in making the showings required for intervention). It stretches both the word and the concept of "amendment" beyond limits that § 2.714(a)(1) will tolerate to interpret the Board's Order of March 25th to include amendments of petitions explicitly and "clearly" *not* petitions to intervene into such petitions. By its April 6th submission, the Planning Board did not *amend* a petition to intervene but, rather, it *created* a petition to intervene for the first time.

[9]Taking a very generous view of the Planning Board petition, the Licensing Board evaluated it under the "representational" aspect of standing, and correctly found that the Planning Board had identified no "member" who had authorized it to represent the member's private interest and who himself or herself would have had standing. *E.g.*, *Virginia Electric & Power Co.* (North Anna Nuclear Power Station, Units 1 and 2), ALAB-536, 9 NRC 402, 404 (1979); *Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), LBP-79-1, 9 NRC 73, 77 (1979). *LBP-98-12* at 17-18. In point of fact, Yankee does not believe the Planning Board to have claimed "representational" standing, which for a purported Massachusetts governmental body would be a criminal violation of Massachusetts law. G. L. (1996 ed.) ch. 268A, §§ 11(c), 17(c). In any event, the Planning Board claims no error with respect to this aspect of the Board's decision.

Massachusetts statutes by which the former Franklin County had been abolished and a new entity created. These statutes demonstrated that the Franklin Regional Planning Board's *sole* function was "advisory" to the Franklin Regional Council of Governments.[10]

On March 26, 1998, the Licensing Board apparently received a letter from one Brad Councilman, identified therein as[11] the Chairman of the Executive Committee of the Franklin Regional Council of Governments. The purport of this letter was that the Planning Board was merely an advisory board and that it was not speaking for the Council itself (though it had been invited to make a presentation to the Executive Committee and declined).[12]

The Planning Board posits error in the Licensing Board's "accepting and giving weight" to the Councilman letter. However, the Planning Board concedes that "Mr. Councilman's representations were not inaccurate," and the Planning Board does not otherwise contend (much less demonstrate) that under the governing Massachusetts law the powers of the Franklin Regional Council of Governments are somehow vested in

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[10]*See* "Response of Yankee Atomic Electric Company to Amendments to Petitions to Intervene" (4/13/98) at 10-15.

The Planning Board later filed an untimely pleading purporting to place before the Licensing Board, in support of its intervention, the terms of the Franklin Regional Council of Governments "charter." The Licensing Board did not grant leave to the Planning Board to make this filing, to which denial the Planning Board takes exception. Prescinding, however, from the fact that whether to grant leave to make an unauthorized filing is committed to the discretion of the Licensing Board, the denial was entirely harmless to the Planning Board, since the "charter" merely confirmed that the Planning Board's sole function was advisory. *See* "Motion of Yankee Atomic Electric Company to Strike Unauthorized Planning Board Pleading and Conditional Motion for Leave to Reply Thereto" (4/30/98) at 3.

[11]And conceded by the Planning Board to be.

[12]Mr. Councilman's letter was most likely triggered by the "Establishment of Atomic Safety and Licensing Board," served on the parties on March 11, 1998, which erroneously stated that a request for a hearing had been received from, *inter alia*, "the Franklin Regional Council of Governments." As Mr. Councilman pointed out in his letter (accurately, as all agree), "[t]he representation that the Franklin Regional Council of Governments has requested a hearing is not correct. The petitioner is [someone else]." Unfortunately, the "Establishment of Atomic Safety and Licensing Board" further directed that "[a]ll correspondence, documents and other materials shall be filed with the Judges in accordance with 10 C.F.R. § 2.701," which instruction Mr. Councilman in fact followed.

the Planning Board. Given, then, that the Licensing Board's ultimate ruling was correct as a matter of law, any error of the Board in handling the concededly "not inaccurate" Councilman letter was harmless as a matter of law.[13]

5. **The Licensing Board's Decision Not to Permit Supererogatory Filings was Within its Discretion.** Under the Rules of Practice and the Licensing Board's Order of March 25, 1998, the Planning Board was entitled to supplement its petition and the Staff and Licensee were entitled to respond. Thereafter, the Planning Board made an unauthorized additional filing,[14] in response to which Yankee (i) moved to strike and (ii) conditionally moved to respond.[15] The Planning Board then conditionally moved for leave to respond to Yankee's response. The Licensing Board disallowed all these filings. *LBP-98-12* at 3-4 & n.4.[16] The Planning Board posits two errors.

First, the Planning Board contends that "[i]t was error for the ASLB not to act on the Conditional Motions . . . ." The Licensing Board *did* act; it denied all conditional motions. The Planning Board essays no cognizable argument that the Licensing Board abused its discretion.

Second, Planning Board contends that "[i]t was error for the ASLB not . . . to have at least considered the FRPB's [unauthorized] pleadings that confirmed its initial filings . . . ." The Planning Board cites no authority for the proposition that it was

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[13]While we have no doubt that, but for some form of clerical oversight, the Councilman letter would have been served on the parties by the Board, the fact of the matter is that this letter was *not* an *ex parte* communication under the Commission's regulations. *See* 10 C.F.R. § 2.780(e)(1)(i), implementing 5 U.S.C. § 557(d), and referring to a § 2.105(e)(2) notice, not a § 2.105(a) notice, as the point at which the § 2.780 rules apply.

[14]"FRPB's Reply to YAEC and Staff's Answers to FRBP's Amendment" (4/28/98).

[15]"Motion of Yankee Atomic Electric Company to Strike Unauthorized Planning Board Pleading and Conditional Motion for Leave to Reply Thereto" (4/30/98).

[16]Strictly speaking, perhaps, the Licensing Board was not obliged to act on any of the "conditional motions" since, the Board having declined to receive any pleadings other than those specifically authorized in its March 25th Order, none of the "conditions" was fulfilled.

Actually, there was nothing unauthorized in Yankee's motion to strike. 10 C.F.R. § 2.730; *Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-85-29, 22 NRC 300, 304 (1985).

entitled as a matter of right to file additional argument and offer additional evidence on the question of standing, and none exists. Its citation to *Houston Power & Light Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 524 (1979), is wide of the mark, as the so-called *Allens Creek* rule applies only to submissions of *contentions*.[17]

Finally, the Licensing Board's declination to receive the Planning Board's untimely and unauthorized submission did not prejudice the Planning Board, for (as noted above), the "charter" that the Planning Board sought to inject into the proceeding merely confirmed the Planning Board's entirely advisory function. *See* note 10, *supra*.

6. **The Planning Board as a Board of Health.** The Planning Board creates, we originally thought unintentionally, the impression that it is a public health agency:

> "The Planning Board cannot carry out its government mandate to protect the 'public health, safety and welfare,' as stated in the purpose clause of the FRCOG Charter, would be derelict in its duties, and bring harm to its organizational interests, were it not to seek formal public hearings on this matter."

*Planning Board 3/25/98 Filing* at 3. This theme is repeated in the Planning Board's brief to this Commission. *Planning Board Br.* at 3. However, as the governing state statute shows, the Planning Board is not a public health agency, but only an advisory board. *See* "Response of Yankee Atomic Electric Company to Amendments to Petitions to Intervene" (4/13/98) at 10-15; "Motion of Yankee Atomic Electric Company to Strike Unauthorized Planning Board Pleading and Conditional Motion for Leave to Reply Thereto" (4/30/98) at 3. The Licensing Board did not err on this point.

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[17]The Appeal Board's statement of the *Allens Creek* rule was thus: "The conclusion we reach is this. Before any suggestion that a contention should not be entertained can be acted upon favorably, the proponent of the contention must be given some chance to be heard in response." This conclusion, moreover, was stated to be "tentative." 10 NRC at 525 n.17. Nor has the *Allens Creek* rule been extended beyond the issue of contentions. *See Boston Edison Co.* (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461 (1985).

## CONCLUSION

Insofar as it denied standing to intervene as a party to the Planning Board, LBP-98-12 should be affirmed.

Respectfully submitted,

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Dated: July 10, 1998.

## CERTIFICATE OF SERVICE



I, Robert K. Gad III, one of the attorneys for Yankee Atomic Electric Company, do hereby certify that on July 10, 1998, I served the within brief in this matter by United States Mail (and also where indicated by an asterisk, by facsimile transmission) as follows:



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