UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S RESPONSE TO CITIZENS AWARENESS NETWORK'S APPEAL OF LBP-98-12

Marian L. Zobler
Counsel for NRC Staff

July 13, 1998

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.714a(a), the staff of the Nuclear Regulatory Commission (Staff) hereby responds to "Citizens Awareness Network's Inc., Brief on Appeal of LSLBP 98-736-01[sic]" (CAN Appeal), dated June 27, 1998. As discussed below, Citizens Awareness Network, Inc. (CAN) fails to demonstrate that the Atomic Safety and Licensing Board (Board), in its decision, LBP-98-12, either abused its discretion or committed an error of law. CAN's Appeal should, therefore, be denied.

BACKGROUND

In response to a notice in the *Federal Register*,[1] the Commission received a letter from CAN requesting a hearing regarding the License Termination Plan (LTP) for the Yankee Nuclear Power Station (YNPS). Letter to Chairman Shirley A. Jackson from Citizens Awareness Network, February 26, 1998. On March 9, 1998, an Atomic Safety and Licensing Board was designated to

[1] *Biweekly Notice; Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations, Yankee Atomic Electric Company, Docket No. 50-029, Yankee Nuclear Power Station, Franklin County, Massachusetts.* 63 Fed. Reg. 4308-09, 4328 (1998).

preside over the proceeding. 63 Fed. Reg. 13077 (1998). Thereafter, the Staff and Yankee Atomic Electric Company (YAEC) filed responses to CAN's letter. "NRC Staff's Response to Requests for Hearing," March 16, 1998; "Answer to Petition to Intervene and Request for Hearing of Citizens Awareness Network, Inc.," March 11, 1998.

On March 25, 1998, the Board issued a Memorandum and Order directing that any petitioner intending to amend its petition should file such amendment within seven days of the receipt of the Order. Order at 1. The Board further provided YAEC and the Staff with five days after receipt of any amendment to file a response. *Id.* at 2. On April 6, 1998, CAN filed an amended petition. "Citizens Awareness Network's Amended Petition to Intervene in License Amendment Proceeding for the Yankee Nuclear Power Station License Termination Plan (CAN Amended Petition)." On April 20, 1998, the Staff filed "NRC Staff's Response to Citizens Awareness Network's Amended Petition to Intervene" (Staff Response).[2]

On June 12, 1998, the Board issued a Memorandum and Order (Decision on Standing). *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-98-12, 47 NRC ____, slip op. (June 12, 1998). In LBP-98-12, the Board denied CAN's Amended Petition for failure to establish standing to intervene in the proceeding. LBP-98-12 at 12-14. On June 26, 1998, CAN filed its Appeal asserting that the Board erred in denying CAN standing. CAN Appeal at 3.

DISCUSSION

In its Appeal, CAN claims that the Board erred in denying it standing. CAN Appeal at 3, 5. A licensing board's determination regarding standing is entitled to substantial deference absent an

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[2] YAEC filed its response on April 13, 1998. "Response of Yankee Atomic Electric Company to Amendments to Petitions to Intervene."

error of law or an abuse of discretion. *International Uranium (USA) Corp.*, (White Mesa Uranium Mill; Alternate Feed Material), CLI-98-6, 47 NRC 11, 118 (1998) *citing Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 116 (1995). Since the Board did not make an error of law or abuse its discretion in LBP-98-12, its decision is entitled to substantial deference and should be affirmed. CAN's Appeal should, therefore, be denied.

In its decision, the Board determined that CAN failed to demonstrate that it had, through one of its members, an injury-in-fact sufficient to confer standing. LBP-98-12 at 12. As correctly determined by the Board, and unchallenged by CAN, a petitioner must demonstrate that the proposed action will cause an injury-in-fact to the petitioner's interests and that the injury is within the zone of interests protected by the Atomic Energy Act (AEA) or the National Environmental Policy Act (NEPA). LBP-98-12 at 5-6 *citing Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282 (1985); *Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521 (1991). The Board also held that injuries complained of must be particularized and capable of being redressed by a favorable decision. *Id.* Redressability, the Board held, is a required element in standing "for it must be demonstrated that there is a likelihood of an injury being redressed if a petitioner is to obtain relief." *Id.* at 6 *citing Westinghouse Electric* Corp. (Nuclear Fuel Export License for Czech Republic-Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322 (1994); *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25 (1993). Applying these legal standards to CAN, the Board determined that CAN failed to demonstrate an injury-in-fact sufficient to establish standing in this proceeding. LBP-98-12 at 12-15.

CAN raises several arguments on appeal of the Board's decision, none of which demonstrate that the Board's decision constituted an abuse of discretion or an error of law. CAN first repeats the arguments it made before the Board regarding standing to intervene. CAN Appeal at 4-5. CAN reasserts that its representative is concerned about the safe decommissioning of YNPS and the creation of an Independent Spent Fuel Storage Installation (ISFSI). *Id.* CAN, however, fails to explain how the Board erred in determining that these concerns did not constitute injuries-in-fact related to the proposed action sufficient to establish standing to intervene in this proceeding. CAN's assertions, therefore, fail to demonstrate the Board's decision constituted an abuse of discretion or an error of law.

CAN next asserts that the Staff violated NEPA by failing to prepare a supplemental environmental impact statement (EIS) for the LTP.[3] *Id.* at 5. CAN fails to explain how this alleged failure demonstrates that the Board erred in finding that CAN did not establish an injury-in-fact sufficient to establish standing to intervene in this proceeding. CAN's assertion is more akin to a proposed contention, which, if CAN had established standing, it could have sought to litigate in this proceeding. *See* 10 C.F.R. § 2.714. Since the Board's decision was based on standing and not on contentions, CAN's NEPA argument fails to demonstrate that the Board's decision was an abuse of discretion or based on an error of law.[4]

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[3] The Commission has stated that under Part 51, an EIS or environmental assessment will be required at the time the license amendment approving an LTP is issued. *Decommissioning Nuclear Power Reactors*, 61 Fed. Reg. 39278, 39290 (1996).

[4] CAN raises its argument that decommissioning of a nuclear power plant is a major federal action requiring the preparation of a supplemental EIS for the LTP for the first time here on appeal. In its Amended Petition, CAN raised, as an aspect of the proceeding, that an EIS was (continued...)

CAN also argues that the Board should have found that it had standing to intervene in this proceeding because CAN was granted standing in a previous proceeding regarding the approval of the decommissioning plan for YNPS ("YNPS Decommissioning Plan Proceeding"). CAN Appeal at 5-6. The fact that CAN established standing in a previous proceeding involving the YNPS's decommissioning plan does not establish CAN's standing in this proceeding. The previous YNPS proceeding involved the approval of the decommissioning plan for YNPS. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61 (1996). In the YNPS Decommissioning Plan Proceeding, the Licensing Board determined that since some public exposures can be anticipated from the *decommissioning process*, the Licensing Board could not rule out the possibility that decommissioning might have an adverse impact on those individuals who lived or recreated in close proximity to the facility or used local waste transportation routes. *Id.* at 70 (emphasis added).

The subject of the current proceeding, approval of the LTP, however, will not result in the authorization of decommissioning activities. *See* 10 C.F.R § 50.82(a)(9)(ii). Thus, the basis for the Licensing Board's decision regarding standing in the YNPS Decommissioning Plan Proceeding is not present in this proceeding. CAN must establish standing based on an injury-in-fact that is related to the action that is the subject of this current proceeding and that the injuries complained of are capable

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[4](...continued)
required due to the existence of documented and undocumented contamination on YNPS site. CAN Amended Petition at 29. CAN's new argument is inappropriate and should not be considered. *See Tennessee Valley Authority* (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-463, 7 NRC 341, 348 (1978)(Ordinarily an issue raised for the first time on appeal will not be entertained.).

of being redressed by a favorable decision in this proceeding.[5] *See Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 32 (1993). As discussed below, the holding of the Board in this proceeding that CAN's concerns as they relate to this proceeding fail to demonstrate an injury-in-fact necessary to establish standing is correct. LBP-98-12. *See Boston Edison Co.* (Pilgrim Nuclear Power Station), LBP-85-24, 22 NRC 97, 98-99 (1985), *aff'd on other grounds*, ALAB-816, 22 NRC 461 (1985)("Generally, a board will consider the nature of the proceeding, and will apply different standing considerations to proceedings involving construction permits or operating licenses than to proceedings involving license amendments.")

CAN, in its Appeal, also asserts that its concerns regarding the storage of irradiated fuel on site as well as the storage of high level waste, the contamination of the site, decommissioning activities, contamination and clean up of the Deerfield River were incorrectly treated by the Board as previously adjudicated rather than "dealing with the hearing offered under 10 C.F.R. 50.82 (the new rule)." CAN Appeal at 6. CAN fails to explain what it means by its assertion that the Board

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[5] 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.). *See also Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-91-33, 34 NRC 138, 141 (1991). Where, as here, however, the scope of the current proceeding and the prior proceeding are different, a petitioner must establish standing within the scope of the current proceeding. *See Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-90-29, 32 NRC 89, 91 (1990) (Recognizing that the current proceeding, a license amendment proceeding, was different in scope from an operating license proceeding, the Licensing Board ruled that the petitioners must demonstrate standing to intervene in the present license amendment proceeding despite the fact that the same petitioners had participated in the prior proceeding.).

considered these concerns as already adjudicated and does not provide any references to the Board's decision supporting its assertion. Moreover, it is clear from LBP-98-12 that the Board considered CAN's standing argument, as well as its proposed aspects, to determine whether CAN had asserted an injury-in-fact that would be redressable by a favorable decision and establish standing to intervene. *See* LBP-98-12 at 10-15. The Board correctly determined that CAN's concerns either were not redressable by a favorable decision in this proceeding or were merely speculative and unsupported. *See id.* at 12, 13, 14.

For example, the Board held that any potential injury related to spent fuel management was insufficient to establish standing to intervene in this proceeding because YAEC's authority to manage and store spent fuel is unaffected by the grant or denial of its LTP. *Id.* at 12. YAEC's Part 50 license gives it the authority under a general license to construct and operate an ISFSI. *Id. citing* 10 C.F.R. § 72.210. The Board further noted that nothing in section 50.82(a)(9)(ii) requires that the LTP address spent fuel management. *Id.* Thus, CAN could not establish an injury-in-fact because any alleged harm from spent fuel management could not be remediated by the denial of the license amendment sought in this proceeding. *See id.*

The Board also considered CAN's concerns related to long term residual contamination from the site and the Licensee's site release criteria. *Id.* at 12-14. The Board held that CAN failed to demonstrate how its representative, Ms. Katz, would be affected, much less harmed, by contamination from the site. *Id.* at 12, 13-15. The Board first determined that CAN provided no basis for its argument that the more stringent site release criteria of Massachusetts law should apply since it is well established NRC law that a state does not have the power to set radiological standards for NRC nuclear power plant licensees. *Id.* at 13, 14 *citing Long Island Lighting Co.* (Shoreham

Nuclear Power Station, Unit 1), ALAB-818, 22 NRC 651 (1985). The Board also considered CAN's argument that the projected radioactive contamination levels calculated by CAN to be between 43 and 87 millirem per year (CAN's Amended Petition at 22-23) and determined that it did not constitute an injury-in-fact. *Id.* at 13. According to CAN, its calculations show that YAEC will exceed its stated release criteria of 15 millirem per year. *Id. See also* CAN's Amended Petition at 22-23. The Board noted, however, that CAN's calculations are based on a worst case assumption. *Id.* The Board determined, based on its review of the Commission's Radiological Criteria for License Termination, that it was not necessary to calculate the doses from the residual levels of radioactivity at a site using worst case assumptions. *Id.* at 13, 14 *citing* 62 Fed. Reg. 39058.

Based on the above, the Board considered CAN's concerns as they related to standing in this proceeding and did not treat these concerns as matters previously adjudicated. Contrary to CAN's assertion (CAN Appeal at 6), CAN was offered an opportunity to request a hearing, as 10 C.F.R. § 50.82 contemplates for the approval of the LTP, but failed to meet the requirements of 10 C.F.R. § 2.714 to intervene in this proceeding. *See* 63 Fed. Reg. 4308-09, 4328. Accordingly, the Board did not abuse its discretion or make an error of law in considering CAN's concerns as they related to standing in this proceeding

CAN also appears to argue, in support of its Appeal, that the Board erred when it held that issues regarding the storage of spent fuel are outside the scope of this proceeding. *See* CAN Appeal at 7-9. In support of its assertion, CAN states that the issue of storage of Greater Than Class C (GTCC) waste is the responsibility of the NRC and not the Department of Energy. *Id.* at 7. Therefore, according to CAN, as long as GTCC waste remains in the fuel pool, it is the NRC's responsibility and thus part of the LTP and site remediation plan. *Id.* As discussed above, nothing

in section 50.82(a)(9)(ii) requires that the LTP address spent fuel management. Further, YAEC already has a general license to store and manage spent fuel on the YNPS site. *See* 10 C.F.R. § 72.210. Thus, the Board correctly determined that YAEC's authority to manage spent fuel will not be affected by the outcome of this proceeding.[6] LBP-98-12 at 12. Therefore, CAN could not have asserted an injury-in-fact related to the outcome of this proceeding related to the storage and management of spent fuel. *See* LBP-98-12 at 12, 15.

CAN also complains that by holding that issues related to the management and storage of spent fuel are outside the scope of this proceeding, the Board is somehow denying CAN its right to a hearing. *See* CAN Appeal at 8. Specifically, CAN asserts that by allowing YAEC to create and maintain an ISFSI under a Part 50 license, the NRC is denying CAN its right to a hearing on these issues. *Id.* at 8-9. Again, CAN fails to understand that the Commission's regulations allow YAEC to maintain an ISFSI under a general license as long as it has a Part 50 license. Nothing in the Board's decision on this issue is in error. If and when YAEC decides to terminate its Part 50 license and apply for a Part 72 license, CAN will be afforded the opportunity to request a hearing on that application.[7] *See* 10 C.F.R. § 72.46.

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[6] The fact that the LTP makes reference to the storage and disposition of GTCC waste does not alter the fact that YAEC's authority to manage this spent fuel comes from the general license granted it pursuant to 10 C.F.R. § 72.210 and not the LTP. *See* CAN Appeal at 7.

[7] In addition to the opportunity to request a hearing if and when YAEC applies for a license under Part 72, CAN also had the opportunity to request a hearing on YAEC's application for an amendment to its license to permit the removal of spent fuel from the Spent Fuel Pit storage racks into a combined storage/shipping cask and to enable handling of the cask components and other hardware by the Yard Area Crane. *See* 62 Fed. Reg. 54866, 54,879 (1997). CAN did not seek to intervene and may not now raise concerns in this LTP proceeding that might have been admissible in a proceeding on that amendment. This amendment was issued on June 17, 1998. 63 Fed. Reg. 35986, 36002 (1998).

CAN asserts that the Board also erred when it determined that "ALARA [as low as reasonably achievable] issues do not pertain." CAN Appeal at 8. CAN fails to discuss, let alone demonstrate, that the Board incorrectly considered ALARA issues. The Board considered CAN's ALARA aspects to determine if any of them identified an injury-in-fact sufficient to confer standing in this proceeding. LBP-98-12 at 14. With respect to CAN's ALARA aspects, the Board stated that CAN's argument concerning the site release criteria appears to be based on a worst case scenario. *Id.* at 14-15. There is nothing in the regulations that requires consideration of a worst case scenario in determining whether the licensee will meet the release criteria. *Id. See also* 10 C.F.R. § 20.1402 and 20.1003.[8] Further, the Board correctly held that if CAN is challenging the NRC's release criteria, such a challenge may not be raised in this proceeding. *Id. See* 10 C.F.R. § 2.758. CAN fails to demonstrate that the Board's application of the Commission's regulations is incorrect or constitutes an abuse of discretion.

CAN also claims that the Board failed to address its concerns regarding site release criteria. CAN Appeal at 9. As already discussed, however, the Board determined that the Licensee need not consider the worst case scenario in order to demonstrate that it will meet the release limit in its LTP.

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[8] 10 C.F.R. § 20.1402 provides:

> A site will be considered acceptable for unrestricted use if the residual radioactivity that is distinguishable from background radiation results in a TEDE [total effective dose equivalent] to an average member of the critical group that does not exceed 25 mrem (0.25 mSv) per year.

A critical group is defined as "the group of individuals *reasonably* expected to receive the greatest exposure to residual radioactivity for any applicable set of circumstances." 10 C.F.R. § 20.1003 (emphasis added).

See LBP-98-12 at 13, 14-15. The Board also determined that the more stringent standards of Massachusetts are not binding here. *Id.* at 13, 14. CAN does not challenge the Board's finding on these issues. Rather, CAN states, without reference to law or fact, that the NRC should require YAEC to adhere to the 15 millirem per year release criteria rather than the standard under the regulations of 25 millirem per year. CAN Appeal at 9. CAN's argument appears to be an impermissible challenge to the Commission's regulations and fails to demonstrate that the Board's decision should be overturned.[9] *See* 10 C.F.R. § 2.758.

Finally, CAN argues that the Board did not "bother to examine the plain language of 50.82, which offers a hearing on the LTP. Instead the LSAB [sic] used the statement of consideration of the rulemaking first." CAN Appeal at 10 (emphasis in the original). CAN fails to provide a reference to where in its decision the Board incorrectly relies on the statements of consideration for 10 C.F.R. § 50.82. The Board does, at one point, reference the statements of consideration for section 50.82, but only as part of a background discussion on the purpose of the LTP. LBP-98-12 at 2 *citing* 61 Fed. Reg. 39278, 39288 (1996). The Board also did not hold that section 50.82 does not offer any person who may be affected by this license amendment an opportunity to request a hearing. CAN requested a hearing; the Board correctly determined that CAN failed to meet the Commission's requirement that CAN establish standing to intervene. CAN, in its Appeal, has failed

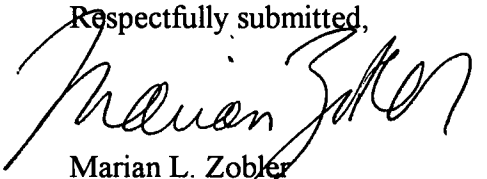
[9] Further YAEC states in its LTP that the site-specific release criteria presented in the LTP are consistent with the criteria identified in the NRC Site Decommissioning Management Plan (SDMP) Action Plan of April 16, 1992 (57 Fed. Reg. 13389) and that the TEDE to the average member of the critical population group from residual contamination must be maintained below 15 mrem per year. License Termination Plan, Appendix A, A-7. YAEC is, therefore, in compliance with 10 C.F.R. § 20.1401(b).

to demonstrate that the Board's decision on standing constituted abuse of discretion or an error of law. CAN's Appeal should, therefore, be denied.

CONCLUSION

For the reasons set forth above, CAN's Appeal should be denied and LBP-98-12 should be affirmed.

Respectfully submitted,



Marian L. Zobler
Counsel for NRC Staff

Dated at Rockville, Maryland
this 13th day of July, 1998

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CERTIFICATE OF SERVICE

I hereby certify that copies of " NRC STAFF'S RESPONSE TO CITIZENS AWARENESS NETWORK'S APPEAL OF LBP-98-12" in the above-captioned proceeding have been served on the following through deposit in the Nuclear Regulatory Commission's internal mail system, or by deposit in the United States mail, first class, as indicated by an asterisk this 13th day of July, 1998:

James P. Gleason, Chairman
Administrative Judge
Atomic Safety and Licensing Board
Mail Stop T 3-F-23
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Thomas D. Murphy
Administrative Judge
Atomic Safety and Licensing Board
Mail Stop T 3-F-23
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Adjudicatory File (2)
Atomic Safety and Licensing Board
Mail Stop T 3-F-23
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dr. Thomas S. Elleman*
Administrative Judge
Atomic Safety and Licensing Board
704 Davidson Street
Raleigh, NC 27609

Office of the Commission Appellate
Adjudication
Mail Stop: O 16-C-1
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Office of the Secretary
ATTN: Rulemaking and
Adjudications Staff
Mail Stop: O 16-C-1
U.S. Nuclear Regulatory Commission
Washington, DC 20555

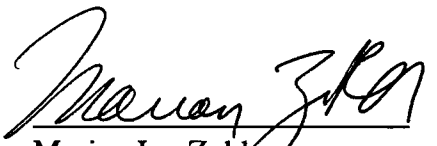
Atomic Safety and Licensing Board
Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Adam Laipson, Chairman*
Franklin Regional Planning Board
425 Main Street
Greenfield, MA 01301

Diane Curran, Esq.*
Harmon, Curran, Spielberg &
Eisenberg, LLP
New England Coalition on Nuclear
Pollution, Inc.
2001 "S" Street, N.W. Suite 430
Washington, D.C. 20009

Thomas G. Dignan, Jr.*
R. K. Gad, III
Counsel for Licensee
Ropes & Gray
One International Plaza
Boston, MA 02110

Deborah B. Katz, President*
Citizens Awareness Network, Inc.
P.O. Box 3023
Charlemont, MA 01339-3023



Marian L. Zobler
Counsel for NRC Staff