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August 25, 1998

'98 AUG 26 A11:57

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF

In the Matter of)

YANKEE ATOMIC ELECTRIC COMPANY)

(Yankee Nuclear Power Station))

Docket No. 50-029-LA

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF

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NRC STAFF RESPONSE OPPOSING
NECNP'S MOTION FOR LEAVE TO FILE REPLY BRIEF

INTRODUCTION

On August 5, 1998, New England Coalition on Nuclear Pollution (NECNP) filed a "Motion for Leave to File Reply Brief on Appeal of LBP-98-12" (Motion) together with the Reply Brief NECNP sought to file. For the reasons discussed below, the staff of the Nuclear Regulatory Commission (Staff) opposes NECNP's motion and urges that it be denied.

BACKGROUND

On July 10, 1998, NECNP filed, pursuant to 10 C.F.R. § 2.714a of the Commission's regulations, a notice of appeal together with a brief on appeal of the Licensing Board's decision denying NECNP's standing to intervene in the above-captioned proceeding.¹ Yankee Atomic Electric Company, the licensee, filed a responsive brief on July 17, 1998, and the Staff filed its

¹ "New England Coalition on Nuclear Pollution's Notice of Appeal of LBP-98-12"; "New England Coalition on Nuclear Pollution's Brief on Appeal of LBP-98-12."

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responsive brief on July 27, 1998.²

DISCUSSION

NECNP argues in its motion that its reply should be allowed because it could not have anticipated all of the licensee and the Staff's arguments and the misstatements of law and fact by those same parties. Motion at 3. This argument is without merit. NECNP cites *Houston Lighting and Power Co.*, (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 524-25 (1979) in support of its argument, characterizing *Allens Creek* as "granting intervenors an opportunity to reply to oppositions to their contentions." Motion at 2. *Allens Creek* does not provide authority for NECNP's motion. It neither concerns appeals pursuant to 10 C.F.R. § 2.714a to the Commission nor, in fact, grants intervenors an opportunity to reply to oppositions to their contentions, as NECNP claims. *Allens Creek* is an advisory opinion. Accordingly, it does not direct the Licensing Board to take any particular action. *Allens Creek* at 525 n.17. Beyond that, LBP-98-12 concerns not contentions, which was the subject of the advisory opinion in *Allens Creek*, but standing. Also, unlike the petitioners in *Allens Creek*, NECNP has had the opportunity to address the licensee's and the Staff's challenges to its standing. What NECNP wants is to have the last word, an opportunity that the Commission's regulations do not afford it.

NECNP also regards the Commission's providing for reply briefs in setting briefing schedules pursuant to 10 C.F.R. § 2.786(d) as offering a basis for the Commission's granting NECNP's motion and accepting its reply brief. Motion at 2. However, all that 10 C.F.R. § 2.786(d) states with regard to briefs is that "if a petition for review is granted, the Commission will issue an

² "Brief of the Licensee Yankee Atomic Electric Company"; "NRC Staff's Response to New England Coalition on Nuclear Pollution's Appeal of LBP-98-12."

order specifying the issues to be reviewed and designating the parties to the review proceeding and *direct that appropriate briefs be filed*, oral argument be held, or both.” (Emphasis added.) Unlike § 2.786, pursuant to which petitions are filed and, if granted, appropriate briefing is ordered, § 2.714a specifies the briefs to be filed. NECNP correctly states that 10 C.F.R. § 2.714a does not provide for reply briefs. Motion at 2.

NECNP’S argument is that it should be allowed to respond to arguments not anticipated by NECNP when it prepared its initial brief. Motion at 1. NECNP also argues that it could not have anticipated the licensee’s and the NRC staff’s arguments and misstatements of law and fact. Motion at 3. In a different context, the Commission noted in *Sequoyah Fuels Corporation*, CLI-94-4, 39 NRC 187 (1994), one of the cases cited by the NECNP for the proposition that the Commission routinely schedules reply briefs on § 2.786 appeals, that “We have accepted the Petitioners’ reply for filing . . . [a]lthough much of [it] appears merely to reinforce arguments made in the initial petition for review. . . . [W]e caution that we expect Petitioners to provide in their original petition their full statement of why Commission review is warranted.” At 188 n.1. The Staff’s argument advanced in its appeal brief is not, contrary to NECNP’s argument, new. The Staff pointed out in its response to NECNP’s amended petition to intervene that NECNP’s declarant’s concern that the final site condition would not satisfy the NRC’s release criteria did not confer standing in that the concern did not relate to the proposed action, approval of the License Termination Plan. NRC Staff’s Response to New England Coalition on Nuclear Pollution’s Amended Petition to Intervene, April 17, 1998, at 6. NECNP uses its false claim of new argument to recast arguments made previously regarding the standing of its declarant. Like the petitioner in *Sequoyah Fuels*, NECNP should have fully stated its position in its initial brief; the Commission case law cited by NECNP

does not support its effort to reinforce by a reply brief the argument made in its initial brief.

CONCLUSION

For the reasons discussed, the Commission should deny NECNP's motion to file a reply brief.³

Respectfully submitted,

Ann P. Hodgdon

Ann P. Hodgdon
Counsel for NRC Staff

Dated at Rockville, Maryland
this 25th day of August, 1998

³ The Staff does not address the arguments presented in NECNP's reply brief and will not do so unless directed by the Commission.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE OPPOSING NECNP'S MOTION FOR LEAVE TO FILE REPLY BRIEF" 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 25th day of August, 1998:

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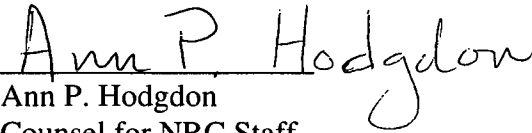
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