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USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'98 JUL 27 P1:40

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
TOLERANINGS AND
ADJUDICATIONS STAFF

In the Matter of)
) Docket No. 50-443 LA
NORTH ATLANTIC ENERGY)
SERVICE CORPORATION) License No. NPF-86
(Seabrook Station, Unit 1))

NRC STAFF'S RESPONSE TO JULY 9, 1998
SUBMITTAL BY SEACOAST ANTI-POLLUTION LEAGUE
AND NEW ENGLAND COALITION ON NUCLEAR POLLUTION

Pursuant to the Memorandum and Order (Initial Order) dated June 18, 1998, issued by the Atomic Safety and Licensing Board (Board), the NRC Staff hereby responds to the submittal dated July 9, 1998, filed by the Seacoast Anti-Pollution League (SAPL) and the New England Coalition on Nuclear Pollution (NECNP) (July 9 submittal) to supplement SAPL's June 5, 1998 hearing request. As discussed below, the Board should deny intervention by NECNP; the Staff, however, does not contest SAPL's standing in this proceeding.

BACKGROUND

By application dated April 8, 1998, North Atlantic Energy Service Corporation (NAESC or Licensee) requested amendments to the Facility Operating License No. NPF-86 technical specifications for Seabrook Station, Unit 1. The Licensee seeks changes to surveillance requirements involving steam generator tube inspections. SAPL filed its

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June 5, 1998 hearing request, which was deemed timely by the Board,¹ on the last day permitted by the *Federal Register* notice of the amendment request.² There was no indication in the June 5, 1998 hearing request that it was being filed jointly by NECNP as well as SAPL. No pleading was filed on behalf of NECNP until June 18, 1998, when SAPL and NECNP filed an amended hearing and intervention request.³

On June 24, 1998, the Staff, viewing the June 18 filing by SAPL and NECNP as, in part, an initial intervention request by NECNP, objected to NECNP's intervention request as untimely.⁴ NECNP had failed to address any of the criteria set forth in 10 C.F.R. § 2.714(a)(1) applicable to untimely petitions. In a July 2, 1998 filing, the Licensee also noted that NECNP's intervention request was untimely.⁵

The July 9 submittal provided affidavits by members of SAPL and NECNP to support those organizations' standing, proffered contentions, and enclosed a memorandum of law to support the admissibility of certain of the proffered contentions. The criteria

¹Initial Order at 1.

²See 63 Fed. Reg. 25,102 (1998).

³Supplemental and Amended Petition for Institution of Proceeding and for Intervention Pursuant to 10 CFR 2.714 On Behalf of the Seacoast Anti-Pollution League and the New England Coalition on Nuclear Pollution (June 18, 1998).

⁴See NRC Staff's Answer to Seacoast Anti-Pollution League's June 5, 1998 Request for a Hearing and to New England Coalition on Nuclear Pollution's June 18, 1998 Request for Intervention (June 24, 1998).

⁵See North Atlantic Energy Service Corporation's Answer to Supplemental Petition for Hearing (July 2, 1998).

applicable to late filed petitions for intervention at 10 C.F.R. § 2.714(a)(1) was still not expressly addressed by NECNP in the July 9 submittal.

DISCUSSION

I. NECNP

The only response by NECNP to the Staff's assertion that NECNP has filed an untimely intervention petition is contained in the cover letter to the July 9 submittal. There, NECNP argues, *inter alia*, that "there is no separate NECNP petition. NECNP is simply joining in the June 5th petition filed by SAPL, which the Board has already ruled as timely. NECNP is not raising any new contentions, bringing forth any matters not addressed in the June 5th filing, or using separate counsel."⁶ NECNP further argues that the Staff or the Licensee will not be prejudiced if NECNP is allowed to intervene, that the only issue is what names will appear in the caption on pleadings, and that NECNP is "merely seeking joinder pursuant to [Rule 20 of the Federal Rules of Civil Procedure]."⁷ According to NECNP, the "Federal Rules apply, when, as here, the NRC has no rule on joinder." NECNP cites *Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2)*, LBP-96-16, 44 NRC 59, 62 (1996), and *Cincinnati Gas & Electric Co. (Wm. H. Zimmer Nuclear Power Station, Unit 1)*, LBP-82-47, 15 NRC 1538, 1542 (1982), in support of this proposition.

⁶Letter from R. Backus to Judge P. Cotter, Jr., et al. (July 9, 1998) (Backus letter) at 2.

⁷Backus letter at 2.

The relevant discussion in the preceding cases actually is that where there is a procedural rule of the NRC analogous to a Federal rule, judicial interpretations of the Federal rule may serve as guidance in applying the NRC rule, but the Federal rules are not directly applicable to NRC proceedings. *See Vogtle*, 44 NRC at 62; *Zimmer*, 15 NRC at 1542. Furthermore, notwithstanding NECNP's assertion that it is "merely seeking joinder pursuant to FRCP 20,"⁸ the Atomic Safety and Licensing Appeal Board has confirmed that the "Federal Rules of Civil Procedure apply only in the district courts and Federal Rules 19 and 20 have no counterparts in Commission practice." *Public Service Co. of Oklahoma* (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 780 n.18 (1979).⁹

In *Public Service Co. of New Hampshire* (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975 (1984), SAPL, coincidentally, filed a motion seeking to join an intervention petition of the Connecticut Division of Consumer Counsel (DCC) filed in connection with an application to renew the Seabrook construction permit. The DCC petition was submitted in October of 1983; following the filing of answers by the Staff and the applicants to the petition, SAPL filed its motion for joinder in January of 1984. Just prior to the Commission's decision on the merits of the DCC petition, DCC effectively withdrew its petition. *Seabrook*, 19 NRC at 977 n.1. Since SAPL had not withdrawn its joinder motion, the Commission decided to consider the DCC petition on its merits. *Id.*

⁸Backus Letter at 2.

⁹Rule 19 of the Federal Rules of Civil Procedure pertains to "Joinder of Persons Needed for Just Adjudication," while Rule 20 addresses "Permissive Joinder of Parties."

However, the Commission stated that by doing so, it “expresses no opinion as to the procedural validity of SAPL’s motion for joinder.” *Id.* After finding that DCC’s proffered contentions fell outside the scope of the proceeding, the Commission denied DCC’s petition. In light of this denial, SAPL’s motion for joinder was declared moot. *Id.* at 979.

NECNP has failed to cite any Commission precedent for the position that NECNP is espousing. NECNP is effectively asserting that as long as one intervenor has been admitted to a proceeding by reason of its timely petition, another person should be admitted, without regard for the deadline for timely filings, merely on the basis that such person later requests to “join” the original intervenor. To accept NECNP’s position would effectively undermine the 10 C.F.R. § 2.714(a)(1) criteria for late intervention petitions.

Under 10 C.F.R. § 2.714(a)(1), nontimely filings will not be entertained absent a determination that the petition should be granted based on a balancing of the following factors (in addition to those contained in subsection (d)(1)):

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner’s interest will be protected.
- (iii) The extent to which the petitioner’s participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner’s interest will be represented by existing parties.
- (v) The extent to which the petitioner’s participation will broaden the issues or delay the proceeding.

As stated earlier, NECNP has not expressly attempted to address the foregoing factors in the July 9 submittal or elsewhere. NECNP provides no explanation of “good cause” why it did not file to intervene by the prescribed deadline of June 5, 1998 (criterion (i)). NECNP has not indicated that it will bring anything more to the proceeding to assist in developing a sound record (criterion (iii)). The July 9 submittal does suggest that if SAPL is admitted as a party, NECNP’s interests would be essentially represented by SAPL, particularly since the contentions filed with the July 9 submittal are on behalf of both SAPL and NECNP (criterion (iv)). See Backus Letter at 2. All of the foregoing weigh against granting NECNP intervention. On the other hand, the Staff is not aware of any other proceeding or other means whereby NECNP’s interests will be protected (criterion (ii)). In addition, NECNP has not suggested that it will attempt to raise separate issues in addition to those that SAPL seeks to raise, or otherwise delay the proceeding (criterion (v)). Nevertheless, the Board should conclude that, balancing all of the above criteria, NECNP should not be permitted to intervene in this proceeding.

II. SAPL

As previously discussed in the Staff’s Answer dated June 24, 1998,¹⁰ the Commission has applied contemporaneous judicial concepts of standing in determining whether a petitioner should be permitted to intervene. When a license amendment involves an “obvious potential for offsite consequences,” it has been held that living near the

¹⁰See note 4 *supra*.

facility is enough to confer standing. *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 95 (1993), citing *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989).

In its July 9 submittal, SAPL has provided four affidavits from members who have authorized SAPL to represent them in this proceeding and who live less than two to less than ten miles from the facility. SAPL has also stated in its contentions that the amendment may cause a significant increase in the probability or consequences of an accident, and that the failure of steam generator tubes can result in an accident with offsite consequences. *See, e.g.*, SAPL Contention 1 and Basis (attached to July 9 submittal).

Because the proposed amendment involves steam generator tube inspections, which, if not performed adequately, could lead to a scenario where there is an offsite release of radioactivity, the amendment would appear to involve an “obvious *potential* for offsite consequences.”¹¹ Accordingly, the Staff does not object to intervention by SAPL, in light of its timely request for intervention and representation of potentially affected members who live in close proximity to the plant.

¹¹The Staff, of course, is not addressing the merits of the amendment request at this time.

CONCLUSION

In consideration of the foregoing, the Board should deny intervention by NECNP.

The Staff does not contest SAPL's standing in this proceeding.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Steven R. Hom", with a long horizontal flourish extending to the right.

Steven R. Hom
Counsel for NRC Staff

Dated at Rockville, Maryland
this 27th day of July 1998

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OFFICE OF SECRETAR
RULEMAKING AND
ADJUDICATIONS STAFF

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO JULY 9, 1998 SUBMITTAL BY SEACOAST ANTI-POLLUTION LEAGUE AND NEW ENGLAND COALITION ON NUCLEAR POLLUTION" in the above captioned proceeding have been served on the following by deposit in the United States mail, first class, as indicated by an asterisk, or by deposit in the Nuclear Regulatory Commission's internal mail system this 27th day of July 1998:

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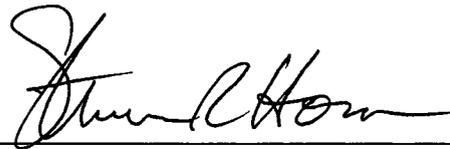
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