B. Vogler - advance copy Leslie

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Thomas S. Moore, Chairman
Alan S. Rosenthal
Howard A. Wilber

June 13, 1988
(ALAB-893)

In the Matter of	
FLORIDA POWER & LIGHT COMPANY	Docket No. 50-335-OLA
(St. Lucie Plant, Unit No. 1)	(SFP Expansion)

Harold F. Reis and Michael A. Bauser, Washington, D.C., and John T. Butler, Miami, Florida, for the applicant, Florida Power & Light Company.

Campbell Rich, Stuart, Florida, intervenor pro se.

Benjamin H. Vogler for the Nuclear Regulatory Commission staff.

DECISION

We have before us the appeal of the applicant, Florida Power & Light Company, from the Licensing Board's April 20, 1988 Memorandum and Order granting the intervention petition of Campbell Rich in this spent fuel pool expansion proceeding. The Board, in agreement with the positions of the applicant and the NRC staff, first determined that Mr. Rich had standing to intervene. It then found that seven of his proffered contentions were admissible.[1]

[1] Mr. Rich originally proffered sixteen contentions. He withdrew two of them and the Licensing Board found six
(Footnote Continued)

8806170036 8pp.

The applicant appeals pursuant to 10 C.F.R. § 2.714a(c). That section permits an interlocutory appeal of an order granting an intervention petition on the ground that the petition "should have been wholly denied." Accordingly, the applicant claims the Licensing Board erred in admitting all seven of the intervenor's contentions and that the petition should have been denied and the proceeding terminated. Rather than analyze each of the admitted contentions with a view toward showing why the individual contentions are inadmissible, however, the applicant levels a broadside attack claiming that the admitted contentions all suffer from a common infirmity. Specifically, the applicant asserts that our cases impose an affirmative duty upon the intervenor to include, as part of his proffered contentions, a critical analysis of any previously published solutions to the issues raised by the contention that may have been proposed by either the applicant or the staff. According to the applicant, the intervenor failed to satisfy this duty with respect to all seven of the admitted contentions. The intervenor and staff oppose the applicant's appeal.

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contentions inadmissible and deferred ruling on one. The applicant opposed the admission of all the contentions and, of the seven admitted, the NRC staff did not oppose the admission of five of them.

Most charitably stated, the applicant's argument is baseless and it need not detain us long.[2] In its brief, the applicant states that it fully recognizes the basic principles governing the admissibility of contentions and it further represents that it does not challenge any of them. Yet, as the staff points out, "[a]lthough [applicant] states that it is not in any way challenging this general doctrine . . . the criteri[on] it proposes does, in fact, impose a far more stringent standard for evaluating this pro se Intervenor's proffered contentions."[3]

The applicant purports to base its argument on that part of a sentence from our decision in Catawba stating that "an intervention petitioner has an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention."[4] From this

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[2] On June 7, 1988, the applicant filed a motion requesting that we hold oral argument on its appeal. The holding of oral argument is a matter solely within our discretion and we normally hold arguments only when one or more members of the Board have questions of the parties on their arguments. In light of the insubstantiality of the applicant's position, no purpose would be served by an oral argument in this instance, and the motion is denied.

[3] Response of NRC Staff (May 24, 1988) at 6.

[4] Duke Power Co. (Catawba Nuclear Station, Units 1 and (Footnote Continued)

language, the applicant creates a duty on the part of the intervenor to answer in his proffered contentions anything found in publicly available documentary material that might be contrary to the intervenor's position.[5] As is apparent from even the most casual reading of Catawba, the applicant has taken this snippet from the case totally out of context: that decision manifestly does not place on an intervenor a duty of the ilk asserted by the applicant.[6]

The Commission's Rules of Practice in 10 C.F.R. § 2.714(b) require that "the bases for each contention [be] set forth with reasonable specificity." In Catawba, we addressed the generic question of whether a contention that

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2), ALAB-687, 16 NRC 460, 468 (1982), rev'd in part, CLI-83-19, 17 NRC 1041 (1983).

[5] The applicant also purports to rely upon the unappealed denial of the intervention petitions in Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit No. 1), LBP-82-52, 16 NRC 183 (1982). Such a licensing board order, however, is not entitled to any stare decisis effect because it was never appealed. See Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), ALAB-713, 17 NRC 83, 85 (1983); Duke Power Co. (Cherokee Nuclear Station, Units 1, 2, and 3), ALAB-482, 7 NRC 979, 981 n.4 (1978).

[6] In its brief, the applicant complains that the staff chose not to address this same argument before the Licensing Board and that the Board below also ignored the argument in its memorandum and order admitting Mr. Rich's contentions. Applicant's Brief (May 9, 1988) at 4-5 & n.5, 16. We suspect that both the staff and the Licensing Board found the applicant's argument so obviously groundless that they quite properly concluded no reply was necessary or deserved.

failed to meet that bases requirement could be conditionally admitted, subject to its being fleshed out later through discovery or being revised subsequently upon receipt of previously unavailable information. We held that the Commission's Rules of Practice preclude a contention from being admitted conditionally for any reason.[7] We then turned to the question whether a contention could be rejected as untimely under the five-factor test of section 2.714(a)(1) when an adequately specific contention could not have been earlier filed because of the unavailability or nonexistence of documentation that was an essential element of the license application or the staff's prehearing review. We held that, as a matter of law, the untimeliness factor (the first of the 2.714(a)(1) factors) could not be overridden in such circumstances by the other four factors governing late-filed contentions.[8]

As part of our discussion in Catawba, we reviewed our earlier decision in Prairie Island.[9] There, we rejected the

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[7] 16 NRC at 466-67.

[8] Id. at 468-70. Upon its sua sponte review of Catawba, the Commission reversed that part of our holding and determined instead that all five factors of 10 C.F.R. § 2.714(a)(1) must be considered and balanced in every case in assessing the acceptance of a late-filed contention. 17 NRC at 1047.

[9] Northern States Power Co. (Prairie Island Nuclear
. (Footnote Continued)

argument that it was not possible for the petitioners to state specific contentions until they had been able to conduct discovery. For, as we pointed out, there already was sufficient information publicly available at the time of publication of the notice of hearing to formulate specific contentions.[10] The language from Catawba quoted out of context by the applicant was made in direct reference to that rationale. In full, we stated: "Implicit in this [Prairie Island] observation was the belief that an intervention petitioner has an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention."[11]

As is clear from the context of our statement in Catawba, we were not in any way creating, referring to, or even suggesting a duty applicable to an intervenor like that now claimed by the applicant, and no such duty exists under

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Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, aff'd CLI-73-12, 6 AEC 241 (1973), aff'd sub nom. BPI v. AEC, 502 F.2d 424 (D.C. Cir. 1974).

[10] 6 AEC at 192. Then, as now, the Commission's Rules of Practice, 10 C.F.R. § 2.740(b)(1), provided that discovery on the subject matter of a contention can only be obtained after the contention is admitted.

[11] 16 NRC at 468.

the bases requirement of 10 C.F.R. § 2.714(b). As we recently stated in Comanche Peak,

> the bases requirement is merely a pleading requirement designed to make certain that a proffered issue is sufficiently articulated to provide the other parties with its broad outlines and to provide the Licensing Board with enough information for determining whether the issue is appropriately litigable in the instant proceeding. The requirement generally is fulfilled when the sponsor of an otherwise acceptable contention provides a brief recitation of the factors underlying the contention or references to documents and texts that provide such reasons. But the fact that a contention complies with the bases requirement of section 2.714(b) does not mean that the issue is destined to go to hearing -- such a contention is subject to being rejected on the merits prior to trial under the summary disposition provisions of the Rules of Practice.[12]

Contrary to these established principles regarding the admission of contentions, the applicant would require the intervenor first to anticipate the applicant's response to the issues he raises and then answer that response in his initial contention. Such matters go directly to the merits of the contention and belong in an applicant's summary disposition motion, not in the intervenor's initial pleading. Thus, the applicant's argument is meritless.

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[12] Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 930 (1987) (footnotes omitted).

Because the applicant has not shown that all seven contentions were erroneously admitted, the Licensing Board's grant of the intervention petition is affirmed.[13]

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

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[13] Except as to contention 4 (which, according to the applicant's June 8, 1988 letter to us, has been overtaken by recent events), the applicant has not individually briefed the question whether Mr. Rich pleaded an adequate basis for the contentions admitted by the Licensing Board. It should go without saying that unbriefed claims do not deserve appellate attention.