05/01/78

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
METROPOLITAN EDISON COMPANY, ET AL.	)	Docket No. 50-320
	)	
(Three Mile Island Nuclear Station, Unit 2)	)	

NRC STAFF RESPONSE TO INTERVENORS' MOTION
TO COMPEL THE APPEARANCE OF THOMAS GERUSKY

On April 16, 1978, Joint Intervenors, Citizens for a Safe Environment and the York Committee for a Safe Environment, filed a motion which requests the Atomic Safety and Licensing Appeal Board (Appeal Board) to direct the Atomic Safety and Licensing Board (Licensing Board) to request the Commonwealth of Pennsylvania to produce Thomas Gerusky, Director of Radiological Health of the Commonwealth, as a witness in the remanded proceeding. Since only the issue of radon was remanded to the Licensing Board with direction to reopen the record to receive new evidence, [1] the NRC Staff will treat the present motion as one requesting (1) that the issue of emergency planning be remanded to the Licensing Board and that the record in this proceeding be reopened to receive evidence on that issue [2] and (2) that the Appeal Board direct the Licensing Board

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[1] Metropolitan Edison Company (Three Mile Island Station, Unit No. 2), ALAB-465, March 27, 1978, slip op. 3 and 5.

[2] See Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 and 2), ALAB-291, 2 NRC 404, 413-14 (1975).

to compel the appearance of Thomas Gerusky to testify on the emergency planning issue. 3/ For the reasons set forth below the Staff urges that both requests be denied.

The Motion was Filed Out-of-Time Without Adequate Justification

The NRC Staff believes that the Joint Intervenors' motion should be denied for being filed late without adequate justification. During oral argument on Joint Intervenors' exceptions held on March 23, 1978, Joint Intervenors requested that the record in this proceeding be reopened to receive additional evidence in the form of testimony by Thomas Gerusky on emergency planning (Tr.15). The Appeal Board advised Joint Intervenors' representative, Dr. Kepford, that if Joint Intervenors wished the record reopened on this matter they should file a written motion to that effect by April 3, 1978 (Tr.112). Dr. Kepford gave no indication that he objected to the established time period or that he would experience difficulty in meeting the deadline.

Dr. Kepford by telephone on Friday, March 31, 1978, advised the Appeal Board that he would be unable to meet the April 3 deadline established by the Appeal Board and requested an extension until Friday, April 7, to

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3/ To the extent the Joint Intervenors' suggestion that the Commonwealth of Pennsylvania or the Applicant (or even the Staff) pay for the witness fees of the subpoenaed witness, is a request for such relief, the Staff urges that this request be denied as a challenge to the following language of 10 CFR § 2.720(d) which is prohibited by 10 CFR § 2.758:

> Witnesses summoned by subpoena shall be paid, by the party at whose instance they appear... [emphasis

file the motion. [4/] As further reported in the Secretary to the Appeal Board's letter of April 3, 1978, following several unsuccessful attempts to reach Dr. Kepford in order to determine the reasons for the sought extension, the Appeal Board through its secretary informed Dr. Kepford that it was not, as of that date, giving consideration to the request for extension and that any such motion filed later than April 3 must be accompanied by a "full explanation of the reasons why it was not possible ... to meet the prescribed deadline". [5/] Finally, the letter of April 3 observed that the Appeal Board assumed that justification for an untimely filing would go beyond the mere fact of Dr. Kepford's absence from State College, Pennsylvania during the week of March 27, a fact known to Dr. Kepford at the time of the oral argument.

Time limits established in Commission regulations and by administrative tribunals are entitled to respect Cf. Kansas Gas & Electric Company, et al. (Wolf Creek Generating Station, Unit No. 1) ALAB-424, 6 NRC 122, 125 (1977). A party with an objection to schedules established by a board should make known its objection in a timely fashion. Cf. Consolidated Edison Company of New York, Inc. (Indian Point, Units 1, 2 & 3) ALAB-377, 5 NRC 430, 431 (1977). Here, Joint Intervenors neither objected

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[4/] Letter from Romayne M. Strutski to Dr. Chauncey R. Kepford dated April 3, 1978.

[5/] The Staff finds Joint Intervenors' argument that the language in footnote 6 to ALAB-465 as confusing with respect to the prescribed deadline of April 3, 1978 to be without merit. (Motion, p.4).

promptly to the schedule set by the Appeal Board nor requested leave to file out-of-time. The unjustified tardiness of the instant Motion provides adequate basis for its rejection by the Appeal Board.

The Motion Fails to State Sufficient Arguments to Warrant Reopening the Record

Appeal boards have noted in several past proceedings involving a request to reopen a record to entertain newly-discovered evidence that the proponent of such a motion has a heavy burden. Kansas Gas & Electric Company, et al. (Wolf Creek Generating Station, Unit No. 1) ALAB-462, 7 NRC ___ (March 7, 1978), citing Duke Power Co. (Catawba Nuclear Station, Units 1 and 2) ALAB-359, 4 NRC 619, 620 (1976). The motion must be both timely presented and addressed to a significant issue. ALAB-462, supra, citing Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station) ALAB-138, 6 AEC 520, 523 (1973); id., ALAB-167, 6 AEC 1151-52 (1973). Here, the Joint Intervenors have not met their burden to demonstrate a need to reopen. Thus, their request should be denied.

Joint Intervenors' Motion fails to meet either element of the Vermont Yankee test for reopening a record. See Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station) ALAB-167, 7 AEC 1151 (1973); ALAB-138, 6 AEC 520 (1973); and ALAB-124, 6 AEC 358 (1973). The first element of that test is "whether the issue sought to be presented could have been raised at an earlier stage . . . ." ALAB-138, supra, at 523. The issue sought to be presented by Joint Intervenors involves the capability of BRH to participate in implementation of the TMI emergency [illegible] evacuation. [illegible]

Board's Initial Decision (para. 64) and in Applicants' Response To Intervenors' Exceptions (para. 45), that this issue has been raised and that the uncontroverted evidence was that the emergency plan would function with or without BRH's availability. (See Tr.1720-21, 2529-32). Furthermore, Joint Intervenors have already requested the appearance of Mr. Gerusky and withdrawn that request. During the course of the evidentiary hearing in April 1977, Joint Intervenors requested a BRH witness to address BRH's capabilities. (Tr.888). Following the explanation by Pennsylvania's counsel that Pennsylvania had produced civil defense witnesses to testify on Contention 8 because that contention appeared to be directed at the ability to evacuate, not the expertise of BRH (Tr.888-89) and following the Licensing Board's apparent agreement with that reading of Joint Intervenors' contention (Tr.890), Joint Intervenors withdrew their request (Tr.891). Joint Intervenors' request was never renewed throughout the extended discussions and cross-examination of witnesses on the subject of BRH reduced capability. Therefore, it is our position that Joint Intervenors had an opportunity to request a BRH witness to address this subject, but chose not to. Thus, Joint Intervenors have not satisfied the first element of the Vermont Yankee test.

The Joint Intervenors have failed to meet the second element of the Vermont Yankee test - the significance or gravity of the issue. Certainly the subject of emergency planning generally involves significant issues and the need to demonstrate an adequate and workable emergency evacuation plan is in itself significant. We do not believe, however, that

Gerusky to address BRH capabilities could lead to a different result from that reached by the Licensing Board on the existing record. [6/] The basis of the Joint Intervenors' request is that BRH will not be able to perform as anticipated. For a different reason [7/] the same concern was raised during the hearing and was fully addressed. Joint Intervenors argue (Motion, p.2) that the Licensing Board "assumed without support on the record that there would be other groups which would pick up the slack if BRH was unable to perform" (Initial Decision, para. 64). The evidence of the record is uncontroverted that should there be a reduction in BRH capability the "slack" would be taken up. BRH acts as the radiological expert advisor to state and local authorities, reviewing the information and recommendations of Applicants and, in turn, providing information and recommendations to those within the state, such as civil defense, who actually carry out an evacuation. [8/] The Civil Defense witnesses presented by the Commonwealth testified that they would effectively be able to carry out evacuation procedures on the basis of radiological information from the Applicants or other sources such as

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[6/] Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-227, 8 AEC 416, 418 (1974); Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-359, 4 NRC 619, 620 (1976).

[7/] The possibility that BRH could suffer a reduced capability was suggested by a May 1977 Press Release issued by the Secretary of Environmental Resources (Board Exhibit 1). The Press Release indicated that there was a chance of a budget reduction and that, therefore, BRH would suffer a reduction in its radiological health environmental monitoring program and emergency response capability.

[8/] Applicants' Testimony of John G. Herbein, following Tr.757, at 4.

the NRC in the event BRH could not respond. 9/ Mr. Herbein, for the Applicants, stated that provisions would be made, in conjunction with the NRC, to provide the same capability as the BRH would have provided. 10/ Thus, the alleged new evidence would not raise a safety deficiency, but instead, if true, would only raise an issue (decreased capability of BRH) which has already been thoroughly aired on the record. It is therefore clear that compelling Mr. Gerusky to testify on BRH capabilities would not lead to a result other than a favorable finding on the adequacy and workability of TMI-2 emergency evacuation planning.

Conclusion

For the reasons set forth above, Joint Intervenors' Motion should be denied.

Respectfully submitted,

Henry J. McGurren
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 1st day of May, 1978

9/ Tr.1720-21, 2529-32. The Joint Intervenors have incorrectly cited the Seabrook decision for the precedent that there can be no such reliance on Applicants' information. Instead Seabrook held that the Applicant is not required by the Commission's regulations to include in its emergency plan dynamic protection (in the event of an accident) of persons located outside of the Low Population Zone. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-390, NRCI-77/4, 733 at 747 (1977).

10/ Tr.1570-71.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO INTERVENORS' MOTION TO COMPEL THE APPEARANCE OF THOMAS GERUSKY" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 1st day of May, 1979:

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