

11/13/79

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
SACRAMENTO MUNICIPAL UTILITY)
DISTRICT)
(Rancho Seco Nuclear Generating)
Station))

Docket No. 50-312



RESPONSE OF NRC STAFF TO CEC'S "MOTION FOR
RECONSIDERATION OF THE SCHEDULE FOR DISCOVERY AND HEARINGS"

INTRODUCTION

On October 24, 1979 the California Energy Commission (CEC) filed a "Motion for Reconsideration of the Schedule for Discovery and Hearings." The NRC Staff filed on November 8, 1979 on behalf of all parties to this proceeding a "Joint Response" to the portion of CEC's motion which dealt with scheduling concerns. As part of its motion CEC had also requested the Licensing Board to:

- (1) "set forth the procedures which it wishes the Applicant and the NRC staff to follow in going forward on each of the Board's and CEC's issues" (p. 2),
- (2) "establish procedures pursuant to which the Applicant and the NRC Staff shall carry the burden of going forward on the Board's and CEC's issues" (p. 3); and
- (3) render "any other guidance which the Board may consider appropriate for participants in this proceeding" (p. 2).

This pleading is filed in response to these requests.

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DISCUSSION

It is unclear to us why CEC has requested the Board to establish who will have the burden of going forward on CEC's issues, since the Board has already ruled on that question. In its August 3, 1979 "Prehearing Conference Order" (p. 2) the Board

- (c) ordered that the burden of proof on all contentions will be placed upon the licensee and the burden of going forward on contentions shall be placed upon the party making the contention.

Although the Board used the term "contentions" and the CEC (as an interested state under 10 C.F.R. §2.715(c)) has raised "issues," it is clear from the discussion at the prehearing conference that the Board intended its ruling to apply to CEC, as well as to the 10 C.F.R. §2.714 intervenors. Tr. 48-49.^{1/}

We believe the Board's allocation of the burden of going forward is appropriate and fair. Certainly were CEC participating in this proceeding under §2.714 there would be no question that it assumed the burden of going forward, either by direct evidence or cross-examination, as to its contentions. Philadelphia Electric Co. (Limerick) ALAB-226, 8 AEC 381, 388-89 (1974);

^{1/} Any question as to the reach of the Board's ruling is resolved by its discussion of the burden question at pp. 4-6 of its October 5, 1979 "Order Ruling on Scope and Contentions."

Maine Yankee Atomic Power Co. (Maine Yankee), ALAB-161, 6 AEC 1003, 1008, reconsid. den., ALAB-166, 6 AEC 1148 (1973), remanded on other grounds, CLI-74-2, 7 AEC 2, affirmed, ALAB-175, 7 AEC 62 (1974); Consumers Power Co. (Midland), ALAB-123, 6 AEC 331, 345 (1973). Although Commission case law has not addressed the precise question of whether a §2.715(c) interested state has the burden of going forward with respect to issues it has raised, it has been established that an interested state "must observe the procedural requirements applicable to other participants." Gulf States Utilities Co. (River Bend), ALAB-444, 6 NRC 760, 768 (1977). See also Public Service Co. of New Hampshire (Seabrook), CLI-77-25, 6 NRC 535, 537 n. 1 (1977) and Project Management Corp. (Clinch River), ALAB-354, 4 NRC 383, 393 n. 14 (1976). Thus, in order to raise independent issues of its own, an interested state must plead those issues with the same degree of detail and precision as would be required of a petitioner under §2.714. River Bend, supra and Clinch River, supra. It logically follows, we believe, that an interested state has the burden of going forward on its issues.

The Board has not specifically addressed the question of the allocation of the burden of going forward with respect to Board questions. These questions arose as a result of the Board's reframing of certain issues which were raised by CEC, but inadequately so in the Board's view. Order Ruling on Scope and Contentions, October 5, 1979, at 6. Having assumed these issues as its own, it appears that the Board has relieved CEC of any unique burden of going forward with respect to them. Rather, the Board undoubtedly

expects the Licensee,^{2/} the Staff, and any other party having something to contribute on these questions to file testimony on them.

CONCLUSION

For the reasons set forth above we conclude that:

1. The Licensing Board correctly determined that CEC has the burden of going forward with respect to its issues.
2. CEC does not have the unique burden of going forward with respect to the Board issues.

As to point 1, above, CEC's motion should be denied. As to point 2, we believe that clarification of the Board's order, along the lines we have argued, would be appropriate.

Respectfully submitted,

Stephen H. Lewis

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Counsel for NRC Staff

Dated at Bethesda, Maryland
this 13th day of November, 1979.

^{2/} This would also be consistent with the Board's ruling that the Licensee retains the ultimate burden of proof.

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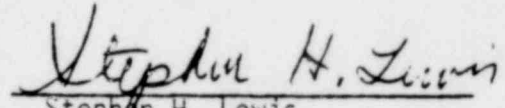
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