March 31, 1981

SECY-81-207

ADJUDICATORY ISSUE

(Information)

For: The Commission

From: James A. Fitzgerald, Assistant General Counsel

Subject: BACKGROUND OF ADMINISTRATIVE JUDGES' CONCERNS ARISING OUT OF ALAB-590

Purpose: To report the results of an OGC survey of the NRC administrative judges about the Appeal Board decision in ALAB-590.

Discussion: The Appeal Board in ALAB-590, 11 NRC 542, reversed a Licensing Board denial of Mr. F. H. Potthoff's petition to intervene in the Allens Creek proceeding on the ground that he failed to provide a basis for his contention that a marine biomass farm would be environmentally preferable to Allens Creek. A divided Appeal Board found that the Licensing Board, in rejecting the contention, had disregarded the long-standing administrative practice that the underlying factual support for a contention is not a proper subject for examination in a decision whether to permit intervention. E.g., Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423 (1973). The Appeal Board found that Potthoff, a pro se litigant, contended only that the biomass farm was a viable alternative that had been neglected in the NRC FES and that he

Contact:
Mark E. Chopko, GC
X-43224

8104080581

should not have been held to a basis for "preferability." This decision drew a vigorous dissent from Dr. Buck who urged not only that the majority opinion was in error in accepting what in his view was a frivolous contention, but also that the Commission should review this case to address the "basis" requirement for contentions. While this case was pending before the Commission, the Acting Chairman of the Licensing Board Panel and several Licensing Board members filed separate memoranda with the Commission -- some urging review because ALAB-590 was seen as an evisceration of the contention requirement for intervention and others urging no review because ALAB-590 was seen as a confirmation of present practice. These filings were extraordinary in view of the nature of the case and its practical effect on Allens Creek.

We recommended that the Commission not review ALAB-590. SECY-A-80-68 (May 15, 1980). In our view view the majority position correctly applied consistent NRC practice of not using the contention requirement as a vehicle for a merits examination at the intervention stage. Whether the intervenor might prevail on the merits is not to be decided by a judge's deduction but on a record created by the parties. As we understand it, the requirement serves two purposes: to assure that prospective parties have a cognizable issue appropriate for adjudication in the particular proceeding and not simply an undifferentiated concern without regard to the specific ligitation, and to give notice to the other parties of the issues to be tried in the hearing. OGC Analysis -- "The Contention Requirement for Intervention," SECY-A-80-16 (January 31, 1980). In our view, to the extent Mr. Potthoff had called into question the thoroughness of

the staff's evaluation of an alternative to the Allens Creek facility with sufficient precision and identified his basis for this belief, he had qualified for further participation. Under NEPA it is the agency's duty to fully explore alternatives to the proposed action. A challenge to the performance of that duty is surely cognizable in the proceeding. This did not mean that Mr. Potthoff would prevail on the merits; in fact he has not.[1/] What it means is that he presented enough information that on its face gave the other parties adequate notice of his concern and supported going forward to a merits evaluation.

Members of various Boards questioned the validity of an intervention policy that permitted such a contention to be accepted in the first place. This dispute was placed before the Commission. On June 10, the Commission discussed ALAB-590 and the views expressed by the various Board members

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1/ On February 2, the Appeal Board affirmed the Licensing Board's grant of summary disposition to the applicant on the Potthoff biomass farm contention. Because that was his only contention, Mr. Potthoff has been dismissed from the proceeding. Dr. Buck, who dissented in ALAB-590, stated in a separate opinion that this procedure "served no purpose other than to consume unnecessarily the time of the parties, the Board below, and this Board." Slip op. at 15. See SECY-A-81-131 (March 2, 1981).

and decided not to take review.[2/] At the same time, however, the Commission directed us to study what sparked the filing of various memoranda from the Boards and what might be done about it, including whether the Grand Gulf/Allens Creek standard should be changed. As you will recall, the Commission's discussion focused on the policies for and against the current low threshold for judging the adequacy of contentions at the intervention stage. On the one hand, it was noted that technical members must feel frustrated by not being able to use their expertise to weed out unmeritorious contentions at this stage. (See also n.1, supra.) On the other hand, the view was expressed that in adjudication issues should be rejected for lack of merit, not on a judge's intuition and calculation but on a record developed by the parties -- the danger being that only conventional issues would be accepted.[3/] We believe the current standard for determining the sufficiency of a contention for intervention purposes is that a Board may examine

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2/ In a one-page order, the Commission, with the Chairman dissenting, announced it would not review ALAB-590 and stated it did not read that decision as departing from the standard set in Grand Gulf. After this order, we would regard any decision interpreting ALAB-590 as eliminating the basis requirement as error and a candidate for reversal.

3/ These concerns paralleled the issues raised in the Licensing Board memoranda. It was suggested that ALAB-590 represented an overly legalistic approach that was irrational and wasteful for a technical agency (Deale) and had stripped the "basis-for-contention" requirement of meaning (Lazo). On the contrary, it was noted that there was a danger in letting technical judgment go unchecked because only the conventional issue would survive and that ALAB-590 had only confirmed what had always been the law (Paris, et al.).

only the four corners of the contention and the basis asserted. Unless the contention is frivolous on its face or discloses some illegality or is unsupported by the plain language of the basis asserted, the contention must be admitted. Such a contention would thus present a reasonable basis to go forward to a merits examination.

What follows is our report on the causes of the reaction to ALAB-590. A presentation of alternatives on how the contention standard may be changed is now the subject of a separate OGC task ar[illegible]ing out of SECY-81-111 (February 17, 1981).

Administrative Judges' Opinions

We have discussed the ALAB-590/contention situation at a meeting of the Licensing Board panel and with Alan Rosenthal and John Buck of the Allens Creek Appeal Board. From these discussions, we have identified several reasons to explain why ALAB-590 should have caused such concern from Board members while the case was still pending before the Commission.[4]

(1) Concern among the judges about the nature of the role the Commission intends its adjudicatory boards to play in dealing with public participants. Some judges alluded to their dual role in the Commission's system -- they are at the

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4/ In one of its Shearon Harris decisions, the Commission encouraged its adjudicatory boards to advise the Commission on situations that the Commission should address, where the boards were powerless to act. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), CLI-80-12, 11 NRC 514 (1980). The concerns expressed reflect that policy. In our view, such expressions should be reserved onl· for some important legal, factual, or policy issue and not simply to disagree with the result in a particular case. In this situation, there are elements of both.

same time judges ruling on particularized matters in adjudication and the Commission's agents representing the agency's authority to the public. There is considerable balance in these roles, and they are aware of this most acutely in ruling on intervention petitions. Some judges specifically indicated that they would welcome Commission guidance here: What does the Commission want of them? To what extent does it want the Boards to indulge members of the public and hear unreasonable issues? What is the NRC trying to accomplish by pleadings? What is the hearing supposed to accomplish? These invitations for guidance suggest the need for some Commission action, either to bless the current approach (with some further direction) or to change it.

(2) Differing views on the wisdom of the current threshold for contentions. Perhaps the dichotomy of views is best exemplified by the opinions of Dr. Buck and Mr. Farrar in ALAB-590. Dr. Buck was disturbed at the thought that the NRC process should require that the biomass contention be heard, with an appropriate reference to Dickens. Mr. Farrar conceded that this case might be perceived as a "bad result," but it was nonetheless the price NRC pays for having an open system of adjudication. Some judges feel that the current threshold (10 CFR 2.714 as interpreted in Grand Gulf) is sensible and workable. They see it as "easily applied," and are concerned that raising the threshold will cut off some good but novel contentions. Moreover, since the Commission allows an intervenor to make his case entirely on cross-examination, one

judge indicated it would be inconsistent to raise a high threshold to entry to the proceeding itself. On the other hand, some would like to see the Commission be more conservative in allowing "losing" contentions into the proceeding. These judges believe it is wasteful to go forward with insubstantial contentions. Summary disposition, while more efficient than hearing, nevertheless is "not so easy." It takes resources, discovery time, etc. One judge felt that it was somewhat fraudulent to go to hearing on a specious issue, particularly to the intervenor who is misled into believing he might prevail.

(3) The Appeal Board interpreted the contention differently than the Licensing Board did. Mr. Potthoff had urged that a large marine biomass farm would be "environmentally preferable" to Allens Creek. The Licensing Board found that no basis for the "environmental superiority" of the proffered alternative had been demonstrated. The Appeal Board, however, said Potthoff's papers clearly indicated his concern that a <u>viable</u> alternative had been overlooked in the FES. The Board found that an examination of the superiority of an alternative is a merits determination, the decision that the large marine biomass farm was not shown to be an environmentally superior alternative was error, and the Licensing Board should have found a basis for the contention that a biomass farm was a viable alternative. A theory of the Appeal Board decision is that a reasonable basis for viability is all that needs to be established and a Board may not examine superiority as well in deciding whether to allow the contention at the intervention stage.

The Appeal Board was implicitly critical of the Licensing Board's interpretation of Mr. Potthoff's pro se pleadings. On this level, the Appeal Board decision is perceived as an invocation to read less stringently the pleadings of a pro se litigant, notwithstanding their plain words. This result was in fact urged by intervenor TexPIRG in its brief in support of Potthoff's appeal. While there is solid caselaw support for the Appeal Board's departure from the words of the pleading to its general intention, because the result was to allow an apparently absurd contention into the hearing, there was strong opposition directed at ALAB-590. As a matter of law, however, the decision was well-founded.[5/] The judges may have reacted more to the result in fact than the policy itself. The feeling was also expressed that the Appeal Board should not have taken the lower Board to task when it was construing the contention to be "viability," not "preferability." Had Mr. Potthoff expressed a more usual alternative, the same degree of concern might not have been expressed.

5/ It is well-settled that a complaint drafted by a pro se litigant must be liberally construed in view of his lack of professional sophistication. Merckens v. DuPont, Glore Forgan & Co., 514 F.2d 20 (2d Cir. 1975), citing Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam). In Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944), Judge Clark, drafter of the Federal Rules of Civil Procedure, sustained a "home drawn" complaint against a motion to dismiss stating that, under the rules, Mr. Dioguardi was only required to make "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. 8(a). This practice is well-respected by the federal judiciary. The Commission's pleading rule, 10 CFR 2.714, is interpreted analogous to the federal rules. See SECY-A-80-16, supra.

(4) Mr. Potthoff offered additional bases to the Appeal Board. At the prehearing conference, Mr. Potthoff explained that he intended by his marine biomass contention that the farm "would grow kelp and take it in and have it decay into alcohol or methane or something like that" (Tr. 931) as an energy source and his basis was "project independence, which says a biomass farm could be ready *** in 1986." (Tr. 932). The Licensing Board said that basis was insufficient to show that a marine biomass farm was environmentally superior to a nuclear plant. In his brief on appeal, Mr. Potthoff pleaded that he believed the Licensing Board would just take notice of the obvious environmental advantages to a marine farm -- no radionuclides and less land irrevocably committed to nuclear energy production. Neither of these assertions was made to the Board below and both directly related to the biomass contention. In our discussions with the judges, the Allens Creek Licensing Board Chairman remarked that had that additional information been presented initially the Board would have reached a different conclusion on intervention. This suggested to us a feeling on the part of the judges that the Appeal Board reversed the Licensing Board on a record that includes information not presented below. The Appeal Board decision, however, does not cite this information and could not rely on it to reverse the Licensing Board. In ALAB-582, decided in February 1980 in that same docket, the Board refused to reverse a lower decision on information only first adduced on appeal. ALAB-582, 11 NRC

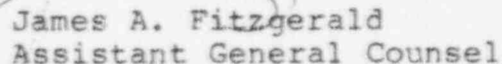
239, 242. We found no evidence to suggest that these additional bases had been given any consideration by the Appeal Board. Yet perhaps if the case were simply remanded with instructions to review these additional bases, the instant matter would have been avoided.

Points 1 and 2 suggest that some change is needed to 10 CFR 2.714. Points 3 and 4 indicate administrative reasons for the concerns raised about ALAB-590 -- principally issues of inter-Panel relations.

Preliminary Conclusions

This dispute probably was inevitable given the divergent views and the strength of conviction among NRC administrative judges but could have been averted for a time if ALAB-590 had been decided on a different footing. The views expressed reflect different outlooks on the role of the adjudicatory boards in dealing with the public in the intervention process. While the Potthoff case was an aberration, it raises serious policy questions relevant to the future direction of the NRC's adjudicatory process. Those questions will be addressed in a separate paper now in preparation.

Coordination: This paper has been reviewed by members of the Licensing Board Panel and Judges Rosenthal and Buck. Written comments are attached.



James A. Fitzgerald
Assistant General Counsel

Attachments:
1. Memo, 3/20/81, Rosenthal to Fitzgerald
2. Memo, 3/24/81, Buck to Fitzgerald

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