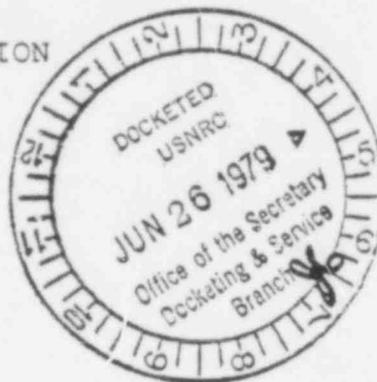


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NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Alan S. Rosenthal, Chairman
Dr. John H. Buck
Michael C. Farrar



SERVED JUN 27 1979

In the Matter of)

VIRGINIA ELECTRIC AND POWER)
COMPANY)

(North Anna Nuclear Power)
Station, Units 1 and 2))

Docket Nos. 50-338 OL
50-339 OL

Mr. Stuart A. Treby for the Nuclear Regulatory
Commission staff.

Messrs. Michael W. Maupin, James N. Christman
and James M. Rinaca, Richmond, Virginia, for
the applicant, Virginia Electric and Power
Company.

MEMORANDUM AND ORDER

June 26, 1979

(ALAB-551)

This is an operating license proceeding involving the first two units of the North Anna nuclear facility. The Licensing Board resolved all matters in controversy in the applicant's favor. LBP-77-68, 6 NRC 1127 (1977); LBP-78-10, 7 NRC 295 (1978). No appeal was taken to us from either of those decisions. Accordingly, as is customary in such circumstances, we reviewed them on our own initiative.

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The results of that review were announced last August in ALAB-491, 8 NRC 245. We there concluded that further action on our part was required only with respect to three issues. Two of them concerned the North Anna facility itself; more specifically, (1) the safety implications of the settlement of the land underneath the facility's service water pumphouse and (2) the possibility that damage to safety-related structures would be occasioned by turbine missiles. (As to those issues, we subsequently ordered an evidentiary hearing,^{1/} which was conducted last week.) The third was the generic radon-release issue which is also being considered in a number of other proceedings.^{2/}

On April 2, 1979, the NRC staff transmitted a "Board Notification" to the presiding licensing or appeal boards in a number of then pending proceedings -- including this one. That notification, together with the documents which accompanied it, called attention to the existence of a safety question concerning the "current practice of relying on nonsafety grade equipment to mitigate the severity of anticipated operational occurrences" (hereinafter the "nonsafety grade equipment" issue).

The notification prompted our issuance in this proceeding of ALAB-538, 9 NRC _____ (April 12, 1979), in which we asked the

^{1/} See ALAB-529, 9 NRC 153 (1979).

^{2/} See ALAB-491, supra, 8 NRC at 250, fn. 12.

parties to brief us on two questions: (1) our jurisdiction to consider the nonsafety grade equipment issue; and (2) the precise significance of that issue in the context of the North Anna facility. In compliance with that request, the staff submitted a brief to which the applicant (but not the other parties) has responded.

A. As observed in ALAB-538,^{3/} the staff has long been under an obligation to keep licensing and appeal boards apprised of significant new developments in pending cases. Duke Power Company (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-143, 6 AEC 623, 625 (1973). Last summer, the staff adopted detailed procedures for fulfilling this obligation; this followed on the heels of a Commission policy pronouncement on the subject.

The April 2 notification herein involved presumably was thought required by those procedures. Nonetheless, we entertained doubt respecting whether the notification could serve any useful purpose insofar as this proceeding was concerned. The basis for this doubt was explained in ALAB-538:

In short, we have only three issues now before us; all other issues have been resolved. Of course, all parties must keep us informed of new developments pertaining to those issues. But the obvious question is whether in these circumstances we still have jurisdiction to consider unrelated issues -- such as the one

^{3/} 9 NRC at _____, fn. 1.

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covered by the staff document now before us. If not, then such issues are exclusively within the staff's bailiwick, and no purpose is served by bringing them to our attention. We have previously decided a closely related question in the context of construction permit cases. See, e.g., Public Service Company of New Hampshire (Seabrook Units 1 and 2), ALAB-513, 8 NRC _____ (December 21, 1978); Public Service Company of Indiana (Marble Hill Units 1 and 2), ALAB-530, 9 NRC _____ (March 19, 1979). Whether the same principles govern at this stage in operating license cases has not been passed upon.

9 NRC at _____ (footnotes omitted).^{4/}

Reduced to its essentials, the staff's response is that the jurisdiction of an appeal board to consider new matters arising during the course of its review of a licensing board decision does not hinge upon the nature of the proceeding. Rather, irrespective of whether a construction permit or an operating license is involved, the pivotal factor is "the posture of the case and the degree of finality which has attached to the agency action which is in question". Where, as here, finality has attached to some but not all issues, appeal board jurisdiction to entertain new matters is dependent upon the existence of a "reasonable nexus" between those matters and the issues remaining before the board. Thus, "[f]or this Appeal Board to have jurisdiction with regard to the new matters raised in the April 2

^{4/} We did, of course, acknowledge that any person might petition the appropriate staff official to take action pursuant to 10 CFR 2.206, as well as the right of the Commission to review the staff decision on such a petition. 9 NRC at _____, fn. 6. See discussion, pp. 8-9, infra.

Board Notification, a nexus between such matters and at least one of the [pumphouse settlement, turbine missile and radon] issues must be shown". Staff Br. pp. 3, 6, 13.

The applicant is in agreement with that analysis. So, too, are we.

It is beyond dispute that, in the course of its review of an initial decision in a construction permit proceeding, an appeal board is free to raise sua sponte issues which were neither presented to nor considered by the licensing board. See, e.g., Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-435, 6 NRC 541, 544-46 (1977). It is equally plain that like power exists in an operating license proceeding. As a general rule, the inquiry in such proceedings is confined to "the matters put into controversy by the parties to the proceeding". But the Commission has expressly decreed that that limitation shall not apply "in extraordinary circumstances" where the board determines that there exists "a serious safety, environmental, or common defense and security matter" beyond the ambit of the issues in controversy.^{5/} 10 CFR 2.760a and 2.785(b)(2), codifying Consolidated Edison Co. of New York (Indian Point Nuclear Generating Station, Unit 3), CLI-74-28, 8 AEC 7 (1974).

^{5/} Needless to say, the board notification procedures are designed, inter alia, to alert boards to the existence of such matters. See, generally, Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-408, 5 NRC 1383, 1386 (1977).

Section 2.785(b)(2) was, of course, the foundation of our decision in the proceeding at bar to raise the turbine missile issue on our own initiative. ALAB-491, supra, 8 NRC at 247-50.

The authority vested in the adjudicatory boards to raise or to consider new issues must be understood, however, to be qualified by settled principles relating to the finality of adjudicatory action; principles which govern our proceedings to no less an extent than those of the courts or other administrative agencies. Thus, once an appeal board has wholly terminated its review of an initial decision -- whether it be a construction permit or an operating license proceeding -- its jurisdiction over the proceeding comes to an end. To be sure, that jurisdiction may be resurrected by a remand order of either the Commission or a court, issued during the course of its own review of our decision. What might be considered by us on the remand would, however, be shaped by that order; i.e., if (as would customarily be the case) the remand related to only one or more specific issues, the finality doctrine would foreclose a broadening of its scope to embrace discrete matters.

As has been seen, in its current posture the proceeding at bar falls in between the two extremes of (1) no appeal board decision having yet been rendered on any issue and (2) an appeal board decision having been rendered on all issues. By virtue of ALAB-491 (and the lack of any further review of it by Commission or court), the finality curtain has dropped on most of the issues

which were raised in the proceeding. On the other hand, three issues remain before us.

Last December, we confronted a parallel situation arising in the setting of a construction permit proceeding. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-513, 8 NRC 694. There, an intervenor moved to reopen, on the basis of new developments, the issue of the applicants' financial qualifications to construct and operate the Seabrook facility. Observing that that issue had been determined by us in 1977 and that our decision on it had been affirmed in turn by both the Commission and the court of appeals, we held that we lacked jurisdiction to reopen it. We added that this conclusion was

not altered by the fact that we still have before us an entirely discrete issue raised in the proceeding; viz., whether there is an alternative site in New England which would be "obviously superior" to the Seabrook site were use of a closed-cycle cooling system to be required at the latter site. Neither our decision last April calling for a further exploration of that issue nor the Commission's directive in June that we (rather than the Licensing Board) conduct the exploration purported to preserve our jurisdiction over other, unrelated questions.

8 NRC at 695-96 (footnote omitted). See also, to the same effect, Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-530, 9 NRC _____ (March 19, 1979).

No good reason appears why any different result might obtain where, as here, an operating license proceeding is involved and the question is one of jurisdiction to entertain an entirely new issue (rather than to reopen a previously resolved one). For the purposes of the application of the finality doctrine, the precise nature of the Commission license sought should be of little moment. And, irrespective of whether a reopening of a determined issue, or instead the raising of an issue not earlier considered, is involved, the concept underlying the finality doctrine -- that litigation must come to an end at some point -- comes into play. In both instances, the decisive factor is whether, except for those limited issues as to which jurisdiction has been expressly retained, the case has been decided.

We hasten to add that, as stressed in both Seabrook and Marble Hill, the absence or loss of appeal board jurisdiction over a particular issue because of finality considerations does not mean that, even if clothed with serious safety or environmental implications for the facility in question, the issue must be ignored. To the contrary, it just falls within the staff's bailiwick, not ours. It can be there reviewed on an informal basis; beyond that, either on his own initiative or upon the request of any individual (whether or not a party to the licensing proceeding), the Director of Nuclear Reactor Regulation is empowered to institute a show-cause proceeding looking to the modification, suspension or revocation of a particular permit or

license. 10 CFR 2.202, 2.206.^{6/} In the show-cause proceeding, the new matter would be subject to full ventilation and the grant of such relief as might be warranted by the disclosures of record.^{7/}

B. Although in agreement that our authority to consider the nonsafety grade equipment issue here turns upon the existence of a "reasonable nexus" between that issue and one of the issues over which we have retained jurisdiction, the staff and the applicant are of two minds on whether there is such a nexus. The staff sees a "potential relationship" between the nonsafety grade equipment issue and the turbine missile issue; in any event, we are told, it is unable to state that "beyond all doubt * * * no relationship whatsoever exists" (Staff Br. pp. 13-14). For its part, the applicant maintains that a reasonable nexus does not exist.

^{6/} The denial by the Director of a request for a show-cause order is reviewable by the Commission sua sponte. 10 CFR 2.206(c)(1).

^{7/} To this point, we have confined our discussion to construction permit and operating license proceedings. In other types of proceedings (e.g., those involving applications for license amendments), the licensing and appeal boards are limited ab initio to the issues identified in the notice of hearing which triggered the proceeding. Thus, considerations of finality to one side, neither board would be empowered to consider any issue beyond those so identified. Portland General Electric Co. (Trojan Nuclear Plant), ALAB-534, 9 NRC _____, _____, fn. 6 (March 27, 1979). With respect to the issues embraced by the notice of hearing, the above-explained principles would be fully applicable.

We do not endeavor to resolve this disagreement now. Rather, we intend to carry the question with the case and to consider it, if then seemingly necessary, in conjunction with our decision on the turbine missile issue. For the present, it should suffice to set forth a few guidelines which should be observed in the instance of future "board notifications".

As we noted in ALAB-538, 9 NRC at _____, the notification with respect to the nonsafety grade equipment issue, and the documents which accompanied it, were too cryptic to permit an intelligent evaluation of the significance of the issue in the context of this proceeding.^{8/} A notification which suffers from that infirmity is virtually useless. Although there may be no warrant for treating the subject at encyclopedic length, if the notification is to serve its intended purpose a board must be supplied with an exposition adequate to allow a ready appreciation of (1) the precise nature of the addressed issue and (2) the extent to which the issue might have a bearing upon the particular facility before the board. In this connection, the bald assertion that the issue has "no immediate safety significance" (see ALAB-538, 9 NRC at _____) is insufficient. Without the reasoning underlying the assertion, it is obviously impossible for a board to pass an informed judgment on its validity. Of course, where (as here) the board has limited remaining jurisdiction, the notification must additionally spell out (unless readily apparent) the possible

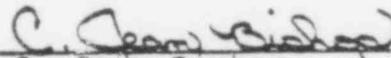
^{8/} The staff's brief in response to ALAB-538 provided (at pp. 15-18) considerably more information in that regard.

relationship between the subject matter of the notification and one or more of the open issues.

Action on the April 2, 1979 "Board Notification" is deferred.

It is so ORDERED.

FOR THE APPEAL BOARD


C. Jean Bishop
Secretary to the
Appeal Board