UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
BOSTON EDISON COMPANY, et al.	)	
	)	Docket No. 50-471
(Pilgrim Nuclear Generating Station, Unit 2)	)	
	)	

MEMORANDUM OF THE COMMONEALTH OF MASSACHUSETTS IN OPPOSITION TO DISMISSAL OF ITS CONTENTION ON EMERGENCY PLANNING

In the course of a conference call on September 10, 1979 the parties were asked to brief the following question: in light of the consideration now being given by the NRC to the issue of emergency planning, should the Licensing Board dismiss the Commonwealth's emergency planning contention as a matter presently the subject of a generic rulemaking proceeding? For the following reasons, the Commonwealth opposes dismissal of the contention, but does renew its request that the evidentiary hearings on emergency hearings not be reconvened until further guidance on emergency planning has been issued by the NRC, guidance which can reasonably be expected to be forthcoming in the next few months.

Although a licensing board is not required to consider the details of a proposed emergency plan in reaching a decision on an application for a construction permit, it must at the very least determine whether surrounding population densities, transportation routes, land use and other unique site characteristics might combine to render any emergency plan ineffective. Southern California Edison Company, et al (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-248, 8 AEC 957, 962-63 (1974); Consumers Power Company (Midland Plant Units 1 and 2), ALAB-123, 6 AEC 331, 342-43 (1973); 10 CFR Part 50, Appendix E, Sections I-III. The issue, therefore, is one of emergency planning feasibility, and as such is a site-specific matter that must be resolved by consideration of the demographic, meteorological and topological peculiarities of the area surrounding the proposed reactor. Emergency planning feasibility, in turn, is a necessary component of the larger issues of site suitability (see 10 CFR §100.10), reactor safety (see 10 CFR §50.34 [a] [10] and Appendix E to 10 CFR Part 50) and the NEPA alternative sites cost-benefit analysis (see Supplementary Information to the proposed amendment to Appendix E, 43 Fed. Reg. 37473, 74 (August 23, 1978), all of which must be resolved prior to the issuance of a construction permit. In short, if the feasibility issue is to be considered at all, it must be at some time prior to the start of construction; to deal with it at any time thereafter is both illogical and runs the considerable risk that the applicant's ongoing investment in the project will impermissibly affect the decision-making process.

Based on these considerations, the Staff supported and this Board granted the Commonwealth's motion that the feasibility of emergency planning for the Pilgrim 2 reactor site be taken up during the construction permit phase of these proceedings. Because the accident at Three Mile Island has obliged the NRC to reassess its policies with respect to emergency planning, however, the question has now arisen whether the Commonwealth's contentions should not be dismissed under those cases holding that licensing boards should not accept contentions which are the subject of pending or imminent generic rulemaking proceedings. See Potomac Electric Power Company (Douglas Point Nuclear Generating Stations, Units 1 and 2), ALAB-218, 8 AEC 79, 84-85 (1974); Long Island Lighting Company (Shoreham Nuclear Power Station), ALAB-99, 6 AEC 53, 55-56 (1973); Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-179, 7 AEC 159, 163-64 (1974). In each of these proceedings, intervenors sought to litigate the environmental consequences of the uranium fuel cycle at a time when the Commission itself was considering the matter generically, and in each instance the Appeal Board held that the pending rulemaking action at least temporarily precluded consideration of the issue by individual licensing boards.

In order to determine the impact of the fuel cycle cases on the instant proceedings, it is necessary to understand the factual context in which they arose. Between November of 1972

and April of 1974, the NRC conducted a detailed study of the production, transportation, consumption and disposal of uranium fuel, and ultimately promulgated a definitive regulation that quantified the environmental effects of the entire fuel cycle by providing numerical values that could then be factored into to the cost-benefit analysis that must be performed under NEPA for each individual proposed reactor. Generic rulemaking in this instance was particularly appropriate, for as was noted in Ecology Action v. United States Atomic Energy Commission, 492 F.2d 998, 1002 (2nd Cir. 1974), "it would be absurd that the issue of the environmental effect of uranium mining in Wyoming should have to be separately considered on every application to construct nuclear plants from Maine to California." A similar rationale was provided by the Appeal Board in Douglas Point:

> The proper evaluation of the environmental consequences of the uranium fuel cycle, initially raised in the Vermont Yankee adjudication, was not a matter capable of simple resolution. It necessarily encompassed considerations far transcending the operation of a single nuclear power generator in New England. It resolution required knowledgeable examination into industry-wide and nation-wide problems and policies relating to mining, processing, storing, transporting and ultimately disposing of uranium fuel. Indeed, as noted in Vermont Yankee, full information respecting some of those questions had not at that time been developed, much less explored. 4 AEC at 938. The uranium fuel cycle issue was thus particularly appropriate for resolution by the Commission in a rulemaking proceeding. In context, our observations in Vermont Yankee about the availability of that procedure (e.g., 4 AEC at 937) must be understood as anticipative, although notice that the Commission was about to embark on rulemaking to consider the environmental effects of the uranium fuel cycle was not announced formally until a few months thereafter. 37 F.R. 24181. Our consideration in

> adjudicatory proceedings of issues presently to be taken up by the Commission in rulemaking would be, to say the least, a wasteful duplication of effort. Id. at 85.

There are a number of aspects of the fuel cycle cases that bear emphasis. First, as was noted by the Appeal Board in Shoreham, the NRC's pending rulemaking proceeding precluded consideration of the environmental effect of the fuel cycle by individual licensing boards, but only to the extent that the issue sought to be raised was 'not unique to any given reactor." Id. at 55. Accordingly, individual licensing proceedings could still be expected to reach such "site-dependent" issues as the transportation of fuel elements to the plant itself and the removal of irridated fuel from the plant to a reprocessing facility. Id. at 54, 56. See also Vermont Yankee, supra at 164, fn. 12.

Second, the Commission's comprehensive rulemaking proceeding involved what amounts to final findings of fact with respect to all phases of the uranium fuel cycle as it takes place throughout the nation and throughout the industry. It was not a matter of issuing guidelines or standards that were then to be applied by licensing boards in relitigating the matter; the fuel cycle itself was considered on the merits, and a quantative and irrebuttable judgment made that then became applicable to all individual proceedings. Because the nation-wide character of this issue lent itself to generic rulemaking, in other words, individual licensing boards were relieved of all fact-finding responsibility with respect to it.

Finally, although the fuel cycle contentions in Douglas Point were initially excluded because of the NRC's pending generic consideration of the issue, its rulemaking process was concluded well before issuance of the Douglas Point construction permit, so that the intervenors were then free to once again raise their fuel cycle contentions, at least to the extent that certain purely local aspects of the issue were not foreclosed by the NRC's new regulation. The Appeal Board in Douglas Point, therefore, had no occasion to consider whether pending rulemaking could operate to foreclose consideration of an issue altogether, or to foreclose it at that stage of the proceedings where it appropriately belonged. Indeed, in the face of a interpretation of the new regulation by the applicant and the staff which would have prevented its application in the ongoing Douglas Point licensing proceeding, the Board insisted on a contrary interpretation that would avoid leaving "a gap through which some pending applications might pass free of all consideration of the environmental effects of the uranium fuel cycle." Id. at 87.

In contrast to the fuel cycle cases, the issue of emergency planning currently before this Board is generic only in the sense that it can be reasonably anticipated that the NRC will soon issue more elaborate guidelines and standards to aid individual licensing boards in reaching the required site-specific determination as to whether effective emergency measures can be taken to protect the public in the area

surrounding a proposed reactor. In short, there is nothing currently being contemplated by the NRC that will relieve this Board of its responsibility under existing regulations to make findings of fact on the emergency planning feasibility issue, and in accordance with San Onofre and Midland that determination must be made prior to issuance of the construction permit.

The issue, therefore, is not one of preclusion but one of timing: at some point prior to the close of the record on BECo's application for a construction permit, this Board must consider the question of emergency planning feasibility, as required by 10 CFR §50.34(a)(10), Appendix E to 10 CFR Part 50 the "interim guidance" provided by the propcsed amendment to Appendix E and 10 CFR §100.10. If this issue is reached after the NRC issues its new guidelines, then all parties and the Board will have the benefit of the work done by the Staff in reassessing NRC emergency planning policy in the light of Three Mile Island; if it is reached before the NRC acts, then we must rely on present guidance, as well as whatever can be gleaned from the ongoing Staff effort.

The Commonwealth welcomes the Staff's motion that it be granted additional time to carry out further studies in the Plymouth area, for it was this lack of data and thoroughgoing analysis that originally prompted the Commonwealth's emergency planning contention. In addition to citing its need for more site-specific information, however, the Staff in its motion

also noted that the NRC has a number of emergency planning projects in various stages of completion, and the Commonwealth continues to urge this Board not to rush into hearings without first determining what further guidance might be forthcoming from the NRC in the near future.

Some of the deliberations now going on within the NRC cannot reasonably be expected to be concluded within the next year, and we would not propose to wait that long. On the other hand, certain decisions, reports and new regulations are due to be issued shortly, and they can be expected to provide this Board and the parties with further insights into the issue of emergency planning. In making its decision when to commence the hearings, this Board should be mindful of the following:

1. In June of 1979 the NRC's Task Force of Emergency Planning was established in response to the accident at Three Mile Island. It submitted its final report on August 9, 1979, and its recommendations are currently under consideration by the Commission. See SECY-79-499.

2. Expedited rulemaking on emergency planning is currently in progress, with the final rule now expected to be published on January 15, 1980.

3. The report of the joint EPA/NRC Task Force on Emergency Planning, NUREG-0396, was submitted for Commission approval on July 25, 1979 and is currently under consideration. See SECY-79-461.

4. The report of the Siting Policy Task Force, NUREG-0625, has been issued and is presently under consideration by the Commission.

5. On October 25, 1979 the final report of the President's Commission on Three Mile Island is due, and emergency planning is one of the areas that it will be addressing.

Of particular interest to the Commonwealth are the new emergency planning regulations, due to be promulgated on January 15, 1980. Since the Staff has said that it will require seven weeks after its site visit to analyze the data it gathers, the delay necessitated by the staff's site visit will bring the earliest date for reconvening of the hearings quite close to January. Under these circumstances, and with a briefing schedule already in place for all other outstanding issues, the Commonwealth urges this Board to defer the next round of hearings until after issuance of the new emergency planning regulations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, FRANK S. WRIGHT, hereby certify that the foregoing "Memorandum of the Commonwealth of Massachusetts in Opposition to Dismissal of the Contention on Emergency Planning" submitted by the Commonwealth of Massachusetts, Intervenor, has been served on the following by depositing copies thereof in the United States Mail, first class postage prepaid, this 25th day of September, 1979:

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Form 20. 20M-12-78 507037