

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD



_____)
In the Matter of _____)
BOSTON EDISON COMPANY et al. _____)
(Pilgrim Nuclear Generating Station, _____)
Unit 2) _____)

Docket No. 50-471

APPLICANTS' STATEMENT IN RESPONSE
TO BOARD REQUEST WHETHER EMERGENCY
PLANNING IS STILL A PROPER ISSUE
TO BE CONSIDERED IN HEARINGS

Statement

In an Order, under the date of January 17, 1980, the Board, in light of the Commission's rule proposals on "Emergency Planning" (10 CFR Part 50), published in the Federal Register on December 19, 1979 (44 Fed. Reg. 75167), has requested that the parties file statements as to whether emergency planning is still a proper issue in this proceeding and, if so, when should testimony be filed and hearings scheduled.

Emergency planning was accepted by the Board as an issue in this proceeding through a late filed contention stipulated to all the parties, except the Applicants, viz,

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Given the guidelines established by Appendix E to 10 CFR Part 50 and the proposed amendment thereto (43 Fed. Reg. 37433):

(1) An acceptable emergency plan cannot be developed to protect persons within and beyond the LPZ of the proposed site; and (2) The Applicant's preliminary emergency plans as set forth in its Preliminary Safety Analysis are inadequate.^{1/}

It is the Applicants' position that the subject contention, which is underpinned solely on the proposed amendment to Appendix E, 10 CFR Part 50, 43 Fed. Reg. 37473, a subject now in Commission "Emergency Planning" rulemaking (44 Fed. Reg. 75167, December 19, 1979), ought not to be further considered and should be dismissed from these proceedings for the reasons hereinafter set forth.

Background

The instant question put to the parties by the Board is the same question put to the parties earlier, in the context of the Commission's "Advance Notice of Proposed Rulemaking on the Adequacy and Acceptance of Emergency Planning Around Nuclear Facilities", 44 Fed. Reg. 41483 (July 17, 1979). The Applicants and the Commonwealth responded to the Board's inquiry as of September 25 and 26, 1979. The Applicants

^{1/} Tr. 11,229-30.

urged dismissal of the contention and its referral to rule-making.^{2/} The Commonwealth opposed dismissal of its contention but sought a deferral of hearings on its contention until after rulemaking.^{3/} In its reply, under the date of October 24, 1979, the Staff reported to the Board that it was of the opinion that the Commission's Advance Notice of Proposed Rulemaking (44 Fed. Reg. 41483) did not preclude Board consideration of the Commonwealth contention in this proceeding.^{4/} In that the Staff's reply was made sometime after the memoranda of the Applicants and the Commonwealth, the discussion below starts within the framework of the Staff's memorandum of October 24, 1978 (Staff's Memorandum).

Discussion

The Staff memorandum begins with an acknowledgement of the Appeal Board's admonition to Licensing Boards in Potomac Electric Power Company (Douglas Point Nuclear Generating

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- ^{2/} See, Applicants' Response to NRC Staff Motion to Defer Issue of Emergency Planning and to Establish Schedule for Filing Proposed Findings on Completed Issues (September 25, 1979).
- ^{3/} Memorandum of the Commonwealth of Massachusetts in Opposition to Dismissal of Its Contention on Emergency Planning (September 26, 1980).
- ^{4/} NRC Staff Response to Board Inquiry on Impact of Rulemaking on Commonwealth of Massachusetts Contention on Emergency Planning (October 24, 1979).

Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (July 15, 1974) citing the Vermont Yankee line of cases^{5/} that licensing boards should not accept in individual licensing proceedings contentions which are (or about to become) the subject of general rulemaking by the Commission. It then distills the underlying rationale in Douglas Point and the Vermont Yankee line cases.^{6/} However, the Staff's elucidation of the teaching of those cases is of little moment for neither the cases nor their underlying rationale are reintroduced in its Memorandum. Rather, the Staff finds, pivotal to the issue, what it terms "the express action taken by the Commission with regard to the specific emergency planning issue raised by the Commonwealth contention."^{7/}

^{5/} Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-56, 4 AEC 930 (1972), aff'd. ALAB-179, 7 AEC 159 (1974) rev'd. NRDC v. NRC 547 F.2d 663 (D.C. Cir. 1976), rev'd. on other grounds sub nom. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978); Long Island Lighting Company (Shoreham Nuclear Power Station), ALAB-99, 6 AEC 53 (1973).

^{6/} Staff Memorandum, p. 2.

^{7/} Staff Memorandum, p. 2. Interestingly, at the point of its departure from the case teaching, the Staff's Memorandum seeks to distinguish rather than to override the Licensing Board's decision, which relied on Douglas Point, supra, to decide the very same issue as presented here, in Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station) Docket No. 50-313, Slip Opinion pp. 3-4 (attached hereto). More interesting is the basis on which distinction is sought -- that the Rancho Seco Board was not "obligated to make findings, as is this Board with respect to Appendix E to

While acknowledging that the Commission's current rule-making embraces various generic emergency planning issues, including "the one most important . . . to this proceeding -- distance for planning", the Staff Memorandum puts this pivotal fact aside with the observation that the issue has been previously considered by the Commission, and that the Commission has provided the Board with interim policy guidance.^{8/} The first of such policy guidance, the Staff notes, was the Commissioner's proposed amendment to Appendix E, 10 CFR Part 50 (43 Fed. Reg. 37473 (August 23, 1978) where in the notice section of the publication of the proposed rule, the Commission declared:

"that continued implementation of its practice [of reviewing] the possible need for emergency plans beyond the LPZ as necessitated by circumstances in the vicinity of the site is required.' and that '[p]ending the . . . promulgation of a final rule, the proposed Amendment [should] be used as interim guidance in

Part 50 and 10 CFR §§ [50.]34(a)(10) and 50.40."

Appendix E to Part 50 is, of course, one of the very subjects presently in Emergency Planning rulemaking. Section 50.34(a)(10) calls for an applicant's PSAR to discuss preliminary plans for coping with emergencies and states that Appendix E sets forth items which shall be included in these plans. (Section 50.40 simply refers to the common, general standards for licenses and construction permits.)

^{8/} Staff Memorandum, p. 3.

reviewing an Applicant's emergency plan for a construction permit."^{9/}

The guidance afforded by the proposed amendment to Appendix E was according to the Staff further refined by the Commission's Policy Statement -- "Planning Basis for Emergency Responses to Nuclear Power Reactor Accidents", which adopted the guidance set out in the Joint Task Force Report, entitled "Planning Basis for the Development of State and Local Government Radiological Emergency Response Plans in Support of Light Water Nuclear Power Plants" NUREG-0396, EPA 520/1-78-016. This report, the Staff observes, recommends the establishment of two Emergency Planning Zones (EPZ's), one of about a ten-mile radius from the plant (airborne plume exposure), the other of about a fifty-mile radius for the ingestion pathway. Thus, the Staff opines, adoption of these guidelines by the Commission clearly extends emergency

^{9/} The Commission's proposed amendment to Appendix E published August 23, 1978 (43 Fed. Reg. 37473) came on the heels of New England Power Company et al., and Public Service Company of New Hampshire decision ALAB-390, 5 NRC 733 (1977) wherein it was held that an Applicant's emergency planning evacuation plans required by 10 CFR Part 100 and Appendix E of Part 50 need not extend beyond the LPZ. As noted early it is this proposed amendment that underpins the Commonwealth's emergency planning contention in these proceedings.

planning beyond the LPZ for all plants.^{10/} Additionally, the Staff Memorandum reports that letters of October 10 and 23, 1978 were sent by the Staff to all construction permit (CP) applicants setting forth new requirements for emergency planning which were to be added to those already contained in Appendix E.^{11/}

Against this backdrop of "guidance", the Staff turns to the Commission's Interim Statement of Policy and Procedure of October 4, 1979^{12/} which the Staff observes sets forth the Commission's views on how licensing should be conducted while the Commission considers changes in licensing procedures. The Staff concludes that the Commission's interim policy statement authorizes licensing boards to continue with licensing proceedings, and for the Staff to present evidence

^{10/} Staff Memorandum, pp. 3-4. The Commission's Policy Statement published October 23, 1979 44 Fed. Reg. 1979, directed the Staff, as the title of the Joint Task Force Report suggests, to incorporate the planning basis guidance into existing documents used in the evaluation of state and local emergency response plans to the extent practicable. The Commission further advised that additional guidance will be forthcoming following its on-going rulemaking on emergency plans 44 Fed. Reg. 4148[3].

^{11/} Id. at p. 4.

^{12/} 44 Fed. Reg. 58559, October 4, 1979.

on the implications of the Three Mile Island accident for resolution as they relate to a particular proceeding.^{13/}

It opines that with the "guidance" afforded the Board, coupled with the "authorization given the Staff", it would be appropriate to [by-pass rulemaking and] continue with the emergency planning phase of this proceeding.^{14/}

Following the Staff's Memorandum opinion as to how the Board could proceed with licensing hearings on the basis of interim guidance afforded by the proposed amendment to Appendix E and other Commission pronouncements of policy even though rulemaking embracing the "one most important issue to this proceeding was in progress, the Commission on November 9, 1979 published (44 Fed. Reg. 65049) an immediately effective amendment to Section 2.764 of 10 CFR Part 2 and to 10 CFR Part 2, in the latter adding an Appendix B.

Appendix B provided first that licensing boards should hear and decide all issues that come before them indicating in their decisions the type of licensing action, if any, which their decision would otherwise authorize. . . . In reaching their decisions, the boards should interpret existing regulations and regulatory policies with due consideration to the implications for those regulations and policies of the Three Mile Island accident. . . . In this regard, it should be understood that as a result of

analyses still underway, the Commission may change its present regulations and regulatory policies. . . . [I]n addition to taking generic rulemaking actions, the Commission will be providing case-by-case guidance on changes in regulatory policies. . . . Furthermore, the Boards should identify any aspects of the case which in their judgment present issues on which prompt policy guidance is called for. The Boards may request the assistance of the parties in identifying such policy issues, but absent specific Commission directive, such policy issues shall not be the subject of discovery, examination or cross-examination.

Thus, there has been provided to the Board not only Staff but Commission direction as to how to proceed on issues before it. However, neither affords guidance as to whether the Board should proceed to consider a contention based on the same subject matter undergoing rulemaking and particularly under the circumstances prevailing here. The Commonwealth's contention as noted above is premised upon the guidelines established by Appendix E to 10 CFR Part 50. In announcing its proposed rule notice on Emergency Planning (44 Fed. Reg. 75167), the Commission declared:

"Publication of these proposed rule changes in the Federal Register supersedes and thus eliminates the need to continue development of the proposed rule change to 10 CFR Part 50 Appendix E (43 Fed. Reg. 37473) published on August 23, 1978, regarding

Emergency Planning considerations outside the Low Population Zone (LPZ)."
44 Fed. Reg. at 75170.

The Commission has with the announcement of its proposed rule thus folded into its present rulemaking the very basis of the Commonwealth contention. To the extent that the issues underlying the contention have not thereby been rendered moot, along with the contention itself, rulemaking, not licensing and this proceeding, afford the appropriate forum for their disposition.

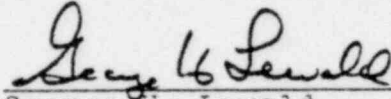
Conclusion

Whether an administration agency passes on issues of general applicability in individual cases on a case-by-case basis or defers generic issues in individual cases to a single rulemaking proceeding, and where appropriate continues in the interim to rely on individual adjudications to resolve remaining questions is, of course, a matter within the informed discretion of the agency. See, cases cited: Douglas Point, supra, at 84.

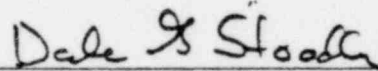
In the instant proceeding, however, whether or not the Applicants' preliminary emergency plant comport with the proposed amendment to Appendix E as published in 43 Fed. Reg. 37473 is moot. While it goes without saying that the Applicants' plans will in any event have to comply with

Commission rules and regulations as they develop, the proper form for developing what the Applicants must now adhere to is not licensing but rulemaking. Accordingly, the Commonwealth's present contention should be dismissed.

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Dated: Feb. 9, 1980

To: George Lewald
From: Bob Culp
NRC PUBLIC DOCUMENTS ROOM

PDR
OCT 9 1979
Office of the Secretary
Washington, D.C.
10/5/79

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

Docket No. 50-312

ORDER RULING ON SCOPE AND CONTENTIONS

In our Prehearing Conference Order of August 3, 1979, we directed, inter alia, that all parties confer regarding a possible stipulation of contentions and that all parties submit briefs on the scope of this Board's jurisdiction in this proceeding (Prehearing Conference Order at p. 2).

On August 17, Intervenors Friends of the Earth, Environmental Council of Sacramento, Original SMUD Ratepayers Association (FOE) noted that they had been unable to reach an agreement with other parties on their contentions (Statement of Petitioner Friends of the Earth). On August 20, the NRC Staff submitted its Response of NRC Staff to Contentions of Intervenors and to Issues of Interested State (Staff's Response) in which the Staff noted it had been orally advised that FOE would stand on its Revised Contentions for Prehearing Conference (FOE Revised) as submitted August 1.

On August 20, the California Energy Commission (CEC) submitted its Revised Statement of Issues of Concern to the CEC (CEC Revised).

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On August 17, Intervenors Gary Hursh and Richard Castro (Hursh-Castro) submitted Contentions of Petitioners Gary Hursh and Richard Castro (Hursh-Castro Revised).

NRC Staff submitted responses to Hursh-Castro Revised on August 28.

On August 27, CEC submitted a Motion of CEC for Leave to Reply to the "Response of SMUD to Revised Statement of Issues of Concern to CEC." The Motion also included the reply. Leave is hereby granted to CEC and the matters discussed in the reply have been considered by us in issuing this Order.

Licensee (SMUD) submitted separate responses to the revised contentions and issues: Statement of SMUD on Revised Contentions Presented by FOE, dated August 16; Response of SMUD to Revised Statement of Issues of Concern to CEC, dated August 17; Response of SMUD to Contentions of Petitioners Gary Hursh and Richard Castro, dated August 20.

All parties except Hursh-Castro submitted briefs on the scope of the hearing, CEC on August 27, FOE on August 27, SMUD on August 24, and Staff on August 27.

In order to formulate a sound basis for deciding the admissibility of contentions, we have first carefully considered the arguments presented in the briefs regarding scope of the proceeding. At the outset of this Order, we wish to make clear that the phrase "related to the action taken by the Commission

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in its May 7 order," as used in footnote three at page three of our July Order, includes all matters and issues which hinge upon response to feedwater transients. We reject the narrow position on the scope of this proceeding asserted by SMUD that no responses beyond the immediate effect on the secondary coolant system should be included. In this proceeding, it will be appropriate to investigate questions concerning the propagation of a response throughout the Rancho Seco system, where "system" includes the physical facilities as well as the organization and personnel which operate them. We recognize, of course, that such an interpretation can arguably be construed to include emergency responses, especially since, at Three Mile Island, some emergency response action ultimately resulted from a feed-water transient. We believe, however, that to include the subject of emergency response as an issue here would be contrary to established Commission policy as enunciated by the Appeal Board in Douglas Point that:

"...[T]he Vermont Yankee line of cases stands for the proposition that licensing boards should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking..."
(8 AEC 79 at 85)

In this regard the Commission has recently published notice of its intent to engage in rulemaking on the subject of emergency

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response plans. (44 F.R. 41483, July 17, 1979). This published notice thus removes the issue of emergency response from those that we may consider as relevant to this proceeding.

As to "various transient events" as the phrase is used at page four of the Commission's May 7 Order, we believe that, taken in the context of page five of that same Order, the scope of this proceeding can be expanded no further than "... feedwater and/or trip of the turbine..." We will, therefore, not allow matters such as loss of off-site power to be raised and considered among the contentions here.

Within the frame of these ground rules, we turn now to the specific issues and contentions of CEC and the Intervenors.

CEC Issues

We are here confronted with a series of matters styled "issues" by CEC in its Revised Statement, on which CEC, as a representative of an interested State pursuant to 10 CFR §2.715(c), wishes to participate without assuming any burden of going forward. (Brief of CEC on the Scope of the Licensing Board's Jurisdiction and Comments on the Burden of Going Forward on Contentions, p. 8). This desire parallels, in considerable part, the role which an interested State sought to assume in the River Bend case (Gulf State Utilities, Co., Docket Nos. 50-458, 50-459, River Bend Station, Units 1 and 2). In that case the Appeal Board noted:

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