UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

2/4/80

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)	)	

NRC STAFF RESPONSE TO BOARD INQUIRY REGARDING EMERGENCY PLANNING

INTRODUCTION

In its Order Requesting Statements from the Parties, dated January 17, 1980, the Licensing Board expressed concern about proceeding with the issue of emergency planning in light of the Commission's proposed rulemaking on this subject (44 Fed. Reg. 75167 (December 19, 1979)) and requested all parties to file statements with the Board as to (1) whether emergency planning is still a proper issue in this Construction Permit proceeding, and (2) if so, when testimony should be filed and hearings scheduled to consider this issue. Order at 1. It is the position of the Staff that emergency planning is properly in issue at this time.[1/] However, establishment of a schedule for further actions regarding this issue is partially beyond the control of the

1/ This is consistent with an earlier position taken by the Staff in response to the Licensing Board's prior inquiry as to whether the "Advanced Notice of Rulemaking - Adequacy and Acceptance of Emergency Planning Around Nuclear Facilities," 44 Fed. Reg. 41483 (July 17, 1979), precluded consideration of the Commonwealth of Massachusetts' emergency planning contention. NRC Staff Response to Board Inquiry on Impact of Rulemaking on Commonwealth of Massachusetts Contention on Emergency Planning, October 24, 1979.

Staff, as discussed herein, and we are therefore unable to provide a firm estimate as to when the Staff's testimony can be filed on this issue.

DISCUSSION

I.

The Licensing Board's concerns about litigating issues which are, or are about to become, the subject of general rulemaking by the Commission is well grounded, for the Appeal Board has, on several occasions, specifically counseled against such litigation in certain well defined circumstances. See, e.g., Potomac Electric Power Company (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974); 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). However, in seeking to determine whether such a prohibition is applicable to the present case, it is first necessary to review closely the holding in each of these cases, and the circumstances under which each decision was rendered.

1. The first two decisions to address the question of litigating issues then in rulemaking (or about to be in rulemaking) were the Appeal Board's decisions in Shoreham and Vermont Yankee. The question in these cases was whether the environmental impact of the uranium fuel cycle, a subject not then covered by Commission regulation, was appropriate for consideration in individual reactor licensing proceedings. In Vermont Yankee, ALAB-56, supra, 4 AEC at 931-32, the Appeal Board held that the transportation of spent fuel from the

facility to a reprocessing plant and the transportation of high and low-level wastes from the nuclear plant were appropriate considerations in individual licensing proceedings, but that the operations of a reprocessing plant or the disposal of wastes resulting from reprocessing did not have to be considered in that forum. Because of the generic nature of those subjects, the Appeal Board held that they were not appropriate for adjudication in individual proceedings. 4 AEC at 935. The Appeal Board's treatment of the subject indicates that it was influenced by two principal facts: (1) that the impacts associated with the reprocessing of spent fuel and disposal of wastes associated with the Vermont Yankee facility would not differ in any significant respect from those associated with any other reactor of similar size, and (2) that the type of information and analysis that was required could only be developed on an industry-wide basis. 4 AEC at 933-935.

At the time ALAB-56 was issued, the Commission had not yet instituted a rulemaking proceeding on how to factor uranium fuel cycle impacts into individual proceedings.[2/] Shortly thereafter, the Commission published a "Notice of Proposed Rule Making -- Environmental Effects of the Uranium Fuel Cycle," 37 Fed. Reg. 24191, November 15, 1972. In Shoreham, ALAB-99, supra, 6 NRC at 56-57, the Appeal Board pointed to the pendency of this rulemaking as rendering the consideration of uranium fuel cycle impacts inappropriate in individual licensing proceedings.[3/]

[2/] The Appeal Board, in fact, suggested rulemaking as the appropriate procedure for pursuing the intervenor's concerns. 4 AEC at 937.

[3/] The Appeal Board later reaffirmed this ruling in ALAB-156, supra n. 10, 6 AEC at 833 and also reaffirmed its Vermont Yankee ruling in ALAB-179, supra n. 9, 7 AEC at 163-164.

By the time of the Appeal Board's later decision in the Douglas Point case, ALAB-218, supra, the Commission's rulemaking had been completed and a regulation had been promulgated.[4/] The Appeal Board specifically held that now that a regulation had been promulgated, the intervenor was entitled to litigate compliance with that regulation. Douglas Point, ALAB-218, supra, 8 AEC at 88. In that case, this meant that the intervenor could litigate the question of whether the values set forth in Table S.3 tipped the balance against construction of the facility. Id.

The situation at hand is analogous to that presented in Douglas Point. The Commission has an existing regulation (10 C.F.R. Part 50, Appendix E) setting forth the requirements for emergency planning by Commission licensees. With respect to this regulation, as with Table S.3 in Douglas Point, the parties to this proceeding are entitled to litigate the Applicant's compliance with these requirements. For where there is an existing regulation, any party to the proceeding is free to raise the issue of compliance with that regulation.[5/] Therefore, applying the teachings of Douglas Point to the present case,it is clear that the Commonwealth is entitled to a demonstration of the Applicant's compliance with the requirements of 10 C.F.R. Part 50, Appendix E.[6/]

4/ This regulation is now codified in 10 C.F.R. §51.20(e) and Table S.3.

5/ Douglas Point, supra, n. 3, 8 AEC at 88. See also Vermont Yankee Nuclear Power Corp. (Vermont Yankee), ALAB-138, 6 AEC 520, 528 (1973).

6/ The contention raised by the Commonwealth reads as follows:

> Given the guidelines established by Appendix E to 10 C.F.R. Part 50 and proposed amendment thereto (43 F.R. 37473):
>
> (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 Report are inadequate.

2. To state that the Board must insure compliance with existing emergency planning regulations does not, however, fully respond to the companion question contained in the Board's inquiry as to what effect, if any, should be given to the Commission's newly announced proposed rule on emergency planning. 44 Fed. Reg. 75167. However, the answer to this latter question, as with the former, can be found in the above analysis of the Vermont Yankee - Douglas Point decisions. For the rationale expressed by the Appeal Board in Vermont Yankee for precluding consideration of the generic issues raised therein - operation of a reprocessing plant and the disposal of wastes resulting from reprocessing - equally militates against consideration of generic issues in the present case. For here, as in Vermont Yankee, many of the matters contained in the proposed emergency planning rule are generic in nature and merit industry-wide consideration rather than adjudication in individual licensing proceedings. Thus, with the exception of the subject matter to be discussed hereafter - distance for emergency planning - the mandate of the Appeal Board in Vermont Yankee strongly counsels against consideration of the proposed emergency planning rule in the present proceeding.

3. To parcel out the requirements of Vermont Yankee and its progeny does not, however, fully dispose of the question posed by the Board in the present case. For here, unlike the cases considered, there exists an additional factor not present in either Douglas Point or Vermont Yankee - that being an express directive from the Commission to the Staff and the Boards on the subject in issue. Given these distinguishing circumstances, the additional question to be considered in responding to the Board's inquiry is

what consideration should be given to the policy directives of the Commission on the specific issue presented by the present case - distance for emergency planning.

The initial policy guidance on this subject was set forth by the Commission in a proposed amendment to Appendix E, 10 C.F.R. Part 50. In promulgating that proposed amendment (43 Fed. Reg. 37473 (August 23, 1978)), the Commission observed "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 reviewing an Applicant's emergency plan for a construction permit." Ibid.7/

The interim policy guidance of August 23, 1978 was further refined by the Commission's promulgation of the "NRC Policy Statement--Planning Basis for Emergency Responses to Nuclear Power Reactor Accidents." 44 Fed. Reg. 61123 (October 23, 1979). This statement "concur[red] in and endorse[d] for use the guidance contained in the 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

7/ In its proposed emergency planning rule, the Commission noted that "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 C.F.R. Part 50, Appendix E (43 F.R. 37473), published on August 23, 1978, regarding emergency planning considerations outside the Low Population Zone (LPZ)." 44 Fed. Reg. 75167, 75170.

520/1-78-016, dated December 1978 (Joint Task Force Report). The major recommendation of the Joint Task Force Report was the establishment of two Emergency Planning Zones (EPZ's) - one EPZ of about 10 miles for plume exposure (airborne); the other EPZ of about 50 miles for the ingestion pathway. Thus, through this endorsement of these guidelines, the Commission clearly signaled its unambiguous intent to extend emergency planning beyond the present regulatory definition of an LPZ for all plants.[8/]

In conjunction with the issuance of these two policy statements on emergency planning distances, the Commission also issued two statements on the conduct of pending licensing proceedings. In the first of these statements published on October 10, 1979,[9/] the Commission set forth its views on how licensing proceedings should be conducted in the aftermath of the Three Mile Island accident while the Commission was considering changes in the procedures by which it would exercise supervision over adjudicatory licensing decisions. In this Interim Statement of Policy, the Commission authorized Licensing Boards to continue with licensing proceedings, and the Staff to present evidence on the implications of the Three Mile Island accident for resolution as they related to a particular proceeding.

Thereafter, on November 9, 1979, the Commission provided further explicit direction to the Licensing Boards on the implementation of the Commission's

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8/ In this policy statement the Commission further directed the Staff to "incorporate the planning basis guidance into existing documents used in the evaluation of state and local emergency response plans to the extent practicable." Id. at 61123.

9/ Interim Statement of Policy and Procedure, 44 Fed. Reg. 58559 (October 10, 1979). This policy statement was sent to the Board and parties on October 23, 1979.

regulations and regulatory policies. In this second statement - issued as part of an immediately effective rule - the Commission expressly directed all Licensing Boards to:

> 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 under way the Commission may change its present regulations and regulatory policies in important respects and thus compliance with existing regulations may turn out to no longer warrant approval of a license application. (emphasis added).10/

Thus, it is against this background that the scope of the Board's adjudication of the emergency planning issue in this proceeding must be resolved. Or stated differently, must the Board - under the direction of Appendix B - insure compliance with the Commission's express directive contained in its October 23, 1979 policy statement, that the guidance of NUREG-0396 be utilized. The Staff submits that it must.

The law is clear that a policy statement, unlike a regulation, does not have the force and effect of law.11/ And indeed, in a proceeding where a policy statement is applied, a party does possess the right to challenge the requirements set forth in that directive. Ibid. Yet notwithstanding this recognized distinction, the Staff nonetheless submits that the Board is compelled, under the mandate of Appendix B, to apply to the present proceeding the

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10/ Appendix B, 10 C.F.R. Part 50 (Suspension of Adjudicatory Proceedings), 44 Fed. Reg. 65049, 65050 (November 9, 1979).

11/ See, e.g., Pacific Gas and Electric Co. v. Federal Power Commission, 506 F.2d 33, 38-39 (D.C. Cir. 1974).

emergency planning requirements of the task force report set forth in NUREG-0396. For to do less would clearly thwart the intent of the Commission in "concur[ring] in and endorse[ing] for use the guidance contained in the task force report" (44 Fed. Reg. 61123) and directly contravene the express directive of the Commission to the Licensing Board to "interpret existing regulations and regulatory policies with due consideration to the implications for those regulations and policies of the Three Mile Island accident," 44 Fed. Reg. 65049, 65050.

Therefore, applying the Commission's directives to the present proceeding, it is the Staff's position that the Board must not only insure compliance by the Applicant with the requirements of 10 C.F.R. Part 50, Appendix E, but also must require implementation of the distance for planning guidance contained in NUREG-0396.

II.

The Licensing Board's inquiry as to when testimony should be filed and hearings scheduled, assuming acceptance of the Staff position regarding the propriety of litigating the emergency planning contention at this time, is not presently susceptible to being answered with any degree of certainty. Initially, inputs are still outstanding from Applicant Boston Edison Company in response to letters addressed to Applicant by the NRC Staff on October 23, 1979 and December 26, 1979. Acceptable responses to these letters would be a prerequisite to analysis of Applicant's emergency plans. Subsequent to the receipt of all inputs from Applicant, a minimum of several months would be needed to review these inputs and the preliminary emergency plans, and to prepare testimony thereon.

Thus, a present schedule for future actions in this proceeding cannot be proposed to an acceptable degree of specificity.

CONCLUSION

For the reasons stated above, the NRC Staff submits that emergency planning is a proper subject for litigation at this time, and that in its consideration of this issue the Board must insure compliance with the requirements of 10 C.F.R. Part 50, Appendix E, as well as the distance for planning recommendation of NUREG-0396.

Respectfully submitted,

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Dated at Bethesda, Maryland
this 4th day of February, 1980

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO BOARD INQUIRY REGARDING EMERGENCY PLANNING" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 4th day of February, 1980.

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