

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION



In the Matter of )

PUBLIC SERVICE COMPANY OF NEW )  
HAMPSHIRE, et al. )

(Seabrook Station, Units 1 & 2) )

Docket Nos. 50-443  
50-444

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NRC STAFF RESPONSE TO NECNP LETTER OF JUNE 11, 1980

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Edwin J. Reis  
Assistant Chief Hearing Counsel

June 26, 1980

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INTRODUCTION

The General Counsel by letter of April 29, 1980, in respect to the pending petition for review of Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33 (1977), and ALAB-561, 10 NRC 410 (1979), stated that the Commission wished an oral briefing to help it to determine whether to take review of the seismic issues in this matter. The letter particularly asked the parties to address the following issues:

1. Staff's methodology for establishing the design ground acceleration associated with a Safe Shutdown Earthquake and;
2. Dr. Chinnery's methodology for calculating recurrence times of larger than historical earthquakes in a tectonic province.

It continued:

A verbatim transcript of the proceeding will be made and distributed to all parties. No later than 10 days after the briefing parties may identify to the Commission any extra-record material that may have been presented and suggest appropriate steps for either its consideration or exclusion from the record.

The briefing was given on May 29, 1980, as unsworn argument and explanation. On June 11, 1980, NECNP mailed a letter to the Commission proposing that there be entered in the record of the pending proceeding two articles written by Dr. Chinnery and the entire transcript of the May 29, 1980 briefing, subject only to written comments of the parties.<sup>1/</sup> The same articles were formerly attached to NECNP Supplemental Memorandum in Support of Petition for Review, mailed September 26, 1979, and the Staff responded to the content of these articles in an affidavit of Richard B. McMullen and Leon Reiter submitted with the NRC Staff's response of December 11, 1979, to that supplemental memorandum.

The General Counsel's office has informed the NRC Staff that it is proposed to treat the NECNP letter of June 11, 1980, as a motion to reopen and enter into the record the material NECNP has designated. For the reasons set out below the NRC Staff does not believe consideration of this material as a part of the record in this proceeding would be appropriate.<sup>2/</sup>

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<sup>1/</sup>The NRC Staff never received a copy of this letter from NECNP. (On June 23, 1980, it obtained a copy of the letter from the Secretary's office.)

<sup>2/</sup>The Staff in its Response of December 11, 1979 to NECNP's Supplement Memorandum for review detailed why the proffered articles of Dr. Chinnery are not "new evidence" and would not lead to a different result in the subject proceeding even if the record was reopened to accept them. Under the standards of the Commission, proceedings are reopened to receive new evidence only on a showing that the new evidence could or would lead to a different determination upon a material health and safety or important environmental issue in the proceeding. Public Service Co. of New Hampshire (Seabrook Station Units 1 & 2), CLI-78-1, 7 NRC 7, 21-22 (1978); Id., ALAB-422, 6 NRC 33, 64 n. 35. 81-82 (1977); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 2), ALAB-486, 8 NRC 9, 21-22 (1978). Staff review of these articles by NECNP's witness as well as much other material published since the hearings confirms the conclusion that there is no need to reopen the record to consider these matters as these articles do not provide a base to change the SSE and acceleration values established herein. See affidavit of Richard R. McMullen and Leon Reiter, submitted with that Staff Response. As Dr. Chinnery recognized his presentation on May 29, 1980, this presentation duplicated material in these articles. Tr. 8 & 14. Thus this presentation similarly provides no basis for reopening the record.

DISCUSSION

Although "extra-record" material might be considered in determining whether to reopen a record for the receipt of additional evidence,<sup>3/</sup> a substantive determination in an adjudicatory proceeding may only be based on material in the record absent agreement of all parties that extra-record material may be considered in that determination.<sup>4/</sup> As the following discussion shows, in the absence of a stipulation by the parties, the inclusion of such material in the record of this proceeding as NECNP requests would be contrary to applicable requirements.<sup>5/</sup>

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<sup>3/</sup> As we indicated in the preceding footnote, this Commission and its Boards have looked at "new evidence" to see if a record should be reopened for its receipt. Essentially they have looked at this proffered evidence and seen whether it could change the determination. Where it was not "new evidence," merely cumulative or could not otherwise change the course of the proceeding the record was not reopened to receive that evidence. See e.g.: Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-78-1, supra; Id., ALAB-422, supra; Metropolitan Edison Co., supra; Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 338 (1978). As seen in these cited cases that course has been followed at least twice in this proceeding.

<sup>4/</sup> The parties may of course stipulate to supplement the record or otherwise admit evidence without the usual testing of its authenticity or any inquiry into the weight to be given to that evidence. See 10 C.F.R. §§2.752, 2.753.

<sup>5/</sup> The Staff does not agree with the characterization in NECNP's letter of the Staff's argument as indicating that Dr. Chinnery's methodology and conclusions should have been applied in this proceeding. The Staff explained that although probabilistic methodology might be valid in some instances, and indeed is used by the Staff, there were not the predicates for its application here. Tr. 59-60. Further, the Staff explained that in applying the probabilities of earthquakes of over a certain intensity in a large area to a specific site in that area one must take into account the attenuation of intensity with distance; that there were questions involving the largest earthquakes that could occur in an area; and that there were questions involving the proper slope or slopes for the recurrence curves of earthquakes in an area. Tr. 55-59. The Staff set out the conservatisms in the tectonic province approach incorporated into Appendix A to 10 C.F.R. Part 100, which involves transferring the largest known occurrence in an area to the particular site of the facility in order to determine a safe shutdown earthquake. Tr. 28-30.

Section 7(d) of the Administrative Procedure Act, 5 U.S.C. 556(e), provides:

The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitute the exclusive record for decision . . .

Similarly the Rules of Practice of this agency provide that decisions may only be based on the evidence presented at hearing. 10 C.F.R. §2.760(a); 10 C.F.R. Part 2, Appendix A, paras. V(e)(1) & (2).

Such evidence must be presented under oath and subject to cross-examination. 10 C.F.R. §2.743(a); 10 C.F.R. Part 2, Appendix A, para. V(d)(3). In Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), CLI-75-1, 1 NRC 1 (1975), the Commission affirmed that parties having an interest in a matter must be given "opportunity to cross-examine on those portions of a witness' testimony which relate to matters which have been placed into controversy . . ." In Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-284, 2 NRC 197, 206 (1975), the Appeal Board emphasized that: "It is inconceivable that [a highly technical scientific] issue might be considered and decided without the availability of the witnesses not only for cross-examination by the parties but also interrogation by members of this Board."

In Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-463, 7 NRC 341, 351-352 (1978), the Appeal Board rejected attempts to have additional "extra-record" scientific articles which were not introduced subject to cross-examination considered, stating:

In their proposed findings of fact and conclusions of law submitted below, which, as we have stated, are urged upon us on appeal, intervenors cited a number of scientific articles which were not introduced into evidence. It is clear that neither we nor a licensing board may base a decision on factual material which has not been introduced into evidence. See Administrative Procedure Act §7(d), 5 U.S.C. §556(e); Public Service Co.

of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179 at 191 (February 16, 1978). This rule is both traditional and just. It would have been unfair to the parties on the opposite side of the case for the Licensing Board to have given probative weight to extra-record material because that would have deprived them of an opportunity to impeach it by cross-examination or to rebut it with other evidence. For the same reasons, we may not rely on it.

See also Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 492 (1978); Public Service Co. of Indiana (Marble Hill Hill Nuclear Generating Station, Units 1 & 2), ALAB-459, 7 NRC 179, 191 (1978).

Here the articles of Dr. Chinnery and the statements at the presentation before the Commission which Intervenor seeks to have admitted into the record were highly technical, involving difficult questions concerning the prediction of the frequency of recurrence of earthquakes of over a certain size and the correlation of ground motion accelerations. No cross-examination was had on the articles or the other statements. No meaningful opportunity for rebuttal was given.<sup>6/</sup> Over the objection of the Permittees, these exhibits cannot be made part of the record to be considered in the determination of this matter without violating due process rights to have evidence sworn, to confront witnesses, and to cross-examine.<sup>7/</sup> The supplemental material which

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<sup>6/</sup> See Tr. 4.

<sup>7/</sup> The citations given by NECNP to support its proposition that the Commission could choose to admit the articles and statements in this adjudicatory proceeding with merely a right to comment, and without a right to cross-examination and rebuttal are inapposite. The quote from Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 543-544 (1978), involved proper procedures in rulemaking proceedings, not in adjudications. Although cross-examination is not required in rulemaking, it is a hallmark of adjudications. The Administrative Procedure Act and the Procedural Rules of this agency give a right to cross-examination in adjudicatory proceedings. 5 U.S.C. 556(d); 10 C.F.R. 2.743(a). See cases cited above. The quote from Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 878 (1st Cir. 1978), deals with whether an appellate administrative body may accept evidence. We do not dispute that it may. However, the case particularly holds that it is error to accept evidence at any level from no matter what source without allowing useful cross-examination. 572 F.2d at 880 & 882.

Intervenor wants included in the record in this proceeding cannot be admitted even should other parties be given an opportunity to submit comments on such material.

CONCLUSION

For the above stated reasons the NRC Staff does not believe that NECNP's request to reopen the record and add supplemental material to this record can be honored.

Respectfully submitted,



Edwin J. Reis  
Assistant Chief Hearing Counsel

Dated at Bethesda, Maryland  
this 26th day of June, 1980

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO NECNP LETTER OF JUNE 11, 1980" 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 26th day of June, 1980:

- |   |   |
|---|---|
| *Alan S. Rosenthal, Esq., Chairman<br>Atomic Safety and Licensing<br>Appeal Board<br>U. S. Nuclear Regulatory Commission<br>Washington, D. C. 20555 | Joseph F. Tubridy, Esq.<br>4100 Cathedral Avenue, N.W.<br>Washington, D. C. 20016   |
| * Dr. John H. Buck<br>Atomic Safety and Licensing<br>Appeal Board<br>U. S. Nuclear Regulatory Commission<br>Washington, D. C. 20555                 | *Leonard Bickwit<br>Office of the General Counsel<br>U. S. Nuclear Regulatory Commission<br>Washington, D.C. 20555                                  |
| * Michael C. Farrar, Esq.<br>Atomic Safety and Licensing<br>Appeal Board<br>U. S. Nuclear Regulatory Commission<br>Washington, D. C. 20555          | Dr. Ernest O. Salo<br>Professor of Fisheries Research<br>Institute<br>College of Fisheries<br>University of Washington<br>Seattle, Washington 98195 |
| * Ivan W. Smith, Esq.<br>Atomic Safety and Licensing<br>Board Panel<br>U. S. Nuclear Regulatory Commission<br>Washington, D. C. 20555               | Dr. Kenneth A. McCollom<br>1107 West Knapp Street<br>Stillwater, Oklahoma 74074   |

Ms. Elizabeth H. Weinhold  
3 Godfrey Avenue  
Hampton, NH 03842

Robert A. Backus, Esq.  
O'Neill, Backus, Spielman and Little  
116 Lowell Street  
Manchester, New Hampshire 03101

\*Mr. Samuel J. Chilk  
Secretary of the Commission  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Thomas G. Dignan, Jr., Esq.  
John A. Ritsher, Esq.  
Ropes & Gray  
225 Franklin Street  
Boston, Massachusetts 02110

Norman Ross, Esq.  
30 Francis Street  
Brookline, MA 02146

William C. Tallman  
Chairman and Chief Executive Officer  
Public Service Company of New  
Hampshire  
1000 Elm Street  
Manchester, NH 03105

Karin P. Sheldon, Esq.  
Sheldon, Harmon, Roisman & Weiss  
1725 I Street, N.W.  
Suite 506  
Washington, D.C. 20006

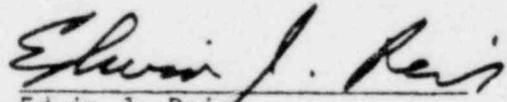
\* Atomic Safety and Licensing  
Board Panel  
U. S. Nuclear Regulatory Commission  
Washington, D. C. 20555

\* Atomic Safety and Licensing  
Appeal Board  
U. S. Nuclear Regulatory Commission  
Washington, D. C. 20555

\* Docketing and Service Section  
Office of the Secretary  
U. S. Nuclear Regulatory Commission  
Washington, D. C. 20555

E. Tupper Kinder, Esq.  
Assistant Attorney General  
Office of Attorney General  
State House Annex, Room 208  
Concord, New Hampshire 03301

Laurie Burt, Esq.  
Assistant Attorney General  
Commonwealth of Massachusetts  
Environmental Protection Division  
One Ashburton Place, 19th Floor  
Boston, Massachusetts 02108

  
Edwin J. Reis  
Assistant Chief Hearing Counsel