

05/12/80

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)

TEXAS UTILITIES GENERATING)
COMPANY, ET AL.)

Docket Nos. 50-445
50-446

(Comanche Peak Steam Electric)
Station, Units 1 and 2))

NRC STAFF MEMORANDUM ON ALAB-590 AND ITS
APPLICABILITY TO A DETERMINATION ON THE
ADMISSIBILITY OF THE PROPOSED CONTENTION
OF THE INTERVENORS IN THIS PROCEEDING

I. INTRODUCTION

The Atomic Safety and Licensing Board (Board) convened a Special Prehearing Conference on April 30, 1980, to hear the position of the parties "on those contentions that have not yet been ruled on by the Board." See "Order Scheduling Prehearing Conference" dated March 19, 1980.^{1/} At the beginning of the prehearing conference, the Nuclear Regulatory Commission Staff (Staff) brought to the attention of the Board and other parties a decision, ALAB-590,^{2/} of the Atomic Safety and Licensing Appeal Board (Appeal Board) issued eight days earlier, on April 22, 1980 (Tr. 141-142). In view of the relevance of

1/ A further purpose of the conference, as described by the Board, was to hear oral argument as to "whether it is appropriate to refine the language of the quality assurance contention admitted by the Board."

2/ Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, _____ NRC _____ (April 22, 1980) (Slip. Op.)

this recent Appeal Board decision to the purpose of the prehearing conference, the Board granted the request of counsel for the Applicants that the participants, if they desired, be permitted to file a memorandum addressing the Appeal Board's holding in ALAB-590 (Tr. 306, 307).

As discussed more fully below, the principles described below governing the admissibility of contentions, as most recently applied by the Appeal Board in ALAB-590, support admission of CFUR's proposed contentions 2.A. and 6. and ACORN's proposed contentions 4., 7., 15. and 20., in addition to the proposed contentions of the various Intervenors supported by the Staff for admission in its report of April 10, 1980.^{3/}

II. PRINCIPLES GOVERNING THE ADMISSIBILITY OF CONTENTIONS

As a general matter, in order for proposed contentions to be found admissible, they must fall within the scope of the issues set forth in the Notice of Hearing initiating the proceeding, and comply with the requirements of 10 CFR § 2.714(b) and applicable Commission case law. Northern States Power Co. (Prairie Island, Unit Nos. 1 and 2) ALAB-107, 6 AEC 188, 194 (1973), aff'd, BPI v. Atomic Energy Commission, 502 F.2d 424, 429 (D.C. Cir. 1974); Duquesne Light Co. (Beaver Valley, Unit No. 1), ALAB-109, 6 AEC 243, 245 (1973). 10 CFR § 2.714(b) requires that a list of contentions which intervenors seek to have

^{3/} See "NRC Staff's Report on Its Position Concerning the Admissibility of Intervenors' Contentions," April 10, 1980.

litigated be filed along with the bases for those contentions set forth with reasonable specificity.^{4/} The purpose of the basis requirement of 10 CFR § 2.714 is to assure that the contention in question does not suffer from any of the infirmities listed in fn. 4, to establish sufficient foundation for the contention to warrant further inquiry of the subject matter in the proceeding, and to put the other parties sufficiently on notice "so that they will know at least generally what they will have to defend against or oppose." Peach Bottom, supra at 20. From the standpoint of basis, it is unnecessary for the petition "to detail the evidence which will be offered in support of each contention". Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 426 (1973). Furthermore, in examining the contentions and the bases therefor, a licensing board is not to reach the merits of the contentions. Duke Power Co. (Amendment

4/ A contention must be rejected where:

- (a) it constitutes an attack on applicable statutory requirements;
- (b) it challenges the basic structure of the Commission's regulatory process or is an attack on the regulations;
- (c) it is nothing more than a generalization regarding the intervenor's views of what applicable policies ought to be;
- (d) it seeks to raise an issue which is not proper for adjudication in the proceeding or does not apply to the facility in question; or
- (e) it seeks to raise an issue which is not concrete or litigable.

Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974).

to Materials License SNM-1773 - Transportation of Spent Fuel From Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC 146, 151 (1979); Peach Bottom, supra at 20; Grand Gulf, supra at 426.

In sum, at the petition stage, although intervenors need not establish the validity of their contentions and the bases therefor, it is incumbent upon intervenors to set forth contentions and the bases therefor which are sufficiently detailed and specific to demonstrate that the issues raised are admissible and that further inquiry is warranted, and to put the other parties on notice as to what they will have to defend against or oppose.

In ALAB-590, supra, the Appeal Board once again discussed the principles governing the admissibility of contentions derived from 10 CFR § 2.714(b) and the applicable case law. Applying the principles to the facts in that proceeding, the Appeal Board overturned the Licensing Board's rejection of a contention^{5/} alleging that a marine biomass farm (apparently not considered by the Staff in its evaluation of alternatives in the Final Environmental Statement Supplement) would be environmentally preferable to Allens Creek.^{6/} According to the Appeal Board, the Licensing Board erred in holding that in

^{5/} Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), LBP-80 _____, _____ NRC _____, (March 10, 1980) (Slip. Op).

^{6/} Because the rejection led to the outright denial of the petition for leave to intervene, it was subject to interlocutory appellate review under 10 CFR § 2.714a at the instance of the petitioner. ALAB-590, supra, slip. op. at 2.

order to put into litigation the marine biomass alternative (and the Staff's failure to have considered it), the petitioner was required not merely to allege that the alternative would be environmentally preferable but also to explain why that is so. ALAB-590, supra, slip. op. at 8. The Appeal Board held that that holding cannot be squared with its 1973 decision in Grand Gulf, ALAB-130, supra, and therefore, the teachings of Grand Gulf mandated reversal of the Licensing Board's determination. More specifically, the Appeal Board stated that all that was required at the petition stage was that petitioner:

" . . . state his reasons (i.e., the basis) for his contention that the biomass alternative should receive additional consideration. That responsibility was sufficiently discharged by his references to Project Independence and his assertion respecting the environmental superiority of a marine biomass farm." ALAB-590, supra, slip. op. at 11.

It is noteworthy that the Appeal Board's determination that the petitioner must be admitted to the proceeding on the strength of his contention:

" . . . does not carry with it any implication that we view the contention to be meritorious. . ." ALAB-590, supra, slip. op. at 12.

Moreover, the Appeal Board emphasized that whether the petitioner will be able to prove the assertions underlying the contention is quite beside the point at this preliminary stage of the proceeding. Id., slip. op. at 13. According to the Appeal Board, it does not follow that this contention will have to be taken up at the forthcoming evidentiary hearing on the Allens Creek application, since:

". . . the Section 2.749 summary disposition procedures provide, in reality as well as in theory, an efficacious means of avoiding unnecessary and possibly time-consuming hearings on demonstrably insubstantial issues. . ." Id., slip. op. at 14-15.

ALAB-590 does not purport to change the existing law governing the admissibility of contentions. Rather, it merely emphasizes that in ruling on the admissibility of contentions, a licensing board is not to venture beyond the contention and its stated basis into the merits of the contention. All that a licensing board need determine is whether there is a reason (basis) for the contention set forth with reasonable specificity. Any question concerning the validity of the contention or of its basis must be left for consideration when the merits of the controversy are reached, i.e., through summary disposition or in the evidentiary hearing.

III. APPLICATION OF THE CASE LAW, AS INTERPRETED BY THE APPEAL BOARD IN ALAB-590, TO THE CONTENTIONS PROPOSED IN THIS PROCEEDING

In the Staff's report on the contentions proposed by the Intervenors, supra, the Staff discussed the applicable case law in much the same terms stated above in Section II (without citation of ALAB-590). In considering the example ALAB-590 provides as to what constitutes an admissible contention, it became apparent to the Staff that there are certain proposed contentions in this proceeding which the Staff had opposed for lack of basis but which the Staff now believes should be admitted as issues in controversy. These contentions are CFUR's proposed contentions 2.A. and 6. and ACORN's proposed

contentions 4., 7., 15. and 20. In light of ALAB-590, it appears that in the relevant portions of the Staff's report, supra, evaluating the admissibility of these contentions, the Staff went beyond determining whether a reason (basis) had been provided for the contention and examined the validity of the reasons offered in support of the particular contention. ALAB-590 emphasized that at the petition stage, Intervenors need not establish the validity of their contentions and of the bases therefor. Accordingly, at the prehearing conference, the Staff changed its position on the above identified contentions, stating that in its view, each contention and its bases satisfies the specificity requirements of 10 CFR § 2.714. Further, each contention raises an issue appropriate for consideration in this proceeding. Based on the Commission's regulations and the applicable case law, including the Appeal Board's decision in ALAB-590, supra, these contentions thus constitute admissible contentions.

The Staff's view supporting admission of these contentions does not carry any implication that the Staff views these contentions to be meritorious. For example, in ACORN's proposed contention 6., ACORN alleges that "the CPSES design does not adequately assure that safety-related water supplies will be available for plant operation in the event of ice build up at the service water intake structure." In support of this contention, ACORN states that ice storms have been known to occur in the Dallas/Ft. Worth area and that an ice storm incapacitated Applicants' lignite plants. Whether this contention is meritorious is questionable, especially in view of Applicants' statement at the prehearing conference that the ice at the bodies of

water surrounding CPSES would have to be fifteen feet thick to affect the availability of safety-related water supplies. Nevertheless, as the Appeal Board emphasized in ALAB-590, supra, whether the proponent of a contention will be able to prove the assertions underlying the contention is quite beside the point at this preliminary stage of the proceeding. Id., slip. op. at 13.

IV. CONCLUSION

The Staff believes that application here of the teachings of ALAB-590 supports admission of CFUR's proposed contentions 2.A and 6. and ACORN's proposed contentions 4., 7., 15. and 20., in addition to the contentions supported by the Staff for admission in its report of April 10, 1980, supra.

Respectfully submitted

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Dated at Bethesda, Maryland
this 12th day of May, 1980