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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	Docket Nos. 50-443 OL-1
PUBLIC SERVICE COMPANY OF	)	50-444 OL-1
NEW HAMPSHIRE, et al.	)	
	)	
(Seabrook Station, Units 1 and 2)	)	

NRC STAFF'S RESPONSE TO MASSCHUSETTS
ATTORNEY GENERAL'S MOTION TO EXPEDITE APPEAL
AND APPEAL BOARD ORDER OF OCTOBER 26, 1989

Edwin J. Reis
Deputy Assistant General Counsel
for Reactor Licensing

October 27, 1989

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INTRODUCTION

On October 20, 1989, the Massachusetts Attorney General (MAG) filed a "Notice of Appeal" of the Licensing Board's "Memorandum and Order (Denying Intervenors' Motion to Admit Low Power Testing Contentions and Bases or to Reopen the Record, and Requests for Hearing)", LBP-89-28, 30 NRC ___ (October 12, 1989), and a "Motion for Expedited Appeal" ("Motion"). On October 23, 1989, the Appeal Board requested the applicants and the staff to address the issue of whether the Licensing Board's Order is presently appealable in their responses to the motion to expedite.

BACKGROUND

The Licensing Board Order (LBP-89-30) rejected Intervenor's motions to late-file contentions or in the alternative reopen the record to litigate events related to a natural circulation test conducted during low power testing Seabrook Station, Unit 1, on June 22, 1989. LBP-89-28, slip op. at 3, 55. At the time the motions were filed, the record of the proceeding had been closed and the only matter pending before the Licensing Board was the issuance of a final initial decision on off-site

emergency planning issues. [1/] The Licensing Board, in LBP-89-28, rejected the motions to litigate matters related to the natural circulation test principally on the grounds that Intervenors did not demonstrated that a significant safety issue existed, which is necessary for a reopening of a record under 10 C.F.R. § 2.734 [2/] LBP-89-28 at 41-44, 54.

As discussed below, the NRC Staff believes that the Memorandum and Order (LBP-89-28), disposed of a discrete aspect of this proceeding and can be appealed at this time. The thrust of the motion to expedite the appeal is that the Licensing Board wrongly chose to apply the Commission's regulations governing the reopening of a record, 10 C.F.R. § 2.734, to their motion to litigate new matters filed after the record had been closed and that therefore appeal should be expedited on "grounds of public policy." Motion at 1-2, 4-5. No other reason is given for expedited

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1/ LBP-89-28 at 1 n.1, 4. Subsequent to the filing of those motions, Intervenors alsc filed motions to litigate matters relating to the conduct of an on-site emergency planning exercise conducted on September 27, 1989. Intervenors' Motion to Admit Contentions on the September 27, 1989 Plan Exercise, (September 28, 1989); Intervenors' Second Motion to Admit Contentions on the September 27, 1989 Emergency Plan Exercise (October 13, 1989); Intervenors' Motion to Amend Intervenors Motions of September 29, 1989 and October 13, 1989 to Admit Contentions on the September 27, 1989 Onsite Emergency Plan Exercise (October 16, 1989).

2/ 10 C.F.R. § 2.734 provides in part:

> (a) A motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied:
> (1) The motion must be timely, except thats exceptionally grave issue may be considered in the discretion of the presideing officer even if untimely pretested.
> (2) The motion must address a significant safety or environmental issue.
> (3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered intially.

review. 3/ Although this seems to be an argument on the merits rather than a reason for expedition, the Staff here responds to the reason given, and opposes the Motion For Expedited Review. 4/

DISCUSSION

1. The Appealability of the Memorandum and Order Dismissing Contentions Based On The Natural Circulation Test.

As the Appeal Board has observed, the Commission does not apply a hard and fast rule in determining whether an order is "final" for purposes of appellate review:

> The test of "finality" for appeal purposes before this agency (as in the courts) is essentially a practical one. As a general matter, a licensing board's action is final for appellate purposes where it either disposes of a major segment of the case or terminates a party's right to participate; rulings which do neither are interlocutory.

Toledo Edison Company (Davis-Besse Nuclear Power Station, Units 1 and 2), ALAB-300, 2 NRC 752, 758 (1975) (footnotes omitted); accord, e.g. Public

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3/ The motion also contains a concluding statement that expedited review is in the interest of all parties to avoid further delay should intervenors prevail on their right to hearing. At 8. As we show in this response, that argument has no merit as the Licensing Board was required to apply 10 C.F.R. § 2.734.

4/ The MAG's motion contains many unsupported and disputed statements of facts which are not fully discussed herein as they do not seem germane to the issues involved. For instance, it is stated that the applicants' low-power license was suspended, without indicating that the Board reached a contrary conclusion. Cf. Motion at 3 and 6 n.8 and LBP-89-28 at 12. The MAG also states that the Staff is improperly testing and evaluating operator's qualifications while opposing a hearing on the issue. Motion at 6 n.8. This statement presumes that the December operator's tests and evaluations are being conducted because of the June 22, 1989, events. No support exists in the record for that statement and it is disputed. The MAG has further looks to the event of June 22, 1989 and the reports of that event (Motion at 3, 6), without considering that the event in the context of low power testing as whole, which Licensing Board did in concluding that the events of June 22, 1989, were not safety significant under 10 C.F.R. § 2.734(a). LBP-89-28, e.g. at 54-55.

Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-894, 27 NRC 632, 636-37 (1988) ("Although 10 C.F.R. § 2.762 speaks in terms of appeals from 'initial decisions,' we long ago determined that phrasology was not to be taken to literally."); see also Id., ALAB-906, 28 NRC 615, 618-19 (1988) (suggesting that a determination that an order was "final" was best left for a time when the facts surrounding the issuance of the order could be examined). The Licensing Board's decision in LBP-89-28 did not dismiss the Massachusetts Attorney General from the full power phase of this operating license proceeding or otherwise restrict his ability to participate. Consequently, the order cannot be deemed to satisfy the second prong of the Davis-Besse finality test cited above. Accordingly, there is no right to an appeal from the order at this time unless it "disposes of a major segment of the case." Id. Although recognizing that a plausible argument may be made in support of the opposing viewpoint, the Staff believes that the order disposes of a major segment of the case.

The Commission's jurisprudence does not establish a bright line test for determining whether a licensing board order disposes of a major segment of the case. Instead, this determination is to be made on a case-by-case basis giving due regard to the totality of the circumstances. See Seabrook, supra, ALAB-894, 27 NRC at 636-37; Id., ALAB-920, 30 NRC ___ (slip op. 3-7, August 21, 1989), upon certification, CLI-89-20, 30 NRC ___ (October 19, 1989). 5/

5/ See also Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC ___ (slip op. 9-10, July 26, 1989), accepting referral of question on admissability of a contention and

(Footnote continued on next page)

In ALAB-894, intervenor sought to appeal the dismissal of remanded contentions. Although other contentions were being considered by the Licensing Board, the Appeal Board found that the appeal was not premature, but was a "final order" disposing of a "major segment" of proceeding in the circumstances since the dismissal of the remanded contentions was late in the proceeding and the contentions dismissed were not related to other contentions still being considered. ALAB-894, 27 NRC at 637. The Appeal Board then observed that this conclusion -- i.e., the order involved was final and thus immediately appealable -- was buttressed "by the consideration that there is no apparent, good, or practical reason to defer to some undetermined later day" its resolution of intervenor's claims. Id. This consideration was particularly strong in light of the fact that the issues raised by intervenor's appeal "ha[d] nothing whatever to do do with any other matter still pending" before the on-site Licensing Board and that the proceeding had already been protracted. Id.

In ALAB-920, the Appeal Board considered whether it could consider a Licensing Board order denying a petition to waive Commission regulations to permit litigation of matters related to applicants' financial qualifications. Labelling the question of the present appealability of the order as a "close one", the Appeal Board found that since petitions for waivers of regulations are unique, special circumstances existed to allow appeal.

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> referring its ruling to the Commission because the parties "are entitled to have our opinion thereon now" and because "most other contentions in this proceeding have been resolved, making the Licensing Board's ruling 'less interlocutory' as each day passes."

The NRC Staff similarly believes the question here on the present appealability of the Licensing Board order is a "close one." Although the matter here sought to be appealed concerns neither a remanded issue or a matter on which a waiver of a regulation is sought, the issue sought to be appealed concerns a matter most closely aligned to the safety aspects of the Seabrook proceeding which was mainly concluded in March 1987. LBP-87-10, 25 NRC 251, remanded in part, ALAB-875, 26 NRC 251 (1986). 6/ It does not relate to the emergency planning issues before the Licensing Board or any other issue in the proceeding. Further, this proceeding has been protracted. In these circumstances, "there is no apparant, good, or practical reason to defer to some undetermined later day" the Appeal Board's consideration of the intervenor's claim that the Licensing Board erred in applying 10 C.F.R. § 2.734 to a motion which sought to litigate additional matters after a record had closed. See ALAB-894, 27 NRC at 637. As there are "no litmus paper tests for determining what constitutes a "'major segment'of a particular case", (ALAB-894, 27 NRC at 638), the Staff believes that the Appeal Board should conclude that the rejection of the attempt to litigate the issues concerning the natural circulation test during low power testing is the dismissal of what can be viewed as a "major segment" of the case. 7/

6/ See also ALAB-883,27 NRC 243 (1988); ALAB-891, 27 NRC 341 (1988).

7/ The issue of the application of 10 C.F.R. § 2.734 to issues sought to be raised late in a proceeding, is also pertinent to other matters in this proceeding such as Intervenors' attempts to raise issues on the September 1989 onsite emergency planning exercise. See footnote 2, above.

2. The MAG Gives No Proper Reason For Expedited Appeal.

The MAG seeks an expedited appeal on the ground that "the Licensing Board improperly burdened Intervenors' hearing rights conferred by § 189a of the Atomic Energy Act by applying the reopen the record standard" in 10 C.F.R. § 2.734. Motion at 1-2. It is claimed that as this action was contrary to the Court of Appeals' pronouncements in San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287, 1318 (D.C. Cir. 1984), rehearing denied en banc, 789 F.2d 26 (1985), cert. denied, 479 U.S. 923 (1986), and should be reviewed with expedition since it shows bad faith. Motion at 4-5.

The Licensing Board is, of course, bound by the Commission's regulation and could not choose to ignore the regulation even if it wished to follow that course. See 10 C.F.R. § 2.758(a); see also Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-875, 26 NRC 251, 256 (1987) (Commission regulations must be followed by adjudicatory board unless stricken by the Commission); South Carolina Electric & Gas Co. (Virgil C. Sumner Nuclear Station, Unit 1), ALAB-710, 17 NRC 25, 28 (1983) (Licensing Boards must follow Commission direction). 8/

In Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-89-1, 29 NRC 89, 93-94 (1989), the Commission applied the standards in 10 C.F.R. § 2.734(a), for the reopening of a record to a contention on emergency planning being considered after the record had closed in the face of a claim to an absolute right to a hearing on the matter. The

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8/ Should the intervenor choose not to have a regulation applied its remedy is to apply for a waiver the regulation under 10 C.F.R. § 2.758(b). The MAG was well aware of this regulation having applied for the waiver of regulations before. See e.g. Seabrook, CLI-89-20, 30 NRC ___ (October 19, 1989); Id., ALAB-875.

Commission there particularly recognized that such motions must meet 10 C.F.R. § 2.734(a) and show significant matters which likely affect the result of the proceeding. The MAG cannot seek expedited review on the ground that the Licensing Board applied the Commission sanctioned standards to reopening the record. Thus, the MAG cannot realistically claim error in the Licensing Board's choosing to apply the Commission's regulation and no ground exists for expedited review.

Further, the regulation involved, 10 C.F.R. § 2..734, was adopted after the Mothers for Peace case. The Commission in adopting the regulation specifically stated it was acting in consonance with the court's opinion in that case; and any claim that the Commission was not acting in conformity with that case may not be considered by the Commission's adjudicatory boards. 51 Fed. Reg. 19535, 19537-39; Seabrook, ALAB-875, 26 NRC at 256; South Carolina Electric & Gas Co.. 17 NRC at 28.

Moreover, in the Mothers for Peace case, 751 F.2d at 1318, cited by the MAG, the court particularly stated that standards such as those set out in 10 C.F.R. § 2.734(a) might properly be applied to motions to reopen a record even where intervenors claimed they had an absolute right to have the record reopened under section 189a of he Atomic Energy Act. The court stated:

> Under Commission practice, reopening is required when new evidence is shown to be timely, safety significant, and sufficiently material to have changed the result initially taken. A party moving to reopen must show that its new evidence is "strong enough, in the light of any opposing filings, to avoid summary disposition." Applying these criteria, we conclude that the Commission and its boards did not err in denying petitioners an opportunity to reopen . . .[court's emphasis, footnotes omitted].

751 F.2d at 1318. The court recognized that before the Commission need reopen a record, it could see if the matter was safety significant and

sufficiently material to have changed the result. These are the same standards later incorporated into 10 C.F.R. § 2.734(a), and it could not be said the Board acted contrary to the Mothers for Peace case in applying these standards. 9/ In Oystershell Alliance v. NRC, 800 F.2d 1201, 1207 (D.C. Cir. 1986), the court set out these standards later incoporated into 10 C.F.R. § 2.734(a), and held this "court-sanctioned test" (in the Mothers for Peace case) might be applied to a motion to reopen a record in a NRC proceeding. Application of the Commission's regulations prescribing a "court-sanctioned test" to a motion which seeks to reopen a record cannot be said to "'steering. . . a collision course with governing legal principles.'" See Motion at 7, quoting Tennessee Valley Authority (Clinch River Breeder Reactor Plant), ALAB-330, 3 NRC 613, 617 (1976). 10/

9/ The MAG also cites UCS v. NRC, 735 F.2d 1437, (D.C. Cir. 1984), for the proposition that the standard of significance and likely materiality contained in 10 C.F.R. § 2.734(a) may not be considered in determining whether to reopen a record. The court there particularly recognized that hearings need not be provided on issues considered to lack materiality or significance. 735 F.2d at 1447-49. There is not guaranted right to a hearing on issues which are not significant and material.

10/ The MAG, in seeking expedited review, has ignored the issue of whether low-power testing is a prerequisite for a full-power license entitling one to a hearing as a matter of right on such testing. The Licensing Board concluded that there was no Commission requirement of low power testing before the issuance of an operating license. LBP-89-28 at 15-18. If such testing is not a predicate to licensing or one of the seven other categories of action set out in section 189a of the Atomic Energy Act "no hearing need be granted by the Commission." San Luis Obispo Mothers for Peace, 751 F.2d at 1314, on reconsideration en banc, 789 F.2d at 30; Union of Concerned Scientists v. NRC, 880 F.2d 552, 560 (D.C. Cir. 1989). In the earlier case of Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984), it was determined that the Commission had made an emergency planning exercises a predicate to licensing by regulation and therefore the Commission could not by regulation exclude such an exercise from the hearing process. That case is not pertinent to the

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Further, the Licensing Board also indicated that the intervenors had not established that they could be reasonably expected to assist in developing a sound record on their proffered contentions and that the admission of the proffered contentions would broaden and delay the proceeding. LBP-89-28 at 44-45. Therefore, further reason appears that no purpose would be served by expediting this appeal.

CONCLUSION

For the above stated reasons, although this appeal will probably lie at this time no reason exists to expedite this appeal.

Respectfully submitted,

Edwin J. Reis
Deputy Assistant General Counsel
for Reactor Licensing

Dated at Rockville, Maryland
this 27th day of October, 1989

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right to a hearing on low power testing which is not a regulatory predicate to licensing. Thus, even if 10 C.F.R. § 2.734 had no applicability to issues where there was a hearing required by the Atomic Energy Act, that would not affect the Licensing Board's action here as no hearing is mandated by the Atomic Energy Act on low power testing which is not regulatorily required for licensing.

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'89 OCT 30 A9:51

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRS STAFF'S RESPONSE TO MASSACHUSETTS ATTORNEY GENERAL'S MOTION TO EXPEDITE APPEAL AND APPEAL BOARD ORDER OF OCTOBER 26, 1989" 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, by deposit in the Nuclear Regulatory Commission's internal mail system, or as indicated by double asterisk by telecopier this 27th day of October 1989:

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