UNITED STATES NUCLEAR REGULATORY COMMISSION

In the Matter of	)	Docket No. 50-309
	)	
MAINE YANKEE ATOMIC POWER COMPANY	)	(To Increase and Modify
	)	
(Maine Yankee Atomic Power Station),	)	Spent Fuel Pool Capacity
	)	
Applicant.	)	and Systems; Compaction)

ATOMIC SAFETY AND LICENSING APPEAL BOARD

BRIEF IN SUPPORT OF INTERVENOR'S APPEAL FROM "MEMORANDUM AND ORDER ON SCHEDULING . . ."

Statement of Relevant Procedural History

This proceeding was begun by Applicant in a filing on September 18, 1979, subsequent notice being made in the Federal Register, and a Petition for Leave to Intervene timely filed by Intervenor on November 23, 1979. Thereupon an Atomic Safety and Licensing Board Panel was duly constituted and appointed[1] and Specific Contentions were scheduled as due from Intervenor on or before January 28, 1980. By motion filed and served January 16, 1980, Intervenor moved for an enlargement of time[2] to prepare said Specific Contentions. The same was granted in a conference call on or about January 25, 1980, over vigorous objections by Applicant. Intervenor timely filed and served said Specific Contentions on April 28, 1980, responses thereto being due May 12, 1980. Applicant then moved for a thirty-day enlargement of time to file its response, asserting current conflict-

[1] Dr. Robert M. Lazo, Esq., Chairman; Mr. Gustave A. Linenberger, Member; and Dr. Cadet H. Hand, Jr., Member.

[2] Intervenor was joined in said Motion by the State of Maine.

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ing demands upon Applicant's Counsel; crediting and respecting such assertions, Intervenor did not oppose said motion. Applicant filed and served its responses on June 11, 1980, together with a motion to postpone or delay the holding of the Special Prehearing Conference herein until after October 1, 1980. Intervenor filed and served an eight-page Opposition on June 26, 1980. On July 2, 1980, by and through Edwin J. Reis, Esquire, Assistant Cheif Hearing Counsel, the Commission's Staff filed and served its Response to said Motion, also opposing the four-month delay sought by Applicant. On July 14, 1980, a "Memorandum and Order on Scheduling . . ." issued from the ASLB panel herein, unqualifiedly granting the delay sought by Applicant. This Appeal is taken therefrom.

Argument Upon Issues Presented

I. THE DECISION APPEALED FROM IS ARBITRARY, CAPRICIOUS, NOT SUPPORTED BY ANY CONCRETE OR CREDIBLE EVIDENCE, AND CONSTITUTES AN ABUSE OF DISCRETION:

A. One of the more remarkable characteristics of the decision appealed from is its self-demonstrating tendency to agree with most of the objections raised by Intervenor and by NRC Staff Counsel, but to decide in favor of Applicant, despite noting the validity of such objections.

The first of two prime examples of this characteristic occurs at the bottom of page 2 in said decision where, after finding Applicant's "TMI avoidance" to be insubstantial, the decision treats the two other "reasons" propounded by Applicant, referendum and possible modification of proposal, noting: "These two reasons do not . . . constitute legal

grounds in support of a delay in holding the special prehearing conference." Yet despite this correct beginning, and apparently by means of extended conjecture in support of which no evidence has been offered by Applicant, the decision somehow breathes life into that which has already been recognized as insufficient.

Subsequently, at 4, said decision also recognizes that: "Licensee's carefully worded statement regarding its consideration of alternative proposals . . . is heavily qualified and vague." But once again, and despite its adoption of a correct premise, the decision errs in somehow validating that which has been recognized as insufficient.

B. The error wrought in these examples, and elsewhere, demonstrates itself upon factual and logical examination. The signal insufficiency of Applicant's motion, and consequently of the Panel's decision, is a complete lack of any real evidence whatever in support of the motion. As developed more thoroughly below, such failure not only constitutes a thorough breach of the governing regulations, but is also simply wrong in fact and in law: Applicant's thin, vague, unsupported and immaterial assertions by counsel do not, and in law cannot, amount to the quantum of evidence necessary to support the decision rendered; in holding for Applicant without any concrete or credible evidence in support of the motion, the decision is arbitrary, capricious, and logically unsupportable. One example of such "decision without evidence" presents itself on page 3 of the decision, where it is asserted: "It is not unusual for new circumstances to alter previous actions in a proceeding . . .". But in the case at bar Applicant has propounded no evidence of "new circumstances" — only some windy vagueries that this, that or the other occurrence may be in the offing; any real evidence of "new circumstances" is conspicuous by its absence.

In addition to the absence of any concrete evidence any [illegible]

C. In addition to the demonstrated lack of any concrete evidence in support of the motion, the decision also strays in the degree to which it indulges unsupported, and in fact even uninvited, conjecture. Such conjecture is indulged on points of who may or may not "one day be prejudiced", on the potential success of the unrelated referendum, and in an altogether speculative "consideration of (Applicant's) other proposals" — whatever they might be! In short, lacking any real evidence from Applicant, the decision seems instead to rely upon some sort of guessing game as to what the future may hold in store; thus achieved, the decision is arbitrary, capricious, legally defective and constitutes an abuse of discretion.

D. The decision appealed from also goes awry in its outright failure or refusal to consider several of the issues or objections raised by Intervenor's Opposition. By way of example only, said Opposition contended that, on the facts and circumstances presented herein,[3] Applicant should be held estopped from the delay sought, especially where its motivation appears suspect — yet the decision below wholly ignores this entire issue.

E. Last, while the response of the NRC Staff Counsel is not binding upon the ASLB Panel, it is entitled to substantial weight and respect which in this case were clearly not accorded to it.

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[3]From the filing of its original proposal on September 18, 1979, up to its requested delay on June 11, 1979, Applicant vigorously pursued all means available to hurry this proceeding forward as fast as possible, noting a need for "approval of this proposed change not later than December 3, 1979" in its submission; in its response to Intervenor's Petition, Applicant sought "a prehearing conference . . . at the earliest practicable time"; and Applicant strenuously opposed, both in writing and orally during the conference call of January 25, 1980, Intervenor's request for additional time in which to prepare its Specific Contentions — yet all of Applicant's past conduct is entirely ignored in the decision below.

II. IN ITS BREACH OR DISREGARD OF VARIOUS OF THIS COMMISSION'S OWN REGULATIONS, THE DECISION APPEALED FROM IS NOT ONLY DEFECTIVE, INVALID AND VOID OF LEGAL FORCE AND EFFECT, BUT ALSO CONSTITUTES A DENIAL OF PROCEDURAL DUE PROCESS AGAINST INTERVENOR AND AGAINST THE PUBLIC INTEREST:

A. In rendering the decision below the ASLB Panel was of course bound by the rules and regulations of the Commission which possess the force of law, binding upon the Commission and all parties before it. E.g., Rodway v. U. S. Dept. of Agriculture, 168 U.S.App.D.C. 387, 514 F.2d 809 (1975); Accord, McKay v. Wahlenmaier, 96 U.S.App.D.C. 313, 226 F. 2d 35 (1955) (Secretary of Interior bound by own regulations); and Sheridan-Wyoming Coal Co. v. Krug, 84 U.S.App.D.C. 172, 172 F.2d 282, revd 338 U.S. 621, 70 S.Ct. 392, 94 L.Ed. 393 (1949).

As developed in Intervenor's Opposition filed herein, at 2-3, Part 2 of the Commission's "Rules of Practice" — more specifically, 10 CFR §§ 2.711, 2.730(b) and 2.732 — establish clear requirements which Applicant must satisfy in order to gain the relief sought. Those sections deal respectively with the requisite standard (good cause shown), the quantum and specificity of evidence required, and assignment of the burden of proof and persuasion upon Applicant.

As there developed in said Opposition, and as otherwise discussed above and herein, Applicant has altogether failed to meet the criteria required in this Commission's rules of practice, and it follows therefrom that any decision in breach of such requirements is defective and invalid. Stated otherwise, the ASLB Panel herein cannot ignore the legally binding effect of this Commission's own reules of practice which, in gaining the result below, it clearly seems to have done.

B. But further, and of equal import here, it is a well-established principle of law that an agency's own regulations establish a minimum of procedural due process protections for those influenced by its decisions. See, Service v. Dulles, 98 U.S.App.D.C. 268, 235 F.2d 215, rev'd 354 U.S. 363, 77 S.Ct. 1152, 1 L.Ed.2d 1403 (1957).

Thus here, where a decision has been rendered in contravention of the procedural requirements noted, it clearly negatives and frustrates such minimum protections as against the interests of Intervenor and as against the public interest as well.

There can also be little doubt that the public interest carries a premium: "In matters of scheduling, the paramount consideration is the public interest." Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-277, 1 NRC 539 (1975). See discussion in Intervenor's Opposition, at 2.of "Memorandum".

And thus here, where the decision below has been rendered in breach of the regulations noted, such public interest in prompt and timely proceedings has been altogether violated and ignored. The decision's conjecture upon prejudice is thus beside the point: this Commission's procedural regulations have been violated, and harm to the public's "paramount . . . interest" may be presumed.

III. THE ASSERTION, RELIANCE AND CONCLUSION IN THE DECISION APPEALED FROM THAT "THE (MAINE) REFERENDUM COULD MOOT THE (INSTANT) PROCEEDING" IS ERRONEOUS IN FACT AND IN LAW:

A. As developed in Intervenor's Opposition, Memorandum at 5, the proposed referendum in the State of Maine is an unrelated proceeding, reliance upon which by Applicant should not be credited. Further, substantial constitutional questions are implicit therein as demonstrated by recent federal decisions (United States District Court,

California) voiding state efforts at nuclear regulation.

Equally significant, Applicant should be bound by its past public declarations, as the admissions of a party,[4] that "should the referendum be successful Maine Yankee will be in federal court the next morning for a restraining order."

Thus in law and in fact Applicant's suggestion, and the decision's adoption, of a mootness issue, is erroneous; rather Applicant can be anticipated to protect its multimillion-dollar expenditure with all force and vigor.

IV. THE DECISION APPEALED FROM ERRONEOUSLY, UNFAIRLY AND UNLAWFULLY PROTECTS AND PROMOTES APPLICANT'S CONTINUING WILLFUL VIOLATIONS OR AVOIDANCES OF THE PUBLIC'S RIGHT TO KNOW:

As developed elsewhere, the public's right to be informed concerning nuclear power carries a statutorily recognized "paramount interest". Such interest is clearly frustrated here where Applicant has — thus far successfully — sought some four months' "quiet" exactly contemporaneous with the noted referendum. The inference is all but inescapable that Applicant is primarily motivated by a desire to avoid such adverse publicity as might flow from the proper and timely holding of the Special Prehearing Conference. Thus the instant decision, procedurally invalid for the reasons noted, also works the very sorry result of protecting and promoting Applicant's avoidance of the public's right to be informed of these matters. In all reason and fairness the scheduling decisions by and before this Commission should not be allowed so to frustrate, in fact to negative and contravene, the public's statutorily recognized right to be informed. Just as clearly as the decision recognizes that a "delay . . . may never be a pacing item", so too should it be recog-

[4] Intervenor can, if requested, submit newspaper articles in support.

nized that a delay should never be a hiding place by means of which a party can frustrate or altogether defeat the right of the public to be informed.

Perhaps the most illustrative quotation upon Applicant's motivation has issued from Mr. John Randazza, Vice-President in Charge of Special Projects for Central Maine Power, a major owner of Applicant: "Unless participatory democracy is brought under some knid of control our society will come to a screeching halt." On the facts and circumstances presented, this Commission should not allow the wrongful application of its processes, which have here been abused and altogether misdirected.

V. ALL PROPER AND MATERIAL FACTORS THUS FAR DEVELOPED IN THIS PROCEEDING FAVOR THE PROMPT, TIMELY HOLDING OF THE SPECIAL PREHEARING CONFERENCE HEREIN WITHOUT ANY FURTHER DELAY:

In its Opposition, Memorandum at 4-5, Intervenor has already discussed the propriety, and indeed the great utility, of holding the Special Prehearing Conference now due herein, without any further delay, to which discussion Intervenor respectfully directs the attention of this Board.

Additionally, and in review of the foregoing Appeal and the prior Opposition, not only this Commission's rules of practice, but also all facts and circumstances in this case favor the prompt holding of the Sepcial Prehearing Conference in this proceeding. Such forum presents the ideal opportunity for both sides to propound, and the ASLB Panel to consider, whether or not the delay herein is justified, and what if any supplemental proposals are being considered by Applicant, together with such further orders upon scheduling as may be appropriate in furtherance of the discussions had.

Last, Intervenor respectfully requests that this Appeal be considered in the most expeditious manner possible, due consideration being given to Applicant's right of response. Intervenor has taken eight days since actual receipt of the decision appealed on July 19, 1980, and it is more particularly requested that Applicant be held to a like period in framing its reply. Intervenor also respectfully and more particularly requests that an appeals Panel be appointed as soon as practicable to treat this matter and to resolve the same, due consideration being given the facts, law and circumstances herein meriting a prompt resolution.

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ATOMIC SAFETY AND LICENSING APPEAL BOARD

This matter having been put before the Board on the day below noted, and the Board having considered the facts, law, circumstances of the case, and arguments of counsel as presented to it, it is hereby ORDERED:

1. That the decision of the ASLB Panel appealed from ought to be, and hereby is, reversed; and

2. That the Special Prehearing Conference herein shall be held

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For the ATOMIC SAFETY AND LICENSING APPEAL BOARD PANEL