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SECRETARY OF ENERGY  
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November 15, 1989

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before The Administrative Law Judge

In the Matter of	)	
	)	
NORTHERN STATES POWER COMPANY	)	Docket No. 30-05004-MLA
	)	
(Pathfinder Atomic Plant)	)	

LICENSEE'S REQUEST FOR  
CLARIFICATION OR RECONSIDERATION  
OF MEMORANDUM AND ORDER (HEARING  
REQUEST), DATED OCTOBER 24, 1989

On September 22, 1989, Citizens for Responsible Government, South Dakota Resources Coalition, Technical Information Project and Catherine Hunt ("Requestors") filed a request for hearing on the pending application to amend the Pathfinder facility's by-product material license. On October 6, 1989, prior to the designation of the presiding officer for this proceeding, Northern States Power Company ("Licensee") submitted its answer to the request for hearing. On October 24, 1988, the Administrative Law Judge ("ALJ") issued a Memorandum and Order (Hearing Request), LBP-89-30, which:

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1. stated that licensees had not filed an answer to the request for hearing;
2. concluded that Requestors had not submitted sufficient information to make a determination on their standing to request a hearing;
3. ordered that Requestors submit additional information with respect to their standing to request a hearing;
4. ruled that, if an oral hearing should be held in this proceeding, such hearing would be held in Sioux Falls, South Dakota; and
5. stated that NRC regulations governing this proceeding are consistent with Requestors' suggestion that any hearing date await completion of all necessary documentation (and particularly the environmental assessment).

Subsequent to issuance of the Memorandum and Order, the ALJ learned that Licensee had in fact filed an answer to the request for hearing and granted it the right to request reconsideration of any of the findings and conclusions contained in the Memorandum and Order. Memorandum and Order Modification (Hearing Request), dated November 6, 1989.

Licensee has reviewed the October 24 Memorandum and Order. We agree with the ALJ's analysis of the request for hearing and the requirement that Requestors submit additional information to demonstrate their standing. We also agree that, if an oral hearing is held, it should take place in Sioux Falls.

Licensee would, however, request clarification or reconsideration of the ALJ's statement concerning the relationship between the timing of the "hearing date" and the "completion of all necessary documentation, more particularly the Environmental Assessment." Memorandum and Order at 12.

Licensee believes that the informal proceeding contemplated by the Notice of Hearing can and should proceed in parallel with preparation of the environmental assessment (as well as other NRC Staff documents). While completion of the proceeding may not be feasible prior to completion of the environmental assessment, other steps in the proceeding should continue. These include:

1. determination of Requestors' standing (§ 2.1205(g));
2. identification of those areas of Requestors' concerns that are germane to the subject matter of the proceeding, (§ 2.1205(g));



3. simplification and specification of the issues on which written presentations are to be made (§§ 2.1209(c), 2.1233);
4. submission of written presentations on issues based upon claimed deficiencies or omissions in the license application (§ 2.1233(c));
5. submission by ALJ of written questions (if any) and responses thereto (§ 2.1233(a)).

The NRC's regulations governing this hearing do not require that these steps await the completion of the Staff's environmental assessment. Instead, Subpart L to 10 CFR Part 2 gives the presiding officer the authority to establish the hearing schedule, including submission of written presentations (and therefore the steps leading up to that submission) prior to completion of the environmental assessment. In adopting Subpart L, the Commission explicitly addressed this issue.

[T]he Commission has not adopted the suggestion of another commenter that the rule contain language setting specific time frames within which an initial presentation and any reply thereto must be filed after the date the hearing file is made available. While the Commission endorses the concept that written presentations should be made as promptly as possible, the Commission continues to believe that the presiding officer will be in the best position to set a schedule based upon his or her review of the

issues raised in each hearing petition. The Commission also cannot endorse this commenter's suggestion that language should be added that would direct that the submission of written presentations should not await the completion of an NRC staff safety or environmental analysis that is being prepared relative to the licensing application. Again, this is an issue best left to the discretion of the presiding officer.

54 Fed. Reg. 8269, 8274 (1989) (emphasis added).

The Subpart L rules are consistent with this discretion. Thus, while written presentations are to be submitted after the hearing file is established, 10 CFR § 2.1233(a), the creation of the hearing file need not await completion of the environmental assessment. As stated in 10 CFR § 2.1231(c), the Staff is under "a continuing duty to keep the hearing file up to date with respect to the materials set forth in paragraph (b) of this section . . . ." And the "materials set forth in paragraph (b)" include "any NRC environmental impact statement or assessment." 10 CFR § 2.1231(b). The timing of the hearing file's establishment is not linked to the issuance of the environmental assessment, but rather to issuance of the order granting a request for a hearing. 10 CFR § 2.1231(a).

The hearing is intended to consider the adequacy of the proposed license amendment, not the Staff's review. This was made clear in the Notice of Opportunity for Hearing, which stated that

"this is a proceeding on an application for a license amendment" and that a request for hearing is to identify "requestor's areas of concern about the licensed activity that is the subject matter of the proceeding." 54 Fed. Reg. 35267 (1989). The rules governing this proceeding indicate that it is the license application -- and not the NRC Staff's review of it -- that is to be considered in the hearing.

[T]he initial written presentation of a party that requested a hearing or petitioned for leave to intervene must describe in detail any deficiency or omission in the license application, with references to any particular section or portion of the application considered deficient, give a detailed statement of reasons why any particular section or portion is deficient . . . .

10 CFR § 2.1233(c) (emphasis added). Limiting the subject matter of the hearing to the adequacy of the license application is also consistent with NRC case law. See, e.g., Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 N.R.C. 5, 56 (1985); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Generating Power Plant, Units 1 and 2), ALAB-728, 17 N.R.C. 777, 807 (1983). Finally, the Commission in its most recent revisions to Subpart G to 10 CFR Part 2 emphasized once again that it is the licensee application and not the Staff review that is to be the subject matter of the hearing.



Apart from NEPA issues, which are specifically dealt with in the rule, a contention will not be admitted if the allegation is that the NRC Staff has not performed an adequate analysis. With the exception of NEPA issues, the sole focus of the hearing is on whether the application satisfies NRC regulatory requirements. See, e.g., Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 N.R.C. 777, 807, review declined, CLI-83-32, 18 N.R.C. 1309 (1983). For this reason, and because the license application should include sufficient information to form a basis for contentions, we reject commenters' suggestions that intervenors not be required to set forth pertinent facts until the Staff has published its [final environmental statement and safety evaluation report].

54 Fed. Reg. 33168, 33171 (1989) (emphasis added) (footnote omitted). For NEPA issues, the revised rule

makes clear that to the extent an environmental issue is raised in the applicant's [environmental report], an intervenor must file contentions on that document. The NRC staff in its [draft environmental impact statement] or [final environmental impact statement] may well take a different position than the applicant. 10 CFR § 2.714(b)(2)(iii) explicitly recognizes for environmental matters existing precedent regarding the right to amend or supplement contentions based on new information.

54 Fed. Reg. at 33172. Based on this analysis, Licensee believes that the appropriate course of action (if requestors are granted standing), is to move ahead with the proceeding recognizing their

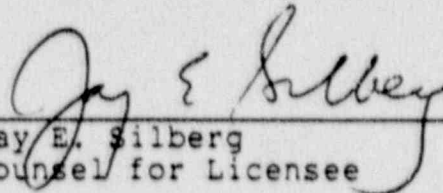
right to seek to supplement or amend their issues based upon new information.

Licensee respectfully requests that the ALJ clarify the October 24 Memorandum and Order to make clear that the identification of the issues and the submission of written presentations will not be delayed pending completion of the environmental assessment or safety evaluation report.

Respectfully submitted,

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By

  
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November 15, 1989



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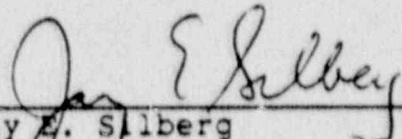
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Licensee's Request for Clarification or Reconsideration of Memorandum and Order (Hearing Request), Dated October 24, 1989, was mailed, first class mail, postage prepaid, to the attached service list, this 15th day of November 1989.

  
\_\_\_\_\_  
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