Nov 13, 1980

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

before the

ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

PERMITTEES' RESPONSE TO
MOTION TO SUSPEND
CONSTRUCTION

On June 29, 1976, a Licensing Board issued an Initial Decision unanimously approving the seismic design of the Seabrook Station. P.S. Co. of N.H. (Seabrook Station, Units 1 & 2), LBP-76-26, 3 NRC 857, 868-71, 919-22, 939 (1976). A little over one year later, on July 26, 1977, this Board issued a 2-1 decision which, inter alia, affirmed the Licensing Board on the seismic issue. P.S. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33 (1977). One Appeal Board member, Mr. Farrar, dissented from this decision presenting "only an outline of his conclusions", 6 NRC at 106, and promising a "full elucidation" of his views at a later date. The Commission then took the position that it would await Mr. Farrar's full dissent before

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deciding whether to review the seismic issue in Seabrook. These views were not forthcoming until over two years later on August 3, 1979. P.S. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-561, 10 NRC 410 (1979). One year after that the NRC, having sua sponte extended its time for review numerous times, ordered a "remand to the Appeal Board to take further evidence on . . . two issues". P.S. Co. of N.H. (Seabrook Station, Units 1 & 2), CLI-80-33, 12 NRC ___, ___ Slip Op. at 2 (Sept. 25, 1980). The NRC order did not vacate the order authorizing issuance of the Seabrook Construction Permits; nor did it hold that the ultimate conclusions as to seismic design reached by the Licensing Board and the Appeal Board were erroneous. Rather it directed the Appeal Board to take further evidence on two matters, and then in each case, to "reconsider its opinion on this matter" presumably in light of that evidence. Id. at 4.

Thirty days after issuance of CLI-80-33, NECNP has moved for an order suspending construction at Seabrook. This memorandum replies to that motion.

ARGUMENT

I. THE AUTHORITY OF THE APPEAL BOARD TO SUSPEND CONSTRUCTION IS DOUBTFUL IN LIGHT OF NRC'S ORDER, AND, IN ANY EVENT, THE ISSUE OF SUSPENSION IS RES ADJUDICATA

The Commission certainly did not order a suspension of construction at Seabrook. Nor did it vacate the construction permits. It merely directed the Appeal Board to take evidence

and reconsider its opinion on two specific matters. The NRC's choice of authority to be cited for its action, Cincinnati G.&E. Co. (William H. Zimmer Nuclear Station), ALAB-79, 5 AEC 342 (1972) cited at n.2 of CLI-80-33, is interesting. That was a construction permit case where an Appeal Board remanded a proceeding to a Licensing Board to take further evidence on a discrete issue, the Appeal Board itself retaining jurisdiction and not ordering a suspension of ongoing construction during the pendency of the proceedings to be held before the Licensing Board. In short, it appears that the NRC has not authorized this Appeal Board to entertain a motion of this nature.

This view of CLI-80-33 is reinforced by consideration of prior decisions and proceedings in the Seabrook proceeding. In his original or "outline" dissent, Mr. Farrar stated:

> "[My seismic] views call for a substantial upgrading of the plant's ability to withstand earthquakes. Although this is important to safety, the necessary design changes would not be foreclosed by any construction efforts taking place in the near future. Thus, there is no cause to delay the release of today's decisions -- which allow construction to proceed -- while I complete the full elucidation of my response to my colleagues' seismic analysis." 6 NRC at 106.

To this statement Mr. Farrar appended a footnote as follows:

> "My conclusion on the seismic matter will affect the cost of the plant at those alternative sites located outside the same seismic area. Given the standards laid down by the Commission [citation omitted], the alternative site question would not likely be affected were my views on the seismic question adopted."

In addition, Mr. Farrar did not list the final resolution of the seismic issue as a ground for not allowing construction to proceed in his dissent in the companion decision to ALAB-422 which reinstated the then suspended construction permits. See P.S. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-423, 6 NRC 115, 120-21 (1977).

Subsequent to the Farrar "outline" dissent in ALAB-422, in a decision which reinstated the again suspended Seabrook construction permits the Commission cited the above-quoted portions of the Farrar dissent as the basis for rejecting an argument for continued permit suspension in light of the then still pending petition for review of the seismic issue.

> "SAPL/Audubon also refers to the fact that Commission review of seismic issues in this case has not yet been completed as another basis for continuing the suspension. That factor has no bearing on the suspension question. Mr. Farrar of our Appeal Board dissented from the Appeal Board majority's resolution of certain seismic issues, but he made clear that his position on these seismic issues, even were it accepted, would not preclude continued construction of the Seabrook facility, nor would it be likely to affect the alternate site question." P.S. Co. of N.H. (Seabrook Station, Units 1 & 2), CLI-78-17, 8 NRC 179, 180-81 n.7 (1978).

The foregoing, we submit, is a flat ruling that a reopening of the seismic issue for additional evidence or reconsideration on an expanded record (where, as here, there has been no finding that in fact the present design is not proper) is not grounds for suspension. It should be given precedential or res adjudicata effect by this Appeal Board.

II. ASSUMING THE APPEAL BOARD HAS AUTHORITY TO ENTERTAIN THE MOTION, IT SHOULD BE DENIED

A. It is Settled That When a Remand is Made for the Taking of Further Evidence but Without any Finding or Ruling of Error on the Ultimate Conclusion Originally Reached, Construction will not be Suspended

NECNP argues (Motion at 3 et seq.) that the controlling authority in the matter at bar is Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-268, 1 NRC 383, 401 (1975) and Public Service Electric and Gas Co. (Hope Creek Generating Station, Units 1 and 2), ALAB-429, 6 NRC 229 (1977). However, in both those the decision below was either partially vacated (in ALAB-268) or partially reversed (in ALAB-429) as well as remanded. In ALAB-268 it was found that the permittees did not have control over the exclusion area and thus it had to be modified. In ALAB-429 the Appeal Board held that there was no basis in the record for certain findings underpinning a conclusion that certain LNG and LPG accidents need not be designed against.

Here the Commission has reversed or vacated nothing. It has not held the seismic design to be erroneous or the Licensing or Appeal Board conclusions to be unsupportable by the record as it now stands. Rather it has provided an opportunity for expansion of the record to see if additional evidence will, on reconsideration, persuade this Appeal Board to change its findings and rulings.

This being the case, the controlling authority is, we submit, Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-212, 7 AEC 986 (1974), wherein it is stated:

> "The consistent practice of appeal boards has been to leave a construction permit or operating license in effect pending the outcome of a remand for further proceedings unless there was reason to believe that the pendente lite continuation of the activities in question might pose in itself a threat to health and safety (or to the environment of the remand encompasses environmental issues). [Citing 5 cases] 7 AEC at 997.

The only possible exception to ALAB-212 which has been recognized is in cases where the remand involves issues of alternate sites, P.S. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-366, 5 NRC 39, 68-72, affirmed but decision on this point avoided, CLI-77-8, 5 NRC 503, 520-21 and n.19 (1971), an issue which is not involved here.

Applying the ALAB-212 rule, it is clear that suspension is not in order. This is not an environmental case and the "irreparable" environmental harm has been done already. Continued construction in itself poses no threat to public health and safety. NECNP will argue that continued construction will foreclose the ability to comply with a higher seismic standard if it is required. This ignores the fact that, unlike under NEPA rules, there can be no compromise on health and safety regulations. Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), ALAB-161, 6 AEC 1003, 1007 (1973). If the permittees place

themselves in a position where they cannot make required changes, they do not get an operating license. NECNP may argue that further construction may make it more expensive than otherwise to comply with a higher seismic standard if ordered. This is possibly true. But "this Commission is not charged with the duty of insuring that utilities expend their funds wisely". P.S. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 516 (1978). See also Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-458, 7 NRC 155, 162 (1978).

B. If Some Balancing Test is to be Used, Suspension of Construction Clearly is not in Order

1. The Traditional Balancing of Equities Favors Denial of the Motion, Which Denial Would not Prejudice Future Decisions

At least in an "alternate sites" setting it has been held that the question of license or permit suspension on remand "must at least be decided on the basis of (1) traditional balancing of equities and (2) consideration of any likely prejudice to further decisions that might be called for by the remand." P.S. Co. of N.H. (Seabrook Station, Units 1 & 2), CLI-77-8, 5 NRC 503, 521 (1977). See also Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-458, 7 NRC 155, 160 n.14 (1978).

The traditional equities favor denial of the motion. NECNP can show no irreparable harm to it as a result of continued construction. The injury to the permittees and the public of

more delay and concommitment increased cost is obvious. Certainly the permittees are not guilty of unclean hands; they did nothing to delay this review three years.

This is not a NEPA issue on remand. It is a safety issue. Thus, no future decision can be prejudiced because unlike NEPA issues, no cost-benefit analysis is applicable; safety regulations simply must be met. ALAB-161, supra.

2. The Virginia Petroleum Jobbers Test Provides No Basis for Suspension

If it be concluded that the so-called Virginia Petroleum Jobbers criteria memorialized in 10 CFR § 2.788(e) should guide the decision here, clearly no suspension is in order. Even assuming that one cannot predict the outcome on the merits, the fact is that NECNP can show absolutely no irreparable harm to it if construction is allowed to continue. and "irreparable harm" is clearly the most crucial factor. E.g., P.S. Co. of N.H. (Seabrook Station, Units 1 & 2), CLI-77-27, 6 NRC 715, 716 (1977); P.S. Co. of Ind., Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-437, 6 NRC 630, 632 (1977); Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), ALAB-481, 7 NRC 807 (1978). As to injury to other parties, it is well recognized that the cost of delay in terms of finished cost and the extension of completion date are legally cognizable injuries to the permittee. Fla. P. & L. Co. (St. Lucie

Nuclear Power Plant, Unit 2), ALAB-404, 5 NRC 1185, 1188 (1977); P.S. Co. of Ind., Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-437, 6 NRC 630, 634 (1977). And, it is settled that an intervenor cannot be heard to argue in favor of a stay that there is risk to the applicant of useless expenditure. Fla. P. & L. Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-404, 5 NRC 1185, 1188 (1977). As to public interest, it is difficult to see how throwing the construction force out of work for Christmas and assuring increased cost of this plant by further delay can be viewed as being in the public interest.

C. Not That Much Will Change Prior to a Decision in This Matter

As directed by the Appeal Board the permittee is filing herewith an affidavit showing the percent completion of the safety related structures and, assuming ongoing construction, the percent completion which will occur during the next 6, 12 and 18 months. A review of this affidavit shows that the increased amount of construction over the next six months (by which time the hearing on remand will be completed) is not very great as to most items. This too militates against suspension.

CONCLUSION

The motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas G. Dignan, Jr., one of the attorneys for the applicants herein, hereby certify that on November 13, 1980, I made service of the within document by mailing copies thereof, postage prepaid, first class or airmail, to:

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