

in a late intervention petition submitted by Fairfield United Action on April 9, 1982. The Staff opposed that petition as it does this motion for much the same reasons.

The instant motion is the Intervenor's third motion to reopen the record of this proceeding; two entailed the advancement of new contentions and the other an expansion of an already admitted contention. The Intervenor's first motion to reopen of December 8, 1981 was granted, in part, and led to further evidentiary hearings on Contention 8. Despite this, the Intervenor did not file any findings on the reopened aspects of this contention. The Intervenor's second motion to reopen of February 24, 1982 was denied by the Licensing Board in an Order issued on April 28, 1982. This pattern of successive efforts to reopen the record of this proceeding should not be permitted in a fair and orderly administrative process. For the particular reasons set forth below, the present motion must be denied.

II. DISCUSSION

Denial of the present motion is mandated under the operative law and facts. Since the record would have to be reopened before the proposed new contentions could be admitted, the legal standards governing reopening must be evaluated along with the factors governing the late

filing of contentions.^{2/} The Staff will address these distinct standards in turn.

A. Late-Filed Contentions

The Commission's regulations provide that nontimely filings will not be entertained absent a favorable balancing of the five factors enumerated above. 10 CFR § 2.714(a)(1). These factors are not expressly addressed in the present motion.

The first factor is whether there is good cause for the filing delay. The sole issue raised in the present motion and proffered new contentions is a concern over the potential for accelerated steam generator tube wear caused by flow-induced vibrations in the preheater region of Westinghouse Model D3 steam generators in use at Summer. The Intervenor acknowledges that the existence of this phenomenon was disclosed in a January 20, 1982 Board Notification (BN-82-02) in which the Board was informed about the appearance of the problem at two foreign reactors. Unrelated concerns over steam generator tube integrity have

^{2/} Those factors are:

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner's interest will be protected.
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner's interest will be represented by existing parties.
- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding. 10 CFR § 2.714(a)(1).

These factors, applicable to late-filed petitions to intervene, are also to be applied in determining whether late-filed contentions should be admitted. Statements of Consideration, 43 F.R. 17798, 17799 (April 26, 1978).

been extant for a considerable period of time as specifically addressed in the February 1981 Summer Safety Evaluation Report (SER). See SER, § C.5 (A-3).

Along with the subject Board Notification, the motion cites two other documents allegedly bearing on the matter. These are a local newspaper article of March 10, 1982 which reports that the Summer plant could be forced to operate indefinitely at reduced capacity (50%) because of the immediate problem and a March 12 or 13, 1982 [sic]^{3/} Staff memorandum summary of a meeting with Westinghouse on Model D steam generators.^{4/}

An argument can be made that good cause may have been present to seek to adjudicate the specific steam generator matter advanced in the present motion if requested promptly following the January Board Notification on the subject. It is now April, however, three months have elapsed since the close of the record, and an initial decision is finally imminent in this five-year old licensing proceeding. Under the exigencies of this case, months of delay in submission of the present motion renders it "crucially tardy." Cf. South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 885 (1981) (late intervention).

^{3/} The memorandum is actually dated March 15, 1982.

^{4/} See motion at 1.

The second and fourth factors, the availability of other means whereby the Intervenor can protect his interest and the extent to which other parties will represent that interest, are somewhat analogous. With regard to the former factor, other means, perhaps less expansive in scope, such as the submission of a request for Commission action under 10 CFR §2.206, exist to obtain formal consideration of the perceived problem. A decision by the Director of Nuclear Reactor Regulation thereunder is reviewable by the Commission itself. Therefore, consideration of this factor does not necessarily weigh in favor of the Intervenor.

With regard to the latter of these complementary factors, the Staff is dedicated to assure a safe and timely resolution of the vibrational tube wear problem and to take whatever measures are necessary to protect the public health and safety in the interim as evidenced by the Staff affidavit which accompanied the April 29, 1982 response to the recent late intervention petition of Fairfield United Action (Staff affidavit).^{5/} This includes the imposition of operating restrictions as necessary.

This effort is consistent with the firmly established regulatory scheme whereby reconciliation of concerns unrelated to the contested issues in an operating license proceeding rests within the sole province of the Staff. It is not the responsibility of a licensing board at the operating license stage to supplant or duplicate this role. Summer, supra, 13 NRC at 895. Further, no operating license may issue unless and

^{5/} Affidavit of Staff members Murphy, Collins, Rajan, Feld. That affidavit is incorporated herein by reference.

until the agency makes the specified safety findings in 10 CFR § 50.57. Any eventual full-power operating license for the Summer facility, including any terms and conditions relevant to the subject problem, must receive Commission approval. The steam generator concern at issue has and will continue to receive paramount attention by the Staff. Therefore, like factor two, consideration of this factor does not necessarily weigh in favor of the Intervenor.^{6/}

The third factor, the extent to which the Intervenor can assist in developing a sound record, weighs importantly against this belated motion to reopen. The technical problem raised in the proposed new contentions is one for which a design solution is being actively pursued, and believed probable, by industry, Westinghouse, and NRC experts in the field.^{7/} Pending a successful design solution, conservative operating and surveillance procedures will be imposed by the NRC to prevent any undue risk to the health and safety of the public from interim plant operation.^{8/}

By contrast with the considerable technical resources already being devoted to the problem, the motion is devoid of any indication that the Intervenor possesses any expertise in this unique matter which would in any way contribute to its potential evidentiary consideration.

^{6/} Whatever their objective merits herein, the Appeal Board has observed that these two factors are accorded relatively less weight than the other factors. Summer, supra, 13 NRC at 895.

^{7/} See Staff affidavit at 8-9.

^{8/} Id.

Nor does the Intervenor identify, or indicate an intent to produce, any potential expert witnesses on the issues. Therefore, this important factor weighs decisively against the Intervenor.

Finally, factor five, the extent to which admission of the late petition will broaden the issues or delay the proceeding, weighs almost conclusively against the Intervenor. The instant proceeding commenced in 1977. Evidentiary hearings begun in June, 1981 concluded with the close of the record in January, 1982. Two motions to reopen the record, one granted^{9/} and the other denied,^{10/} have already been lodged by the Intervenor. An initial decision is expected any day. The admission of new contentions on the eve of an initial decision will obviously delay the proceeding to an unjustified degree. Therefore, on balance, the five pertinent factors appear to weigh substantially against the admission of new contentions. The Staff will now turn to a discussion of the standards for reopening the record.

B. Reopening

The standards for reopening a record in Commission proceedings are set forth in Kansas Gas and Electric Company (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978). Therein, the Appeal Board makes it clear that the proponent of a motion to reopen bears a heavy burden. The movant must demonstrate that: (1) the motion is timely, (2) the motion is directed to a significant safety or

^{9/} See Licensing Board Memorandum and Order, dated January 5, 1982.

^{10/} See Licensing Board Memorandum and Order, dated April 28, 1982.

environmental issue,^{11/} and (3) a different result would have been reached initially had the material submitted in support of the motion been considered.^{12/} These standards were reiterated in Public Service Company of Oklahoma, et al. (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 804 (1979), where, as here, the motion to reopen was filed after the record was closed but prior to issuance of a decision by the licensing board.^{13/} Thus, the motion to reopen must be timely and not based on information that reasonably could have been raised prior to the close of the record, it must involve a matter which is of some significance, and it must be such that the outcome of the case is likely to be affected by the alleged new information.

Even if these factors are resolved in the movant's favor, there is no justification to reopen the record for an additional evidentiary hearing unless a triable issue of fact (that which would defeat a summary disposition motion) exists. Vermont Yankee, supra, 6 AEC 523. According to the Appeal Board, a hearing should not be reopened if the affidavits

^{11/} See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 846, 887 (1980); Georgia Power Co. (Alvin W. Vogtle Nuclear Power Plant, Units 1 and 2), ALAB-291, 2 NRC 404, 409 (1975); Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973).

^{12/} See Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-227 8 AEC 416, 418 (1974). In this connection, the Appeal Board has recently observed that the proponent of a motion to reopen must establish the existence of newly discovered evidence having a material bearing on the proper result in the case. Duke Power Co. (McGuire Nuclear Station, Units 1 and 2), ALAB-669, 14 NRC _____, Slip op. at 20 (March 30, 1982).

^{13/} See also Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-644, 13 NRC 903 (1981).

submitted in response to the motion to reopen "demonstrate that there is no genuine unresolved issue of fact, i.e., if the undisputed facts establish that the apparently significant safety issue does not exist, has been resolved, or for some other reason will have no effect upon the outcome of the licensing proceeding." Id. As the April, 1982 Staff affidavit attests, that is precisely the situation which obtains in the case at bar.

The first relevant factor is the timeliness of the request. As discussed above, under the circumstances of this case, an April 1982 motion to reopen is untimely to raise a potential safety issue identified by the Staff in January, 1982 in view of the extremely late stage of this proceeding.

The second criterion involves the safety significance of the matter in question. Obviously, any avoidable potential for steam generator tube leakage is important from a safety standpoint. The Staff attaches considerable importance to devising a solution to the problem of flow-induced vibrations in the steam generators and has taken concrete steps to eliminate the risk of any attendant tube wear in the interim. This includes the installation of instrumentation to measure the extent of vibratory effects, surveillance and temporary restrictions on power levels to those below which no adverse consequences due to this particular phenomenon in Model D steam generators have been known to occur.^{14/}

^{14/} See Staff affidavit at 8.

As a result of a concerted NRC program for dealing with the technical problem raised in the present motion, which must be acceptable to the Commission, the outcome of the instant proceeding should not be affected if the potential problem of vibration and tube wear are litigated. There is no practical necessity for formal adjudication of the problem nor could this Board fashion any relief beyond that already being undertaken by the Staff. Therefore, this final criterion for reopening the record weighs heavily against the Intervenor.

Even assuming the Intervenor could prevail on the criteria applicable to a request to reopen the record, the proposed new contentions do not present triable issues necessitating an evidentiary hearing as the April 29, 1982 Staff affidavit demonstrates. Each of the proposed new contentions is without substantive merit.

The first proposed new contention evinces a concern that tube vibration could lead to tube degradation or leakage of significant amounts of radiation to the environment. As the April, 1982 Staff affidavit attests, this concern is unfounded. In the first place, a design modification to the Model D steam generator which will eliminate the vibration problem is potentially available by the latter part of 1982.^{15/} An operating plan is being carefully devised to govern interim power operation for the Summer facility until the design modification

^{15/} See Staff affidavit at 8-9.

is fully implemented and verified.^{16/} It will likely be comparable to the operating plan in effect for the McGuire facility which also utilizes the Model D steam generator.^{17/}

This plan will likely include the installation of internal instrumentation in the steam generator tubes to measure vibration before it becomes significant and restrictions on power levels to those below which no damaging tube wear has been known to occur.^{18/} Coupled with careful vigilance and periodic eddy current testing, this prospective plan provides reasonable assurance that the plant can be operated with the Model D steam generators in the prescribed manner without undue risk to the public health and safety. Accordingly, there are no genuine issues of material fact relevant to Intervenor's first proposed new contention. Therefore, there is no justification to reopen the record for an additional evidentiary hearing under the circumstances of this case. See Vermont Yankee, supra, 6 AEC at 523.

The second proposed new contention questions the impact of potential operating restrictions pending resolution of the tube vibration problem upon the Applicant's financial ability to operate the plant. By virtue of a recent rule change, this does not present a litigable issue in this licensing proceeding. As the Staff indicated in its April 7, 1982 motion to dismiss existing contention 2, the Commission has recently promulgated a final rule eliminating entirely the financial

^{16/} Id. at 7-8.

^{17/} See attachment to Staff affidavit.

^{18/} Id. at 8.

qualifications review and findings for an electric utility Applicant and providing that the financial qualifications of such an applicant are not among the issues to be considered in pending or future construction permit and operating license proceedings.^{19/} Therefore, proposed new contention 2 is precluded from adjudication herein by this new regulation.

The third proposed new contention claims that the favorable cost-benefit balance struck at the construction permit stage has been compromised because it did not consider the prospect that the Summer station may have to operate at half power for a prolonged period of time or the alleged added costs that could result from steam generator repairs and/or replacement. This contention is erroneous on both legal and factual grounds.

First and foremost, the need for the added electrical generation from a completed nuclear power plant is not to be considered at the operating license stage of the process. The Commission has recently amended its regulations to expressly provide that need for power issues will not be considered in operating license proceedings.^{20/} The sole exception to this rule is where special circumstances are shown to justify a waiver or exception to application of the rule in a petition filed in accordance with 10 C.F.R. § 2.758.^{21/} If a licensing board finds that a prima facie showing has been made warranting a waiver or exception, the matter must be certified directly to the Commission for

^{19/} 47 F.R. 13750 (March 31, 1982).

^{20/} 47 F.R. 12940 (March 26, 1982).

^{21/} Id.

determination. 10 C.F.R. § 2.758(d). No petition for waiver or exception has been filed herein nor, in the opinion of the Staff, could the requisite showing be made.

The purpose of the recent amendments is to avoid unnecessary consideration of issues that the Commission has found are not likely to tilt the cost-benefit balance.^{22/} As the April 29, 1982 Staff affidavit attests, the prospect of limited plant operation at 50% power occasioned by the steam generator concern in question does not vitiate the specific favorable cost-benefit balance struck in this case nor contradict the generic finding on the relationship of need for power and cost-benefit considerations which formed the underpinning for the Commission's recent amendments.

In addition to the regulatory bar to this aspect of proposed new contention three, the allegations therein are factually unsupportable. The primary benefit found by the Staff in its May, 1981 operating license Final Environmental Statement (FES) includes the baseload electrical energy the plant will be able to produce, improved system reliability, about \$90 million in production cost savings per year, and increased fuel diversity.^{23/} The Staff analysis of baseload energy assumed an average 60% capacity factor.^{24/} The Intervenor apparently argues that, based on a referenced newspaper account, the plant may

^{22/} 47 F.R. at 12940.

^{23/} FES, § 9.2.

^{24/} Id.

have to operate at 50% capacity for some indefinite period, thereby appreciably reducing the benefits of operation. First, whether and for how long the plant may need to operate at less than full power has not been determined.^{25/} It is presently expected that a design modification solution to the vibration problem may be available by the latter part of 1982.^{26/} Even assuming, nonetheless, that the plant is required to operate at 50% capacity for this period or longer, this does not significantly alter the benefits assigned plant operation in the FES or invalidate the cost-benefit balance struck in the FES.^{27/} In this context, a 50% capacity is not markedly less than the 60% annual average assumed in the FES over the lifetime of the plant. Moreover, this annual average would likely be restored in subsequent years of commercial operation at anticipated capacity factors in excess of 60%.^{28/}

The second facet of this proposed new contention concerns the added economic costs related to an assumed need for frequent steam generator repairs and/or replacement.^{29/} Resolution of the vibration problem is not expected to entail either frequent repairs or steam generator replacement. Rather, the problem is believed resolvable by a relatively simple design modification.^{30/} Total plant construction costs have been

^{25/} See Staff affidavit at 8.

^{26/} *Id.* at 8-9.

^{27/} *Id.* at 10-11.

^{28/} *Id.*

^{29/} Motion at 3, 4.

^{30/} See Staff affidavit at 8.

in excess of \$1 billion. The FES estimated an annualized average of \$15.1 million for operating and maintenance costs.^{31/} The precise cost of the prospective design modification, and by whom they will be borne, has not been determined. It will inevitably be small when compared to the construction costs incurred to date and projected costs for routine maintenance. Consequently, it is eminently cost-beneficial to incur the modification costs in order to preserve the considerable capital investment the plant represents and to obtain its unrestricted generation use in a timely manner. Accordingly, there are not genuine issues of material fact relevant to part two of proposed new contention three. Therefore, there is no justification to reopen the record for an additional evidentiary hearing under the circumstances of this case. See Vermont Yankee, supra, 6 AEC at 523.

In sum, both the factors governing late intervention and the standards for reopening weigh against the Intervenor's motion to reopen to litigate these new issues.

III. CONCLUSION

In light of the foregoing, the Intervenor's present motion to reopen the record for the admission of new contentions should be denied.

Respectfully submitted,



Steven C. Goldberg
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 3rd day of May, 1982.

^{31/} FES, § 9.3.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)

SOUTH CAROLINA ELECTRIC & GAS)
COMPANY)

(Virgil C. Summer Nuclear Station,)
Unit 1))

Docket No. 50-395

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO INTERVENOR'S SECOND MOTION FOR ADMISSION OF NEW CONTENTIONS" 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, this 3rd day of May, 1982:

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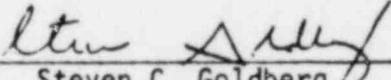
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