

12/15/81

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of  
MAINE YANKEE ATOMIC POWER COMPANY  
(Maine Yankee Atomic Power Station))

Docket No. 50-309  
(Spent Fuel)



NRC STAFF RESPONSE IN OPPOSITION TO  
SENSIBLE MAINE POWER'S MOTION FOR A  
PREHEARING CONFERENCE AND RELATED RELIEF

I. INTRODUCTION

On November 25, 1981, Intervenor Sensible Maine Power (hereinafter referred to as SMP) moved this Board to (1) grant it 60 days in which to file new or additional contentions and (2) hold a prehearing conference to include oral argument on the remaining disputed contentions, subsequent to the Applicant and Staff responses to any proffered contentions. In its pleading, SMP argues that this extraordinary procedure is necessitated by the fact that the Applicant filed on October 5, 1981, a report which ". . . contains new, modified, supplementary and/or additional information, not previously made available by Applicant to the parties which provides a basis for additional contentions."

This proceeding was noticed on October 24, 1979 (44 Fed. Reg. 61273). SMP and the State of Maine petitioned to intervene. A "Notice and Order of Prehearing Conference" was issued on June 22, 1981, scheduling a special prehearing conference for August 11, 1981, and providing that petitions list contentions on or before July 27, 1981. SMP was admitted as a party

DESIGNATED ORIGINAL

Certified By JKW

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at that prehearing conference, and a "Prehearing Conference Order" was issued on August 24, 1981. This order permitted SMP and the State of Maine, a petitioner, to redraft their contentions and submit revised contentions by September 29, 1981. SMP submitted such revised contentions, and by the instant motion seeks to file further revised contentions and requests another prehearing conference.<sup>1/</sup>

The Staff submits that in contrast to the novel procedure outlined in SMP's motion, 10 C.F.R. § 2.714 provides an accepted procedure for addressing late filed contentions; that SMP has demonstrated no exceptional circumstances warranting a deviation from that accepted practice and; therefore, the relief requested in SMP's instant motion should be denied.

## II. DISCUSSION

The Nuclear Regulatory Commission has specifically noted in its Statement of Considerations to Part 2 of 10 C.F.R. that § 2.714 was amended in April, 1978, to clarify the requirements for admitting late filed contentions based on new information. 43 Fed. Reg. 17798 (April 26,

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<sup>1/</sup> SMP states on p. 1 of the subject motion that its contentions were filed on July 27, 1981. It ignores the fact that by the "Prehearing Conference Order" of August 14, 1981, it was allowed until September 28, 1981, to file revised contentions and did so. At p. 14 of these revised contentions SMP specifically raises an issue in regard to the 10.25 inch spacing of fuel assemblies, it implies it was foreclosed from framing contentions upon.

1978).<sup>2/</sup> In that Statement of Consideration, the Commission explained:

The Commission believes that § 2.714 should be amended in the interest of clarifying the requirements in regard to both late filings of petitions and amending, expanding, and deleting contentions. First, § 2.714 is amended to outline clearly the factors which need to be considered and balanced before the presiding officer passes upon the admissibility of late filings. In essence, the amendment codifies the Commission's decision in the matter of Nuclear Fuel Services, Inc. and New York State Atomic and Space Development Authority (1 NRC 273), which makes clear that the reason for the untimely filing is one factor to be balanced along with others in determining whether a late filing will be admitted. Second, § 2.714 is revised to specifically provide that late filed contentions (a contention or amended contention which is filed after 15 days prior to the special prehearing conference, or where there is no special prehearing conference, which is filed after 15 days prior to

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2/ 10 C.F.R. § 2.714(a)(1) provides in relevant part:

. . . nontimely filings will not be entertained absent a determination by the Commission, the presiding officer or the atomic safety and licensing board designated to rule on the petition and/or request, that the petition and/or request should be granted based upon a balancing of the following factors in addition to those set out in paragraph (d) of this section:

- (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.

the first prehearing conference) will be considered for admission under the clarified criteria set forth in subparagraph (a)(1). Third, revised § 2.714 is intended to make clear that late filed contentions must meet the same requirements as timely filed contentions. That is, a proposed contention must be set forth with particularity and with the appropriate factual basis.

The clarified criteria referenced by the Commission requires any Board when presented with a late filed contention to balance the factors of 10 C.F.R. § 2.714(d) and the five factors set forth in 10 C.F.R. § 2.714(a)(1) in their determination of whether any of the proffered contentions should be admitted. See, Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-81-5, 13 NRC 361, 364 (1981); Duke Power Co. (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-615, 12 NRC 350, 352 (1980). By the instant motion, SMP ignores the procedural steps mandated by § 2.714 and simply asks this Board for a 60 day grace period in which to file additional contentions as a result of the Applicant's submittal of October 5, 1981. The Staff urges this Board to rule that if SMP should choose to file any contentions at this stage of the proceeding after a prehearing conference has been held and revised contentions submitted pursuant to the "Prehearing Conference Order," SMP must do so in accordance with the requirements of the applicable subsections of 10 C.F.R. § 2.714(a)(1). No unfairness is shown in requiring SMP to abide by the rules of the Commission, prior to the submission of further revised contentions.

To date, SMP has not addressed the various factors set forth in 10 C.F.R. § 2.714 in proposing any new contentions. Indeed, SMP has proposed no new contentions as a result of the Applicant's October 5, 1981, submittal. Instead, it suggests a novel procedure in dealing with contentions it assumedly will file in the future without explaining why it cannot follow the procedures established by the Commission's regulations.

In effect, the request amounts to an attack on the Commission's regulations, which is expressly prohibited by 10 C.F.R. § 2.758. Consideration of such challenges is not appropriate for a licensing board.<sup>3/</sup>

Lastly, with respect to SMP's request for a prehearing conference following both the submission and response to any new contention, the Staff maintains that such a request is procedurally premature. SMP should first file any new contention it deems appropriate and in that pleading address the factors required by 10 C.F.R. § 2.714, the Applicant and Staff should then be given an opportunity to respond to those new contentions and only then should this Board be called upon to decide whether there is justification to convene a prehearing conference to address any new contention beyond the parties' written pleadings.

### III. CONCLUSION

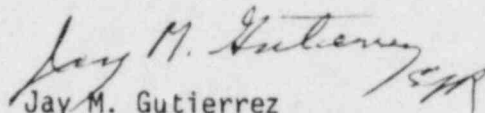
For the reasons aforesaid, the Staff opposes granting a 60 day grace period to Sensible Maine Power in which to file any new or additional contentions and further opposes at this time the convening of a prehearing

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<sup>3/</sup> See, Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 2), ALAB-456, 7 NRC 63, 67 n.3 (1978); Potomac Electric Power Company (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 89 (1974). SMP has not set forth any "special circumstances" warranting a waiver or exception of the requirements of 10 C.F.R. § 2.714 for late filed contentions as required by 10 C.F.R. § 2.758. SMP simply makes the argument that to force it to set forth its contentions before Maine Yankee's application is final and complete would be unfair and unreasonable. However, this ignores the established rule that there is no prohibition on amending an application after the start of a proceeding and that, in fact, this is a common accepted practice. See, Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-74-30, 7 AEC 877, 879 (1974).

conference to address any new contentions unless and until the factors set forth in 10 C.F.R. § 2.714 are first addressed. Accordingly, the Staff submits the motion of Sensible Maine Yankee for a prehearing conference and related relief should be denied.

Respectfully submitted,

  
Jay M. Gutierrez  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 15th day of December, 1981.

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(Maine Yankee Atomic Power Station) ) (Spent Fuel)

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE IN OPPOSITION TO SENSIBLE MAINE POWER'S MOTION FOR A PREHEARING CONFERENCE AND RELATED RELIEF" 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, through deposit in the Nuclear Regulatory Commission's internal mail system, this 15th day of December, 1981:

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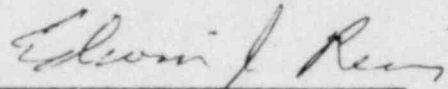
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