

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of
LOUISIANA POWER AND LIGHT COMPANY
(Waterford Steam Electric Station,
Unit 3)

}
} Docket No. 50-382
}

NRC STAFF'S BRIEF IN OPPOSITION
TO APPEAL FILED BY THE STATE OF LOUISIANA

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August 27, 1982

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On August 6, 1982, the State of Louisiana ("Louisiana") filed its "Notice of Appeal", in which it seeks to appeal from (i) the Licensing Board's denial of its petition for leave to participate as an interested State in this proceeding (Notice of Appeal, at 1),^{1/} and (2) the Licensing Board's withdrawal of its own sua sponte issue concerning feed-and-bleed capability (id., at 5), both of which actions were announced by the Licensing Board in a telephone conference call held on April 16, 1982, in which Louisiana participated (id., at 1). For the reasons set forth herein, the NRC Staff ("Staff") opposes Louisiana's appeal and urges that the Licensing Board's actions be affirmed.

^{1/} Inasmuch as the Notice of Appeal is not paginated, the Staff has assigned consecutive numbers to each page thereof.

BACKGROUND

The instant proceeding was initiated by publication of a notice of opportunity for hearing in the Federal Register on January 2, 1979 (44 Fed. Reg. 125 (Jan. 2, 1979)). Two petitions seeking leave to intervene were filed promptly thereafter,^{2/} and the proceeding progressed steadily through pretrial litigation, culminating in the hearings held on March 23-April 2 and May 3-12, 1982, limited to the issues raised by Joint Intervenors' Contentions 8/9 (synergism) and 17/26 (emergency planning). Proposed findings of fact have now been filed by all parties.^{3/}

On March 18, 1982, the Licensing Board issued an order adopting "Feed and Bleed Capability" as a sua sponte issue in the proceeding.^{4/} Following the filing of Applicant's motion for reconsideration of that order,^{5/} Louisiana filed its initial petition for leave to participate

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- ^{2/} Petitions were filed by Save Our Wetlands, Inc. and Oystershell Alliance, Inc. ("Joint Intervenors") and by Louisiana Consumer's League, Inc. ("LCL"). Both petitions were granted, however LCL withdrew from the proceeding prior to the commencement of the hearing.
- ^{3/} The only matters pending at this time relate to (1) Joint Intervenors' motion to reopen on Table S-3/high level waste, and (2) a further petition recently filed by Louisiana seeking leave to participate as an interested State "pursuant to 10 C.F.R. § 2.714(a)" [sic]. See discussion infra, at 4.
- ^{4/} Memorandum and Order, dated March 18, 1982, at 2-3.
- ^{5/} "Applicant's Motion for Reconsideration of March 18, 1982 Memorandum and Order Raising Sua Sponte Issue," filed March 26, 1982.

The Staff filed a response supporting the Applicant's motion. See "NRC Staff's Answer in Support of Applicant's Motion for Reconsideration of March 18, 1982 Memorandum and Order Raising Sua Sponte Issue," dated April 12, 1982. No response was filed by the Joint Intervenors.

as an interested State in this proceeding, pursuant to 10 C.F.R. § 2.714(a)(1)[sic].^{6/} Therein, the State asserted that its "intervention" was needed in order that "adequate consideration" be given to the feed-and-bleed issue, and sought intervention limited to that subject area.^{7/}

On April 16, 1982, the Licensing Board and parties held a telephone conference call, in which counsel for Louisiana was permitted to listen and, to some extent, to participate.^{8/} During the course of that conference call, the Licensing Board orally granted the Applicant's motion for reconsideration and withdrew the sua sponte issue.^{9/} At that time, counsel for Louisiana explicitly stated that the dismissal of that issue mooted its initial petition.^{10/} Nonetheless, the Licensing Board granted Louisiana leave to file a petition for leave to intervene or to participate as an interested State, in which "the State should show good

^{6/} "Petition for Leave to Participate as An Interested State in Facility Operating License Proceedings and for a Hearing of the Issue Raised Sua Sponte on March 18, 1981," filed on April 13, 1982.

^{7/} Id., at 2-3. Louisiana's petition was accompanied by a "Request for Hearing," which sought to relocate the then scheduled evidentiary hearings to Baton Rouge, Louisiana.

^{8/} See "Order (Denying State of Louisiana's Petition for Leave to Participate)", dated April 20, 1982.

^{9/} Id., at 1. A further "Memorandum and Order (Granting Applicant's Motion for Reconsideration)" was issued by the Licensing Board on April 27, 1982, which sets forth in detail the basis for the Licensing Board's withdrawal of its sua sponte issue.

^{10/} While the telephone conference call was not transcribed, Applicant's counsel's recollection of this statement is identical to that of counsel for the Staff. See "Applicant's Brief in Opposition to Appeal by State of Louisiana," filed August 23, 1982, at 4.

cause, if any for its failure to file in a timely manner."^{11/} Three months later, on July 21, 1982, a second petition was filed by Louisiana.^{12/} Responses to that petition were filed by the Applicant and Staff on August 9, 1982^{13/} and August 10, 1982,^{14/} respectively, and the petition is pending before the Licensing Board for consideration at this time.^{15/}

Louisiana filed the instant appeal from the denial of its initial petition on August 6, 1982, just 16 days after Louisiana had filed

^{11/} Order of April 20, 1982, n.8, supra, at 2.

^{12/} "Petition to Participate as An Interested State in Facility Operating License Proceedings and to Reopen Such Proceedings to Precipitate Commission Rulings Consistant [sic] with Recent Court of Appeals Decision and to Request the Nuclear Regulatory Commission to Cease Issuing Licenses Consistant [sic] with the Court of Appeals Decision," filed July 21, 1982. Louisiana filed a similar petition on July 21, 1982, in Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), Docket Nos. 50-416/417, where no adjudicatory hearings had been held and a low power license had already been issued.

^{13/} "Applicant's Response to the State of Louisiana's Petition to Intervene Pursuant to 10 C.F.R. § 2.714(a)(1)," dated August 9, 1982.

^{14/} "NRC Staff's Response to Petition Filed by the State of Louisiana," dated August 10, 1982.

^{15/} Also pending before the Licensing Board is Joint Intervenors' motion to reopen hearings to consider the issues raised by the U.S. Court of Appeals' decision in Natural Resources Defense Council, Inc. v. NRC, Civil Action No. 74-1586 (D.C. Cir., April 27, 1982). See "Joint Intervenors Motion to Reconsider Atomic Safety and Licensing Board Order of September 13, 1979 and Ruling of May 12, 1982, to Reopen Operating License Hearings and/or Hold New Operating License Hearings," filed June 12, 1982. On Applicant's motion, and in view of the fact that the Commission is expected to act soon in this area, the time in which Applicant and Staff must file responses to Joint Intervenors' motion has been extended until 14 days after issuance of the Commission's policy statement on Table S-3. See "Order (Granting Applicant's Motion for Time Extension)", dated July 19, 1982.

its currently pending second petition to intervene. On August 11, 1982, the Appeal Board ordered the filing of responses to Louisiana's appeal by Applicant and the Staff, by August 23, 1982, and August 27, 1982, respectively.

DISCUSSION

The Staff believes that the Licensing Board's order of April 20, 1982 should be affirmed on the grounds that (1) Louisiana's appeal from the Licensing Board's order is untimely; (2) Louisiana's initial petition was effectively withdrawn by Louisiana and/or correctly denied by the Licensing Board; and (3) Louisiana lacks standing to appeal from the Licensing Board's withdrawal of its sua sponte issue. In the discussion which follows, the Staff addresses each of these issues seriatim.

A. Louisiana's Appeal Should Be Denied As Untimely

Pursuant to 10 C.F.R. §§ 2.714a and 2.762(a), a notice of appeal from an order denying a petition for leave to intervene or from an initial decision must be filed within 10 days "after service" of the Licensing Board's decision. In the instant proceeding, service of the Licensing Board's order of April 20, 1982 apparently was not made until July 29, 1982, when the Licensing Board discovered that Louisiana's counsel had not yet received an official copy thereof.^{16/}

If the filing requirements set forth in 10 C.F.R. §§ 2.714a and 2.762(a) are strictly interpreted, Louisiana's appeal should be deemed

^{16/} Letter from Sheldon J. Wolfe, Licensing Board Chairman, to William J. Guste, Jr., Esq., Louisiana Attorney General, dated July 29, 1982.

to have been timely filed. However, certain facts in the instant proceeding warrant a different conclusion, in that Louisiana's counsel participated in the telephone conference call of April 16, 1982, and received actual notice of the Licensing Board's actions at that time. Louisiana does not contend otherwise, but merely states that "formal service" of the Licensing Board's order was not made until July 29, 1982 (Notice of Appeal, at 1).

In the Staff's view, Louisiana should not be permitted to delay filing an appeal from a ruling which had been conveyed to it orally by the Licensing Board fully three months earlier. Cf. Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-329, 3 NRC 607, 610 (1976). As set forth in Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 188-89 (1978), a party may not stand mute in the face of a procedural error, seeking to "hoard" it for later use. Rather, the party "must make a reasonable effort to have a procedural error corrected." Here, Louisiana should have filed its appeal within the time prescribed by the Commission's regulations, or inquired of the Licensing Board or parties (with whom counsel for Louisiana had been in contact earlier) to determine the whereabouts of the Licensing Board's order. For these reasons, the appeal should be rejected as untimely.

B. The Licensing Board's Order Should Be Affirmed

As noted supra at 3, Louisiana's counsel expressly stated that the Licensing Board's withdrawal of the sua sponte issue mooted its petition. Louisiana was informed by the Licensing Board that it could file a further petition should it care to do so and, indeed, Louisiana has now filed a second petition. At no time in the telephone conference call or later

(until it filed the instant appeal), did Louisiana state that it was aggrieved by the denial of its initial petition. Rather, Louisiana effectively withdrew that petition, and should not now be heard to complain of the petition's denial.

Further, while it is not clear whether Louisiana sought to participate as an interested State pursuant to 10 C.F.R. § 2.715(c), or as a party intervenor pursuant to 10 C.F.R. § 2.714(a), in either case the denial of the petition was appropriate. Thus, as an interested State, Louisiana indicated that it had no interest in any issue other than feed-and-bleed; when that sua sponte issue was withdrawn by the Licensing Board, the State's petition was mooted and its denial was proper. On the other hand, as a potential intervenor (or as an interested State seeking to raise its own issues), Louisiana failed to demonstrate or even address "good cause" and the other factors required to be set out in late-filed petitions pursuant to 10 C.F.R. § 2.714(a)(1)--although it cited that regulation in its petition and presumably was aware of its contents; accordingly, the denial of the petition was entirely proper. See, e.g., Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975); Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, 12 NRC 350, 352 (1980). As these cases indicate, the burden to demonstrate that a late-filed petition should be granted, based upon a balancing of the factors listed in 10 C.F.R. 2.714(a)(1), properly rests with the petitioner. Particularly where the petition is not filed until after the evidentiary hearing has commenced, that burden is heavy, indeed. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-671, 15 NRC 508, 511 (March 31, 1982).

C. Louisiana's Appeal Should Be Denied on Grounds of Standing

As set forth supra at 1, Louisiana appeals not just from the denial of its initial petition but also--and more fundamentally--from the Licensing Board's withdrawal of its own sua sponte issue. However, Louisiana is not and never has been a party to this proceeding and, for this reason, it lacks standing to appeal from any ruling other than the denial of its petition. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-433, 6 NRC 469, 470 (1977).

Furthermore, even if Louisiana's initial petition had been granted by the Licensing Board, it could not properly have appealed from the Licensing Board's withdrawal of the sua sponte issue. Thus, it is well established that where an intervenor or State representative makes a late decision to participate in an NRC proceeding, he must "take the proceeding as he finds it" and cannot complain of rulings made prior to the commencement of his participation. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-600, 12 NRC 3, 8 (1980). Here, the Licensing Board had withdrawn its sua sponte issue before ruling on the State's initial petition. Even if the Licensing Board had then granted Louisiana's petition, the Licensing Board's withdrawal of its sua sponte issue could not have been appealed.^{17/}

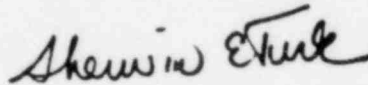
^{17/} Louisiana's second petition, which is currently pending before the Licensing Board for consideration, seeks to raise feed-and-bleed (as well as Table S-3 high level waste) as an issue in the proceeding. As was true in the case of the State's first petition, it is not clear whether Louisiana's second petition reflects a desire to file contentions as a party intervenor, or to participate in the litigation of issues which have been raised already by others (viz, the Joint Intervenors with respect to Table S-3 and the Licensing Board with respect to feed-and-bleed). Assuming that Louisiana's intention is to file its own feed-and-bleed contentions, upon its demonstrating good cause and balancing the other pertinent factors, and upon its filing an admissible contention, the issue could conceivably arise again before the Licensing Board.

In addition, the Licensing Board, itself, had raised feed-and-bleed as a sua sponte issue, and then withdrew that issue on the grounds that it was being resolved by the Staff and ACRS on a generic basis, for all PWRs. The Licensing Board's withdrawal of its own issue is not an appealable decision, in that no party had raised the issue and therefore no party is "aggrieved" by the withdrawal of that issue. Further, both the Staff and the ACRS are involved in seeking a resolution of the feed-and-bleed issue. Accordingly, Louisiana's concerns may be brought directly to the attention of the Staff for consideration. Accord, South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981), aff'd sub nom. Fairfield United Action v. NRC, 679 F.2d 261 (D.C. Cir., April 28, 1982).

CONCLUSION

For the reasons set forth above, the Staff submits that the Licensing Board's denial of Louisiana's initial petition was proper and should be affirmed.

Respectfully submitted,



Sherwin E. Turk
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 27th day of August 1982

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S BRIEF IN OPPOSITION TO APPEAL FILED BY THE STATE OF LOUISIANA," 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 27th day of August, 1982.

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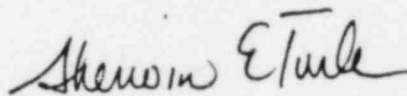
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