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USNRC

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

Administrative Judges:

Stephen F. Eilperin, Chairman  
Christine N. Kohl  
Dr. Reginald L. Gotchy

SERVED SEP 8 1982

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In the Matter of )

LOUISIANA POWER AND LIGHT COMPANY )

Docket No. 50-382 OL

(Waterford Steam Electric Station, )  
Unit 3) )

Mr. William J. Guste, Jr., and Ms. Linda B. Watkins,  
Baton Rouge, Louisiana, for appellant, the State of  
Louisiana.

Mr. Bruce W. Churchill, Mr. James B. Hamlin, and  
Ms. Delissa A. Ridgway, Washington, D.C., for  
applicant Louisiana Power & Light Company.

Mr. Sherwin E. Turk for the Nuclear Regulatory  
Commission staff.

MEMORANDUM AND ORDER

September 7, 1982

(ALAB-690)

The State of Louisiana has appealed from an unpublished  
April 20, 1982 order of the Licensing Board that denied the  
State's petition to participate on an issue initially raised

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by the Board sua sponte but subsequently withdrawn. <sup>1/</sup> The Licensing Board's April 20 order advised the State that it "may, however, pursuant to 10 C.F.R. § 2.714(a)(1) or § 2.715(c), file a petition for leave to intervene or to participate and set forth therein the specific aspect or aspects of the subject matter as to which the State wishes to intervene or to participate." On July 21, 1982, the State of Louisiana filed a new such petition, which is currently pending before the Licensing Board.

The State's appeal is opposed by the NRC staff and the applicant on a variety of grounds. For the reasons set forth below, we hold that the Board's April 20 order is nonfinal and hence not appealable. Consequently, we dismiss the State's appeal without prejudice to its raising the question of its right to participate through a new appeal, should the Board deny the State's pending petition.

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<sup>1/</sup> The issue concerned the reliability of the Waterford 3 emergency feedwater system and the need for a "feed-and-bleed" backup capability. See Memorandum and Order of March 18, 1982 (unpublished). The Board orally granted the applicant's motion for reconsideration of its decision to raise this issue sua sponte and withdrew the issue during an April 16, 1982 conference call. The April 20 order reiterated the Board's decision to withdraw the issue.

## Analysis

We have often commented that

[t]he test of "finality" for appeal purposes before this agency (as in the courts) is essentially a practical one. As a general matter, a licensing board's action is final for appellate purposes where it either disposes of at least a major segment of the case or terminates a party's right to participate; rulings which do neither are interlocutory.

Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 758 (1975) (emphasis added; footnotes omitted). See also Nuclear Engineering Co. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-606, 12 NRC 156, 160 (1980). <sup>2/</sup> The order from which the State has appealed in this case did neither. As we have recounted, because the Board was no longer pursuing the issue, the April 20 order rejected the State's attempt to "piggyback" on the Board's investigation of the plant's feedwater reliability. See n.1, supra. <sup>3/</sup> While rejecting

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<sup>2/</sup> This requirement of finality applies with equal force to both appeals from rulings on petitions to intervene pursuant to 10 CFR 2.714a, and appeals from initial decisions pursuant to 10 CFR 2.762.

<sup>3/</sup> The Board declined to pursue sua sponte review because it concluded that the Advisory Committee on Reactor Safeguards, NRC staff, and Combustion Engineering were all giving their attention to questions concerning the reliability of the Waterford 3 emergency feedwater system and the need for feed and-bleed backup. Memorandum and Order of April 27, 1982 (unpublished) at 8.

the State's participation on that ground, the Board nonetheless afforded the State leave to amend its petition. As noted, the State took advantage of this offer and filed a new petition pursuant to 10 CFR 2.714(a)(1) raising the feedwater reliability issue as well as waste disposal questions. The applicant and staff have responded to this latest petition and the petition is pending before the Licensing Board at this time. <sup>4/</sup>

Louisiana is essentially in the position of one whose complaint has been dismissed with leave to amend and who has pursued that option. The federal courts have not treated that situation or comparable ones as giving rise to an appealable order, nor will we. See Austracan, (U.S.A.) Inc. v. M/V Lemoncore, 500 F.2d 237, 239-40 (5th Cir. 1974); United States Sugar Corp. v. Atlantic Coast Line R. R., 196 F.2d 1015, 1016 (5th Cir. 1952). See also Washington v. Confederated Tribes of the Colville Indian Reservation, 447

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<sup>4/</sup> See Applicant's Response to State of Louisiana's Petition to Intervene (August 9, 1982); NRC Staff's Response to Petition Filed by the State of Louisiana (August 10, 1982).

U.S. 134, 149-50 (1980) (filing of motion for partial new trial renders nonfinal trial court's disposition of all issues). Should the Licensing Board deny the State's new petition to intervene thereby terminating its right to participate in this proceeding, an appeal will properly lie from that new order. At this point, however, the State's petition rests with the Licensing Board for decision. 5/

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The appeal of the State of Louisiana from the Licensing Board's April 20, 1982 order is dismissed.


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5/ We summarily reject the argument of both the staff and the applicant that the State's appeal should be dismissed because it was not filed within the 10-day period established for appeals under either 10 CFR 2.714a or 2.762(a). There is no dispute that the State was not served with the Board's April 20 order until July 29, 1982, although the State, as it reminded the Board, apparently requested the order on at least one occasion. See State of Louisiana Petition (July 21, 1982) at 3. We note that the Board acknowledged its responsibility for this oversight. Letter of Licensing Board Chairman Sheldon J. Wolfe to William J. Guste, Jr. (July 29, 1982).

The Licensing Board's informal, oral notification of its ruling during the April 16 conference call in which State counsel participated cannot fairly substitute for service of the order or initial decision, which triggers the time for seeking appeal. 10 CFR 2.714a, 2.762(a). See also 10 CFR 2.712(a), requiring service by the Commission of all orders upon all parties, and 10 CFR 2.730(e), permitting oral rulings only during the course of a prehearing conference or hearing. In those latter instances a transcript of the oral ruling is made and most of the parties are physically present. Indeed, 10 CFR 2.730(e) specifically requires that parties not present be notified promptly of the order.

It is so ORDERED.

FOR THE APPEAL BOARD

  
C. Jean Shoemaker  
Secretary to the  
Appeal Board