

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
before the
ATOMIC SAFETY AND LICENSING BOARD

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

APPLICANTS' ANSWER TO NECNP MOTION
FOR DEFERRAL OF CONSIDERATION OF
MOTIONS FOR SUMMARY DISPOSITION
OR FOR DISMISSAL

The applicants hereby answer NECNP's Motion for Deferral of Consideration of Motions for Summary Disposition or for Dismissal and say that for the reasons set forth below the same should be denied.

1. Background. This Board established deadlines for the submission and response to motions for summary disposition some time ago. Order (9/13/82) at 5, 120.

Motions to alter the general schedule were later submitted and denied; no assertion was made therein to the effect that the SER issuance was a condition precedent to the submission, response to, and entertainment of motions for summary disposition.¹

The Applicants and the Staff filed motions for summary disposition within the time set by the Board, as did one of the intervenors.² Nearly a month after the first of the summary disposition motions filed against its contentions and more than two weeks after the last of the motions filed against its contentions, NECNP filed a motion to "defer" "discussion of summary judgment motions and othr matters specified in 10 CFR 2.752(a)(1)-(6) . . . until after the SER has been issued and the parties have had the opportunity to conduct any necessary discovery and [to] answer

¹At the time of the motions for changes in the schedule previously established (i.e., December, 1982), it was already known that the Staff would not be issuing the SER as originally anticipated (i.e., November, 1982).

²SAPL filed a motion for summary disposition as to one of its contentions on 2/11/83.

summary judgment motions based on the SER." "NECNP Motion for Deferral of Consideration of Motions for Summary Disposition or for Dismissal" ("NECNP Deferral Motion") at 6.³

The NECNP motion at bar is grounded on the asserted proposition of law that under the NRC Rules of Practice a motion for summary disposition is procedurally premature -- and may not even be entertained -- prior to the issuance of the SER.⁴ Since that proposition is not so, the motion for deferral should be denied.

³The first of the summary disposition motions filed against an NECNP contention was served on February 7, 1983; the last, on February 14th. NECNP's motion for deferral was filed on March 3, 1983. It was served on the Board in hand, together with a motion for an ex parte stay.

⁴Note that NECNP is not contending that, because of the non-issuance of the SER (or for any other reason) the motions for summary disposition should be denied; any such contention is raised by an answer to the motions for summary disposition and not by an eleventh-hour request for a deferral of the time within which any answer is required. To the contrary, the motion now pending before the Board is -- and necessarily must be -- premised upon a supposed procedural defect (i.e., prematurity) in the motions for summary disposition themselves.

2. The decision relied upon by NECNP, Duke Power Co., (William B. McGuire Nuclear Station, Units 1 & 2), LBP-77-20, 5 NRC 680 (1977), is wholly inapposite because (a) McGuire involved a situation where the Staff itself asserted that it was as yet unable to take a definitive position on the technical questions raised by the summary disposition motion,⁵ and (b) because

⁵In McGuire the Staff filed an answer to the applicant's motion for summary disposition urging that it be denied. Insofar as the motion addressed technical questions, the Staff urged denial because the SER and ACRS letter had yet to be issued. The Licensing Board accepted this proposition, for which no a priori warrant lay in 10 CFR § 2.749 as it then read, without citation of authority (there is none). The only defensible basis for the ruling is that the technical issue was not ripe for summary disposition prior to the time that the Staff had been able to take a position on it, not that the Staff's position had to be articulated in some particular fashion. Prescinding from the correctness of the position that the Staff took and the Board there accepted (for, after all, the admitted contention is between the applicant and the intervenor; a licensing board disposition of that contention does not require the Staff to issue an operating license; should the Staff have similar problems, they will be identified in the SER, a hearing may be requested by the applicant (or by a late-filed contention), and the Board will then address the issue; if no hearing is requested, then the Staff will resolve the issue itself), plainly the McGuire situation does not obtain where (i) the Staff supports the motion for summary disposition, (ii) the Staff position on the technical question is known to and knowable by the intervenor defending the contention, (iii) and the

McGuire was decided before the 1980 amendment to 10 CFI § 2.749. That amendment, 45 Fed. Reg. 68919 (Oct. 17, 1980), inserted into the summary disposition procedure the provision that parties supporting as well as those opposing could file responses to summary disposition motions and further provided an additional opportunity to those opposing to respond to facts asserted and arguments made on answers in support of the motion, not asserted or made by the original movant. As is clear from the statement accompanying the amendment, the whole purpose of the amendment was to assure that (a) the Staff's views on the motion were known and (b) that an opponent of a Staff position supporting the motion had a chance to deal with it.⁶ In short

regulations have been amended to preclude any such arbitrary time constraints on summary disposition motions.

⁶Thus, the situation that caused the problem in McGuire cannot arise under the amended summary disposition practice.

any argument that decision on a summary disposition motion should be withheld pending SER issuance to insure that the Staff view was on the record was wholly obviated by the 1980 rules change.⁷

3. NECNP's entire argument amounts to a statement that it has no basis for opposing some or all of the motions filed, but it hopes that, by the issuance of the SER, the Staff will provide it with a basis that it does not now have. If the Staff has such help for NECNP, it will be forthcoming in Staff's response to applicants' motions; the SER is unnecessary.

4. The timing of this motion is suspect. If NECNP truly believed the appearance of the SER was a necessity for it to answer any summary disposition motion, the deferral motion should have

⁷To this, it should be added that the summary disposition rule was amended again in 1981, 46 Fed. Reg. 30328, to make clear that the motion could be filed at any time. This amendment was, to be sure, changed to do away with the old rule which required filing at least 45 days prior to the scheduled hearing on the merits. But in the statement accompanying that amendment there is no hint that the Commission contemplated or desired that there exist any additional (and quite unstated) procedural requirements to motions for summary disposition, e.g., that the SER have been published. If the Commission had intended such a blanket condition, it would have said so.

been filed weeks ago. It should not have been filed at the eleventh hour together with an ex parte stay motion which in effect placed the Board in the position of having to rule without the other parties having an opportunity to be heard. This tactic should not be further countenanced.

5. Finally, the SER has issued; this moots the motion.⁸

⁸Counsel for the Staff has informed counsel for the Applicants that the SER was issued Monday, March 8, 1983. Moreover, we are informed that a copy of the SER has been hand delivered to counsel for NECNP. As NECNP notes, it was previously made aware of at least some of the conclusions of the SER prior to the time the document had been printed. NECNP Deferral Motion at 4 n.3.

Conclusion

The motion should be denied. In light of the stay issued, NECNP must be granted some time beyond the original March 9 deadline to respond to the motions. We suggest that an additional 5 days (to March 14, 1982) is adequate inasmuch as the SER is now out and NECNP, for the reasons set forth above, was not entitled to relief in the first place.

Respectfully submitted,

Thomas G. Dignan, Jr.
R. K. Gad III
Ropes & Gray
225 Franklin Street
Boston, Massachusetts 02110
Telephone: 423-6100

Attorneys for the Applicants

CERTIFICATE OF SERVICE

I, R. K. Gad III, one of the attorneys for the Applicants herein, hereby certify that on March 8, 1983, I made service of the within "APPLICANTS' ANSWER TO NECNP MOTION FOR DEFERRAL OF CONSIDERATION OF MOTIONS FOR SUMMARY DISPOSITION OR FOR DISMISSAL" by mailing copies thereof, postage prepaid, to the persons and at the addresses shown below, or, in the case of persons denoted by an asterisk, by causing copies thereof to be delivered to the office of such person as shown below:

*Helen Hoyt, Chairperson
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Rm. 448A
4350 East West Highway
Bethesda, Maryland

Rep. Beverly Hollingworth
Coastal Chamber of Commerce
209 Winnacunnet Road
Hampton, NH 03842

*Dr. Emmeth A. Luebke
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Room 411
4350 East West Highway
Bethesda, Maryland

*William S. Jordan, III, Esquire
Harmon & Weiss
1725 I Street, N.W.
Suite 506
Washington, DC 20006

*Dr. Jerry Harbour
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Rm. 454
4350 East West Highway
Bethesda, Maryland

E. Tupper Kinder, Esquire
Assistant Attorney General
Office of the Attorney General
208 State House Annex
Concord, NH 03301

Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Atomic Safety and Licensing Appeal
Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Philip Ahrens, Esquire
Assistant Attorney General
Department of the Attorney
General
Augusta, ME 04333

David L. Lewis
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Rm. E/W-439
Washington, DC 20555

Mr. John B. Tanzer
Designated Representative of
the Town of Hampton
5 Morningside Drive
Hampton, NH 03842

Roberta C. Pevear
Designated Representative of
the Town of Hampton Falls
Drinkwater Road
Hampton Falls, NH 03844

Mrs. Sandra Gavutis
Designated Representative of
the Town of Kensington
RFD 1
East Kingston, NH 03827

*Roy P. Lessy, Jr., Esquire
Office of the Executive Legal
Director
U.S. Nuclear Regulatory
Commission
Rm. 10211
7735 Old Georgetown Road
Bethesda, Maryland

Robert A. Backus, Esquire
116 Lowell Street
P.O. Box 516
Manchester, NH 03105

Edward J. McDermott, Esquire
Sanders and McDermott
Professional Association
408 Lafayette Road
Hampton, NH 03842

Jo Ann Shotwell, Esquire
Assistant Attorney General
Environmental Protection Bureau
Department of the Attorney General
One Ashburton Place, 19th Floor
Boston, MA 02108

Ms. Olive L. Tash
Designated Representative of
the Town of Brentwood
R.F.D. 1, Dalton Road
Brentwood, NH 03833

Edward F. Meany
Designated Representative of
the Town of Rye
155 Washington Road
Rye, NH 03870

Calvin A. Cannery
City Manager
City Hall
126 Daniel Street
Portsmouth, NH 03801

Patrick J. McKeon
Selectmen's Office
10 Central Road
Rye, NH 03870

R. K. Gad III