

March 22, 1983

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Before the Atomic Safety and Licensing Appeal Board

In the Matter of)	
)	
LOUISIANA POWER & LIGHT COMPANY)	Docket No. 50-382
)	
(Waterford Steam Electric)	
Station, Unit 3))	

APPLICANT'S OPPOSITION TO STATE
OF LOUISIANA'S MOTION FOR LEAVE
TO FILE BRIEF "AMICUS CURIAE"

Applicant submits this memorandum in opposition to the Motion For Leave To File Brief "Amicus Curiae" served by the State of Louisiana on March 11, 1983. The State seeks leave to file an amicus curiae brief on the issue of decay heat removal capability at Waterford 3. For the reasons stated below, Applicant believes the State's motion should be denied.

1. The State's motion is untimely. Section 2.715(d) of the Commission's Rules, 10 C.F.R. § 2.715(d), provides that an amicus curiae brief "must be filed within the time allowed to the party whose position the brief will support." It is apparent from the tenor of the State's motion that it does not support Applicant's position on decay heat removal and will not be urging affirmance of the Licensing Board's decision on that issue. Rather, it appears that the State is generally in support of the exceptions on

decay heat removal that were filed by Joint Intervenors and then abandoned by failure to brief them. Accordingly, the State's amicus curiae brief, preceded by an appropriate motion, would have been due at the time Joint Intervenors' brief was due -- January 26, 1983.^{1/}

Thus the State is more than six weeks late, and it has made no attempt to show good cause or otherwise justify its tardiness. Certainly it is no excuse that the State was never served with copies of Joint Intervenors' exceptions and brief. Not being a party to this proceeding, the State could not have expected that it would be served. Those documents are matters of public record and easily could have been examined by anyone truly interested in the subject of decay heat removal. A non-party who wishes to participate in an appeal as an amicus curiae can reasonably be expected to make the minimal effort necessary to advise himself of the basic pleadings in the case. Moreover, Applicant will be prejudiced by the State's eleventh-hour attempt to expand the scope of this appeal. Applicant and the Staff are required to file their briefs by March 25, 1983, and the case has been set for oral argument on April 19, 1983. The State's participation will interfere with this schedule and at a minimum will require all parties to respond to the State's brief on an unreasonably accelerated basis. Given the advanced stage of this appeal, the Appeal Board should

^{1/} On January 31, 1983, the Appeal Board directed Joint Intervenors to refile a legible copy of their brief by February 4, 1983. That additional time should not logically affect the date for filing an amicus curiae brief.

be hesitant to grant the State's motion in the total absence of any justification for its tardiness.

Finally, the State is no newcomer to the Commission's rules on timeliness. On July 21, 1982 -- after the evidentiary hearing had been completed -- the State filed a petition to intervene on the decay heat removal issue. The State made no attempt to show good cause for its untimeliness, and on September 10, 1982, the Licensing Board denied the petition as untimely. The State's failure to attempt a showing of good cause is all the more remarkable because this was the State's second petition to intervene on the decay heat removal issue. The first petition was denied as moot on April 20, 1982, at which time the Licensing Board specifically cautioned the State to show good cause for untimeliness if it chose to file a second petition.^{2/} The State has shown a consistent pattern of disregarding the Commission's timeliness rules, and there is no reason to give the State the benefit of the doubt in this instance.

2. The State cannot properly brief an issue that the parties have abandoned. Joint Intervenors did file exceptions relating to decay heat removal, but they failed to brief those exceptions. Accordingly, the decay heat removal issue is deemed to have been waived and abandoned.

^{2/} The State's first petition was moot because it sought to intervene on the Licensing Board's sua sponte decay heat removal issue, and the Board had decided to withdraw its sua sponte issue.

See Public Service Electric & Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 N.R.C. 43, 49-50 (1981), aff'd sub nom. Township of Lower Alloways Creek v. Public Service Electric & Gas Co., 687 F.2d 732 (3d Cir. 1982); Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-461, 7 N.R.C. 313, 315 (1978). In accordance with 10 C.F.R. § 2.715(d), amicus curiae participation should not be permitted on an issue that would not otherwise be before the Appeal Board. Amicus curiae briefs should be used to help the Board decide the issues otherwise raised, not to expand the issues that the Appeal Board must decide.^{3/}

3. The State is attempting here to resurrect an issue that it deliberately abandoned months ago. As noted above, the State's second petition to intervene on the decay heat removal issue was denied as untimely by the Licensing Board. The State made no attempt to appeal that ruling to the Appeal Board. The State's current motion admits that instead of appealing, it made a deliberate

^{3/} We understand this to be the general rule applied in the federal courts. For example, in Wiggins Bros. v. Department of Energy, 667 F.2d 77, 83 (Temp. Emer. Ct. App. 1981), cert. denied, 102 S. Ct. 1749 (1982), the court held that in the absence of exceptional circumstances, "amicus curiae cannot expand the scope of this appeal to implicate issues that were not presented by the parties." See also Knetsch v. United States, 364 U.S. 361, 370 (1960); Preservation Coalition, Inc. v. Pierce, 667 F.2d 851, 861-62 (9th Cir. 1982).

decision to "abandon" the decay heat removal issue and to devote its "limited resources" to other matters. State of Louisiana's Motion at 3. Apparently the State has now had a change of heart. Nevertheless, the State should not be permitted to circumvent the Commission's normal appellate processes. If the State were concerned about decay heat removal, it could and should have appealed from the denial of its second petition to intervene. Having rejected that course, the State should not be allowed now to disrupt this on-going appeal with a last-minute amicus brief on an issue it deliberately abandoned months earlier.

4. The current decay heat removal capability at Waterford 3 is in accord with NRC regulations, criteria and guidance. No requirements are being waived or are not met.^{4/} The fact that the issue of decay heat removal is not litigated at the operating license hearing does not mean that the issue will remain unaddressed and unresolved. The NRC -- and the ACRS -- are treating the issue generically, and the ultimate resolution of the issue will affect plants other than Waterford 3. The State has presented no arguments on why such a generic issue should

4/ See generally Applicant's Motion for Reconsideration of March 18, 1982 Memorandum and Order Raising Sua Sponte Issue, March 26, 1982; NRC Staff's Answer in Support of Applicant's Motion for Reconsideration of March 18, 1982 Memorandum and Order Raising Sua Sponte Issue, April 12, 1982 (with supporting affidavits and attachments); NRC Staff Affidavit of Clifford J. Anderson and Chu-Yu Liang concerning Unresolved Generic Safety Issue A-45 (Shutdown Decay Heat Removal Requirements), August 27, 1982; and Applicant's letter to the Licensing Board, with

be individually considered in this proceeding, beyond the consideration that has already been given to the issue by the Staff.

5. It is doubtful that the State can contribute anything of substance on the decay heat removal issue. The Appeal Board has held that an important factor in deciding whether to receive an amicus curiae brief is the extent to which the brief will assist in the resolution of the issue. Nuclear Fuel Services, Inc. (Western New York Nuclear Service Center), ALAB-679, slip opinion at 10 n.11 (July 8, 1982). Here, it is entirely unclear what, if anything, the State can add on the highly technical question of decay heat removal capability at Waterford 3. Nothing in the State's motion identifies the contribution that it hopes to make, nor even the position that it takes on the technical issues involved. Indeed, the Licensing Board denied the State's second petition to intervene in part because it doubted the State's ability to make a useful contribution on the question of decay heat removal. The Board stated:

(Footnote Continued)

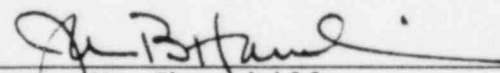
enclosures, dated September 10, 1982. The Staff's position is that the Waterford 3 plant meets all current decay heat removal requirements, and that the Staff is considering generically whether Combustion Engineering plants should be required to have capability to rapidly depressurize the reactor coolant system. Such plants are required to submit justification for safe operation in the interim while the issue is being resolved. The Staff noted that, on the basis of such justification, the Commission has recently approved operation of the San Onofre Unit 2 facility, a plant with a design similar to Waterford 3. See NRC Staff August 27, 1982 Affidavit, at 4-6.

Because this issue is actively being investigated by the NRC Staff and the ACRS, not only with regard to Waterford 3 but also on a generic basis, we doubt that the State of Louisiana could significantly assist (and Louisiana does not tell us how it could assist) in developing a sound record.

Memorandum and Order of September 10, 1983, at 5. As the Licensing Board pointed out, decay heat removal is being studied intensively by the Staff and by the ACRS. There is little that the State of Louisiana can do to amplify on that review process.

In short, a non-party has asked to file an amicus brief, out of time, with no showing of good cause, on an issue which the non-party earlier abandoned and which is not before the Appeal Board. The issue is being intensively studied on a generic basis by the NRC and the ACRS, and the non-party has made no showing of why it should be addressed in an individual licensing proceeding, or how the non-party could contribute anything of substance to its resolution. Accordingly, for all the foregoing reasons, the State's motion for leave to file an amicus curiae brief should be denied.

Respectfully submitted,



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