



disposition. The stay was orally granted by the Board on an ex parte basis, that is, without the Board advising the other parties of the filing of such motion, or its apparent intention to act immediately thereon. On March 4, 1983, before the Staff even reviewed the stay request, the Staff was advised that the stay had been granted. Thus, the Board granted the stay without inquiring into the status of the SER. Subsequently, the Board also cancelled the prehearing conference which had previously been ordered for March 17 and 18, 1983. For the reasons discussed below, the Staff opposes both of NECNP's motions. The Staff, accordingly, believes that NECNP had not met its burden of demonstrating that a stay was warranted and asks that response dates for the filing of answers to summary disposition motions be re-established in accordance with the discussion below.

## II. DISCUSSION

A. NECNP's motions were both posited upon the argument that since the Staff SER has not yet been issued, summary disposition of admitted contentions is premature as a matter of law. The Staff's SER was issued on March 7, 1983. NECNP had been advised of the imminence of this event in the course of its settlement negotiations with the NRC staff.<sup>1/</sup> Notwithstanding the issuance of the document however, NECNP's motion is flawed. NECNP's basic position is that summary disposition motions are premature prior to the issuance of the Staff SER (NECNP Motion, pp. 3, 5). NECNP claims that "the law is clear" to this

---

<sup>1/</sup> The fruits of such discussions have been memorialized in a letter from R. P. Lessy to W. Jordan and D. Curran (March 4, 1983).

effect (NECNP Motion, p. 5), and rests that assertion on one licensing board decision, which is not necessarily binding upon this Board, and which was issued prior to two superseding amendments to the summary disposition provision of the Rules of Practice, 10 C.F.R. § 2.749. The sole authority relied upon by NECNP is Duke Power Company (William B. McGuire Nuclear Station, Units 1 and 2), LBP-77-20, 5 NRC 680 (1977), in which the Board stated, without citing authority, that certain issues were not "appropriate" for summary disposition in the absence of the Staff SER. The Staff disagrees with NECNP's assertion that the McGuire decision is now dispositive of NECNP's motions.

On July 6, 1981, the Commission amended 10 C.F.R. § 2.749(a) to permit the filing of summary disposition motions "at any time." The Commission stated:

After evaluating these comments the Commission has adopted a rule which provides that motions for summary disposition may be filed at any time, but that boards are to reject motions filed right before the hearing or during the hearing itself where response to such motions would require the other parties or the board to divert substantial resources from the hearing. Boards are directed in each case at an early date to set forth as appropriate scheduled [sic] for filing motions for summary disposition.

46 Fed. Reg. 30328 (June 6, 1981). While the Commission acted in that amendment to its regulation to eliminate the previous prohibition which required the filing of summary disposition motions at least forty-five days prior to the scheduled evidentiary hearing, the Commission's amendments now permit the filing of summary disposition motions "at any time." In the same amendment, the Commission also established twenty days as the time for responding to summary disposition motions. This Board's

schedule afforded the parties additional time, i.e., one day short of four weeks to file such answers.

Prior to the aforementioned amendment to 10 C.F.R. § 2.749, but also subsequent to the McGuire decision relied on by NECNP, the Commission also amended 10 C.F.R. § 2.749(a) to provide the Staff an opportunity to state its position on a motion for summary disposition filed by another party, and to provide other parties the right to respond to that position. 45 Fed. Reg. 68919 (October 17, 1980), amending 10 C.F.R. § 2.749. That amendment modified 10 C.F.R. § 2.749 to provide that parties supporting as well as opposing a summary disposition motion, could file responses to summary disposition motions, and further amended § 2.749(a) "to permit the party opposing the motion to file a supplemental response . . . which addresses any new matter raised in supporting statements and not presented in the initial motion." 45 Fed. Reg. 68919. In so amending 10 C.F.R. § 2.749(a), the Commission stated:

Section 2.749(a) now provides that "any other party may serve an answer opposing the motion [for summary disposition], with or without supporting affidavits, within twenty (20) days after service of the motion". However, it has been a long-standing practice of the regulatory staff to file an answer to the motions of other parties for summary disposition--in support or in opposition, as appropriate.

The Commission has determined that the rule should be clarified to specifically permit responses in support of, as well as in opposition to, motions for summary disposition. Since important legal and procedural consequences flow from a presiding officer's grant or denial of a motion for summary disposition, the Commission believes that the views of its regulatory staff, as well as the views of other parties, should be considered and may be of substantial assistance to the presiding officer. Therefore, the Commission is clarifying § 2.749(a) to specifically permit responses from parties which support motions for summary disposition.

45 Fed. Reg. 68919 (emphasis in original).

Thus, NECNP's reliance on the McGuire decision is totally misplaced in light of the aforementioned amendments to the controlling regulation, which now permits the filing of summary disposition motions "at any time", and provides for the consideration of the Staff's views when such motions are filed by other parties. Moreover, even without such amendments, the McGuire decision would not be applicable to summary disposition motions filed by the Staff, where the Staff position on a given contention is evident from the moving papers. NECNP's responses to Staff-filed summary disposition motions were also stayed by this Board on March 4th, however. In any event, with the issuance of the SER, NECNP not only has the benefit of the Staff position in its moving papers, but the Staff position as also reflected in the SER.

It should not be overlooked that NECNP's two motions were filed near the due date for its initial responses. The Commission has also provided guidance to Licensing Boards, that requests for extensions of time "should be received by the Board well before the time specified expires."<sup>2/</sup> While it is true that at times in answer to interrogatories the Staff did reference an SER section, in many, if not most instances, in responding to NECNP's interrogatories, the Staff did delineate its position in detail, although such an exercise was to be repeated in the soon to be published SER. If NECNP believes it did not have sufficient information concerning the Staff position on a given contention, it could have easily requested

---

<sup>2/</sup> Statement of Policy On Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454-55 (1981). Moreover, the movant must establish good cause for such extensions. Id.

the Staff to provide it with a summary of the Staff's views on the matter, or could have filed a timely motion to compel directed at the Staff. While the Staff's review of a given issue may be complete, the SER is not published until the Staff's overall safety review is essentially complete.<sup>3/</sup> NECNP, having failed to use self-help in even requesting information it felt it needed from the Staff, filed an "urgent" stay request, which was made "urgent" as much by its failure to use self-help and the timing of its filing of its motion for a stay, as by the timing of the issuance of the Staff SER.

The stay request was only urgent because NECNP waited until the last moment to address this issue. This is somewhat consistent with NECNP's response times in the discovery phase of this proceeding. On November 10, 1982, the Staff filed its first set of interrogatories and document requests to NECNP. NECNP was not able to answer these until January 29, 1983, well after the close of discovery. This effectively precluded the Staff from filing a second round of discovery.

Similarly, Applicant's first set of interrogatories was filed on December 8, 1982 and not answered by NECNP until January 24, 1983, also after the close of discovery. NECNP was able to obtain voluntary or Board-ordered extensions for these delays. However, this Board should be aware of the timing and the overall context of the relief it has already granted NECNP, and the further relief it has been requested to grant.

---

<sup>3/</sup> In addition, it should be noted that 10 C.F.R. Part 2, Appendix A, § II(e) provides, "When the Staff has reached its conclusions with respect to the application and prepared a safety evaluation, the safety evaluation will be made available - a point of time which may or may not be prior to the hearing." See also, 10 C.F.R. Part 2, Appendix A, § V(c)(2).

It should also be noted that the scheduling of the issuance of an SER is rarely, if ever, done by the Board or by any other party but the Staff. 10 C.F.R. § 2.101 expressly provides that for both construction permit and operating license proceedings, "the Staff shall establish a schedule for its review of the application, specifying the key intermediate steps from the time of docketing until the completion of its review." In the overall context of this proceeding it must also be noted that the Staff and Applicant, having not received interrogatory responses from NECNP until virtually the end of January, still were able to file timely summary disposition motions.

B. In Part 3 of its motion, NECNP requested specific relief to which the Staff now responds, in light of the foregoing discussion.

In Section 3(a) of its motion, NECNP requested the licensing board to rule that summary disposition motions "not be considered" until the SER or appendix thereto is issued. This request has been essentially mooted by the issuance of the SER on March 7, 1983.<sup>4/</sup>

---

<sup>4/</sup> The on-site emergency planning section of the SER is scheduled to be completed in an SER Supplement to be issued by the end of this April. This does not mean that Applicants' pending motions for summary disposition of on-site emergency planning contentions (Applicants' 7th, 20th, and 21st motions) cannot be ruled upon. NECNP can oppose the granting of such motions on the ground that the Staff review has not yet been published. If the Board denies those motions, either the Staff or Applicant can request leave to file summary disposition motions on such issues once the Staff review is completed. See 10 C.F.R. § 2.749(a). Alternatively, the Board can defer ruling on Applicants' pending motions in this area until after the Staff review is completed.

In Section 3(b), NECNP has requested "a reasonable opportunity for review and discovery relative to the SER" before its answers to summary judgment motions must be filed. The Staff is aware of no Commission precedent reopening discovery automatically because of the issuance of Staff documents, and NECNP has not cited any such precedent. The Staff suggests that NECNP first read the SER before it decides whether additional discovery is necessary. The Staff will oppose any effort to reopen discovery based upon information in the SER that was already provided to NECNP by the Staff, formally (as through previous interrogatory answers) or informally in the context of settlement discussions. After having once read the SER, NECNP can then decide whether it needs additional discovery. Such a request must be filed with the Licensing Board and should be governed by existing precedent. See e.g., Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 & 3), LPB-76-8, 3 NRC 199, 201 (1976).

As to NECNP's request that its response time for responding to motions for summary disposition be extended, the Board must decide whether "good cause" has been established to modify the Board-ordered response period. If the Board does grant an extension, the Staff's position is that the time be added to the overall schedule uniformly. The existing schedule calls for a Board ruling on summary disposition motions on April 5, the filing of direct testimony on May 5, rebuttal testimony on May 28, and an evidentiary hearing to begin on June 14. These intervals are fairly tight, and should be maintained. Therefore, if the stay the Board granted NECNP affects the April 5th date for a Board ruling on summary disposition motions, the testimony due date should be similarly adjusted. Obviously, parties should not be required to file testimony not knowing: (1) which

contentions have survived summary disposition, and (2) what are the genuine issues of material fact (or questions of law) which persuaded the Board to deny any such motion. Finally, NECNP (and any other party) cannot now be held to the Board-ordered response date of March 9 for summary disposition answers, because of the stay of March 4, 1983. The Staff would not oppose a reasonable extension of the March 9th date, provided the overall hearing schedule is also considered.

In Section 3(c), NECNP requests that the pending motions for summary disposition be held in abeyance or dismissed. The Staff opposes both of these requests in light of the foregoing discussion. The Board should rule upon the filed motions -- the only issue being whether additional response time has been justified.

In Section 3(d), NECNP argues that oral argument on summary disposition motions be deferred. The Board has apparently already granted this request by postponing the scheduled prehearing conference of March 17-18. The Staff had requested<sup>5/</sup> either a telephone conference of counsel or a prehearing conference so that the important off-site emergency planning information recently received from FEMA and distributed to the parties by the Staff can be incorporated into the schedule. In the absence of a discussion of the off-site emergency planning issues, including the prompt establishment of a schedule relative to the litigation of such issues, the current hearing schedule may well be adversely affected.

---

<sup>5/</sup> Letter from R. P. Lessy to Judges Hoyt, Luebke and Harbour transmitting letter and enclosures from B. Cassidy (February 28, 1983).

In Section 2 of its motion, NECNP argues that its on-site emergency planning contentions, which were originally deferred or rejected by the Board, but admitted on November 17, 1982, are not governed by the existing discovery deadlines. The Board's original order ruling upon contentions (Memorandum and Order, September 13, 1982) established a three-month period for the framing of discovery requests. Such a time frame has already run for the contentions admitted on November 17, 1982, and NECNP has filed discovery thereon. If NECNP needs an extension of time for discovery in that area, it should specifically request such time, and establish good cause therefor. One of the considerations bearing upon good cause, the Staff submits, is the discovery opportunities NECNP has had to date on those contentions admitted on November 17, 1982.

As previously indicated at the outset, the Board acted on March 4, 1983 to stay the obligations of parties to respond to motions for summary judgment. The Board took such action solely on the basis of the motion filed by NECNP.<sup>6/</sup> In light of the foregoing discussion, the Staff requests that the Board dissolve the stay and re-establish a response date for such pending motions, as well as reschedule the prehearing conference previously ordered to consider, inter alia, matters relating to FEMA.

---

<sup>6/</sup> Licensing Boards do have the authority to grant temporary, ex parte, stays in "extraordinary cases." 10 C.F.R. § 2.788(g). One Appeal Board decision which should now be noted, however, is Offshore Power System (Floating Nuclear Plants), ALAB-489, 8 NRC 194 (1978). In Offshore, a licensing board directed the Staff to publish a FES which was well over two years late, pursuant to Applicant's motion.

### III. CONCLUSION

For the reasons discussed above, the Staff believes that the stay granted March 4, 1983 should be dissolved; that the Board establish firm deadlines for summary disposition responses; that NECNP's request for discovery on the SER be denied without prejudice to the filing of a proper motion therefor; that NECNP's request that pending motions for summary disposition be held in abeyance or dismissed also be denied; that the Board promptly set a schedule for the litigation of off-site emergency

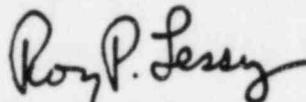
---

6/ FOOTNOTE CONTINUED FROM PRECEDING PAGE

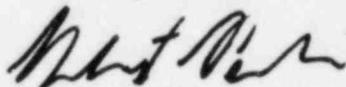
Two previous motions by the Applicant had been denied. 7 NRC 198. The Appeal Board vacated the Licensing Board's order because the procedure invoked by the licensing board did not afford the parties, including the Staff, an opportunity to be heard. 8 NRC 208. The Appeal Board concluded, however, that the licensing board could, following certain procedures that ensured the right to be heard, direct the filing of an FES. The first step in the procedure suggested by the Appeal Board is for the Licensing Board to ascertain the status of the Staff document. 8 NRC 207. If the Board were then dissatisfied with the Staff's explanation, the Board could then reschedule the issuance date, as a second step. It was not until the third step that actions such as suspension of proceedings would be appropriate. 8 NRC 207. In the instant case, the primary matter which the Staff objects to is this Board taking action on matters relating to the SER publication date without attempting to ascertain: (1) the status of the document - which was about to be issued; or (2) the views of the parties, including the Staff, concerning the content and timing of NECNP's stay request. The ascertainment of such matters may have clarified the question of whether NECNP's motions met the threshold of an "extraordinary case." For the relationship between the Staff and Licensing Boards, see generally, Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), CLI-80-12, II NRC 514, 516-17 (1980). See also New England Power Company (NEP Units 1 & 2), LBP-78-9, 7 NRC 271, 279 (178).

planning contentions in consultation with the FEMA representative; and that any extensions granted for the answering of summary disposition motions be reasonable, and that such times be added to the existing schedule.

Respectfully submitted,



Roy P. Lessy  
Deputy Assistant Chief  
Hearing Counsel



Robert G. Perlis  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 10th day of March, 1983

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "RESPONSE OF THE NRC STAFF TO NECNP MOTION FOR DEFERRAL OF CONSIDERATION OF PENDING MOTIONS FOR SUMMARY DISPOSITION" 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 10th day of March, 1983:

Helen Hoyt, Esq., Chairman\*  
Administrative Judge  
Atomic Safety and Licensing Board  
Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Dr. Jerry Harbour\*  
Administrative Judge  
Atomic Safety and Licensing Board  
Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Beverly Hollingworth  
7 A Street  
Hampton Beach, NH 03842

E. Tupper Kinder, Esq.  
Assistant Attorney General  
Environmental Protection Division  
Office of the Attorney General  
State House Annex  
Concord, NH 03301

Edward F. Meany  
Town of Rye, New Hampshire  
155 Washington Road  
Rye, NH 03870

Dr. Emmeth A. Luebke\*  
Administrative Judge  
Atomic Safety and Licensing Board  
Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Jo Ann Shotwell, Asst. Attorney  
Office of the Attorney General  
Environmental Protection Division  
One Ashburton Place, 19th Floor  
Boston, MA 02108

Nicholas J. Costello  
1st Essex District  
Whitehall Road  
Amesbury, MA 01913

Sandra Gavutis  
Town of Kensington, New Hampshire  
RFD 1  
East Kingston, NH 03827

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

Roberta C. Pevear  
Town of Hampton Falls, New Hampshire  
Drinkwater Road  
Hampton Falls, NH 03844

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

Brian P. Cassidy  
Regional Counsel  
FEMA, Region I  
John W. McCormack Post Office &  
Courthouse  
Boston, MA 02109

David R. Lewis\*  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Wilfred L. Sanders, Esq.  
Lawrence M. Edelman, Esq.  
Sanders and McDermott  
408 Lafayette Road  
Hampton, NH 03842

Thomas G. Dignan, Jr., Esq.  
Ropes & Gray  
225 Franklin Street  
Boston, MA 02110

Atomic Safety and Licensing  
Appeal Panel\*  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Jane Doughty  
Field Director  
Seacoast Anti-Pollution League  
5 Market Street  
Portsmouth, NH 03801

Docketing and Service Section\*  
Office of the Secretary  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Ruthanne G. Miller, Esq.  
Law Clerk to the Board  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

William S. Jordan, III, Esq.  
Ellyn R. Weiss, Esq.  
Harmon & Weiss  
1725 I Street, N.W.  
Suite 506  
Washington, D.C. 20006

Phillip Ahrens, Esq.  
Assistant Attorney General  
State House Station #6  
Augusta, ME 04333

Donald L. Herzberger, MD  
Hitchcock Hospital  
Hanover, NH 03755

Edward J. McDermott, Esq.  
Ann C. Thompson, Esq.  
Sanders and McDermott  
408 Lafayette Road  
Hampton, NH 03842

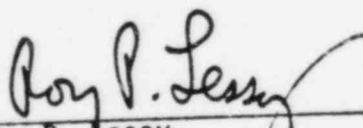
Sen. Robert L. Preston  
State of New Hampshire Senate  
Concord, NH 03301

Atomic Safety and Licensing  
Board Panel\*  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

John B. Tanzer  
Town of Hampton, New Hampshire  
5 Morningside Drive  
Hampton, NH 03842

Letty Hett  
Town of Brentwood  
RFD Dalton Road  
Brentwood, NH 03833

Patrick J. McKeon  
Chairman of Selectmen, Rye,  
New Hampshire  
10 Central Road  
Rye, NH 03870

  
Roy P. Lessy  
Deputy Assistant Chief Hearing Counsel