UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL 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 and 2)	)	

RESPONSE OF THE NRC STAFF IN OPPOSITION TO THE APPEAL BY JOHN F. DOHERTY OF THE NOVEMBER 15, 1983 ATOMIC SAFETY AND LICENSING BOARD ORDER DENYING HIS NONTIMELY PETITION FOR LEAVE TO INTERVENE

William F. Patterson, Jr.
Counsel for NRC Staff

December 16, 1983

DESIGNATED OR

Certified By

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (cont'd)

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I. INTRODUCTION

By unpublished Memorandum and Order dated November 15, 1983, the Atomic Safety and Licensing Appeal Board denied a petition for leave to intervene filed by John F. Doherty on September 6, 1983 (hereinafter cited as "Petition"), and amended on October 4, 1983 (hereinafter cited as "Amended Petition"). The petition was filed almost twenty-two months after the November 18, 1981 deadline for such petitions set forth in the notice of opportunity for hearing published in the Federal Register on October 19, 1981 (46 Fed. Reg. 51,330). In his petition, Mr. Doherty proffered a contention challenging the application of Public Service Company of New Hampshire, et al., for an operating license for Unit 2 of the Seabrook Station. Petitioner argued that the grant of his nontimely petition was justified by a balancing of the factors presented in 10 C.F.R.

§ 2.714(a)(1);[1/] his argument regarding good cause was grounded on his not having acquired standing to intervene until he moved from Texas to Brighton, Massachusetts on June 23, 1983. The NRC staff and the Applicants opposed the petition and argued that a balancing of the § 2.714(a)(1) criteria required its rejection. In its Order, the Licensing Board rejected the Petition on the ground that Petitioner had neither shown good cause for the petition's lateness nor met his burden as to the other four Section 2.714(a)(1) factors. On December 1, 1983, Petitioner filed a "Notice of Appeal," together with a "Brief in Support of His Appeal of the November 15, 1983, Licensing Board Denial of His Petition for Leave to Intervene" (hereinafter cited as "Petitioner's Brief"). For the reasons discussed in Part II below, the Staff opposes Petitioner's Appeal.

II. ARGUMENT IN OPPOSITION TO PETITIONER'S APPEAL

Petitioner advances a two-pronged argument on appeal: first, that the use of 10 C.F.R. § 2.714(a)(1) to dismiss his petition unfairly

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1/ In passing upon a nontimely intervention petition, the Licensing Board must consider and balance the following five factors:

> (i) Good cause, if any, for failure to file on time;
> (ii) The availability of other means whereby the petitioner's interest will be protected;
> (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record;
> (iv) The extent to which the petitioner's interest will be represented by existing parties; and
> (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

10 C.F.R. § 2.714(a)(1).

deprived him of his right to intervene; and second, that the Licensing Board erred in its balancing of the Section 2.714(a)(1) criteria. These arguments are addressed below seriatim.

A. The Appeal Board Should Reject Petitioner's Argument Regarding the "Fairness" of Applying the Section 2.714(a)(1) Criteria to His Petition

Petitioner argues that the dismissal of his petition upon a balancing of the Secion 2.714(a)(1) criteria for considering late-filed petitions is "a denial of due process" in the context of the instant licensing proceeding. He argues that the lag in construction of Seabrook Unit 2 behind that of Unit 1 makes it "unfair" to use the November 18, 1981 deadline established for both units by the notice of hearing published in the Federal Register (46 Fed. Reg. 51,330) in judging the timeliness of an intervention petition challenging "only the less completed unit." Petitioner's Brief at 3.

As discussed below, Petitioner's "fairness" argument fails on three independent grounds: first, it improperly is advanced for the first time on appeal; second, it constitutes an impermissible challenge to Commission regulations; and third, it is devoid of intrinsic merit.

1. Petitioner's Argument May Not Be Advanced for the First Time on Appeal

Petitioner raises for the first time on appeal the issue of the "fairness" of dismissing his late-filed petition under Section 2.714(a) on the ground that Unit 2 should not have been noticed with Unit 1. The Appeal Board has previously held that an appellate tribunal is "scarcely justified in overturning the ruling [on an intervention petition] on the strength of new assertions of fact which could have been, but were not,

either included in the petition or otherwise presented to the Board below." Houston Lighting and Power Company (Allens Creek Station, Unit 1), ALAB-582, 11 NRC 239, 242 (1980). The reason for this rule of appellate practice was stated in Puerto Rico Electric Power Authority (North Coast Plant, Unit 1), ALAB-648, 14 NRC 34 (1981):

> It scarcely is fair for a party to seek relief from a trial tribunal on one theory and, if unsuccessful, then to mount an appeal on a discrete theory founded on additional asserted facts which, although available at the time, had not been given to that tribunal.

Id. at 37-38. Such is precisely what Petitioner is seeking to do by raising his "fairness" argument for the first time before this Appeal Board. Petitioner offers nothing to suggest that this argument could not have been advanced before the Licensing Board. This new argument therefore may not be be propounded on appeal.

2. Petitioner's Argument Constitutes an Impermissible Attack on Commission Regulations

Petitioner's argument also fails because it is a challenge to a Commission regulation, which is not permitted in an individual licensing proceeding. In arguing that "the dismissal of his petition on the basis of lateness in the case of Seabrook Unit 2 has unfairly deprived him of intervention rights," Petitioner's Brief at 2, Petitioner is challenging 10 C.F.R. § 2.714(a). As he conceded below, Mr. Doherty filed his petition "after the period for filing Petitions for Leave to Intervene." Petition at 5. More precisely, the petition was filed on September 6, 1983, nearly twenty-two months after the deadline of November 18, 1981 announced by notice published in the Federal Register

on October 19, 1981 (46 Fed. Reg. 51,330). There is thus no question as to the applicability of 10 C.F.R. § 2.714(a)(1), which states that petitions not filed by the time specified in the notice of hearing "will not be entertained absent a determination by . . . the atomic safety and licensing board designated to rule on the petition . . . that the petition . . . should be granted based upon a balancing" of the five factors set forth in Section 2.714(a)(1). Petitioner's argument that it is unfair to deprive him of his right to intervene by dismissing his untimely petition is, in essence, an attack on this regulation, and is proscribed by 10 C.F.R. § 2.758(a), which provides, in relevant part:

> Except as provided in paragraphs (b), (c), and (d) of this section, any rule or regulation of the Commission, or any provision thereof . . . shall not be subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding involving initial licensing subject to this subpart . . . .

Thus, insofar as Petitioner argues that his Petition should not have been subject to a balancing of the factors set forth in 10 C.F.R. § 2.714(a), his argument must be dismissed.

3. Petitioner was not Unfairly Deprived of his Intervention Rights By the Dismissal of His Nontimely Petition Under Section 2.714(a)

Finally, Petitioner's argument should be rejected because it fails to demonstrate that he has been unfairly deprived of his intervention rights under the Commission's Rules of Practice. Petitioner asserts that the consideration of the licenses for both Seabrook units in a single licensing proceeding is unfair because it has resulted in his intervention petition being dismissed as untimely despite the fact that construction of Unit 2, whose license he wishes to challenge, may not be complete for several years. Petitioner's Brief at 3.

The right to intervene in a Commission proceeding is not absolute, and is limited by reasonable procedures established by the Commission. The Commission has recently stated:

> It is well established that Section 189a. of the Atomic Energy Act does not provide an unqualified right to a hearing. Rather, the Commission is authorized to establish reasonable regulations on procedural matters like the filing of petitions to intervene and on the proffering of contentions.

Duke Power Company, et al. (Catawba Station, Units 1 and 2), CLI-83-19, 18 NRC ___, Slip op. at 6 (1983), citing BPI v. AEC, 163 U.S. App. D.C. 422, 502 F.2d 424 (D.C. Cir. 1974); and Easton Utilities Commission v. AEC, 137 U.S. App. D.C. 359, 424 F.2d 847 (D.C. Cir. 1970).

Requests for licenses for multiple units which comprise a single facility and which are being jointly constructed are generally considered in a single proceeding. The virtual identity in issues presented by each of the license requests for a multi-unit plant makes reasonable the hearing of those issues in a single proceeding. This is true not only where there are issues related to emergency planning (which Petitioner, in his Brief at p. 4, candidly admits would be the same for each of several units at one site), but also as to safety and environmental issues which are similar in regard to each of the similar plants being built at the same site. Thus, a number of parties in this proceeding have raised safety, environmental, and emergency planning issues relating to both Units 1 and 2.

Although a great disparity in the construction progress of the two Seabrook units increases the chance that the less complete unit may be affected by unanticipated changes in design which may cause issues to arise later, the joint noticing of hearing cannot be considered a denial of due process. In the event that changes occur which raise new issues, a

remedy is provided by the Section 2.714(a) procedures for late intervention, and, if the issues arise after the record is closed, by a motion to reopen the record. Catawba, supra; Kansas Gas and Electric Company (Wolf Creek Station, Unit 1), ALAB-462, 7 NRC 320, 338 (1978). See, e.g., Arizona Public Service Company, et al. (Palo Verde Station, Units 1, 2 and 3), LBP-82-117B, 16 NRC 2024 (1982) (wherein Licensing Board granted a non-timely intervention petition and reopened the record on Units 2 and 3, but not Unit 1). As such, the possibility of design changes posited by Petitioner does not form the basis for a cogent argument for requiring separate licensing proceedings for Units 1 and 2, especially in view of the number of common issues capable of resolution now in a single proceeding.

It is a corollary of having procedural requirements that those who are unable to meet them, on timeliness grounds or otherwise, will be unable to participate in the manner in which they might wish. This fact, however, does not make the procedures "unfair." Petitioner's argument should be rejected.

B. The Licensing Board Correctly Balanced the Section 2.714(a) Criteria Governing Nontimely Intervention Petitions

Petitioner argues in the alternative that the Licensing Board erred in its balancing of the five factors enumerated in 10 C.F.R. § 2.714(a)(1), and that this Appeal Board should conclude that, on balance, those factors favor the granting of his petition. Initially it must be noted that neither Appeal Boards nor the Commission are "readily disposed to substitute [their] judgment for that of the Licensing Board insofar as the outcome of the balancing of the Section 2.714(a) factors is concerned." Long Island

Lighting Company (Shoreham Station, Unit 1), ALAB-743, 18 NRC ____, slip op. at 14 (1983). It is well settled that a Licensing Board's determination upon balancing the Section 2.714 factors will be overturned only where the Board has abused its discretion. Detroit Edison Company, et al. (Enrico Fermi Plant, Unit 2), ALAB-707, 16 NRC 1760, 1763-64 (1982), citing South Carolina Electric and Gas Company, et al., (Virgil C. Summer Station, Unit 1), ALAB-642, 13 NRC 881, 885 (1981), aff'd sub nom. Fairfield United Action v. Nuclear Regulatory Commission, 679 F.2d 261 (D.C.Cir. 1982). As discussed below, the Licensing Board below was well within its discretion in dismissing Petitioner's petition under § 2.714, and its ruling should be affirmed.

In its November 15 Order, the Licensing Board observed that the notice of opportunity for hearing (41 Fed. Reg. 51,330, 51,331) established November 18, 1981 as the deadline for the filing of intervention petitions. Order at 2. The Board also noted Petitioner's acknowledgment that his September 6, 1983 petition was late-filed. Id. The Board proceeded to discuss the five Section 2.714(a) lateness factors, concluding that those factors, on balance weighed against allowing intervention. Id. at 8.

Before the Licensing Board, Petitioner sought to justify his lateness on the ground that he did not possess standing to intervene until June 23, 1983, at which time he moved from Texas to a residence in Brighton, Massachusetts. Petition at 5. It would have been "fruitless," Petitioner asserted, for him to have sought to intervene prior to that date. Amended Petition at 1. In an attempt to explain the period of time between June 23 and September 6, Petitioner stated that he "believed that

due to decreased demand and lack of construction, Seabrook Unit 2 would not be nominated for a license to operate soon." Petition at 5 (emphasis in original). Petitioner argued that conflicts between the completion dates discussed in various industry bulletins, together with his understanding of the requirements of 10 C.F.R. § 50.57(a)(1) that construction of a facility be "substantially complete" prior to issuance of a license, "combined to dis-alert" him, constituting good cause for his "two month delay" in filing his petition. Petition at 5-6.

The Licensing Board rejected Petitioner's argument that his lack of standing until June of 1983, and his belief that no license would be sought for Unit 2 in August of 1983, justified his nontimely filing. The Board noted that under Commission Rules of Practice, neither newly acquired standing nor ignorance of Federal Register notices justify late intervention. Order at 4-5, citing Carolina Power and Light Company (Shearon Harris Plant, Units 1-4), ALAB-526, 9 NRC 122, 124 (1979); Houston Lighting and Power Company (Allens Creek Station, Unit 1), ALAB-582, 11 NRC 239 (1980); and Houston Lighting and Power Company (Allens Creek Station, Unit 1), ALAB-574, 11 NRC 7 (1980).

Petitioner argues on appeal that the Licensing Board "overextended" the rule of Shearon Harris, supra, that newly acquired standing is not a sufficient justification for lateness in filing an intervention petition. Petitioner argues that this proceeding has not progressed as far as had the one in Shearon Harris, with the result that the parties in this proceeding would not be burdened as much by granting his petition as the parties in Shearon Harris would have been if the petition in that proceeding had been granted. The distinction he posits between the potential

for delay in the two cases is without relevance to the Shearon Harris holding that newly acquired standing does not constitute good cause for a tardy petition. This aspect of the decision by the Appeal Board in Shearon Harris focused not upon the delay attendant upon admission of the petitioner immediately before it, but rather the impossibility of determining with certainty the parties to the proceeding that would result "if newly acquired standing . . . were sufficient of itself to justify permitting belated intervention . . . . Assuredly, no adjudicatory process could be conducted in an orderly and expeditious manner if subjected to such a handicap." Shearon Harris, supra, 9 NRC at 124, quoted in Order at 4.

Finally, Petitioner argues that the Shearon Harris rule should not be applied to him because of the alleged unfairness of the consequences, asserted to stem from the original decision to consider the licenses for both Unit 1 and Unit 2 in a single proceeding. Petitioner's Brief at 8-9. This argument is the same as that advanced in Petitioner's Brief at 3-5, and is addressed in Part II.A of this Brief, supra, pp. 3-7. For the reasons discussed therein, the argument should be rejected.

Having failed to show good cause for its lateness, Petitioner was required to make a compelling showing on the four other Section 2.714(a) factors. Enrico Fermi, supra, 16 NRC at 1765, citing Summer, supra, 13 at 886. No such compelling showing was made.

The Licensing Board acknowledged that the second and fourth factors (ability of other means to protect his interest and extent to which ng parties will represent his interest) weighed in Petitioner's but held that both factors were outweighed by the fifth factor of

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The Licensing Board acknowledged that the second and fourth factors (availability of other means to protect his interest and extent to which existing parties will represent his interest) weighed in Petitioner's favor, but held that both factors were outweighed by the fifth factor of

delay. Order at 7-8. The Board found that introduction of a new contention "nearly two years after the proceeding began would truly broaden and delay the proceeding." Id. at 8. The Board also noted that Petitioner had offered no indication of the character of evidence or the witnesses it intended to offer or how much time would need to be scheduled for the contention. Id. As to the third factor -- the extent to which Petitioner's participation may reasonably be expected to assist in developing a sound record -- the Board rejected Petitioner's argument that his participation in the Allens Creek construction permit proceeding qualified him to assist in the development of a sound record in the Seabrook proceeding. The Board found that Petitioner had offered no reason to believe that his participation could assist in contributing sound evidence to the record. Id. at 7, citing Allens Creek, supra, 11 NRC 239.2/

In his appeal, Petitioner argues that the Licensing Board counted the delay factor twice because it was mentioned by the Board in its discussion of the second and fourth factors. Petitioner's Brief at

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2/ In Allens Creek, supra, on facts remarkably similar to those of the instant appeal, the Appeal Board rejected a petitioner's claim that his having "dealt intimately" with the issue of the economic impact of the Davis-Besse(Ohio) facility enabled him to contribute to the proceedings in Allens Creek, wherein he sought to raise a similar issue. The Appeal Board was unwilling to accept the Petitioner's argument in the absence of some "explanation forthcoming as to why any information he may have acquired respecting the economic impact of the Davis-Besse facility would be of relevance to the appraisal of another facility to be located in an entirely different section of the United States." 11 NRC at 243. Petitioner Doherty's claim in this regard is more tenuous than that of the petitioner in Allens Creek, supra, in that Mr. Doherty has not shown even that the issues he dealt with in the Allens Creek proceeding are related to those raised by the contention proffered in his petition.

10-11, 13. Petitioner apparently believes that "[t]he Board is in error if it place[d] any weight of delay in the balance against Petitioner" in considering these two factors. Petitioner's Brief at 13. Petitioner is simply wrong in ascribing error to the Licensing Board in its balancing of the Section 2.714(a) factors. The Board acted entirely within its discretion and pursuant to its Section 2.714(a) duty to balance those factors.

In arguing against the Licensing Board's conclusion on the weight to be accorded the third factor (assistance in developing a sound record), Petitioner seeks to supplement the record on appeal to address the deficiency noted by the Board (Order at 7) regarding Petitioner's failure to demonstrate that his participation would assist in compiling a sound record. Petitioner's Brief at 11-12. As noted on pp. 3-4, supra, matters which could have been presented below may not be raised on appeal. North Coast, supra, 14 NRC 34; Allens Creek, supra, 11 NRC 239. For the same reason, the Appeal Board should reject Petitioner's other argument (Petitioner's Brief at 12), raised for the first time on appeal, that the offering of a significant contention mitigates a late petitioner's failure to show that he will by his participation assist in developing a sound record.

The Licensing Board's balancing of the Section 2.714(a) factors resulted in the determination that factors (i), (iii) and (v) weighed against Petitioner, while factors (ii) and (iv) weighed in his favor. The Board's finding on each of the five factors was consistent with Commission precedent and well within its discretion. In finding that the balancing of these factors did not justify granting Petitioner's

nontimely petition, the Licensing Board did not err. The Petitioner's argument should therefore be rejected.

III. CONCLUSION

For the reasons discussed above, the Licensing Board's dismissal of Petitioner's nontimely petition for leave to intervene should be affirmed.

Respectfully submitted,

William F. Patterson, Jr.

William F. Patterson, Jr.
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 16th day of December, 1983

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "RESPONSE OF THE NRC STAFF IN OPPOSITION TO THE APPEAL BY JOHN F. DOHERTY OF THE NOVEMBER 15, 1983 ATOMIC SAFETY AND LICENSING BOARD ORDER DENYING HIS NONTIMELY PETITION FOR LEAVE TO INTERVENE" 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 16th day of December, 1983:

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