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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Morton B. Margulies, Chairman
Dr. Robert M. Lazo
Dr. Frank F. Hooper

In the Matter of	Docket Nos. 50-413 OL 50-414 OL
DUKE POWER COMPANY, Et. Al.	ASLBP No. 81-463-06A OL
(Catawba Nuclear Station, Units 1 and 2 (Emergency Planning))	July 11, 1984

MEMORANDUM AND ORDER
(RULING ON PROPOSED CONTENTION 20)

Intervenors' Petition

Intervenors Carolina Enviromental Study Group and Palmetto Alliance, on May 30, 1984 filed a supplemental petition seeking the admission of a prcposed contention, Proposed Contention 20, which pertains to the adequacy of emergency planning for that part of the City of Charlotte that is within a 17 mile radius of Catawba Nuclear Station.

Proposed Contention 20 as submitted provides:

> A specific, effective emergency plan should be devised and implemented for that part of Charlotte within a 17 mile radius of the Catawba Nuclear Station.
>
> Testimony in the ongoing ASLB proceeding establishes the prevailing wind direction from the station toward Charlotte. A population in excess of 120,000 lives within this area. The FES (NUREG-0921) estimates, for an observed Catawba weather sequence, and actual demography, a possible 24,000 early fatalities for a large release if persons residing

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between 10 and 25 miles from Catawba are not relocated in the first 24 hours (p. F-3).

The guidance provided for planning states "The Task Force [on Emergency Planning] concluded that the objective of emergency response plans should be to provide dose savings for a spectrum of accidents that could produce offsite doses in excess of the PAGs." And "The ability to best reduce exposure should determine the appropriate response," (NUREG-0396, pp. 5 and 13). Clearly the protection of southwest Charlotte is required, although it extends past the "about 10 mile" radius considered for EPZ's, because it can be exposed to a significant radiation hazard which can be reduced by an appropriate response plan.

Testimony also shows the population density of southwest Charlotte to fall between 6 and 10 times that of the present EPZ. Evacuation will, consequently, be slower. Although evacuation, it was testified, of the present EPZ will take about 4 hours, that of southwest Charlotte is estimated to require about 7 hours.

The NRC staff's meteorology witness testified that under some conditions a slightly dispersed release could reach southwest Charlotte in as short a time as 2 hours.

To minimize delays in the evacuation of those prospectively exposed to a radioactive plume:

1. The plume boundaries and rate of movement must be known. This should be the case under present emergency response plans.

2. People who can avoid exposure should evacuate.

3. Evacuation roads lying in the plume pathway must be interdicted.

4. Evacuees must not be so delayed by traffic that the plume overtakes them.

5. People not in danger of plume exposure should not interfere with legitimate evacuee traffic.

6. Those who will not have enough time to escape the plume must shelter until there is a sufficient reduction in plume intensity to make evacuation and relocation the course providing the most effective dose savings.

> To realize this rational and specific plan for the minimization of dosage, the siren/EBS procedure will not be adequate. It will be necessary to provide specific instructions to relatively small zones which will be responsive to the actual magnitude of the release, rate of release, and the instant meteorology.
>
> Specific instructions as to whether to stay in, shelter a specific time and then relocate, or to evacuate within a specific time and by which of alternate routes can be provided by an appropriate cumputer-operated telephonic alert and notification system. Such systems have been given cognizance by the Federal Emergency Management Agency, "Standard Guide for the Evaluation of Alert and Notification Systems for Nuclear Power Plants," (FEMA-43/ September 1983, E.6.2.4.4, pp. E-15 & 16).
>
> Testimony by Applicant's expert acoustical witness, Dr. Bassiouni, shows that 100% alerting and notification is not likely to be realized by the siren/EBS system within the 15 minute/5 mile and 45 minute/EPZ radius guidelines (FEMA-43/September 1983, E.¢.@, (sic) pp. E-4 & 5).
>
> The combination of siren/EBS and an appropriately designed telephonic alert and notification system will much more nearly reach the objective of timely, 100% notification.

Under the proferred contention Intervenors seek to develope what should be an effective emergency plan within the designated area, more particularly the use of a computer-operated telephone alert and notification system in conjunction with the EBS system.

Presently no part of the City of Charlotte is included in the plume EPZ for Catawba Nuclear Station. At the closest point the City limits are some 10.5 miles from the facility.

Intervenors by their Proposed Contention Eleven sought to include all of the City of Charlotte within the EPZ. The proferred contention read:

> Effective emergency planning should be required for the City of Charlotte, North Carolina in the event of a radiological emergency

> at the Catawba Nuclear Station with the full range of protective actions considered including evacuation of the City's population.
>
> Through the process of annexation Charlotte continues to grow rapidly in the direction of the Catawba station, and it will likely encroach on the 10 mile EPZ in the near future. At present the City's nearest boundary is only 10.5 miles from the facility and appears to be directly adjacent to the Applicant's proposed EPZ. Prevailing southwesterly winds make center city Charlotte the most likely target for an airborne release of radioactivity from the plant. See, Catawba Nuclear Station Site Specific Plan, Part 4, SCORERP, p. 2.
>
> In the event of an evacuation of the 10 mile EPZ around Catawba many thousands of people would flow through downtown Charlotte because planned evacuation routes lead through the city; because many EPZ evacuees "assigned" to other routes would choose these same routes since they are "evacuation travelsheds," i.e., the fastest means of exit from the EPZ. See, Voorhees, Catawba Nuclear Station Evacuation Analysis; and, finally, because many additional "volunteers" will choose to join their neighbors in fleeing the vicinity of the Catawba plant. Prudence and effective protective action for those living near Catawba require emergency planning for the City of Charlotte.

In an unpublished Memorandum and Order, of September 29, 1983, the original Licensing Board rejected the proposed contention as an impermissible challenge to 10 CFR 50.47(c)(2), which provides for a plume EPZ of about 10 miles. That proposed would extend 25 miles from the plant.

The Licensing Board revised the contention in a manner which it concluded would not constitute a challenge to regulation and admitted it as Contention 11. Its reasoning in drafting Contention 11 in the manner it did is set forth in its memorandum of September 29, 1983. The contention which was litigated is as follows:

> The size and configuration of the northeast qudrant of the plume exposure pathway emergency planning zone (Plume EPZ) surrounding the Catawba facility has not been properly

> determined by State and local officials in relations to local emergency response needs and capabilities, as required by 10 CFR 50.47(c)(2). The boundary of that zone reaches but
>
> does not extend past the Charlotte city limit. There is a substantial resident population in the southwest part of Charlotte near the present plume EPZ boundary. Local meteorological conditions are such that a serious accident at the Catawba facility would endanger the residents of that area and make their evacuation prudent. The likely flow of evacuees from the present plume EPZ through Charlotte access routes also indicates the need for evacuation planning for southwest Charlotte. There appear to be suitable plume EPZ boundary lines inside the city limits, for example, highways 74 and 16 in southwest Charlotte. The boundary of the northeast quadrant of the plume EPZ should be reconsidered and extended to take account of these demographic, meteorological and access route conditions.

Intervenors assert that the adequacy of emergency response is an issue within the scope of revised Contention 11, coming under the language "in relation to local response needs and capabilities", as contained in the first sentence of the contention.

They further assert thay had been of this belief and expected the matter to be litigated until the prefiled testimony of a witness for Carolina Environmental Study Group for Contention 11, covering a proposed telephonic alerting and notification system for the Charlotte area was stricken on May 24, 1984, by the Licensing Board. This action was taken in response to objections that Contention 11 raises as an issue the size and configuration of the plume EPZ but does not deal with the adequacy of emergency planning within the area. (Tr. 2302-2307).

Intervenors seek to have Proposed Contention 20 accepted for litigation by satisfying the 5 part test applicable to late filings contained in 10 CFR 2.714(a)(1).

(i) The argument they make for good cause for failure to file on time is that they expected the matter to be litigable under Contention 11 and it was not until May 24, 1984, when tne prefiled testimony was ordered stricken that they knew otherwise. The supplemental petition was filed within one week thereafter.

(ii) Intervenors' position is that there are no other means whereby their interest will be protected. The Mecklenburg County Commission appointed an Emergency Management Planning Review Committee to consider the matter of the extension but it has not taken a timely position in regard to representing the county before this Licensing Board.

(iii) As to the extent to which Intervenors' participation may reasonably be expected to assist in developing a sound record, their position is that in the instant proceeding they had already contributed to a sound record and that they reasonably should be expected to continue to do so.

(iv) Intervenors state their interest will not be represented by existing parties. Local and state officials were said to have been called to testify by Applicant and there is no indication on the record any of them support Intervenors' position.

(v) Intervenors' position is that the admission of the proposed contention will not broaden the issues or delay the proceeding. It is their view Proposed Contention 20 only includes matters which they believe were included under Contention 11. They assert no discovery is

required, the testimony to be presented has already been filed, eliminating surprise. Full discovery opportunities have been available. Intervenors submit that one half day of hearing should resolve the issue in Contention 20.

Applicants' Response

Applicants' responded on June 13, 1984, opposing the admission of the proposed contention.

Their position is the Licensing Board was correct in striking testimony dealing with telephonic communication as being beyond the scope of Contention 11. They assert an examination of the text of Contention 11 demonstrates it only deals with alleged factors (specifically "demographic, meteorological and access route conditions") that justify the extension of the plume EPZ beyond its present boundaries into southwest Charlotte. The stricken testimony is said not to address the substance of Contention 11, as to why the plume EPZ should allegedly be extended, but rather assumes that it should be broadened and then proposes how people in that presumptively extended EPZ should be notified.

As to Intervenors' reliance on the language in Contention 11, "in relation to local response needs and capabilities" to support their position for inclusion of emergency responses under the contention, Applicants state the phrase refers to the adequacy of the existing emergency plans, not alternative plans as are hypothesized by Intervenors.

In regard to the 5 factors test for admission of a late filed contention Applicants' position is:

(i) Intervenors could have raised the issue of a telephonic notification system when they filed their first 19 emergency planning contentions in July 1983. No new relevant facts or events have come to light since then other than the Licensing Board's ruling and that an unfavorable evidentiary ruling on relevence cannot be considered "good cause". They assert the lack of good cause should weigh heavily against Intervenors' quest for the admission of the proposed contention;

(ii) Applicants' concede that factor two, availability of other means to protect the Intervenors' interest, and factor four, the extent to which the Intervenors' interest will be represented by existing parties, weigh in favor of admitting the proposed contention but the two factors are entitled to less weight than the other three factors;

(iii) Applicants' assert, that on balance Intervenors have not made a meaningful contribution to this proceeding and that at most the factor should be considered as evenly balanced, favoring neither admission nor rejection of Proposed Contention 20.

(iv) Applicants are of the view that the proposed contention will broaden the issues and delay the proceeding, which is particularly significant in that the hearings have been concluded. It is asserted this factor should weigh heavily against Intervenors. Applicants' advise their case was not prepared on the issues now set forth in the proposed contention. Should the matter be litigated they would have to

conduct discovery, prepare witnesses, develope testimony and try the matter which would causc delay.

In balancing the 5 factors Applicants' conclude Intervenors have made no compelling showing outweighing the lack of good cause. They concede only 2 factors weigh in Intervenor's favor, two and four which is not substantial. The lack of good cause for the tardy filing and the delay the admission of the contention would cause are said to result in the failure by Intervenors of the 5 part test. They call for the rejection of the proposed contention and the closing of the record on all emergency planning issues.

Staff's Response

It is Staff's position the proposed contention is an impermissible challenge to 10 CFR 50.47(c)(2), to the extent it would require detailed planning for that part of Charlotte included in a 17-mile radius from Catawba. Staff notes that unlike the original Licensing Board's revised Contention 11, which stated that various main boundaries could serve as part of the plume EPZ boundary, if various other facts made extension of the EPZ to a limited distance into Charlotte appropriate, the proferred Contention 20 would arbitrarily extend the EPZ out to a radius of 17 miles so long as any such area included the City of Charlotte. It is contended the original Licensing Board disclaimed that revised Contention 11 proposed a 17-mile EPZ which is something Intervenors are attempting to accomplish with the newly submitted proposed contention, in arbitrarily selecting a 17-mile radius for detailed planning. Staff

asserts this extension of the EPZ beyond 10 miles is contrary to 10 CFR 50.47(c)(2) and like the originally sunmitted Contention 11 must be rejected as an impermissible challenge to Commission regulations.

Like Applicants, Staff concludes the criteria for late filing weigh substantially against consideration of the tardily filed proposed contention.

It asserts Intervenors have failed to establish good cause. Staff contends it is clear that in Contention 11, "local emergency response needs and capabilities" refers to the appropriateness of the "size and configuration of the northeast quadrant of the plume exposure pathway emergency planning zone" and does not raise issues relating to the adequacy of protective actions already contained in existing plans or as they might be applied to an expanded zone. Staff does not accept the lack of understanding of Intervenors of the issue involved in Contention 11 as an appropriate standard for determining that good cause exists for the lateness of filing the contention. It points out their original Proposed Contention 11 did not suggest particular plan deficiencies and Intervenors have offered no sound reason why their failure to have done so, in a timely way, should be excused. As a result, it concludes good cause is lacking which weighs heavily against the admission of Proposed Contention 20.

Staff finds factors (ii) and (iv) weigh in Intervenor's favor but they are of relatively minor importance.

As to factor (iii), contribution to a sound record, Staff accepts the Licensing Board's ruling that the witness for CESG had demonstrated

his ability to testify on Contention 11, based on experience and participation in other proceedings (Tr. 2274), and although he was not shown to be an expert in alert and notification systems, concludes that his proferred testimony causes factor (iii) to marginally weigh in favor of admission.

As to the fifth part of the test, Staff contends admitting the contention would significantly broaden the scope of the issues under consideration. It asserts the adequacy of protective actions was not part of the original contention and to treat with it would require further discovery and pretrial preparation. Experts in the new area would have to be sought. It would cause delay in that except for this matter the record has been closed and a schedule for proposed findings has been set. (Tr. 4603). It considers factor (v) to weigh heavily against admission of Contention 20.

Staff's position is that the lack of good cause and expected delay at this stage of the proceeding are very heavy factors to overcome in determining whether the late filed contention should be admitted. They are said to far outweigh the other three factors which are of lesser weight and that Proposed Contention 20 should be rejected based on these late filing considerations.

Discussion And Conclusions Of The Licensing Board

A detailed analysis of the language of litigated Contention 11 and the original Licensing Board's explanation in its memorandum of September 29, 1983, as to why it drafted the contention in the manner it

did, makes it abundently clear that the sole issue in Contention 11 is whether the plume EPZ should be extended into any part of the City of Charlotte and by how far. The matter of the adequacy of protective measures that should be taken if the zone is extended is not at all at issue in the contention. The language in the contention "in relation to local emergency response needs and capabilities", in the context used in the contention only refers to the alleged need to expand the plume EPZ into the City of Charlotte for the purpose of meeting the requirements of the inhabitants. It does not raise the issue of what the future protective measures should be, if the zone were expanded, as Intervenors assert.

The original Licensing Board's approach in limiting Contention 11 to the issue of whether the plume EPZ should be expanded into the City of Charlotte was quite logical. It would be wholly premature and speculative to treat with the adequacy of protective measures for any area that had never been determined to be part of the plume EPZ for the Catawba facility. Also there were no local emergency plans specifically drafted for the area in dispute because of the construction of the Catawba nuclear plant. Absent such plans, what is there to criticize as being inadequate.

In reading Intervenors' initially Proposed Contention 11, we do not see that it differs in any way from the litigated Contention 11 the issue being the same, the appropriateness of the size of the Catawba plume EPZ and not the adequacy of protective measures in areas to which the EPZ might be extended.

Accepting Intervenors' claim that they believed their proposed contention included as an issue the adequacy of protective measures in areas to which the EPZ might be extended, there was no basis for them to continue in the same belief in regard to Contention 11, drafted by the Licensing Board and explained by their memorandum of September 29, 1983. For Intervenors to do so is chargeable error of their part for which they must accept responsibility. Proposed Contention 20 reasonably could have been filed as early as October 1983, at the start of the discovery process and not at the ending of the hearing process as was done. Their failure to timely file constitutes a lack of good cause under the first criterion of 10 CFR 2.714(a)(1). See Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1765 (1982). Failure to charge a party for its own mistake under the criterion would in effect constitute a reward and work to the defeat of the administrative process.

Intervenors' failure to show cause for late filing means they must shoulder a heavier burden with respect to the other factors. Virginia Electric Power Company (North Anna Station, Units 1 and 2), ALAB-289, 2 NRC 395, 398 (1975). The lack of good cause brought about by an unjustified late filing weighs heavily against admission of Proposed Contention 20. Intervenors are required to make a compelling showing on the other factors. Enrico Fermi, ALAB-707, supra. The burden is on the petitioner to demonstrate that a balancing of the five factors is in its favor. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, 12 NRC 350, 352 (1980).

No one disputes, nor is there reason to, that factor (ii), the availability of other means to protect Intervenors' interest and factor (iv), the extent to which Intervenors'interest will be represented by existing parties, weigh in favor of Intervenors and for consideration of the proposed contention. There are no other means to protect Intervenors' interest nor will they be represented by existing parties. The Appeal Board had noted in Enrico Fermi at 1767 that the factors are considered to be of "relatively minor importance" in weighing the five factors.

As to factor (iii), the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record, Intervenors' rely on past participation to date in the proceeding to indicate their capability. No details were provided. The only matters we can glean is that in response to factor (v), Intervenors state they have already submitted their testimony on this matter. This was the prefiled stricken testimony of Jesse L. Riley, who was found by the Licensing Board to have demonstrated by his experience and participation in the proceeding his ability to testify on the relevant issue of Contention 11. Mr. Riley has studied various areas and has developed knowledge that extends beyond that of an ordinary lay individual. He probably has done so in the area of telephonic alerting and notification. Mr. Riley has not demonstrated an expertise in the area through experience or education. His testimony in this area would be of limited weight.

Intervenors sought to subpoena a witness from Southern Bell Telephone Company during the course of the proceeding. Their filing on Proposed Contention 20 did not indicate they would attempt to use him. The nature of his testimony is unknown.

Based on the foregoing it is concluded Intervenors could provide some low level assistance in developing a sound record in the area of telephonic alerting and notification. Factor (iii) is balanced in favor of Intervenors but it cannot be considered a matter of significant weight from the information furnished.

As to factor (v), accepting the contention will broaden the issues and delay the proceeding. As previously discussed Proposed Contention 20 puts at issue a matter not previously part of any litigated contention, the matter of the adequacy of emergency planning within a possible extended EPZ in the City of Charlotte, more particularly the use of a computer operated telephonic alert and notification system.

The proposed contention was submitted on May 30, 1984. Hearing concluded in the proceeding on June 8, 1984. Because this is a new matter Applicants and Staff are entitled to time for conducting discovery and other prehearing preparation. The matter would then have to be tried and post hearing briefs filed. All of the foregoing would have to fit everyone's schedule. Taking care of this matter would interfere with writing the partial initial decision on the contentions already heard. Hearing the contention would delay the proceeding by at least several months.

Having considered each of the five factors individually, they must now be balanced to determine whether the proposed contention should be considered in this proceeding. The determination is to deny the petition to do so.

The lack of good cause weighs heavily against the consideration of the proposed contention. Only by a compelling showing on the other factors can Intervenors sustain their burden of proof.

There is no compelling showing on the other factors. Although criteria (ii) and (iv) weigh in Intervenors' favor they are not of much consequence. Add to that the marginal showing Intervenors established on factor (iii) pertaining to the record they can make does not result in any material showing. These three factors in Intervenors' favor are virtually wholly erroded by the fact that admission of the contention would cause serious delay to the proceeding at an important juncture. What remains in Intervenors' favor is inadequate to overcome the weight of the lack of good cause brought about by an unjustified late filing. They have not made the compelling showing necessary to rule in their favor.

Intervenors have slept on their rights and no sound basis has been provided to grant them the relief they seek. They have not satisfied the requirements of 10 CFR 2.714(a)(i) for acceptance of their late filed Proposed Contention 20 for consideration. The proceeding is at an end and the merits require that the record be closed.

We find it unnecessary to consider Staff's allegation that Proposed Contention 20 is an impermissible challenge to 10 CFR 50.47(c)(2). This

is a matter that goes to the litigability of the proposed contention. It is a point that has been rendered moot by our ruling.

Based on all of the foregoing we hereby Order:

(a) That Intervenors' supplemental petition of May 30, 1984, seeking the admission of Proposed Contention 20 be denied and dismissed; and

(b) That the record in this proceeding, having been held open solely for the purpose of resolution of this matter, be closed.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Morton B. Margulies, Chairman
ADMINISTRATIVE LAW JUDGE

Dated at Bethesda, Maryland
this 11th day of July 1984.