B42 C42

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
DUKE POWER COMPANY, et al.,	)	Docket Nos. 50-413
	)	50-414
(Catawba Nuclear Station, Units 1 and 2)	)	
	)	

APPLICANTS' RESPONSE TO INTERVENORS' LATE-FILED PROPOSED EMERGENCY PLANNING CONTENTION 20

I. Background

On July 11, 1983, the Intervenors Carolina Environmental Study Group and Palmetto Alliance filed nineteen contentions on emergency planning for the area around the Catawba Nuclear Station. See "Palmetto Alliance and Carolina Environmental Study Group Supplement to Petitions to Intervene Regarding Emergency Plans," dated July 11, 1983. One of these contentions, Emergency Planning Contention 11, was reworded and admitted by the Atomic Safety and Licensing Board ("Licensing Board") on September 29, 1983. See "Memorandum and Order (Ruling on Remaining Emergency Planning Contentions)," Sept. 29, 1983, slip op. at 1-5.

As reworded by the Licensing Board, Contention 11 states:

> The size and configuration of the northeast quadrant 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 relation 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

D503

> 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.

As is apparent, Contention 11 focused on whether there was anything peculiar about the Catawba site that requires the inclusion of any area of southwest Charlotte in the plume exposure emergency planning zone ("plume EPZ").

On April 16, 1984, Intervenors prefiled their direct testimony on Contention 11. Portions of this were subsequently admitted by the Licensing Board as Intervenors' Exh. EP-48 (testimony of Riley, Twery, and Sholly). See tr. 2250, 2308, 5/24/84. Portions of Mr. Riley's prefiled testimony dealt with a proposed "system of telephonic alerting and notification" for the area of southwest Charlotte described in Contention 11. See Int. Exh. EP-48, Riley, pp. 13-16 (offer of proof). On May 24, 1984, this testimony was struck by the Licensing Board as beyond the scope of Contention 11. See tr. 2307, 5/24/84.

On May 30, 1984, Intervenors filed a new proposed Emergency Planning Contention 20. See "Carolina Environmental Study Group and Palmetto Alliance Supplemental Contention Regarding Specific Emergency Plan for Southwest Charlotte," dated May 30, 1984 ("May 30th Pleading"). This proposed contention states:

> 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 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 wi;l [sic] 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 innas [sic] 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 computer-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 [sic] 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/ Seprember [sic] 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.

May 30th Pleading at 2-3.

Applicants oppose the admission of this contention. The contention cannot be viewed as an extension of Contention 11, particularly given the propriety of the Board's striking of Mr. Riley's testimony concerning telephonic notification systems as beyond the scope of Contention 11. Further, the newly proposed Contention 20, by which Intervenors seek to elicit this same stricken testimony, fails to satisfy the "five factors" of 10 C.F.R. §2.714(a)(1) governing the admissibility of late-filed contentions. Applicants address these points in order below.

II. Argument

A. Proposed Contention 20 Raises Matters Outside the Scope of Contention 11

The Licensing Board was correct in its ruling (tr. 2307, 5/24/84) striking that the portion of Mr. Riley's testimony dealing with telephonic notification as beyond the scope of Contention 11. An examination of the text of Contention 11 demonstrates that it deals with alleged factors (specifically "demographic, meteorological and access route conditions") that justify extension of the plume EPZ beyond its present boundaries into southwest Charlotte. Mr. Riley's telephonic notification testimony was described by Intervenor's counsel as being in the nature of a proposed remedy should the Licensing Board find in Intervenors' favor on Contention 11. See tr. 2305-06, Guild 5/24/84. The stricken testimony does not address the substance of Contention 11 (why the plume EPZ should allegedly be extended), but rather assumes that it should be extended and then proposes how people in that presumptively extended EPZ should be notified. As the Board correctly recognized when striking this testimony, these matters are beyond the scope of Contention 11.

The Intervenors argue in their May 30th Pleading that the stricken testimony is relevant to the first sentence of Contention 11, which states:

> The size and configuration of the northeast quadrant of the [plume EPZ] has not been properly determined by state and local officials in relation to local response needs and capabilities . . . .

May 30th Pleading at 1 (emphasis supplied by Intervenors). Their reliance on this highlighted language from Contention 11 is misplaced, however. The phrase "in relation to local response needs and capabilities" refers to the adequacy of the existing emergency plans, not alternative plans such as are hypothesized by Intervenors.

In sum, Intervenors' argument that the subject matter of proposed Contention 20 is included within Contention 11 is erroneous. Inasmuch as the testimony of Mr. Riley on telephonic notification was properly struck by the Licensing Board as outside Contention 11, the testimony can only be considered by the Board in connection with the proposed late-filed Contention 20. This proposed Contention 20 must be rejected by the Licensing Board, however, for it fails to satisfy the "five factors" of 10 C.F.R. § 2.714(a)(1).

B. The Proposed Contention 20 Should be Rejected Because it Does Not Satisfy the Test for Admission of Late-Filed Contentions

The five factors stated in 10 C.F.R. § 2.714(a)(1)[1/] are

1/ The five factors are:

(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

(footnote continued)

balanced to determine the admissibility of late-filed contentions, as explained by the Commission in Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), CLI-83-19, 17 NRC 1041, 1047 (1983); see also Statement of Considerations for § 2.714, 43 Fed. Reg. 17,798, Apr. 16, 1978.

1. Factor One--Good Cause for Late Filing

The first factor, "[g]ood cause, if any, for failure to file on time," has not been satisfied by the Intervenors. See 10 C.F.R. § 2.714(a)(1)(i). The Intervenors must establish that "the issue it seeks to raise could not have been raised earlier." Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1765 (1982) (emphasis in original). This they have failed to do.

The Intervenors could have raised the issue of a telephonic notification system, the subject of the proposed Contention 20, in July of 1983 when they filed the first nineteen emergency planning contentions. No new relevant facts or events have come to light in the intervening time except for the Licensing Board's evidentiary ruling during the course of these hearings excluding portions of Mr. Riley's testimony. See May 30th Pleading at 3. Clearly, an unfavorable evidentiary ruling on relevance cannot be

---

(footnote continued from previous page)
interest will be represented by existing parties.

(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).

viewed as establishing "good cause" for failure to file the contention on time. Otherwise, new contentions would regularly be springing forth full-grown during the course of ongoing litigation. An acceptance of Intervenors' logic would make the orderly conduct of administrative litigation an impossibility.

In view of the lack of a recent development sufficient to justify the lateness of proposed Contention 20, the Licensing Board must find that no good cause has been shown and factor one weighs heavily against admitting proposed Contention 20.2/ Although the good cause factor is not by itself determinative, see Catawba, CLI-83-19, 17 NRC at 1046-47, it is accorded more weight than the other factors in the balancing process. See, e.g., Nuclear Fuel Services, Inc., (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975) ("the burden of [justification] on the basis of the other factors in the rule is considerably greater where the latecomer has no good excuse"); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1765 (1982) ("[i]n the absence of good cause, a petitioner must make a 'compelling showing' on the other five factors"). As there is no good cause for tardiness, the first factor weighs heavily against admitting proposed Contention

---

2/ Intervenors seek to imply that their erroneous assumption that Contention 11 embraced the subject matter of proposed Contention 20 serves as good cause. May 30th Pleading at 3. As shown in Section II.A. supra, there is no valid basis for such an assumption.

20. As demonstrated below, Intervenors have made no "compelling showing" on the other four factors, so the proposed contention should be rejected.

2. Factors Two and Four--Other Means and Other Parties to Protect Intervenors' Interests

Applicants concede that factor two, the 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 late-filed Contention 20. See 10 C.F.R. § 2.714(a)(1)(ii) and (iv); Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1173 (1983). Applicants note, however, that both factors two and four are entitled to less weight than the other three factors. See, e.g., Enrico Fermi, ALAB-707, 16 NRC at 1767. Thus, the balance is not affected significantly by the fact that there is no other forum or other party to advance effectively Intervenors' proposed contention.

3. Factor Three--Developing a Sound Record

The third factor is the extent to which the Intervenors' participation may assist in developing a sound record. 10 C.F.R. § 2.714(a)(1)(iii). Applicants assert that, on balance, the Intervenors have not made a meaningful contribution to this proceeding. Although Intervenors presented in their case-in-chief six witnesses with prefiled testimony, plus thirteen subpoenaed rebuttal witnesses, Applicants do not view the testimony elicited by Intervenors as supporting admission of a

new contention and holding additional hearings. This Board has read and heard the testimony presented by the parties, however, and can make its own judgment as to the extent to which the admission of Contention 20 can be expected to lead to the development of a sound record. Applicants view factor three as weighing against the admission of the proposed contention, or at the most, being evenly balanced, favoring neither admission nor rejection of proposed Contention 20.

4. Factor Five--Delay to the Proceeding and Broadening of the Issues

Factor five, the extent to which the proposed contention will broaden the issues or delay the proceeding, weighs heavily against admitting the new contention. See 10 C.F.R. § 2.714(a)(1)(v). The fifth factor is particularly significant at the later stages of a proceeding. The Appeal Board in Greenwood emphasized this:

> We have previously stressed the significance which attaches to the delay factor in striking a balance on all [factors. See Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), ALAB-292, 2 NRC 631, 650-51 (1975); Project Management Corp. (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 394-95 (1976).] Manifestly, the later the petition, the greater the potential that the petitioner's participation will drag out the proceeding.

Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), ALAB-476, 7 NRC 759, 762 (1978) (footnote in brackets).

Intervenors argue that the delay will be minimal should Contention 20 be admitted. May 30th Pleading at 4. This is not the case. Because the only contentions admitted in this

emergency planning proceeding were submitted in July of 1983 and finalized by the Licensing Board in September, Applicants prepared a direct case based on those issues raised for litigation by the ten admitted contentions. The Applicants, like the Board, viewed issues such as are raised by Mr. Riley's testimony on telephonic notification as being beyond the scope of Contention 11 and did not prepare a case on the issues now explicitly delineated by proposed Contention 20. If Applicants were required to prepare a case on this issue delay would result; discovery on this issue, witness preparation, and development of testimony, as well as trial of the issue, would be required.

It is significant that the hearings in this emergency planning proceeding have terminated. At this stage, when the parties are preparing proposed findings of fact on the ten contentions already litigated, delay to the proceeding is inescapable. As the Appeal Board stressed, "the words of the regulation [§ 2.714(a)(1)(v)] refer to delay of the proceeding, not delay to the operation of the facility." Enrico Fermi, ALAB-707, 16 NRC at 1766 (emphasis in original). While Applicants maintain that delay to the operation of the facility could result from admitting proposed Contention 20, this fact is irrelevant when considering factor five. Delay to the proceeding, which is now otherwise completed, will necessarily result from admission of Contention 20. Thus, at this late stage

of the proceeding, factor five weighs heavily against admitting proposed Contention 20. See, e.g., Greenwood, ALAB-476, 7 NRC at 762.

5. A Balancing of the Five Factors Shows that the Proposed Contention Should be Rejected

When the five factors of 10 C.F.R. § 2.714(a)(1) are balanced, it is apparent that the proposed Convention 20 should be rejected by the Board. Good cause for the Intervenors' tardiness has not been demonstrated, so this weighty factor weighs strongly against admitting the contention. The Intervenors have not made the required "compelling showing" on the remaining four factors. Indeed, only two of them, the availability of other means and of other parties to advance their interests, favor admitting the contention. The weight of these two factors, however, is less substantial than that of the other three. The third factor, contribution toward the development of a sound record, either favors Applicants or is equivocal. The final factor, delay to the proceeding and broadening of the issues weighs heavily against admitting proposed Contention 20. The Commission explained in its West Valley decision: "we stress that favorable findings on some or even all of the other factors in the rule [besides good cause] need not in a given case outweigh the effect of inexcusible tardiness." CLI-75-4, 1 NRC at 275. Such is the case here. The balance of all five factors shows that the Intervenors' late-filed proposed Contention 20 should be rejected by the Licensing Board, and the record in the emergency planning proceeding closed as to all issues.

III. Conclusion

Based on the foregoing, Applicants submit that the Intervenors' proposed Contention 20, concerning telephonic notification in southwest Charlotte, has not satisfied the test in 10 C.F.R. § 2.714(a)(1) for late-filed contentions. Accordingly, the proposed contention should be rejected and the record closed on all emergency planning issues.

Respectfully submitted,

J. Michael McGarry, III
Mark S. Calvert
Anne W. Cottingham
BISHOP, LIBERMAN, COOK, PURCELL & REYNOLDS
1200 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 857-9833

Albert V. Carr, Jr.
Ronald V. Shearin
DUKE POWER COMPANY
P.O. Box 33189
Charlotte, NC 28242
(704) 373-2570

Attornies for Duke Power Company, et al.

June 13, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
DUKE POWER COMPANY, et al.	)	Docket Nos. 50-413
	)	50-414
(Catawba Nuclear Station, Units 1 and 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Response To Intervenors' Late-Filed Proposed Emergency Planning Contention 20" in the above captioned matter has been served upon the following by deposit in the United States mail this 13th day of June, 1984.

Morton B. Margulies
Chairman
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Frank F. Hooper
University of Michigan
School of Natural Resources
Ann Arbor, Michigan 48109

Dr. Robert M. Lazo
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

James L. Kelley, Chairman
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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

George E. Johnson, Esq.
Office of the Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Albert V. Carr, Jr., Esq.
Duke Power Company
P.O. Box 33189
Charlotte, North Carolina 28242

Richard P. Wilson, Esq.
Assistant Attorney General
State of South Carolina
P.O. Box 11549
Columbia, South Carolina 29211

Robert Guild, Esq.
Attorney-at-Law
P.O. Box 12097
Charleston, South Carolina 29412

Chairman
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Jesse L. Riley
854 Henley Place
Charlotte, North Carolina 28207

Karen E. Long, Esq.
Assistant Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602

John Clewett, Esq.
236 Tenth Street, S.E.
Washington, D.C. 20003

Bradley Jones, Esq.
Regional Counsel,
Region II
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Palmetto Alliance
2135 1/2 Devine Street
Columbia, South Carolina 29205

Docketing and Service Section
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Don R. Willard
Mecklenburg County
Department of Environmental
Health
1200 Blythe Boulevard
Charlotte, North Carolina 28203

J. Michael McGarry, III