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LBP-84-23

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Herbert Grossman, Chairman
Dr. James H. Carpenter
Dr. Peter A. Morris

In the Matter of	Docket No. 50-416 OLA
MISSISSIPPI POWER & LIGHT COMPANY, et al.	(ASLBP No. 84-497-04 OL)
(Grand Gulf Nuclear Station, Unit No. 1)	June 21, 1984

MEMORANDUM AND ORDER
(Denying Licensees' Motion
for Reconsideration or Certification)

MEMORANDUM

In our Order of April 23, 1984, LBP-84-18, 19 NRC ____, we admitted the Intervenor, Jacksonians United for Livable Energy Policies (JULEP), and two of its contentions. These contentions were understood by this Board to involve amendments to the operating license granting one-time suspensions of certain technical specifications to permit the testing of certain components. These tests have already been performed and, as we

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understood it, were not to be repeated. We admitted these contentions over the objection of Licensees on grounds of mootness, on the basis of the "Sholly Amendment" to Section 189 of the Atomic Energy Act of 1954, enacted in Section 12 of Public Law 97-415 (1982). The amendment was adopted in response to Sholly v. NRC, 657 F.2d 780 (D.C. Cir. 1980) rehearing den., 651 F.2d 792 (1980), vacated 103 S. Ct. 1170, 75 L.Ed. 2nd 423 (1983), in which the Court of Appeals had held that Section 189a of the Atomic Energy Act did not permit the NRC to dispense with a requested hearing on a license amendment even if the Commission had previously made a finding that the modification of license involved "no significant hazards consideration." The new language in Section 189a provided, inter alia, that, where the Commission determines that a license amendment involves no significant hazards consideration, the amendment "may be issued and made immediately effective in advance of the holding and completion of any required hearing." Section 189a(2)(A) (42 U.S.C. § 2239(a)(2)(A)).

We held that this language (and similar language in 10 C.F.R. §§ 2.105(a)(4)(i) and 50.58(b), promulgated under the changes made in the Atomic Energy Act by Public Law 97-415) requires a hearing, if requested, in all cases in which the license amendment has been issued and made effective, notwithstanding that the action permitted under the amendment may have been completed.

Although Licensees objected, on the grounds of mootness, to our admitting those contentions, it now asks us to reconsider our ruling with regard to one of those contentions on those same grounds. (It presently concedes, on factual considerations, that the other contention may not be moot.) In the alternative, in the event that we do not grant the motion for consideration and deny the contention that Licensees object to as moot, Licensees would have us certify the matter to the Appeal Board pursuant to 10 C.F.R. § 2.718(i) or 10 C.F.R. § 2.730(f).

We deny Licensees' motion for reconsideration and decline to certify the matter to the Appeal Board.

Motion for Reconsideration

Licensees have offered no valid reasons for our reconsidering the Order admitting Intervenor's contentions. They have raised no issues beyond those asserted in their initial brief, nor have they cited new information that has become available since we issued our Order. Although their motion argues their point on mootness perhaps more persuasively then their original brief and more thoroughly reviews the legislative history of Public Law 97-415, the NRC Authorization of 1982 which amended Section 189a of the Atomic Energy Act of 1954, it offers nothing new that would form a basis for reconsideration of our Order.

See Nuclear Engineering Company, Inc. (Sheffield, Illinois Low Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5 (1980).

Notwithstanding the lack of basis in Licensees' motion for our reconsidering the prior Order, we would not hesitate to reverse our ruling were we persuaded that we had erred. However, we cannot agree with Licensees' interpretation of the legislative history of Section 12 as evidencing a Congressional intent to permit "irreversible" actions (such as the one-time test permitted here) to remain unreviewed by hearing boards when opposed by a member of the public with the requisite "interest." Our reading of the same Congressional dialogue quoted in Licensees' motion, which accompanied the reporting of the House and Senate bills, brings us to the conclusion that Congress intended that hearings be held if properly requested, even after irreversible actions had been taken upon a finding of no significant hazards consideration. We note in that respect that, although the legislators were apprehensive about irreversible actions being taken under a finding of no significant hazards consideration, none of them suggested that this would foreclose a requested hearing after the fact. Rather, it is clear that they anticipated that a hearing would be held, if requested, even though the practical effects of the contested actions could not be reversed by the licensing board. See, for example, Conf. Rep. to H.R. No. 884, 97 Cong., 2nd Sess. 37-38, reprinted in 1982 U.S. Code Cong. and Ad. News 3603, 3607-08, quoted in Licensees' motion at 13, as follows:

> In those cases [in which license amendments have been taken that have irreversible consequences], issuing the order in advance of a hearing would, as a practical matter, foreclose the public's right to have its views considered. In addition, the licensing board would often be unable to order any substantial relief as a result of an after-the-fact hearing. [Emphasis added.]

Obviously, the conferees considered that a hearing would be held even if, as a practical matter, no substantial relief could be granted.

Moreover, if legislative history is invoked, even in the face of the plain meaning of the statute and Commission regulations promulgated thereunder which appear to require hearings if requested, the language in the Senate report (S. Rep. No. 113, 2nd. Sess. 14, reprinted in 1982 U.S. Code Cong. and Ad. News 3592, 3598) should be dispositive, as follows:

> [T]he Committee stresses its strong desire to preserve for the public a meaningful right to participate in decisions regarding the commercial use of power. Thus, the provision [permitting a license amendment in advance of hearing if it involves no significant hazards consideration] does not dispense with the requirement for a hearing, and the NRC, if requested, must conduct a hearing after the license amendment takes effect. [Emphasis added.]

We see no way of reconciling Licensees' position that the Licensing Board can refuse a hearing because the action is irreversible, with the strong Congressional language to the contrary. And, having decided that Congress intended to, and did, require hearings if requested after a

license amendment has been granted on a no significant hazards consideration determination, we need not further determine in this proceeding how that legislation impacted upon preexisting Section 189b of the Atomic Energy Act of 1954, as amended (42 U.S.C. § 2239(b)), which permits judicial review of hearing board determinations, as Licensees would have us do.

Motion for Referral for Certification

In the event that this Board decides their motion for reconsideration adversely to Licensees, Licensees request that we certify or refer the matter to the Appeal Board pursuant to 10 C.F.R. § 2.718(i) or 10 C.F.R. § 2.730(f). However, the matters in question do not meet the standards for certification or referral.

The grant of a request for certification is an exception to the Commission's general rule against interlocutory appeals and is to be resorted to only in "exceptional circumstances". Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-382, 5 NRC 603, 606 (1977), citing Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 486 (1975). Thus, almost without exception in recent times, discretionary interlocutory review is undertaken only where the ruling below either (1) threatens the party adversely affected with immediate and serious irrevocable impact which, as a practical

matter, could not be alleviated by a later appeal; or (2) affects the basic structure of the proceeding in a pervasive or unusual manner. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-737, 18 NRC 168, 171 (1983).

As Licensees now concede (Motion at 2), one of the two contentions admitted by us may not be factually moot, and could not be successfully challenged as being inadmissible. Consequently, to the extent that Licensees challenge our prior Order, it had the effect of including a contention in this proceeding in addition to one properly admitted. We do not understand established precedent in the NRC to consider the erroneous admission of a contention, where a hearing may be required in any event, as either affecting the basic structure of the proceeding in a pervasive or unusual manner or as causing an irreparable impact which cannot be alleviated by a later appeal. See, e.g., Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105 (1982).

Moreover, while it is possible that the Licensing Board's interpretation of the Sholly Admendment to Section 189a of the Atomic Energy Act, supra, may escape review in this proceeding, the

precedential value of our decision will be negligible if our reasoning can be shown in any later proceeding to have been in error.

ORDER

For all of the foregoing reasons and based upon a consideration of the entire record in this manner, it is, this 21st day of June, 1984

ORDERED

1. That Licensees' motion for reconsideration of our Order admitting Intervenor and two of its contentions is denied; and

2. That Licensees' alternative motion for certification or referral to the Appeal Board is denied.

FOR THE ATOMIC SAFETY AND LICENSING BOARD

Herbert Grossman, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland.