

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND
LICENSING BOARD

DOCKETED
USNRC

'84 AGO 23 A11:22

IN THE MATTER OF
PUBLIC SERVICE ELECTRIC
AND GAS CO., et al.,

(Hope Creek Generating
Station Unit 1)

DOCKET NO. 50-354-OL

INTERVENOR'S PETITION FOR ADDITIONAL
TIME WITHIN WHICH TO MAKE EXPERT
WITNESSES AVAILABLE FOR DEPOSITIONS

Preliminary Statement

On July 31, 1984, the Department of the Public Advocate of the State of New Jersey, the intervenor in the Hope Creek Generating Station's operating license proceeding, received a motion from the applicant entitled "Applicant's Motion to Compel Designation of Witnesses and Their Availability of Depositions and/or Dismiss the Proceeding." In this motion, the applicant requested that the Licensing Board compel the Public Advocate to disclose the identities of the Public Advocate's expert witnesses on the contentions and require that such individuals be made available for depositions no later than the week of August 13, 1984.

Due to the recent departure of the lead counsel for the Department in this matter, R. William Potter, the Public Advocate requested an extension of time to respond to Applicant's motion.

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On August 10, 1984, the Atomic Safety and Licensing Board denied the Public Advocate's request for an extension of time and decided applicant's motion on the merits. In its order, the Licensing Board stated that "[t]he Public Advocate of New Jersey will be given to and including August 20, 1984, to identify its witnesses and to make them reasonably available for depositions within two weeks thereafter."

In a separate response filed on this day, the Public Advocate has complied with the Board's order of August 10, 1984, by identifying the expert witnesses that we plan to call at the hearing. While our Department is prepared to make these witnesses reasonably available, we have no control over their schedules which, at the present time, preclude their availability until October 1984. Therefore, with respect to the exact timing of these depositions, the Public Advocate respectfully submits this Petition for additional time within which to make our expert witnesses available for depositions.

Procedural History

In order to fully explain to the Board the Public Advocate's past and present intention to pursue this matter to the best of our abilities, vigorously and expeditiously, it is necessary to supply some background for our request for extension. As this procedural history will demonstrate, our Department has filed timely responses to the applicant's discovery requests, and initiated discovery and motions of our own. Additionally, we have been compelled to expend a large amount of time on the applicant's meritless challenges to the Public Advocate's authority to intervene in these proceedings. We respectfully submit that the past history of the Public Advocate's involvement reflects a good faith effort to respond

appropriately to the Board's orders and to prepare this case in a manner that will ensure the full and fair assessment of the intervenor's contentions at the operating licensing hearing.

1. The Public Advocate's Intervention in the Hope Creek OL Proceeding:

On August 10, 1983, the NRC published a notice in the Federal Register stating that the NRC will consider the issuance of a facility operating license for the Hope Creek Generating Station, Unit 1. 48 Fed. Reg. 36357 (1983). The notice further stated that by September 9, 1983, the applicants, PSE&G and Atlantic City Electric Company, may request an operating license hearing or any interested person may file a petition to intervene. 48 Fed. Reg. 36458 (1983).

On September 9, 1983, the Department of the Public Advocate filed a motion with the NRC to hold a public hearing and to admit the Public Advocate as a party-intervenor in the operating license proceeding for Hope Creek. (Aa-4).

On September 24, 1983, the applicant, PSE&G, filed an answer opposing the Public Advocate's intervention motion. PSE&G claimed that the Public Advocate lacked the legal authority under this Department's enabling statute to participate in the NRC proceeding. In addition, PSE&G argued that the Public Advocate failed to satisfy the NRC's requirements for intervention. (Ra-1). See 10 C.F.R. §§2.714 and 2.715.

The NRC staff reviewed the Public Advocate's motion and filed its response with the NRC Atomic Safety and Licensing Board on September 29, 1983.* The NRC staff noted that the Public Advocate was the only party to file a request to intervene, and that no operating license hearing

* The NRC staff filed its response to the Public Advocate's intervention petition pursuant to 10 C.F.R. §2.714(c).

would be scheduled but for his intervention and hearing requests. See, 10 C.F.R. §2.714(a)(1). The staff found that the Public Advocate identified several issues, such as quality assurance and emergency planning, which could form contentions sufficient to trigger an operating license hearing. See, 10 C.F.R. §§2.714(a)(2), 2.714(b). Accordingly, the NRC staff concluded that an operating license hearing should be scheduled, and the Public Advocate should be admitted as a party-intervenor provided that suitable contentions were framed within applicable time limits (Ra-28-29). 10 C.F.R. §2.714(b).

On October 5, 1983, the NRC Atomic Safety and Licensing Board granted the Public Advocate's petition to intervene, instructed the Public Advocate to file a supplement to his petition, and scheduled a special prehearing conference on November 22, 1983. The Atomic Safety and Licensing Board concluded that the Public Advocate's intervention petition adequately pleaded the interest, status, and authority of the Public Advocate in this operating license proceeding under both 10 C.F.R. §§2.714 and 2.715. (Ra-36).

The Atomic Safety and Licensing Board stated in its opinion that it was not the proper forum to resolve the practice and procedure of the Department of the Public Advocate pursuant to New Jersey statutes. Rather, the Atomic Safety and Licensing Board indicated that any challenge to the authority of the Public Advocate under New Jersey Law should be pursued in the appropriate state court. (Ra-36).

2. Applicants' Collateral Proceeding Challenging the Public Advocate's Authority

On October 5, 1982, PSE&G filed a notice of appeal from the Public Advocate's decision to intervene and a motion for summary disposition in

the Superior Court of New Jersey, Appellate Division. Essentially, PSE&G contended in this collateral proceeding that the Department of the Public Advocate Act of 1974, N.J.S.A. 52:27E-1 et seq., did not give the Public Advocate the authority to intervene before federal administrative agencies. On November 2, 1983, the Appellate Division denied PSE&G's motion for summary disposition.

On December 1, 1983, the Public Advocate filed for summary disposition in his favor. On December 22, 1983, the Superior Court of New Jersey, Appellate Division, denied this motion as well.

After both parties presented oral argument, the Superior Court of New Jersey, Appellate Division held on August 7, 1984, that the Public Advocate had ample authority to represent the safety and environmental interests of New Jersey citizens before the Atomic Safety and Licensing Board of the NRC. Public Service Electric and Gas Co. v. Joseph H. Rodriguez, Docket No. A-572-83T3 at 7 (App. Div. August 7, 1984). The Court further stated that the Public Advocate's intervention was "clearly . . . justified by the very apparent public interest in nuclear energy matters which deserve representation." Id. at 7.

On August 20, 1984, the Public Advocate received notice that PSE&G is petitioning the Supreme Court of New Jersey for certification of the Appellate Division's decision.

3. The Public Advocate's Contentions

On November 7, 1983, the Public Advocate made a timely pleading of ten contentions relating to the operating license proceeding for the Hope Creek Generating Station. Enclosed with this filing was a memorandum of law in support of the contentions.

On November 22, 1983, the Atomic Safety and Licensing Board held a special prehearing conference to consider the Public Advocate's contentions. On December 21, 1983, the Atomic Safety and Licensing Board issued a special prehearing conference order in which they found four of the Public Advocate's contentions to be viable contentions set forth with sufficient specificity. These contentions concerned the ability of the plant's recirculation piping to withstand stress corrosion cracking, the ability of PSE&G's management to operate the nuclear power plant in a safe manner, the environmental qualifications of certain safety-related equipment, and the environmental effect of salt disposition from the Hope Creek cooling tower. The Board admitted this last contention in view of new hydrogeological studies that a representative of Delaware brought to the Board's attention.

After the experts identified by the State of Delaware were deposed, the Public Advocate acknowledged that these experts knew of no significant new information on the long-term ecological effects on cropland and groundwater due to salt depositions from the Hope Creek cooling tower. Accordingly, the Public Advocate demonstrated his interest in narrowing the scope of these proceedings to meritorious issues by consenting to a withdrawal of the cooling tower contention.

4. The Parties' Discovery

On January 4, 1984, the Public Advocate received the Applicant's Preliminary Set of Initial Interrogatories and Request for Production of Documents. On January 18, 1984, the Public Advocate responded to this first wave of discovery. In this discovery request, the applicant requested, among other things, that we identify our expert witnesses on our four contentions. The Public Advocate responded to this request in a full

and prompt manner. As to contentions one through three, we stated that we would identify our expert witnesses as soon as we complete the consultant selection and contract negotiation process. As to contention four, the Public Advocate identified our two expert witnesses.

On January 24, 1984, the Public Advocate received the Applicant's First Set of interrogatories and Request for Production of Documents. On March 28, 1984, the Public Advocate fully responded to this set of interrogatories.

On January 27, 1984, the NRC staff submitted its First Set of Interrogatories to the Public Advocate. We fully responded to these interrogatories on April 16, 1984.

On January 30, 1984, the Public Advocate submitted his First Set of Interrogatories and Request for Production of Documents to the Applicants. On February 14, 1984, the Applicant sent us its response to our interrogatories and request for documents.

On February 14, 1984, the Public Advocate received from the applicant a notice to depose Commissioner Joseph H. Rodriguez, the Public Advocate for the State of New Jersey. In response, on February 27, 1984, the Public Advocate filed a motion for this Board to vacate the applicants' notice of deposition and to grant a protective order declaring that Commissioner Rodriguez is not subject to compulsory testimony absent a clear showing of necessity.

The applicants then applied on March 13, 1984, to this Board for a subpoena to order that Commissioner Rodriguez appear for a deposition. This subpoena was issued on March 15, 1984. In response, the Public Advocate filed a motion to quash the applicants' subpoena and a lengthy brief in support of his motion. The applicants then answered the Public

Advocate's Motion to Quash by stating that they no longer desired to subject Commissioner Rodriguez to a deposition. (Applicants' Answer to the Public Advocate's Motion to Quash Subpoena at 4.)

5. The Parties' Motion Practice

At the same time that the parties were engaging in the above discovery, the Public Advocate and the applicant were also submitting motions to this Board in order to advance their interests in this operating license proceeding.

On November 8, 1983, the Public Advocate filed motions for (1) Judge James Carpenter to disqualify or recuse himself, (2) Judge Peter Morris to disclose further biographical information, and (3) for the Board to postpone the special prehearing conference until these motions are resolved. Judge Carpenter denied our motion for disqualification or recusal, Judge Morris granted our motion for more information, and the third motion became moot.

In a January 25, 1984, order, the Atomic Safety and Licensing Appeal Board reversed Judge Carpenter's ruling and held that Judge Carpenter should have recused himself. Accordingly, the Appeal Board directed that another member of the Licensing Board Panel be appointed to serve on this Licensing Board.

As mentioned earlier in this procedural history, the Public Advocate filed a motion on February 27, 1984, for this Board to vacate the applicant's notice to depose Commissioner Rodriguez and another motion on March 13, 1984, for this Board to quash a subpoena which ordered that Commissioner Rodriguez appear for a deposition.

On April 12, 1984, the applicants submitted a motion to dismiss the operating license proceeding due to a lack of bases behind the contentions. The Public Advocate filed a brief on April 30, 1984, which vigorously opposed the applicants' motion. On June 19, 1984, this Board denied applicants' motion to dismiss the proceeding stating that "this Board has already ruled that contentions 1, 2, and 3 are admissible and that they set forth sufficient bases to open discovery thereon." (Order of June 18, 1984 Denying Applicants' Motion to Dismiss Proceeding at 2.)

On July 31, 1984, the Public Advocate received a motion from the Applicants to compel the designation of witnesses and their availability for depositions and/or to dismiss the proceeding. On August 10, 1984, this Board granted applicants' motion and held that "[t]he Public Advocate of New Jersey will be given to and including August 20, 1984, to identify its witnesses and to make them reasonably available for deposition within the two weeks thereafter."

The above history portrays a consistent effort on the part of the Public Advocate to be fully responsive to the interests of the Board in the prompt hearing of this matter while diligently ensuring that the meritless diversionary tactics of the applicant are properly addressed and the public interest of New Jersey citizens is amply protected.

Argument

The Public Advocate acknowledges that an Atomic Safety and Licensing Board has broad discretion "to regulate the course of the hearing and the conduct of the participants." 10 C.F.R. §§2.718(e) and 2.721(d); see, In the Matter of Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), L.B.P.-81-22, 14 N.R.C. 150, 154 (1981). In

particular, an Atomic Safety and Licensing Board has the power to "order depositions to be taken." 10 C.F.R., §§2.718(d) and 2.722(d).

However, as the Licensing Board stated in In the Matter of Philadelphia Electric Co., (Limerick Generating Station, Units 1 and 2), L.B.P.-82-72, 16 N.R.C. 968 (1982), if a particular time-frame is onerous, an intervenor should request in advance the Board's permission to obtain an extension and should explain its reasons for such an extension. Id. at 972-73. In the present proceedings, the Public Advocate respectfully submits three reasons why an extension of time is warranted: (1) the unavailability of our expert witnesses; (2) the pendency of discussions between the applicant and the intervenor on matters relating to the licensing proceeding; and (3) the purpose of discovery and, indeed, the operating licensing proceeding will not be furthered by depositions of expert witnesses who have not had the opportunity to prepare for this case.

As we will explain in detail, our expert's previous commitments make it impossible for them to be available for depositions until October 1984.

First, the schedules of our expert witnesses precluded them from being available until October 1984.

Gregory Minor

During the week of August 20, 1984, and August 27, 1984, Mr. Minor will be involved in Shoreham Emergency Planning hearings in New York. Mr. Minor anticipates that the hearings will go from 9:00 A. M. to 5:00 P. M. each day. He also anticipates preparing for the next day of Shoreham hearings during the evenings and on the occasional days when hearings are not scheduled. During the week of September 3, 1984, and September 10, 1984, Mr. Minor will be in St. Thomas in the Virgin Islands involved in a rate arbitration hearing before the Public Utility

Commission. While Mr. Minor might have some time to commence his review of materials on the Hope Creek operation license matter during this time, he will not have an adequate opportunity to prepare for the instant case until the week of September 17, 1984.

Richard Hubbard

From August 17, 1984, until August 26, 1984, Mr. Hubbard is on vacation. On August 27, 1984, he flies to Illinois to prepare for a licensing case. On August 28, 1984, Mr. Hubbard is involved in a licensing matter before the N.R.C. regarding the Illinois Power, Clinton Nuclear Station Corporation. On August 29, 1984, and August 30, 1984, Mr. Hubbard will be in Washington preparing for another case, working with witnesses and finalizing cross-examination plans. On August 31, 1984, he will be in his office preparing testimony with Dale Bridenbaugh for a rate case involving the Houston Light and Power Company before the Texas Public Utilities Commission. This testimony is due September 7, 1984. On September 4, 1984, Mr. Hubbard will be traveling to Long Island, New York, and will prepare for a hearing on the Shoreham nuclear plant. From September 5, 1984, until September 28, 1984, Mr. Hubbard will be presenting testimony, assisting counsel in cross-examination, and preparing for the case regarding the Shoreham nuclear facility.

Dale Bridenbaugh

Mr. Bridenbaugh is now in Norway on vacation. He is expected to return from Europe on August 27, 1984. From August 27 to 31, 1984, Mr. Bridenbaugh will be preparing testimony on pipe cracks for the Pennsylvania Office of Consumer Affairs involving the Peach Bottom Nuclear Station. From August 27 to September 7, 1984, he will be preparing testimony for a case before the Texas Public Utilities Commission

concerning the Houston Light and Power Company. From September 7 to 24, 1984, Mr. Bridenbaugh will be preparing for two cases -- one concerns the Peach Bottom Nuclear Station, and the other concerns a proceeding on the Clinton nuclear plant before the Illinois Commerce Commission. The hearing for both the Peach Bottom case and the Clinton case will be held during the week of September 24, 1984.

Mr. Hubbard and Mr. Bridenbaugh anticipate that they will have little, if any, time to begin review of materials relating to the Hope Creek Station during their heavy schedules in late August and September. They will first be able to prepare for this licensing proceeding at the beginning of October 1984.

As is evidenced from the heavy schedule and other commitments of our three experts, the Public Advocate respectfully requests that the time for depositions which are detailed above be extended until the month of October 1984.

Second, the Public Advocate of New Jersey, Joseph H. Rodriguez, recently received a letter, dated August 14, 1984, from Mr. R. Edwin Selover, the Vice President and General Counsel of Public Service Electric and Gas Company. In this letter, Mr. Selover requests an opportunity to sit down with Commissioner Rodriguez to engage in discussions relating to the operating licensing proceeding. This letter was followed by a telephone call on August 16, 1984 from Mr. Sonn, the Chief Executive Officer of Public Service Electric and Gas Company. Mr. Sonn also expressed his desire to discuss the Hope Creek matter with Commissioner Rodriguez. Based on these initiatives, the Public Advocate has agreed that he would be interested in opening discussions to pursue the possibility of resolving the health, safety, and environmental concerns of New Jersey citizens.

However, because of Commissioner Rodriguez' and Mr. Sonn's vacation schedules, it is not possible for this discussion to take place within the next two weeks. In light of the applicant's overture to the Public Advocate, the Licensing Board might consider whether the time and expense of further discovery, including depositions, should be avoided until discussions have occurred between the intervenor and the applicant. In any event, the Public Advocate submits that this potential for fruitful discussions between the applicant and the intervenor provide an additional reason why an extension of time would be in the best interests of the parties to this case. Cf., In the Matter of Commonwealth Edison Co., (Byron Station, Units 1 and 2), L.B.P.-81-30A, 14 N.R.C. 364, 374 (1981).

Finally, even assuming our experts would find a few free hours within the next two weeks to familiarize themselves with some of the materials in this case, their depositions not be helpful or useful in furthering the goals of this proceeding since they would be conducted so soon after we engaged our expert witnesses.

As this Board recognized in its Special Prehearing Conference Order:

The purpose of discovery is to . . . disclos[e] information in the possession of the parties which is relevant to the subject matter involved in the proceedings so that issues may be narrowed, stipulated, or eliminated and so that evidence to be presented at hearing can be stipulated or otherwise limited to that which is relevant.

Public Service Electric & Gas Co., (Hope Creek Generating Station), Docket No. 50-354-OL, "Special Prehearing Conference Order" at 19, incorporating by reference the rules set forth in Texas Utilities Generating Co., (Comanche Peak Steam Electric Station, Units 1 and 2), L.B.P.-31-22, 14 N.R.C. 150, 154-57 (1981). At this time, our expert

witnesses are only able to testify as to their general expertise on the subject areas of our contentions and as to what information they must obtain and examine in order to prepare for the operating license hearing in this case. Unless they have additional time to familiarize themselves with the peculiarities of this case, they will not be in a position to provide specific testimony on the Hope Creek Generating Station. Therefore, unless an extension of time is granted, the parties to this action will not be in a position to utilize the depositions, to narrow, stipulate, or eliminate issues in this case. Nor will the experts be in a position to disclose information which is uniquely relevant to the subject matter of this case.

Furthermore, licensing boards have recognized that schedules will not be expedited if to do so would "compromise the Commission's fundamental commitment to a fair and thorough hearing process." In the Matter of Duke Power Co., (Catawba Nuclear Station, Units 1 and 2), L.B.P.-83-8A, 17 N.R.C. 282, 286 (1983), citing, Commission Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 N.R.C. 452, 453 (1981). The Public Advocate submits that an extension of time would result in a more fair and thorough hearing, since the experts will be provided with an adequate opportunity to familiarize themselves with the intervenor's contentions.

An extension of time would also be consistent with the action of other licensing boards. In the case In the Matter of Consolidated Edison Co. of New York, (Indian Point, Unit 2), LBP-82-12A, 15 N.R.C. 515 (1982), the licensing board altered the timing of its consideration of motions since such an alteration was necessary "to assure that there will be no time and effort wasted in irrelevant discovery." Id. at 518. Similarly, a licensing board in In the Matter of Duke Power Co., Catawba Nuclear

Station, Units 1 and 2), LBP-83-8A, 17 N.R.C. 282 (1983), refused to accelerate the scheduling of the case since a licensing board should schedule matters based, in part, on the parties' availability of necessary information and on the need to provide an adequate opportunity for a fair and thorough hearing. Id. at 286. Likewise, in In the Matter of Wisconsin Electric Power Co., (Point Beach Nuclear Plant, Units 1 and 2), LBP-81-46, 14 N.R.C. 862 (1981), a licensing board acknowledged that the time schedule in that case caused special difficulties for the intervenors and restricted the applicant's discovery in order that the intervenors could adequately prepare for the operating license hearing. Id. at 863.

In the instant case, an extension of time in which to produce the Public Advocate's experts will also be necessary to assure that our experts can obtain the necessary information, prepare for depositions, and set the groundwork for a fair and thorough hearing. In this way, an extension would guarantee that "no time and effort [is] wasted in irrelevant discovery." In the Matter of Consolidated Edison Co. of New York, (Indian Point, Unit 2), supra, at 518).

However, an extension should not delay the hearing in this matter because the Public Advocate will actively pursue all other means of discovery available during the next several weeks. An extension would ensure that the time and resources of the applicant and the intervenor can be focused on developing this case in an appropriate manner for presentation to the Board.

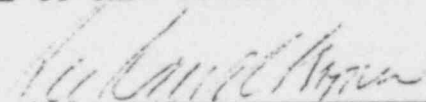
Requested Relief

For all the above reasons, the Public Advocate requests an extension of time in which to produce its experts for depositions. Due to our experts' heavy schedules, the parties' interest in opening discussions in this case, and the need to have adequate time to prepare for meaningful and productive depositions, the Public Advocate respectfully requests that depositions be scheduled in this matter during the month of October.

Respectfully submitted,

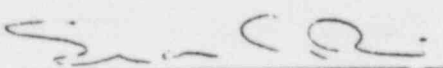
JOSEPH H. RODRIGUEZ,
PUBLIC ADVOCATE OF THE
STATE OF NEW JERSEY

By:


Richard E. Shapiro

Director

Division of Public Interest Advocacy


Susan C. Remis

Assistant Deputy Public Advocate

Dated: August 20, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

Before the Atomic Safety and Licensing Board

'84 AGO 23 A11:22

PUBLIC SERVICE ELECTRIC
AND GAS COMPANY (HOPE
GENERATING STATION) :

Docket No. 50354OL-CREEK
OFFICE OF SECRETARY
U.S. NUCLEAR REGULATORY COMMISSION
BRANCH

CERTIFICATE OF SERVICE

I hereby certify that copies of "Intervenor's Petition for Additional Time Within Which to Make Expert Witnesses Available for Depositions," dated August 20, 1984, in the abovecaptioned matter, have been served upon the following by deposit in the United States mail on this 20th day of August, 1984:

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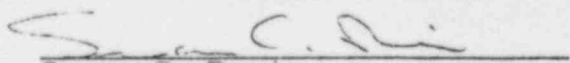
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Dated: August 20, 1984