UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Christine N. Kohl, Chairman
Dr. W. Reed Johnson
Howard A. Wilber

December 12, 1984
(ALAB-792)

In the Matter of	
LOUISIANA POWER & LIGHT COMPANY	Docket No. 50-382 OL
(Waterford Steam Electric Station, Unit 3)	

MEMORANDUM

On November 8, 1984, Joint Intervenors filed their most recent of several motions to reopen the record in this operating license proceeding. The motion, which concerns primarily quality assurance at the Waterford facility, proposes the admission of three new contentions. In its reply to the motion, applicant argues that we lack jurisdiction to rule on the motion and urges that we dismiss it. Applicant's Answer (Nov. 30, 1984) at 4-6.

Joint Intervenors' 62-page motion, supported by 62 exhibits, raises important matters that may take several months to resolve.[1] We therefore believe it desirable to advise the parties and Commission, in advance of our merits

[1] In so characterizing the motion, we do not mean to imply any view whatsoever on its merits.

decision on the motion, of our view on the jurisdictional question raised by applicant. For the reasons set forth below, we have concluded that we have jurisdiction over the motion.[2]

A. A brief synopsis of the procedural background and current posture of this case is a prerequisite to our discussion of why we have jurisdiction over Joint Intervenors' latest motion.

In ALAB-732, 17 NRC 1076 (1983), we considered Joint Intervenors' appeal from the Licensing Board's principal partial initial decision, which concerned mostly emergency planning and synergism issues. We affirmed the Board's decision. The Commission declined to review ALAB-732, and our disposition of the matters addressed there became "final agency action" on September 7, 1983. Memorandum from S.J. Chilk to Board and Parties (Sept. 14, 1983). There were no perfected appeals from the Licensing Board's second and last partial initial decision, which dealt solely with applicant's emergency planning brochure. Before we

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[2] We have reached this conclusion without the benefit of the views of the NRC staff and Joint Intervenors. As for the latter, because they filed their motion before us, it is safe to assume they would agree with our view of jurisdiction. As for the staff, it may or may not have planned to address the jurisdictional issue in its forthcoming reply, due December 21. We believe that, on balance, however, it is better for us to state our view of

(Footnote Continued)

completed our customary sua sponte review of that decision, however, Joint Intervenors filed two motions to reopen the record. One concerned the adequacy of the concrete basemat on which the facility rests, and the other sought to relitigate the synergism issue. In ALAB-753, 18 NRC 1321 (1983), we denied the first motion, found we had no jurisdiction to rule on the second, and completed sua sponte review of the last Licensing Board decision in this proceeding.[3]

Several days after issuing this decision, we received an amendment to Joint Intervenors' motion to reopen on the basemat issue. This filing apparently crossed ALAB-753 in the mail. No party contested our jurisdiction to rule on this pleading, and it was thus treated by all as a new motion to reopen on the adequacy of the basemat. Although applicant replied to the motion in January 1984, preparation of the staff's reply (including work at the site) consumed many months and it was not filed until this past August. After reviewing the motion papers then before us, we determined that still more information from the staff was necessary before we could finally rule on the basemat

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(Footnote Continued)
our own jurisdiction as promptly as possible rather than to await the staff's possible comments.

[3] The Commission has not yet determined if it will review ALAB-753.

motion. ALAB-786, 20 NRC __ (Oct. 2, 1984). The staff's answers to the questions we posed in ALAB-786 are now due December 17. In the meantime, Joint Intervenors have filed their latest motion to reopen on quality assurance. It is our jurisdiction over this motion that applicant challenges.

B. The confusing procedural circumstances of this proceeding, outlined above, present a situation not previously encountered by an appeal board. Although there are several decisions from which we can borrow useful guidance, none is directly on point. Applicant argues that, in general, we lose jurisdiction over a motion to reopen once we have reviewed and affirmed the decisions of the licensing board below. Because our review of the Licensing Board's decisions in this case was complete with the issuance of ALAB-753, applicant contends that we no longer have jurisdiction over the motion to reopen on the quality assurance contention. Applicant distinguishes the motion to reopen on the basemat because the original motion on that subject was filed in July 1983, before our review of the Licensing Board's last decision was completed. Thus, in applicant's view, we have relinquished jurisdiction over this case for all purposes, save one -- the adequacy of the basemat. And, according to applicant, that has no reasonable relationship to the three quality assurance contentions Joint Intervenors now seek to raise through

their November 8 motion to reopen. Applicant concludes that we must dismiss the motion.

Applicant does not suggest what would be the proper forum for the consideration of the matters raised by Joint Intervenors' motion, if it is not this Board. Because it cannot seriously be argued that no forum exists, the obvious alternative is a petition filed under 10 C.F.R. § 2.206 with the Director of Nuclear Reactor Regulation (NRR). The question before us here, then, is whether the matters raised by Joint Intervenors' quality assurance motion should be resolved within the scope of this adjudicatory proceeding or presented to NRR for more informal disposition.

As noted above, we have addressed somewhat similar issues on numerous prior occasions. The lessons of these decisions are clear. If we have previously considered an issue and (by either the action or inaction of the Commission) our determination amounts to final agency action on that issue, we have no jurisdiction over a subsequent attempt to raise that matter once again. Such requests are, in general, more properly directed to NRR. This is true despite the fact that other issues in the same proceeding may still be pending before us. On the other hand, when an issue sought to be considered anew, or to be reconsidered, has a reasonable nexus to the discrete matter still pending before us, we have jurisdiction over it. See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1

and 2), ALAB-782, 20 NRC __, __ (Sept. 6, 1984) (slip opinion at 3-6); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-766, 19 NRC 981, 983 (1984); ALAB-753, supra, 18 NRC at 1329-30; Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-579, 11 NRC 223, 224-26 (1980); Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-551, 9 NRC 704, 705-09 (1979); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-530, 9 NRC 261, 262 (1979); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-513, 8 NRC 694, 695-96 (1978).

The matters raised by Joint Intervenors' motion to reopen on quality assurance have not been previously addressed by either the Licensing Board or us, or by the Commission. And, as in the case of each of the decisions cited above, one issue still commands our attention. The fact that that pending inquiry into the adequacy of the concrete basemat arose from a motion to reopen, rather than from an appeal from a Licensing Board decision, is of no moment to the jurisdictional query posed by applicant. As we stated in North Anna, supra, 9 NRC at 709, "the decisive factor is whether, except for those limited issues as to which jurisdiction has been expressly retained, the case has been decided." Moreover, it is not the specific legal mechanism that has occasioned our continued involvement with

the proceeding, but rather the nature of our involvement that is determinative.[4]

Our inquiry is thus reduced to whether there is a reasonable nexus between Joint Intervenors' pending basemat motion and their latest motion to reopen on quality assurance. Although the latter motion is substantially broader, there is a clear overlap insofar as Joint Intervenors allege quality assurance deficiencies in connection with the construction of the basemat. See, e.g., Joint Intervenors' Motion to Reopen (Nov. 8, 1984) at 39-44. Further, resolution of certain of the concerns raised by the staff in the so-called Eisenhut Letter of June 13, 1984, will be pertinent to our disposition of both motions to reopen. See ALAB-786, supra, 20 NRC at __ (slip opinion at 8-11). In this circumstance, we have no hesitation in

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[4] In North Anna, supra, 9 NRC at 708, we stated that "once an appeal board has wholly terminated its review of an initial decision . . . its jurisdiction over the proceeding comes to an end." See also ALAB-753, supra, 18 NRC at 1330 n.14. Applicant places undue stress on the references to initial decisions in these opinions, suggesting that the pendency of a licensing board decision before us is the sine qua non to our continued involvement. But neither case contemplates such a mechanical approach. The focus is on whether and what issues remain before us, not how they got there. North Anna, supra, 9 NRC at 708, 709. Indeed, in North Anna, we had not yet completed sua sponte review of the proceeding when a staff Board Notification triggered our further unsolicited inquiry into yet another matter. Id. at 705-06. Surely a party's pending motion to reopen gives us no less a tie to an adjudication than sua sponte review of a licensing board decision.

finding "a rational and direct link" between the two motions so as to confirm our jurisdiction. St. Lucie, supra, 11 NRC at 226.

We conclude that we have jurisdiction over the November 8, 1984, motion to reopen filed by Joint Intervenors.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board