

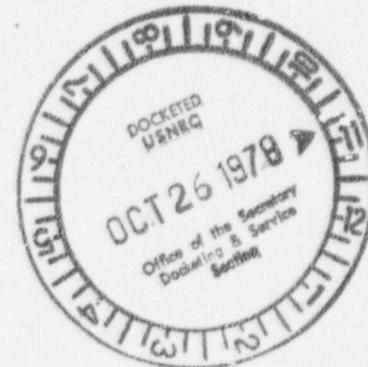
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UNITED STATES OF AMERICA
 NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
 PUBLIC SERVICE COMPANY OF OKLAHOMA,)
 ASSOCIATED ELECTRIC COOPERATIVE, INC.)
 AND)
 WESTERN FARMERS ELECTRIC COOPERATIVE)
)
 (Black Fox Station, Units 1 and 2))

Docket Nos. STN 50-556
 STN 50-557



NRC STAFF RESPONSE TO INTERVENOR'S
 MOTION FOR DIRECTED CERTIFICATION

I. Introduction and Background

On September 19, 1978, Intervenors filed a Motion to Compel Further Supplementation of the NRC's Safety Evaluation Report (SER) and to Continue the Evidentiary Hearing on Health and Safety Issues Pending Such Supplementation. Intervenors argued that the NRC Staff's Safety Evaluation Report did not comply with the standards set forth by the Appeal Board in Gulf States Utility Company (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760 (1977). Intervenors requested that the health and safety hearings which began on October 10, 1978 be continued until such time as the SER is amended to comply with the River Bend standard. Intervenors alleged that compliance with River Bend was necessary before the safety hearings in this case proceed further, in order that the Intervenors might more clearly perceive the

pertinent safety questions raised by the Task Action Plans. Intervenor's Motion at 2.

On September 25, 1978, the NRC Staff submitted the pre-filed 56-page testimony of Messrs. Aycock, Crocker and Thomas on Generic Safety Issues. On September 29, 1978, the Licensing Board issued an order denying Intervenor's Motion to Supplement. The Licensing Board indicated that the Staff could comply with the River Bend criteria by supplying the requested generic safety information not only in an SER but also on the record in the Black Fox evidentiary hearing. ASLB Order of September 29, 1978, at 2. Accordingly, the Licensing Board held that the adequacy of the River Bend material would be decided based on the evidentiary record.

In the same vein, in its earlier September 8, 1978 Order on Summary Disposition Motions, the Licensing Board had also posed questions to be answered by the parties at the safety hearings as to the effect of uncompleted Task Action Plans and ACRS investigations on Black Fox Station litigated contentions. The Licensing Board determined that, until it heard testimony in cross-examination on these questions, it could not determine whether the information being furnished was sufficient to enable it to make the safety findings required at the construction permit level. ASLB September 29, 1978 Order at 2. The Licensing Board stated that if it should later conclude that the information is insufficient, it would require that further information be presented. Id.

Intervenors now seek Directed Certification of the issue of the Board's denial of supplementation of the Black Fox Station SER under 10 CFR §2.718(i).^{1/} In this motion, Intervenors ask that the Licensing Board continue the radiological health and safety hearings and certify the question of whether the SER (including the Task Action Plans) meets the River Bend standard. Intervenors' Motion at 1. The NRC Staff opposes this Motion for Directed Certification for the reasons listed below.

II. Intervenors are not Entitled to a Continuance of the Health and Safety Hearings: The Issue is Moot.

Since Intervenors' Motion to Continue was renewed at the hearings and the Board granted them the right to conduct discovery and to take up the issue of Task Action Plans at the reconvened safety hearings to be held in December, 1978, this part of the Intervenors' motion is

^{1/} This motion might more properly have been filed under 10 CFR §2.730(f), which sets forth the circumstances under which a presiding officer may refer a question to the Commission. 10 CFR §2.730(f) states:

"...When in the judgement of the presiding officer prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense, the presiding officer may refer the ruling promptly to the Commission, and notify the parties either by announcement on the record or by written notice if the hearing is not in session."

However, since the Appeal Board has determined that the standards for referral and directed certification are the same, in the Matter of Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2) ALAB-271, 1 NRC 478, 483 (1975), Intervenors' choice of §2.718(i) does not create a significant procedural difficulty.

moot. Tr. 4444-4459. By the time the matter goes to hearing, Intervenors will have had over two months to review the Task Action Plan testimony and prepare for hearing. Also, they will have had adequate opportunity to conduct discovery upon the Staff.

III. Intervenors Do Not Meet The Standards For Certification

Certification is the exception, not the rule. Toledo Edison Company (Davis-Besse Nuclear Power Station); the Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), ALAB-300, 2 NRC 752, 759 (1975). According to the Commission's regulations, a presiding officer should only refer questions for certification when an immediate decision is necessary "...to prevent detriment to the public interest or unusual delay or expense." 10 C.F.R. §2.730(f). Appendix A to Part 2 adds the qualification that such question should be major questions of policy, law, or procedure which cannot be resolved except by the Commission or the Appeal Board. 10 C.F.R. Part 2, Appendix A, V(f)(4). The Appeal Board, in applying the standards for certification, has manifested its reluctance to step into a pending proceeding to rule upon a single issue, Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 483 (1975), and have supported the standard set forth above in the NRC's regulations.

In the instant case, the Intervenors have presented no major questions of policy, law or procedure sufficient to warrant certification. Their

objections to the adequacy of the proffered River Bend material and the SER instead seem to turn on whether specific issues of fact should be included in the Staff testimony or in the SER. Thus, in the Motion presently before the Licensing Board, Intervenors have asked for the certification of a question which the Licensing Board felt would better be litigated on the merits of the facts, some of which related to contentions in issue at the hearings. ASLB Order dated September 21, 1978 at 2-3. For this reason, the NRC Staff believes that the Licensing Board correctly pointed out that it was obligated to defer a ruling on the adequacy of the SER until it heard testimony in cross-examination on questions which it posed concerning the Task Action Plans, and very importantly, the ACRS investigations and specific contentions in litigation in this case, the testimony of which might be affected by the TAPS.^{2/} Lacking an adequate factual record for review by the Appeal Board, the NRC Staff believes that the instant motion to direct certification should be denied.

The conclusions stated above are underscored by the fact that Intervenors have not made a showing of what kind of harm will be suffered by the

^{2/} While the River Bend opinion does not so state, the NRC Staff believes that the use of the alternative "evidence" in that opinion means pursuing the issues through the give and take of cross-examination at a contested hearing, thus satisfying any issues of procedural due process. Thus, in the instant case, the NRC Staff believes that a summary finding of inadequacy of the TAPS would be as unjustifiable as a summary finding of adequacy of the TAPS, were the Staff to so request.

public interest, nor have they even specified what the harm will be. They do not cite specific instances of unusual delay or expense. Their sole unsupported claim is that Intervenors will be disadvantaged at the evidentiary hearing if the adequacy of the SER is not predetermined. Lacking such a showing, their motion should be denied.

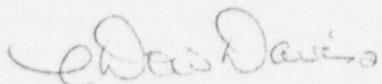
IV. There are no Exceptional Circumstances in the Present Case Sufficient to Warrant Directed Certification.

Intervenors' final argument is that this case presents an exceptional circumstance which would justify the grant of discretionary review by the Appeal Board by certifying the question of the adequacy of the SER to the Appeal Board by this Licensing Board. However, as mentioned above, Intervenors do not state what the exceptional circumstances are in this case. Their motion cites three decisions that deal with the propriety of appellate review of Licensing Boards' evidentiary rulings but none of which support this case since all three of those cases denied certification of evidentiary questions such as presented here. Toledo Edison Company (Davis-Besse Nuclear Power Station, Unit 1), ALAB-314, 3 NRC 98 (1976); Long Island Lighting Company (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-353, 4 NRC 381 (1976); Power Authority of the State of New York (Greene County Nuclear Power Plant), ALAB-439, 6 NRC 640 (October 21, 1977). These cases do not, therefore, support Intervenors' contention that the question of fact concerning the adequacy of the SER is an exceptional circumstance requiring immediate appellate review. Accordingly, the Intervenors' Motion should be denied.

Conclusion

For the reasons discussed above, both Intervenors' Motion for Directed Certification and their request for a continuance of the health and safety hearings should be denied by this Licensing Board.

Respectfully submitted,



L. Dow Davis
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 25th day of October, 1978

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO INTERVENOR'S MOTION FOR DIRECTED CERTIFICATION", dated October 25, 1978, in the above-captioned proceeding, have been served on the following, by deposit in the United States mail, first class, or, as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, this 25th day of October, 1978:

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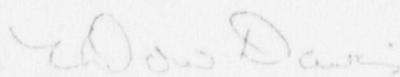
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