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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Alan S. Rosenthal, Chairman
Thomas S. Moore
Howard A. Wilber

March 18, 1988
(ALAB-889)

In the Matter of	
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL.	Docket Nos. 50-443-OL 50-444-OL
(Seabrook Station, Units 1 and 2)	(Offsite Emergency Planning)

Matthew T. Brock, Portsmouth, New Hampshire, for the intervenors, Town of Amesbury, Massachusetts; Town of Hampton, New Hampshire; Seacoast Anti-Pollution League; and New England Coalition on Nuclear Pollution.

Frank W. Ostrander, Boston, Massachusetts, for the intervenor, James M. Shannon, Attorney General of Massachusetts.

Thomas G. Dignan, Jr., George H. Lewald, and Kathryn A. Selleck, Boston, Massachusetts, for the applicants, Public Service Company of New Hampshire, et al.

Sherwin E. Turk for the Nuclear Regulatory Commission staff.

MEMORANDUM

On February 25, 1988, the Town of Amesbury, the Town of Hampton, the Seacoast Anti-Pollution League and the New England Coalition on Nuclear Pollution (hereinafter "intervenors") jointly filed a motion for directed certification of a February 17, 1988 scheduling order of the

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Licensing Board.[1] The Board's order established a schedule designed to bring to a conclusion the litigation of the offsite emergency planning issues in this operating license proceeding.[2] To borrow its language, the issues before that Board are proceeding on three separate "tracks": the first, or "Main Track," consists of all issues involving the New Hampshire Radiological Emergency Response Plan (NHRERP), except sheltering; the second, or "Sheltering Track," includes the sheltering issues involving the NHRERP; and, the third, or "SPMC Track," embraces the issues arising from the applicants' Seabrook Plan for the Massachusetts communities.

In an earlier order issued on February 3, the Licensing Board had fixed a number of filing dates and proposed others for all three tracks. Then, in its February 17 order, the Board changed certain of the dates it had previously set and proposed. For the Main Track, the Board advanced the date established for the applicants' proposed findings of fact

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[1] Because of the time constraints facing the intervenors under the Licensing Board's scheduling order, we directed that all responses to the intervenors' motion be filed expeditiously and, on March 9, we issued an order denying the motion for directed certification. This memorandum sets forth our reasons for denying the motion.

[2] At present, the proceeding is divided between two Licensing Boards. The other Board is presiding over onsite emergency planning and safety issues.

from March 9 to March 2 and, in the SPMC Track, it advanced the previously proposed filing date for the intervenors' contentions from May 6 to April 1. It is this latter change that is the focus of the intervenors' motion. The Board also delayed both the proposed hearing starting date for the Sheltering Track from April 18 to May 2 and the previously set date for filing testimony from March 28 to April 18.

A. The intervenors seek interlocutory review of the Licensing Board's scheduling order, claiming that the Board's three-track schedule, combined with the intervenors' Seabrook-related responsibilities before other boards and in other forums, is so compressed that, absent relief, they will be denied their due process right to a fundamentally fair hearing secured by 10 C.F.R. § 2.718 and the Constitution. They argue that the offsite Board's advancement from May 6 to April 1 for the filing of their contentions on the Massachusetts portion of the Seabrook Plan is the straw that broke the camel's back, with the consequence that they are being deprived of the opportunity to raise significant issues in the SPMC Track of the proceeding. The Attorney General of Massachusetts supports the intervenors' motion, pointing out that even though he has far more resources available for the proceeding than the

intervenors, the Board's schedule is such that his office "has been hard pressed to meet its obligations."[3]

In particular, the intervenors argue that even though they were served with a version of the plan for the Massachusetts communities on September 22, 1987, they were engaged in thirty-four days of hearings on the New Hampshire portion of the plan, scattered throughout the period beginning October 5, 1987, and concluding February 10, 1988. And, since the end of the hearings, the intervenors claim they have been preparing proposed findings of fact and conclusions of law on those issues that, under the Board's schedule for the Main Track, are due April 6. Additionally, as the Attorney General points out, the Commission did not determine that the applicants' plan for the Massachusetts communities was a bona fide one until November 25, 1987, so any earlier review would have been senseless. According to the intervenors, the applicants also withheld from the Massachusetts portion of the plan information on the identities of those providing emergency services and they only received this material on February 24, 1988, following the Licensing Board's entry of an interim protective order on February 17. In this regard, the intervenors argue that

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[3] Response of Commonwealth of Massachusetts in Support of Joint Intervenor Appeal by Motion for Directed Certification (March 8, 1988) at 2.

the Licensing Board's filing deadline for contentions does not give them sufficient time to investigate and to survey a reasonable sample of the hundreds of alleged service providers in order to ensure that they can file contentions with adequate bases and specificity. Further, they assert that since the entry of the scheduling order the applicants, on February 18, 22 and 23, have served "three substantial modifications or additions to the SPMC, totalling hundreds of pages of plans and materials" that they have not even had an opportunity to assess.[4]

In addition to the issues being litigated before the offsite Board, the intervenors note that they have other Seabrook-related demands on their time and resources that the Board seemingly ignored in setting the schedule for offsite issues. These other obligations, when combined with the Board's three-track schedule for offsite issues, are so burdensome that they effectively preclude the intervenors from developing and filing by April 1 many important contentions on the Massachusetts portion of the plan. First, the intervenors assert that, at our invitation, they had to supplement their petition to waive the Commission's financial qualification rule, which supplement was filed

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[4] Joint Intervenor Appeal by Motion for Directed Certification (February 25, 1988) at 9.

February 23. They also have been preparing briefs for submission to the United States Court of Appeals for the First Circuit in the challenge to the Commission's amendment of 10 C.F.R. § 50.47(c)(1) that provides new criteria for evaluating utility-prepared emergency plans in situations where state and local governments decline to participate in emergency planning. Similarly, they have prepared comments on the Federal Emergency Management Agency's guidance criteria for implementing the Commission's amendment of section 50.47(c)(1). Finally, they assert that intervenor New England Coalition on Nuclear Pollution is occupied litigating other issues before the onsite Seabrook Board and that the other intervenors have an opportunity to participate before that Board on the reopened issue of the applicants' amended notification plan.

The applicants and the NRC staff oppose the intervenors' directed certification motion, arguing that the intervenors have made no showing that the Licensing Board's scheduling order deprives them of due process and hence the standard for interlocutory review has not been met. In short, they claim that the intervenors overstate and misstate their litigation burdens before the offsite Board and, in the words of the applicants, "[i]f they squander

their time, the fault lies not in the Board's order, but in the Intervenors' election of tactics."[5]

Specifically, the applicants and the staff assert that the principal part of the Massachusetts portion of the plan has been available since September 1987 so the intervenors have had many months to draft contentions. Next, they note that the hearings on the New Hampshire portion of the Seabrook Emergency Plan were held on an intermittent basis from October 1987 to February 1988 and that the intervenors utilized a "lead intervenor" approach on the issues, so that the hearings did not require each intervenor's undivided attention throughout that period. The applicants and the staff also claim that in late December 1987 the applicants offered the intervenors, subject to a protective order, the information the applicants originally deleted from the Massachusetts portion of the plan concerning service providers. The intervenors, however, refused to sign the protective order, so they should not now be heard to complain about needing more time to file contentions.

B. It is well established that we will exercise our discretionary authority pursuant to 10 C.F.R. § 2.718(i) to direct certification of an interlocutory order of a

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[5] Applicants' Response to Joint Intervenor Appeal by Motion for Directed Certification (March 3, 1988) at 9.

licensing board "only where the ruling below either (1) threaten[s] the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, [can]not be alleviated by a later appeal or (2) affect[s] the basic structure of the proceeding in a pervasive or unusual manner."[6] Where, as here, a scheduling order is involved, our cases make clear that, under either of these alternative standards, a showing that the schedule deprives a party of its right to procedural due process is required.[7] Further, as we recently noted in directing certification and reversing a scheduling order in this same proceeding, "fundamental fairness is at the root of procedural due process" and, although "[t]here is . . . no litmus paper test for determining whether, in a particular case, the fundamental fairness standard is satisfied[,] . . . that assessment must be made on the basis of the

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[6] Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977) (footnotes omitted). Accord Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-870, 26 NRC 71, 73 (1987); ALAB-864, 25 NRC 417, 420 (1987); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 134 (1987).

[7] See ALAB-864, 25 NRC at 420-21; ALAB-858, 25 NRC 17, 21 (1987); Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-637, 13 NRC 367, 370-71 (1981).

totality of relevant circumstances disclosed by the record."[8]

Unlike the situation presented in ALAB-864 where the Licensing Board, without explanation, established a schedule that provided the intervenors only eleven days to conduct discovery on twenty-one contentions and only ten days to prepare prefiled testimony, the Board's scheduling order here, although once again without explanation, is not so draconian as to raise an issue of constitutional dimensions. In their motion papers, the intervenors acknowledge that before the Licensing Board they acceded to the schedule set forth in the Board's February 3 order. But the only change from that original schedule that moved up any of the intervenors' filing deadlines was the advancement of the intervenors' filing date for contentions. Thus, having made that concession, the intervenors' argument before us is necessarily limited to one that the April 1 deadline for contentions on the Massachusetts portion of the plan is so short, when considered with their other litigation obligations, that they will be deprived of the opportunity to raise important issues about the plan. Our review of the relevant circumstances, however, does not support the intervenors' claim. Accordingly, the intervenors have not

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[8] ALAB-864, 25 NRC at 421 (footnotes omitted).

shown that the Licensing Board's scheduling order meets the standard for interlocutory review.

The intervenors' joint motion paints with a very broad brush in depicting their litigation burdens but they have failed to present us with any quantitative figures of the actual resources available to each intervenor, as well as estimates of the actual and proposed use of such resources, in meeting their respective Seabrook obligations. Indeed, in enumerating these obligations, the intervenors' motion does not even tell us whether the various filings are joint filings like this motion or separate filings by each intervenor. Absent at least some indication of the number of attorneys, paralegals and technical experts each intervenor is using and how their time is allocated to meet their respective obligations, it is difficult to conclude that the intervenors are overburdened by a schedule that on its face is not patently unreasonable.

For example, the intervenors concede that the majority of the Massachusetts portion of the Seabrook Plan has been available since last September 22. Even if we disregard this date and start the clock with the Commission's determination on November 25, 1987 that the plan was a bona fide one,[9] the intervenors still have had almost three

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[9] See CLI-87-13, 26 NRC 400 (1987).

months prior to the Board's scheduling order to study and evaluate the plan. Although the hearing on the New Hampshire portion of the plan also was spread over much of this same period (from October 5 to February 10), the hearing consumed only 34 out of a total of 129 days with only 6 days of hearings in all of January and February. Further, each intervenor's participation in the hearing was not so all-consuming that the intervenors now reasonably can claim they had no time during this period to devote to other tasks, such as evaluating the Massachusetts portion of the plan or preparing proposed findings of fact on individual issues in the hearing as the testimony on those issues was completed. Moreover, the Licensing Board's scheduling order gives the intervenors a period of over six additional weeks (until April 1) to prepare contentions for the SPMC Track and eight weeks (until April 6) from the date of the close of the hearing to file proposed factual findings on the New Hampshire portion of the Seabrook Plan. This latter period for filing proposed factual findings is significantly longer than the usual, and presumptively reasonable, period of forty days prescribed for such findings in the Commission's Rules of Practice.[10] In these circumstances, we cannot find that the Licensing Board's April 1 filing deadline for

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[10] See 10 C.F.R. § 2.754.

contentions on the Massachusetts portion of the Seabrook Plan is unreasonable. Obviously, therefore, the schedule is not so harsh as to deprive the intervenors of their right to a fair hearing.

The intervenors also argue that two additional circumstances make the Board's schedule so burdensome that they cannot meet the April 1 deadline for filing contentions. They assert that on February 18, 22 and 23 the applicants issued substantial modifications to the Massachusetts portion of the plan. Besides the fact that under the current schedule the intervenors still will have over five weeks to analyze the amendments before contentions are due, we cannot ordinarily base a decision on whether to grant directed certification of a scheduling order upon subsequent events that were not before the Board when it established the challenged schedule. Rather, an appropriate request for relief must be presented in the first instance to the Licensing Board. In any event, we note that even though the applicants' recently filed amendments are voluminous due to the nature of the amendment process, many of the changes appear to be relatively minor and nonsubstantive.

Finally, the intervenors argue that they did not receive from the applicants the portions of the plan containing service-provider information until February 24 after they signed the Licensing Board's interim protective

order. According to the intervenors, the April 1 deadline for contentions simply does not give them sufficient time to investigate and to survey a reasonable portion of the applicants' hundreds of service providers in order to ensure their contentions are adequately framed. Once again, we cannot base our decision on the appropriateness of granting directed certification of the Board's scheduling order on events occurring after that order.[11] Because the number of service providers utilized by the applicants and the magnitude of the intervenors' investigative task regarding those providers were not directly before the Licensing Board when it established the contention deadline, an appropriate request for relief must be presented in the first instance to the Board.[12]

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[11] We cannot accept the argument of the applicants and the staff that the intervenors have only themselves to blame for the delay in their receiving the service-provider information because the applicants offered the intervenors that material last December but the intervenors refused to sign the applicants' protective order. The record does not contain any correspondence among the parties setting forth the exact terms of that offer and the transcript of the argument on this point before the Licensing Board raises serious questions as to the substance of the applicants' offer. See, e.g., Tr. 9726-27.

[12] We note that in the event the Licensing Board denies the intervenors relief, the Commission's Rules of Practice, 10 C.F.R. § 2.714, permit late-filed contentions. Therefore, assuming the intervenors act with all possible resources and with due diligence in carrying out their investigation, any contentions they are unable to file

(Footnote Continued)

For the foregoing reasons, the intervenors' motion for directed certification is denied.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

(Footnote Continued)
because of insufficient time to investigate might still be pursued by establishing, inter alia, good cause for not filing the contentions on time.