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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Alan S. Rosenthal, Chairman
Howard A. Wilber

July 15, 1988
(ALAB-896)

In the Matter of	
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al.	Docket Nos. 50-443-OL-1 50-444-OL-1
(Seabrook Station, Units 1 and 2)	(Onsite Emergency Planning and Safety Issues)

Thomas G. Dignan, Jr., and Deborah S. Steenland, Boston, Massachusetts, for the applicants Public Service Company of New Hampshire, et al.

Diane Curran and Dean R. Tousley, Washington, D.C., for the intervenor New England Coalition on Nuclear Pollution.

Gregory Alan Berry for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

Last April, we remanded to the Licensing Board once again the issue of the environmental qualification of the RG58 coaxial cable used, according to the information in the evidentiary record, for data transmission in the Seabrook nuclear power facility's computer system.[1] Subsequently, the applicants filed with the Licensing Board a suggestion

[1] See ALAB-891, 27 NRC 341 (1988). As detailed therein, the issue had been returned to that Board on two earlier occasions.

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of mootness, accompanied by several affidavits. The suggestion was founded on the applicants' assertions, said to be supported by the affidavits, that (1) only twelve of the 126 installed RG58 cables were routed at least partially through a harsh environment within what the applicants characterized as the "nuclear island" and, as a consequence, required environmental qualification by reason of 10 CFR 50.49; and (2) those twelve cables would be replaced by RG59 coaxial cables with respect to which there is no current environmental qualification issue.[2]

The suggestion of mootness was opposed by both the NRC staff and the intervenor New England Coalition on Nuclear Pollution (Coalition), the sponsor of the contention that had put the environmental qualification of the RG58 cable into question. In the staff's view, the matter was not susceptible of resolution on mootness grounds. Rather, according to the staff, the appropriate course was the reopening of the record to receive, first, the affidavits submitted by the applicants and, thereafter, any "relevant and admissible evidence in support of or opposition to

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[2] See Applicants' Suggestion of Mootness (May 19, 1988) at 2 et seq. It appears from the affidavit of Gerald A. Kotkowski (at 2) that, contrary to the impression left by the existing evidentiary record, some of the twelve cables are to be used for purposes not associated with the Seabrook computer system.

[a]pplicants' position" that either the Coalition or staff might wish to submit.[3] For its part, the Coalition maintained, inter alia, that the applicants' filing had "all the characteristics of a summary disposition motion," yet left unresolved "material issues of dispute between the parties."[4]

In a June 23, 1988 transcribed telephone conference call, the Licensing Board rejected the suggestion of mootness, directed the commencement of discovery and invited the institution of summary disposition procedures.[5] As the Board saw it, still open questions stood in the path of a finding that the environmental qualification issue had become moot.[6]

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[3] NRC Staff Response to Applicants' Suggestion of Mootness (June 2, 1988) at 11-12.

[4] New England Coalition on Nuclear Pollution's Response to Applicants' Suggestion of Mootness Regarding Environmental Qualification of RG-58 Cable (June 9, 1988) at 1, 3-4. In part, the Coalition's filing relied upon an attached affidavit.

[5] See Tr. 1177-79, 1181. On June 28, the Board issued a memorandum in which it memorialized those actions and noted that the relevant pages of the transcript were being served on the parties.

[6] See Tr. 1178-79.

The applicants now seek an immediate appellate examination of this result.[7] To begin with, they claim an entitlement to appeal the Licensing Board's ruling under 10 CFR 2.714a.[8] Alternatively, should we find the ruling not appealable as a matter of right, they ask that we exercise our discretion to review the ruling by way of a grant of directed certification under 10 CFR 2.718(i) and 2.785(b)(1).[9]

We agree with the staff and the Coalition that the appeal will not lie and, further, that the well-settled standards for granting discretionary interlocutory review of a Licensing Board order are not met in this instance. Accordingly, we dismiss the appeal and deny directed certification.

1. It scarcely could be more obvious that the provisions of 10 CFR 2.714a have no application in the circumstances of this case. As the single exception to the

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[7] The Licensing Board declined the applicants' request that it refer this matter to us. See Tr. 1178.

[8] See Applicants' Appeal and Petition for Directed Certification of an Order of the Atomic Safety and Licensing Board Rejecting Applicants' Suggestion of Mootness With Respect to the Issue of Environmental Qualification of RG-58 Cable (June 28, 1988) [hereinafter, Applicants' Appeal] at 14.

[9] Id. at 14-15. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 482-83 (1975).

general proscription against interlocutory appeals contained elsewhere in the Commission's Rules of Practice,[10] section 2.714a permits an appeal, on certain limited and precisely defined questions, from an order on a petition for leave to intervene in a proceeding. In the instance of an order granting such a petition, the authorization extends only to appeals by a party "other than the petitioner on the question whether the petition . . . should have been wholly denied."[11] In other words, to invoke section 2.714a the utility applicant must be in a position to assert that the petitioner for intervention should have been totally excluded from participation in the proceeding. It will not suffice to claim merely that, although properly granting intervention, the Licensing Board should have rejected certain of the contentions advanced by the petitioner.

The Licensing Board ruling here under attack has nothing at all to do with the grant or denial of the Coalition's intervention petition -- which was filed and acted upon many years ago. Nor, as it happens, does the ruling bear upon the Coalition's right to participate in this operating license proceeding. Not only is the

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[10] See 10 CFR 2.730(f).

[11] 10 CFR 2.714a(c). The entitlement to appeal from an order denying an intervention petition, of no relevance here, is covered in section 2.714a(b).

Coalition taking an active role in the litigation of the issues presented in the offsite emergency planning phase of the proceeding, but also it still has an appeal pending before us on another matter raised in the onsite emergency planning and safety issues phase (i.e., the phase that embraces the environmental qualification issue now at hand).[12] In short, the absolute condition precedent to the resort to section 2.714a is simply not present.[13]

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[12] See ALAB-894, 27 NRC ___ (June 14, 1988). In noting these facts, we do not mean to imply that, had the challenged order addressed the question of the Coalition's continued entitlement to participate in the proceeding, section 2.714a would have been available to the applicants. For the applicants would still have been confronted with the fact that the order would not have been entered on, and would not have disposed of, an intervention petition and its supplement containing the intervenor's proposed contentions.

[13] Even if factually correct, the applicants' insistence that the Licensing Board "wholly changed" the "contention to be litigated" (Applicants' Appeal at 14) is quite beside the point. As we have seen, section 2.714a does not authorize an interlocutory appeal based upon a claim of that character. It is equally irrelevant that, as the applicants further stress (ibid.), were they to prevail on their attempted appeal, "this discrete matter [would be brought] to a close." Whenever, for example, a licensing board denies a motion for summary disposition on a particular issue, a successful interlocutory appeal from that denial similarly would bring a discrete matter to a close. That consideration has never been thought sufficient to justify entertaining, in contravention of 10 CFR 2.730(f), appeals from summary disposition denials. See, e.g., Louisiana Power and Light Co. (Waterford Steam Electric Generating Station, Unit 3), ALAB-220, 8 AEC 93, 94 (1974).

2. The applicants' alternative request that we undertake review of the Licensing Board ruling in the exercise of our discretion stands on scant better footing. As the applicants acknowledge, such relief is not ordinarily granted unless the challenged ruling either (1) "threaten[s] the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal or (2) affect[s] the basic structure of the proceeding in a pervasive or unusual manner."[14] We are satisfied that neither of these standards is met here.

The applicants do not appear to assert that the ruling below will have a serious irreparable impact upon them, and it is clear to us that any such assertion would be unavailing. Insofar as the other prong of the Marble Hill test is concerned, we are told by the applicants that, because it purportedly "has resulted in a proceeding, or discrete portion thereof, not being wholly terminated when it should have been," the ruling below "does not merely affect the structure of a proceeding, it creates it."[15] But the same could be said of any licensing board determination

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[14] Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977) (footnote omitted).

[15] Applicants' Appeal at 15.

that declines to end the litigation of a particular issue at a time when one of the parties thinks it should be terminated. Inasmuch as determinations of that stripe are quite commonplace in NRC licensing proceedings,[16] one would have to stretch the reach of the second Marble Hill prong a considerable distance in order to bring them within its bounds. Neither have we been given nor do we perceive any good reason to indulge these applicants in that regard. To the contrary, there is absolutely nothing before us to distinguish this case from the myriad others in which, although dissatisfied with a ruling that has the effect of prolonging the litigation of one or more issues, the party must abide the event of further developments before seeking (if still necessary) appellate relief.[17]

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[16] Every time a licensing board admits a contention over objection or denies a motion for summary disposition, it leaves for additional proceedings and possible trial an issue that at least one party believes should not be explored further.

[17] This is so even though the result may be that, once further litigation is conducted, the question whether the issue(s) warranted additional examination "will be moot and of academic interest only." Applicants' Appeal at 15. It is only in highly unusual circumstances where there is the potential of irreparable harm -- not present here -- that the prospect of mootness will be deemed a relevant consideration on the question whether interlocutory appellate review of a particular licensing board order should be allowed. See, e.g., Kansas Gas and Electric Co. (Wolf Creek Nuclear Generating Station, Unit No. 1), ALAB-327, 3 NRC 408 (1976) (interlocutory review of the

(Footnote Continued)

Appeal dismissed; petition for directed certification denied.[18]

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

(Footnote Continued)
denial by the Licensing Board of a protective order with respect to the disclosure of certain pricing terms of a nuclear fuel supply contract).

[18] Although opposing the relief sought by the applicants, the NRC staff asks us to direct the Licensing Board to expedite its determination of the RG58 cable environmental qualification issue. In this connection, the staff maintains that the hearing schedule established by the Board below in the June 23 telephone conference is excessive, particularly in allowing more than six weeks for discovery. See Tr. 1181-85. But "[w]e have emphasized repeatedly in the past that matters of scheduling rest peculiarly within the licensing board's discretion; we enter that thicket reluctantly, particularly so when it is on an interlocutory basis." Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-541, 9 NRC 436, 437-38 (1979), and decisions there cited. In this case, there is insufficient cause to put that reluctance to one side. The staff is free, of course, to seek reconsideration of the schedule by the Licensing Board.