

July 13, 1988

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

'88 JUL 15 P5:53

In the Matter of)
)
Public Service Company of)
New Hampshire, et al.)
)
(Seabrook Station, Units 1 & 2))
)
_____)

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Docket No. 50-443 OL-1/444-06-1

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NEW ENGLAND COALITION ON NUCLEAR POLLUTION'S
RESPONSE TO APPLICANTS' APPEAL AND PETITION
FOR DIRECTED CERTIFICATION, DATED JUNE 28, 1988

Introduction

The New England Coalition on Nuclear Pollution ("NECNP") hereby responds to "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," dated June 28, 1988. NECNP opposes Applicants' appeal and petition. Applicants have failed to demonstrate the existence of a final decision on which they have a right of appeal; nor have they satisfied the Commission's requirements for obtaining interlocutory review. Moreover, Applicants' substantive arguments are entirely without merit.

Factual Background

In ALAB-891, the Appeal Board charted the long and "tortuous" evolution of the RG-58 coaxial cable issue up to that point. slip op. at 2. Thus, it will not be repeated here. Following the issuance of ALAB-891, Applicants filed a dispositive

pleading styled "Suggestion of Mootness" with the Licensing Board, which asserted that it had identified all installed RG-58 coaxial cables; and that only twelve of the cables were routed through a harsh environment, thus requiring environmental qualification. Id. at 4. Applicants also asserted that it had decided to substitute RG-59 coaxial cable for the RG-58 cable in those applications.

NECNP responded to the Applicants' filing on June 9, 1988, requesting discovery and an opportunity to examine documents on which Applicants relied for its position.¹ NECNP also asserted the right to examine the credibility of Applicants' witnesses, given their numerous changes in position and the vagueness with which their most recent change was described. Finally, the Coalition listed a number of key substantive questions that remained unresolved regarding the RG-58 coaxial cable. These questions, which must be resolved prior to concluding the Applicants have met the Commission's requirements for environmental qualification, included the following:

- 1) Why was RG-58 cable designated Class 1E safety equipment in the first place?

1 NECNP Response to Applicants' Suggestion of Mootness (Appendix 5 to Applicants' Appeal). It should be noted that until the Licensing Board opened discovery on June 23, there had been no discovery at all on Applicants' changes in position following ALAB-875.

2) What are the specific uses of RG-58 cable? What particular pieces of equipment does it serve?

3) Have Applicants correctly identified all instances in which RG-58 coaxial cable is used at Seabrook Station? Have Applicants identified all purchase orders of RG-58 coaxial cables?

4) Have Applicants adequately determined the exact physical locations of all RG-58 cable that has been identified as being used at Seabrook Station?

5) What are the specific environmental qualification requirements for RG-58 coaxial cable?

6) What are the specific environmental qualification requirements for RG-59 coaxial cable when used in place of RG-58?

7) Is RG-59 coaxial cable qualified to replace RG-58 cable? (If so, why was RG-58 purchased in the first place, since it is more expensive than RG-59?) (See NECNP Exh. 4, Ref. 7)

Following the filing by Applicants of a Reply to NECNP's and the NRC's responses to its Suggestion of Mootness, the Licensing Board conducted a telephone conference on June 23, 1988, in which it rejected the Suggestion of Mootness and established a hearing schedule. The Board listed a number of facts that must be established by Applicants, including that they had properly identified all RG-58 coaxial cables; that they had correctly identified the cable which must be qualified; and that RG-59 coaxial cable is an

"acceptable substitute" for RG-58 coaxial cable.² Tr. at 1178-79. (See Appendix 1 to Applicants' Appeal.) The Board also rejected objections voiced by Applicants and the NRC to the length of the schedule.

ARGUMENT

I. Applicants' Appeal and Petition for Directed Certification Do Not Meet Commission Review Standards

Applicants first claim that they have a right to appeal the Licensing Board's order because the "original remanded issue" of whether the RG-58 coaxial cable is qualified is "gone," and the Licensing Board's order amounts to the admission of new contentions directed at Applicants' technical qualifications rather than the environmental qualification of the RG-58 coaxial cable. Applicants' Appeal at 13.

This argument is apparently based on 10 CFR § 2.714a(c), which allows license applicants to appeal orders granting petitions to intervene "on the question of whether the petition

² The Board also stated that NECNP would be precluded from litigating the environmental qualification of RG-59 coaxial cable. *Id.* at 1179-80. NECNP has asked the Licensing Board to clarify or reconsider that the question of whether RG-58 coaxial cable is an acceptable substitute for RG-58 coaxial cable necessarily encompasses the issue of whether it meets the qualification specifications for each of the twelve applications where it is to be used. That issue was not raised in NECNP's late-filed contention that was rejected by the Appeal Board; it has arisen for the first time since Applicants decided to use RG-59 coaxial cable in applications formerly assigned to RG-58 coaxial cable. (NECNP's Motion for Clarification or Reconsideration is attached to this brief.)

and/or the request for a hearing should have been wholly denied." The characterization of the Board's action as the admission of new contentions rests on the premise that the Licensing Board has lost jurisdiction over the issues it wishes to litigate because they go beyond the narrow remanded question of whether the RG-58 cable is qualified.

Applicants are wrong. As discussed more fully in Section II below, the environmental qualification of RG-58 coaxial cable is still very much a live issue. By their own actions, Applicants have simply changed the focus of the litigation, at least initially, from whether the cable is qualified to a question of whether it should be qualified, and whether substitute cable proposed by Applicants for safety applications is qualified for those applications. The Licensing Board has continuing jurisdiction over those issues, and did not need to entertain or create, sua sponte, new contentions in order to reach those issues.³

3 Even assuming for purposes of argument that the Board has admitted new issues to the remanded hearings, § 2.714a does not apply. That regulation is clearly intended to apply to a situation which generally occurs at the outset of a proceeding, where rejection of a petition to intervene would result in termination of the entire proceeding or dismissal of an intervenor. That is far from the case here. Given the many other facets of the Seabrook proceeding and the multitude of intervenors, neither NECNP's participation in the Seabrook operating license hearing nor the hearing itself will end if the environmental qualification segment of the hearing is terminated. See note 4, infra. Thus, there is no appeal of right from the Licensing Board's decision.

Applicants also attempt to obtain interlocutory review of the Licensing Board's order on the related ground that the Licensing Board's order affects the basic structure of the proceeding by creating a new hearing where none should have existed. This argument, too, depends on the fallacious premise that a "new" contention has been created. In addition, NECNP concurs in the NRC Staff's response, which points out that termination of this environmental qualification hearing will in no way affect the overall structure of the Seabrook proceeding. Litigation will continue on both technical and emergency planning issues.⁴ "[T]he mere fact that additional issues must be litigated does not alter the basic structure of the proceeding in a pervasive or unusual way so as to justify interlocutory review of a licensing board decision."⁷ Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 135 (1987).

II. If the Appeal Board Decides to Review Applicants' Appeal, It Must Find that the Licensing Board Has Jurisdiction Over the Issues Raised by Applicants' Change in Position Regarding the Qualification of RG-58 Coaxial Cable.

Contrary to Applicants' position, this litigation is not limited to the narrow question of whether RG-58 coaxial cable is

⁴ The parties are now engaged in hearings or hearing preparation on offsite emergency planning for New Hampshire and Massachusetts and the adequacy of provision for public notification. In addition, NECNP has appealed the Licensing Board's dismissal of remanded Contention IV. Finally, the Appeal Board has referred to the Commission a joint intervenors' petition for waiver of the financial qualifications rule; thus, a hearing may be ordered on that issue as well.

qualified. As the Licensing Board stated, "In shifting their position from initially asserting before us and before the Appeal Board that all RG-58 cable had to be and were environmentally qualified but in now arguing that only 12 RG-58 cables had to be environmentally qualified, and that 12 environmentally qualified RG-59 cables would be substituted, applicants cannot now be heard to argue that the issue of environmental qualification of RG-58 cable is now entirely mooted." Tr. of June 23, conference at 1178 (Appendix 1 to Applicants' Appeal) (emphasis added).

By virtue of Applicants' own assertions, the major focus of the litigation has changed from whether the cable is qualified, to whether Applicants have made a valid determination that virtually none of it needs to be qualified. Clearly, the question of whether a cable that was previously classified as safety equipment may be downgraded to a lower classification is encompassed by this litigation. Moreover, it is the Applicants' own actions which have dictated this new avenue of inquiry.

Similarly, it is Applicants' own doing that the scope of the litigation now includes questions about the substitution of RG-59 coaxial cable for RG-58 coaxial cable. The basic question here is whether the cable used for a variety of functions originally said to be safety related is qualified under the Commission's rules so that it can be relied upon to perform these functions when needed. The litigation has heretofore focused on the qualification of the cable denoted "RG-58" because that was the

cable used by Applicants. Had Applicants decided to test the RG-58 coaxial cable and present those results, or had they discovered any new documentation with respect to the qualification of RG-58 cable, the litigation would remain focused exclusively on the question of whether RG-58 coaxial cable is qualified. In deciding to substitute RG-59 cable for RG-58 cable, the Applicants themselves have raised numerous issues, including whether they have correctly identified all applications of RG-58 coaxial cable for which substitutions must be made; and whether RG-59 coaxial cable is itself qualified to perform the functions originally intended to be performed by RG-58 cable.

Applicants rely heavily on the tortured and semantic argument, repeatedly asserted, that the issues encompassed by the Board's order are questions of "technical" ability which have no relation to environmental qualification. Questions of the Applicants' technical capabilities are no more raised here than they are raised in any safety contention asserting a failure to meet prevailing standards. The issue for the Board in all such cases is whether the appropriate standards have been met.

The questions of whether Applicants have correctly identified all applications of the cable for which environmental qualification is required, and have met those requirements with respect to each application, are key elements in determining whether the Commission's environmental qualification requirements have been met. See 10 C.F.R. (50.49(d), which requires

Applicants to specifically identify each piece of equipment that must be qualified. This identification is made through an understanding both of the application of the equipment and the conditions to which it may be subjected during an accident.⁵

III. Reconsideration of ALAB-875 is Inappropriate

In the section of their brief entitled "Statement of Prior Proceeding and Facts," Applicants devote a significant effort to an attack on the Appeal Board's decision in ALAB-875, 26 NRC 251 (1987). While this challenge is not directly taken up in Applicants' argument, the apparent intent of Applicants' discourse is to create the impression that this proceeding has run amok as a result of the Appeal Board's inattention to Applicants' prior arguments regarding the scope of Contention I.B.2 and the allowable evidentiary uses of NECNP's Exhibit 4.

Applicants' absurd attempt to rehash the appellate arguments that led to ALAB-875 should be rejected out of hand. The Appeal Board's silence on these issues is testament to their meritless nature, not an invitation to raise them again. The question of whether the language of NECNP's original contention properly encompassed the issue of environmental qualification of the RG-58

⁵ In ALAB-891, the Appeal Board directed the Board and the parties to consider whether the RG-58 cable has an accident mitigation function in its "intended use" as part of the plant's computer system. slip op. at 23. This inquiry remains relevant because the Applicants have determined to replace only twelve of the 126 identified RG-58 cables.

cable issue was fully aired in briefs and oral argument, and laid to rest in ALAB-875. See Applicants' appellate brief at 15; Transcript of July 24, 1987 oral argument at 91-93, 94-96; ALAB-875, 26 NRC at 269-70.

With respect to the introduction of Exhibit 4, Applicants make much of the fact that this equipment qualification file was introduced "for the truth of the matters asserted" therein. As NECNP explained, however, the offer was also made for the purpose of "fleshing out the basis upon which these representations are made regarding the qualification of the equipment." See quotation from ASLB hearing transcript in Applicants' Appeal at 3. In NECNP's view, it was necessary to include the entire equipment qualification file in the record in order to demonstrate that nowhere in that file did Applicants perform a technical comparison of the unqualified RG-58 cable with the qualified RG-59 cable.⁶

IV. The Board's Scheduling Order Should Not Be Disturbed

Having asserted the unreviewability of the Licensing Board's June 23rd order, the NRC Staff nevertheless takes a swing in its

⁶ Moreover, aside from the ultimate conclusion that the RG-58 cable is qualified, NECNP has challenged few if any of the assertions made in Exhibit 4. We did not dispute IT&T's "confidence" in the qualification of the cable; but rather challenged the basis for it. Throughout the litigation, we have used the equipment qualification file to show that the assertions made therein, even if true, do not support a finding that the equipment is qualified. It should be noted that NECNP's position has been thoroughly vindicated in this regard.

brief at the scheduling order set forth in that order. NRC Staff Response to Applicants' Appeal at 9-10. The Staff makes no showing whatsoever to justify departure from the long-established rule that scheduling orders are not subject to interlocutory review. See Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-864, 25 NRC 417, 420-421 (1987).

Moreover, there is no basis for disturbing the Licensing Board's discretion to set a schedule for this litigation. Given the large volume of discovery material to be provided by Applicants, the Board deemed six weeks of discovery to be a reasonable time period. See Tr. at 1183-85. The suggestion that the Commission would favor expedited consideration of the cable qualification issue in order to pave the way for low power licensing is pure speculation that is both demeaning to the Commission's role as protector of the public health and safety above all other considerations, and insufficient grounds for reversal of the Licensing Board's order.

CONCLUSION

In effect, the Applicants are asking the Licensing Board to end this remanded proceeding, solely on the basis of Applicants' unsupported and untested assertions that they now believe that for most applications, RG-58 coaxial cable need not be qualified, and that an adequate substitute has been found and installed in the few applications where qualified cable is required. NECNP is entitled to test those assertions through discovery and a hear-

ing. To hold otherwise would turn the hearing process into a shell game. The Applicants' appeal and petition for directed certification must be rejected.

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July 13, 1988

CERTIFICATE OF SERVICE

I certify that on July 13, 1988, copies of the foregoing pleading were served by hand or by first-class mail on all parties to this proceeding, as designated on the attached service list.



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