

6216

DOCKETED  
April 29, 1988

'88 MAY -2 P6:00

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

before the

ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

APPLICANTS' RESPONSE TO JOINT INTERVENORS'  
MOTION FOR DIRECTED CERTIFICATION

Statement of Prior Proceedings and Facts

Under date of April 22, 1988, The New England Coalition on Nuclear Pollution (NECNP), The Attorney General of The Commonwealth of Massachusetts (MAG), the Seacoast Anti-Pollution League (SAPL), and the Town of Hampton (TOH), hereafter collectively referred to as the Joint Intervenor, filed a Joint Intervenor's Motion for Directed Certification which requests "directed certification of three rulings of the Atomic Safety and Licensing Board" which are claimed to be "discussed in detail below." J.I. Motion at 1.

A major difficulty with the motion is that one is hard pressed to ascertain exactly what three rulings are being complained of. On page 16 of the motion there is a statement that "the Board held that the Intervenor would have the

8805050111 880429  
PDR ADCK 05000443  
G PDR

D503

opportunity to attack the credibility of only the witnesses offered by FEMA." J.I. Motion at 16. The citation for this ruling is "Tr. 9957-9958." We confess total inability to discern the ruling described from the transcript cited. On page 27 there is a reference to: "the Board's April 5 ruling prohibiting further questioning of Mr. Thomas about the January 19, 1988 FEMA/NRC meeting . . ." J.I. Motion at 27. There is a ruling described on page 28 as follows:

"While the transcript does not unequivocally indicate that a ruling was made, it is clear from the context that, with the exception of Mr. McLaughlin, the depositions were denied on the ground that they would invade FEMA's deliberative process." (emphasis added).

J.I. Motion at 28. The citation for this ruling is "See Tr. 9970 ff.". A review of the transcript will reveal no ruling of the type described. On that same page there is a reference to "the ruling barring discovery regarding the January 19 NRC/FEMA meeting on deliberative process grounds" and a "ruling prohibiting all further depositions." Id. No citations to the record appear. The request for relief is for this Appeal Board to "reverse" whatever rulings are in fact being appealed.<sup>1</sup>

---

<sup>1</sup>The unstructured approach taken by the movants is further illustrated by the fact that while the Appeal Board has apparently been favored with excerpts from certain documents which excerpts are apparently attached to the copies of the motion served upon the Appeal Board, see J.I. Motion at 6 n.4, at 21 n.23, the copy served upon the applicants was bereft of attachments. This does not make easier the task of answering.

On April 26, 1988, this Appeal Board entered an order directing that response to the Joint Intervenors' Motion should be in the hands of the Appeal Board by 4:00 p.m. on May 2, 1988. This order further directed that responses:

"address both (1) whether the established standards for the review of interlocutory rulings by way of directed certification are satisfied here; and (2) the merits of the challenged rulings of the Licensing Board."

Herein the Applicants respond. The Applicants leave to the governmental agencies the question of executive privilege and makes no argument herein with respect thereto.

#### Argument

Discovery orders very rarely merit directed certification. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-780, 20 NRC 378, 381 (1984); Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-608, 12 NRC 168, 170 (1980). Joint Intervenors have made essentially no effort to satisfy the standards for directed certification of these discovery orders which allegedly have been made beyond making bald assertions that the rulings "have surely had a pervasive and unusual impact in this critical litigation" and have "determined the 'very shape of the ongoing adjudication'." J.I. Motion at 3. No analysis or argument is given as to why these assertions are accurate. This is not surprising, because it is not so. The Licensing Board has made no ruling of any kind as to what will be admissible in the upcoming hearing itself by way of

evidence. The only possible relevance the evidence apparently hoped to be obtained in further discovery would have would be on the issue of credibility. By the Joint Intervenor's own admission, the Licensing Board has not purported to put any fetters on credibility cross examination. Nor has the Board stated that it will not issue witness subpoenas. The Board did rule, Tr. 9952, that the January 19 meeting was privileged; that the privilege had not been waived and "we see no need, no ligative needs yet to set that privilege aside for the litigation," (emphasis added) and went on to say it was not ruling that the privelege would never be set aside because such a ruling would be premature. Tr. 9952-53. All the Board really has said is that Mr. Thomas's hearsay (and possibly double or triple hearsay) renditions of what went on at a meeting is not enough for the Board to allow a wholesale (non Board controlled) inquiry by way of deposition into the interagency meeting, Tr. 9960-62, ("we have not seen extraneous information of such a degree to inquire into those meetings as it refers to the testimony offered by FEMA in its March version." Tr. 9962 (emphasis added)). This ruling hardly has any pervasive effect on the proceeding. When, as and if the Joint Interveners can get competent testimony by someone at the meeting which confirms Mr. Thomas' hearsay version of the events, the Joint Interveners might be in a position to complain of a pervasive effect in the event that the Licensing Board forbids further

inquiry on the subject in the proceeding. But they are not even close to that point now.<sup>2</sup>

Prescinding from the foregoing, there exist other reasons for denying this motion. As stated earlier, it is not clear at all what alleged rulings are being appealed. Indeed, the motion itself classifies one of the rulings as not "unequivocally indicated" in the transcript. The alleged rulings were not preceded by motions to compel and briefs. Indeed, these Joint Intervenors have not filed such motions. It is fundamental that directed certification is not granted unless the Licensing Board has had a reasonable opportunity to decide the question as to which certification is sought, Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-297, 2 NRC 727, 729 (1975) and specific record references to the rulings are set out in the petition, Houston Light &

---

<sup>2</sup>Perhaps in an effort to overcome the foregoing reasoning, or perhaps for other reasons, Joint Intervenors assert at page 21 of their motion:

"Moreover, even assuming that the Board would allow questioning as to extraneous influences at the hearing, cross-examining is no substitute for discovery. The intervenors cannot be required to put their questions for the first time at hearings, nor be precluded from pursuing this matter through duly noticed depositions, in order to identify witnesses to subpoena."

No citation of authority accompanies this assertion. This is not surprising. Absent an absolute right to discovery, and none exists here, see infra, if a court is willing to put up with discovery on the witness stand, it can commit no error by refusing pretrial discovery. The only cognizable "right" which arises out of discovery is the right to the evidence; the fact that one has to get it in the courtroom as opposed to the deposition conference room violates no right at all.

Power Co. (Allens Creek Nuclear Generating Station, Unit No. 1), ALAB-630, 13 NRC 84, 85 n.2 (1981). Neither of these has occurred here.

Finally it is to be remembered that discovery against FEMA is discovery against the Staff and governed by 10 CFR §2.720(h). Long Island Lighting Co. (Shoreham Nuclear Power Station), LBP-83-61, 18 NRC 700 (1983); 10 CFR § 2.4(p). It has long been recognized that the discretion accorded the Licensing Boards in deciding whether to allow discovery against the Staff is extremely broad and their decisions can be reversed only for an abuse of that discretion. Consumer Power Co. (Midland Plant, Units 1 and 2), ALAB-634, 13 NRC 96, 99-102 (1981). In addition, the Commission and the Appeal Boards have acknowledged that one reason for the great deference in this matter is that it is only the Licensing Board that has the detailed familiarity with the case that is needed to properly address issues of this nature. Id. at 99; Consumers Power Co. (Midland Plant, Units 1 and 2), CLI-74-27, 3 AEC 4, 6 (1974). No abuse of discretion has occurred here.

Conclusion

The motion should be denied.

Respectfully submitted,



Thomas G. Dignan, Jr.  
George H. Lewald  
Kathryn A. Selleck  
Ropes & Gray  
225 Franklin Street  
Boston, MA 02110  
(617) 423-6100

Counsel for Applicants

CERTIFICATE OF SERVICE

DOCKETED  
USNRC

I, Thomas G. Dignan, Jr., one of the attorneys for the Applicants herein, hereby certify that on April 29, 1988, I made service of the within document by depositing copies thereof with Federal Express, prepaid, for delivery to (or, where indicated, by depositing in the United States mail, first class postage paid, addressed to):

MAY -2 P6:00

DEPT. OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

Alan S. Rosenthal, Chairman  
Atomic Safety and Licensing  
Appeal Panel  
U.S. Nuclear Regulatory  
Commission  
East West Towers Building  
4350 East West Highway  
Bethesda, MD 20814

Howard A. Wilber  
Atomic Safety and Licensing  
Appeal Panel  
U.S. Nuclear Regulatory  
Commission  
East West Towers Building  
4350 East West Highway  
Bethesda, MD 20814

Thomas S. Moore  
Atomic Safety and Licensing  
Appeal Panel  
U.S. Nuclear Regulatory  
Commission  
East West Towers Building  
4350 East West Highway  
Bethesda, MD 20814

Robert Carrigg, Chairman  
Board of Selectmen  
Town Office  
Atlantic Avenue  
North Hampton, NH 03862

Administrative Judge Ivan W.  
Smith, Chairman, Atomic Safety  
and Licensing Board Panel  
U.S. Nuclear Regulatory  
Commission  
East West Towers Building  
4350 East West Highway  
Bethesda, MD 20814

Diane Curran, Esquire  
Andrea C. Ferster, Esquire  
Harmon & Weiss  
Suite 430  
2001 S Street, N.W.  
Washington, DC 20009

Judge Gustave A. Linenberger  
Atomic Safety and Licensing  
Board Panel  
U.S. Nuclear Regulatory  
Commission  
East West Towers Building  
4350 East West Highway  
Bethesda, MD 20814

Stephen E. Merrill  
Attorney General  
George Dana Bisbee  
Assistant Attorney General  
Office of the Attorney General  
25 Capitol Street  
Concord, NH 03301-6397

Dr. Jerry Harbour  
Atomic Safety and Licensing  
Board Panel  
U.S. Nuclear Regulatory  
Commission  
East West Towers Building  
4350 East West Highway  
Bethesda, MD 20814

Sherwin E. Turk, Esquire  
Office of General Counsel  
U.S. Nuclear Regulatory  
Commission  
One White Flint North, 15th Fl.  
11555 Rockville Pike  
Rockville, MD 20852

Adjudicatory File  
Atomic Safety and Licensing  
Board Panel Docket (2 copies)  
U.S. Nuclear Regulatory  
Commission  
East West Towers Building  
4350 East West Highway  
Bethesda, MD 20814

Robert A. Backus, Esquire  
116 Lowell Street  
P.O. Box 516  
Manchester, NH 03105

\*Atomic Safety and Licensing  
Appeal Board Panel  
U.S. Nuclear Regulatory  
Commission  
Washington, DC 20555

Mr. J. P. Nadeau  
Selectmen's Office  
10 Central Road  
Rye, NH 03870

Philip Ahrens, Esquire  
Assistant Attorney General  
Department of the Attorney  
General  
Augusta, ME 04333

Carol S. Sneider, Esquire  
Assistant Attorney General  
Department of the Attorney  
General  
One Ashburton Place, 19th Flr.  
Boston, MA 02108

Paul McEachern, Esquire  
Matthew T. Brock, Esquire  
Shaines & McEachern  
25 Maplewood Avenue  
P.O. Box 360  
Portsmouth, NH 03801

Mr. Calvin A. Canney  
City Manager  
City Hall  
126 Daniel Street  
Portsmouth, NH 03801

Mrs. Sandra Gavutis  
Chairman, Board of Selectmen  
RFD 1 - Box 1154  
Route 107  
Kensington, NH 03827

R. Scott Hill-Whilton, Esquire  
Lagoulis, Clark, Hill-  
Whilton & McGuire  
79 State Street  
Newburyport, MA 01950

\*Senator Gordon J. Humphrey  
U.S. Senate  
Washington, DC 20510  
(Attn: Tom Burack)

Mr. Peter J. Matthews  
Mayor  
City Hall  
Newburyport, MA 01950

\*Senator Gordon J. Humphrey  
One Eagle Square, Suite 507  
Concord, NH 03301  
(Attn: Herb Boynton)

Mr. William S. Lord  
Board of Selectmen  
Town Hall - Friend Street  
Amesbury, MA 01913

Mr. Thomas F. Powers, III  
Town Manager  
Town of Exeter  
10 Front Street  
Exeter, NH 03833

Brentwood Board of Selectmen  
RFD Dalton Road  
Brentwood, NH 03833

H. Joseph Flynn, Esquire  
Office of General Counsel  
Federal Emergency Management  
Agency  
500 C Street, S.W.  
Washington, DC 20472

Gary W. Holmes, Esquire  
Holmes & Ells  
47 Winnacunnet Road  
Hampton, NH 03841

Mr. Ed Thomas  
FEMA, Region I  
442 John W. McCormack Post  
Office and Court House  
Post Office Square  
Boston, MA 02109

Leonard Kopelman, Esquire  
Kopelman & Paige, P.C.  
77 Franklin Street  
Boston, MA 02110

Richard A. Hampe, Esquire  
Hampe and McNicholas  
35 Pleasant Street  
Concord, NH 03301

Judith H. Mizner, Esquire  
79 State Street, 2nd Floor  
Newburyport, MA 01950

Charles P. Graham, Esquire  
Murphy and Graham  
33 Low Street  
Newburyport, MA 01950

Ashod N. Amirian, Esquire  
376 Main Street  
Haverhill, MA 01830

  
Thomas G. Dignan, Jr.

(\* = Ordinary U.S. First Class Mail.)