16983

LBP-88-21

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Ivan W. Smith, Chairman
Gustave A. Linenberger, Jr.
Dr. Jerry Harbour

In the Matter of	Docket Nos. 50-443-OL 50-444-OL
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al.	(ASLBP No. 82-471-02-OL) (Offsite Emergency Planning)
(Seabrook Station, Units 1 and 2)	
	August 26, 1988

MEMORANDUM AND ORDER
(Denying Applicants' Motion For Referral)

Background

Pending before the Board is Applicants' August 5, 1988 motion to refer to the Appeal Board our rulings on the admissibility of Contentions 1, 3, 4, and 6 of the Massachusetts Attorney General. See, MEMORANDUM AND ORDER - PART I (Ruling on Contentions on the Seabrook Plan For Massachusetts Communities), July 22, 1988 (unpublished), 1-27.

The Attorney General's first six contentions were in the nature of threshold and legal statements seeking to establish a broad framework upon which the Massachusetts

D502

Attorney General can litigate allegations that the Seabrook Plan for the Massachusetts Communities (SPMC) would not be followed by local governments or the Commonwealth in the event of a radiological emergency at Seabrook. The background of the dispute between the Commonwealth and the Seabrook Applicants, as it relates to the SPMC, is set out in the Preliminary Statement of the Board's July 22 Memorandum and Order. There we noted that in 1986 the Commonwealth of Massachusetts ceased its cooperation with Applicants in the preparation of the Seabrook radiological emergency plan on the stated ground that meaningful radiological emergency planning for Seabrook is impossible. Subsequently the Applicants attempted to satisfy the emergency planning regulations by submitting a plan formulated without the cooperation of state and local governments.

In essence the Attorney General alleges that the plan will not be followed by the governments because: (1) the plan is not good enough to be followed because of plan inadequacies and the features of the Seabrook site; (2) no plan would be adequate given the nature of the site; (3) in any event, the state and local officials would respond to an emergency ad hoc; and (4) the SPMC is particularly defective because it contemplates an unlawful delegation of Commonwealth police powers to Applicants' emergency offsite response organization.

In ruling on the relevant Attorney General contentions the Board applied the two presumptions of the recently amended emergency planning rule: (1) the conclusive presumption that the state and local officials will exercise their best efforts to protect their citizens in the event of a radiological emergency at Seabrook, and (2) where the utility has submitted its own adequate plan with measures compensating for the non-participation of the state and local governments, the presumption that the governments will follow the utility plan. E.g., July 22 Memorandum and Order at 9, citing 10 C.F.R. 50.47(c)(1)(iii).

At the heart of Applicants' discontent with our rulings is our interpretation of the provision of the rule that the second presumption ". . . may be rebutted by, for example, a good faith and timely proffer of an adequate and feasible state and/or local radiological emergency plan that would in fact be relied upon in a radiological emergency." 10 C.F.R. 50.47(c)(1)(iii). In response to most of the Attorney General's threshold legal contentions, Applicants argued that the only way the follow-the-utility-plan presumption can be rebutted is for the governments to make a timely proffer of their own plan. Applicants' April 26 Response to Contentions at 4, 11, 14, 20 and 24.

In support of this position the Applicants rely heavily, almost entirely, upon a Licensing Board holding in Long Island Lighting Company (Shoreham Nuclear Power

Station, Unit 1), LBP-88-9, 27 NRC 355 (1988), at 367-68, 369-70, where the Shoreham Board stated:

> The effect of the new rule then is to place a responsibility on state and local governments to produce, in good faith, some adequate and feasible response plan that they will rely on in the event of an emergency or it will be assumed in the circumstances of this case that the LILCO plan will be utilized by the Intervenors here. In that event, the LILCO plan will be evaluated for adequacy alone.
>
> * * *
>
> Intervenors . . . can no longer raise the specter of legal authority as a response nor can simple protestations that they will not use LILCO's plan suffice. The Intervenors are required to come forward with positive statements of their plans and must specify the resources that are available for a projected response and the time factors that are involved in any emergency activities proposed. (emphasis added).

This Board concluded that the two rulings flow from different considerations because the respective proceedings are at different stages. In rejecting Applicants' arguments, we stated:

> It is true that the Shoreham Board ruled that, in the circumstances of that case, the effect of the new rule was to place upon the government intervenors the responsibility to produce some plan that they will follow or suffer the presumption that they will follow the LILCO plan. Id. (Slip op. at 21). But the Shoreham proceeding is in a different stage than this one. There is already a very large record upon which the LILCO plan for Shoreham was found adequate but for state and local government non-participation. Legal impediments to the LILCO plan were resolved. We read the Shoreham Board's opinion in LBP-88-9 to be carefully limited to the context of that proceeding, and to simply

> reject any bald, stonewalling assertion that the only response by the governments to an emergency at Shoreham would be ad hoc. Further, the Shoreham Board was emphasizing that aspect of the new rule that requires a recognition that some "best effort" response by local officials will be made to protect their citizens, and that without other rational responses set forth by the governments, the response will be either to follow the LILCO plan or some other plan. It is too early in this proceeding to determine whether the Shoreham rationale will apply.

July 22 Memorandum and order at 22-23 n.2.

As we explained at the prehearing conference, in the absence of an evidentiary record, and being unfamiliar with the SPMC, we could not categorically rule out other proffered rebuttals to the presumption if they were to be advanced in well-pleaded contentions. Our purpose in giving effect to the "for example" aspect of the rule was to establish legal criteria in advance of our actual consideration of the hundreds of contentions awaiting our attention. As it turned out, the only proffered rebuttal to the presumption accepted by the Board was the Attorney General's legal-authority contention, No. 6.

Now Applicants would have us refer, pursuant to 10 C.F.R. 2.730(f), our rulings that the Commission has not foreclosed the possibility that the presumption might be rebutted in some other way, and that the legal-authority issue is a permissible rebuttal to the presumption. Motion at 2, citing Memorandum and Order at 22, 27. Again, Applicants rely almost entirely on the Shoreham opinion,

supra, for their legal authority that the "for example" clause of the rule is "nugatory." E.g., Tr. 14308 (Dignan).

Standards for Referring Board Rulings

Interlocutory appeals are disfavored in NRC practice, but licensing boards may refer their rulings to the Appeal Board where a ". . . prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense . . . ." 10 C.F.R. 2.730(f). See also, e.g., Public Service Company of New Hampshire (Seabrook Station), ALAB-734, 18 NRC 11, 15 (1983).

However, in deciding whether to accept a referral under Section 2.730(f), Appeal Boards ". . . apply essentially the same test as is utilized in acting upon directed certification requests filed under Section 2.718(i)." Virginia Electric and Power Company (North Anna Power Station), ALAB-741, 18 NRC 371, 375, n.6 (1983), citing, Duke Power Co. (Catawba Nuclear Station), ALAB-687, 16 NRC 460, 464 (1982), vacated in part on other grounds, CLI-83-19, 17 NRC 1041 (1983), and the cases cited therein.

The standards for accepting interlocutory review under a directed certification are firmly established in NRC practice. The review is granted sparingly and may be taken only under the most compelling circumstances. Seabrook, ALAB-737, supra, Arizona Public Service Co. (Palo Verde

Station), ALAB-742, 18 NRC 380, 383, 383 n.7 (1983). Appeal Boards will undertake interlocutory review,

> 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, could not be alleviated by a later appeal or (2) affect[s] the basic structure of the proceeding in a pervasive or unusual manner.

Seabrook, supra, citing Public Service Company of Indiana (Marble Hill Station), ALAB-405, 5 NRC 1190, 1192 (1977).

Applicants call our attention to the Statement of Policy on Conduct of Licensing Proceedings, 13 NRC 452, 456-57 (1981), where the Commission directed licensing boards to refer or certify promptly significant legal or policy questions on which Commission guidance is needed. Boards are invited to anticipate such crucial issues to avoid delay.

Discussion

With the foregoing broad principles in mind, we turn to the specifics of Applicants' motion to determine whether there is an adequate fit.

Is a prompt appellate decision necessary to prevent detriment to the public interest? No argument is made that there is a direct public interest in a referral, nor can we identify any special public interest considerations. Applicants argue that the public interest would be served in that a referral would allow the Commission to decide which

of the two Licensing Boards' interpretations of the relevant portions of the rule it wishes to affirm before the record closes. But, assuming, contrary to our holding, that there is a conflict between this Board's rulings and those of the Shoreham Board, that is not an unusual state of affairs in NRC proceedings, and a conflict does not in itself raise questions of public interest. Nor is a conflict between licensing board rulings a separate basis for interlocutory review. Public Service Company of Indiana (Marble Hill Station), ALAB-371, 5 NRC 409 (1977); Public Service Company of New Hampshire (Seabrook Station), ALAB-271, 1 NRC 478, 484-85.

Is a prompt appellate decision necessary to prevent unusual delay or expense? No. The delay or expense which might be incurred by Applicants by litigating an issue which otherwise need not be litigated is not unusual and is not the type of delay or expense requiring referral of licensing board rulings. This is a typical reason why interlocutory reviews are not favored in NRC proceedings. North Anna, ALAB-741, passim, supra, citing, e.g., Cleveland Electric Illuminating Company (Perry Nuclear Power Plant), ALAB-675, 15 NRC 1105, 1113-14 (1982); and Seabrook, ALAB-737, supra, 18 NRC at 176 n.12. The Board recognizes that the effect upon Applicants of cumulative delay in the proceeding could be unusual compared to earlier NRC licensing proceedings. Even so, in this instance, litigating the legal-authority

issue does not portend much delay. In fact Applicants have indicated that it intends to address the matter by summary disposition.

Is the party adversely affected by the ruling threatened with immediate and serious irreparable impact which could not be alleviated by a later appeal? No to each aspect of the question. Indeed, we cannot discern, without speculation, why Applicants see themselves to be adversely affected by the rulings.

The legal-authority contention is written on a clean slate. It stands independently of the similar issue in Shoreham. Assuming, as we now must: that the contention is factually correct; that the SPMC depends upon a delegation of police authority, which delegation cannot, for genuine legal reasons, materialize in an actual radiological emergency; then certainly the contention is factually relevant and material to the effectiveness of the SPMC. How would Applicants have us manage the issue? So far we have not had the benefit of Applicants' reasoned analysis of this point. For that reason alone the motion is deficient. As we noted in the order ruling on contentions, after all the evidence is in, the ruling may not be controlling. The assigning of burdens and the identification of presumptions and rebuttals are now useful primarily for organizational puposes. Memorandum and Order, Part I at 20-21.

Does the ruling affect the basic structure of the proceeding in a pervasive or unusual manner? No. The ruling did not in itself even admit or reject a contention. The effect of the ruling was to allocate the burden of proceeding with the evidence. Applicants have never explained why the legal-authority contention is not factually relevant to the SPMC. Most of all, they have failed to explain the basis for their dissatisfaction with the Board's reasoning that, logically, there is no presumption that a plan that cannot be followed will be followed, that, logically, well-pleaded allegations rationally seeking to rebut the presumption appropriately support a litigable issue. They have simply relied on their sparse reference to the Shoreham ruling.

ORDER

Applicants' Motion for Referral is denied. The Alternative Cross Motion for Referral by the Massachusetts Attorney General and New England Coalition on Nuclear Pollution is denied as moot.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Ivan W. Smith, Chairman
ADMINISTRATIVE LAW JUDGE

Bethesda, Maryland
August 26, 1988