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SEPTEMBER 6, 1988

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'88 SEP 12 P2:29

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
VERMONT YANKEE NUCLEAR POWER CORPORATION	)	Docket No. 50-271-OLA (Spent Fuel Pool Amendment)
	)	
(Vermont Yankee Nuclear Power Station)	)	

NRC STAFF RESPONSE TO JOINT MOTION OF NEW ENGLAND COALITION ON NUCLEAR POLLUTION AND THE COMMONWEALTH OF MASSACHUSETTS FOR LEAVE TO FILE LATE-FILED CONTENTIONS

I. INTRODUCTION

On August 15, 1988, Intervenor New England Coalition on Nuclear Pollution (NECNP) and the Commonwealth of Massachusetts (Commonwealth), which is participating in this proceeding as an interested state pursuant to 10 C.F.R. § 2.715(c), submitted late-filed contentions. The NRC Staff's response to these contentions is set forth below.

II. BACKGROUND

On May 26, 1987, the Licensing Board admitted three contentions derived from contentions filed by NECNP and the Commonwealth. Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), LBP-87-17, 25 NRC 838 (1987).

On the licensee's appeal, the Appeal Board sustained the admission of Contention 1, a safety contention alleging that the single failure criterion would be violated by the use of the RHR to cool the spent fuel pool, but reversed the Licensing Board on its admission of two environmental contentions. Vermont Yankee Nuclear Power Corporation

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(Vermont Yankee Nuclear Power Station), ALAB-869, 26 NRC 13 (1987), reconsideration denied ALAB-876, 26 NRC 177 (1987). One of the environmental contentions, "Contention 2," concerned the need for the NRC staff to prepare an environmental impact statement to discuss the increased risks associated with severe reactor accidents; the other, "Contention 3," alleged that the licensee's application did not provide an adequate discussion of alternatives to the proposed action, including dry cask storage and independent pool storage.

On July 25, 1988, the NRC staff published its Environmental Assessment and Finding of No Significant Impact ("EA").

On August 15, 1988, Intervenor NECNP and the Commonwealth of Massachusetts, participating as an interested state, submitted the late-filed contentions that are the subject of this response.

III. DISCUSSION

A. Standards Applicable to Proposed Contentions

In order for contentions to be admitted as matters in controversy in NRC proceedings, they must satisfy the Commission's requirement that the basis for the contention be set forth with reasonable specificity. 10 C.F.R. § 2.714(b). Also, the proposed contentions must fall within the scope of the issues set forth in the Notice of Hearing initiating the proceeding. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170 (1976). See, also, Commonwealth Edison Company (Carroll County Site), ALAB-601, 12 NRC 18, 24 (1980); Portland General Electric Co. (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-290, n. 6 (1979).

The purpose of the basis requirements of 10 C.F.R. § 2.714 are (1) to assure that the contention in question raises a matter appropriate for litigation in a particular proceeding, 1/ (2) to establish a sufficient foundation for the contention to warrant further inquiry into the subject matter addressed by the assertion, and (3) to put the other parties sufficiently on notice "... so that they will know at least generally what they will have to defend against or oppose." Peach Bottom, at 20. In examining the contentions and their bases, a licensing board should not reach the merits of the contentions. Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 548 (1980); Duke Power Co. (Amendment to Materials License SNM-1773-Transportation of Spent Fuel From Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC 146, 151 (1979); Peach Bottom, supra, at 20; Grand Gulf, supra, at 426.

As the Appeal Board instructed in Alabama Power Company (Joseph M. Farley Nuclear Power Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 216-217

1/ A contention must be rejected where:

(a) it constitutes an attack on applicable statutory requirements;

(b) it challenges the basic structure of the Commission's regulatory process or is an attack on the regulations;

(c) it is nothing more than a generalization regarding the intervenor's views of what applicable policies ought to be;

(d) it seeks to raise an issue which is not proper for adjudication in the proceeding or does not apply to the facility in question; or

(e) it seeks to raise an issue which is not concrete or litigable.

Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974).

(1974), in asserting the acceptability of a contention as a basis for granting intervention:

> the intervention board's task is to determine, from a scrutiny of what appears within the four corners of the contention as stated, whether (1) the requisite specificity exists; (2) there has been an adequate delineation of the basis for the contention; and (3) the issue sought to be raised is cognizable in an individual licensing proceeding. (Footnotes omitted)

If a contention meets these criteria, the contention provides a foundation for admission "irrespective of whether resort to extrinsic evidence might establish the contention to be insubstantial." Farley, supra, 7 AEC at 217. 2/ The question of the contention's substance is for later resolution either by way of 10 C.F.R. § 2.749 summary disposition prior to the evidentiary hearing or in the initial decision following the conclusion of such a hearing. Farley, supra, 7 AEC at 217. Thus, it is incumbent upon petitioners to set forth contentions supported by bases that are sufficiently detailed and specific to demonstrate that the issue they purport to raise are admissible.

B. Standards Applicable to Late-Filed Contentions

In addition to showing that its proposed contentions meet the Commission's requirements for admissibility, an intervenor proposing late-filed contentions must satisfy the requirements of 10 C.F.R. § 2.714(a)(1) regarding late-filed contentions. Section 2.714(a)(1) provides that nontimely petitions to intervene or requests for hearing will not be entertained absent a determination by the Licensing Board that

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2/ However, the proposed contention should refer to and address relevant documentation available in the public domain. . . See, Cleveland Electric Illuminating Company, et al. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-24, 14 NRC 175, 181-184 (1981).

the petition or request should be granted based upon a balancing of the following factors:

(i) good cause, if any, for failure to file on time;

(ii) the availability of other means to protect petitioner's interest;

(iii) the extent to which petitioner's participation may reasonably be expected to assist in developing a sound record;

(iv) the extent to which existing parties will represent the petitioner's interest; and

(v) the extent to which petitioner's participation will broaden the issues or delay the proceeding.

The Appeal Board in Catawba established a three part test for good cause: a late-filed contention lacks good cause unless it "(1) is wholly dependent upon the content of a particular document; (2) could not therefore be advanced with any degree of specificity (if at all) in advance of the public availability of that document; and (3) is tendered with the requisite degree of promptness once the document comes into existence and is accessible for public examination." Duke Power Company, (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 469 (1982); affirmed in relevant part, 17 NRC 1041 at 1047 (1983).

C. The Joint Contentions Are Inadmissible.

1. Joint Contention 1 is inadmissible.

Joint Contention 1, regarding reactor accidents resulting in severe consequences in the spent fuel pool, [3/] is closely related to contentions proposed by NECNP and the Commonwealth on March 30, 1987, reworded and admitted by the Licensing Board in LBP-87-17 and rejected by the Appeal Board in ALAB-869. Indeed, Joint Contention 1 is virtually identical to Contention 2 as admitted by the Licensing Board in LBP-87-71. In ALAB-869, the Appeal Board rejected Contention 2, reasoning that:

> [a]s the D.C. Circuit held in San Luis Obispo, 751 F.2d at 1301, NEPA does not require NRC consideration of severe, beyond design-basis accidents because they are, by definition, highly improbable -- i.e., remote and speculative -- events.... The scenario that provides the basis for intervenors' claims of increased risk in contention 2 is just such an accident.... Thus, the Licensing Board erred in its belief that NEPA "mandate[s]" consideration of the risks of the accident hypothesized here....
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> To the extent that the Commission ever considers the environmental impact and risks of a beyond design-basis accident, it does so as an exercise of discretion under its 1980 NEPA Policy Statement.... [B]y its terms, the policy applies to those cases where there has already been a determination that a major federal action significantly affecting the environment is involved and hence an EIS is necessary; it therefore directs what should be included in the EIS (i.e., consideration of the environmental impacts of a severe accident), not whether the EIS is required in the first place.... Thus, before the NEPA Policy Statement is even invoked, there must be some basis for requiring an EIS other than a claim of increased risk from a beyond design-basis accident scenario. In contrast, intervenors' claim here is just that: i.e., the proposed action (expansion of the spent fuel pool) will significantly affect the environment, thereby requiring an EIS, because of the risks of the beyond design-basis accident scenario they have described.
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> In sum, intervenors cannot use a beyond design-basis accident scenario to "bootstrap" their way to an admissible contention that asserts an EIS is required to examine the

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3/ In proposed Joint Contention 1, Joint Movants contend that the risks of an hypothesized reactor accident are sufficient to constitute the proposed amendment as a major federal action significantly affecting the quality of the environment, requiring the preparation and issuance of an Environmental Impact Statement prior to the issuance of the amendment. Joint Motion at 2.

> environmental risks of such an accident. Neither the Commission's NEPA Policy Statement nor the statute itself provides a legally cognizable basis for contention 2. Emphasis in original. Citations omitted. 26 NRC 13, 30-31 (1987).

In ALAB-876, the Appeal Board denied NECNP's petition for reconsideration of ALAB-869, explaining that:

> The principal flaw in NECNP's challenge to ALAB-869 is that it conveniently overlooks the wording and basis of the particular contention here at issue. The unequivocal point of contention 2--both in the forms originally proffered by NECNP and the Commonwealth and as reworded by the Licensing Board, without their objection -- is that a severe reactor core accident, involving substantial fuel damage, hydrogen generation and detonation, reactor vessel failure, and breach of primary containment, would ultimately lead to an accident in the spent fuel pool (housed within the same building as the reactor), the consequences of which would be greater due to the increased number of fuel assemblies stored there pursuant to the instant license amendment request. 26 NRC 277 at 283 (1987).

The Commission's policy statement on severe reactor accidents defines a severe nuclear accident as one in which substantial damage is done to the reactor core whether or not there are serious offsite consequences. 50 Fed. Reg. 32,138 (August 8, 1985).

Both in the statement of proposed Joint Contention 1 and in the basis, NECNP and the Commonwealth state: "A self-sustaining fuel cladding fire in a spent fuel pool with high density racking could be caused by an accident which involves substantial fuel damage without full core melt, if hydrogen leaks to the reactor building." Joint Motion 1, 2. The joint contention is a failed attempt to write around the Appeal Board's proscription in ALAB-869 and ALAB-876. However, contrary to the Joint Movants' scenario, accidents involving hydrogen leakage to the reactor building are not design basis accidents but are beyond the design basis. See, 50 CFR Appendix A, Criteria 35 and 50.

Proposed Joint Contention 1 is substantially the same contention as rejected Contention 2 and must be excluded for the reasons stated above.

2. Proposed Joint Contention 2 is Inadmissible.

Proposed Joint Contention 2 alleges increased worker exposure to radiation resulting from the proposed amendment. 4/ Yet there is nothing in the basis for the contention to suggest that there is any increase in exposure or what the basis for the comparison is. The Environmental Assessment states that the spent fuel pool reracking including the installation of the enhanced cooling system will result in 33 person rem occupational exposure. The EA does not mention the time frame or the worker population over which this dose will be spread. Nor is it necessary for an EA to break down such a very small occupational dose.

The exposure to individual workers is of course limited by the requirements of Part 20 and in any event must be ALARA.

The highly remote and speculative chain of events that Joint Movants project as a basis for their proposed Joint Contention 2 is so conjectural that it would be unreasonable to consider these events in connection with the environmental analysis for this amendment. Joint Movants suggest that a number of events could occur that could result in increases in the occupational dose, such as a breach of protective clothing or the dropping of a rack. They further speculate that: "Workers could be exposed to isotopes other than Krypton-85 from leaking rods. Worker exposure to the

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4/ The proposed contention states that the risk of increased worker exposure to radiation is sufficient to constitute the proposed amendment as a major federal action significantly affecting the environment, requiring the preparation and issuance of an Environmental Impact Statement prior to issuance. Joint Motion at 3.

heavily radioactive gamma rays could result if the Purification filter does not work, and releases gamma rays to the pool." Joint Motion at 4. As a bottom line, NECNP and the Commonwealth state that if any of these highly remote and speculative events were to occur, a significant radiological impact might ensue. All of this is highly speculative. The staff properly concluded that the projected occupational dose is environmentally insignificant. This is true whether that dose is considered as a percentage of total occupational dose to workers on a yearly basis or over the life of the plant. Neither NEPA nor the Commission's regulations require more than the discussion provided by the Staff in the EA. The Joint Movants provide no credible basis for their belief that the occupational dose associated with the proposed amendment has any environmental significance.

The proposed contention cannot be said to be stated with the requisite basis and specificity and should, therefore, not be admitted.

3. Proposed Joint Contention 3 is Inadmissible.

Proposed Joint Contention 3 alleges that the Staff's consideration of dry cask storage is inadequate because Section 102(2)(E) of NEPA, 42 USC § 4332(E) and the NRC's regulations in 10 C.F.R. § 51.30(a)(ii) require an environmental assessment to consider such alternatives to the proposed action as may partially or completely meet the proposal's goal. In support of this proposition, Joint Movants cite to Natural Resources Defense Council v. Callaway, 524 F.2d 79 (2nd Cir 1975), which is a case involving an EIS not as EA. In any event, Section 102(2)(E) concerns EIS's not EA's. The Commission's regulation in § 51.30(a)(ii) admittedly concerns EA's. However, it merely states: "An environmental assessment

shall identify the proposed action and include: (ii) alternatives as required by Section 102(2)(E) of NEPA." That section of NEPA concerns alternative use of resources. The Staff's EA properly and correctly states that alternative use of resources need not be considered as the action does not involve the use of resources not previously considered in connection with the Nuclear Regulatory Commission's Final Environmental Statement dated July 1972 related to Vermont Yankee Nuclear Power Station. The Staff's EA supplements the FES; it need not consider the alternative use of resources unless resources not identified in the FES are implicated. Such would be the case if the proposal were for, for example, an offsite ISFSI. However, such is not the case here. Even though neither NEPA nor the Commission's regulations in 10 CFR § 51 requires consideration of alternatives under the circumstances described above, the Staff did discuss alternatives and the Joint Movants offer no basis for their suggestion that the discussion is inadequate.

Also, as a part of their basis, NECNP and the Commonwealth state that dry cask storage is an environmentally preferable alternative. They offer no support for their preference for dry cask storage. NECNP and the Commonwealth's proposed Contention 3 is without basis in law or in fact. It should not be admitted.

D. Balancing the Five Factors Would Favor Admission of Proposed Joint Contentions 2 and 3 if They Were Otherwise Admissible; It Would Disfavor Admission of Proposed Joint Contention 1.

1. Good Cause

As proposed Joint Contention 1 is inadmissible, the Licensing Board need not consider the five factor test for late-filed contentions with regard to proposed Joint Contention 1. However, if the Licensing Board

should determine that it is necessary to weigh the five factors, it should consider the Staff's views concerning the Joint Movants' showing on those factors. As regards good cause, contrary to what the joint movants state, proposed Joint Contention 1 was not held by the Appeal Board to be premature, Joint Motion at 8, but was rather held to be inadmissible as a matter of law.

Consideration of the first factor, good cause, with regard to proposed Joint Contention 1 disfavors admission of such a contention. All of the information necessary to formulate the contention was available prior to the issuance of the EA. However, because proposed Joint Contentions 2 and 3 relate to the EA, a document that was not available until July 25, 1988, good cause exists with regard to those two contentions.

2. Availability of Other Means to Protect Petitioner's Interests and the Extent to Which That Interest Will be Represented by Existing Parties.

Factor (ii) concerns whether there is another forum available in which a party may have its interests represented. Factor (iv) concerns whether there is another party to represent those interests. 10 C.F.R. § 2.714(a). These factors are generally given less weight than the others. See, Commonwealth Edison Company (Braidwood Nuclear Power Station, Units 1 and 2) CLI-86-8, 23 NRC 241, 245 (1986); citing, South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981). In light of precedent, the Staff believes that these two factors weigh in favor of the Joint Movants.

3. Ability to Contribute to the Development of a Sound Record.

Inexplicably, the Joint Movants have failed to address the third factor, ability to contribute to the development of a sound record. Therefore, their showing on this factor weighs against admission.

4. Whether Admission of the Proposed Contentions would Broaden the Issues or Delay the Proceeding.

With regard to broadening the issues, the Joint Movants merely state that admission of their contentions would not "unduly" broaden the issues. Joint Motion at 9. It is the staff's opinion that admission of the contentions would broaden the issues, in that the only contention in the proceeding concerns a safety matter. Therefore, admission of any of the three contentions would, of course, broaden the issues to be resolved by the Licensing Board.

As far as delay is concerned, the question to be decided is whether by filing late the petitioner has occasioned a delay in the proceeding that would not have been present had the filing been on time. Washington Public Power Supply System (WPPSS) Nuclear Project No. 3) ALAB-747, 18 NRC 1167 at 1180 (1983). Here, with regard to proposed Contentions 2 and 3, the filing could not have been timely, given the nature of the contentions, in that they relate to a recently issued Environmental Assessment. Any delay that might be occasioned by the admission of Joint Contentions 2 and 3 should not, therefore, weigh heavily against the Joint Movants. However, admission of either or both of the two contentions will delay the proceeding by the time required to litigate them. With regard to proposed Joint Contention 1, that contention not only could have been filed earlier but was in fact filed earlier. Therefore, weighing the fifth factor might slightly favor Joint Contentions 2 and 3 but definitely disfavors Joint Contention 1.

A balancing of the five factors weighs in favor of proposed Joint Contentions 2 and 3 and against proposed Joint Contention 1.

IV. CONCLUSION

For the reasons discussed, the Licensing Board should reject the joint contentions proposed by NECNP and the Commonwealth of Massachusetts.

Respectfully submitted,

Ann P. Hodgdon

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Dated at Rockville, Maryland
this 6th day of September, 1988

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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VERMONT YANKEE NUCLEAR POWER CORPORATION	)	Docket No. 50-271-OLA (Spent Fuel Pool Amendment)
	)	
(Vermont Yankee Nuclear Power Station)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO JOINT MOTION OF NEW ENGLAND COALITION ON NUCLEAR POLLUTION AND THE COMMONWEALTH OF MASSACHUSETTS FOR LEAVE TO FILE LATE-FILED CONTENTIONS" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 6th day of September 1988.

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