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IN NRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'88 SEP 23 P2:50

BEFORE THE COMMISSION

In the Matter of
PUBLIC SERVICE COMPANY OF
NEW HAMPSHIRE, et al.
(Seabrook Station, Units 1 and 2)

}
Docket Nos. 50-443 OL-01
50-444 OL-01
(On-site Emergency Planning
and Safety Issues)
}

NRC STAFF RESPONSE TO NEW ENGLAND COALITION ON
NUCLEAR POLLUTION'S PETITION FOR REVIEW OF ALAB-899

Stephen A. Bergquist
Counsel for NRC Staff

September 23, 1988

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INTRODUCTION

On September 12, 1988, the New England Coalition On Nuclear Pollution (NECNP), petitioned the Commission to review the Appeal Board's decision in ALAB-899, ^{1/} affirming the Licensing Board's unpublished May 12, 1988 Order dismissing NECNP Contention IV. Prior thereto the Licensing Board had ruled that Contention IV did not embrace the issue of microbiologically-induced corrosion (MIC), but rather was concerned only with the possibility of a blockage of coolant flow caused by the accumulation of aquatic organisms. ^{2/} In the face of that ruling NECNP served notice that it would not litigate Contention IV as interpreted by the Licensing Board but reserved the right to appeal whether the Contention encompassed the MIC issue. See Letter From Andrea Ferster, Esq. to Licensing Board (April 22,

^{1/} Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC ____ (August 23, 1988).

^{2/} Memorandum and Order (Denying Motion to Compel) (February 17, 1988) ("February 17, 1988 Order"), reconsideration denied, Memorandum and Order (March 18, 1988) ("March 18, 1988 Order").

1988). The Appeal Board upheld both the Licensing Board's interpretation and its dismissal of Contention IV because "a fair reading of the Coalition's Contention IV and its stated basis compels us to conclude that that contention was intended to embrace only cooling system blockage." ALAB-899, slip op. at 7.

As explained below, Commission review of ALAB-899 is not warranted. ALAB-899 does nothing more than uphold the Licensing Board's interpretation that the scope of NECNP Contention IV is limited to the issue of whether Applicants' surveillance and inspection program is adequate to detect and prevent possible coolant flow blockage resulting from the buildup of biological organisms and not from corrosion. This interpretation fully comported with established standards of interpretation and with policy considerations underlying the regulatory requirements for reasonable specificity in contentions. The Appeal Board so held. ALAB-899, passim. Hence, NECNP's petition does not raise "an important matter that could significantly affect the environment, the public health and safety" or present "an important procedural issue or question of public policy." For these reasons, NECNP's petition for review should be denied.

DISCUSSION

A. Legal Standards

Petitions for review, and responses in opposition, must satisfy the requirements of 10 C.F.R. § 2.786(b)(2). Those requirements are:

- (i) A concise summary of the decision or action of which review is sought;
- (ii) A statement (including record citation) where the matters of fact or law raised in the petition for review were previously raised before the Atomic Safety and

Licensing Appeal Board and, if they were not why they could not have been raised;

- (iii) A concise statement why in the petitioner's view the decision or action is erroneous; and
- (iv) A concise statement why Commission review should be exercised.

10 C.F.R. § 2.786(b)(2)(i-iv). The Staff will address each of these points seriatim.

B. Summary of ALAB-899

In its August 23, 1988 Order, the Appeal Board affirmed the Licensing Board finding that remanded NECNP Contention IV did not encompass MIC, but rather focused exclusively on the possibility of blockage of coolant flow to safety-related systems caused by the accumulation of aquatic organisms. ALAB-899, slip op. at 5-6. The Appeal Board noted that the sole basis of the contention was a Federal Register notice in which the Commission called attention to a previously undiscovered cooling system blockage at several nuclear facilities due to the accumulation of asiatic clams, mussels, other aquatic organisms, and debris. Id. In concluding that Contention IV was intended to embrace only cooling system blockage, the Appeal Board also observed that the overall record, including excerpts from NECNP's written submissions and oral argument before the Appeal Board, pointed toward a concern only with potential cooling system blockage arising from the accumulation of aquatic organisms and debris. Id. at 8-10. The Appeal Board stated that had NECNP wished to litigate the adequacy of Applicants' program for controlling MIC, the proper course was for it to have filed a late contention which met the five-factor test set forth in 10 C.F.R. § 2.714(a). Id. at 11.

C. The Matters Raised In The Petition Were Raised Below

In its petition, NECNP challenges the Appeal Board's determination that Contention IV encompassed only blockage of reactor coolant systems and not degradation caused by MIC. Petition at 5-6. Further, NECNP objects, in essence, to the Appeal Board's determination that it was unnecessary to consider NECNP's discovery-related requests since these were predicated on the interpretation of Contention IV. ^{3/} Id. at 6-8. NECNP raised these arguments below. See NECNP Brief, passim.

D. ALAB-899 Contains No Error Of Fact, Law, or Policy

The Appeal Board and the Licensing Board correctly interpreted NECNP Contention IV not to encompass the issue of MIC. The arguments in NECNP's Petition do not serve to undermine the Appeal Board's determination, and it should not be disturbed.

A petition to intervene in a proceeding must set forth with particularity "the specific aspect or aspects of the matter of the proceeding as to which petitioner wishes to intervene." 10 C.F.R. § 2.714(a)(2). Among the elements that 10 C.F.R. § 2.714(a) and (b) have been construed as requiring is that the petitioner identify the specific matters as to which the petitioner desires to participate. Philadelphia Electric Co. (Peach

^{3/} NECNP continues to argue, as it has in earlier stages of this proceeding, that the Licensing Board erred in denying its February 19, 1988 Motion for Leave to Enter Applicants' Land and its motion to compel discovery into circulating, as opposed to cooling, water systems. These arguments are logically dependent on the validity of NECNP's primary argument regarding the proper scope of its Contention IV. Since that argument is without merit, see Section D. post, these contingent claims fall of their own weight and need not be further addressed.

Bottom Atomic Power Station, Units 2 & 3), CLI-73-10, 6 AEC 173 (1973); Florida Power and Light Co. (Turkey Point Plant, Units 3 and 4), CLI-81-31, 14 NRC 959, 960 (1981), citing, Public Service Co. of Indiana (Marble Hill Nuclear Generating Station Units 1 and 2), CLI-80-10, 11 NRC 438 (1980); Consumers Power Co. (Big Rock Point Plant), CLI-81-32, 14 NRC 962, 963 (1981). Where the issue is the scope of a contention, the Appeal Board has stated that "there is no good reason not to construe the contention and its bases together in order to get a sense of what precise issue the party seeks to raise." ALAB-899, slip op. at 7. A prime purpose of the reasonable specificity requirement of 10 C.F.R. § 2.714(b) is that other parties be put on notice as to what issues they will have to defend against or oppose. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20, modified on other grounds, CLI-74-32, 8 AEC 217 (1974). ^{4/}

The Appeal Board correctly concluded that NECNP Contention IV failed to meet these requirements regarding the subject of MIC. The theme and focus of the contention is the accumulation of mollusks and other aquatic organisms and debris in Seabrook's cooling systems. The plain and ordinary meaning of the language of the contention and its basis sustain the Appeal Board's conclusion that NECNP impermissibly sought to expand the scope of Contention IV to inject an issue into the proceeding which

^{4/} Additionally, a contention drawn by counsel experienced in NRC practice, such as counsel for NECNP, must exhibit a high degree of specificity. Kansas Gas & Electric Co. (Wolf Creek Generating Station), ALAB-279, 1 NRC 559, 576-577 (1975).

neither the Licensing Board nor opposing parties had any reason to anticipate.

For example, the contention refers to the need for establishing a "maintenance program for the accumulation of mollusks, other aquatic organisms, and debris in cooling systems. . ." (Emphasis added). The basis similarly emphasizes "accumulation" and "blockage of coolant systems." In spite of the fact that the basis also mentions "the buildup of fouling organisms or corrosion products on piping walls, although not severe enough to block water flow during normal operation, could be dislodged by seismic activity", there is no mention of MIC. The gravamen of NECNP's concern was the asserted danger of piping blockage or obstruction. Further, the Federal Register notice which prompted the filing of this contention (47 Fed. Reg. 21653 (May 19, 1982)) concerned potential blockage due to dislodged buildup of various aquatic organisms including clams, mussels, barnacles, and the like. The term "microbiologically induced corrosion" or "MIC" is not even mentioned in the notice.

NECNP, in its May 1987 brief appealing the Licensing Board's rejection of Contention IV, stated that "[t]he basis for this contention was a Federal Register notice dated May 19, 1982, which stated NRC's concerns over the accumulation of asiatic clams, mussels, and other aquatic organisms in six nuclear power plant reactor cooling systems." ^{5/} (Emphasis added). This position was reiterated at oral argument before the Appeal Board, during which NECNP's counsel referred to the Federal

^{5/} New England Coalition on Nuclear Pollution's Brief in Support of Appeal of Partial Initial Decision Authorizing Issuance of a License to Operate at Low Power (May 8, 1987) at 10.

Register notice as the basis for Contention IV. ALAB-899, supra, slip op. at 8-9. Thus, for five years after the contention was filed, NECNP itself thought it concerned only blockage caused by an accumulation of aquatic organisms and debris.

Finally, as pointed out by the Appeal Board, NECNP itself has repeatedly recognized a dichotomy between the blockage problem caused by microbiological organisms and leakage caused by MIC, with the term blockage used solely in the context of the accumulation of microbiological organisms and debris. Id. at 9-11.

The argument in NECNP's brief was basically that Contention IV broadly refers to "fouling", that scientific literature indicates that MIC is encompassed in "fouling", and that the contention must be construed to include the issue of MIC. As ALAB-899 holds, this path of reasoning is too tortuous to comply with requirements that contentions must give notice of facts which petitioners desire to litigate and must be specific enough to satisfy the requirements of 10 C.F.R. § 2.714. Id. at 5-7.

The foregoing considerations lead to the conclusion that the Appeal Board was correct in upholding the Licensing Board's ruling that Contention IV concerned only macrobiologically-caused blockage, and not MIC. The Appeal Board made no error of fact, law, or policy.

E. Commission Review Is Not Warranted

As 10 C.F.R. § 2.786(b)(4) makes clear, "the grant or denial of a petition for review is within the discretion" of the Commission. The Commission has indicated that review will not be granted in the absence of a showing that the case "involves an important matter that could

significantly affect the environment, public health and safety, . . . involves an important procedural issue, or otherwise raises important questions of public policy[.]" 10 C.F.R. § 2.786(b)(4)(i). Further, a petition for review "of matters of fact will not be granted unless it appears that the Atomic Safety and Licensing Appeal Board has resolved a factual issue necessary for decision in a clearly erroneous manner contrary to the resolution of that same issue by the Atomic Safety and Licensing Board." 10 C.F.R. § 2.786(b)(4)(ii).

NECNP argues that the Commission should take review of its petition because it raises both significant safety issues and important questions of Commission practice and policy. However, there are none. What is involved here was solely a like interpretation of words of a contention by both a Licensing Board and an Appeal Board in an individual case. No wide-ranging issue is presented calling for Commission review. The Board only followed the self-evident principle that a contention and its supporting bases must be specific enough to apprise opposing parties of the claims they must defend against.^{6/} It is not error for a Licensing Board to exclude contentions or bases that fail this fundamental test.^{7/} It is also well settled that the Appeal Board will defer to a licensing board's findings of fact except where the Appeal Board's examination of the

^{6/} Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20, modified on other grounds, CLI-74-22, 8 AEC 217 (1974).

^{7/} Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 635 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 725 (1985).

evidence convinces it that the record compels a different result. ^{8/}
NECNP's petition for review, therefore, does not raise any important
factual, legal, procedural, or policy issue.

Further, the Licensing Board's dismissal of NECNP Contention IV does
not relieve the NRC Staff "of its obligation to ensure the adequacy of the
applicants' program for detecting and controlling microbiologically-induced
corrosion." ALAB-899, slip op., n.18 at 11-12.

CONCLUSION

For the reasons stated in this response, NECNP's Petition for Review
of ALAB-899 should be denied.

Respectfully submitted,

Stephen A. Bergquist

Stephen A. Bergquist
Counsel for NRC Staff

Dated at Rockville, Maryland
this 23rd day of September, 1988

8/ See Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), ALAB-611, 12 NRC 301, 304 (1980); Niagara Mohawk Power Corporation (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 357 (1975); Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-781, 20 NRC 819, 834 (1984); Carolina Power and Light Company (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 531 (1986).

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO NEW ENGLAND COALITION ON NUCLEAR POLLUTION'S PETITION FOR REVIEW OF ALAB-899 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, by deposit in the Nuclear Regulatory Commission's internal mail system, this 23rd day of September 1988.

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