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UNITED STATES OF AMERICA

before the

NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al.	)	Docket Nos. 50-443-OL-1 50-444-OL-1
(Seabrook Station, Units 1 and 2)	)	(Onsite Emergency Planning and Safety Issues)

APPLICANTS' RESPONSE TO MOTION TO ADMIT EXERCISE CONTENTION OR, IN THE ALTERNATIVE, TO REOPEN THE RECORD

STATEMENT OF THE CASE

Under date of September 16, 1988, the Attorney General of The Commonwealth of Massachusetts, New England Coalition on Nuclear Pollution, Seacoast Anti-Pollution League, and the Town of Hampton, New Hampshire (hereinafter referred to collectively as the Intervenors) filed with this Board a document entitled Motion to Admit Exercise Contention or, in the Alternative, to Reopen the Record (the Motion). The thrust of the Motion is to inject into the proceeding a new contention which would permit the litigation of certain alleged deficiencies in the Seabrook Station onsite emergency plan.

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The gravamen of the Motion is an inspection report issued by the Staff on July 6, 1988[1] and served by mail upon all parties to the Seabrook proceeding on July 7, 1988.[2] In that report, the Staff reported its observations of a graded exercise held on June 28, 1988. As is customary in such reports, the Staff, in a discussion of "Exercise Observations,"[3] listed "strengths" and "weaknesses." Included in the discussion of "weaknesses" was the following item:

> "1. The Technical Support Center (TSC) and Emergency Operations Facility (EOF) staff displayed questionable engineering judgment and/or did not address technical concerns (50-443/88-08-01). For example:
>
> . Neither the EOF or TSC staff questioned a release of greater than 7000 curies per second with only clad damage and no core uncovery;
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> . Efforts continued to restore the Emergency Feedwater Pump after a large break LOCA;
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> . A questionable fix for the Containment Building Spray system;

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[1]The report is reproduced as Exhibit A to the Motion and will be hereinafter cited as "Exh. A."

[2]Letter, Bellamy to Harrison Re: Inspection No. 50-443/88-09 (July 7, 1988) (hereinafter referred to and cited as "Letter"). The Intervenors did not include the covering letter as part of Exhibit A to the Motion.

[3]Exh. A at 4-5.

- A lack of effort to locate and isolate the release path; and

- No effort was noted to blowdown Steam Generators to lessen the heat load in containment."[4]

This "weakness" (as well as others upon which the Intervenors apparently do not base the Motion) was set out in the context of a report which also recited as the "Results":

> "No violations were identified. Emergency response actions were adequate to provide protective measures for the health and safety of the public."[5]

This conclusion was also expressed essentially verbatim in the Letter.[6] Nevertheless, focussing upon the above-quoted

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[4] Exh. A at 5.

[5] Exh. A at 1. In addition, the following appeared in Section 6 (Exit Meeting and NRC Critique) of the Report:

> "The licensee was informed that previously identified items were adequately addressed and *no violations were observed*. Although there were areas identified for corrective action, the NRC determined that within the scope and limitations of the scenario, *the licensee's performance demonstrated that they could implement their Emergency Plan and Emergency Plan Implementing Procedures in a manner which would adequately provide protective measures for the health and safety of the public.*" (Emphases supplied).

[6] "Within the scope of this inspection, no violations were observed. It was determined that your emergency response actions were adequate to provide protective measures for the health and safety of the public." Letter at 1.

"weakness," and supported by an affidavit which purports to demonstrate that the "weakness" is more significant than the Staff believed,[7] the Intervenors now claim to have just learned of a significant safety issue which must be litigated. For the reasons set forth below, Intervenors efforts should be found wanting.

ARGUMENT

I. THIS BOARD IS WITHOUT JURISDICTION TO GRANT THE RELIEF REQUESTED

This Board, at this juncture, is a board of severely limited jurisdiction. The matters remaining before it, remain as the result of a remand of an initial decision issued some time ago. It is fundamental that when a Licensing Board receives a proceeding back on remand from the Appeal Board, its jurisdiction is limited to those issues remanded to it; other issues which might have been, or, in fact, were, raised before it may, thereafter, be raised only through the vehicle of a petition to the Director of Nuclear

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[7]The affidavit attempts to shrug off the overall conclusion of the report by making certain assumptions as to what must have been going through the Staff's collective mind in reaching the conclusions it did. Pollard Aff. ¶ at pp. 8-9. Whatever qualifications the affiant may have to address the technical matters he purports to address, psychology and mindreading are not listed among them.

Reactor Regulation under 10 CFR §2.206.[8] No issue of the nature here sought to be raised was remanded to this Licensing Board. Indeed as the Intervenors concede, the issue was never raised before this Board when it was exercising plenary jurisdiction over the proceeding.[9] Therefore, there is no jurisdiction in this Board to entertain it now.

II. THE INTERVENORS HAVE FAILED TO SATISFY THE CRITERIA FOR ADMISSION OF A LATE-FILED CONTENTION.

A. Introduction.

Admission of late-filed contentions in NRC licensing proceedings is governed by 10 CFR §2.714(a) which requires a balancing of five factors, each of which is discussed below. The burden is upon the party proffering the late-filed

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[8] Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-526, 9 NRC 122, 124 (1979); Portland General Electric Co. (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979).

[9] Motion at 7 n.5. The Intervenors apparently believe this state of affairs assists their cause. However, since this Board would have had jurisdiction to entertain the issue in the past, and since it was not raised, the Director of Nuclear Reactor Regulation's findings as to all issues not raised before the Licensing Board encompassed in the outstanding operating license constitutes the finding upon this issue by the Commission. 10 CFR §2.760a; 10 CFR §50.57.

contention to satisfy the balancing test set forth in the rule.[10]

B. Analysis of the "Five Factors."

i. Good Cause, if any, for Failure to File on Time

The "Good Cause" factor "is a crucial element in the analysis of whether a late-filed contention should be admitted. If the proponent of a contention fails to satisfy this element of the test, it must make a 'compelling' showing with respect to the other four factors."[11]

With respect the matter at bar, the Intervenors knew or should have known of the existence of the issue they seek to raise upon receipt by them of the Letter which was sent on July 7, 1988. Accepting the Intervenors' representation that the letter was not received by them until "on or about July 15, 1988,"[12] this still means that they waited two full months, or until the eve of possible resolution of the remaining issue blocking low-power licensure, before filing

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[10] Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, 12 NRC 350, 352 (1980).

[11] Commonwealth Edison Company (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986), citing, Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-83-58, 18 NRC 640, 663 (1983); Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725 (1982).

[12] Motion at 9.

the Motion. They argue that the trigger date should be extended to the week of August 15, 1988 on the theory that it was not until their receipt of the "exercise scenario documentation" that they could have "a proper technical understanding" of the significance of the report. This argument rings hollow from a group that has been able to discern contentions by the dozen from webs of gossamer in the past. More importantly we are unadvised as to how the existence of the possible contention had to await the later information when the very basis of the contention was listed under a heading in a Staff document of "weaknesses." No good cause for the delay has been shown. The first factor should weigh against admission.

ii. Availability of Other Means to Protect Petitioners' Interest.

The Applicants would concede that this (and the fourth factor) favor the Mass AG, as is usually the case. However, "[t]his factor, like the closely related fourth factor (the extent to which other parties will represent petitioners' interest) is accorded less weight, under established Commission precedent, than factors one, three, and five."[13]

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[13] Commonwealth Edison Company (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 245 (1986), citing with approval, South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981).

iii. The Extent to Which the Petitioner's Participation May Reasonably Be Expected to Assist in Developing a Sound Record.

Commission "case law establishes both the importance of this third factor in the evaluation of late-filed contentions and the necessity of the moving party to demonstrate that it has special expertise on the subjects which it seeks to raise. [citation] The Appeal Board has said: 'When a petitioner addresses this criterion it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony'."[14] The Intervenors have merely alleged that they will "[provide] an expert witness" and generally identified the subject matter of the testimony the unnamed witness will give. This hardly meets the standard set forth above.

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[14] Commonwealth Edison Company (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 246 (1986), citing with approval, Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982).

iv. The Extent to Which the Petitioner's Interest Will Be Represented by Existing Parties.

As indicated above in §B., this factor always favors the petitioner and is entitled to less weight than numbers 1, 3, and 5.

v. The Extent to Which the Petitioner's Participation Will Broaden the Issues or Delay the Proceeding.

The injection of a new issue will obviously delay any proceeding. In this case, it has a possibility of delaying the issuance of low power testing authority, and its timing is susceptible of a cynical reading that its filing was solely for that purpose. Obviously it will also broaden the proceeding, as the Intervenors, themselves, concede.[15]

C. The Balance of the Factors

The weightier factors, numbers 1, 3, and 5, all weigh against the Intervenors. Only the two factors which are given less weight, weigh, as they usually do, in their favor. The balance favors denial of the motion.

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[15] Motion at 11.

III. THE MOTION FAILS TO SATISFY THE CRITERIA FOR REOPENING THE RECORD.

A. The Applicable Regulation.

The Intervenors must satisfy the requirements of the regulation governing reopening of the record in order to succeed herein. This is so because the Commission has ruled that the record in this docket is closed for consideration of new issues.[16]

Motions to reopen the record are governed by 10 CFR §2.734. That regulation states, in material part:

> "(a) A motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied:
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> "(1) The motion must be timely, except that an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented.
>
> "(2) The motion must address a significant safety or environmental issue.

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[16] Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-88-07 __ NRC ___, Slip Op. at 3 (Sept. 22, 1988).

> "(3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially."
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> * * *
>
> "(d) A motion to reopen which relates to a contention not previously in controversy among the parties must also satisfy the requirements for nontimely contentions in §2.714(a)(1)(i) through (v)."

The movant is required to meet each and every one of the criteria set forth above, and "[t]he burden of satisfying all these requirements is heavy indeed."[17]

B. Analysis of the Factors

i. Timeliness

As already set forth in §II.B.i. above, the motion is not timely in the circumstances of this case.

ii. Significance of the Issue.

To begin with it is noteworthy that the Staff did not feel that the "weakness" upon which this whole motion is based had raised any concern which prevented the Staff from

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[17] Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 14 (1985). Accord, Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-786, 20 NRC 1087, 1090 (1984); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-756, 18 NRC 1340, 1344 (1983); Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 328 (1978).

finding that the response measures taken were adequate to protect the public. This alone makes clear that the issue being raised is not a significant safety issue.

In addition, there are filed herewith the affidavits of James A. MacDonald, Gary J. Kline, and Gregg F. Sessler. These affidavits address each of the "examples" of situations where the TSC or EOF staffs supposedly "displayed questionable engineering judgement and/or did not address technical concerns." With respect to the release of greater than 7000 curies per second, it appears that (a) the release figure was supplied by the controllers and, therefore, was not to be questioned under the rules, (b) a review of exercise events reveals that, in fact, the lack of correlation between the release condition and core cooling indications was recognised and discussed by TSC personnel, and (c) the lack of correlation in no way hindered the response and implementation of emergency procedures.[18] The continued efforts to restore the Emergency Feedwater (EFW) pump (a) did not hinder nor would it have effected the response of the TSC to higher priority activities, (b) was recognised as an effort which may not be needed to mitigate a large break LOCA, and (c) was continued for good and sufficient reason anyway in light of the fact that no higher

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[18] MacDonald Aff. ¶¶ 4-6.

priority item was being interfered with.[19] The "questionable fix for the Containment Building Spray System" was (a) in fact a contingency plan developed in case the normal flow path of the system could not be reestablished (the controllers interceded and declared efforts to reestablish the flow to be ineffectual on four occasions), (b) was technically sound, and (c) if needed, the fix would have been reviewed by NRC before implementation, a review not carried out because the normal flow path was reestablished.[20] In fact, a concerted effort was made to locate and isolate the containment bypass leakage but was curtailed because of the fact that entry into the areas necessary for ultimate isolation or repair had to be postponed due to high radiation levels therein.[21] As to the assertion that "[n]o effort was noted to blowdown the Steam Generators to lessen the heat load in the containment," it appears that (a) in fact such an effort was considered and temporarily postponed to assess its possible radiological consequences, (b) prior to completion of the assessment necessary to determine whether such an action would lead to introduction of accident levels of radioactivity to areas of the plant as yet unaffected, Day #1

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[19] Kline Aff. ¶¶ 4-10.

[20] Sessler Aff. ¶¶ 4-11

[21] Kline Aff. ¶¶ 11-14.

of the exercise ended, and (c) subsequent analysis has shown that such action would have had no practical effect in reducing the temperature and pressure of interest.[22]

From all of the foregoing it is clear that the issue which Intervenors seek to raise is not a significant safety issue.

iii. Difference in Result

All of the matters upon which the Intervenors base their Motion have been shown by the affidavits filed herewith to, in fact, be matters which were properly addressed during the exercise and not to have any safety significance. Thus, there is little doubt that the result of the heretofore completed litigation would not change.

iv. Compliance with 10 CFR §2.714(a)(1)(i)-(v).

As set forth in §II.C. above, the Intervenors have not made the necessary showing under 10 CFR §2.714(a)(1)(i)-(v).

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[22] Sessler Aff. ¶¶ 13-21.

CONCLUSION

The Motion should be denied.

Respectfully submitted,

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

Counsel for Applicants