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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'88 OCT -4 P5:11

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF THE CLERK
DOCKETING AND RECORDS
DIVISION

In the Matter of)	
)	Docket Nos. 50-443 OL-01
PUBLIC SERVICE COMPANY OF)	50-444 OL-01
NEW HAMPSHIRE, <u>et al.</u>)	On-site Emergency Planning
)	and Safety Issues
(Seabrook Station, Units 1 and 2))	

NRC STAFF RESPONSE TO JOINT INTERVENORS'
MOTION TO ADMIT EXERCISE CONTENTION OR,
IN THE ALTERNATIVE, TO REOPEN THE RECORD

INTRODUCTION

On September 16, 1988, the New England Coalition On Nuclear Pollution (NECNP), the Seacoast Anti-Pollution League (SAPL), the Town of Hampton, and the Massachusetts Attorney General (collectively "Joint Intervenors") filed a "Motion To Admit Exercise Contention Or, In The Alternative, To Reopen The Record" ("Motion") in which they request the "on-site" Licensing Board to admit a contention which alleges that there were "fundamental deficiencies" in the emergency planning exercise conducted by Applicants on June 27-29, 1988, and that the alleged deficiencies preclude a finding that there is reasonable assurance adequate protective measures can and will be taken by Applicants in the event of a radiological emergency. See Motion at 1 and Exhibit 1 at 1. In the event the Board determines that the record has been closed in the on-site portion of this proceeding, Joint Intervenors move that the record be reopened for the purpose of admitting their contention. Motion at 1.

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As explained below, a balancing of the five factors listed in 10 C.F.R. § 2.714(a)(1) weighs against admitting Joint Intervenors' untimely contention. The motion to admit the contention should be denied. ^{1/}

DISCUSSION

Contrary to the position of Joint Intervenors, the contention proffered by them is untimely. The proffered contention comes nearly eighteen months after the issuance of the Licensing Board's March 25, 1987 initial decision and almost two years after the record was closed in the onsite emergency planning phase of this case. In these circumstances, the proffered contention must be considered "nontimely" as that term is used in 10 C.F.R. § 2.714(a)(1). That section provides that before an untimely, though otherwise admissible, contention may be accepted for litigation, the proponent must demonstrate that a balancing of the five

^{1/} The Staff agrees with Joint Intervenors that the emergency planning exercise conducted by Applicants on June 27-29, 1988 is "material" to the determination whether there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency. See Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1443-44 (D.C. Cir. 1984). For this reason, the Staff does not discuss herein whether the Joint Intervenors' alternative motion to reopen the record meets the standards set forth in 10 C.F.R. § 2.734.

However, requiring that the instant late-filed contention satisfy the requirements of 10 C.F.R. § 2.714(a)(1) does not violate Joint Intervenors' hearing rights under section 189a of the Atomic Energy Act because it has been held that the Commission may place, in the interest of efficient administrative process, reasonable procedural requirements concerning the exercise of that right. See e.g. Duke Power Company (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC at 1045, citing BPI v. AEC, 502 F.2d 424 (D.C. Cir. 1974); Easton Utilities Commission v. AEC, 424 F.2d 847 (D.C. Cir. 1970).

factors listed in 10 C.F.R. § 2.714(a)(1) weigh in favor of admitting the contention. E.g. 10 C.F.R. § 2.714(a)(1); Commonwealth Edison Company (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241 (1986); Duke Power Company (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983); Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-883, 27 NRC 43, 49 (1988). The five factors are:

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner's interest will be protected.
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which petitioner's interest will be represented by other parties.
- (v) The extent to which petitioner's participation will broaden the issues or delay the proceeding.

10 C.F.R. § 2.714(a)(1). As shown below, a balancing of these factors militates against the admission of Joint Intervenors' late-filed contention.

1. Good cause

As the Commission itself has noted, "this first factor is a crucial element in the analysis of whether a late-filed contention should be admitted." Braidwood, supra, CLI-86-8, 23 NRC at 244. In Braidwood, the Commission also reaffirmed the well settled principle that a proponent who "fails to satisfy this element" of the test "must make a 'compelling'

showing with respect to the other four factors." Id.; accord Mississippi Power and Light Company (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725 (1982).

Joint Intervenors argue that there is good cause for failing to file the proffered contention earlier. They are only partly correct. Inasmuch as the emergency planning exercise referenced in the contention was not conducted until June 27-29, 1988, they of course cannot be faulted for not raising the issue before then. However, Joint Intervenors admit that they received a copy of the NRC Inspection Report No. 50-443/88-09 on or about July 15, 1988. See Motion at 9. This Staff inspection report forms the basis for Joint Intervenors' late-filed contention ^{2/} and had been in their possession for more than six weeks prior to the filing of their late-filed contention. It is this six week period of inaction on Joint Intervenors' part that precludes a finding of good cause for the delay in filing the proffered contention. And it is from the date which this information first was made publicly available (July 6, 1988) that the time period for evaluating whether there is good cause for the untimely filing begins to run. See Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), ALAB-815, 22 NRC 198, 201 (1985).

Neither of the reasons advanced by Joint Intervenors for not filing earlier during this period are sufficient to establish good cause. First, Joint Intervenors state that it was necessary to await receipt of "the exercise scenario documentation" to gain "a proper technical

^{2/} Compare Motion, Exhibit 1 and accompanying Affidavit of Robert D. Pollard, with, Inspection Report 88-09 at 5, attached to Motion as Exhibit A.

understanding" of the Seabrook personnel's actions and that the report was not received by them until the week of August 15, 1988. Motion at 9-10. The unavailability of this document does not establish good cause. The case law is clear that the unavailability of a licensing-related document does not establish good cause if information was publicly available early enough to provide the basis for a more timely filing of the contention. E.g. Catawba, supra, CLI-83-19, 17 NRC at 1045; Id., ALAB-813, 22 NRC 59, 84-85 (1985). Since Joint Intervenors' late-filed contention is based on the "weaknesses" in the emergency planning exercise identified by the Staff in Inspection Report 88-09, it is apparent that information sufficient to enable them to formulate the basis for their contention was publicly available as early as July 6, 1988, the date the report was issued.

Joint Intervenors also seek to justify their untimely filing by noting that the Licensing Board in the "off-site" emergency planning phase of the proceeding afforded the parties in that proceeding until September 21, 1988 to submit contentions challenging the emergency planning exercise conducted by Applicants. Motion at 10. That the off-site Board may have done so is decisively irrelevant as to whether there is good cause for Joint Intervenors' untimely filing of the proffered contention in the "on-site" portion of the case. As Joint Intervenors are or should be aware, scheduling orders issued by the off-site Board are applicable only to that proceeding. Moreover, it was or should have been apparent to Joint Intervenors that their late-filed contention has the potential for expanding considerably the on-site phase of the proceeding. In view of the advanced stage of the on-site proceeding, it was incumbent upon Joint

Intervenors to bring that contention to the Board and the parties at the earliest possible time. Inexcusably, they failed to do so. Thus, the first of the five factors -- good cause -- should weigh heavily against them.

2. Other means or parties to protect Joint Intervenors' interests.

The second factor -- the availability of other means to protect petitioner's interest -- favors Joint Intervenors. As does the fourth factor: the extent to which petitioner's interest will be represented by other parties. However, as the Commission has observed, these factors are "accorded less weight, under established Commission precedent, than factors one, three, and five." Braidwood, supra, 23 NRC at 245; South Carolina Electric and Gas Company (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981).

3. Extent to which petitioner can contribute to the development of a sound record.

The Commission's case law emphasizes the importance of the third factor: the extent to which petitioner can contribute to the development of a sound record. The Commission has observed that "[w]hen a petitioner addresses this criterion it should petitioner must set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony." Braidwood, supra, 23 NRC at 246, quoting, Grand Gulf, supra, 16 NRC at 1730 (emphasis added). Joint Intervenors have not identified any prospective witnesses. Joint Intervenors do not set out with precision

the issues they plan to cover or identify their prospective witness by name. Instead, they state only that they will provide an expert witness "who will analyze the emergency response actions taken by the Seabrook Station staff and describe in detail the manner in which those actions reflect the failure of that staff to comprehend the significance of plant conditions and identify the appropriate measures needed to prevent any further plant deterioration and/or further offsite radiological releases." Motion at 10. However, since Joint Intervenors have not identified witnesses or provided anything other than generalities concerning the evidence they will offer, this factor weighs against the admission of the contention.

4. Broadening of issues and delay to the proceeding

Joint Intervenors' late-filed contention will result in a broadening of the issues and will delay the completion of the on-site proceeding. This cannot be disputed. The late-filed contention seeks to inject issues that have not been raised previously. It takes no great leap of faith to assume that Joint Intervenors will request an extensive amount of time to conduct discovery and it is fair to say also that in the event that the issue is not disposed of summarily, the anticipated amount of hearing time needed to litigate the contention will be extensive. The Board should find that the late-filed contention will occasion a broadening of the issues.

Similarly, the Board should find that Joint Intervenors' late-filed contention will result in a significant delay to this proceeding. As noted earlier, the record in the on-site phase of this proceeding has been

closed for nearly two years. All that is left of the Licensing Board's jurisdiction over the proceeding are the issues remanded by the Appeal Board in ALAB-875 (NECNP Contention I.V and IV), ALAB-883 (Massachusetts Attorney General's Alert Notification Contention), and ALAB-891 (NECNP Contention I.B.2). Litigation of the contentions remanded in ALAB-875 has been concluded favorably to Applicants. See ALAB-899. Applicants have moved for summary disposition of the contentions remanded in ALAB-891 and ALAB-883 on September 9 and 17, 1988, respectively. Responses to those motions and a decision thereon soon will be forthcoming. To admit Joint Intervenors' late-filed contention at this stage will substantially delay the completion of the proceeding. The fifth factor must weigh heavily against Joint Intervenors. ^{3/}

In sum, the first, third and fifth factors weigh against the Joint Intervenors; the second and fourth factors weigh in Joint Intervenors' favor. The showing made by Joint Intervenors on the two factors favorable to them fall far short of the "compelling" showing required to overcome the lack of good cause for the untimely filing of their contention. See Braidwood, supra, 23 NRC at 244. Thus, a balance of all

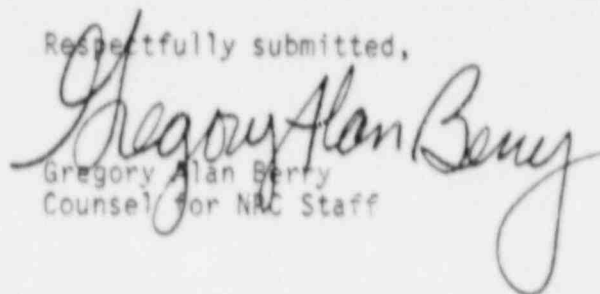
^{3/} Joint Intervenors concede that admission of the late-filed contention will broaden the issues but argue that this fact is outweighed by the significance of the issues raised. Assuming arguendo that Joint Intervenors are correct in contending that the issue sought to be raised is "absolutely vital to the safety of the public," this argument is entitled to no weight in considering the fifth factor. See Braidwood, supra, 23 NRC at 248 (it is error for a Board "to make its own balancing of significance versus delay in its evaluation of the fifth factor alone.").

the factors leads to the conclusion that the late-filed contention should not be admitted. ^{4/}

CONCLUSION

For the reasons stated in this response, Joint Intervenors' motion to admit their late-filed contention should be denied.

Respectfully submitted,


Gregory Alan Berry
Counsel for NRC Staff

Dated at Rockville, Maryland
this 3rd day of October 1988

^{4/} Denying Joint Intervenors' motion will not work an unfairness on them or compromise safety. As the Appeal Board has observed, "at the operating license stage, the Staff generally has the final word on all safety matters not placed in controversy by the parties through an admitted contention." Southern California Edison Company (San Onofre Nuclear Generating Stations, Units 2 and 3), ALAB-680, 16 NRC 127, 143 (1982); accord South Carolina Electric and Gas Company (Virgil E. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895-96 (1981), aff'd sub nom., Fairfield United Action v. Nuclear Regulatory Commission, 878 F.2d 261 (D.C. Cir. 1982) ("As to those aspects of reactor operation not considered in an adjudicatory proceeding (if one is conducted), it is the Staff's duty to insure the existence of an adequate basis for each of the requisite Section 50.57 determinations").

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(Seabrook Station, Units 1 and 2)

OFFICE OF THE SECRETARY
DOCKET SERVICE
Docket Nos. 50-443 OL-01
50-444 OL-01
On-site Emergency Planning
and Safety Issues

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO MASSACHUSETTS ATTORNEY GENERAL'S REQUEST TO FILE REPLY TO APPLICANTS' ANSWER TO MOTION TO AMEND BASIS FILED BY MASSACHUSETTS ATTORNEY GENERAL WITH RESPECT TO SIREN 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, by deposit in the Nuclear Regulatory Commission's internal mail system, this 3rd day of October 1988:

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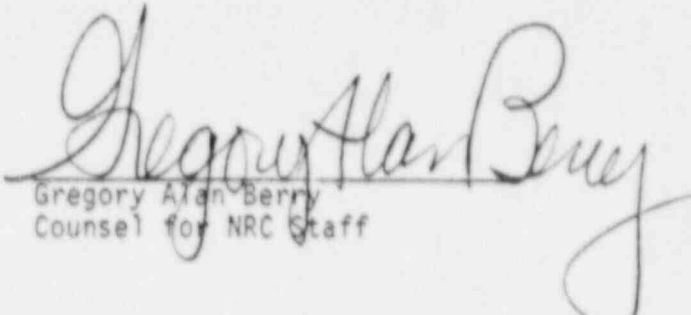
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