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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Alan S. Rosenthal, Chairman
Gary J. Edles
Howard A. Wilber

June 25, 1986
(ALAB-838)

In the Matter of	
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL.	Docket Nos. 50-443-OL 50-444-OL
(Seabrook Station, Units 1 and 2)	(Offsite Emergency Planning)

Carol S. Sneider, Boston, Massachusetts, for Attorney General Francis X. Bellotti of the Commonwealth of Massachusetts.

Thomas G. Dignan, Jr., Boston, Massachusetts (with whom R.K. Gad, III, Boston, Massachusetts, was on the brief), for the applicants, Public Service Company of New Hampshire, et al.

Edwin J. Reis (with whom Oreste Russ Pirfo was on the brief), for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

Before us is an appeal taken by Francis X. Bellotti, Attorney General of Massachusetts, in the offsite emergency planning phase of this operating license proceeding involving the Seabrook nuclear facility. The appeal challenges so much of the Licensing Board's unpublished

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April 29, 1986 memorandum and order as rejected at the threshold the Attorney General's sole pending contention.[1]

Our jurisdiction to entertain the appeal is invoked under 10 CFR 2.714a. We agree with the applicants and the NRC staff, however, that that section does not come into play in the particular circumstances of the case and, further, that the appeal is premature. Accordingly, we dismiss the appeal.

A. If the petition for leave to intervene of a private litigant (necessarily filed under 10 CFR 2.714) is denied in its entirety for want of an acceptable contention, the petitioner indisputably has the right to take an immediate appeal under 10 CFR 2.714a.[2] By the same token, if all of

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[1] That contention states:

> The draft radiological emergency response plans for the Towns of Seabrook, Hampton, North Hampton, and Rye do not provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency at the Seabrook Station, as required by 10 C.F.R. § 50.47(a)(1), because in the event of a severe accident on a summer weekend some or all of the beach area transient populations within those communities cannot under many plausible meteorological conditions be protected by means of evacuation even from early death and because there are not adequate plans or provisions for sheltering the beach area transients within those communities.

[2] Subsection (b) of section 2.714a provides that:

(Footnote Continued)

the accepted contentions of an admitted private intervenor are disposed of adversely to that intervenor during the course of the proceeding (e.g., by summary disposition under 10 CFR 2.749), an immediate appeal may be taken under the general appellate provisions found in 10 CFR 2.762.[3]

In both instances, the same fundamental considerations underlie the result. In carving out an exception to the general proscription against appeals from interlocutory orders found in 10 CFR 2.730(f), section 2.714a implicitly recognizes that the effect of the denial in its entirety of a private litigant's intervention petition perforce is to foreclose any participation in the proceeding on the part of the petitioner.[4] Thus, as to that petitioner, the denial is in essence a final order. Likewise, in holding in Allens Creek that the summary disposition in the applicants' favor of an intervenor's sole contention was immediately appealable, we explained:

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> An order wholly denying a petition for leave to intervene and/or request for a hearing is appealable by the petitioner on the question whether the petition and/or hearing request should have been granted in whole or in part.

[3] Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit No. 1), ALAB-629, 13 NRC 75, 77 n.2 (1981).

[4] See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 18 n.6 (1986).

> Had other contentions of [the intervenor] been admitted to the proceeding, the proscription against appeals from interlocutory orders (10 CFR 2.730(f)) would have come into play. In other words, he would have had to await the rendition of the Licensing Board's initial decision before complaining to us of the summary disposition of contention VI. Because, however, that contention provided the sole footing for his being allowed intervention the consequence of the summary disposition of it was [the intervenor's] dismissal from the proceeding. . . . This being so, there is the requisite degree of finality to permit an appeal at this juncture. See Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 758 (1975).[5]

But the Attorney General is not a private litigant. And, as he readily conceded at oral argument,[6] it is equally plain that the Licensing Board's denial of his sole contention has not deprived him of the right to continue to participate in this proceeding. This is because, several years ago, the Commonwealth of Massachusetts was granted the status of an "interested State" under 10 CFR 2.715(c).[7] Such status permits the representative of an interested State (here the Attorney General)[8] to participate in a licensing proceeding without the necessity of submitting

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[5] 13 NRC at 77 n.2.

[6] App. Tr. 5, 8-9.

[7] See LBP-82-76, 16 NRC 1029, 1078-79 (1982).

[8] At oral argument, the Attorney General acknowledged that, for present purposes, he and the Commonwealth are to be deemed a single entity. App. Tr. 5.

(and having accepted) a single contention.[9] By the express terms of the section, that participation may include the introduction of evidence, the interrogation of witnesses, the filing of proposed findings, and the seeking of appellate review by an appeal board and the Commission itself.

The record below discloses that the Attorney General has taken full advantage of the Commonwealth's "interested State" status. To cite but a single example, on July 15, 1983 he filed with us in his own name a petition for directed certification of the Licensing Board's order granting partial summary disposition in the applicants' favor on two contentions of the intervenor New England Coalition on Nuclear Pollution (Coalition) dealing with evacuation time estimates. In this submission, the Attorney General explained that he had "been admitted to this license proceeding as a representative of an interested state" and, prior to the Licensing Board's action on the Coalition's contentions, had indicated on the record a desire to present testimony on those contentions "given their relevance to the

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[9] The section extends the same right to the representatives of counties, municipalities, and agencies of governmental bodies.

concerns which he is seeking to raise in the off-site emergency planning area."[10]

In these circumstances, the appeal is barred by our decision a decade ago in River Bend.[11] In that case, the State of Louisiana, which had been granted "interested State" status under section 2.715(c), sought to obtain appellate review under 10 CFR 2.714a of a Licensing Board's ruling that the identification of the issues that it sought to raise had not been set forth with adequate specificity.[12] Without intimating any views respecting the correctness of the challenged ruling, we dismissed the appeal. Our rationale was this:

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[10] Petition of Attorney General Francis X. Bellotti for Directed Certification of ASLB Decision on Applicants' Twenty-First Motion for Summary Disposition (July 15, 1983) at 3. The Attorney General's directed certification petition was denied in ALAB-737, 18 NRC 168 (1983). The basis of the denial was that the petition did not meet the standards for the grant of directed certification set forth in Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977). There was, of course, no suggestion that the Attorney General's status as the representative of an "interested State" was insufficient to permit his endeavor to obtain interlocutory review of a Licensing Board order on the contentions of another litigant.

[11] Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-329, 3 NRC 607 (1976).

[12] Although an "interested State" need not take a position with respect to issues raised by other parties, section 2.715(c) provides that its representative may be required "to indicate with reasonable specificity, in

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As we have frequently held, Section 2.714a excepts from the general prohibition against interlocutory appeals only those orders which are directly concerned with the grant or denial of status as an intervenor. See, e.g., Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-168, 6 AEC 1155 (1973); Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-176, 7 AEC 151 (1974); Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), ALAB-206, 7 AEC 841 (1974); Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), ALAB-269, [1 NRC 411 (1975)]. As a consequence, one who has been permitted to intervene may not invoke the Section to obtain interlocutory review of an order which does no more than to exclude from consideration in the proceeding certain of the issues which he has sought to raise. Ibid.

These holdings apply here. We have seen that the State was granted intervention -- albeit (in accordance with its wishes) as an "interested State" participating under Section 2.715(c) rather than as a party under Section 2.714(a). The ruling of the Licensing Board under present attack did nothing to affect the State's status in the proceeding. To the contrary, the State was left entirely free to participate to the fullest extent not only on the remanded environmental (i.e., fuel utilization efficiency) issue which it had previously and successfully raised but, as well, on each and every health and safety issue which the Licensing Board determined to be properly before it for consideration and decision. The sole practical consequence of the ruling was that the scope of the health and safety hearing would not be further broadened to encompass the additional issues which the State sought to inject into it.

In the totality of these circumstances, the situation before us differs in no material respect from that in any of the earlier cases in which intervenors attempted under the aegis of Section 2.714a to have us examine on an interlocutory basis Licensing Board rulings addressed to what issues would or would not be entertained by the Board. The complaint of those intervenors was precisely the same as that of the State

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advance of the hearing, the subject matters on which he desires to participate."

> in the proceeding at bar; namely that, although allowed to intervene, they were not allowed to introduce some of the issues which they thought warranted Licensing Board consideration. Our uniform response to them was that, even if meritorious, their complaint was premature; i.e., its assertion to us must await the rendition of an initial decision. The identical response is called for in this instance.[13]

The Attorney General's endeavor at oral argument to distinguish River Bend is unavailing. Contrary to his insistence,[14] it is of no moment that, assertedly unlike Louisiana in that proceeding, the Attorney General is here pursuing a relatively narrow interest. As the foregoing discussion in River Bend reflects, of present significance instead is simply the fact that, despite the rejection of his sole pending contention, the Attorney General's right to participate fully in this proceeding remains wholly unaffected. The extent to which he will continue to exercise that right is, of course, for him to decide. But his voluntary choice in that regard can hardly serve to control whether he is entitled to challenge at this juncture a manifestly interlocutory order.

B. The question remains whether, as the Attorney General urges in the alternative, there is sufficient warrant for treating his appellate papers as a petition for

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[13] 3 NRC at 610-11 (footnotes omitted).

[14] App. Tr. 9-10.

directed certification, seeking our review of the Licensing Board's ruling as a matter of discretion rather than of right.[15] Although we entertain some doubt that the Licensing Board correctly rejected the Attorney General's contention on the ground "that it does not state a violation of a regulatory basis,"[16] it does not appear that the strict standards for the grant of discretionary interlocutory review are met here.

We employ our directed certification authority only where a licensing board ruling either threatens the party adversely affected by it with immediate and serious irreparable impact that, as a practical matter, could not be alleviated by a later appeal, or affects the basic structure of the proceeding in a pervasive or unusual manner.[17] Neither test ordinarily is satisfied where a licensing board simply admits or rejects particular issues for consideration in a case.[18] Moreover, in the instant case, it may well turn out that there will be no actual prejudice to the

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[15] See Response of Attorney General Francis X. Bellotti to Appeal Board Order Dated May 22, 1986 (May 30, 1986) at 7-8. See also App. Tr. 6.

[16] April 29, 1986 Memorandum and Order, at 45.

[17] See Marble Hill, supra note 10.

[18] Project Management Corp. (Clinch River Breeder Reactor Plant), ALAB-330, 3 NRC 613, 615, rev'd on other grounds, CLI-76-13, 4 NRC 67 (1976).

Attorney General stemming from the rejection of his contention. The contention asserts that adequate protective measures cannot and will not be taken as required by 10 CFR 50.47(a) because the two principal protective steps -- evacuation and sheltering -- will not sufficiently safeguard the beach populations under certain conditions.[19] This concern has been or will be explored.

The applicants' time estimates for evacuation of the beach populations were considered during the hearings held in August 1983 in connection with the Coalition's Contentions III.12 and III.13.[20] The Attorney General participated in those hearings and filed proposed findings of fact and conclusions of law with the Licensing Board.[21]

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[19] See supra note 1.

[20] The text of the contentions is set out in LBP-83-32A, 17 NRC 1170, 1180 (1983).

[21] See Attorney General Bellotti's Proposed Findings of Fact and Conclusions of Law re NECNP Contentions III.12 and 13 (October 26, 1983). See also App. Tr. 6-7. The Licensing Board granted partial summary disposition in the applicants' favor on portions of the two contentions. LBP-83-32A, 17 NRC at 1174-81. The Board rejected the argument that the estimates were inaccurate because they were not based on the actual evacuation routes yet to be chosen in the emergency plans. The Board noted, in this regard, that the applicants would revise the estimates once the evacuation routes were chosen. Id. at 1180. In ALAB-737, 18 NRC at 172-74, we denied petitions for directed certification of the Board's decision filed by the Attorney General and the Coalition. In our view, the Board's decision did not foreclose litigation of contentions

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No partial initial decision has yet been issued in connection with that phase of the case. The Licensing Board, however, currently has under consideration whether to reopen the proceeding to examine newly prepared evacuation time estimates.[22] The Board has also admitted for litigation three contentions dealing with the adequacy of sheltering as a protective measure for the public, including the beach populations.[23] Thus, absent a withdrawal or settlement of the pending contentions, the Attorney General will have an opportunity to present the concerns raised by his contention within the context of other contentions, and argue that the requirements of 10 CFR 50.47(a) have not been met.

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directed toward the evacuation estimates or necessarily prevent the filing of additional contentions at a later date. See supra note 10.

[22] Since the 1983 hearings, a new evacuation time estimate (the so-called KLD Report) has been prepared and is now part of the New Hampshire plan. App. Tr. 28-29, 34-35. The Licensing Board has not decided whether the new estimates will be the subject of litigation and has called for briefs on the issue. See Tr. 2327-30. The applicants argue that the Commission's regulations require only that applicants provide an evacuation time estimate so no further litigation is needed. See Applicants' Brief With Respect to (1) The Mass AG Contention and (2) The So-Called "Multiple ETEs" Issue (April 11, 1986) at 6-8. If the new evacuation time estimates are examined, the Attorney General could presumably participate fully.

[23] See April 29, 1986 Memorandum and Order at 8, 58-59, 93.

In this connection, section 50.47(b)(10) requires that a "range of protective actions have been developed for . . . the public."[24] In our Zimmer opinion we explained that

> emergency planning must provide for a variety of protective measures including sheltering [and] evacuation . . . -- the overall objective being the avoidance of as much radiation exposure as possible.[25]

As we read the Licensing Board's decision, it plans to consider whether the range of protective responses developed in the emergency plans -- including both evacuation and sheltering -- is sufficient to provide reasonable assurance that adequate protective measures can and will be taken for the summer beach populations. This appears to be essentially the issue set out by the Attorney General's contention, although we appreciate that there is some disagreement among the parties over what steps are sufficient to satisfy the Commission's emergency planning regulations and what evidence the Board intends to admit.[26]

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[24] The emergency response plans for nuclear power plants must meet the specific standards of 10 CFR 50.47(b) -- or an applicant must demonstrate pursuant to 10 CFR 50.47(c) that compliance with section 50.47(b) is not necessary -- in order for the Commission to be able to make the ultimate finding required by section 50.47(a)(1).

[25] Cincinnati Gas & Electric Co. (Wm. H. Zimmer Nuclear Power Station, Unit No. 1), ALAB-727, 17 NRC 760, 765 (1983).

[26] The Attorney General, for example, asserts that the

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In the event that the Attorney General is dissatisfied with the Board's ultimate disposition of the emergency planning issues, he can then appeal. That appeal can encompass any interlocutory orders having a bearing upon that disposition.[27]

The appeal is dismissed.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

(Footnote Continued)
Board intends to determine only whether the applicants can and will take some, rather than adequate, protective measures. See Brief in Support of Attorney General Francis X. Bellotti's Appeal of Licensing Board Order of April 29, 1986 (May 15, 1986) at 7-13. The applicants claim that the emergency planning requirements are, to some extent, affected by the Commission's site selection decision made during the course of the earlier construction permit proceeding. See Brief of Applicants on Appeal from the Memorandum and Order of the Licensing Board Issued April 29, 1986 (May 30, 1986) at 15-17. And, at the urging of the applicants and the staff, the Board has indicated that it will not consider any particular quantitative level of dose protection and will not explore the dose consequences of specific accident sequences.

[27] Nothing in our discussion of the issues under consideration by the Licensing Board should be construed as a determination on our part of the merits of issues to be decided.