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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'87 JUL 17 P2:28

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Helen F. Hoyt, Chairperson
Gustave A. Linenberger, Jr.
Dr. Jerry Harbour

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In the Matter of	Docket Nos. 50-443-OL 50-444-OL
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al.	(ASLBP No. 82-471-02-OL) (Offsite Emergency Planning)
(Seabrook Station, Units 1 and 2)	July 16, 1987

MEMORANDUM AND ORDER
(Ruling on Motions for Reconsideration and Clarification of Board's May 18, 1987 Memorandum and Order)

On May 18, 1987 this Board issued a Memorandum and Order[1] explaining the bases for, and revising, our February 18, 1987 Order[2] ruling on the admissibility of contentions on Revision 2 of the New Hampshire Radiological Emergency Response Plan (NHRERP). Corrections to the May 18, 1987 Order were issued on May 27, 1987.

Subsequently, motions for reconsideration or clarification of our Order of May 18, 1987 were received from the Town of Amesbury (TOA),

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1 Memorandum and Order Providing Basis for and Revision to Board's Rulings on Contentions on Revision 2 of NHRERP, dated May 18, 1987.

2 Memorandum and Order Ruling on Contentions -- Revision 2 New Hampshire Radiological Emergency Response Plan, dated February 18, 1987.

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dated May 26, 1987; the Town of Hampton (TOH), dated May 27, 1987; and the Seacoast Anti-Pollution League (SAPL), dated May 27, 1987.

The Staff responded to the motions for reconsideration on June 15, and June 16, 1987. The Applicants, relying upon 10 C.F.R. § 2.752, moved to strike the Staff's responses. Applicants' Motion To Strike Staff's Responses to Motions for Reconsideration Filed by the Town of Amesbury and the Town of Hampton, June 18, 1987. Applicants subsequently filed a similar motion to strike the Staff's response to SAPL's motion for reconsideration. In our order of June 25, 1987 we granted Applicants' alternative motion to permit Applicants and other parties to file responses to the motions for reconsideration. The Applicants' responses thereto were filed July 7, 1987.

We consider and rule upon each of these motions for reconsideration in turn.

Town of Amesbury's Motion for Reconsideration

In our May 18th Order, we rejected TOA's eight contentions alleging deficiencies in the KLD Evacuation Time Estimate (KLD ETE) study on the grounds that TOA had failed to file its ETE contentions promptly after its receipt of the KLD ETE documents, and on balancing the five factors specified in 10 C.F.R. § 2.714(a), the five factors weighed against admission of TOA's late-filed contentions. We also agreed with the Staff's objections, on other grounds, as to inadmissibility of TOA's contentions. Memorandum and Order, May 18, 1987, at 2-7.

TOA requests reconsideration of our ruling because:

1. TOA asserts that its contentions 7 and 8 could not have been advanced before September 20, 1986 when the Governor of Massachusetts established the State's policy of non-participation/non-implementation of any RERP for Seabrook Station, which assertedly represents a change in conditions with respect to the KLD ETE.

2. The Board assertedly erred in weighing the fourth factor against admissibility of TOA's contentions since SAPL lacks authority to represent the interests of governmental entities within the Commonwealth, their employees or residents. TOA asserts that the Massachusetts Attorney General cannot represent its interests because the Board has not admitted the Mass AG's contentions.

3. Since no other hearings on the KLD ETE issues are scheduled, TOA asserts that they are ripe for litigation and the proceeding will not be delayed because a decision on full-power licensing appears to be many months away.

4. TOA disagrees with the Board's finding that TOA's contentions deal with deficiencies in Massachusetts' planning. TOA asserts that they deal with Massachusetts' policy of non-participation/non-implementation.

In regard to TOA's first statement, above, in support of its motion, we find that TOA could have relied upon its own and other Towns' non-participation/non-implementation policies rather than upon

"establishment" of such a policy by the Governor of the Commonwealth.[3] Thus, our holding on TOA's showing of good cause for late filing is unchanged.

In regard to TOA's second statement in support of its motion, the Board's previous finding was based on the wording of TOA's own offer with respect to the fourth Section 2.714(a) factor that "no other party is directly representing the interests of residents, either permanent or transient, within the Commonwealth of Massachusetts, with respect to the facts and issues proffered by the KLD ETE." TOA Contentions, November 28, 1986, at 5. While the Board recognizes that SAPL's interests do not necessarily coincide with those of any governmental entity, the Massachusetts Attorney General (as well as TOA), as Section 2.715(c) participants, represent governmental interests with respect to litigation of the KLD ETE. Thus, our finding on the fourth Section 2.714(a) factor is unaffected by TOA's argument.

Because this Board currently has no Massachusetts emergency response plans before it, and because the eventual outcome of Massachusetts' state and local policies of non-participation/non-

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3 We understand that the Town of Amesbury's resolution to terminate further emergency planning dates from its Town Meeting on November 18, 1985 and that other Massachusetts towns adopted similar resolutions shortly thereafter. Affidavit of Charles V. Barry, Secretary of the Massachusetts Department of Public Safety, at 4; attached to Petition of Attorney General Francis X. Bellotti to Revoke Regulation 50.47(d) or in the Alternative to Suspend its Application in the Seabrook Licensing Proceeding, July 2, 1986. We
(Footnote Continued)

implementation in emergency planning must be resolved eventually on some other basis, the issues framed by TOA, which clearly deal with current deficiencies in Massachusetts' emergency planning, are not ripe for litigation at this time. Thus, TOA's third and fourth arguments in support of its motion are not sufficient to cause us to alter our previous rulings on TOA's contentions.

Finally, TOA does not address the Staff's objections to the admission of TOA contentions on other grounds, with which we agreed. Memorandum and Order, May 18, 1987, at 5-6.

TOA's Motion for Reconsideration is denied.

Town of Hampton's Motion for Reconsideration and Clarification

TOH seeks amendment of our Orders ruling on admissibility of contentions, and asserts that the Board improperly rejected bases of its Revised Contentions III and IV previously admitted for litigation and that the supplemental bases of TOH Revised Contention III (as proffered in its First Supplement to NHRERP Revision 2 Contentions, dated November 19, 1986) present litigable issues. TOH also seeks reconsideration of Board rulings on admissibility of certain other issues in connection with its contentions.

(Footnote Continued)
took official notice of this affidavit only for the purpose of establishing the date of the Town of Amesbury's adoption of its resolution.

In regard to the Board's rejection of bases previously asserted in support of TOH's Revised Contention III,[4] TOH misstates the Board's "justification" for rejection (TOH Motion at 3) by quoting only the Board's conclusion in this regard. Our reason for rejection of the previous bases was that they were largely, if not entirely, duplicated by the newly offered bases. Indeed, because this contention addresses ETE allegations raised against the KLD documents available in April, which were not substantially changed by the issuance of NHRERP Revision 2, the bases offered by TOH on October 31st were admissible only to the extent that they alleged issues substantially similar to those issues previously offered, absent a showing by TOH of good cause for not offering them earlier. TOH made no such showing in its October 31st pleading.[5]

The Board's ruling here, as well as in regard to TOH Revised Contention IV, was not intended to bar the Town from litigating timely filed material issues. Our intention was to bring some order to multiple filings in the proceeding resulting from the fact that the emergency

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4 To the extent that there may be a misunderstanding with respect to previously offered bases for TOH Revised Contention VI (TOH Motion, at 5 n.3), the Board clarifies that it did not reject the previous bases when admitting the substituted wording of the contention. Board Order, dated May 28, 1987, at 24-25.

5 Although not explicitly stated, this reasoning also underlies our rejection of Bases C.7 proffered by TOH in its November 19, 1986 first Supplement, in which TOH sought to "flesh out" additional expectations of shortcomings in the KLD ETE through discovery.

planning process yields successive iterative documents that become available at different times, each potentially raising some new litigable issues, and potentially eliminating or preserving other issues previously admitted for litigation. The Town's pleadings are not always clear in regard to these changing issues (except that it realleges all previous allegations, whether admitted or rejected), and frequently restate what appears to be a differently worded but already admitted issue. Of the examples given in its motion where TOH described issues it thought were denied by the Board's May 28th Order, with respect to TOH Revised Contentions III and IV, the Board's understanding was that each of them was apparently litigable under the new bases proffered in TOH's October 31, 1986 pleading.

On reconsideration, the Board recognizes that there may be issues framed in bases not ruled upon in TOH Revised Contention III, or previously admitted in the case of TOH Revised Contention IV, that were not substantially duplicated in TOH's October 31, 1986 pleadings. As the Staff noted in its response, except for the task of sorting out duplicate or overlapping issues, and consolidating them where appropriate, the presence of duplicated issues should not significantly increase hearing time or resources required on the part of the parties and the Board. Accordingly, we modify that part of our May 18, 1987 Order (at 14) that rejected TOH's bases for TOH Revised Contention III as submitted in its pleading dated May 23, 1986 (and the corresponding part of our February 18, 1987 Order (at 2) is changed to include TOH's May 23, 1986 bases of TOH Revised Contention III). Also, we modify that

part of our May 28, 1987 order (at 20-21) that did not permit TOH to reassert and adopt the previously admitted bases of TOH Revised Contention IV as submitted by TOH on April 14, 1986 (and admitted by our Order of May 22, 1986). We admit these bases to TOH Revised Contentions III and IV as limited to matters preserved in NHRERP Revision 2.

TOH's Motion asks us to reconsider our rejection of the new basis C.7 to its Revised Contention III proffered in TOH's First Supplement dated November 19, 1986, relying on Braidwood to support its belief that NRC regulations permit the Town to expand upon, or buttress, contentions following discovery. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 617 (1985). The Braidwood Order, in the same paragraph points out that the determination regarding specificity with which the basis of a contention is to be pled obviously involves a case-by-case judgment of the licensing board, citing Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974). The licensing board's holding in Braidwood (supra) does not suffice in this instance. First, because it issued from a corollary licensing board, this Board is not bound by it. Second, Braidwood (at 617) relied on the Perry licensing board for the premise that intervenors may submit a reasoned explanation for raising a contention which later will be buttressed with factual data after discovery. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-24, 14 NRC 175, 182 (1981). As we stated in our May 18, 1987 Order, Catawba governs our ruling that a licensing board is not authorized to admit conditionally for any

reason a contention that falls short of meeting the specificity requirements. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 467-68 (1982).[6] While TOH specifies what it would expect to litigate, should discovery confirm its expectations, it seeks admission of the basis prior to the determination as to whether it actually presents litigable issues. Conditional bases are no more admissible than conditional contentions. NRC regulations do not permit discovery in order to determine litigable issues, and on its face, that is what TOH's First Supplement states the Town seeks to do. We affirm our holding as to the inadmissibility of the proffered new Basis C.7 to TOH Revised Contention III. Also, see supra, n.5.

TOH presented no substantial new information in its Motion to cause us to reconsider our May 18, 1987 rulings on the admissibility of other bases to TOH Revised Contentions IV and VIII.

For the reasons stated above, we partially grant the Town of Hampton's Motion and modify parts of our February 18 and May 18, 1987 Memoranda and Orders with respect to certain previously submitted bases to TOH Revised Contentions III and IV (supra) and, with clarification of our ruling on Basis C.7, affirm all other rulings in those orders with respect to admissibility of the Town's contentions.

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6 If a party discovers litigable issues during discovery, it may seek to amend its contentions to include the newly discovered bases. Such amendment would be subject to the same criteria under 10 C.F.R. § 2.714(a) as non-timely filed contentions.

SAPL Motion for Partial Reconsideration

In its motion SAPL seeks reconsideration of certain of our rulings with respect to the bases of SAPL Revised Contention 7, and SAPL Revised Contention 18; with our limitation of admissibility of SAPL Contention 25 to the specific bases proffered; with our denial of previously submitted (Fourth Suppl. Petition, dated May 15, 1986) bases for SAPL Contention 31; and with our rejection of SAPL Contentions 35 and 36.

SAPL (Motion at 2) objects to our rejection of the first two bases for its Revised Contention 7 concerning asserted need for letters of agreement with personnel who will conduct monitoring and decontamination activities at reception centers and with the governments to secure the reception center facilities contemplated for use under the plans. We restate our previous holdings that letters of agreement are not required of individuals who collectively supply a labor force or activity, nor with host communities for which emergency response plans have been prepared (Board Orders dated May 21, 1986 (at 6-8), and May 18, 1987 (at 34-35)). SAPL (Motion at 2) attempts for the first time to introduce "fire departments in each community" and "principals of schools that are to serve as reception centers" as those providing monitoring and decontamination services who should sign letters of agreement. We will not consider this late attempt to rehabilitate the first two bases proffered with SAPL Revised Contention 7 on November 26, 1986 (at 17), and affirm our earlier rejection of them.

SAPL (Motion at 3) objects to our rejection of using any comparison between previous versions of the NHRERP and the current NHRERP Revision 2 in regard to SAPL Revised Contention 18. While SAPL asserts such comparisons of population estimates would be enlightening in assessing the validity of current estimates, it fails to show how the earlier estimates are material to those in the current Revision 2. We affirm our ruling in this regard.

In respect to SAPL Revised Contention 25, SAPL (Motion at 3-4) attempts to broaden the bases by asserting that the examples cited were "indicators of a pervasive problem broadly affecting the treatment of such facilities' evacuation problems throughout the Seabrook EPZ." SAPL made no such showing of a pervasive problem in its bases to this contention and will not be permitted to broaden the issue by this means. We affirm the limitation of SAPL Revised Contention 25 to the specific bases offered in its November 26, 1986 pleading (Board Order dated May 18, 1987, at 40).

SAPL asks the Board to reconsider our denial of the previously submitted bases to SAPL Revised Contention 31 in light of its statement that the new bases submitted with its NHRERP Revision 2 contentions address changed specifics found in the Revision 2 ETE, and provides one example, i.e., that the revised KLD ETE report now estimates the time for loading passengers at special facilities at 45 minutes. SAPL Motion at 4-5. [Presumably this previously was 40 minutes or 0.67 hours.] Absent identification by SAPL of those unaffected bases proffered in its (earlier) Fourth Supplemental Petition, the Board has examined those

earlier bases and finds that the allegations associated with certain roadway capacities do not appear to be repeated in SAPL's November 26, 1986 bases, but that all other earlier issues are substantially encompassed by the later submittal. On reconsideration, we amend our Order of May 18, 1987 (at 64-65) to admit that portion of the Basis offered in support of SAPL Contention 31, as stated in the first paragraph of page 11 of SAPL's Fourth Supplemental Petition, dated May 15, 1986, and alleging overestimated capacities of certain roads and intersections.

Also, the Board inadvertently failed to rule upon SAPL's prayer to join in and adopt the bases of TOH's admitted contentions (SAPL Revision 2 Contentions, at 2-3). SAPL is not permitted to adopt the bases of TOH's contentions as its own and thus enlarge SAPL's contentions (see our rulings with respect to similar requests by other parties, e.g., Order dated May 18, 1987, at 20, 63-64).

SAPL provides no substantial reasons to cause us to reconsider our May 18, 1987 ruling on SAPL Contention 35, and we affirm our rejection of that contention as both untimely and lacking in specificity.

In regard to SAPL Contention 36 asserting effects of the reliance by the Towns of Hampton and Seabrook upon the Salisbury, Massachusetts police, SAPL raises the argument that the contention is timely because the Governor did not announce the Commonwealth's withdrawal from emergency planning activities until September 20, 1986. For the same reasons that cause us to reject a similar argument by the Town of Amesbury in regard to its Contentions 7 and 8 (supra at 3-5), we do

not find that the Governor's announcement provided good cause for advancing a previously rejected, substantially similar contention (SAPL Contention 2, see Order dated April 29, 1986, at 80-81). The appearance in New Hampshire local plans of an indication that evacuation traffic moving from New Hampshire to Massachusetts may encounter traffic control points in Massachusetts does not cure the timeliness flaw of this contention. We affirm our May 18, 1987 rejection of SAPL Contention 36.

IT IS SO ORDERED.

ATOMIC SAFETY AND LICENSING BOARD

Jerry Harbour
Jerry Harbour
ADMINISTRATIVE JUDGE

G A Linenberger
Gustave A. Linenberger, Jr.
ADMINISTRATIVE JUDGE

Helen F. Hoyt
Helen F. Hoyt, Chairperson
ADMINISTRATIVE JUDGE

Issued at Bethesda, Maryland
this 16th day of July, 1987.