

8799

DOCKETED
USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'89 JUN 21 P5:31

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF REGULATORY
DOCKETING

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

NRC STAFF RESPONSE TO MOTION OF MASSACHUSETTS
ATTORNEY GENERAL TO HOLD OPEN THE RECORD
PENDING LOW POWER TESTING AND THE REQUIRED
YEARLY ONSITE EXERCISE AND FOR OTHER RELIEF

INTRODUCTION

On May 31, 1989, the Massachusetts Attorney General filed a motion with the off-site Licensing Board in which he requests the Board to hold open the record in this full power proceeding pending completion of low power testing of the Seabrook Station and an annual onsite emergency planning exercise which is currently scheduled to take place during the week of September 25, 1989. See Massachusetts Attorney General Motion at 1-2. According to the Massachusetts Attorney General, because low power testing and the onsite emergency planning exercise is "material and relevant to the issuance of a full power license," the Board should not close the record before these events have occurred and intervenors have had sufficient time to submit additional contentions arising therefrom. Id. The Massachusetts Attorney General insists that intervenors have a statutory right to submit and litigate contentions relating to these matters, id. at 3-8, and requests the Board to facilitate the exercise of this rights by (1) permitting the Massachusetts Attorney General and other

8906270021	890615
PDR ADOCK	05000443
G	PDR

507

intervenors to observe Applicants' low power testing program and the onsite exercise planned for September 1989 and (2) scheduling a prehearing conference pursuant to 10 C.F.R. §§ 2.751a, 2.752, and 2.714.

As explained below, the Massachusetts Attorney General's motion should be denied in its entirety.

BACKGROUND

The Massachusetts Attorney General's motion comes after denials by the Commission and the United States Court of Appeals for the District of Columbia Circuit of his request for a stay of low power operation of the Seabrook Station. See Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-08, 29 NRC ____ (May 18, 1989), motion for reconsideration denied, CLI-89-09, 29 NRC ____ (May 24, 1989); Commonwealth of Massachusetts, et al. v. NRC, Nos. 88-1817, 88-1819, 88-1821, 89-1306 (May 25, 1989). The Commission issued a license to Applicants authorizing low power operation on May 26, 1989 and the actual testing of the facility has commenced. In contrast to contentions pertinent to low power operation, litigation of intervenors' contentions bearing on full power operation has yet to be completed. The instant motion seeks to prevent completion of the full power proceeding to give intervenors time to raise additional issues for litigation in the full power proceeding which would substantially delay the completion of the proceeding.

DISCUSSION

A. Lack of Authority To Entertain The Instant Motion

As Massachusetts Attorney General points out, this Licensing Board has general jurisdiction "over all matters pertaining now or in the future to the application for a license to operate . . . the Seabrook Station not

otherwise expressly assigned to the onsite Board." Notice of Reconstitution of Board, 54 Fed. Reg. 2009 (January 10, 1989); see Public Service Company of New Hampshire (Seabrook Station Units 1 and 2), ALAB-916, 29 NRC ____, slip op. at 5-9 (May 25, 1989). The authority to rule on the admissibility of contentions arising out of the low power testing now being conducted or the projected September 1989 onsite exercise has not been "expressly assigned" to the onsite Board. ^{1/} Consequently, jurisdiction to entertain a request relating to the admission of such contentions appears to lie in the first instance with this Board. Id. However, a "licensing board must confine itself to those matters with respect to which it has been given authority to act." Id. at 5, see also id. at n.10. As explained below, the general jurisdiction of this Board provides no support for implying that this Board has authority to grant the relief sought by the Massachusetts Attorney General.

A licensing board in an operating licensing proceeding only has jurisdiction to consider the admission of contentions and to take action in regard to the resolution of contentions admitted into controversy. 10 C.F.R. §§ 2.104(c), 2.760a; Carolina Light and Power Co. (Shearon Harris Nuclear Power Plant), ALAB-852, 24 NRC 532, 545 (1986); Union Electric Company (Callaway Plant, Unit 1), ALAB-750, 18 NRC 1205, 1216 (1983); Consolidated Edison Co. of New York (Indian Point, Units 1, 2 and 3),

^{1/} The only matter subject to the jurisdiction of the onsite Licensing Board relates to the adequacy of Applicants' means of providing early notification to the Massachusetts portion of the Seabrook emergency planning zone in the event of an emergency at the Seabrook Station. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-916, 29 NRC ____, slip op. at 7 and n.11 (May 24, 1989); Notice of Reconstitution of Board, supra.

ALAB-319, 3 NRC 188, 190 (1976). ^{2/} As often stated, the jurisdiction of a licensing board considering the issuance of an operating license encompasses only those issues placed in controversy by admitted contentions and any other matters specifically delegated to it by Commission order. See e.g. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167 (1976); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790 (1985). This Board therefore lacks the authority to grant the subject motion which relates not to issues in controversy or pending contentions.

The Massachusetts Attorney General's motion is directed to holding open the record and conducting discovery so that new issues may be raised in the future. The Rules of Practice specifically provide that licensing boards may permit discovery only on issues which have been admitted for litigation after a prehearing conference and which "shall relate only to

^{2/} Pursuant to 10 C.F.R. § 2.760a an operating licensing board may raise an issue sua sponte that has not been placed in controversy by the parties provided it determines that a serious safety, environmental or security issue is involved. The Board has not made such a determination here; nor could it do so in view of the fact that neither low power testing nor the onsite exercise, the matters upon which the Massachusetts Attorney General's motion is based, has been completed and reported upon. See Texas Utilities Generating Company (Commanche Peak Station, Units 1 and 2), CLI-81-36, 14 NRC 1111, 1113 (1981). In Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 7 (1986), the Commission ruled that the Appeal Board had no sua sponte authority to seek additional information regarding the merit of a motion to reopen a record and that the pendency of a formal investigation did not raise any significant safety issue. Here, where there is not any investigation pending but only low power testing to be performed and an onsite exercise to be conducted, a fortiori, no significant issue exists to allow the Board to hold open the record or engage in discovery.

matters in controversy." 10 C.F.R. § 2.740(b)(1); see also 10 C.F.R. § 2.714. In Louisiana Power and Light Co. (Waterford Steam Electric Station, Units 1 and 2), CLI-86-1, 23 NRC at 6 and Cleveland Electric Illuminating Co. (Perry Nuclear Power Station, Units 1 and 2), CLI-86-7, 23 NRC 233, 235-36 (1986), each of which involved motions to reopen the record, the Commission made plain that adjudicatory boards have no authority to fashion ad hoc procedures to determine whether new safety-significant matters have arisen which might lead to new contentions. This Board similarly lacks the authority to hold open the record or adopt other procedures for the purpose of determining whether new contentions could be formulated.

The Massachusetts Attorney General relies upon Union of Concerned Scientists v. Nuclear Regulatory Commission, 735 F.2d 1437 (D.C. Cir. 1984), in arguing that this Board should hold the record open. However, that case does not confer authority on this Board to do so where such authority has not been granted to it by the Commission. Although the case may prescribe certain matters which may have to be considered by the Commission in a hearing prior to the issuance of a license, it cannot be read to increase the authority of this Board.

Moreover, there is nothing in UCS v. NRC which indicates that a record may not be closed upon the completion of the litigation of admitted issues, but should instead be kept open to consider issues which may arise

in the future. ^{3/} In UCS, the court was considering the promulgation of a rule which foreclosed the consideration of the results of an emergency preparedness exercise in a licensing hearing. The court held that because exercises were "material" to the licensing decision, section 189(a)(1) of the Atomic Energy Act (42 U.S.C. § 2239(a)(1)) prevented the Commission from adopting a rule eliminating all rights to a hearing on the results of such exercises. 735 F.2d at 1451. ^{4/} The court did not state that on-going hearings could not be closed before the exercise was conducted or before other matters material to the issuance of a license were resolved. The court specifically stated:

[W]e see nothing to prevent the Commission from holding a special supplementary hearing solely on issues raised by emergency planning exercises close to the date of full power operation. And certainly the Commission can limit that hearing to issues -- not already litigated -- that it considers material to hearing.

735 F.2d at 1447-48 (Emphasis added). Thus, the court implied that a hearing record could be closed if a right to reopen the record to litigate significant late developing matters existed. Continuing, the court stated

^{3/} Indeed the logical outcome of this argument would prevent records from ever being closed. The Commission has indicated that even though circumstances may change and new facts may develop, at some point proceedings must end and a decision rendered. See generally, Carolina Light & Power Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), CLI-79-10, 10 NRC 575, 576 (1976); Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 750-51 (1977).

^{4/} The Massachusetts Attorney General argues at length that UCS v. NRC requires that there be an opportunity for hearing on low power testing, but fails to mention that the court specifically recognized that low power testing might be exempted from hearing requirements under the Administrative Procedure Act, 5 U.S.C. § 554(a)(3). 735 F.2d at 1449-51; see also Tr. 23567 (Judge Smith).

that the Commission could apply much more stringent standards to the admission of those new issues or contentions raised near the end of the proceeding and could limit the "supplementary hearing" to those contentions which could effect the outcome of the proceeding. 735 F.2d at 1448-49. Although it could be argued that the Commission may not, as a matter of discretion, deny a hearing to a party who raises issues material to the licensing decision resulting from an event which arises late in the licensing process; nothing in the UCS case in any way indicates that a record must be kept open merely because such issues may later arise, or that this Board has the authority to keep a record open for such a purpose. See 735 F.2d at 1443-440. ^{5/}

^{5/} In Chemical Waste Management, Inc. v. EPA, No. 88-1490, slip op. 9-10 (D.C. Cir., May 5, 1989), the court emphasized that the UCS case involved only whether the NRC could "bypass [a statutory] hearing requirement altogether on issues material to its licensing decision." The court "decline[d] to adhere any longer to the presumption that a statute which mandates a "hearing" requires "on the record" formal hearing procedures to resolve all issues and left it "to the agency, as an initial matter, to resolve the ambiguity" of determining the procedures to be followed. Id. The court further determined that due process does not require formal hearing procedures. Id., slip op. at 15-16. Thus, the extent to which the Commission must hold a formal adjudicatory proceeding to address such matters as issues which might arise from low power testing or emergency planning exercises occurring late in hearing process is an open question.

Certainly, standards relating to reopening a record would be applicable to such issues if they were submitted late in the licensing process after a hearing record had closed. The court in UCS stated that Commission could refuse to admit a contention if it was not "material to its decision." 735 F.2d at 1448. The Commission's rule governing a motion to reopen a record provides that before a record is reopened it must be shown that "a materially different result would be or would have been likely" had the evidence or issue been presented earlier. 10 C.F.R. § 2.734(a)(1). Thus, the court and the Commission set out a similar standard for contentions submitted late in a proceeding.

In sum, neither Commission nor judicial precedent indicates that a licensing board has authority to hold open a record to aid in the possible future discovery of new contentions. See Waterford, supra; Perry, supra, UCS v. NRC, supra. Because its purpose is to gain time to file new contentions, the Board should deny the Massachusetts Attorney General's motion to hold open the record.

B. Commission Policy Requires The Board To Close The Record Upon Completion Of Hearings On The Contentions Pending Before The Board

More than eight years ago the Commission issued a policy statement providing guidance to licensing boards on the use of procedural mechanisms "intended to reduce the time for completing licensing proceedings while still ensuring that hearings are fair and produce full records." Statement Of Policy On Conduct Of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981). In that policy statement, the Commission stated, inter alia, that "adjudicatory boards are encouraged to expedite the hearing process by using those management methods already contained in Part 2 of the Commission's Rules and Regulations." Id. at 453. With respect to the issuance of initial decisions, the Commission had this to say:

. . . The Commission expects that decisions will issue as soon as practicable after the submission of proposed findings of fact and conclusions of law.

Accordingly, the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel should schedule all board assignments so that after the record has been completed individual Administrative Judges are free to write initial decisions on those applications where construction has been completed. Issuance of such decisions shall take precedence over other responsibilities.

Id. at 458 (emphasis added).

In its Statement Of Policy On Conduct Of Licensing Proceedings, the Commission recognized that a number of factors "bear on the length of time

it will take the boards to issue initial decisions." 13 NRC at 453. These factors include the number, difficulty, and complexity of the issues to be decided, and the size of the record compiled. Id. Delaying the issuance of an initial decision for the sole purpose of retaining jurisdiction over contentions which are not even inchoate is not among the factors cited by the Commission.

In Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-08, slip op. at 28, the Commission reiterated that "the public has an interest in the resolution of licensing proceedings with reasonable expedition." In a memorandum order issued January 24, 1989 in this proceeding, the Commission stated:

Litigation of emergency planning issues, particularly in planning efforts, can be a lengthy process. We are pleased, therefore, that the [Licensing] Board is taking steps to bring this proceeding to a close within a reasonable timeframe, taking into account the rights of the parties.

See also ALAB-910, 29 NRC 95 (1989); CLI-89-04, 29 NRC 243 (1989). The motion to hold the record open to search for new contentions to delay the completion of this proceeding should be denied as contrary to Commission policy to have hearings completed and findings issued as expeditiously as possible.

C. Request For Prehearing Conference

The Massachusetts Attorney General also requests the Licensing Board to schedule a prehearing conference for the purpose of setting a schedule for the filing of contentions arising out of low power testing and the September 1989 onsite exercise. Motion at 9. The request should be denied as premature. Section 2.751a of 10 C.F.R. provides that prehearing conferences are to be held to consider contentions which already have been

filed. Neither low power testing nor the onsite exercise has been completed. At present there is no basis for filing any contentions and no legitimate purpose to be served in holding a prehearing conference devoted to events which have yet to occur. The appropriate time to hold such a conference, if any, is after these events have occurred and intervenors have had an opportunity to review the documents and other materials generated in connection with them and after intervenors submit their contentions, if any. See 10 C.F.R. §§ 2.714, 2.751a. Intervenors' review of those materials might disclose the absence of any matter giving rise to a safety issue and lead them to conclude that it is unnecessary to file any contentions.

D. Request For Access And Observational Status During Low Power Testing And The September 1989 Onsite Exercise

The Massachusetts Attorney General argues that in order for his hearing rights to be meaningful, the Board should provide "reasonable access and observational status" to him and his experts during low power testing and the September onsite exercise. Motion at 10. In an oral ruling on Thursday, May 31, 1989, the Board denied this request. See Tr. at 23590; see also Waterford, supra; Perry, supra (both holding that preliminary discovery inquiries to frame contentions are not to be permitted). The Board's ruling was correct since the obvious purpose of the request is to facilitate the Massachusetts Attorney General's effort to discover information needed to formulate admissible contentions. The case law is clear that discovery is permissible only with respect to contentions already admitted. See 10 C.F.R. § 2.740(b)(1) (limiting discovery to after admission of contentions); Duke Power Company (Catawba

Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 467-68 (1982)
(discovery may be had only with respect to admitted contentions).

CONCLUSION

For the reasons stated in this response, the Massachusetts Attorney General's motion to hold open the record pending low power testing and the completion of the September 1989 onsite exercise should be denied in its entirety.

Respectfully submitted,

Edwin J. Reis/gb

Edwin J. Reis
Deputy Assistant General Counsel
Reactor Licensing Branch

Gregory Alan Berry

Gregory Alan Berry
Counsel for NRC Staff

Dated at Rockville, Maryland
this 15th day of June 1989

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
U.N.C.

'89 JUN 21 P5:32

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	OFFICE OF SECRETARY
PUBLIC SERVICE COMPANY OF)	DOCKETING & SERVICE
NEW HAMPSHIRE, <u>et al.</u>)	Docket Nos. 50-443 OL BRANCH
)	50-444 OL
(Seabrook Station, Units 1 and 2))	Off-site Emergency Planning
)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO MOTION OF MASSACHUSETTS ATTORNEY GENERAL TO HOLD OPEN THE RECORD PENDING LOW POWER TESTING AND THE REQUIRED YEARLY ONSITE EXERCISE AND FOR OTHER RELIEF" 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, as indicated by double asterisks, by express mail, this 15th day of June 1989:

Ivan W. Smith, Chairman (2)*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Philip Ahrens, Esq.
Assistant Attorney General
Office of the Attorney General
State House Station
Augusta, ME 04333

Richard F. Cole*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

John Traficante, Esq.**
Assistant Attorney General
Office of the Attorney General
One Ashburton Place, 19th Floor
Boston, MA 02108

Kenneth A. McCollom
Administrative Judge
1107 West Knapp Street
Stillwater, OK 74075

Geoffrey Huntington, Esq.
Assistant Attorney General
Office of the Attorney General
25 Capitol Street
Concord, NH 03301

Thomas G. Dignan, Jr., Esq.**
Robert K. Gad, III, Esq.
Ropes & Gray
One International Place
Boston, MA 02110-2624

Diane Curran, Esq.**
Harmon, Curran & Tousley
2001 S Street, NW
Suite 430
Washington, DC 20009

Robert A. Backus, Esq.**
Backus, Meyer & Solomon
116 Lowell Street
Manchester, NH 03106

H. J. Flynn, Esq.
Assistant General Counsel
Federal Emergency Management Agency
500 C Street, S.W.
Washington, DC 20472

Paul McEachern, Esq.
Shaines & McEachern
25 Maplewood Avenue
P.O. Box 360
Portsmouth, NH 03801

Charles P. Graham, Esq.
McKay, Murphy & Graham
100 Main Street
Amesbury, MA 01913

Sandra Gavutis, Chairman
Board of Selectmen
RFD #1, Box 1154
Kensington, NH 03827

Calvin A. Canney
City Hall
126 Daniel Street
Portsmouth, NH 03801

R. Scott Hill-Whilton, Esq.
Lagoulis, Clark, Hill-Whilton
& McGuire
79 State Street
Newburyport, MA 01950

Allen Lampert
Civil Defense Director
Town of Brentwood
20 Franklin
Exeter, NH 03833

William Armstrong
Civil Defense Director
Town of Exeter
10 Front Street
Exeter, NH 03833

Gary W. Holmes, Esq.
Holmes & Ellis
47 Winnacunnet Road
Hampton, NH 03842

Judith H. Mizner, Esq.
79 State Street
Newburyport, MA 01950

Robert Carrigg, Chairman
Board of Selectmen
Town Office
Atlantic Avenue
North Hampton, NH 03862

William S. Lord
Board of Selectmen
Town Hall - Friend Street
Amesbury, MA 01913

Mrs. Anne E. Goodman, Chairman
Board of Selectmen
13-15 Newmarket Road
Durham, NH 03824
Kensington, NH 03827

Hon. Gordon J. Humphrey
United States Senate
531 Hart Senate Office Building
Washington, DC 20510

Richard R. Donovan
Federal Emergency Management
Agency
Federal Regional Center
130 228th Street, S.W.
Bothell, Washington 98021-9796

Peter J. Matthews, Mayor
City Hall
Newburyport, MA 01950

Michael Santosuosso, Chairman
Board of Selectmen
South Hampton, NH 03827

Ashod N. Amirian, Esq.
Town Counsel for Merrimac
145 South Main Street
P.O. Box 38
Bradford, MA 01835

Barbara J. Saint Andre, Esq.
Kopelman and Paige, P.C.
77 Franklin Street
Boston, MA 02110

Ms. Suzanne Breiseth
Board of Selectmen
Town of Hampton Falls
Drinkwater Road
Hampton Falls, NH 03844

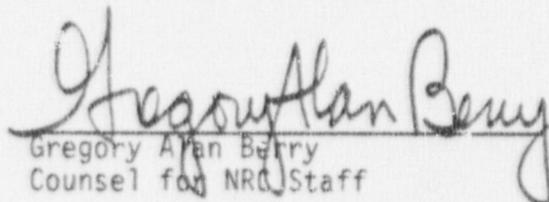
Robert R. Pierce, Esq.*
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Atomic Safety and Licensing
Appeal Panel (5)*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Docketing and Service Section*
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555

J. P. Nadeau
Board of Selectmen
10 Central Street
Rye, NH 03870

Atomic Safety and Licensing
Board Panel (1)*
U.S. Nuclear Regulatory Commission
Washington, DC 20555


Gregory Alan Berry
Counsel for NRC Staff