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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'89 JUN 20 P12:34

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Alan S. Rosenthal, Chairman
Thomas S. Moore
Howard A. Wilber

June 20, 1989
(ALAB-918)

SERVED JUN 20 1989

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)

John Traficonte, Boston, Massachusetts, (with whom Diane Curran, Washington, D.C., and Robert A. Backus, Manchester, New Hampshire, were on the brief) for the intervenors James M. Shannon, Attorney General of Massachusetts, New England Coalition on Nuclear Pollution, and Seacoast Anti-Pollution League.

Thomas G. Dignan, Jr., Boston, Massachusetts (with whom George H. Lewald, Kathryn A. Selleck, Jeffery P. Trout, Jay Bradford Smith, and Geoffrey C. Cook, Boston, Massachusetts, were on the brief) for the applicants Public Service Company of New Hampshire, et al.

Gregory Alan Berry for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

After the Licensing Board presiding over the so-called onsite issues in this operating license proceeding renewed its authorization for a low power testing license for Seabrook, Unit 1, the Massachusetts Attorney General, the New England Coalition Against Nuclear Pollution, the Seacoast Anti-Pollution League, and the Town of Hampton, New

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Hampshire (intervenors) filed a joint motion to admit a new contention.[1] The intervenors claimed that the contention arose out of the then recently concluded graded emergency preparedness exercise for Seabrook station. Alternatively, the intervenors' motion requested that the record be reopened to admit their contention which raised an issue not previously in controversy in the proceeding.[2] The Licensing Board denied the intervenors' motion in its entirety[3] and the intervenors have appealed.[4] For the reasons that follow, we affirm the Licensing Board's denial of the intervenors' motion.

I.

On June 27, 28, and 29, 1988, the applicants held a full participation emergency exercise to test the emergency plans for the Seabrook facility. An NRC inspection team observed the onsite portion of the exercise and subsequently

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[1] Motion To Admit Exercise Contention Or, In The Alternative, To Reopen The Record (September 16, 1988) [hereinafter, "Intervenors' Motion"] at 1-9.

[2] Id. at 9-12.

[3] LBP-89-4, 29 NRC 62 (1989).

[4] The denial of a motion to admit a contention or to reopen the record is normally interlocutory and, therefore, not immediately appealable. See 10 C.F.R. § 2.730(f). At the time of the instant ruling, however, the Licensing Board already had disposed of all other issues pertinent to low-power operation thereby making this order appealable.

issued an inspection report dated July 6, 1988, setting out the results of its observations. The report first stated that "[n]o violations were identified" and that the applicants' "[e]mergency response actions were adequate to provide protective measures for the health and safety of the public."[5] In six sections, the report then recounted the details of the inspection and the exercise. Included among these sections was one listing the strengths and weaknesses of the exercise, stating that

> [t]he NRC team noted that the licensee's activation and augmentation of the emergency organization, activation of the emergency response facilities, and use of the facilities were generally consistent with their emergency response plan and implementing procedures. The team also noted the following actions that provided strong positive indication of their ability to cope with abnormal plant conditions:
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> 1. Very good command and control of all emergency response facilities (ERFs) was [sic] demonstrated;
> 2. Plant conditions were quickly recognized and classified;
> 3. Shift turnover was accomplished smoothly and with no apparent loss of control of the situation;
> 4. The ERFs were activated in a timely manner; and
> 5. Protective Action Recommendations (PARs) were prompt and conservative. Evacuation time estimates were effectively utilized in determining the PARs.[6]

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[5] Inspection Report No. 50-443/88-09 (July 6, 1988) at 1.

[6] Id. at 4.

This same section also indicated that

> [t]he NRC identified the following exercise weaknesses which need to be evaluated and corrected by the licensee. The licensee conducted an adequate self critique of the exercise that also identified these areas.
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> 1. The Technical Support Center (TSC) and Emergency Operations Facility (EOF) staff displayed questionable engineering judgment and/or did not recognize or address technical concerns (50-443/88-08-01). For example:
>
> - Neither the EOF nor TSC staff questioned a release of greater than 7000 curies per second with only clad damage and no core uncovery [sic];
> - Efforts continued to restore the Emergency Feedwater Pump after a large break LOCA;
> - A questionable fix for the Containment Building Spray system;
> - 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.[7]

These five examples of purported exercise weaknesses served as the bases for the exercise contention that the intervenors sought to have admitted before the Licensing Board, as well as the foundation for their alternative request to reopen the record. The contention asserted that the exercise showed that the present state of onsite emergency preparedness at Seabrook did not provide reasonable assurance that adequate protective measures can

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[7] Id. at 5. The inspection report also listed three additional items as weaknesses but none of these matters is pertinent to the issues before us on appeal.

and will be taken in the event of a radiological emergency as required by 10 C.F.R. § 50.47(d). Hence the contention claimed that low-power authorization was precluded even though the Licensing Board had already authorized such a license for the facility. Specifically, the contention alleged that the exercise revealed fundamental deficiencies in the applicants' emergency plan, which deficiencies, in turn, showed that the applicants' plan did not comply with 10 C.F.R. § 50.47(b)(15), requiring the training of those persons who assist in an emergency.[8]

As the bases for their contention, the intervenors relied upon an affidavit of Robert D. Pollard, a nuclear safety engineer with the Union of Concerned Scientists. In his affidavit, Mr. Pollard examined the five examples of purported exercise weaknesses identified in the inspection report and concluded that each instance was much more

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[8] Intervenors' Motion, Exhibit 1, Joint Intervenors On-Site Exercise Contention.

The contention also alleged that the applicants' emergency plan failed to meet the standards of 10 C.F.R. §§ 50.47(b)(2), (b)(14) and Part 50, Appendix E, §IV.F. Subsection (b)(2) requires, inter alia, that the applicants have "adequate staffing to provide initial facility accident response in key functional areas . . . at all times," while subsection (b)(14) requires that the applicants conduct "[p]eriodic exercises . . . to evaluate major portions of emergency response capabilities . . . ." Section IV.F of Appendix E also provides for the training of the applicants' employees to ensure they are familiar with their emergency response duties.

significant than the NRC staff believed. Unlike the staff, he concluded that each of the staff's examples demonstrated a fundamental deficiency in the applicants' emergency plan by showing that the applicants' personnel, contrary to the requirements of the Commission's regulations, were inadequately trained to accomplish the tasks assigned to them in the exercise. For example, the first exercise weakness noted in the report was that neither the TSC nor EOF staffs questioned the exercise release rate of 7000 curies per second when the exercise accident scenario prescribed only fuel cladding damage but no uncovering of the core. In dealing with this matter, Mr. Pollard's affidavit states that

> [t]his failure of both the TSC and EOF staff is an indication that the onsite emergency response personnel's knowledge of the relationship between the magnitude and rate of a radioactive release and the amount of core damage is seriously deficient . . . . Without a sound knowledge of the magnitude of releases possible under varying degrees of core damage, the emergency response staff may not recognize that their analysis of plant conditions is incorrect, leading them to take incorrect protective actions or fail to take the correct protective actions.[9]

After analyzing each of the other examples, Mr. Pollard reached a similar conclusion, i.e., that the TSC and EOF staffs lacked sufficient knowledge and understanding of

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[9] Intervenors' Motion, Affidavit of Robert D. Pollard at 12-13.

plant fundamentals to meet the objectives of the emergency exercise.[10]

The applicants and the staff opposed the intervenors' motion before the Licensing Board.[11] After reviewing the

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[10] Id. at 8-12.

[11] Both the staff and the applicants opposed the admission of the exercise contention. Because the staff took the position that a reopening motion was unnecessary in the circumstances, however, it initially did not address the intervenors' alternative motion to reopen the record. See NRC Staff Response To Joint Intervenors' Motion To Admit Exercise Contention Or, In The Alternative, To Reopen The Record (October 3, 1988) at 2 n.1. The applicants, on the other hand, opposed the intervenors' alternative reopening motion and, in accordance with 10 C.F.R. § 2.730(c), filed affidavits of three experts addressing the five examples of purported exercise weaknesses from the staff's inspection report relied upon by the intervenors. Applicants' Response To Motion To Admit Exercise Contention Or, In The Alternative, To Reopen The Record (September 28, 1988) at 10-14. For example, the affidavit of the applicants' Radiological Assessment Manager for Seabrook, James A. MacDonald, addressed the first purported weakness concerning the applicants' failure to question the lack of correlation between the release rate of 7000 curies per second and the status of the core. His affidavit stated that the release figure was supplied by the exercise controllers, and pursuant to their guidance, exercise participants were instructed to accept the information as given. Mr. MacDonald's affidavit also stated that a review of the exercise showed that this lack of correlation, in fact, was discussed by the exercise participants and, in any event, the actual response and implementation of all emergency response procedures by the applicants' personnel (i.e., sampling and analysis) were not hindered by the purported lack of correlation. His affidavit concluded that the observation contained in the staff inspection report was inaccurate and did not evidence any weakness by the TSC and EOF staffs. Id., Affidavit of James A. MacDonald at 2-4. The affidavits of the applicants' two additional experts addressed the other four examples from the inspection report

(Footnote Continued)

parties' initial round of pleadings, the Licensing Board ordered the filing of additional submissions with respect to the intervenors' alternative motion to reopen the record.[12]

(Footnote Continued)
and similarly concluded that the staff's criticisms were unfounded. Id., Affidavits of Gary J. Kline and Gregg F. Sessler.

[12] Order (Directing Additional Briefing and Affidavits) (October 25, 1988).

The Licensing Board ordered the supplemental filings when the applicants called to its attention a second inspection report issued by the staff after a further inspection at Seabrook. LBP-89-4, 29 NRC at 71. See Applicants' Response To Joint Intervenors' Motion For Leave To File A Reply (October 12, 1988) at 2-3. Among other things, the second inspection report addressed and "closed" the items identified in the first report as exercise weaknesses that needed correction by the applicants. Inspection Report No. 50-443/88-10 (September 28, 1988) at 8-10. For example, with respect to the first purported weakness (i.e., the applicants' failure to question the lack of correlation between the release rate and the specified core condition), the second report stated that

> [t]he inspector reviewed the player and controller logs for selected TSC, EOF and engineering support center (ESC) staff. These logs revealed that several staff members did question and/or comment on the mismatch between the reactor coolant activity and the release rate. Subsequent discussions with the TSC and EOF controllers and players also indicated that they were aware of this mismatch. In actuality, the ESC staff made very accurate core damage assessments based upon the data supplied by the TSC. The EOF dose assessment staff made accurate dose projections based upon the release rate, as well as correlation of field data to the release rate.

Id. at 10. After further investigation of the other four purported exercise weaknesses, the staff concluded in each instance that the applicants' actions were appropriate. Id. at 8-10.

Specifically, the Board directed the parties to file further briefs and supporting affidavits addressing, inter alia, whether the intervenors' motion raised a significant safety issue as required by 10 C.F.R. § 2.734.[13] Thereafter, the Board denied the intervenors' motion in its entirety.[14]

In its opinion, the Licensing Board first found that the intervenors' exercise contention was late-filed because it had not been filed within the time limits contained in 10 C.F.R. § 2.714(b).[15] Next, the Board assumed that the

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[13] The applicants' submission in response to the Licensing Board's order generally recited their earlier filings. See Applicants' Response To Board Order Of October 25, 1988 (November 8, 1988). The intervenors' reply included a second affidavit of their expert addressing the initial affidavits of the applicants' experts and the second staff inspection report. From their analysis, the intervenors concluded that, in the circumstances, the applicants' affidavits and the second inspection report lacked credibility. See Memorandum Of Joint Intervenors In Response To October 25, 1988 Order Of Licensing Board (November 9, 1988). The staff's filing included the joint affidavit of two staff members involved in the emergency preparedness exercise and it explained the further information leading the staff to conclude in the second inspection report why none of the initially reported exercise weaknesses was valid. See NRC Staff Response To Licensing Board Order Of October 25, 1988 (November 28, 1988). The intervenors then filed a further response to the staff submission and the staff filed a rejoinder. See Joint Intervenors' Response To "NRC Staff Response To Licensing Board Order Of October 25, 1988" (December 7, 1988); NRC Staff Response To Joint Intervenors' Motion For Leave To Submit Response To NRC Staff Response To Licensing Board Order Of October 25, 1988 (December 27, 1988).

[14] LBP-89-4, 29 NRC at 86.

[15] Id. at 67-68.

record of the proceeding was open and balanced the five factors set forth in 10 C.F.R. § 2.714(a)(1) for considering the admission of late-filed contentions. The Board concluded that a majority of the factors, and the most important of those factors, weighed against admitting the contention.[16] Finally, the Board turned to the intervenors' alternative motion to reopen the record. Even though the Commission's Rules of Practice require that a reopening motion raising a contention not previously in controversy must also satisfy the requirements set forth in 10 C.F.R. § 2.714(a)(1) for nontimely contentions -- the same factors the Board had already decided against the intervenors -- the Board nevertheless considered the motion and found it did not raise a significant safety issue.[17]

II.

A. Before us, the intervenors argue that the Licensing Board erred in ruling that their exercise contention was nontimely and therefore subject to a balancing of the five factors set forth in 10 C.F.R. § 2.714(a)(1) for the consideration of late-filed contentions. Contrary to this assertion, however, the

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[16] Id. at 68-71.

[17] Id. at 71-86. See 10 C.F.R. § 2.734(a),(d).

Licensing Board was correct in finding that the exercise contention was late-filed. The Rules of Practice provide that any contention filed "later than fifteen (15) days prior to the holding of the special prehearing conference . . . or where no special prehearing conference is held, fifteen (15) days prior to the holding of the first prehearing conference" is nontimely and can be admitted only upon a balancing of the five lateness factors.[18] Here, because the intervenors' exercise contention was not filed within the time constraints of the Commission's rule, it is necessarily late.

That there are no exceptions to the time limits for filing contentions under the Rules of Practice is one of the teachings of the Commission's decision in Catawba.[19] There the Commission dealt with the question whether all five of the late-filed contention criteria apply to a contention based on licensing-related documents, such as the agency's environmental impact statement, that are not prepared early enough in the licensing proceeding to permit the timely filing of a contention. In answering that question in the affirmative, the Commission held that section 189a of the

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[18] 10 C.F.R. § 2.714(b).

[19] Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983).

Atomic Energy Act, as amended, does not provide an unqualified right to a hearing and does not mandate the automatic admission of a late-filed contention in that situation. It ruled that a party's hearing rights are not offended by a reasonable procedural rule applying all of the factors of 10 C.F.R. § 2.714(a)(1) for admitting a late-filed contention, even if the contention could not have been filed within the period for timely filing contentions.[20] Catawba is controlling here and establishes that the intervenors' contention was late-filed and subject to a balancing of the five lateness factors, even though the emergency preparedness exercise on which the contention was based had yet to be held at the time the period for filing contentions in this proceeding closed.[21]

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[20] Id. at 1046-47.

[21] The intervenors' attempt to distinguish Catawba on the ground that only licensing-related documents were involved in that case while here a material licensing event is involved, obviously cannot withstand scrutiny. Neither the history, language, nor reasoning of Catawba supports such a notion.

Moreover, the intervenors' reliance upon Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984), cert. denied, 469 U.S. 1132 (1985), is also wide of the mark. In that case, the court invalidated an amendment to the Commission's regulations that eliminated the emergency preparedness exercise as a prerequisite to the agency's operating license authorization. By making the exercise part of the operational inspection program, the amendment effectively removed any challenge to the exercise from the

(Footnote Continued)

B. Alternatively, the intervenors argue that even if their exercise contention was nontimely, the Licensing Board nevertheless erred in finding that the factors governing the acceptance of a late-filed contention in 10 C.F.R. § 2.714(a)(1) weighed against admitting the contention.

(Footnote Continued)
adjudicatory licensing proceeding. The court found that, in spite of the amendment, the Commission nevertheless considered the offsite emergency preparedness exercise material to its decision whether to license a plant. It held, therefore, that it was beyond the Commission's statutory authority to remove from the licensing hearings required by section 189a of the Atomic Energy Act issues material to the licensing decision. In reaching this decision, the court also rejected the Commission's argument that a party's hearing rights were protected because a party could always seek to reopen the record if the exercise identified fundamental defects in the emergency plans.

In an effort to cloak themselves in the rationale of the UCS case, the intervenors argue that their right to litigate the exercise is burdened when the hearing record is closed before they have an opportunity to file contentions on the exercise and here the Licensing Board "has deemed every June 1988 onsite exercise contention to be filed after the record has closed." Brief Of The Appellants On Appeal of LBP-89-04 (February 13, 1989) at 7. The short answer to the intervenors' claim, however, is that the Licensing Board did not deem the exercise contention to be filed after the record was closed at all. Indeed, the Board specifically assumed the record remained open in finding the exercise contention was late-filed and in applying the five factors of 10 C.F.R. § 2.714(a)(1). LBP-89-4, 29 NRC at 68. Further, contrary to the intervenors' apparent belief, the UCS case does not prohibit placing reasonable procedural requirements upon the filing of late-filed contentions. Rather, it holds that a party's statutory hearing rights on a material licensing issue cannot be made to hinge upon the agency's unfettered discretion to reopen the record. See 735 F.2d at 1443-44.

That section requires that the Licensing Board consider the following five factors:

> (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 the petitioner's interest will be represented by existing parties.
> (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.[22]

In rejecting the intervenors' contentions, the Board below found that the first, third, and fifth factors weighed against admitting the contention, while the second and fourth factors favored accepting it.

Although the intervenors challenge the Licensing Board's balancing of the lateness factors, their argument is silent on the standard we are required to apply in reviewing that ruling. Because the lateness factors were placed in the rules to give the hearing boards "broad discretion in the circumstance of individual cases,"[23] we have noted previously that "neither this Board nor the Commission has been readily disposed to substitute its judgment for that of the Licensing Board insofar as the outcome of the balancing

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[22] 10 C.F.R. § 2.714(a)(1).

[23] Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975).

of the Section 2.714(a) factors is concerned."[24] Our review in such instances is strictly limited to determining whether the Board abused its discretion.[25] To establish that the Licensing Board transgressed that standard, the intervenors have a heavy burden on appeal. It is insufficient for them to show merely that the Board below might legitimately have determined that the five lateness factors weighed in favor of admitting the contention; rather, they must demonstrate that a reasonable mind could reach no other result.[26] In their arguments to us, the intervenors have fallen far short of making this showing.

The intervenors first dispute the Licensing Board's determination that they failed to demonstrate good cause for not filing their exercise contention in a more timely manner. The Board concluded that the intervenors unjustifiably delayed filing their contention until September 16 when, by their own admission, they received the

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[24] Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 395-96 (1983).

[25] Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 922 (1987); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 20-21 (1986); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1763 (1982).

[26] See Comanche Peak, 25 NRC at 922; Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1171 (1983).

July 6 inspection report on which the contention was based by July 15. The Board rejected the intervenors' claim that they had insufficient information to file the contention until at least the week of August 15 when they received the eight-volume exercise documentation that contained, inter alia, the objectives and scenario sections for the emergency exercise. The Board reviewed the relied upon sections of these materials and found that they were not necessary to the preparation of an appropriate contention. Rather, it found that the July 6 inspection report was all that was needed in order for the intervenors to plead their exercise contention properly.

The intervenors renew this same argument before us. But we cannot find that the Licensing Board acted unreasonably in rejecting their claim. It is, of course, settled that a late-filed contention must be tendered promptly upon the discovery of the information upon which it is based.[27] From our examination of the same exercise documentation reviewed by the Licensing Board, we would be hard pressed to conclude, as the intervenors argue, that these materials were indispensable to the proper pleading of their contention. Rather, as the Licensing Board found, the

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[27] Catawba, 17 NRC at 1048 (1983). See Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244-45 (1986); Limerick, 23 NRC at 21.

pertinent details of the exercise accident scenario are all listed in the July 6 inspection report.[28]

Equally unpersuasive is the intervenors' claim that this same documentation was necessary for them to learn of the exercise objectives. In particular, the intervenors argue that in order to frame their contention they had to know that one of the exercise objectives required the applicants to demonstrate that the onsite staff could develop appropriate solutions to reactor problems. Like the exercise accident scenario, this information is found in the July 6 inspection report. The report specifically notes those activities of the applicants' personnel that the NRC inspectors observed during the exercise, including the "[d]etection, classification, and assessment of scenario events" and "[p]erformance of technical support, repair and corrective actions."[29] Moreover, this particular exercise objective is, or reasonably should have been, self-evident to the intervenors because every onsite emergency preparedness exercise necessarily must test the operators' ability to develop appropriate solutions to the reactor

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[28] See Inspection Report No. 50-443/88-09 at 3.

[29] Id. at 3-4 (emphasis supplied).

problems causing the emergency.[30] Accordingly, we cannot find that the Licensing Board erred in determining that the intervenors failed to establish good cause for not submitting their exercise contention much earlier than September 16, 1988, when the information on which the contention was based was available to them by July 15.

The Licensing Board also concluded that the second and fourth factors tipped the scales in favor of the intervenors, but that these two factors were entitled to less weight than the other three factors. It found, however, that the third factor (i.e., the extent intervenors may reasonably be expected to assist in developing a sound record) weighed against the admission of the exercise

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[30] Although we do not rely on it, we note that the onsite exercise objectives were announced at a public meeting attended by one of the counsel for the intervenors shortly after the conclusion of the emergency planning exercise. On July 2, 1988, in Portsmouth, New Hampshire, the Federal Emergency Management Agency sponsored a public meeting on the exercise where various officials involved in the exercise entertained questions from interested members of the public. The transcript of that meeting reveals that Alan Fierce, one of the attorneys involved in the Seabrook licensing proceeding from the Massachusetts Attorney General's office, raised several questions at the meeting. FEMA Tr. 93, 145-60. The transcript also shows that Craig Conklin, an NRC senior emergency preparedness specialist, explained the agency's inspection of the onsite portion of the exercise. As part of his presentation, Mr. Conklin enumerated the "major areas" of the exercise concentrated upon by the NRC inspectors that included, inter alia, the ability of the applicants "to formulate and implement actions that could mitigate further damages to the plant." FEMA Tr. 56.

contention. The Board reiterated that the intervenors had an obligation in addressing the third criterion to set out with as much particularity as possible the precise issues they plan to cover, the identity of their prospective witnesses, and a summary of their proposed testimony. It then found that even though the intervenors were experienced litigants before the agency, they failed in their original motion to furnish the required information in the prescribed form and, in their reply pleading, they still did little to supply this information. The intervenors challenge this determination and argue that the Licensing Board placed form over substance in deciding the third factor against them.

The Commission has emphasized "the necessity of the moving party to demonstrate that it has special expertise on the subjects which it seeks to raise."[31] Hence, the Commission has indicated that, in addressing the third criterion, the intervenors must not only identify the issues they plan to cover but they also must identify their prospective witnesses and summarize their proposed testimony.[32] Here, finding that the intervenors were experienced litigants that were cognizant of these pleading

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[31] Braidwood, 23 NRC at 246.

[32] Id. See Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982).

requirements, the Licensing Board refused to ignore them as the intervenors would have it. In the circumstances, we cannot fault the Licensing Board for its decision. The intervenors fulfilled their obligation to identify the issue they sought to raise by including the exercise contention with their motion to admit it.[33] But their assertion that the Licensing Board put form over substance has a hollow ring, given that their initial motion stated only that they would contribute to the development of a sound record "by providing an expert witness"[34] and then, in their reply to the responses of the applicants and the staff noting this deficiency, they claimed that "[o]bviously, the contention itself which incorporates the Pollard Affidavit was intended to satisfy this requirement."[35] The Licensing Board's refusal to countenance such tactics by weighing the third factor against the intervenors was not unreasonable.

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[33] See Comanche Peak, 25 NRC at 925 n.48.

[34] Intervenors' Motion at 10.

[35] Joint Intervenors' Reply To Responses Of The Applicants And The NRC Staff To Onsite Exercise Contention (October 7, 1988) at 18.

Not only did the intervenors not identify their affiant as the prospective witness in their motion to admit the exercise contention but, as the applicants' counsel noted in an unchallenged statement at oral argument before us, the intervenors' affiant has previously filed many affidavits in the Seabrook proceeding yet he has never appeared as a witness in any phase of the proceeding. App. Tr. 38.

Finally, the Licensing Board found that the fifth factor (i.e., the extent the contention will broaden the issues or delay the proceeding) militated against admitting the exercise contention, and the intervenors do not question this determination. On balance, the Board concluded that the intervenors had failed to demonstrate that they prevailed on the five-factor test and it denied the intervenors' motion to admit the contention. Our review of the Licensing Board's consideration of the five lateness criteria does not permit us to find under the applicable review standard that a reasonable mind could reach no other result than to admit the intervenors' late-filed exercise contention.

Further, even if we were to find that the Licensing Board should have weighed the third factor in intervenors' favor, we still would reach the same result. It is well established that the first factor is the most crucial and, when the proponent of a contention fails to demonstrate good cause for not filing the contention in a more timely fashion, the movant must make a compelling showing on the other four factors.[36] Here, as the Licensing Board found, the intervenors failed to make a sufficiently compelling showing on factors two through five to overcome their

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[36] Braidwood, 23 NRC at 244.

failure to establish good cause. Further, in considering whether to admit a late-filed contention, the second and fourth factors are accorded less weight than the first, third, and fifth factors.[37] Therefore, when the relative importance of the five factors is considered, the most important first factor and the significant fifth factor weigh heavily against the admission of the intervenors' exercise contention. On the other side of the equation, the less important second and fourth factors favor admission and, under our assumption, the significant third factor would favor admission. But the intervenors failed to make a compelling showing on any of these three factors. In the circumstances, a proper balancing of the factors would still weigh against admitting the intervenors' contention. Accordingly, the Licensing Board's balancing of the five factors and its denial of the intervenors' motion to admit the exercise contention are affirmed.

C. In light of our affirmance of the Licensing Board's denial of the intervenors' motion to admit their exercise contention, we need not reach any of the issues involved in the lower Board's consideration of the alternative motion to reopen the record. There is, however, an independent basis for affirming the Licensing Board's

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[37] Id. at 245.

result that was raised below by the staff. The Commission has restricted licensing hearings on the results of emergency planning exercises to contentions involving "deficiencies which preclude a finding of reasonable assurance that protective measures can and will be taken, i.e., fundamental flaws in the plan."[38] In defining a "fundamental flaw" we have stated that "[f]irst, it reflects a failure of an essential element of the plan, and, second, it can be remedied only through a significant revision of the plan."[39] It is clear that the intervenors' exercise contention does not meet this standard.

Even if we generously assume that the intervenors' exercise contention complies with the first requirement of the fundamental-flaw test by properly implicating an essential element of the applicants' onsite emergency plan, i.e., training, there is no room for doubt that the contention does not meet the second prong. We have noted that "where the problem can be readily corrected, the flaw cannot reasonably be characterized as fundamental."[40] The gist of the intervenors' contention is that each of the

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[38] Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-86-11, 23 NRC 577, 581 (1986).

[39] Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-903, 28 NRC 499, 505 (1988).

[40] Id. at 506.

purported weaknesses listed in the staff inspection report shows that the staffs of the TSC and EOF were insufficiently trained to accomplish the tasks assigned to them in the exercise. But contrary to the intervenors' apparent belief, the asserted weaknesses, even if accepted as true, do not implicate the applicants' emergency plan itself at all, and therefore they cannot be remedied "only through a significant revision of the plan".[41] Rather, as the intervenors' contention recognizes, "[t]he personnel at the TSC and EOF are expected to use the emergency operating procedures to assist in recognizing an emergency condition in order to prescribe the actions necessary to correct the condition."[42] At most, the intervenors' contention highlights deficiencies that would require minor modifications to several plant operating procedures, and the intervenors do not claim that such procedures are part of the emergency plan. Moreover, even if we further assume that the applicants' emergency plan was somehow directly involved in these purported deficiencies, such problems are readily corrected by providing supplemental training to some of the applicants' personnel; such training does not involve

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[41] Id. at 505.

[42] Intervenors' Motion, Exhibit 1, Joint Intervenors On-Site Exercise Contention, at 2.

any revision, much less a significant one, of the emergency plan. Thus, the intervenors' contention fails to assert a fundamental flaw, and we affirm the Licensing Board's denial of the intervenors' motion for this additional reason.

For the foregoing reasons, the Licensing Board's denial of the intervenors' motion to admit their exercise contention, LBP-89-4, 29 NRC 62, is affirmed.

It is so ORDERED.

FOR THE APPEAL BOARD

Barbara A. Tompkins

Barbara A. Tompkins
Secretary to the
Appeal Board

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL. (Seabrook Station, Units 1 and 2)	Docket No.(s) 50-443/444-OL-1

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing AB MEMO & ORDER (ALAB-918) have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Docket No.(s)50-443/444-OL-1
AB MEMO & ORDER (ALAB-918)

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Dated at Rockville, Md. this
20 day of June 1989

Office of the Secretary of the Commission