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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:
Kenneth M. Carr, Chairman
Thomas M. Roberts
Kenneth C. Rogers
James R. Curtis

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE (Seabrook Station, nits 1 and 2)	Docket Nos. 50-443-OL 50-444-OL (Onsite Emergency Planning Issues)
	July 10, 1989

PETITION FOR REVIEW OF ALAB-918

INTRODUCTION

Pursuant to 10 C.F.R. §2.786(b), the Massachusetts Attorney General ("Mass AG"), SAPL and NECNP (collectively the "Intervenors") petition for Commission review of ALAB-918, the Appeal Board's June 20, 1989 affirmance of LBP-89-4, 29 NRC 62, the Licensing Board's denial of Intervenors' September 1988 motion to admit an onsite exercise contention.

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ARGUMENT[1/]

I. THE CONTENTION FILED IN SEPTEMBER 1988 ON THE JUNE EXERCISE WAS NOT LATE-FILED AND SHOULD NOT HAVE BEEN SUBJECT TO THE FIVE STANDARDS OF §2.714(a)(1) AT ALL.

Following the Licensing Board, the Appeal Board held that as a threshold matter the Intervenors' June 1988 onsite exercise contention was late-filed "because [it] was not filed within the time constraints of the Commission's rule [§2.714(b)]." ALAB-918, slip opinion at 11. According to the Appeal Board, these "time constraints" would have required that this contention be filed in the spring of 1982, 15 days prior to either a special prehearing conference or the first prehearing conference held after the notice of hearing. (The notice of hearing was published on October 19, 1981, 46 Fed. Reg. 51330, setting November 19, 1981 as the date for filing a request for hearing. A Licensing Board was constituted December 7, 1981. 46 Fed. Reg. 59668)

A. By prior practice the various Licensing Boards assigned jurisdiction over Seabrook licensing matters had modified these time constraints. Indeed, many contentions were filed in the years after 1982 in the Seabrook proceeding which were not subject to late-filed standards. In fact, if the

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1/ All matters of law argued here were put before the Appeal Board in Intervenors' February 13, 1989 brief or in oral argument on April 21, 1989 with the exception of argument based on post-April 1989 rulings by the Appeal Board and the Commission. These rulings were not available at the time the matter was submitted to the Appeal Board and, obviously, the Appeal Board was itself aware of them independently before June 20, 1989.

Appeal Board's "time constraints" were uniformally applied in this proceeding, every emergency planning contention filed in 1986 (on the New Hampshire plan) and in 1988 (on the utility's substitute Massachusetts plan and the June 1988 exercise) was late-filed.

B. In this specific instance, by order of August 19, 1988 (memorializing in part rulings made at a prehearing conference held on August 3 and 4, 1988) the Smith Board set September 21, 1988 as the filing deadline for exercise contentions. Thus, "[a]dditional time for filing the supplement [containing a list of contentions]" was granted in this case and the September 16 filing was not "late-filed."[2/] The Smith Board had plenary jurisdiction over exercise issues. Subsequent NRC decisions indicate that the Smith Board: a) would have had jurisdiction over this contention; b) could have entertaine this contention along with other June 1988 exercise contentions; and c) may

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2/ In granting such additional time, the Smith Board should be deemed to have balanced the 5 standards in favor of such additional time. Although logically there can only be one "first prehearing conference", there may be a series of special prehearing conferences and thus a series of filing triggers pursuant to §2.714(b). The timing of a special prehearing conference is 90 days after the notice of hearing "or such other time as the Commission or the presiding officer may deem appropriate." 10 C.F.R. §2.751a(a). Finally, at a special prehearing conference, the presiding officer may "establish a schedule for further action." These procedural regulations permitted the Smith Board during the August 3 and 4, 1988 prehearing conference to set the September deadline for contentions.

well have thereby taken jurisdiction over the issuance of a low power license.[3/] Thus, the deadline for filing exercise contentions was September 21, 1988. Contentions filed on or before that date were treated as timely filed. Because the litigable issues raised in the onsite exercise contention run to both low-power and full-power, Intervenors chose to file the contention with the Licensing Board which at the time appeared to have jurisdiction over the issuance of the low-power license. If the Intervenors had until September 21 to file exercise contentions they did not waive that right by filing one such contention on September 16 with a Licensing Board they reasonably believed had jurisdiction over the low-power license.[4/] The filing deadline set by the Smith Board was met.

3/ The Wolfe Board held in LBP-89-04 at 4 that the Commission gave it jurisdiction over the subject matter of the September 1988 motion in its December 21, 1988 decision, CLI-88-10. However, in CLI-89-08 at 14 n.14, the Commission noted that CLI-88-10 "did not decide that the issue was one properly before the Onsite Board, but simply required that the Onsite Board decide it before low power." Subsequently, the Appeal Board noted in ALAB-916 at 7-8 that: 1) jurisdiction of the "onsite" Board in September 1988 was limited to the single issue of public notification; and 2) the Smith Board had jurisdiction over exercise issues including those with "both full and low power ramifications."

4/ It appears in retrospect that the Smith Board would have been the appropriate Board even if Intervenors sought to litigate these issues prior to low power as well as full power licensing. In light of the circumstances, Intervenors should not be denied the benefit of a timely filing because they filed with what turned out to be the wrong Board. Had the Intervenors filed this onsite exercise contention with the Smith Board requesting that that Board assert jurisdiction over onsite issues and low power licensing, that Board would have undoubtedly refused to do so. See, e.g., Smith Board's July 22, 1988 Memorandum and Order (on SPMC Contentions), slip

(footnote continued)

II. BY TREATING THE CONTENTION AS LATE-FILED THE LOWER BOARDS VIOLATED THE ATOMIC ENERGY ACT AND DENIED THE INTERVENORS AN ADEQUATE OPPORTUNITY FOR A HEARING

Assuming that the Commission's procedural regulations require that the September 1988 onsite exercise be treated as late-filed because it was not filed in 1982 pursuant to §2.714(b), such a result denies the Intervenors' rights to a hearing under §189a of the Atomic Energy Act ("AEA").

A. Intervenors had a right to litigate the June 1988 exercise because it is material to the Commission's licensing decisions. Subjecting every contention arising out of that exercise automatically to the late-filed contention standard impermissibly burdens that hearing right. See UCS v. NRC, 735 F.2d 1437, 1442-1444. As the Appeal Board noted in ALAB-918 at 14 (citation omitted) "the lateness factors were placed in the rules to give the hearing boards 'broad discretion in the circumstances of individual cases....'" Automatically subjecting the public's right to a hearing on all matters arising after 1982 to such "broad discretion" is virtually indistinguishable from requiring that the record be reopened

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(footnote continued)

opinion at 82-85 (distinguishing between onsite and its offsite jurisdiction); and Smith Board's May 22, 1989 ruling expunging MAG-Ex 19 Basis D at Tr. 22,190 et seq. Moreover, Intervenors filed the September 1988 contention with the Appeal Board and the Commission noting in a letter to the Chairman of the Commission that a dispute over jurisdiction was anticipated.

for exercise litigation which the UCS Court held violated the AEA.

The Appeal Board failed to persuasively distinguish UCS. It interpreted the UCS holding as limited to those circumstances in which "a party's statutory hearing rights on a material licensing issue [hinged] upon the agency's unfettered discretion to reopen the record." ALAB 918, slip opinion at 13 n.21 (emphasis supplied). But UCS rejected a discretionary standard for a hearing not only an unfettered discretionary standard. In fact, the record reopening standard, like the late-filed standard is not an exercise in "unfettered" discretion. There are express criteri for both.[5/] Even as an exercise of "fettered" discretion, the Court expressly rejected the record reopening standard as a violation of the AEA. San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287, 1312, 1316-1317 (D.C. Cir. 1984).

B. To the extent that Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983) mandates that the September 1988 contention be subject to a discretionary late-filed standard, then Catawba violates the AEA. It is not a reasonable procedural requirement to automatically subject every contention filed after 1982 to the

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5/ In 1984, when UCS and Mothers for Peace were decided, the record reopening standard was not codified at §2.734. 51 Fed. Reg. 19535 (May 30, 1986). Nothing hinges on this because the codified standard in all relevant particulars was taken from then existing case law and remained discretionary.

late-filed contention standard.[6/] "[N]o procedural requirement can lawfully operate to preclude from the very outset a hearing on an issue both within the scope of the petitioner's interest and germane to the outcome of the proceeding. If it had that effect, the requirement would not merely be patently unreasonable but, as well, would render nugatory Section 189a hearing rights." ALAB-687, 16 NRC 460, 469 (1982).[7/]

III. INTERVENORS DID MAKE OUT GOOD CAUSE FOR LATE-FILING

A. Intervenors did file the onsite exercise contention promptly after receipt of the materials necessary to frame an admissible contention. The contention was filed 2 months after receipt of the July 15, 1988 Inspection Report and only 1 month after receipt of the exercise scenario documents. The latter documents were necessary to the September contention because the July 6 inspection report did not set forth in sufficient detail the exercise accident scenario and the exercise

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6/ The Appeal Board misses the point when it asserts that the "UCS case does not prohibit placing reasonable procedural requirements upon the filing of late-filed contentions." ALAB-918, slip opinion at 13 n.21. The relevant question is how reasonable the requirements were which resulted in the contention being treated as late-filed in the first place. Even if a procedural requirement were reasonable assuming a contention was late-filed, the NRC must act reasonably in determining which contentions are late-filed. Because the contention filed on the June 1988 exercise was considered automatically late-filed even though that exercise is material to licensing, the procedural requirements for a hearing on this exercise issue were not reasonable.

7/ Space limitations prevent further argument that Catawba as interpreted and applied to this contention violates the AEA.

objectives. The contention and initial supporting affidavit are based on an analysis of accident scenario events and the corresponding onsite personnel responses which required detail not available until the week of August 15, 1988 (Cf. Inspection Report No. 50-443/88-09 at 3 with September 16, 1988 Pollard Affidavit at ¶¶ 10, 11 and 12.)

B. Intervenors also had good cause for late-filing because they relied on the Smith Board's September 21 deadline for the submission of exercise contentions.

IV. THE APPEAL BOARD ERRED IN HOLDING THAT THE ONSITE EXERCISE CONTENTION DID NOT MAKE OUT A FUNDAMENTAL FLAW

Following its earlier decision in Shoreham, the Appeal Board held that the exercise contention did not make out a "fundamental flaw" in the onsite emergency plan because no "significant revision of the plan" would be necessary to correct the alleged flaw. In making this determination, the Appeal Board noted at 24-25: 1) that the contention concerns emergency operating procedures and not the emergency plan; 2) that supplemental training could be readily provided and thus such a deficiency would be "readily correctable"; and 3) training itself is not part of the onsite plan.

The Appeal Board's interpretation of a "fundamental flaw" as a flaw requiring a "significant revision of a plan," in turn understood as an asserted defect in planning that is not "readily correctable" so limits the litigable issues arising out of emergency exercises as to violate the hearing rights set

forth in the AEA. Intervenors' hearing rights extend to the results of an emergency plan exercise to the extent those results are considered by the NRC to be material to licensing. Exercise results are material if they indicate deficiencies of such a nature and kind that would affect the decision to license. A serious deficiency in training as revealed by an exercise -- for example, the absence of adequately trained emergency staff -- would obviously affect the decision to license. Thus, such training deficiencies would be material and, therefore, litigable under UCS v. NRC and Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-86-11, 23 NRC 577, 581 (1986). The fact, if it is a fact, that training deficiencies might be "readily correctable' has nothing whatsoever to do with the materiality of such exercise results. It would be quite absurd for the NRC, having discovered through an exercise that key emergency response staff are untrained, to ignore that fact in a licensing decision because of how easy it might be to train such staff. And if the NRC quite properly would require corrective action prior to licensing then such exercise results are litigable. The Appeal Board's additional pleading requirement for a fundamental flaw -- that an alleged planning defect not be "readily correctable" -- has no basis in logic or law.

CONCLUSION

The Appeal Board's decision should be reviewed because the issues raised by the Intervenors' September 1988 onsite

exercise contention are significant matters affecting the public health and safety and the disposition of that contention presents several important procedural issues.

Respectfully submitted,

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Dated: July 10, 1989

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	)	50-444-OL
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL.	)	
	)	
(Seabrook Station, Units 1 and 2)	)	July 10, 1989

CERTIFICATE OF SERVICE

I, John Traficonte, hereby certify that on July 10, 1989, I made service of the within PETITION FOR REVIEW OF ALAB-918 by First Class Mail, by Federal Express as indicated by [*] or by hand as indicated by [**] to:

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