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UNITED STATES OF AMERICA

before the

NUCLEAR REGULATORY COMMISSION

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 and Safety Issues)

APPLICANTS' ANSWER TO PETITION FOR REVIEW OF ALAB-918

Introduction

Under date of July 10, 1989, the Attorney General of The Commonwealth of Massachusetts (MAG) on behalf of himself, Seacoast Anti-Pollution League (SAPL) and the New England Coalition on Nuclear Pollution (NECNP), filed a petition for review of a decision of the Appeal Board in the above-entitled matter denoted ALAB-918.[1] This Appeal Board decision affirmed a decision of the Licensing Board rejecting a late-filed Contention filed concerning the training of

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1 Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-918, 29 NRC ___ (June 20, 1989).

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control room operators. For the reasons set forth below, the Petition should be denied.

ARGUMENT

The first error asserted by MAG is that the Appeal Board erred in holding that all contentions filed in the Seabrook proceeding after the spring of 1982 must be considered late filed by virtue of 10 CFR § 2.714 and this Commission's decision in Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983). Petition at 2. It is argued that "By prior practice the various Licensing Boards assigned jurisdiction over Seabrook licensing matters had modified these time constraints." Id. To begin with, in fact, no Licensing Board did ever purport to modify those time constraints. Second, if one had, its action would be a nullity because Licensing Board's are not empowered to either modify Commission regulations or overrule Commission adjudicatory decisions. The regulation could not be clearer, all contentions filed after the date stated in the original notice of hearing are "nontimely." 10 CFR § 2.714(b). The Catawba case could also not be clearer, the balancing of factors test must be met in the usual manner even if the late filing is occasioned by lack of a document. MAG also argues that he had a right to have the benefit of the so-called "Smith" Board's order that permitted the filing of exercise contentions with the Board up until September 16, 1988. Petition at 3-4. This argument is flawed for several

reasons. First, even though the Smith Board set such a deadline, it did not make any contention filed thereby any less "late-filed." It is true that the Applicants and Staff did not argue that a showing had to be made with respect to contentions arising out of the offsite portion of the exercise with that Board, but that was a waiver by the Applicants and Staff, not a change with respect to the rule, which a Licensing Board could not grant as set forth above. Second, even if the argument did not have this flaw, the fact is that MAG elected to file the contention with the Onsite Licensing Board. It was this decision of MAG, himself, which vitiates any hope he has of prevailing on this particular argument. MAG and the other intervenors made a decision to take what, in fact, was an exercise-related contention and twist it into something that, hopefully could be argued as grounds to stop issuance of a low power license for Seabrook Station. To accomplish this legerdemain, they engaged in tactics whereby they wound up filing the wrong contention with the wrong board and now are suffering the consequences, at least insofar as the possibility of ever having litigation is concerned.

The second assignment of error is that, assuming the Appeal Board has correctly interpreted 10 CFR § 2.714 and Catawba, this means that the Commission's procedures are in violation of the Atomic Energy Act as interpreted by Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984).

Petition at 5-7. The argument is that the onsite portion of the graded exercise is material to the decision to issue a low power license, and therefore, according to MAG there is an absolute right to a hearing under UCS. This argument is also flawed. Issuance of a low power license is not, under NRC regulations, dependent upon the onsite portion of the emergency plan for the site being exercised. The pertinent regulation states:

> "Insofar as emergency planning and preparedness requirements are concerned, a license authorizing fuel loading and/or low power operation may be issued after a finding is made by the NRC that the state of onsite emergency preparedness provides reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency. The NRC will base this finding on its assessment of the applicant's emergency plans against the pertinent standards in paragraph (b) of this section and Appendix E of this part."[2]

In short, the necessary finding for low power is to be made only on the basis of the plan, not the exercise. And this finding was made a long time ago in a record already closed.[3]

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2 10 CFR § 50.47(d)

3 MAG is also in error in his remonstrations with the Appeal Board's interpretation of UCS and his argument as to San Luis Obispo Mother for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984). He argues that these cases stand for the proposition that NRC may not ever deny a hearing on an exercise contention as a matter of "fettered" discretion and cites excerpts from these two cases for the proposition that the court was essentially declaring invalid the Commission's rule with respect to reopening closed records at least

There is nothing in UCS which can be read as precluding the requirement that the 10 CFR § 2.714 test be satisfied as a pleading requirement for a contention whether or not material to the licensing decision.

The third assignment of error is that the Appeal Board erred in its ruling with respect to the first factor of the "five factors" test under 10 CFR § 2.714.[4] The complaint made is that both the Appeal Board and Licensing Board erred in finding that MAG did not need the accident scenario to file the contention. This is an issue of fact which the Appeal Board decided consistently with the Licensing Board, and therefore cannot be the basis for Commission review. 10 CFR § 2.786(b)(4)(ii). Furthermore, as stated by the Appeal Board: "as the Licensing Board found, the pertinent details of the exercise analysis scenario are all listed in

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insofar as exercise contentions were concerned. However, a review of the two cases will reveal that the only regulation UCS discussed was 10 CFR § 2.206, which is a rule of unfettered discretion. Mothers for Peace discussed the case law which set out only one of the two "decision generated" standards for reopening, which standard was one of unfettered discretion (the movant having to show that a different result would result). Of course, the later-adopted rule of practice, 10 CFR § 2.734, did not adopt that draconian standard, and is, for that reason, not a rule of unfettered discretion. In short, the Appeal Board was absolutely correct in its analysis of UCS.

4 Apparently, no claim is made that the treatment accorded the other factors was erroneous, which means that MAG now concedes that the fifth factor and extremely weighty third factor weigh against him.

the July 6 inspection report."[5] The second argument made in support of this argument is that there was good cause for late filing because MAG relied upon the Smith Board deadline set for filing offsite exercise contentions. Petition at 8. The Petition does nothing more than make the assertion, providing no argument in support thereof. If the argument is that MAG was lulled into error by the Smith Board, the argument would set better if MAG had filed the contention with the Smith Board.

The fourth assignment of error is that the Appeal Board erred in holding that the proffered contention did not allege a fundamental flaw in the emergency plans of Seabrook Station. Petition at 8-9. The Appeal Board, as an alternative basis for its decision, held that the contention did not allege a "fundamental flaw."[6] MAG quarrels with this holding, saying in effect that the Appeal Board's definition of a fundamental flaw as being one which would require a significant revision of an emergency plan, is erroneous. This definition, which was first set out in Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-903, 28 NRC 499, 505 (1988), makes eminent good sense. There could be no greater waste of resources imaginable than litigating at length a supposed flaw in an emergency plan which is correctable by additional training. In this case,

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5 ALAB-918 at 17.

6 ALAB-918 at 22-25.

the flaw did not even exist, and, as the Appeal Board pointed out, if it had, it would have been corrected not by any revision of the plan at all, but rather by more training. There was no error.

Finally, it should be noted that there exists another and separate ground upon which the decision of the Licensing Board could have been upheld which was not addressed by the Appeal Board. This Commission had held the relevant record in this matter to be closed in the docket in which the motion was filed.

> "The procedural posture of this case reflects that the record is closed for the consideration of new issues, and litigation on [the issue before the Commission] may only be pursued if a motion to reopen is granted and at least one late-filed contention is admitted."[7]

This means that the provisions of 10 CFR § 2.734 had to be met by MAG, including the provision which requires that the existence of a significant safety issue be shown. 10 CFR § 2.734(b)(2). The gravamen of the original motion made to the Licensing Board was an inspection report in which five specific alleged examples of questionable engineering judgment by Applicants were listed.[8] Each of these was subsequently addressed by the Staff in another inspection report after the Staff had obtained further information which

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7 Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-88-7, 28 NRC 271, 273 (1988) (emphases added).

8 Inspection Report No. 50-443/88-09 at 4-5.

was unavailable to it at the time of the first report. In this second report, the Staff, on the basis of the additional and newly acquired information, retracted each of its assertions as to questionable engineering judgment in the prior report.[9] In short, the idea that any significant safety issue had been presented was a figment of the intervenors' imaginations.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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9 Inspection Report No. 50-443/88-10, items 1-5.

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Adjudicatory File
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