Filed: October 26, 1982

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

before the

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al.	)	Docket Nos. 50-443 OL 50-444 OL
(Seabrook Station, Units 1 & 2)	)	

APPLICANTS' RESPONSE TO
"STATE OF NEW HAMPSHIRE'S OBJECTION AND
MOTION FOR RECONSIDERATION OF ATOMIC
SAFETY AND LICENSING BOARD'S
ORDER OF SEPTEMBER 13, 1982"

Pursuant to this Board's Order of October 1, 1982,* the Applicants hereby reply to the "State of New Hampshire's Objection and Motion for Reconsideration of Atomic Safety and Licensing Board's Order of September 13, 1982" ("N.H. Objections") filed by the Attorney General of the State of New Hampshire ("NHAG").

*On October 18, 1982, at the request of the Applicants and with the assent of NECNP, NHAG, and the Staff, the presiding officer enlarged the reply times in that order by 7 days.

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GENERAL PROPOSITIONS

1. The Function of Licensing Boards in Operating License Proceedings. At least in part, N.H. Objections is premised upon a misapprehension concerning the role of Licensing Boards in operating license adjudications. The primary responsibility for reviewing an operating license application and for determining whether the proposal complies with applicable regulatory requirements and portends the requisite assurances regarding the public safety and national security lies with the NRC Staff.[1] The Staff reviews the entire application, all of the supporting information, and every jot, tittle and detail of the proposed use. Applying its technical expertise as well as its application-auditing resources, the Staff reaches a judgment, or, more accurately, a myriad of specific judgments which together form the basis for a conclusion that the application should be granted, denied, or granted with conditions. The Licensing Board is neither permitted nor required -- nor,

[1] See 10 C.F.R. § 2.760a.

frankly, equipped in terms of manpower, resources or time -- to duplicate this effort.[2]

[2]See Consumers Power Co. (Midland Plant, Units 1 and 2) ALAB-123, 6 AEC 331, 334-36 (1973); Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-83, 5 AEC 354, 357-59 (1972), aff'd on this point, 499 F.2d 1069 (D.C. Cir. 1974). As the Court of Appeals observed: "As a practical matter, moreover, it would simply not be possible for the two technical numbers of the [Licensing Board] to evaluate in detail of the totality of material relevant to safety matters that the Staff and ACRS have generated through so many months of work. This fact is so obvious that it borders on the ludicrous to suggest that Congress intended the ASLB so to function." 499 F.2d at 1077 (footnote omitted). See also CincinattiGas and Electric Co. (William H. Zimmer Nucler Power Station, Unit No. 1), CLI-82-20, ___ NRC ___, CCH Nuc. Reg. Rptr. ¶ 30,691 at p. 30,383-4 (July 30, 1982):

> "[T]he primary role of the Board is to adjudicate issues in dispute raised in the hearing process. We do not believe the role of the Board is to address as a technical review body each potential problem. The large technical staff of the NRC is charged with reviewing, monitoring, inspecting and enforcing actions for nuclear power reactors. The taxpayer provides a large amount of funds (over $450 million per year) to support over 3,000 staff members of the NRC whose primary function is to insure the health and safety of the public are protected in the use of the commercial nuclear power."

(Additional views of Commissioners Ahearne and Roberts.)

Once the Staff has reached its conclusions, the possibility exists that either the applicant or an intervenor may disagree with one or more of them. The role of the Licensing Board is to resolve these disagreements and, having done so, to determine whether the Staff's ultimate conclusions remain valid or must be modified.[3]

As a condition precedent, the points of disagreement between the Staff and the disagreeing party must be designated and framed in a fashion suitable for resolution by the litigation process. It is beyond dispute that the party requesting that a particular topic be set aside for litigation bears the burden to specifying that topic with sufficient definiteness as to yield something that is litigable. It is no less beyond dispute that it does not suffice for the party wishing litigation simply to point to a

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[3]See, e.g., Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-674, ___ NRC ___, CCH Nuc. Reg. Rptr ¶ 30,678 at p. 30,315 (May 5, 1982); Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2) ALAB-669, 15 NRC 453, 457 n.1 (1982); Consolidated Edison Co. (Indian Point, Units 1, 2 & 3), ALAB-319, 3 NRC 188, 190 (1976).

general topic and say, in effect, "That looks like a fertile field; let us all throw our hooks into the water and see what (if anything) comes up." The Licensing Board adjudicatory process exists to serve controversies in search of a resolution; it does not exist to serve putative litigants in search of a controversy.

Finally, because there exists a definite set of regulatory standards against which the Staff will -- and must -- measure the pending application, a controversy must take the form of a contention that the application fails in some concrete fashion to measure up against those standards in order to be litigable before the Licensing Board. A contention to the effect that the standards ought to be changed, or that some topic is a worthwhile field of investigation in order that the universe of knowledge regarding nuclear power plants be expanded, or that for some reason or another there is a finite probability that a valid controversy will exist in the future -- all of these fail to meet the mark of litigability before the Licensing Board. Refinement of standards, enlargement of knowledge, and anticipation of potential future problems are all worthy endeavors; they happen, however, not to be on

the list of proper functions for a Licensing Board in operating license proceedings.

It is with the foregoing in mind that the rules regarding the admissibility of contentions have been framed. The requirements that a proposed contention be stated with specificity and definiteness, that it have a basis both in terms of the pending application and the governing body of regulatory standards, and that it take the form of an assertion that these standards are not met by the application are not just flexible principles of guidance. They are jurisdictional principles in the sense that they derive from the boundaries of the Licensing Board's proper function. That in a particular case they stand as a bar to a proposed contention demonstrates not that a prospective litigant has been somehow unfairly wounded, but rather that what the litigant has attempted is improper.

2. The Duty to Frame Proper Contentions. At least at one point NHAG seems to fault this Board for having failed to rewrite NHAG's proposed contention for it, so as, presumably, to create out of an inadmissible mass some admissible substitute. NHAG Objections at 3. While, to be sure, a Licensing Board may rewrite proposed contentions that, unless rewritten, would not

be admissible, a Licensing Board is not required to do so and error cannot be predicated upon a Board's declination to rewrite a contention. Commonwealth Edison Company (Zion Station, Units 1 & 2), ALAB-226, 8 AEC 381, 406 (1974). See also Pennsylvania Power & Light Company (Susquehanna Steam Electric Station, Units 1 & 2), LBP-79-6, 9 NRC 291 (1979). Fault-finding of this ilk is particularly inappropriate (and unfair to the Board) where, as occured here, the proponent was offered more than once an opportunity to reframe his contentions in the light of the objections pointed out by other parties.

SPECIFIC OBJECTIONS

NH 2 (Systems Interaction)

This is a rehash of NECNP proposed contention NECNP I.Q, which is argued in the Applicants' Reply to NECNP's Objections[4] filed contemporaneously herewith. To avoid excessive repetition, the Applicants' respectfully refer the Board to their discussion of this issue in that document, limiting their response herein to a summary of the points made.

By this contention, NHAG, like NECNP, proposed the imposition by the Board of a requirement that, as a condition precedent to the granting of the license application, the Applicants perform what is quickly becoming known as a "systems interaction study." This type of study, which some plant operators are performing on their own and which some people think is a good idea, is a full-blown audit-type assessment of the performance of the many systems in the plant under various hypothesized scenarios. NHAG could and did point neither to a regulation making the performance of

[4] "NECNP Objections to Prehearing Conference Memorandum and Order and Motion to Certify Objections to the Appeal Board."

such a study a licensing obligation of applicants for nuclear power plant operating licenses, and, indeed, dozens of nuclear power plants have been licensed to operate without having performed such a study.

NHAG did point to one case where a Licensing Board did admit a "systems interaction" related contention.[5] However, that decision does not stand for the proposition that there is any regulatory requirement that such a study be performed, but rather it seems to have acknowledged that there is none. The only other decision of which we are aware[6] concurs with the Shoreham Board that there is no such regulatory requirement and excluded the contention. Thus, both Boards have concluded that there is no regulatory requirement that the type of study NHAG would like to see done performed, and their only difference is

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[5] Long Island Lighting Company (Shoreham Nuclear Power Plant), LBP-82-19, 15 NRC 601 (1982). This decision, it may be recalled, was brought to the attention of both the Board and NHAG by the Applicants and the Staff. Tr. 57-58 (May 6, 1982).

[6] Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-81-27, 14 NRC 325, 331 (1981).

whether a contention may be admitted that seeks to litigate an extra-regulatory requirement. Manifestly, such a contention may not be admitted; the Shoreham Board was in error on this point; and this Board -- necessarily forced to follow the lead of one of the two Boards -- followed the correct decision.

It should be pointed out that NHAG has not pointed to any particular system that it contends will not function as it is intended to, nor has it provided any basis for a contention that any particular system will not so perform. Thus this Board need not -- and did not -- reach the question of whether a contention so drawn would be admissible.

NH 5 (Liquid Pathway Consequences Analysis)

Though it is not made clear in N.H. Objections, the contention proposed by NHAG was that the Applicants should be required to perform a consequences analysis of the liquid pathway implications of an hypothesized so-called "core melt" at Seabrook.

This contention was made in the context of emergency planning regulations that impose planning requirements for both the plume exposure zone and the liquid pathway zone without regard to the probability that such measures will ever be called upon; that is to say, unlike the siting regulations of 10 CFR Part 100, the size of the area for which planning is required is generalized and not dependent upon factors that would either increase or decrease the probability of a radioactive migration or increase or decrease the consequences of such an event. The manifest purpose of this regulatory approach was to side-step such issues and get on with the business of planning, an approach justified by the use of zones so large as to cover the field of possible results from a "necessity" analysis and, particularly in the case of the liquid pathway, so large as to leave ample room for adjustments in the

event that adjustments are ever perceived to be appropriate to deal with a real life situation.

As a result, the proposed contention was deficient on its face as a proposed radiological health and safety item under Appendix E.

In this context the only regulatory hook on which proposed contention NH 5 could be hung is the asserted need to impose design changes on the plant to deal with the consequences of a so-called "Class 9" accident[7] or as a "NEPA" issue under 10 CFR Part 51. While the Commission in its wisdom has seen fit to open the door

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[7]As NHAG framed it:

> "Evaluation of liquid pathway impacts should be undertaken before an operating license is issued, such that modifications or corrective measures can be implemented before such measures are foreclosed. Safety systems to flood runaway reactor cores with cooling water, 'core catchers' to contain a melting core for several days, and interdiction mechanisms should be evaluated."

"Amendment and Supplement to the Petition for Leave to Intervene and Request for Hearing of the State of New Hampshire and Gregory H. Smith, Attorney General of the State of New Hampshire" at 16. Among its other vices, the proposed contention sought to litigate the desirability of technical plant features for which, for plants of Seabrook's vintage, there is no regulatory requirement.

to litigation of "Class 9" accidents, the door has been opened only partially. NHAG did not frame its contention as a NEPA issue, nor did it contend that the Applicants had failed to comply with the Commission's directive, nor has it satisfied the threshold burden imposed upon one who seeks to litigate the consequences of a "Class 9" accident.[8]

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[8] One other point should be noticed. In N.H. Objections NHAG quotes the "amended" version of proposed contention NH 5 (arguing that somehow this Board tripped up by failing to notice the reference therein to 45 Fed. Reg. 40101). N.H. Objections at 6. However, proposed contention NH 5 was not one of the proposed contentions that NHAG was given leave to refile during the prehearing conference of May 6 & 7, 1982, and its "amendment" was therefore out of time and unilaterally submitted. The NRC Staff objected to NHAG's arogation of the power to decide what leave to amend ought to be granted to itself, and the Board determined at the subsequent prehearing conference that "amended" NH 5 was not before it. Tr. 634-36 (July 16, 1982). Though the point is not, in fact, material to the fate that ultimately befell NH 5, to attempt to urge error in the alleged failure to read the language of a pleading that had, in fact, been effectively stricken is a type of advocacy that warrants neither encouragement nor emulation.

NH 6 (Environmental Qualification - Electrical)

As amended,[9] proposed contention NH 6 contained four parts. NHAG now apparently concedes that two of the four were not admissible as framed. N.H. Objections at 7.[10] Likewise, NHAG does not appear to raise an issue with regard to the third sub-part, on which the Board admitted what NHAG sees as a similar contention proposed by NECNP. Id. Thus, the argument advanced by NHAG is limited to the Board's exclusion of sub-part (d) relating to "the effects of aging and cumulative radiation." Id.

As both the Applicants and the Staff pointed out, NHAG failed totally to specify what equipment it

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[9]This time with leave.

[10]NHAG there goes on to say that "the State will attempt to provide [the further specificity that the Board required before admitting this proposed contention] at the earliest possible time." (Emphasis added.) We trust that NHAG is not by this language signalling a repetition of the impropriety described in note 8, supra; the time within which proposed contentions may be submitted has now long passed, and any attempt to submit new or revised proposals in the future will be subject to -- and, frankly, on the point at issue will have a nearly impossible job of trying to satisfy -- the rules on late filed contentions under 10 CFR § 2.714. Once may not be enough, but three times is too many.

thought was not properly environmentally qualified, the respects in which it was not adequately qualified, and the additional or difference qualification to which the equipment should be qualified. There is an awful lot of electrical equipment in the Seabrook plants; absent some sort of specification all that this Board could perform is an audit. Auditing is the task of the Staff.

In N.H. Objections NHAG still declines to give this proposed contention any direction or limits; rather it invites this Board "to limit the scope of the contention as it sees fit." N.H. Objections at 8. Neither is it the function of the Board to draft contentions for NHAG ("as it sees fit" or otherwise), nor, for the reasons set forth above, does NHAG have any grounds for complaint should the Board decline to render this service.[11]

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[11] See, e.g., Commonwealth Edison Company (Zion Station, Units 1 and 2), ALAB-226, 8 AEC 381, 406 (1974), discussed supra.

NH 12 (QA Program Execution)

There were two independently sufficient bases for denying admission of this proposed contention. First, as the Staff pointed out, not only did NHAG not provide any direction, basis, scope or specifics with regard to this proposed contention (thus foreshadowing another audit-type exercise), but what NHAG was really trying to do was to use the hearing process to explore in seach of an issue that, as far at it knew, might or might not be out there. As the Staff correctly observed:

> "Inasmuch as New Hampshire has not attempted to meet the Staff's objections to this contention by providing specific instances in its contention for ligitation of alleged improper function ing of the QA program, the Staff continues to object to this contention as failing to meet the specificity requirements of 10 C.F.R. § 2.714 and for vagueness. New Hampshire suggests that this contention should be admitted in its present state '. . . so as to permit discovery on and litigation, if necessary of the issue . . .' (Amended Contention, p. 17)"[12]

[12]"Response of the NRC Staff to Supplements to Petitions to Intervene of Coastal Chamber of Commerce, 'Lynn Chong et al and Co-op Members for Responsible investment,' Refiled and Supplemental Contentions of NECNP, Amended Contentions of Sun Valley and of New Hampshire," filed July 1, 1982 (emphasis supplied by the Staff).

The only quarrel one can make with this is that the Staff ought to have placed the editorial emphasis on "if necessary." The NRC hearing process does not exist for the purpose of providing discovery to those who would like to hunt around a little to see if they have an issue to litigate.

The Board rejected proposed contention NH 12, observing that:

> "It appears to this Board that without detailing information NH is not in fact looking for a mechanism by which to litigate a safety contention but to launch upon an expedition seeking information as to whether such a contention could ever be framed."

This ruling was plainly correct and hence there is no need to explore the other difficulty with with a proposed operating license contention regarding the sufficiency of the contruction QA program (as opposed to the soundness of the "as built" facilities).

NH 14 (Diesels)

One could tell from this proposed contention that NHAG was looking for a general seminar on diesel generators, but one could tell little else. For instance, one could not tell what it was about the proposed Seabrook diesels that NHAG thought was deficient; one could not tell what about the proposed Seabrook diesels NHAG thought ought to be done differently; one could not tell, indeed, that NHAG thought anything was wrong with the Seabrook diesels; as a matter of fact, one could not tell that NHAG had even read the voluminous materials that were and are available about the Seabrook diesels.

As submitted, proposed contention NH 14 was a paradigm of the vagueness that the rules of the Commission do not tolerate. Even with its customary generosity, the Staff opined that:

> "The Staff would not object to this contention if New Hampshire were to specify in what manner the onsite power system fails to meet the enumerated General Design Criteria or Appendix A."[13]

[13] Op. cit., supra note 12, at 16.

NHAG made no attempt to be specific, and the Board did what, under the circumstances, it had little choice but to do.

It turns out that what NHAG was saying (as well as demonstrating) was that, once again, it did have any basis for a contention but was searching for one. N.H. Objections at 9:

> "This is a narrow issue which is suitable for summary disposition should discovery reveal no factual basis."

(Emphasis Added.) Basis, however, must exist before discovery.

The fact that a contention is doomed to demise upon a motion for summary disposition is not, by itself, a sufficient reason for waiting.

CONCLUSION

For the foregoing reasons, the Board committed no error in its rulings upon the proposed contentions of NHAG; there is no warrant for reconsideration; and, NHAG not having requested certification, the Board ought not to certify any of its rulings to the Appeal Board.

Respectfully submitted,

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Dated: October 26, 1982

CERTIFICATE OF SERVICE

I, Robert K. Gad III, one of the attorneys for the Applicants herein, hereby certify that I made service of the within "Applicants' Response to 'State of New Hampshire's Objection and Motion for Reconsideration of Atomic Safety and Licensing Board's Order of September 13, 1982'" by causing copies thereof to be delivered to the office of the persons shown below and marked by an asterisk on October 26, 1982, by sending a copy thereof to NHAG by Federal Express on October 25, 1982 and mailing copies thereof, postage prepaid, to the balance of the persons set forth below on October 25, 1982:

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