11/20/81

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of the Application of Public Service Company of Oklahoma, Associated Electric Cooperative, Inc. and Western Farmers Electric Cooperative (Black Fox Station, Units 1 and 2)	)	Docket Nos. STN 50-556 STN 50-557

APPLICANTS' ANSWER TO INTERVENORS' MOTION TO REOPEN THE RADIOLOGICAL AND SAFETY HEARINGS

Public Service Company of Oklahoma ("PSO"), Associated Electric Cooperative, Inc., and Western Farmers Electric Cooperative ("Applicants"), by their attorneys, answer "Intervenors Motion to Reopen the Radiological and Safety Hearings." In response to the October 14, 1981, Order of the Atomic Safety and Licensing Board ("Licensing Board") directing the parties to the Black Fox proceeding to file motions to reopen the record in connection with the resumed health and safety hearings, Citizens' Action for Safe Energy, Lawrence Burrell, and Ilene Younghein ("Intervenors") moved that the areas of financial qualifications (Intervenors' Original Contention 18) and the containment (Intervenors' Original Contention 16) be reopened so that

additional evidence could be considered. For the reasons set forth below, Intervenors' Motion should be denied with respect to both subjects it seeks to reopen.

I. THE LICENSING BOARD SHOULD NOT REOPEN THE MATTER OF FINANCIAL QUALIFICATIONS

The thrust of Intervenors' argument concerning financial qualifications is that the changed economic and financial conditions affecting the nuclear industry in general and Applicants in particular, especially the cost and schedule estimates for Black Fox and related information shown in the report of Touche Ross & Co. prepared for the Oklahoma Corporation Commission (the "OCC"), warrant reopening the record to determine whether Applicants continue to meet the "reasonable assurance" standard articulated in 10 C.F.R. § 50.33(f). Applicants believe that, irrespective of the significance of the information contained in the Touche Ross report, there are sound policy reasons why the Licensing Board should reject Intervenors' invitation to launch a renewed inquiry into the matter of financial qualifications. Moreover, Applicants believe that these policy reasons still obtain despite the fact that additional information concerning the cost of and schedule for the Black Fox

Station has been supplied to the Licensing Board and the parties since the date of Intervenors' Motion.* The fact that cost and schedule figures have changed (even changed considerably) since the date of the NRC's original financial qualifications review is not determinative of the question of whether to reopen. Rather, the salient point is that the subject of financial qualifications is not a significant safety-related issue. Similarly, the latest financial information concerning PSO and Black Fox does nothing to change the fact that the entire question of financing the Black Fox Station is being adequately addressed in another forum. The two reasons underlying Applicants' position will be discussed in detail below.

A. The Link Between Financial Qualifications and Safety Is Speculative

As Applicants pointed out in their "Motion to Reopen the Record," dated November 5, 1981, the standards by which a motion to reopen must be judged are set forth in Vermont Yankee Nuclear Power Corporation (Vermont Yankee

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* Letter dated November 13, 1981, from Joseph Gallo to Judges Wolfe, Purdom, and Shon, transmitting the testimony of Messrs. Brown and Stratton before the OCC and two Orders of the OCC granting interim rate relief.

Nuclear Power Station), ALAB-124, 6 AEC 358; ALAB-138, 6 AEC 520; ALAB-167, 6 AEC 1151 (1973). The linchpin of those decisions is the concept that a record should only be reopened if the evidence to be considered concerns a significant safety-related matter. Intervenors, attempting to meet this test, assert that financial qualifications are "directly related to safety."* Their support for this statement, however, consists of the 1968 statement accompanying the promulgation of Appendix C to 10 C.F.R. Part 50, which sets forth the types of financial data required of applicants for construction permits and operating licenses, and the dissenting opinion of a member of the Atomic Safety and Licensing Appeal Board in Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33 (1977).

Significantly, Intervenors ignore the Commission's review of that case in which the financial qualifications issue was explored in depth and the Commission arrived at conclusions which squarely contradict Intervenors' assertions. In Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-78-1, 7 NRC 1 (1978), the Commissioners

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* Intervenors' Motion at 6.

examined the proposition set forth in the statement of considerations which accompanied the present financial qualification regulation (10 CFR §50.33(f) and Appendix C to Part 50) that "an applicant's financial qualifications can . . . contribute to his ability to meet his responsibilities on safety matters." The Commission found that this proposition, "[w]hile unexceptionable in the abstract," was "less compelling" in the case of a regulated public utility and, furthermore, was neither supported nor negated by any facts in the rulemaking record.*

Secondly, with respect to the contention that an applicant might engage in substandard construction practices if it ran short of funds, the Commission noted that recent experience indicated that a utility would, instead, slow down or suspend construction if faced with financial difficulties. There was no evidence of utilities cutting corners on safety in order to save money.**

Finally, the Commission declared that the safe construction of reactors could adequately be assured by the quality and extensiveness of the inspections carried out by the NRC's Office of Inspection and Enforcement.*** In

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* 7 NRC at 18.

** Id. at 18-19.

*** Id. at 19.

contrast, the financial qualifications inquiry was seen to have only a "limited usefulness."*

In view of all these considerations, the Commission, characterizing the link between safety and financial qualifications as "seemingly tenuous," particularly for a large regulated utility, directed the NRC Staff to initiate a rulemaking proceeding in which the factual, legal, and policy aspects of the financial qualification issue would be reexamined.

The outcome of the Commission's direction was the issuance on August 18, 1981, of a proposed rule amending the NRC's financial qualifications regulations. 46 Fed. Reg. 41786. If enacted, that rule would eliminate entirely the financial qualifications review at the construction permit stage for applicants which are electric utilities. With respect to the operating license stage, the proposed rule sets forth two alternative approaches for electric utility applicants. The first would also eliminate the review entirely at that stage; the second would retain the review only to the extent that applicants are required to submit information regarding decommissioning costs.

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* Id.

The statement accompanying the proposed rule concludes that:

> In summary, the Commission has tentatively concluded that adoption of the proposed rule will substantially reduce the effort of demonstrating financial qualifications without reducing the protection of the public health and safety. If the proposed rule is promulgated as a final rule, it is the Commission's present intention to make it effective immediately upon publication, pursuant to 5 U.S.C. § 553(d)(1) since the rule is expected to significantly relieve the obligation of certain applicants with respect to information required for construction permits and operating licenses, and also to reduce the amount of unnecessary time-consuming staff review and adjudicatory proceedings. In that regard, the Commission notes that the final rule, when effective, will be applied to ongoing licensing proceedings now pending and to issues or contentions therein. Union of Concerned Scientists v. AEC, 499 F. 2d 1069 (D.C. Cir. 1974). 46 Fed. Reg. at 41788-89.

Applicants are well aware of the fact that this rule has not yet become effective and hence cannot control the Licensing Board's decision with respect to Intervenors' attempt to reopen the area of financial qualifications. However, nothing prevents the Licensing Board from taking into account the important recent development in the area of financial qualifications in passing upon Intervenors' Motion.

In the wake of the Commission's Seabrook decision, the financial qualifications of an applicant which is an electric utility are no longer viewed as being directly related to safety. This change in NRC philosophy, as articulated by the Commission in the Seabrook decision, concerning the importance of the financial qualifications review and the pending rule, is a persuasive factor which the Licensing Board may rightfully consider. After all, the Board has discretion in deciding whether to reopen the record on any issue, and the fact that a matter is not related to safety as required by Vermont Yankee can, and should, influence the Licensing Board's exercise of that discretion.

Therefore, because financial qualifications are not a significant safety-related matter within the meaning of Vermont Yankee, and in view of the pending rulemaking on financial qualifications, the Licensing Board should refuse to reopen this matter.

B. The Ability of PSO to Finance Black Fox is Being Adequately Addressed in Another Forum

In addition to the argument that financial qualifications are not a safety-related matter, Applicants believe that another policy reason weighs heavily against the grant of Intervenors' Motion to reopen this issue. That reason relates to the fact that, in the course of the PSO rate case

currently pending before the OCC, that body will decide PSO's ability to finance its overall construction program, including Black Fox Station. The issues in that proceeding revolve around the difference in construction costs which result under Construction Work in Progress and Allowance for Funds Used During Construction regulation.* The rate case hearings have been completed and the parties are now awaiting the decision of the OCC.

Because the issues before the OCC include the question of the economic viability of Black Fox, it would be an unproductive use of the NRC's resources for this Licensing Board to embark upon another, duplicative, investigation of the financial circumstances of PSO. Once again, it should be pointed out that the Licensing Board is faced with the essentially discretionary question of whether to reopen the subject of financial qualifications. In exercising that discretion, the Board can certainly take into consideration the fact that the same inquiry which Intervenors would have the NRC undertake has just been completed by another agency. For this reason, the Licensing Board should decline to reopen the question of Applicants' financial qualifications.

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* This is discussed in the testimony of Mr. Stratton before the OCC, which was distributed to the Licensing Board and the parties by letter from Joseph Gallo dated November 13, 1981.

II. THE LICENSING BOARD SHOULD DECLINE TO REOPEN THE RECORD ON CONTENTION NUMBER 16 BECAUSE THE MATTERS INTERVENORS SEEK TO LITIGATE ARE NOT WITHIN THE SCOPE OF THAT CONTENTION

The second issue upon which Intervenors seek to reopen the record is Contention 16 from the previous Black Fox health and safety hearings, which reads as follows:

> 16. Intervenors contend that the Applicant has not established the integrity of the Mark III containment in that the following items have not yet been resolved:
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> (1) vent clearing;
> (2) vent/coolant interaction;
> (3) pool swell;
> (4) pool stratification; and
> (5) pressure loads and flow bypass.

Intervenors point to the notification letter sent to the Licensing Board and the parties by Mr. Gallo on July 18, 1979, which described the actions Applicants intended to take in order to correct the effects of a phenomenon known as containment vessel ringing, and assert that the design changes identified in that letter and later documented in Amendment No. 17 to the PSAR require that the record relating

to Contention 16 be reopened so that certain impacts of the design change may be explored. Specifically, Intervenors submit that the change:

> could have significant impact on safety in that Applicant has not provided sufficient preliminary design information to show how it will impact the following design factors:
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> (a) Thermal transients in the suppression pool and lines during blow-down and LOCA events.
> (b) Heat transfer from the suppression pool.
> (c) Stress levels in the welds and joints of the lining and connected piping.
> (d) Connections with the base mat and shield wall.
> (e) Vibratory motion transmitted to other structural components.
> (f) Ability to perform in-service inspection and leak rate analysis of the suppression pool lines.

Applicants believe that Intervenors' Motion to reopen with respect to Contention 16 must be denied for the simple reason that the issues that Intervenors now want to litigate do not fall within the scope of their original Contention 16. A comparison of the original contention

with the itemization of Intervenors new concerns bears out this point. While the thrust of Contention 16 was that five load-definition issues had not been resolved sufficiently to establish containment integrity, the new areas Intervenors want to explore relate to how the concrete reinforcement will impact six specified design factors. The connection between the six design factors and the load-definition issues in Contention 16 is not apparent. Patently, Intervenors must do more to link the old and the new subjects than boldly assert that both relate to the containment. Absent any nexus between the new topics Intervenors seek to explore and the subject matter of their original Contention 16, it is axiomatic that a motion to reopen Contention 16 will not lie.* For this reason, Intervenors' Motion to reopen on Contention 16 must be denied.**

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* Intervenors seem to recognize the lack of nexus since their list of newly-asserted contentions contains one identical to the proposed issue being proffered here. See "Intervenors' Proposed Contentions For The Continued Radiological and Safety Hearings," item 12, pp. 8-9, filed November 5, 1981.

** Because of the conclusion drawn above, it is not necessary to reach the question of whether the new information upon which Intervenors base their motion relates to a significant safety-related matter within the meaning of Vermont Yankee.

III. CONCLUSION

For the reasons set forth above, the Licensing Board should, in the exercise of its discretion, refuse to reopen the subject of Applicants' financial qualifications. Because Intervenors improperly seeks to reopen the record on Contention 16 in order to consider material not properly within the scope of that contention, that portion of Intervenors' Motion must also be denied.

Respectfully submitted,

Martha E. Gibbs/JG
Martha E. Gibbs

Joseph Gallo
Joseph Gallo
Two of the Attorneys for
Public Service Company
of Oklahoma

ISHAM, LINCOLN & BEALE
Suite 4200
One First National Plaza
Chicago, Illinois 60603
(312) 558-7526

ISHAM, LINCOLN & BEALE
Suite 325
1120 Connecticut Avenue, N.W.
Washington, D. C. 20036
(202) 833-9730

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