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UNITED STATES NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of	)	
Public Service Company of New Hampshire, et al.	)	Docket No. 50-443 OL/444-OL
(Seabrook Station, Units 1 & 2)	)	

INTERVENORS' SUPPLEMENTAL MOTION ADDRESSING APPEAL BOARD'S JURISDICTION TO CONSIDER MOTION TO REOPEN RECORD AND ADMIT LATE-FILED CONTENTION REGARDING DEFECTIVE ROSEMOUNT TRANSMITTERS

Introduction

On February 27, 1990, the Intervenors filed a motion to reopen the record and admit a late-filed contention regarding potentially defective Rosemount transmitters installed in the Seabrook reactor. In an order dated February 28, 1990, the Appeal Board questioned its "continuing jurisdiction" over the safety issues raised by the contention, and ordered Intervenors to file a supplemental memorandum addressing the issue. The Appeal Board also asked Intervenors to address the question of "whether, inter alia, 10 C.F.R. § 2.734(d) necessarily contemplates that issues not previously in contest in the proceeding may be raised before the adjudicatory boards."

Intervenors contend that the Appeal Board continues to have jurisdiction over motions to reopen the record until the point at which it approves the Licensing Board's authorization of a full

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power operating license for Seabrook.[1] Intervenors request the Appeal Board to assert its jurisdiction over Intervenors' motion to reopen the record and admit a late-filed contention; or in the alternative, that it refer the motion without prejudice to the Commission.

Discussion

The Licensing Board's authorization of a full power operating license for Seabrook is now pending before the Appeal Board and no full power license has issued for the Seabrook reactor. It is Intervenors' position that the Appeal Board continues to have jurisdiction over motions to reopen the record until the point at which it approves the Licensing Board's authorization of a full power operating license for Seabrook. While NRC regulations do not expressly address the Appeal Board's jurisdiction over motions to reopen the record, Intervenors' position is consistent with 10 C.F.R. § 2.734, which permits the raising of new issues after a record has closed; and § 2.718(j), which deprives the Licensing Board of jurisdiction to consider motions to reopen the record after issuance of its initial decision.

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[1] At that point, jurisdiction would transfer to the Commission. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-823, 22 NRC 773 (1985). But see Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-551, 9 NRC 704, 707 (1974), referring motion to reopen record to staff for resolution under 10 C.F.R. § 2.206. In Intervenors' view, such a remedy is inapplicable where the Commission has not yet made its final licensing decision and thus may still assert its jurisdiction as an adjudicatory body. Moreover, § 2.206 is an inappropriate remedy because it provides for the enforcement of existing licenses. In this case, there is no full power license to enforce.

Appeal Board precedents, however, appear to be in conflict with NECNP's position on this subject. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-901, 28 NRC 302, 306 (1988); Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-551, 9 NRC 704, 707 (1974). However, those decisions are inconsistent with other NRC requirements and would unfairly deprive Section 2.734 of any meaningful utility where intervenors discover new information relevant to the safety of full power operation.

Under NRC case law, appeal board jurisdiction to entertain new matters is dependent upon the existence of a "'reasonable nexus' between those matters and the issues remaining before the [appeal] board." Shoreham, supra, 28 NRC at 306, quoting North Anna, supra, 9 NRC at 707. See also Louisiana Power & Light Co., (Waterford Steam Electric Station, Unit 3), ALAB-797, 21 NRC 6 (1985). These decisions have interpreted the "reasonable nexus" standard to require that motions to reopen must raise subject matter related to the issues on appeal.

Here, it is clear that the potentially defective nature of Rosemount transmitters has no direct relationship to the adequacy of emergency planning at Seabrook. However, the contention does raise an issue related to the safety of full power operation at Seabrook; and the Appeal Board still has before it the issue of whether Seabrook should be granted a full power license.

If the Appeal Board considers that all technical safety issues related to full power operation were disposed of in its

1987 review of the Licensing Board's low power licensing decision,[2] it should be aware that this would contradict the position taken by the Commission before the United States Court of Appeals in opposition to Intervenors' appeal of the Seabrook low power licensing decision. According to the Commission, the NRC's decision on a technical safety issue that had not been determined to be "relevant" to low power operation under 10 C.F.R. § 50.57(c) was not appealable in connection with the low power license.[3] The Commission cannot have it both ways by asserting on the one hand that issues resolved in the low power decision were not final for purposes of appeal, and contending on the other hand that they were finally resolved for purposes of reopening the record.

In its decisions, the Appeal Board has "stressed a practical, common sense approach to the resolution of such jurisdictional problems, taking into account 'efficiency in the disposition of the matter at hand and fairness to the parties.'" Shoreham, supra, 28 NRC at 306, quoting Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-797, 21 NRC 6,9 (1985), and citing Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-726, 17 NRC 755 (1983). In this light, it is important to note the circular reasoning

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2 ALAB-875, 26 NRC 251 (1987)

3 Commonwealth of Massachusetts et al. v. NRC, No. 89-1306, NRC Brief at 38-39. Copies of the relevant pages from the brief are attached.

inherent in these cases which serves to deprive Section 2.734(d) of any meaningful effect. Section 2.734(d) obviously contemplates that parties may raise new information, not previously litigated, in motions to reopen the record. However, that provision is of no use whatsoever if the Appeal Board refuses to consider any matters that are not expressly pending before it and considers all other matters to have been finally resolved below.[4] Under such an interpretation, new contentions become casualties of Catch-22 logic and the very purpose of providing for motions to reopen the record, i.e. to allow the reception of new evidence relating to the safety of operation before licensing, is defeated.

Accordingly, Intervenors request the Appeal Board to assert its jurisdiction over Intervenors' motion and undertake consideration on the merits. In the alternative, Intervenors request that the Appeal Board refer the contention without prejudice to the Commission.[5]

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[4] See, e.g., North Anna, supra, 9 NRC at 708 [for both new issues and issues litigated earlier, "the decisive factor is whether except for those limited issues as to which jurisdiction has been expressly retained, the case has been decided."] But see Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1329-30 (1983) and cases cited therein (Appeal Board may not revisit matters "specifically addressed" in an earlier decision that is now administratively final.) (Emphasis added) In this case, the quality of Rosemount transmitters was never addressed in any earlier proceeding.

[5] Copies of the motion were served on the Commission on February 28, 1990.

Respectfully submitted,

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March 7, 1990

CERTIFICATE OF SERVICE

I certify that on March 7, 1990, copies of the foregoing document were served on the parties by hand, telefax, or first-class mail as indicated on the attached service list.

Diane Curran

ORAL ARGUMENT SCHEDULED FOR APRIL 9, 1990

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-1306

COMMONWEALTH OF MASSACHUSETTS, et al,

Petitioners,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION
and the UNITED STATES OF AMERICA,

Respondents,

BRIEF FOR NUCLEAR REGULATORY COMMISSION

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January 29, 1990

NRC staff (see p. 13, supra) and reiterated by petitioners in their contention did not vitiate the plan itself, but simply pointed up correctable problems in the plan's implementation. Thus, under the "fundamental flaw" test, these weaknesses were not material to licensing, and did not need to be litigated. Petitioners' position here is analogous to saying that if a physical inspection revealed that a number of bolts were insufficiently tightened and no more pervasive or systemic problem was identified, the looseness of the bolts opens the inspection to full litigation, even though the Commission can and will simply require that they are tightened before a license is issued. This approach is contrary to common sense, as well as to NRC practice, and ought not be required by this Court.

II. PETITIONERS' ATTACK ON THE APPEAL BOARD'S INTERPRETATION OF NECNP'S CONTENTION IV (COOLING SYSTEM BLOCKAGE) IS NOT PROPERLY BEFORE THIS COURT ON A CHALLENGE TO THE LOW POWER LICENSE, AND IN ANY EVENT THE COMMISSION CORRECTLY CONSTRUED THE CONTENTION

Petitioners' attempt to have this Court reverse the Commission's interpretation of NECNP's cooling system blockage contention (Contention IV) fails at the outset because petitioners did not contest the Licensing Board finding that the contention is not relevant to safe operation of Seabrook at low power. See Statement of the Case, supra, at 10-11, 17. If petitioners disputed that finding, they could and should have challenged it

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(Footnote Continued)
believes warranted and corrective actions can be required or enforcement actions taken. Safety matters will not be ignored by the Commission or the staff simply because they are not litigated.

during Appeal Board review of the Licensing Board's decision of February 17, 1988 reauthorizing low power operation. They waived that opportunity, however, and instead challenged the Licensing Board reauthorization on purely legal grounds that the Appeal Board found without merit. (Petitioners have not repeated those legal arguments here.) Since the finding stands uncontroverted that Contention IV has no bearing on the subject matter of this petition for review, namely low power operation of Seabrook, this Court should dismiss petitioners' arguments regarding Contention IV.

If the Court should reach the merits, the Court should find that the NRC correctly construed Contention IV as encompassing only blockage in the plant's cooling system caused by macrobiological aquatic organisms and debris and not coolant leakage caused by microbiologically induced corrosion.[27]

In NRC operating license proceedings for nuclear reactors, the issues to be heard at the hearing on a license application are determined by the contentions that have been admitted for litigation. The contention and its bases must be set forth with reasonable specificity. 10 C.F.R. § 2.714(b). The purpose of this requirement, among others, is to assure that the contention adequately notifies the other parties of the issues to

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[27] Microbiologically-induced corrosion refers to corrosion in cooling systems brought about by the attack of extremely small marine organisms that pass through protective screens. In contrast to larger "macro-organisms," by reason of their size these organisms do not directly pose a blockage threat. See ALAB-892, 27 NRC at 488 n.8.

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