

~~RELATED CORRESPONDENCE~~

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of)
)
KANSAS GAS AND ELECTRIC COMPANY, et al.)
)
(Wolf Creek Generating Station,)
Unit No. 1))

Docket No. STN 50-482

APPLICANTS' OBJECTIONS TO CERTAIN PROPOSED ISSUES
AND MOTION FOR ADOPTION OF INTERROGATORY RESPONSES
AS STATEMENT OF ISSUES FOR LITIGATION

I. INTRODUCTION

On April 6, 1983, Intervenorors filed a "Proposed Stipulation of Contentions," including 21 expansive contentions in place of the single broad contention originally admitted to this proceeding. In addition, Intervenorors filed "Amended and Supplemental Answers To Applicants' Interrogatories To Intervenorors." Because the proposed stipulation lacks the requisite specificity and is in many respects duplicative, Applicants move that the Board adopt as the statement of issues for litigation in this proceeding the Intervenorors' response to Interrogatory EP-17, modified to reflect Applicants' specific objections discussed herein. In the alternative, should the Board desire to retain the proposed stipulation, Applicants

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move that the Board adopt the attached compilation of the proposed stipulation and the interrogatory responses, again modified to reflect Applicants' specific objections.

II. PROCEDURAL HISTORY

The Licensing Board initially admitted to this proceeding a single broad contention challenging the adequacy of offsite emergency plans for evacuation, on which discovery was conducted. Applicants framed their interrogatories to elicit all of Intervenors' concerns about the emergency plans. In preparation for the March 10, 1983 prehearing conference, counsel for all parties agreed to meet to discuss, inter alia, the need for (and possible means of achieving) greater specification of the precise issues for litigation.

As a result of the parties' March 9 meeting (at which Intervenors further explained their specific concerns), all counsel agreed that Intervenors would provide greater specificity of their concerns through updated interrogatory responses, but that no formal reformulation of the contention was necessary. This was reported to the Licensing Board at the prehearing conference. Tr. 87-88. However, the Board expressed its independent concerns about the need for a more specific contention, and directed the parties to confer over a recess about other mechanisms for "refining [the] broad contention." Tr. 88-92. The parties thereafter agreed that

Intervenors would update their interrogatory responses within four weeks, and would attach a separate list of each of Intervenors' specific objections as identified in the interrogatories. Tr. 137.

On April 6, 1983, Intervenors served their "Proposed Stipulation of Contentions," as well as the "Amended and Supplemental Answers To Applicants' Interrogatories To Intervenors." Given the relative lack of specificity of the proposed 21 contentions, Applicants suggested that the parties agree to litigate the alleged deficiencies identified in Intervenors' amended and supplemental response to Interrogatory EP-17.^{1/} All parties initially agreed in principle with Applicants' proposal and agreed to convene a conference call among themselves to resolve the details of the proposal. However, counsel for Intervenors reconsidered and, at the beginning of the April 27 conference call, indicated that Intervenors would not agree to be limited to litigation of the specific deficiencies identified in their discovery responses.

The parties were unable to reach agreement, either with respect to a formulation of the specific issues for litigation, or with respect to certain identified objections of Applicants, the Staff and FEMA to individual matters Intervenors sought to

^{1/} Intervenors' response to Interrogatory EP-17 is their statement of the alleged "deficiencies which render the State and County plans unworkable."

raise. Accordingly, the parties requested Board intervention to resolve their differences. The Board set a schedule for expedited ruling on these questions, and directed Applicants to file their request for relief by May 3, with other parties' responses due May 16.

III. DISCUSSION

A. The Specificity of The Proposed Contentions

Nearly two years after the admission of the initial broad contention, after the completion of discovery, after an allowance of four weeks to expressly list all their specific concerns, and although they have been consistently served with revisions of all emergency plans as revisions are issued, Intervenorors still maintain that they have a "right" to frame only very general contentions, and need not explicitly identify each of their specific concerns prior to the hearing. To the contrary, at this late date in the hearing process -- when discovery is closed and Intervenorors have had even the latest revisions of the emergency plans in their hands for some time,^{2/} -- the Board and the other parties are entitled to notice of the precise issues for litigation at the evidentiary hearings now only a few months away.

^{2/} Intervenorors have had the most recent revision of the County plan since January 17, 1983, and the most recent revision of the State plan since March 9, 1983.

Intervenors' "Proposed Stipulation of Contentions" fails to provide such notice. Although the document is asserted to "specify in detail the objections of the intervenors," Proposed Stipulation at 1, the 21 proposed contentions for stipulation are replete with phrases such as "in many instances . . .," "in most instances . . .," "frequently . . .," "for example . . .," "in some instances . . .," "much . . .," and "little, if any . . ." See, e.g., proposed contentions 1(b), 1(c), 2, 4(b), 4(c), 4(e), 10, 12(b), 13, 21. These phrases render the proposed contentions impermissibly vague. Even the proposed contentions which do not include such broadening phrases are so general as to be almost meaningless. See, e.g., proposed contention 4(a). In effect, Intervenors have taken the four weeks allotted to them to expressly identify each of the alleged specific deficiencies they wish to litigate, and have used that time to frame 21 broad contentions to replace the single broad contention in place before the March 10 prehearing conference.

The litigation of such broad contentions would be contrary to the Commission's Rules of Practice. Although general contentions are sometimes initially admitted to a proceeding, the Commission's rules clearly contemplate further refinement of the issues for litigation through the discovery process prior to the hearing. Indeed, as the Board here recognized in its "Order Scheduling Prehearing Conference" (January 10,

1983), one of the primary purposes of the prehearing conference (held after the close of discovery in a proceeding) is the "[s]implification, clarification, and specification of the issues" to be heard. See 10 C.F.R. § 2.752(a)(1). Moreover, the prehearing conference order entered after such a conference is to "[limit] the issues" and "[define] the matters in controversy to be determined in the proceeding." See 10 C.F.R. § 2.752(c). Plainly, the issues for litigation in this proceeding would not be limited, simplified, clarified or specified by the adoption of Intervenor's proposed stipulation. Because of the expansive phrases in the proposed stipulation, only the Intervenor would know, prior to the hearing, exactly what their specific concerns are. Such "litigation by surprise" should not be condoned by the Board.

Further, the record of the prehearing conference reveals that even the Intervenor envisioned that they would amend their interrogatory responses to accurately reflect all their concerns, then provide -- in the form of a proposed stipulation of contentions -- a list of the individual specific deficiencies expressly identified in their amended and supplemental answers to interrogatories. When the Board expressed concern that the proposed stipulation explicitly identify "what the specific objections are . . . to the plans and exactly what the issues are that will be litigated at this hearing," Tr. 137, Counsel for Applicants and Intervenor explained:

MR. SILBERG: Mr. Chairman, what I anticipate . . . would be something like this: In their prior Answers, the Intervenor's stated that one of the deficiencies of the plan was that it would require five pumper trucks to carry out decontamination at road blocks on the periphery of the 10-mile emergency planning zone and the county didn't have ten [sic; five] pumper trucks. . . . I would anticipate, if that's still a concern of theirs, that there would be, in addition to the Interrogatory Answers, a list which says, No. 1, Coffey County does not have five pumper trucks. . . . to carry out decontamination at road blocks at the outer periphery of the 10-mile emergency planning zone. [The proposed stipulation] would track what is in their Interrogatory responses. It would just be a separate list of all those points.

MR. SIMPSON: And I would agree that that is probably what we should provide you then. I think that makes sense to me, sir.

Tr. 137-38 (emphasis supplied). See also Tr. 138 (Simpson). The general allegation that "The plans are deficient because they do not adequately specify the . . . amount of equipment and facilities . . . required to meet a duty specified under the plan" (see proposed contention 4(a)) is obviously a far cry from the level of specificity (e.g., five pumper trucks for decontamination) contemplated at the prehearing conference. Thus, quite apart from the requirements of the regulations and the conventions of NRC practice, the proposed stipulation is vastly more general than the explicit list of specific concerns which counsel for Intervenor's expressly agreed, on the record, to provide to the Board and the other parties.

The practical impact of Intervenor's explicit refusal to identify all their specific concerns for litigation is -- at this stage of the proceeding -- very real and very significant. Prior to the prehearing conference, Applicant was willing to litigate the initial single broad contention, by addressing the specific deficiencies alleged in Intervenor's initial interrogatory responses. Now, however, Intervenor seek to effectively broaden the scope of the issues for litigation by advancing contentions that, e.g., "in many instances" thus-and-so is true, while declining to further identify the specific "instances" to which they refer, either in the proposed contentions themselves or in their amended and supplemental answers to Applicants' interrogatories. Plainly, in these circumstances, it would be more difficult for the other parties to address in testimony Intervenor's 21 generalized contentions, than it would have been to address a single general contention which had been fleshed out through discovery.^{3/}

In the course of the April 27 conference call among the parties, Applicants proposed a compromise by which the proposed stipulation would be combined with the related amended and supplemental interrogatory responses for a full listing of all issues for litigation. Such a compilation is attached hereto

^{3/} Applicants note that Intervenor's initial discovery responses were, as a general rule, more specific than Intervenor's more recent responses.

as Appendix A, for the convenience of the Board and the other parties.^{4/} But counsel for Intervenor would not agree to the proposed compromise, asserting that Intervenor should not be limited to litigation of the specific deficiencies expressly identified in their amended and supplemental answers to interrogatories. Rather, Intervenor candidly admit that the purpose of the expansive language of their 21 proposed contentions for stipulation is to afford them leeway to litigate at the hearing specific concerns which have not been previously expressly identified. Intervenor are not entitled to such leeway.

Either Intervenor know of additional specific concerns not identified in their interrogatory responses and are simply attempting to hoard those concerns for use as the proverbial "smoking gun" at the hearing, or Intervenor have identified all specific concerns now known to them and simply seek to preserve an opportunity to advance at the hearing further specific issues should Intervenor themselves later identify any. The former is clearly impermissible. As to the latter, Intervenor have the right, throughout a proceeding, to raise new issues upon a showing of "good cause." But where, as here,

^{4/} The attached compilation represents Applicants' best efforts to combine the proposed stipulation with related interrogatory responses, but necessarily reflects some judgment on the part of counsel for Applicants.

discovery is closed and Intervenor's have long had copies of the plans, Intervenor's are expected to have already combed those documents so as to be able to detail precisely for the Board and the parties every objection Intervenor's have.

Applicants further note that a number of Intervenor's' proposed stipulation of contentions are duplicative. For example, proposed contentions 12(b) and 21 both allege conflicts between the State and County plans as to who is responsible for particular functions. Similarly, proposed contentions 2 and 4 both assert that the plans include insufficient detail about the resources (equipment and personnel) designated for implementation of functions. And both proposed contentions 12(a) and 20 charge inadequate coordination among various unspecified governmental entities. Proposed contentions 1(a) and 19 include similar allegations about the adequacy of training for emergency response workers. And, finally, proposed contentions 1(b) and 4(c) both assert deficiencies in the designation of personnel to perform emergency response functions.

Accordingly, because the "Proposed Stipulation of Contentions" is so lacking in specificity, and because many of the 21 proposed contentions included there are duplicative, Applicants move that the Licensing Board adopt Intervenor's' response to Interrotatory EP-17 (included at pages 11 through 48 of the "Amended and Supplemental Answers To Applicants'")

Interrogatories To Intervenor") as the complete statement of issues for litigation in the evidentiary hearing.

Alternatively, should the Board decide to retain the proposed stipulation, Applicants move that the Board adopt as the statement of issues for litigation Applicants' compilation of the stipulation and the amended and supplemental interrogatory responses.^{5/}

B. Other Objections To The Proposed Issues For Litigation

1. Intervenor cannot expand issues for litigation to protective actions other than evacuation.

The focus of the entire proceeding to date has been on the provisions of the offsite emergency plans for the effectuation of an evacuation in a radiological emergency. Indeed, the contention initially admitted was expressly so limited:

Local governments do not have a workable evacuation plan and the Wolf Creek facility should not be licensed until there is a workable plan and until the governmental bodies in the evacuation area are sufficiently staffed, equipped and funded to successfully carry out the evacuation plans.

See "Special Prehearing Conference Order (Ruling on Intervention Petitions, Requests for Hearing and Contentions)" (June 3, 1981), slip opinion at 4.

^{5/} Rulings in Applicants' favor on the specific objections discussed in Section III.B, *infra*, may necessitate excision of appropriate portions of the Intervenor's response to Interrogatory EP-17, or the compilation, if either is adopted by the Board as the statement of issues for litigation.

Nevertheless, Intervenors now seek to inject into the hearing challenges to provisions for the implementation of protective actions other than evacuation. Intervenors' proposed contention 5, as well as their interrogatory responses at page 29 (under the heading "Section 3.3.1," item 5) and page 38 (under the heading "Table 3-2 (Sheet 6 of 15)"), challenge provisions for sheltering as a protective action. Similarly, Intervenors' interrogatory responses at page 39 (under the heading "Table 3-2 (Sheet 9 of 15)") and pages 46 to 47 (under the heading "Tab J") address provisions for the administration of radioprotective drugs as a protective action.

Intervenors have never before sought leave to expand the issues beyond provisions for evacuation, and have not even attempted to demonstrate "good cause" why, at this late date, they should be permitted to do so. Accordingly, the proposed issues for litigation should be limited to provisions for evacuation, excluding litigation of provisions for the implementation of alternative protective actions such as sheltering and radioprotective drugs.

2. Intervenors are limited to litigation of the evacuation of the Plume EPZ.

The Commission's emergency planning regulations require provisions for implementation of protective actions only within the plume exposure pathway Emergency Planning Zone ("plume EPZ"), the area within an approximate 10-mile radius of a

nuclear facility. See 10 C.F.R. § 50.47(b)(10); 10 C.F.R. § 50.47(c)(2). The Wolf Creek plume EPZ does not include all of Coffey County. Nevertheless, a number of Intervenor's interrogatory responses contemplate evacuation of the entire county. See p.3 (response to Interrogatory EP-5, item 4); p.12 (under heading "Section 1.1," item 7); p.15 (under heading "Section 1.2.3," item 1); p.26 (under heading "Section 3.2," item 8); p.27 (under heading "Section 3.2," item 10); p.35 (under heading "Section 3.8," item 1); p.43 (under heading "Section 5.3," item 3). See also p.21 (under heading "Section 1.2.7," item 6); p.26 (under heading "Section 3.2," item 5).

To the extent the cited allegations go to evacuation of the entire county rather than the plume EPZ, the allegations constitute an impermissible challenge to the Commission's regulations, and should be rejected as issues for litigation.

3. Intervenors have inadequately specified their concerns about the general public's response to an emergency.

At the meeting of the parties prior to the recent prehearing conference, Intervenor's indicated for the first time that they wished to litigate the reliability of emergency workers in a nuclear emergency, i.e., whether emergency workers will perform their designated functions. See Tr. 99-100. In addition, at the prehearing conference itself, Intervenor's indicated, again for the first time, that they wished to litigate the response of the general public as well. Tr. 101-03.

Both the Board and counsel for Applicant emphasized the necessity of very explicit allegations on the subject, and counsel for Intervenor expressly agreed to provide particular specificity of Intervenor's concerns in this area. See Tr. 138. Despite this commitment, Intervenor's proposed contention 8 states simply:

The plans are deficient because they rely on the assumption that emergency workers and the general public will always act as directed and in a very rational manner. The plan should make adequate provision to deal with people (workers and the general public) who fail to respond or respond in ways other than assumed. The plans cannot assume that people will respond in a nuclear emergency as they will in any other disaster situation.

Intervenor's interrogatory responses indicate that they are concerned that emergency workers will fail to respond in a nuclear emergency. See p.36 (under heading "Section 3.9," item 5). This response adequately specifies the issue for litigation with respect to emergency workers.

However, there is no comparable interrogatory response with respect to the response of the general public. In the April 27 conference call among the parties, in response to Applicant's request for further specificity, counsel for Intervenor indicated that they were concerned about matters such as the alleged possibility that members of the public may refuse to follow prescribed evacuation routes, or may attempt to pick up their children at school (rather than letting school authorities evacuate students en masse).

Since Intervenor's obligation to provide specificity in raising these psychological response issues was especially emphasized in the course of the prehearing conference, and since Intervenor nevertheless failed to provide any specificity whatsoever with respect to their particular concerns about the response of the general public, Intervenor should be precluded from litigating the response of the general public. In the alternative, if they are permitted to litigate the issue, they should be limited to the two precise concerns which they identified to the other parties in the April 27 conference call.

4. Intervenor cannot litigate offsite emergency plan provisions for medical treatment of contaminated injured and radiation-injured individuals.

Intervenor's proposed contention 11 asserts:

The plans are deficient because they do not contemplate that a very substantial number of radiological injuries can occur. Hundreds or even more such injuries could occur. The plans do not provide for quick and adequate evacuation and treatment for that number of injuries. Also, hospital facilities for that number of people have not been arranged for, and the hospitals are not prepared to deal with that number of injuries.

Similar concerns are expressed in proposed contention 14, as well as in Intervenor's interrogatory responses. See p.4 (response to EP-5, item 9); p.11 (response to EP-16, item 8); p.12 (under heading "Section 1.1," item 5; p.16 (under heading

"Section 1.2.3," item 6); p.20 (under heading "Section 1.2.7," item 3); p.21 (under heading "Section 1.2.7," item 5); p.50 (response to Interrogatory 31, item (c)).

In the parties' recent conference call, counsel for Intervenors supported their proposed contention by reference to the San Onofre proceeding, in which this general issue was litigated. However, counsel for Intervenors was unaware of the Commission's recent decision in that proceeding, clarifying for the licensing board there the very limited nature of the provisions offsite emergency plans need include for medical treatment of contaminated injured and radiation-injured individuals. In that decision, the Commission expressly disavowed the need for extensive pre-planning for medical treatment for large numbers of individuals. The Commission concluded:

With respect to individuals who become injured and are also contaminated, the arrangements that are currently required for onsite personnel and emergency workers provide emergency capabilities which should be adequate for treatment of members of the general public. Therefore, no additional medical facilities or capabilities are required for the general public. However, facilities with which prior arrangements are made or which have the capability to treat contaminated injured individuals should be identified with respect to individuals who may be exposed to dangerous levels of radiation, treatment requires a lesser degree of advance planning and can be arranged for on an as-needed basis during an emergency. Emergency plans should, however, identify those local or regional medical facilities which have the

capabilities to provide appropriate medical treatment for radiation exposure. No contractual agreements are necessary and no additional hospitals or other facilities need be constructed.

See Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), CLI-83-10 (April 4, 1983), slip opinion at 13-14 (footnote omitted).

Accordingly, litigation of Intervenor's expressed concerns about the provisions for medical treatment of radiological injuries is barred by the Commission's San Onofre decision.

5. Intervenors are not permitted to litigate whether actions such as evacuation and confirmation of evacuation will "take too long."

Intervenors repeatedly assert that actions such as evacuation and confirmation of evacuation will "take too long." See, e.g., proposed contention 14. See also interrogatory responses at p.28 (under heading "Section 3.3," item 5); p.40 (under heading "Table 3-5," item 3); (all as to time for evacuation). See also interrogatory responses at p.4 (response to Interrogatory EP-5, item 8); p.16 (under heading "Section 1.2.3," item 6); p.28 (under heading "Section 3.3," item 10); p.40 (under heading "Table 3-6"); (all as to time for confirmation of evacuation).

However, there are no regulatory requirements or guidance providing that actions such as evacuation and confirmation of evacuation must be completed within some specified time.

Indeed, licensing boards have uniformly rejected the notion that evacuation must be completed within a particular time period.^{6/} For example, the San Onofre Licensing Board recently observed:

The regulations do not require that the time estimates for evacuation be less than a specified time period. The purpose of the time estimates is to provide decisionmakers with an appropriate basis for determining whether evacuation can be carried out successfully in advance of potential radiation exposure under the circumstances present at that time.

Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-82-39, 15 N.R.C. 1163, 1185 (1982). Accord, Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), LBP-82-100 (November 3, 1982), slip opinion at 12, 37-39.

Accordingly, to the extent that the above-identified allegations challenge the time necessary to complete evacuation and confirmation of evacuation, those allegations must be rejected as issues for litigation in this proceeding.

^{6/} The time necessary for confirmation of evacuation is calculated as a component of the overall time for evacuation. See NUREG-0654, Appendix 4, at 4-10. Accordingly, the Board's holdings with respect to evacuation time would logically extend to the time for confirmation of evacuation.

6. Intervenors cannot challenge Commission regulations on frequency of exercises and drills.

At page 47 of the "Amended and Supplemental Answers To Applicants' Interrogatories To Intervenors," under the heading "Tab N," Intervenors assert:

The State Plan provides that all major components of emergency response plans will be tested by an exercise over a five year period. This is not often enough.

Intervenors have misperceived the State's commitments on exercises and drills. In complete fulfillment of the requirements of 10 C.F.R. Appendix E, Section IV.F, the State has committed to participate in one exercise per year. See "State of Kansas, Annex A, Nuclear Facilities Incidents Response Plan, To Assistance R, Nuclear Emergencies, of The State Disaster Emergency Plan" (February, 1983), at N-1.

In addition, the State has made the further commitment (on which Intervenors focus) to vary the exercise scenario "from year to year so as to test, over a five year period, all major components of the emergency response plans." Id. This commitment is not required by the regulations, but precisely parallels the provisions of the Commission's regulatory guidance, "Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants," NUREG-0654/FEMA-REP-1 (Rev. 1), at Criterion N.1.b.

Thus, the State has gone even beyond the requirements of the Commission's emergency planning regulations, and has met the additional provisions of NUREG-0654. Intervenors' concern is thus at best a challenge to the Commission's regulations, and must therefore be rejected as an issue for litigation. See Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 A.E.C. 79, 88-89 (1974); 10 C.F.R. § 2.758.


IV. CONCLUSION

Accordingly, for all the reasons discussed above, the Licensing Board should adopt as the statement of issues for litigation in this proceeding the Intervenors' response to Interrogatory EP-17, modified to reflect Applicants' specific objections discussed herein. In the alternative, should the Board desire to retain the "Proposed Stipulation of Contentions," Applicants move that the Board adopt the attached compilation of the proposed stipulation and the interrogatory

responses, again modified to reflect Applicants' specific objections.

Respectfully submitted,

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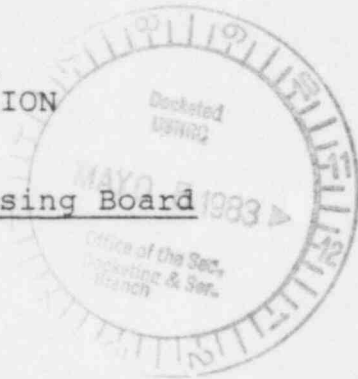
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

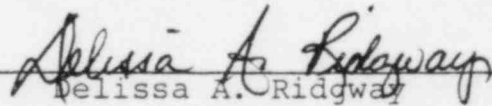
Before the Atomic Safety and Licensing Board



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CERTIFICATE OF SERVICE

This is to certify that copies of "Applicants' Objections To Certain Proposed Issues and Motion For Adoption of Interrogatory Responses As Statement of Issues For Litigation" were served, by deposit in the U.S. Mail, first class, postage prepaid, to all those on the attached Service List, this 3d day of May, 1983, except that John M. Simpson, Esq. and Brian P. Cassidy, Esq. were served by deposit with Federal Express this 3d day of May, 1983, and Myron Karman, Esq. will be hand-served on the 4th day of May, 1983.


Melissa A. Ridgway

Dated: May 3, 1983

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NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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