UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
ROCHESTER GAS AND ELECTRIC	)	Docket No. 50-244OL
	)	
(R.E. Ginna Nuclear Power Station, Unit No. 1)	)	

LICENSEE'S MEMORANDUM OF LAW CONCERNING THE NEED TO RE-NOTICE AN OPPORTUNITY TO INTERVENE IN THE GINNA PROCEEDING

Introduction

Rochester Gas and Electric Corporation ("Licensee") is currently operating R.E. Ginna Nuclear Power Station, Unit No. 1, under a provisional operating license during the pendency of its application for conversion of the license to a full-term operating license. The application was noticed at 37 Fed. Reg. 26,144 (1972), and has been pending before the Commission since that time. Following notice, the Intervenor, Mr. Michael Slade, was admitted to the proceeding by an Atomic Safety and Licensing Board order on January 23, 1973.

There has been no fundamental change in Licensee's application. Licensee has sought neither postponement nor suspension of the proceeding at any time since the initial notice was published. The Ginna facility has operated throughout this proceeding, continuing service that was authorized in 1969.

The Licensing Board issued an order on June 15, 1983 that requested comments on whether the Licensing Board should or is required to re-notice an opportunity for interested persons to intervene and seek a hearing on the proposed license conversion. The Licensing Board asked for specific consideration of an Atomic Safety and Licensing Appeal Board decision, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-539, 9 N.R.C. 422 (1979).

Argument

I.

THERE IS NO LEGAL REQUIREMENT THAT THIS PROCEEDING BE RE-NOTICED.

The Allens Creek decision is not particularly helpful in addressing the question posed by the Licensing Board. The Appeal Board never addressed the propriety of the Licensing Board's decision to re-notice the Allens Creek proceeding after the applicant filed an amended application to construct a different project. Instead, the case involved whether the re-notice had been sufficiently clear to preclude consideration of certain issues that had been brought before the NRC at an earlier stage of the proceeding. As a result, the brief discussion of re-notice in Allens Creek is pure dicta. Even that dicta is not helpful in the instant case, since it spoke to re-notice after a postponement or suspension of a construction permit proceeding. In contrast, our proceeding has been ongoing

continuously and involves a conversion application for an existing facility. Also, the basic features of the Ginna plant--an operating reactor--have not been altered since notice was first published; the Allens Creek project, however, had undergone significant design changes prior to the issuance of the second notice. In sum, the Allens Creek decision does not resolve the re-notice issue raised by the Licensing Board in the instant case.

The question of when re-notice of an application is required because of changed circumstances was adverted to, but not answered, in Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-371, 5 N.R.C. 409 (1977), and ALAB-459, 7 N.R.C. 179 (1978).

In ALAB-371, the Appeal Board said that the amended hearing notice issued by the Licensing Board "should not . . . trigger any new rights in the public to raise contentions with respect to . . . those issues [as to which an opportunity for hearing] was afforded at an earlier stage . . . ." 5 N.R.C. at 411. It directed the filing of briefs on whether the amended notice was required.

Thereafter, the Appeal Board held that "the propriety of the Licensing Board's decision to issue an amended notice of hearing is moot", ALAB-459, 7 N.R.C. at 201 n.63, because no additional petitions to intervene had been filed.

Accordingly, even though amendment of the application was held to be required, the Appeal Board never determined that the change in ownership of the Marble Hill units required re-notice.

Although we have not found any Commission or Federal court decisions addressing when re-notice is required in licensing proceedings, re-notice guidelines that may be analogously applied do exist for rulemaking proceedings. According to Connecticut Light and Power Company v. NRC, 673 F.2d 525 (D.C. Cir. 1982), re-notice of rulemaking is needed only if "changes [in the initially proposed rule] are so major that the original notice did not adequately frame the subjects for discussion." Id. at 533, citing Weyerhauser Co. v. Costle, 590 F.2d 1011, 1031 (D.C. Cir. 1978); Ethyl Corp. v. Environmental Protection Agency, 541 F.2d 1, 48 (D.C. Cir.)(en banc), cert. denied, 426 U.S. 941 (1976). So long as a final action is a "logical outgrowth" of an initial proposal, original notice is deemed sufficient. Id.

In the instant case, Licensee initially and continuously has sought approval of the license conversion. The purpose of the initial application has remained unchanged; clearly, the original notice properly framed the issues that are before the Commission in this case. The conversion proceeding has reasonably developed from the initial application since first, no significant design changes have been proposed, and, second, Licensee has acted throughout the proceeding in a manner intended to facilitate

favorable consideration of its original application. Under these circumstances, re-notice guidelines for rulemaking suggest that re-notice is not required in the instant case.

Re-notice has also been required for agency adjudications under § 554 of the APA, 5 U.S.C. § 554 (1976), when an agency initiates an action and subsequently changes the legal theory under which it has brought the action. See, e.g., Rodale Press, Inc. v. FTC, 407 F.2d 1252, 1256 (D.C. Cir. 1968); American Home Products Corp. v. FTC, 695 F.2d 681, 693 n.21 (3d Cir. 1982). Legal theories have not changed in the instant case, however, since the general criteria for review of the plant are the same as those in force when the conversion application was made. Also, adjudications are procedurally distinguished from licensing proceedings by 5 U.S.C. § 554(d)(2)(A) (1976), suggesting that this re-notice requirement would not apply in the instant case. This standard, therefore, does not compel re-notice of the Ginna proceeding.

II.

THERE IS NO POLICY REASON TO RENOTICE THIS PROCEEDING.

Interested parties have had continuous, meaningful and fair notice of the Ginna proceeding. First, the Ginna plant is an existing facility on a highly visible site. Its physical presence has been known to area residents for nearly 15 years. Second, local media coverage of the proceeding insures that an average resident of the Ginna area has been apprised of the conversion proceeding as it

has moved toward conclusion. In addition, State and local governments have received, and continue to receive, notice of each stage of the proceeding, providing an additional scurce of notice. Any reasonable party with a legitimate interest in the Ginna proceeding has had ample notice and opportunity to intervene.

The Environmental Assessment recently issued by the Commission's Staff confirms that there are no significant new issues that would support re-notice. See 48 Fed. Reg. 29,764 (1983). Staff thoroughly analyzed the validity of the 1973 FES prepared for the conversion application. It concluded that the environmental issues are substantially unchanged, noting that neither previously unidentified environmental concerns nor significant physical changes necessitate a new environmental study. Re-notice is unnecessary, therefore, to insure that all issues surrounding the environmental impact of the Ginna facility will be considered.

In sum, the circumstances in the instant case suggest that re-notice would add little to the Ginna proceeding except delay. The conversion proceeding has been ongoing for over a decade. Parties with reasonable concerns have had access to more effective notice than Federal Register publication through the local media, and through the service of all documents on local and State government agencies. The basic thrust of the conversion application has not changed since notice was first published. Finally, interested parties may still seek to intervene in the

conversion proceeding upon a showing of good cause. 10 C.F.R. § 2.714 (1982).

Licensee has a legitimate interest in bringing the Ginna proceedings to a close. Since neither law nor policy counsel in favor of re-notice, the Licensing Board should respect that interest by permitting this case to go forward.

Conclusion

For the foregoing reasons, the Licensing Board should not order any re-notice.

Respectfully submitted,

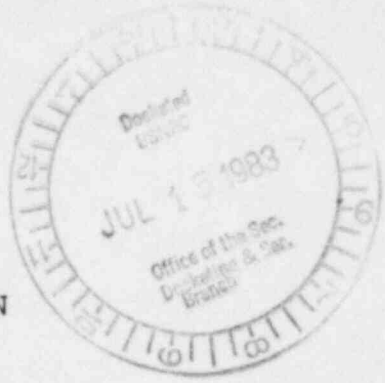
LeBOEUF, LAMB, LEIBY & MacRAE

By Harry H. Voigt
Harry H. Voigt

July 15, 1983

1333 New Hampshire Ave., N.W.
Washington, D.C. 20036

Attorneys for Rochester Gas and Electric Corporation



BEFORE THE UNITED STATES

NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
ROCHESTER GAS AND ELECTRIC CORPORATION	)	Docket No. 50-244OL
	)	
(R. E. Ginna Nuclear Power Station, Unit No. 1)	)	

CERTIFICATE OF SERVICE

I hereby certify that I have served the documents entitled "Response of Rochester Gas and Electric Corporation to Order Issued June 15, 1983" and "Licensee's Memorandum of Law Concerning the Need to Re-Notice an Opportunity to Intervene in the Ginna Proceeding," by mailing copies thereof first-class, postage prepaid to each of the following persons this 15th day of July, 1983:

Herbert Grossman, Esq.
Chairman, Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dr. Richard F. Cole
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Michael L. Slade
12 Trailwood Circle
Rochester, NY 14618

Rochester Committee for Scientific Information
Robert E. Lee, Ph.D.
Post Office Box 5236
River Campus Station
Rochester, NY 14627

Mr. Robert N. Pinkney
Supervisor
107 Ridge Road West
Town of Ontario
Ontario, NY 14519

Dr. Emmeth A. Luebke
Administrative Judge
Atomic Safety and Licensing
Board
Washington, DC 20555

Warren B. Rosenbaum, Esq.
One Main Street East
707 Wilder Building
Rochester, NY 14614

Jay Dunkleberger
New York State Energy Office
Agency Building 2
Empire State Plaza
Albany, NY 12223

Stanley B. Klimberg, Esq.
General Counsel
New York State Energy Office
Agency Building 2
Empire State Plaza
Albany, NY 12223

Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory
Commission
Washington, DC 20555

Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, DC 20555

Secretary
U.S. Nuclear Regulatory
Commission
ATTN: Chief, Docketing and
Service Branch
Washington, DC 20555

Mr. John E. Maier
Vice President
Electric and Steam Production
Rochester Gas & Electric Corp.
89 East Avenue
Rochester, NY 14649

Harry H. Voigt

Harry H. Voigt

LeBOEUF, LAMB, LEIBY & MacRAE
Attorneys for Rochester Gas
and Electric Corporation