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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL 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 and 2)

SAPL APPEAL OF DENIAL OF MOTION TO DISMISS
APPLICATION FOR SEABROOK UNIT 2

By Order of January 13, 1984, the Atomic Safety and Licensing Board (hereinafter "ASLB") denied the Seacoast Anti-Pollution League (hereinafter "SAPL"), Motion to Dismiss the operating license application for Seabrook Unit 2.

The appeal from the denial of the Motion to Dismiss is ripe and should be allowed, under 10 C.F.R. §2.718(i). This Board's authority to hear this appeal is discretionary, and should be exercised where "the action (complained of) would effect the basic structure of the proceeding in a pervasive or unusual manner." In re: Sumner Generating Station, 14 NRC 1140 (1981).

SAPL submits that the issue of substantial delay in the construction of Unit 2 has a pervasive impact on the ability of the Board to conduct a fair hearing. The issue of completeness is central to the ability of intervenors to file timely contentions based on health and safety issues concerning vital safety systems yet to be installed in Unit 2. Adjudication of these issues, while they exist solely on paper, violates the Commission's duty to ensure

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construction in compliance with the regulations, and subject to public participation through the hearing process.

"Interlocutory appeals are not favored in Commission proceedings any more than in judicial practice. Whether review should be undertaken on certification pursuant to 10 C.F.R. 2.718(i)...before the end of the case turns on whether a failure to address the issue would seriously harm the public interest, result in unusual delay or expense, or affect the basic structure in the proceeding in some pervasive or unusual manner." Consumer's Power Company, 13 NRC 96 (1981).

The Board's denial of SAPL's Motion revolves around the attempted distinction between the Commission's mandate to find "substantially complete" construction prior to issuance of an operating license, under 10 C.F.R. §50.57(a)(1), and the Board's duty to conduct proceedings culminating in the authorization of issuance to the Commission.

SAPL asserts that this distinction is unsound and contrary to the Commission's own policy as stated in Duke Power Company, et al, 17 NRC 282 (1983).

"...the Commission's policy of completing licensing ahead of construction, consistent with a fair hearing, necessarily assumes that a fairly firm completion date is projected well in advance."

The Board cannot continue the operating license proceedings at this point in time, where no completion date exists, and comport with the Intervenor's or the public's right to a fair hearing.

"In order to assure meaningful public participation in the adjudicatory process in both construction permit and operating license proceedings, an Intervenor must be afforded the opportunity to cross-examine a witness on matters which have been placed in controversy by any of the parties..." Northern States Power Company, 8 AEC 857, 868, (1974), affirmed, 1 NRC 1, (1975).

The Board is required to make findings on the matters placed in controversy, including "whether there is reasonable assurance

that construction of the facility will be substantially completed on a timely basis, in conformity with the construction permit and the Application, as amended, the provisions of the Act, and the rules & regulations of the Commission." 10 C.F.R. Part 2, App. A, VIII, H8(G)(1).

Section 185 of the Atomic Energy Act (42 U.S.C.A. §2001 et seq.) sets forth three conditions, in addition to completion of construction, which must be met prior to issuance of an operating license.

"(1) Filing of any additional information necessary to bring the application up to date--information which will necessarily in this case include detailed safety data concerning the final design of petitioner's reactor; (2) a finding that the reactor will operate in accordance with the Act and regulations, i.e. that the safety and health of the public will be adequately protected and with the construction permit itself, which is expressly conditioned upon a full investigation and finding of safety before operation is permitted; and (3) the absence of any good cause why the granting of a license to operate would not be in accordance with the Act--e.g. a showing by respondent unions, who will have full rights to appear and contest the issuance of an operating license, that the reactor may not be reasonably safe." Power Reactor Development Corp. v. International U., etc., 367 U.W. 413 at 1537, 81 S. Ct. 1529 (1961) (emphasis supplied)

SAPL asserts that it will not be granted full rights to appear and contest these issues relative to the construction and operation of Unit 2, because construction has been effectively suspended on Unit 2. The ASLB is required under 10 C.F.R. 2.760(c) to render an initial decision with respect to authorizing an operating license, "based on the whole record, and supported by reliable, probative, and substantial evidence." It is SAPL's contention that the record cannot be whole if issues pertinent to the construction of Unit 2

cannot be litigated.¹ The distinction must be made between proposed and actual construction, and must apply to both units as discrete construction projects, accomplished at different times, by different employees, under different weather and environmental conditions, with components of different age and possibly even design,, given the rapid changes in technology. To close hearings as Unit 1 is issued an operating license, while Unit 2 is still indefinitely postponed and not substantially complete, is to ignore the right of SAPL and the public to assure continued compliance with the law.

One Licensing Board has recognized the reality of delay in construction of a second unit as eliminating the need to proceed with an operating license application. In Illinois Power Co., et al, 14 NRC 1035 (1981), the Board granted an applicant's request for severance and stay of the operating license proceeding for a second unit which would not be completed until 12 years after the first unit. Citing 10 C.F.R. §50.57(a) the Board supported the notion that an operating license proceeding may be postponed when the completion date is distant. It certainly makes no sense to conduct a tandem operating license proceeding when one unit is years from completion; it makes even less sense when a unit is indefinitely postponed. And when a unit is both suspended and has no completion date, it is a fortiori that proceedings for an operating license should not now proceed.

1. Findings based on Unit 1 cannot be imputed to Unit 2; to do so would be tantamount to guaranteeing an operating license for Unit 2 without regard for the two-step process mandated by the Act to protect the health and safety of the public.

The ASLB should have considered the impact of the Applicant's abandonment of a completion date for Unit 2 on these proceedings. Although the Board is not charged with compiling a record, it is responsible for assuring the sufficiency of the record upon which an initial decision is made. See Union of Con. Scientists v. Atomic E.C., 449 F.2d 1069, 163 U.S. App., D.C. 64 (1974). Sufficiency of the record can only be accomplished through a fair hearing to expose the record to adversarial proceedings in which all parties can participate fully. SAPL contends that to continue operating license proceedings on Unit 2, while it remains indefinitely postponed, and substantially incomplete, is to develop a record based on assumptions, rather than facts, to support a decision to authorize issuance of an operating license. It is contrary to the intention of the Act and the public interest to "assume" that Unit 2 will be completed in compliance with regulations.

The importance of a full and fair hearing at the operating license stage is evident, since the effect of the Board's initial decision is to seriously restrict further input of the parties. The parties are allowed ten days to submit "brief comments" to the Commission contesting the immediate effectiveness of the Board's decision [10 C.F.R. §2.764(f)(2)]." However, the Commission may dispense with comments by so advising the parties." Id. At the close of operating license proceedings, the Board will deliver its recommendation to the Commission; SAPL would then have ten days to challenge the record. Unit 2 will not be substantially complete at the time a decision will be made regarding Unit 1. Unless the proceedings are then severed, there will be no opportunity for SAPL

to effectively intervene with concerns relative to Unit 2. The result of a continued tandem proceeding is to authorize issuance of an operating license for Unit 2 at a point in time when it cannot be challenged, because it is not constructed. Theoretically, this authorization would lie dormant for years until the Commission determines that construction is substantially completed. In the interim, operating license proceedings have concluded, and construction of Unit 2 proceeds free of the ongoing supervision provided by operating license proceedings. Therefore, it follows that the application for an operating license for Unit 2 is premature and should be dismissed.

In anticipation of the Board's denial of its Motion to Dismiss the operating license application for Unit 2, SAPL submitted a late-filed contention for admission. Again, the Board skirted the issue of there being no completion date for Unit 2 and the merits of SAPL's contention, relying on its discretionary powers over procedural matters to deny the contention. That decision, too, was clearly erroneous.

This Appeal is ripe. The issue will be moot once an initial decision is rendered by the ASLB, having denied SAPL its right to fully participate in operating license hearings on Unit 2. The ASLB has the authority to consider "changed circumstances" or "newly discovered evidence" which arise in the context of operating license proceedings. See So. Cal. Edison, 17 NRC 346, (1983), in which issues pertinent at construction permit stage could be reviewed at operating license stage in light of changed circumstances.

A completion date is one requirement for a construction permit, and the operating license proceeding is conducted on the premise that construction will be completed on a timely basis. The applicant's abandonment of a completion date for Unit 2 is, therefore, a proper issue to be placed in controversy at this time. SAPL asserts that the Board abused its discretion in failing to consider the merits of the contention, and in balancing the factors to be considered in a late filed contention.

Late Filed Contention Criteria

(i) Good cause, if any, for failure to file on time.

The Board mentioned that this contention was filed two years into the proceedings (Order of January 13, 1984, p. 10) which totally ignores the fact that there was a change in circumstances, brought on by the Applicant, that was not present two years ago. It is the Applicant's duty to inform the Board of changes in circumstances during the pendency of its application. See Duke Power Co., 1 NRC 626, (1975). This, however, the applicant did not do, and SAPL should not be required to act before it was clear the Applicant would not fulfill its obligation under 10 C.F.R. §50.71² The Applicant

2. 10 C.F.R. 50.71 maintenance of records, making reports. (a)...each holder of a construction permit shall maintain such record and make such reports, in connection with the licensed activity, as may be required by the conditions of the license or permit or by the rules, regulations, and orders of the Commission in effectuating the purposes of the Act, including §105...The applicant is clearly required to furnish a completion date, on its application; see 10 C.F.R. 50.30 ("the application shall state...the time when the facility is expected to be ready for operation") and 10 C.F.R. 50.33(h) ("If the applicant proposes to construct...a production of utilization facility, the application shall state the earliest and latest dates for completion of the construction.") (Emphasis added) It follows that the applicant is obliged to notify the commission of a change in information required in its application. Presumably the requirement for a completion date is not arbitrary or irrelevant, but is rather

did not formally abandon its completion date for Unit 2 until September 9, 1983. At this time a petition for intervention had been filed by Mr. Doherty, addressing the Unit 2 operating license application. A late-filed contention by SAPL would not be necessary if Mr. Doherty were permitted to intervene. When Mr. Doherty's petition was denied, it became apparent to SAPL that the Board was not addressing the merits of the issue of Unit 2 completion date. SAPL's contention was filed less than one month from the date of denial.

SAPL urges the Appeal Board to distinguish this case from Mississippi Power and Light, 16 NRC 1725 (1983) in which a contention was filed 4 years into an uncontested operating license proceeding. In the instant case, SAPL asserts that the 3 month period between formal abandonment of Unit 2 completion date and SAPL's late-filed contention, was reasonable, for good cause, and in the public interest of safety, which is the paramount consideration in all proceedings, (see Power Reactor Development Co. v. International V., etc., 81 S. Ct. 1529, (1961)). The Board abused its discretion in weighing this factor against SAPL and thereby invoking the "compelling showing" standard of Mississippi Power and Light, supra, to be applied to the four remaining criteria.

Since it is the Applicant's duty to inform the ASLB of its changed circumstances, it is unreasonable to expect SAPL to present as detailed a contention as would be possible following proper discovery. In spite of its obvious disadvantage, with respect to the availability of information regarding a Unit 2 completion

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connected to effectuating the purposes of the Act; a completion date is, therefore, an integral consideration in the proceedings.

schedule, SAPL nevertheless outlines with as much particularity as possible, its strategy for litigating this contention.

(ii) The availability of other means whereby the Petitioner's interest will be protected.

The Board erred in concluding that the contention was unreasonably late-filed, which is irrelevant to this factor regarding SAPL's interests. Late-filed contentions may not be denied solely on the basis of their lateness. The consequence of a late-filed contention, based on new and changed information, not in SAPL's control, should not be to deprive SAPL the opportunity to protect its interests.

SAPL's interest in construction of Unit 2 in compliance with NRC regulations is not protected while operating license proceedings on Unit 2 continue. To require that SAPL await an initial decision flies in the face of the purpose and policy of the two-step licensing process in which compliance issues are given a fair hearing prior to the issuance of a license. Once an initial decision is rendered, SAPL would have 10 days to appeal to the Commission; however, if Unit 2 is not "substantially complete" prior to the Board's authorization, it is unlikely that SAPL would have had an opportunity to discover, document, and support by affidavit, serious issues involving as yet unconstructed systems in Unit 2. Considering the lag between scheduled completion of Units 1 and 2, unless the proceedings are dismissed (or in the alternative, severed and stayed) for Unit 2, an initial decision would be made years before Unit 2 was substantially complete.

The Board failed to respond to the merits of SAPL's argument in favor of factor (ii), which resulted in an erroneous decision to weigh this factor against SAPL.

(iii) The Extent to which SAPL's participation may reasonably be expected to assist in developing a sound record.

SAPL clearly articulated its intention to support its contention as required, in the manner appropriate to these proceedings.

The burden of proof is on the Applicant to demonstrate compliance with regulations when challenged by intervenors (10 C.F.R. 2.732). Therefore SAPL would likely cross-examine the Applicant's expert witness and would necessarily await the Applicant's response to its contention, so as to determine a strategy for litigation of the contention in its final form. The Board's requirement for anticipatory specificity is unwarranted and constitutes an abuse of its discretion in considering this factor. It is readily apparent that the substantial delay of Unit 2 has the potential to drastically alter the ability to proceed with meaningful hearings on the operating license application. Therefore, the contention surely introduces an issue which has only recently materialized and which should become the focus of the proceedings relative to Unit 2.

(iv) The extent to which the Petitioner's interest will be represented by existing parties. This factor was correctly weighed in favor of SAPL.

(v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

The Board erred in finding a likelihood of delay, as these hearings are still underway, with no hearing date yet set. Thus the

determination of a completion date in and of itself should not involve any delay. Litigation of the issue of the importance of a completion date vis a vis safety issues might involve more time; however, since completion of Unit 2 is hardly imminent, adverse effects of a minor delay are insignificant in relation to public concern for safety.³

CONCLUSION

This issue did not exist at the start of these proceedings, and the Board has flagrantly ignored the "changed circumstances" in dereliction of its duty to represent public safety interests.

It is illogical to dismiss this issue, with the assertion that Units 1 and 2 proceedings may be combined in spite of an expected lag of as much as ten years between completion dates. Construction in compliance with the regulations cannot be imputed from Unit 1 to Unit 2. Potential areas of concern (e.g. protracted construction and design changes) are highly probable in light of rapid changes in technology and may not be ignored.

Regarding the need to separate the operating license hearing procedures for Units 1 and 2, this Board, in upholding denial of the Doherty Petition, incorrectly analogized SAPL's Motion to Dismiss the Unit 2 operating license application to a request for rulemaking requiring single unit applications in every case. The Commission's denial of a petition for rulemaking (47 Fed. Reg. 46524, 1982) addressed mandatory separate proceedings for all operating licenses. However, the Commission stated that "existing regulations permit a separate hearing be held on a single reactor unit in any case in

3. It is ironic for SAPL to be denied its right to litigate the issue of Unit II ripeness for adjudication on the basis of delay, when the issue itself arises from the Applicants' delay of the whole project.

which the Commission finds that a hearing is required in the public interest" (emphasis added). The Commission further noted:

"The operating license hearing is limited instead to examining substantial changes or conditions which have occurred since the issuance of the construction permit and issues which were deferred to consideration at the operating license stage." 47 Fed. Reg. 46526

SAPL asserts that the Board did not acknowledge or examine significant changes having recently occurred, which have a pervasive impact on the ability to assess compliance with construction requirements. This issue is necessarily deferred to the operating license state because it cannot be accomplished prior to substantial completion of construction. The Commission has both the authority and the duty to assure a fair hearing on the safe construction of each Unit. This requires SAPL's Motion to Dismiss be granted, or in the alternative, that its late filed contention be allowed.

Respectfully submitted,
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CERTIFICATE OF SERVICE

DATED: February 17, 1984

I, Robert A. Backus, hereby certify that I have mailed to the attached list of people, first-class, postage prepaid a copy of the enclosed. If served by Federal Express or Express Mail it is so indicated by * by the person's name.


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