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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	:	
Public Service Electric and Gas Company et al.	:	Docket No. 50-354 O.L.
(Hope Creek Generating Station) (Unit 1)	:	

THE PUBLIC ADVOCATE'S RESPONSE TO THE APPLICANTS' MOTION TO DISMISS THE PROCEEDING

Introduction

The Public Advocate of the State of New Jersey ("Public Advocate"), intervenor in this operating license proceeding, opposes the applicants' motion to dismiss. As this response will show, the applicants have mischaracterized and misapplied the governing law once again, and demonstrated no basis whatsoever for the harsh result they seek.

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ARGUMENT

Point 1. None of the Cases Cited by the Applicants Supports Their Theory or Otherwise Justifies Dismissal

In footnotes 7-11 (pp. 3-4) of the applicants' motion, they cite a series of cases for the proposition that the Public Advocate's statement that he has "no personal knowledge or specialized information [regarding the admitted contentions] beyond the information presented to the Board in support of the contentions",[1] compels dismissal for want of a "basis." (emphasis added) At no point do the applicants review the existing record of discovery to date. They rely entirely on these few (less than ten) words while seeking what is for them the ultimate remedy.

A review of the Nuclear Regulatory Commission ("NRC") cases relied on by applicants reveals that they neither compel nor support the drastic result they seek. These

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1. Conveniently, applicants simply ignore the underscored clause throughout their 4½ page brief.

cases, at best, deal with only loosely-related questions; some are so inapplicable as to raise the prospect that they were chosen at random. Significantly, at no point in their motion have the applicants made any effort to analyze these cases or otherwise to show how they mandate or even allow the radical sanction they demand. Accordingly, we must turn de novo to these cases to determine afresh what they reveal.[2]

The applicants begin by citing four recent NRC cases for the point -- which no one disputes -- that "to be admissible . . . contentions must have a basis".[3] These cases have nothing to do, however, with the radical departure sought by the applicants here.

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[2]At the outset, it is difficult to discern what is objectionable -- or self-damning -- in the half-sentence fingered by the applicants as proof positive that the entire proceeding should be dismissed at this early stage. The statement merely conveys the straightforward message that Commissioner Rodriguez held nothing back when filing the original contentions on November 7, 1983. It does not show that he "merely read documents drafted by another attorney" (Motion, at 4); nor does it suggest that helpful technical information has not or will not be employed in the course of the proceeding. The applicants' theory appears to be that each intervenor personally must be an expert in every contention -- in order to be admissible. Such a bizarre notion has no basis in law or exerience. And none of the cases cited by the applicant comes close to aiding such a remarkable notion.

[3]Applicants' Motion, at 2-3.

In Washington Public Power Supply System (WPPSS No. 2), 17 NRC 546 (1983), the Appeal Board confronted what it termed the "narrow" issue of whether the intervenor had "sufficiently particularized" its contention to permit its adjudication in a "construction permit extension proceeding."[4] The Board concluded that the intervenor had not alleged "intentional delay" by WPPSS, an allegation which the Board believed to be essential in the pleadings.[5] For that reason, not lack of "basis", the Board affirmed denial of admission in the hybrid proceeding ordered by the full Commission.[6] Importantly, the Commission and the Board placed heavy reliance on the intervenor's opportunity to participate in the "operating license proceeding" -- an opportunity which the party had chosen to forego.[7] In short, the case refines the maxim that an intervenor's pleadings on their face must stay within the scope of the proceedings and be "particularized" enough to show that they are, in fact, within the permitted scope, if the intervenor is to be admitted. See, also Bellotti v.

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[4] 17 NRC, supra., at 548

[5] Id., at 554

[6] CLI-82-29, 16 NRC 122[illegible] (1982)

[7] Id., at 553, n.8.

United States N.R.C., 725 F.2d 1380 (1983), which affirmed that basic principle. Basis, it turns out, was not an issue at all in the decision.

Next, the applicants call upon Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 2), 14 NRC 1125 (1981). This case, like WPPSS, is not a traditional licensing proceeding. Indeed, the question presented was the novel issue of whether the intervenors had standing to assert that the PREPA's effort to dismiss without prejudice its construction permit application should be converted into a hearing on dismissal with prejudice. 14 NRC at 1131. The Board found that the intervenor had not asserted that they would suffer any "legal harm" if dismissal was without prejudice. Id., at 1133. As to the intervenor's substantive claim -- that the North Coast site was vulnerable to sabotage -- the Board quoted its earlier comment that, should PREPA file again, "no permit will later issue...without prior full consideration of all relevant developments -- no matter when they might have come to light." Id., at 1138. Thus, the Board refused to take the "drastic step" of forever ruling out the chosen site, which was the intervenor's stated goal, and would have resulted from a dismissal with prejudice. Id.

So, taken together, WPPSS and PREPA may be seen as two interesting but truly rare proceedings in which intervenors, if they wish to be parties, must allege matters within the "scope" of the case (WPPSS) and show some "legal harm" (PREPA). How they aid applicants' cause here remains a puzzle.

Turning now to Houston Light & Power Co. (Allens Creek Nuclear Generating Station), 10 NRC 521 (1979), next on the applicants' list, the reader must engage in more mental gymnastics to find a relevance to the applicants' latest demands. There, the Appeal Board offered sua sponte advice to a licensing board which it found was on the verge of committing a grievous error -- namely, forbidding intervenors from speaking in oral argument at a special prehearing conference where their proposed contentions would be considered. 10 NRC at 523-24. The only possible relevance to this motion is the board's observations on the lack of explicit rules for applicants to move to dismiss contentions at all -- a lacuna saved by recourse to the federal rules, e.g., F.R. 12(b)(6),10 NRC at 523-25.

Likewise, Commonwealth Edison Co. (Dresden) 16 NRC 714 (1982) is no help to the applicants' cause. Indeed, this spent fuel (re-racking) license amendment decision is a most curious addition to the applicants' string

of unadorned citations. For the opinion says not a word about the matters raised here; it does not even mention a motion to dismiss any contention for lack of basis or for any other reason. (The applicant utility did move "to strike portions of the [intervenor's] cross-examination ...on the ground that [it] had no relevance to ...any matter in controversy," 16 NRC at 717, but that is all. Could that be why it was cited?)

Next, applicants draw our attention to Public Service Co. of New Hampshire (Seabrook) 18 NRC 311 (1983).[8] They cite it for the rule that contentions without a basis must be dismissed -- i.e., "[t]his result is required by the NRC's rules."[9] But, once more, a reading of the cited case -- assuming this is the case intended by applicants -- leaves us shaking our heads. Here, the full Commission first declined sua sponte review of an intervener's petition for directed certifi-

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8. The Public Advocate assumes that this is the case applicants have in mind, since they cite to a case with this name, docket number, date of decision (September 20, 1983) with reference to the "slip op. at 2." The applicants, however, did not cite to the official citation which, had they done so, would have revealed a case by the same name and docket number (no "OL" appears in the applicants' citations), but with the date of September 19, 1983. (Normally, when quoting from a slip opinion it is considered good practice to attach a copy of same if practical to do so, if the case is not yet reported,unless the parties have copies already).

9. Motion, at 3.

cation of a licensing board dismissal of one of its contention, then proceeded to "reaffirm its statement" concerning the factors to consider when weighing "a late-filed contention." 18 NRC at 311 (emphasis added).[10] (As all participants in this Hope Creek proceeding know, all of the Public Advocate's contentions were timely filed; at no time have applicants made an allegation to the contrary.)

Our next stop in the applicants excursion through the library is Philadelphia Electric Co. (Peach Bottom), 8 AEC 13 (1974). This time, the applicants have succeeded at least in correctly citing to a case which discusses the "basis" requirements for admission of contention. 8 AEC at 20-21. One of the bases for the basis requirement, as noted by the applicants, is to let applicants "know at least generally what they will have to defend against or oppose." Id. (emphasis added). Yet at no point in the applicants' motion do they assert that the existing, already admitted contentions fail this test. Instead, they appear to argue -- again, the point is not made explicitly -- that if the intervenor party himself is

10. Two commissioners dissented; one (Comm. Asselstine) argued for reversing an earlier decision on late-filed contention; the other (Comm. Gilinsky) agreed in a single sentence.

not an acknowledged nuclear expert then, ipso facto, regardless of how specific or particularlized the contention and notwithstanding all other explanations, discovery, or expert assistance, all contentions must be dismissed. Does Philadelphia Electric or any other case command or even suggest such a radical, shamanistic view of the law? Of course not. A turn through the Peach Bottom case reveals the Appeal Board's rejection of that applicant's attempt to convert

> Section 2.714 [which governs intervention] into a fortress to deny intervention because the basis for even one contention appears to be lacking, even though as a result of a reasonable appraisal there would appear to be sufficient specificity and basis to warrant further prehearing exploration in connection with the facility to be licensed. There is a considerable amount of discretion for the Commission or a presiding officer to exercise in this area. In the exercise of their discretion, the body deciding on intervention questions should not blind itself to reality -- the denial of intervention may well close the door to further administrative relief, while granting an intervention merely sets in motion the next steps in the prehearing process which are designed to assure that a genuine issue in fact exists which warrants an evidentiary hearing.[11] 8 AEC at 21 (emphasis added).

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11. The Appeal Board also stated in equally compelling language: "Section 2.714 should not be read and construed as establishing secretive and complex technicalities such as in some other areas of the law are associated with special pleading requirement for which some practitioners have an almost superstitious reverance. On the other hand, we cannot construe the section in a vacuum. Neither of these approaches provides an acceptable substitute for a construction which takes into account relevant statutory requirements, precedent, and

(continued)

Moreover, it is worthy of at least passing note that the applicants "no basis" claim was rejected, using the above general considerations. Id. at 119. To be sure, the rejection of one contention -- after great soul-searching -- was narrowly approved by the Appeal Board based "on the particular facts of this case." Id. at 25. But the reason was not lack of basis, specificity or other objective pleading deficiency; it was because the issue on its merits (cumulative radiation releases from two nuclear units over 30 miles apart) was "not relevant to ... whether the discharges from a separate facility comply with [commission standards.] The Licensing Board's ruling rests on that narrow ground and is affirmed on that basis." Id. (emphasis added)*

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* That the Appeal Board in Peach Bottom expressly rested its holding on "that narrow ground" -- i.e. "evidence of combined radioactive effluents . . . . would not be admissible", Id. -- implicitly shows that the contention satisfied the previously discussed requirements of "basis" and "specificity". Otherwise, the two boards could not have determined admissibility vel non, as they, like the applicants, would not have been able to know "at least generally what the [parties] will have to defend against or oppose." Clearly, they knew; just as clearly, the boards said the issue, however compelling, was beyond the scope of an individual licensing case.

11. (continued)
common sense." 8 AEC at 20. Here, of course, the applicants would convert Sec. 2.714 into a "secretive and complex" requirement that each intervenor be able to call himself an authority on each issue in controversy. Such an "Einstein-only" rule has no basis in law, precedent or, most certainly, common sense.

Finally, we come to applicants' reliance on Detroit Edison Co. (Enrico Fermi), 8 NRC 575 (1978) and Cincinnati Gas & Electric Co. (Zimmer) 3 NRC 8 (1976). Here, yet again we find that applicants have stretched and pulled the cases into shapes never dreamed of by their authors. In Fermi, for example, the Licensing Board passed on the applicants' challenge to the intervenor's standing which they sought to accomplish through depositions. The Board declined to approve depositions for two reasons. First, standing would be resolved at the still pending special prehearing conference, and, in any event, deposition would not affect "whatsoever...intervention as discretionary matter." 8 NRC at 583. Accordingly, the Board denied the discovery demands, "and in lieu thereof order[ed] a pre-hearing conference." Id. at 584. Similarly, in the Zimmer case, the Appeal Board ordered a remand to hold a prehearing conference on numerous intervenor contentions and to then prepare an order containing a "sufficient exposition [of a] reasoned decision-making." Id. at 10-11. This, the Board below had "manifestly" not done. The Board then closed with the quotation on which applicants here finally, rest their case for blanket dismissal:

> "In an operating license proceeding ... a licensing board should take the utmost care to satisfy itself fully that there is at least one contention advanced in the petition which, on its face, raises an issue clearly open to adjudication..."
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> Id., at 12 (emphasis added)

(See also Gulf States Utilities Co. (River Bend), 7 AEC 222, 226 (1974)).

To sum up, in none of the cases lined up by the applicants do we find authority for -- or even discussion of -- their novel and unarticulated theory that it is the subjective expertise of the intervenor which controls the right to intervene, and not the objective manifestation of sufficient basis, interest, standing, and specificity long held to be the determinants in intervention. On the latter (objective) side, the applicants have written not a word. Instead, they point to half of a single sentence in the Rodriguez affidavit as if it were the Rosetta Stone, and then string-cite several questionably relevant cases. A flimsier or weaker claim to the harsh relief requested -- dismissal of the entire proceeding -- can scarcely be imagined.

Point II. The Applicants Fail Utterly to Show That Their Motion Meets the Standards for Dismissal in the Analoguous Federal Rules of Civil Procedures.

(a.) It is patently improper for the applicants' counsel to file this motion without addressing the parallel federal rules.

We begin by noting that it is by now axiomatic that the Commission's "Rules of Practice" are to be interpreted in light of the relevant Federal Rules governing civil practice in the federal courts. Houston Light & Power Co. (Allens Creek), 10 NRC, supra, 5:24-25. That applicants -- represented by counsel with many years experience in NRC proceedings -- are aware of this rule cannot be doubted. Yet nowhere in the applicants' brief, seeking the most drastic possible remedy, have they written at all about the parallel federal rule (s), if any, which they believe serve to provide guidance on these important questions. For this reason alone the motion should be denied. Otherwise, by their silence applicants would succeed in forcing us to rebut that which has not been asserted.

In this respect, the current motion is regrettably all too consistent with the pleadings and briefs emanating from applicants' counsel in this proceeding. See, e.g., the Memorandum and Order of the Atomic Safety and Licensing Appeal Board, ALAB-759, slip. op. at 18-19, n.33. The Board trenchantly commented on the applicants' "four-page brief" filed in response to a specific request from the Board.[12] After first observing that applicants' counsel "did not even refer to [the controlling statute], let alone discuss the relevance of that Section to the situation at bar," the Board concluded:

> "All in all, we found [the applicants' brief] to be singularly unhelpful and, as such, far short of what we have a reason to expect from counsel whose views have been requested. True, recusal motions are matters of some delicacy. . .But that consideration did not relieve applicants' counsel of the obligation to brief the disqualification more fully." Id.

Worse still, in the applicants' attempts to subpoena Commissioner Rodriguez, their counsel grossly misstated the law to this Board. Thus, in their brief in support of an application for a subpoena, the applicants argued that

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[12]Order of December 28, 1983, slip. op. at 3.

as a matter of New Jersey law they were entitled to the forced deposition of a State cabinet head.[13] Yet, as shown in the Public Advocate's motion to quash, the unadorned cases cited by the applicants' counsel were either 180° contra the applicants' position or had nothing whatever to do with the issue.

Now comes this four and one-half page motion to "dismiss this proceeding" en toto, citing (again) cases without comment which, on analysis, show at best only the most tangential relevance, followed by utter silence on the parallel federal rule(s) and the litterally hundreds of cases which construe them. Surely, something better than this lamentable performance must be expected of applicants' counsel to escape the suspicion that their behavior is designed primarily to harass, distract, and exhaust the intervenor and otherwise serves no legitimate purpose.

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[13] Applicants' Response to the Public Advocate's Motion to Vacate (etc.), (March 13, 1984) at 9. This indiscretion is discussed at some length in the Public Advocate of the State of New Jersey's Motion to Quash, (etc.), (March 26, 1984) at 24-26.

The Commission's rules, it should be recalled, require "parties and their representatives. . .to conduct themselves with honor, dignity and decorum as they should before a court of law." 10 C.F.R. §2.713(a). Also, 10 C.F.R. §2.713(c) authorizes the presiding officer to discipline "any party or representative. . .guilty of . . .contemptuous conduct." Certainly, the off-hand motion practice and briefing style of applicants' counsel at least approach the clearly "contemptuous." Such actions also, needless to say, tarnish the credibility of all of applicants' claims and diverts the parties and the Board from the true task at hand -- namely, determining whether the Hope Creek Nuclear Generating Station will be operated in accordance with the Atomic Energy Act, 42 U.S.C. §2239 and the Commission's regulations, 10 C.F.R. Part 50.

In sum, due to the applicants' failure to submit argument on the relevant cases and federal rules, their motion should be denied -- and atleast a warning issued that such behavior is not be be countenanced in the future.

(b) The applicants have not shown that they are entitled to dismissal under the standards of Rule 12 (b) (6) or to consideration of the motion under Rule 56.

Rule 12 (b) (6) permits any party to move for dismissal for "failure to state a claim upon which relief can be granted." (This resembles the motions made in the WPPSS and PREPA cases, supra, and discussed in the Allens Creek decision, 10 NRC, supra., 525.) However, R.12(b)(6) also provides that if the motion depends upon

> "matters outside the pleading...and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. (emphasis added)

This last sentence suggests that if the motion is not limited to the face of the pleadings, it should be treated as a Rule 56, motion for summary judgment. Samara v. United States, 129 F.2d 594, 597 (2nd Cir. 1942), cert. denied., 317 U.S. 686, 63 S. Ct. 258.; Trans World Air Lines, Inc. v. Hughes, 214 F. Supp. 106,108 (S.D. N.Y. 1963); Government of India v. Hughes, 445 F. Supp. 714, 719 (S.D. N.Y. 1978); and Carter v. Stanton, 405 U.S. 670, 671, 92 S. Ct. 1232, 1234 (1972). (These cases also take note of an important difference between a R. 12 (b) (6) and a

R. 56 (b) motion. The former alleges what may be only a defect in the pleading, while a dismissal on the latter perforce"goes to the merits of the case." Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d, §2713.)

The applicants' motion here is typical of a 12 (b) (6) claim, although it refers to one matter outside the original pleading -- the partial sentence in the Rodriguez affidavit submitted in a motion to quash a subpoena. Thus, it may seem to be "converted" into a R. 56 action. However, since the applicants' motion attaches no affidavits, discusses none of the discovery to date, and otherwise merely attacks the pleadings exactly as they were when filed -- supplemented by the single, semi-sentence quoted at the beginning -- it is questionable whether by this single act the applicants have succeeded thereby in transforming the R. 12 (b) (6) action into a R. 56 action. Certainly, they have made no argument to that effect.

The importance of the point -- besides that the former may be resolved by amending the pleadings, while the latter may resolve the case -- is that a R. 56 motion (if appropriate) triggers what amounts to additional workload on all the parties and then a

second "special prehearing conference"! This is so because of the instruction in R. 56(d) that "if practicable" the court is to "ascertain what material facts exist...and what material facts are actually and in good faith controverted."

The functional outcome could well be a costly and premature pretrial conference -- leading to a second prehearing order -- but without the applicants' prior discussion of "the pleadings, depositions, answers to interrogatories, and admissions on file" (i.e., all discovery to date) which show whether there is "a" genuine issue as to any material fact and [if] the moving party is entitled to a judgment as a matter of law." R. 56 (c).

In short, ought this board to reward applicants' counsel for his barren and misleading brief with a plenary "prehearing hearing" and at the same time shift responsibility to others to sift through the discovery materials to date, compare them to the original allegations, the transcript of the special prehearing conference, etc.? Surely, we are all entitled to better than that, and just as surely the applicants are not entitled to such unjustified gains as a Rule 56 "conversion" might bring.

There is a swift and economic way out of the confusion shown by the applicants' palpably defective papers:

Rule 56 (f) directs a court to "make such order as is just."[14] The Public Advocate submits that in light of the applicants' "singularly unhelpful" brief, their continued practice of string-citing irrelevant cases, and their patent failure even to address the analogous federal rules, that the only "just" order is a flat denial of the motion -- due to the applicants' failure to carry their very heavy burdens of proof and persuasion.

As the cases show, even when parties have briefed and argued in excruciating detail their right to judgment, courts are properly reluctant to grant this ultimate remedy, especially at such an early stage.

See, e.g., Jackson Tool & Die, Inc. v. Smith, 339 F. 2d 88, 91 (5 Cir. 1964), which reversed summary judgment even when all parties agreed below that it was proper by finding that "this case bristles with triable issues of fact". In United States v. United Scenic Artists, 27 F.R.D. 499, 501-502 (S.D.N.Y. 1961), Judge Kaufman held that "even if the. . . evidential facts are not in dispute, summary judgment should not be granted in difficult and complex cases if the inferences which

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[14] Rule 1 also admonishes courts to construe the rules "to secure the just, speedy, and inexpensive determination of every action".

may be drawn from these facts are conflicting." (emphasis added) J. Kaufman quoted at length from United States v. Bethlehem Steel Corp., 157 F. Supp. 877, 879 (S.D.N. Y. 1958):

> While, as already noted. . .there is no dispute as to the underlying facts. The [parties] urge inferences and findings contrary to those advocated by the Government. . .
>
> The Court does not reach the classical summary judgment question of whether there is a genuine issue as to any material fact. . .[A trial] will serve to bring into sharper focus, certain issues of importance which have been obscured by the voluminous[documents]. . .Under all the circumstances the application of the summary judgment rule is questionable and the court deems it sound judicial administration to permit a trial for such additional evidence and clarification as may be relevant. (emphasis added)

It is hard to imagine an area of the law as complex as nuclear power licensing, or one where "the inferences [to be] drawn" from underlying facts are in need of"sharper focus". To think otherwise is to ignore the great discretion in the Commission's charge to find, before licensing operation, that "the final design provides reasonable assurance. . .that the health and safety of the public will not be endangered by operation of the reactor." Power Reactor Devel. Co. v. International U., Etc., 367 U.S. 396, 400, 81 S. Ct. 1529, 1531 (1961).

(emphasis added)[15]

In addition, many leading cases warn of the duty to show caution and "liberality" in matters of great complexity. Slagle v. United States, (5th Cir. 1956) 228 F. 2d 673, 678 (noting the appellants lack of time to develop a record); Suckow Borax Mines Consol. v. Borax Consol., 185 F. 2d 196, 205 (admonishing against "trial. . .of fact by affidavit"); Briggs v. Kerrigan, 431 F. 2d 967, 968 (1st Cir. 1970) ("When a motion for summary judgment has been properly made and supported, an adverse party must set forth specific facts showing that there is a genuine issue for trial. [R.] 56(e).")[16] (emphasis added); Neff v. World Publishing Co., 349 F. 2d 235, 253-54 (8th Cir. 1956) (affidavits to be considered must be limited to facts admissible at trial); and Aetna Insur. Co. v. Cooper Wells, 234 F. 2d 342, 3 & 4 (6th Cir. 1956) ("The trial court should be slow

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[15]Also, it is critical to bear in mind that the Public Advocate is not urging at this time a "trial" on all his contentions, but merely denial of the applicants flagrantly excessive motion. Discovery has already been hindered enough by the applicants' contumaciousness. Let discovery proceed on individual contentions--and there will be opportunity enough for appropriate motions. (Note that the Public Advocate earlier consented to the dismissal of his Contention IV)

[16]As demonstrated earlier, Point II, (a), supra, the applicants have not come close to the requisite proper showing of a R.56(b) motion sufficient to force the Public Advocate to disgorge "specific facts" which remain largely in their control.

in granting a motion for summary judgment. . . where there is a reasonable indication that a material fact is in dispute.")

In this OL proceeding, complex, multiple "inferences" of fact, U.S. v. United Scenic Artists, supra, are abundant, and remain largely unilluminated. Further discovery -- beyond the first exchange of interrogatories -- is obviously needed to bring these matters of such great public import into "sharper focus," U.S. v. Bethlehem Steel Corp., supra. For, at this early point, the question is not whether to try the case, but simply whether to explore further. Manifestly, applicants have shown nothing to the contrary.

To recapitulate, the courts are virtually unanimous in holding that the proponents of summary judgment have a truly heavy burden to demonstrate that they are entitled to the "drastic" result they demand. In short, the Board should be wary of taking short-cuts in areas of such public magnitude and complexity as present here. As courts have, to their chagrin, learned all too often the

> misuse of the summary judgment procedure to cut a trial short . . . serves only to prove that short-cutting of trials is not an end, and that . . . it is quite often true that the longest way around is the shortest way through.[17]

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17. Gray Tool Co. v. Humble Oil and Refining Co., 186 F. 2d 365 (5th Cir. 1951), quoted approvingly in Moore's Federal Practice, Sec. 56.02(1)

As a result, courts agree that any reasonable doubt should be resolved against the movant.[18] And, by its very nature, summary judgment is "ill-adapted to cases of a complex nature or to thosethat involve constitutional or other large public issues."[19] This is so even where the parties agree as to the basic facts, but "disagree regarding the factual inferences that properly may be drawn from these facts." Winters v. Highland Ins. Co., 569 F. 2d 297, 299 (5th Cir. 1978). Lighting Fixture and Electric Supply Co. v. Continental Ins. Co., 420 F.2d 1211, 1213 (5 Cir. 1969). Moore's Federal Practice, 1983 Suppl. to Vol. 6, § 56.15[20]

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[18]Decisions expressing this point are too numerous to cite. But see, e.g., Van Brode Milling Co. v. Kravex Mfg. Corp. 21 F.R.D. 246 (E.D.N.Y. 1957); United States v. Farmers Mutual Insur. Ass'n, 268 F.2d 560, 562 (8 Cir. 1961); Trowler v. Phillips, 260 F.2d 924, 926 (9 Cir. 1958), and cases cited at Moore's, §56.15, pp. 393-95, n. 3-5.

[19]Moore's Federal Practice, Sec. 56.15, at 398

[20]See, also, discussion in Point II, (b), supra at 20-23. It scarcely can be overstated that it is the "factual inferences," far more than the underlying facts, which will determine the outcome of this proceeding.

The applicants here have not stated that no genuine factual issue is in dispute, nor that they are entitled to summary judgment "as a matter of law". They have merely argued that the intervenor's acknowledgement that he is not an expert -- i.e., qualified himself to present testimony -- and that he has "no personal knowledge. . . beyond the information [already] presented to the Board" translates automatically into the lack of a "basis" for all the contentions -- and therefore mandates dismissal.[21]

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[21] As previously shown, none of the cases relied upon by applicants even discusses such a subjective, "Einstein-only" theory of intervention. The Board appears to have already rejected this very same argument when the applicants attempted to interpose objections on this ground at the November 22 conference. (Tr. 228, lines 21-25, and 229, line 1:

MR. CONNER: I am just trying to make the distinction that if I think--

JUDGE MILLER: I see your distinction, but I'm not making it.

MR. CONNER: I think they are betting on "to come" and they are going to go find an expert.

Nevertheless, it may be helpful at this point to review briefly the information that has been submitted to the Board, the current state of discovery, and the likely information yet "to come."

Contention 1: Pipe Cracks

This contention asserts that, inter alia

> The recirculation piping installed at Hope Creek utilizes American Iron and Steel Institute Type SS-304, which is highly susceptible to IGSCC, intergranular stress corrosion cracking. The Applicants have failed to demonstrate that they can prevent and mitigate IGSCC in accordance with 10 CFR Part 50, Appendix A, Criterion 20.[23]

It further argues that "critical recirculation piping" should be replaced with "corrosion resistant piping"; that if not replaced piping should be subjected to various procedures designed to prevent corrosion; that manual "ultrasonic testing" is inadequate to spot cracks; and that the applicants have not yet supplied how they will regularly inspect piping.[24]

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23. Board Order of December 21, 1983, at 3.

24. Id.

The importance of this issue is widely known, and can hardly be understated. As the Advisory Committee on Reactor Safeguards ("ACRS") has warned: "The present approach [to checking for pipe cracks] may accept a much higher probability of a loss-of-coolent accident then has been considered acceptable [heretofore]."[25] (emphasis added) This particular hazard, fortunately, seems to be limited to boiling water reactors ("BWR's"), such as Hope Creek.[26]

The bases for this contention were further enumerated by the Public Advocate during the conference.[27]

The discovery to date is composed of two sets of applicant interrogatories to the Public Advocate, one set of interrogatories by the staff to the Public Advocate, and

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25. Public Advocate Exhibit 1, Tr. 58-59. (ACRS letter of August 9, 1983: Report on Flaw Evaluation Procedures for BWR Pipe Cracks). The staff did not oppose the admission of this contention. Tr. 53.

26. Tr. 60-61.

27. Tr. 52-90, 132-140. E.g., the study by Danko and Stahlkopf, 23 Nuclear Safety 653, identified some 272 reported incidents of "Intergranular Stress Corrosion Cracking" ("IGSCC") in this commonly used SS-304 piping as of 1982. In 1983 the NRC briefly ordered the immediate shutdown of 5 operating BWR's due to recent discoveries of potentially severe IGSCC. Nucleonics Week, Oct. 13, 1983.

the intervenor's first interrogatories to the applicants. Answers on all these have been made and exchanged.

In the Public Advocate's interrogatory reponses we have identified eighteen (18) separate 10 C.F.R. Part 50, General Design Criteria ("GDC") which "pertain . . . to the phenonenon of [IGSCC]".[28] We have aslo specified several "additional 'regulatory requirements'" that are applicable and must be met.[29] Fifteen (15) sections of PSE&G's Final Safety Analysis Report are then listed as bearing on the problems.[30] As to the applicants' compliance with the above, discovery has not yet progressed that far -- but it may be expected that once the current motion is disposed of (assuming no further applicant distractions), the parties will then begin to "zero in" on this, the next logical question. (Note: No depositions have yet been scheduled or held on this or the other two admitted contentions.)

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28. The Public Advocate's First Responses to the Applicant's First Set of Interrogatories, at 1-3.

29. Id., at 4.

30. Id., at 4-5.

Among the factual aspects of this contention -- apart from the "factual inferences" related to safety adequacy which must be drawn therefrom -- are the following: (1) the exact quantity and location of IGSCC-susceptible piping, which will further depend upon the extent of PSE&G use of SS-304 piping and pipe cladding; (2) whether pipe "connections" consitute "critical piping"; (3) when it is "feasible" to repalce IGSCC-prone pipes; (4) the necessity and nature of pre-start up "preventive measures"; (5) the existence and nature of deficiencies in "the applicants' system for identification of cracks . . . after start-up"; and, generally, (6) the prudence of relying on manual ultrasonic testing of pipes as an adequate safety surrogate for various pre-start-up devices and initiatives (such as the installation of an oxygen control and hydrogen ingestion system for IGSCC prevention.)[31]

Finally, as stated in response to the NRC staff's interrogatory question 2(A), asking whom the Public Advocate "will rely upon to substantiate" the contention, the Public Advocate "anticipates relying upon Dale G. Bridenbaugh" of MHB Associates, San Jose, California, a well-known nuclear engineer. In fact, Mr. Bridenbaugh, as later confirmed, assisted in the preparation of the Public Advocate response.

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31. Id., at 5-9.

Contention 2: Management Competence
PSE&G's Qualification to Safely
Operate Hope Creek

The basis for this contention was argued at some length before the Board on November 22, 1983.[32] (Further discussion is found in Appendix I, pp. 9-11 of the Advocate's amended petition to intervene.) It states in brief that

> Prior to operation, PSE&G must demonstrate that it has fully resolved the management implications of the Salem events of February 22 and 25, 1983, which resulted in the NRC civil penalty, and that it has taken all steps necessary to achieve and maintain the technical qualifications required for the safe operation of Hope Creek as a result of these incidents.[33]

(As reworded above, the staff did not object to this contention.)[34] Discovery on this contention is limited to the various, "preliminary" and "first" interrogatories set forth earlier. Moreover, the continued existence of material factual matters genuinely in dispute -- as well as the relevant safety "inferences" -- has not been challenged further by the applicants. Indeed, information available to date raises clear inferences of a corporate management

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32. Tr. 169-178, regarding what was then labelled "Contention V".

33. Board's Order, at 9.

34. Id., at 11; Tr. 170, 178.

which tolerates lassitude and passivity by those in charge of nuclear operations.

See, e.g., Inside N.R.C., April 16, 1984, at 10-11 summarizing the NRC staff's report to the full Commission on PSE&G's unusually "large numbers of reactor trips and slow management response to problems" at the Salem nuclear units. According to Region I Administrator Thomas Murley, management remains "reactive rather than proactive". PSE&G's Eckert -- as if to underscore the criticism -- said that it will take "three to five years" to implement management improvements recommended by its consultants. Murley added that it was "simply too soon to check" how well PSE&G was doing, but noted that, since only two of 26 "action items" are done," progress is being made but it's quite slow." (emphasis added)[35]

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35. In commenting on the importance of this contention, Chairman Miller observed: "[This] is a matter which we feel the public interest, which this Board is required to look at -- as well as everyone else, we think the public interest would indicate we at least find out . . . what is meant." (Tr. 173) Mr. Dewey for the staff added: "[This] does appear to be an important question which this Board should take a look at regarding the safety implications [at Salem] . . . so the same problem doesn't occur at Hope Creek." (Tr. 178)

Current discovery has only barely scratched the surface on this vital contention. For example, PSE&G has directed the intervenor's attention to all the "reports, studies, recommendations and correspondence" which the company has filed in an on-going State of New Jersey proceeding.[36] Among the "quite bulky and numerous" materials -- which encompass many hundreds of pages -- are the following: B.E.T.A.'s* Report -- A Review of [PSE&G's] Corrective Action Program Related to Reactor Trip Breaker Failures at Salem Generating Station, Unit No. 1 (1983); M.A.C.'s**Management Assessment and Action Plan for Improvement of Salem Stations 1 and 2 Operations (1983); M.A.C.'s Assessment of [PSE&G's]Operations Quality Assurance Program for Salem Generating Stations Units 1 and 2 (1983); PSE&G's own Plan for the Improvement of Nuclear Operations (1983); and [PSE&G] Response to BETA's Report (1983).

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36. In the matter of the Motion of PSE&G Co. to reduce The Level of the Levelized Energy Adjustment Clause, BPU Docket No. 831-25. Applicants' Response to Public Advocate's First Set of Interrogatories, at 8.

*Basic Energy Technology Associates, Inc.

**Management Analysis Co.

Clearly, fact-gathering has only just begun. Much more focussing and winnowing out remains ahead. And just as clearly any assertion that no factual issue remains -- let alone the proper safety "inferences" to draw from undisputed facts -- is grossly premature and unsupportable.

Indeed, what has come to light only further thickens the mystery. For example, in answering the intervenor's first queries, PSE&G has referred, inter alia, to the HCGS FSAR, Table 13.1-1 (pp. 1-44), which contains the resumes of Hope Creek operating management. "None of the management team has experience in the operation of large LWR-BWR facilities. Almost all are [transferees from] the Salem project which is a large LWR-PWR."[37] (emphasis added). In short, those who have performed so erratically at Salem -- a distinctly different, pressurized water reactor -- are now to manage Hope Creek. Meanwhile, completion of the company's management program (the adequacy of which is untested) remains "three to five years" away.

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37. The Public Advocate's responses to the NRC staff's first set of Interrogatories, at 10-11

To paraphrase Senator Howard Baker, the continuing factual inquiry remains "What has PSE&G learned from the Salem incidents? And when will they apply the lessons learned to Hope Creek?" Nothing submitted by the applicants' in their barren 4 1/2 page motion addresses these questions or disputes their critical validity.[38]

Contention 3: Environmental Qualification

This contention reads as follows:

> The Applicants have not demonstrated that safety-realted electrical and mechanical equipment, components and subcomponents will be environmentally qualified at the start of operation and throughout the life of operation, so as to assure compliance with G.D.C. 1, 2 and 4 of 10 CFR Part 50, Appendix A. [General Design Criteria].
>
> (See Board's Order, at 11)

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38. The Public Advocate has extensive experience in this particular area due to active involvement in the economic investigation of the Salem "ATWS events" before the New Jersey Board of Utilities (n 36, supra). There, an inquiry into "management produce" was completed using Dr. Stephen H. Hannauer whose experience at the NRC and the ACRS is a matter of record. Dr. Hannauer testified at length on the company's management and is familiar with the reports submitted by the applicants.

The basis for this contention -- like that of the others -- has not been specifically challenged by the applicants. That there is a continuing factual issue in dispute can be found in the first instance from the commentary to the Board's Order. Thus, the Board noted that the issues the Advocate raised in his original Contention III[39] would be considered under this "new" Contention 3.[40] Moreover:

> Inasmuch as the Staff has not completed its review of the Applicants' [EQ] program . . . the Board is unable to find that Applicant does, or will, comply with 10 CFR Part 50.49.[41]

In the meantime, the staff, utility licensees, and various study groups wrestle on with the seemingly intractable problem of verifying that necessary safety devices will operate when called upon. These electrical systems and devices of questionable integrity were recently specified

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39. This allged that there was a serious risk of "degradation of electrical cables and other safety-related systems due to the heat and radiation in the [reactor] drywell." Board's Order, at 6.

40. Id., at 12.

41. Id., To the best of the intervenor's knowledge the staff has still not completed its review. Thus, on that ground alone, it must be concluded that both basic and all-important inferential fact questions remain unanswered.

in the Public Advocate's response to a staff interrogatory.[42] They include:

1. solanoid valves
2. barksdale pressure switches
3. static-o-ring pressure switches
4. ITT-Barton transmitters
5. limitorque valve operators
6. Anaconda flexible conduits
7. Rockwell International post-LOCA hydrogen recombiners
8. electrical penetration assembly
9. Model K connectors, and
10. terminal blocks

The overriding Public Advocate concern -- and one, no doubt, shared by all members of the public with the slightest awareness of the problem -- is that much equipment important to safety has not yet been "proven capable of surviving and performing [their] function under accident conditions" (i.e., the ability "to mitigate an accident or to shut

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42. The Public Advocate's Responses (etc.) at 11. The staff had opposed this contention on November 22 for failure to specify "which safety-related equipment should be environmentally qualified." Board Order, at 12. Perhaps this listing will meet the staff's earlier objection.

down a reactor following an accident in a nuclear plant"). Union of Concerned Scientists v. Nuclear Reg. Com'n, 711 F.2d 370, 371 (D.C. Cir. 1983). These are not merely theoretical concerns. Sandia Laboratories, under contract with the NRC, each year reports on the continued failure of the nuclear industry -- licensees, vendors, and parts suppliers -- to demonstrate under laboratory conditions resembling the actual environment of an operating reactor under stress, that critical equipment (listed earlier) will work. The tests keep coming up negative or, worse, possibly rigged.[43] U.C.S. v. NRC, supra, 372.

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43. These are referred to as testing "anomalies" in Bonzon, et al., "An Overview of Equipment Survivability Studies at Sandia National Laboratories (SNL)," presented at Proceedings, International Meeting on LWR Severe Accident Evaluation (Aug. 28-Sept. 1 1983), Cambridge, Mass., reported in Inside NRC (Oct. 31, 1983); Memorandum of W.J. Dircks to the NRC Commissioners, re: "Discussion/Possible Vote on Equipment Qualification Policy Statement and Proposed Rule," Encl. 3, Att. A. (Jan. 10, 1984). See, also, transcript of Jan. 6, 1984 Commission meeting on EQ testing progress, generally (Tr. 6, 12); Franklin Research Center, BN 83-128 and 83-128A (Oct. 6, 1983), reports on EQ testing.

To be sure, the staff is well-aware of the burgeoning EQ problem in operating reactors, inasmuch as the Commission has named it a "priority" matter. Petition for Emergency and Remedial Action, CLI-80-21, 11 NRC 707, 718 (1980). Nevertheless, it would be imprudent to assume that a general staff concern is sufficient to relieve this Board of responsibility to encourage a full evidentiary inquiry during this O.L. proceeding. 10 C.F.R. Part 50, Sec. 50.57 and 50.58 (In that regard, the transcript of the Commission meeting of January 6, 1983 shows the staff efforts to assure the Commissioners that it had looked behind licensee representations that equipment was qualified at operating units. Tr. 24, 28.29. Yet a year later, the staff admitted that its reviews had been limited to "what the licensee told us." Commission meeting of January 6, 1984, Tr. 63. The staff also justified its position on the expectation that a future Franklin Research Center report would confirm them. Tr. at 71. Yet this report later showed that only 8% of safety equipment passed EQ muster; for 71% EQ could not be verified.)[44]

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44. Union of Concerned Scientists' Supplemental Petition for Emergency and Remedial Action (Feb. 7, 1984) at 33-34. The Public Advocate is aware of possible disfavor

(footnote continued next page)

At any rate, even to consider dismissing or limiting this contention at this time is clearly premature. Evidence from all sources continues to mount that EQ issues will be the nuclear reactor safety issues of the era. Further and extended discovery is therefore an essential prerequisite to Board action.

(footnote no. 44 continued from previous page)

in quoting from the transcripts of Commission meetings. 10 C.F.R. 9.103 provides that, e.g., staff statements in these meetings "are not intended to represent final determinations or beliefs. Such statements may not be pleaded, cited or relied upon before the Commission or in any proceeding under . . . (10 C.F.R. Part 2) except as the Commission may direct." The Public Advocate, therefore, requests that the Board allow consideration of these references, subject to the understanding that they may not represent "final [staff] determinations or beliefs."

Conclusion

The applicant's motion to dismiss should be rejected. The cases the applicant cited to support their "Eisentein-only" theory of intervention neither address nor support their position. Nor have applicants referred to or discussed the analogous federal rules of pleading. Had they done so, the many cases on dismissal motions would have been equally inapposite. Clearly, the applicant's counsel, once again, has shown a cavalier disregard for the applicable law. And even now clearly, a fair appraisal of the existing state of the case at bar shows no grounds for any limiting action by the Board at this time.

For these and other reasons discussed earlier, the motion should be dismissed.

Respectfully submitted,

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Public Advocate of the State
of New Jersey

By: R. Will Potter
R. WILLIAM POTTER
Assistant Commissioner

Dated: April 30, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	:	
Public Service Electric and Gas Company	:	
(Hope Creek Generating Station)	:	Docket No. 50-354 OL

CERTIFICATE OF SERVICE

I certify that copies of the Public Advocate's Response to the Applicants' Motion to Dismiss the Proceeding were sent this date, April 30, 1984, to the following:

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