

August 13, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Alan S. Rosenthal, Chairman

Dr. W. Reed Johnson

Gary J. Edles

'85 AUG 16 AIO:51

OFFICE OF RECORDS
DOCKETING & SERVICE
BRANCH

In the Matter of:

BOSTON EDISON CO.

(Pilgrim Nuclear Power Station,
Unit 1)

Docket No. 50-293-OLA

JOHN F. DOHERTY'S BRIEF IN SUPPORT OF HIS APPEAL OF THE
JULY 19, 1985 ASLB ORDER DISMISSING HIS PETITION FOR LEAVE
TO INTERVENE AND REQUEST FOR HEARING.

Introduction

John F. Doherty, of 318 Summit Ave., Apt. #3, of
Brighton, Massachusetts 02135, (617) 232-3853, now files
this Brief in Support of his Appeal (together with a
Notice of Appeal) of an Atomic Safety and Licensing Board
(hereafter: ASLB) Memorandum and Order (hereafter: Order)
of July 19, 1985, (and designated ASLBP. No. 85-510-01 LA)
which dismissed his Petition for Leave to Intervene of
June 29, 1985.^{1/}

On May 21, 1985, a notice appeared in the Federal
Register announcing an amendment to the operating con-
ditions for the subject nuclear plant.^{2/} On June 29, 1985,
John F. Doherty (hereafter: Petitioner) filed with proper
service a "Request for Hearing and Petition for Leave to
Intervene", (hereafter: Petition) in this operating license
amendment proceeding. On July 9, 1985 an Atomic Safety

^{1/} This is the correct date. The Order in two places (p. 1
and p.4) gives June 21, 1985, which curiously would have
obviated the timeliness issue. (infra.)

^{2/} 50 Fed. Reg. 20969

and Licensing Board was established. On July 12, 1985, the Boston Edison Company filed an objecting answer (hereafter: Licensee Answer). The NRC Staff filed an objecting "response" (hereafter: Staff Answer) on July 19, 1985. Dated July 19, 1985, the Order subject of this Appeal, emerged. Subsequent, but less relevant to this Appeal, Petitioner filed an exception on July 27, 1985. On July 31, 1985, Chairman Rosenthal corrected Petitioner for filing an exception, and directed a filing under 10 CFR 2.714a.

The Amendment to the Operating License

The subject amendment of the May 21, 1985 Federal Register announcement would raise the limit for the K_{eff} to 0.95 from 0.90 for normal operation of the spent fuel pool. The limit for K_{eff} for the spent fuel pool would remain 0.95 for "abnormal conditions". If approved, a safety margin would be substantially reduced for the virtual entire time of plant operation since abnormal conditions seldom occur and are of short duration.

The use of 10 CFR 2.714a in this Appeal

10 CFR 2.714a(b) permits Appeals when an ASLB wholly denies a petition for leave to intervene as with this Petition, on the question whether the petition should have been granted. However, in this case, only that part of the order which dismissed the Petition for lack of standing would appear appealable under 10 CFR 2.714a. Here the question in part is should the Petition have been denied as early as it was, a procedural defect based complaint. In view of Chairman Rosenthal's July 31, 1985 Order, and the obvious need for a mechanism of appeal under this set of facts, the Petition is filed pursuant to 10 CFR 2.714a.

Denial of the Petition was based on two reasons

The Petition was dismissed for untimeliness and lack of standing, (Order, p. 4). Petitioner urges that denial for untimeliness was an abuse of power by the ASLB, being procedurally defective due to the fact Petitioner was not permitted time to reply to the Staff Answer and Licensee Answer. In addition, dismissal for lack of standing was procedurally defective for the same reason and the ASLB was further in error on the standing dismissal because it stated it used facts not judicially noticed or a part of the record in reaching its conclusion, (Order, p.2, and p.4).

Dismissal of the Petition based on lack of timeliness without an opportunity of reply was procedural error requiring a remedy

The ASLB predicated its denial of the Petition on the basis of untimeliness in part on the Federal Register notice of intervention. That notice states: "Non-timely filings of petitions for leave to intervene, amended petitions. . . will not be entertained absent a determination by the . . . Atomic Safety and Licensing Board designated to rule on the petition and/or request that the petitioner has made a substantial showing of good cause for the granting of a late petition and/or request."^{2/}

The ASLB treated this as saying unequivocally that if the first filing of an intervention petition does not treat the issue of lateness, it must deny it and not give the petitioner an opportunity to explain the reason for the late filing. By logical extension, the ASLB appears to be saying (Order, p.2) that it would have had to dismiss the Petition even if the Licensee or Staff did not mention the lateness. This is tantamount to a civil court rule saying defendant employed counsel need not raise the

^{2/} 50 Fed. Reg. 20970.

defense of statute of limitations, the Court will take care of that. However, besides the arguments made below, the Staff (Staff Answer, p.1) indicates the ASLB had discretion in the matter of dismissal for timeliness. It is unclear if the Staff expected the ASLB to give Petitioner a time for reply.

The ASLB's interpretation of the NRC regulations as demonstrated by its interpretation of its Federal Register notice is one overtly restrictive to the rights of members of the general public such as Petitioner. While there is no statutory or common law requirement that reply be permitted at the pleading stage as here, there is considerable practice which shows in civil suits or administrative proceedings that a reply where it answers new matters raised in a defendant's answer is appropriately permitted. In Vonella vs. Northern Assurance Co. et al., 160 A 2nd 672, (1960) the New Jersey Court of Appeals held the plaintiff had the right to file a reply against new affirmative defenses of the defendant prior to a dismissal.

In administrative practice, the Appeal Board of this agency, in Houston Lighting & Power Co., (Allens Creek Nuclear Generating Station, Unit 1, ALAB-565, 10 NRC 521 (1979), (a memorandum) stated that an ASLB should allow petitioners for leave to intervene an opportunity to reply to staff and applicant answers which were in some cases: lack of standing. In Allens Creek the Board had set a pre-hearing conference date and expected a large number of contentions from a large number of Petitioners. The Appeal Board stated (Slip op. p. 6), "But if in fact it (the Board) intends to rule on the admissibility of contentions without allowing the prospective intervenors to present argument, we see serious problems on the horizon." It concluded (Slip op. p. 8) "Thus when a defendant moves to dismiss a complaint (see, e.g., Rule 12(b), F. R. Civ. P.), a plaintiff is -- and must be-- allowed the oppor-

to respond to the motion.^{14/} ". Footnote 14 is relevant here because it pertains to the procedural rules as does Petitioner's Appeal. The footnote states, "In other words, to use just one example, a complaint in federal court must contain a jurisdictional allegation. But if the defendant argues that jurisdiction is lacking for some reason, the plaintiff is allowed to respond with arguments supporting his statement of jurisdiction." In the instant case, Petitioner believed the lateness was de minimus and would possibly be unnoticed, and thus hurried on discovering the notice 12 hours prior, to file the Petition.

The notice stated a determination would be made of the admissibility of a late filing party under a "substantial showing of good cause", but did not say only a single filing opportunity would be afforded the late filers to state the good cause. The Petition did not state justification for an untimely filing and this was raised as a defence by the Licensee. Yet, nothing empowers the ASLB (or a civil court federal judge) to blow the whistle and end the contest there. The notice cannot with certainty be read to say this would result if a Petitioner did not present his justification at once. The notice was interpreted by this Petitioner to say a filing objected to as untimely will have to have been judged late for good cause before the concerns of the petitioner about the changes in the nuclear plant will be entertained. And, certainly there would be opportunity for the petitioner to consider Staff and Licensee filings and THEN reply.

In a more recent proceeding, an ASLB denied an applicant motion that intervenors not be permitted to respond in writing to motions concerning late filed contentions. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2, LBP 82-89, 16 NRC 1355, 1356, 1982). Relying on Allens Creek, that Board held even late filed contentions

had to be heard in reply to objecting answers prior to adjudication as to admissibility. In both Allens Creek and Perry time was a serious consideration in an ongoing construction license and operating permit proceeding respectively. Here, unlike those two proceedings, time is not, since the Commission has yet to make its final determination that the Amendment involves no significant hazards.

Dismissal of the Petition based on lack of standing without an opportunity to reply was procedural error

The ASLB (Order, p.4) also dismissed the Petition for lack of standing of Petitioner. Petitioner, of course, was given no opportunity to reply to the Licensee's Answer which contested his assertion of standing. The ASLB evidently accepted the Licensee's argument (Licensee's Answer, p. 2) that at 43 miles distance from the plant, this Petitioner should not have standing because he, ". . . resides at the 'outer edge' of 'proximity standing' in every sense of the word." In the Staff's Answer (p. 13) Staff supports Petitioner's standing.

Further, in supporting its finding of lack of standing, the ASLB stated, "In making this ruling we note that we know of no scenario under which radiation attributable to the fuel pool would affect a residence 43 miles distant from the fuel pool; and Petitioner has not informed us of any such scenario." (Order, p. 4) Petitioner believes by its finding there were no scenarios in the Petition that met the ASLB's requirements, the ASLB violated the Administrative Procedures Act, (60 Stat. 237, (1946), 5 U.S.C., in particular § 557(c)(A) (Section 3b of the 1946 Act) since it is a finding outside the record and based on information not judicially noticed. That Petitioner had not informed the ASLB of any scenario (or indeed if Petitioner could) is in the realm of contentions.

The Staff Answer, (p. 15, f.n. 2) points out contentions are not required in a petition for leave to intervene. See: Consumers Power Co. (Midland Plant, Units 1 and 2, LBP-78-27, 8 NRC 275,277 (1978)).

In summary, Petitioner urges dismissal for lack of standing of his Petition without allowing a reply was error requiring reversal by the Appeal Board.

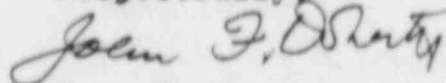
The untimeliness of the Petition was de minimus

Finally, the fact the Petition was received after the June 21, 1985 deadline was not cited by the Licensee or Staff as harming any interest of their own. One reason for this may be simply that the amendment proposal had not been approved by the NRC as of July 17, 1985, according to a letter from D. Vassallo, Chief, Operating Reactors Branch #2, Division of Licensing.^{4/} A hearing on any license amendment proposed as containing no significant hazards cannot be scheduled until this is done.

Conclusion

For the reasons above, Petitioner urges that the Appeal Board direct the ASLB to permit Petitioner to reply to the Licensee's Answer of July 12, 1985, and the Staff's Answer of July 19, 1985, and that they consider its contents in a fresh determination of this Petitioner's status in the proceeding.

Respectfully,



John F. Doherty

Appearing pro se

(NOTE: Service of Process for this Brief appears with the enclosed Notice of Appeal.)

^{4/}Letter to Petitioner, enclosing copy of the proposed amendment.