UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Alan S. Rosenthal, Chairman
Dr. W. Reed Johnson
Gary J. Edles

September 5, 1985
(ALAB-816)

In the Matter of	)	
BOSTON EDISON COMPANY	)	Docket No. 50-293 OLA
(Pilgrim Nuclear Power Station)	)	

John F. Doherty, Boston, Massachusetts, petitioner pro se.

Thomas G. Dignan, Jr., R.K. Gad, III, and William S. Stowe, Boston, Massachusetts, for the applicant Boston Edison Company.

Gregory Alan Berry for the Nuclear Regulatory Commission staff.

DECISION

I.

A May 21, 1985, Federal Register notice informed the public of, among other things, the request of the Boston Edison Company (applicant) for an amendment to the operating license for its Pilgrim nuclear facility. The amendment would permit the applicant to change the technical specifications governing the facility's spent fuel storage pool.[1] The proposed change would raise the K-effective

[1] 50 Fed. Reg. 20,969, 20,971.

limit of the pool from 0.90 to 0.95 for normal conditions.[2] According to the notice, "[t]he K-effective of the pool is [currently] limited to 0.95 for abnormal conditions and this would not be changed. The K-effective limit of 0.95 would then apply to both normal and abnormal conditions in conformance with NRC's current practice."[3]

The notice further advised the reader that the Commission had made a "proposed determination" that the desired amendment involved "no significant hazards consideration;" that is, it "would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any

---

[2] Ibid. The K-effective concept has been explained in these terms:

> A system containing fissionable material -- such as a spent fuel pool -- is "critical," or "supercritical," if it is capable of supporting a neutron chain reaction. This condition is expressed in terms of the "effective neutron multiplication factor" (k_{eff}) -- i.e., the ratio of the number of neutrons produced by fission in each generation to the number of neutrons lost by absorption and leakage. Thus, when a system is critical or supercritical, k_{eff} equals or is greater than 1.0.

Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-725, 17 NRC 562, 564 n.2 (1983). See also Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units Nos. 1 and 2), ALAB-334, 3 NRC 809, 819 n.24 (1976).

[3] 50 Fed. Reg. at 20,971.

accident previously evaluated; or (3) involve a significant reduction in a margin of safety."[4] Nonetheless, those persons whose interest might be affected by the amendment were provided the opportunity to file a request for hearing and a petition for leave to intervene. In this connection, the notice stated that the deadline for any such submission was June 21, 1985, and directed attention to 10 CFR 2.714, the particular section of the Commission's Rules of Practice governing petitions to intervene in NRC proceedings.[5] Prospective intervenors were told that a nontimely petition would not be entertained unless the Licensing Board determined that the petitioner had made a "substantial showing" on the five lateness factors set forth in section 2.714(a).[6]

---

[4] Id. at 20,969; see also Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-807, 21 NRC 1195, 1200 n.12 (1985). The basis for that determination was summarized at 50 Fed. Reg. at 20,971.

[5] Id. at 20,969.

[6] Id. at 20,970. Those factors, to be balanced by the Board, are:

> (i) Good cause, if any, for failure to file on time.
>
> (ii) The availability of other means whereby the petitioner's interest will be protected.
>
> (iii) The extent to which the petitioner's participation may reasonably be expected to assist in

(Footnote Continued)

The only request for hearing and intervention petition submitted in response to the notice (hereafter collectively referred to as the "petition") was that of John F. Doherty. Filed on June 29, 1985, it was eight days late.[7] It made no reference to that fact, however, and thus did not undertake to address the five section 2.714(a) lateness factors. Rather, Mr. Doherty confined himself to a discussion of his standing and how his interest might be affected by the proposed license amendment. On the first score, he alleged principally that his Boston, Massachusetts residence is 43 miles from the Pilgrim facility (located near Plymouth, Massachusetts on Cape Cod Bay) and, further, that he consumes food products (such as cranberries and fish) grown or caught in the vicinity of the facility.[8] On the latter

---

(Footnote Continued)
developing a sound record.

(iv) The extent to which the petitioner's interest will be represented by existing parties.

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

[7] Inasmuch as the petition mentioned the Federal Register notice, Mr. Doherty presumably had read the notice and was aware of the June 21 filing deadline imposed by it.

[8] Request for Hearing and Petition for Leave to Intervene with Regard to Unnumbered Amendment to Operating License DPR-35, Announced in the Federal Register, May 21, 1985 (June 29, 1985) at 1-2. Mr. Doherty additionally claimed standing as a ratepayer of the applicant. Id. at 2.

score, his articulated concern is that the raising of the K-effective limit for normal conditions to 0.95 would enhance the possibility that criticality would take place in the spent fuel pool, which in turn assertedly might occasion the release of radiation "through spent fuel heat-up and melt."[9]

Both the applicant and the staff responded to the petition. The applicant urged that the petition be denied because Mr. Doherty had demonstrated neither that his tardiness should be overlooked nor that he meets the established standing test.[10] For its part, the NRC staff differed with the applicant on the standing question but agreed that Mr. Doherty had not met his burden with regard to the lateness of the petition.[11] As the staff saw it, the Licensing Board should either deny the petition as untimely or require Mr. Doherty to make a further showing on the section 2.714(a) lateness factors.[12]

---

[9] Ibid.

[10] Licensee's Answer to John F. Doherty's Request for a Hearing and Petition for Leave to Intervene (July 12, 1985) at 2-8.

[11] NRC Staff Response to John F. Doherty's Petition for Leave to Intervene (July 19, 1985) at 9-10, 11-13.

[12] Id. at 15.

In a July 19, 1985 memorandum and order, the Licensing Board denied the petition both because it was late and because the Board concurred in the applicant's view that Mr. Doherty lacked standing to challenge the license amendment in question.[13] The Board's treatment of the lateness matter was brief. After observing that Mr. Doherty "should have been aware of the need for timely filings because that need was explained in the Federal Register notice," the Board stated that it was required to dismiss the petition because he "has not shown good cause for his late filing."[14]

Mr. Doherty appeals this result under 10 CFR 2.714a. His principal claim is that the Licensing Board erred in denying his petition without giving him an opportunity to reply to the responses of the applicant and the staff.[15]

---

[13] LBP-85-24, 22 NRC ___.

[14] Id. at ___ (slip opinion at 1-2). In an accompanying footnote, the Board alluded to the fact that a balancing of all of the 10 CFR 2.714(a) lateness factors is a condition precedent to the grant of an untimely petition. Id. at ___ n.3.

[15] 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 (August 13, 1985) at 3-7. Mr. Doherty also asserts that the untimeliness of the petition was of no practical significance in that, as of July 17, 1985, the applicant's proposal had not been approved by the staff. Id. at 7. Still further, he maintains that the Licensing Board relied upon extra-record information (not subject to official notice) in reaching its conclusion on the standing question. Id. at 6.

Insofar as the timeliness matter is concerned, Mr. Doherty believes that the Licensing Board could not deny the petition on lateness grounds unless either the applicant or the staff raised the issue. On the premise that untimeliness is akin to an affirmative defense and must be asserted as such,[16] he reasons that he was justified in withholding any discussion of the lateness factors until the receipt of the responses to the petition. If those responses did not oppose the petition as late, that would be the end of the matter. If, on the other hand, the petition was opposed by one or more parties on tardiness grounds, then his obligation to address the lateness factors would ripen and he would be entitled to fulfill this obligation by way of a reply to the opposition(s).[17]

Both the applicant and the staff dispute this line of argument and urge affirmance of the result below.[18]

---

[16] Id. at 4.

[17] Id. at 3-4. Mr. Doherty does explicitly acknowledge, however, that "there is no statutory or common law requirement that reply be permitted at the pleading stage as here." Id. at 4.

[18] Licensee's Brief (August 27, 1985); NRC Staff Brief in Opposition to John F. Doherty's Notice of Appeal (August 29, 1985). The applicant supports the Licensing Board on both the untimeliness and standing questions. The staff's endorsement of the decision below is confined to the untimeliness matter.

II.

In deciding the appeal before us, we need not and do not reach the question whether either his place of residence or his consumption of food products originating in the vicinity of the facility serves to clothe Mr. Doherty with the requisite mantle of standing to challenge the proposed amendment to the Pilgrim operating license.[19] For, given its failure even to address the section 2.714(a) lateness factors, his intervention petition was correctly denied because it was untimely.

A. There is no conceivable merit to Mr. Doherty's claim that his duty to confront the five lateness factors did not materialize until after the applicant and the staff had responded to the intervention petition and raised the matter of its untimeliness. To begin with, on its face section 2.714(a)(1) lays to rest his suggestion that the lateness of such a petition is in the nature of an affirmative defense, to be considered by a licensing board only if the board is asked to do so by a party to the proceeding. In plain terms, the section permits a licensing board to grant an untimely petition only if, upon a

---

[19] We note in passing, however, that his claim of standing based upon ratepayer status is in the teeth of controlling Commission precedent. Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614 (1976).

consideration and balancing of the lateness factors, it determines that the petition should be granted: "Nontimely filings 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 petition and/or request should be granted based upon a balancing of the [lateness factors]."[20] In short, it is of no consequence whether, in an opposition to the late petition, one of the other litigants points to the untimeliness. Even if all of the parties are inclined to waive the tardiness, the board nevertheless is duty-bound to deny the petition on its own initiative unless it is persuaded that, on balance, the lateness factors point in the opposite direction.

It is equally clear that the burden of persuasion on the lateness factors is on the tardy petitioner and that, in order to discharge that burden, the petitioner must come to grips with those factors in the petition itself.[21] The underlying reason for this requirement is particularly apparent in the context of the first factor. A licensing board hardly could determine whether there was justification for the untimely filing without knowing why the petition was

---

[20] Emphasis supplied.

[21] See Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, 12 NRC 350, 352-53 (1980).

not submitted by the prescribed deadline -- information peculiarly within the possession of the petitioner. Likewise, in most instances at least, the board will not be able to assess confidently the third factor (the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record) without having before it the petitioner's reasons for believing that the factor weighs in his or her favor.[22]

---

[22] Mr. Doherty points to our holding some years ago that, "[b]efore any suggestion that a [timely] contention should not be entertained can be acted upon favorably [by the licensing board,] the proponent of the contention must be given some chance to be heard in response." Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 525 (1979). That holding has no pertinence here. It rests on the consideration that intervenors (or petitioners for intervention) "cannot be required to have anticipated in the contentions themselves the possible arguments their opponents might raise as grounds for dismissing them." Ibid. (emphasis in original). But, as seen above, late petitioners are not called upon to anticipate what their opponents might have to say about the untimeliness; rather, their obligation is to establish affirmatively at the threshold (i.e., in the late petition itself) that a balancing of the five lateness factors warrants overlooking the tardiness.

Mr. Doherty's reliance upon Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-89, 16 NRC 1355, 1356 (1982), is equally misplaced. The situation in that case was markedly different from that at bar. There, an intervenor had sought to justify the filing of a late contention on the ground that it was based upon new information which had just recently become available. In response, the applicant asserted that the information had been available at an earlier time. Relying upon what it deemed to be "the rationale of Allens Creek," the Licensing Board decided to have the intervenor respond to this assertion.

It is thus not surprising that the Federal Register notice specifically informed Mr. Doherty and others similarly situated that a belated intervention petition would not be entertained in the absence of a "substantial showing" by the petitioner that there was warrant for granting it -- a showing that was to focus on the lateness factors.[23] Far less understandable, however, is why Mr. Doherty paid no heed to that admonition.

Our puzzlement in this regard is enhanced by the fact, noted by both the applicant and the staff, that Mr. Doherty is by no means a newcomer to NRC licensing proceedings.[24] Some six years ago, while a resident of Texas, he succeeded in obtaining intervenor status in the Allens Creek construction permit proceeding and actively participated in that proceeding until its termination three years later in

---

[23] See p. 3, supra.

[24] We do not mean to imply that, had this been Mr. Doherty's first appearance in such a proceeding, his failure to comply with the Rules of Practice would have been excusable. As emphasized on more than one occasion, there is an "imperative necessity that all participants in NRC adjudicatory proceedings -- whether lawyers or laymen representing themselves or organizations to which they belong -- familiarize themselves at the outset with" those rules. Perkins, 12 NRC at 352, quoting from Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-609, 12 NRC 172, 173 n.1 (1980).

October 1982.[25] Of greater present significance, after acquiring his current Massachusetts residence in June 1983, he filed a late intervention petition in the operating license proceeding involving the Seabrook nuclear facility on the New Hampshire seacoast. In light of his present line of argument, one might have thought that that petition similarly would have said nothing with respect to its tardiness. But such was not the case. Acknowledging that it was late, the petition devoted several pages to the reasons why, in Mr. Doherty's view, each of the factors favored the allowance of intervention.[26] In the circumstances, it would seem reasonable to infer that, at one time at least, Mr. Doherty fully apprehended the reach of the affirmative obligation imposed upon the petitioner

---

[25] See Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 384 (1979); ALAB-625, 13 NRC 13 (1981); LBP-82-94, 16 NRC 1399 (1982).

[26] John F. Doherty's Petition for Leave to Intervene (September 6, 1983), filed in Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), Docket Nos. 50-443 and 50-444, at 5-7. The petition was denied by the Licensing Board on the basis of its balancing of the five lateness factors. On Mr. Doherty's appeal, we affirmed the result on an unrelated ground. See ALAB-758, 19 NRC 7 (1984).

who appears on the scene after the prescribed deadline has passed.[27]

B. It is manifest from the above analysis that, as he should have readily appreciated, Mr. Doherty possessed no right to respond to the applicant and staff answers to his petition -- i.e., a second opportunity to make the "substantial showing" on the five lateness factors that should have been included in the petition itself. And, although the Licensing Board might have accorded him that opportunity as a matter of discretion, it was not obliged to do so. In short, Mr. Doherty ignored the procedural guidance contained in the Federal Register notice -- as well as the terms of 10 CFR 2.714(a)(1) and his own past practice in Seabrook -- at his peril.

Nor are we inclined to exercise our independent discretion to allow Mr. Doherty a fresh chance to explain why a balancing of the lateness factors supports the grant of his petition.[28] Among other things, it does not appear

---

[27] In contrast to the eight-day tardiness here involved, Mr. Doherty's Seabrook intervention petition was almost two years late. But, contrary to his possible belief, that distinction has no legal importance insofar as concerns the necessity to bring the lateness factors into play (although, obviously, the extent of the tardiness may influence the outcome on the assessment of certain of those factors).

[28] In this regard, we find it curious that, in his (Footnote Continued)

that saddling Mr. Doherty with the consequences of his own dereliction might result in a possibly serious safety problem escaping proper scrutiny. While the merits of the proposed license amendment are not before us, it can be said at this juncture that we neither have been provided with nor know of any technical basis for questioning the staff's judgment that, if approved by it, the 0.95 K-effective limit will furnish an adequate margin of safety.[29]

For the foregoing reasons, the Licensing Board's denial of Mr. Doherty's request for hearing and petition for leave to intervene[30] is affirmed.

(Footnote Continued)
appellate papers, Mr. Doherty has shed no light on what he would have told the Licensing Board on the lateness factors if given a second chance to do so. For all we know, his case on the factors is so weak that, had he possessed a right to reply, the denial of that right by the Licensing Board would have been harmless error. We expect parties taking appeals on purely procedural points to explain precisely what injury to them was occasioned by the asserted error. Cf. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1151 (1984).

[29] As the May 21 Federal Register notice observes (see p. 2, supra), a K-effective limit of 0.95 under all conditions is in accordance with current NRC staff requirements. It is also consistent with industry standards for spent fuel storage facilities. See Big Rock Point, 17 NRC at 567-68.

[30] LBP-85-24, supra.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board