

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
CAROLINA POWER & LIGHT COMPANY)	Docket No. 50-400-LA
)	
(Shearon Harris Nuclear Power Plant))	ASLBP No. 99-762-LA
)	

NRC STAFF OPPOSITION TO ORANGE COUNTY'S MOTION FOR
EMERGENCY STAY OF LBP-01-09 AND NRC STAFF MOTION TO STRIKE

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April 2, 2001

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INTRODUCTION

On March 16, 2001, the Board of Commissioners of Orange County (BCOC), pursuant to 10 C.F.R. § 2.788, filed "Orange County's Request for Emergency Stay of LBP-01-09 (Stay Motion)." The NRC staff (Staff) hereby files its response in opposition to BCOC's request for a stay. As discussed below, BCOC has not met the criteria for the granting of a stay in this matter. Accordingly, the motion for stay should be denied. The Staff also moves to strike those portions of the March 16, 2001 declaration of Gordon Thompson not relevant to BCOC's stay motion.

BACKGROUND

This matter arises as a result of a December, 1998, application by Carolina Power and Light Company ("CP&L") for a license amendment to increase the spent fuel storage capacity at its Shearon Harris facility by placing into service two previously inactive spent fuel pools (labeled C and D). BCOC subsequently sought intervention and the Licensing Board granted intervention and admitted two technical contentions. LBP-99-25, 50 NRC 25 (1999). CP&L requested a Subpart K hearing, pursuant to 10 C.F.R. § 2.1109. The matter proceeded to oral argument, pursuant to

Subpart K, resulting in the denial of a hearing and resolution of the two technical contentions in favor of CP&L. LBP-00-12, 51 NRC 247 (2000).

On December 15, 1999, the Staff issued an Environmental Assessment and Finding of No Significant Impact (FONSI). 64 Fed. Reg. 71514 (Dec. 21, 1999). BCOC subsequently filed a motion for admission of late-filed environmental contentions, which was granted as to one contention. LBP-00-19, 52 NRC 85 (2000). On December 7, 2000, the Licensing Board heard oral argument on this environmental contention.

On December 21, 2000, the Staff issued its final No Significant Hazards Consideration (NSHC) determination and the requested license amendment. On December 22, 2000, BCOC submitted a petition for review and a request for stay of the NRC Staff's NSHC determination and issuance of the license amendment. Following a series of motions, responses, and replies, on February 14, 2001, the Commission issued a Memorandum and Order summarily rejecting BCOC's petition for review as inconsistent with the Commission's regulations, asking the Staff to provide information to aid the Commission in determining whether it should exercise its discretion to review the NSHC determination, and directing the licensee not to store spent fuel under the license amendment "pending further Commission order or a Licensing Board decision approving the amendment." CLI-01-07, 53 NRC _____, slip op. at 1 (2001).

On March 1, 2001, the Licensing Board issued its decision on the one remaining environmental contention, authorizing the requested license amendment and dismissing the proceeding. LBP-01-09, 53 NRC _____, slip op. at 42 (2001). On March 16, 2001, BCOC filed the instant motion for emergency stay. The motion was accompanied by the declaration of Gordon Thompson.

DISCUSSION

A. Motion to Strike Portions of the Thompson Declaration.

On March 16, 2001, Dr. Gordon Thompson filed a lengthy declaration in support of BCOC's stay motion. See Declaration of 16 March 2001 by Dr. Gordon Thompson in Support of Orange County's Stay Motion of 16 March 2001 (Thompson Declaration). The Commission's regulations state that an application for a stay must be no longer than ten pages and must contain: (1) a concise summary of the decision; (2) a concise statement of the grounds for a stay; and (3) appropriate references to the record or affidavits supporting the grounds for a stay. See 10 C.F.R. § 2.788(b). The Commission has previously held that documents appended to an appellate brief will be stricken where they constitute an attempt to circumvent page limitations or an unauthorized attempt to supplement the record. See *Philadelphia Electric Power Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 720 n.51 (1995); *Toledo Edison Co.* (Davis Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-430, 6 NRC 457, 458 (1977).

The material in paragraphs 15 through 76 of the Thompson Declaration addresses issues such as "Spent Fuel Fires," "Proposed Spent Fuel Pool Expansion at Harris," and "Consideration of Pool Fires in the Harris License Amendment Proceeding," and similar substantive topics. This is material that is not relevant to BCOC's Stay Motion. Nor is it material relied upon by BCOC. The Stay Motion states that the Thompson Declaration is being submitted in order to demonstrate that the license amendment would cause irreparable injury. Stay Motion at 1. The Stay Motion makes
n o f u r t h e r r e f e r e n c e t o t h e d e c l a r a t i o n .¹

¹ Although it may be argued that some of the paragraphs are an effort to demonstrate the potential of success on the merits, that argument is not made in the Stay Motion. In any event, such an argument would be disingenuous considering the scope of the declaration, which goes far beyond such argument and clearly constitutes an attempt to supplement the record, circumvent the page limitations and to argue points more properly argued elsewhere.

As stated above, BCOC did not rely upon or cite the Thompson Declaration for any purpose other than to support its irreparable injury argument. Nonetheless, the Staff notes the following

Based on the foregoing, all material not related to the irreparable injury criterion of 10 C.F.R. § 2.788 (is found in paragraph 77 of the declaration) should be stricken. *See Toledo Edison Co.*, ALAB-430, 6 NRC 457-58.

B. NRC Staff Response to Motion for Stay.

BCOC is moving to stay the Licensing Board's order terminating this proceeding and authorizing the issuance of the license amendment. The Staff submits that, for the reasons set forth below, the Commission should deny the request for a stay.

1. Petitioners Have Not Met the Standards for Obtaining a Stay

Four traditional factors are applicable to the grant of a stay: 1) whether the petitioners have demonstrated that they are likely to prevail on the merits; 2) whether there will be irreparable harm to the petitioners if no stay is granted; 3) whether any other party will be harmed by a stay; and 4) where the public interest lies. 10 C.F.R. § 2.788. *See also Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 5 (1986), *rev'd and remanded on other grounds, San Luis Obispo Mothers for Peace v. NRC*, 799 F.2d 1268 (9th Cir. 1986). The party moving for a stay bears the burden of persuasion in showing that these factors favor the granting of a stay. *See Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 and 2),

about the declaration: Paragraphs 4 through 14 contain Paragraphs 15 through 40 present material that is irrelevant to BCOC's request for a stay. Paragraphs 41 through 76 contain opinion or merely restate BCOC's positions and add nothing new to the case. Paragraphs 57 through 76 additionally contain information not addressed in BCOC's Motion that is clearly an attempt to circumvent the Commission's page limitations. Thompson Declaration, ¶¶ 15 - 76. The Staff also notes that the declaration makes numerous claims regarding the Board's alleged lack of understanding of the technical issues. *See e.g.* Thompson Declaration at ¶¶ 45, 49-53, 55. Such claims are baseless, especially in light of Dr. Thompson's lack of expertise in many of the technical issues raised in this case. *See "NRC Staff Brief and Summary of Relevant Facts, Data and Arguments Upon Which The Staff Proposes to Rely at Oral Argument on Environmental Contention EC-6,"* at 18-23 (November 20, 2000). The remainder of the Thompson Declaration is apparently based on his dissatisfaction with the Board's conclusions because they differ with his own, and do not meet the criteria of 10 C.F.R. § 2.788.

CLI-81-27, 14 NRC 795, 796 (1981). For the reasons set forth below, the Staff submits that BCOC has failed to meet its burden and that its request for a stay should be denied.

a. Irreparable Injury

BCOC alleges irreparable injury resulting from the potential for a severe accident in the Harris spent fuel pools. According to BCOC, the Licensing Board has significantly understated the potential for a severe accident at the Harris facility and that the consequences of such a severe accident would be “catastrophic.” See Stay Motion at 9. BCOC further alleges that it would suffer irreparable injury if CP&L is allowed to continue making the modifications to pools C and D that are now authorized by LBP-01-09. Specifically, BCOC argues that the costs associated with the modifications to the spent fuel pools may jeopardize fair consideration of other alternatives in any EIS that the Commission may order the Staff to prepare. *Id.*

The Commission has held that irreparable injury is the “most crucial factor” in determining whether to grant a stay. *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-03, 31 NRC 219, 258 (1990) (citations omitted). A party that cannot establish irreparable injury, “is not entitled to a stay in the absence of a showing that a reversal of the decision under attack is not merely likely, but a virtual certainty.” See *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 747 (1985).

BCOC must reasonably demonstrate, not merely allege, irreparable injury. *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-814, 22 NRC 191, 196 (1985). BCOC asserts that the potential for a severe accident at the Harris facility constitutes irreparable injury. The principle is well established, though, that speculation about the possibility of a nuclear accident does not constitute the type of irreparable injury required for staying a licensing decision. See, e.g. *Seabrook Station*, CLI-90-3, 31 NRC at 259-60; *Perry*, ALAB-820, 22 NRC at 748 n.20. Furthermore, the Commission has previously found that “[m]ere exposure to risk. . . does not

constitute irreparable injury if the risk, as here, is so low as to be remote and speculative. . . .”
Diablo Canyon, CLI-85-14, 22 NRC at 180.

BCOC was given ample opportunity to present evidence and arguments to the Licensing Board supporting their claim that bringing spent fuel pools C and D into service posed a significant risk to the public. The Licensing Board carefully weighed their evidence and arguments, as well as the evidence and arguments presented by the Staff and CP&L, and found that the risk of an accident was so low as to be remote and speculative. *See* LBP-01-09 at 41. In such a fact specific area of disagreement, the Commission’s deference to the trier of fact is quite high. *Hydro Resources, Inc.*, (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 324 (1998). Furthermore, CP&L has stated that it will not be placing spent fuel into pool C until June 2001 and that spent fuel will not be placed into pool D until 2016 at the earliest. The placing of spent fuel into pool C can be reversed should the Commission so order. Therefore, even if BCOC were to suffer harm from the placing of spent fuel into pool C, it would not constitute the irreparable injury necessary to justify the issuance of a stay. Accordingly, the Staff submits that given the remote and speculative nature of BCOC’s postulated accident scenario, BCOC has failed to demonstrate the type of irreparable injury required for staying this licensing decision.

BCOC also alleges that allowing CP&L to continue making the modifications to pools C and D that are now authorized by LBP-01-09 may jeopardize fair consideration of other alternatives in any EIS that the Commission may order the Staff to prepare. Stay Motion at 9. Although the commitment of resources and other economic factors are properly considered in the NEPA decision-making process, none of the work that CP&L is performing to bring pools C and D into service is irreversible and none of it causes any injury to BCOC or the public.² CP&L’s activities

² Dr. Thompson, in his December 22, 2000, declaration in support of BCOC’s petition for review of the same date, stated that BCOC would not object to the activation of pools C and D prior to completion of an EIS if certain conditions were satisfied. It therefore seems somewhat disingenuous to argue now that activation of pools C and D will cause irreparable injury.

and expenditures to bring pools C and D into service will be limited and will not prejudice the fair consideration of reasonable alternatives should the Commission order the Staff to prepare an EIS. Therefore, these expenditures do not constitute any irreparable injury to BCOC. *See Kerr-McGee Chemical Corp.*, ALAB-928, 31 NRC 263, 267-69 (1990).

Because BCOC has failed to establish any “discernible irreparable injury” associated with operation of the spent fuel pools during the pendency of an appeal G8 should Commission review be granted, it is not necessary for the Commission to consider any of the other stay criteria at length. *See Perry*, ALAB-920, 22 NRC at 749.

b. Success on the Merits

BCOC asserts that it will prevail on the merits upon review of both LBP-00-12 and LBP-01-09. The likelihood of success on the merits that must be demonstrated to obtain a stay turns in large part on the strength of the movants’ showing on the other three factors. *See Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-385, 5 NRC 621, 631-32 (1977). Absent a finding of irreparable injury, the movant must show “that a reversal of the decision under attack is not merely likely, but a virtual certainty.” *See Kerr-McGee Chemical Corp.*, ALAB-928, 31 NRC 263, 269 (1990).

(i) LBP-00-12

In LBP-00-12, the Licensing Board ruled that enrichment/burnup/boron solubility measures “fall within the confines of those criticality control measures sanctioned by GDC 62.” LBP-00-12, 51 NRC 247, 259 (2000). BCOC alleges that the Licensing Board’s decision is inconsistent with the plain language and regulatory history of GDC 62 and constitutes reversible error. The Licensing Board stated in its decision, however, that the precise meaning of “physical procedures or processes” is not as clear as BCOC alleges. *See id.* Accordingly, the Licensing Board looked

to the legislative history of this provision to determine whether administrative and procedural controls constitute acceptable criticality control measures under GDC 62. After reviewing the change in the wording of this provision from the original proposal to the present wording, the Licensing Board reasonably concluded that the term “processes” in the phrase “physical procedures or processes” encompasses administrative measures to ensure that criticality cannot occur. *See id.* at 259-60.

The Licensing Board found further support for this conclusion in the Staff’s interpretation of GDC 62 as embodied in draft Regulatory Guide 1.13 and in the Commission’s prior adjudicatory treatment of criticality-related matters. As the Licensing Board stated in its opinion, over the past 18 years the Staff has authorized the use of credit for burnup under GDC 62 as an administrative criticality control measure. *See id.* at 260. In addition, several adjudicatory decisions appear to accept the Staff-endorsed concept of administrative controls to prevent SFP criticality.³ *See id.* Finally, the Licensing Board noted that the language of 10 C.F.R. §§ 50.68(b)(2), (4) and (7) appears to contemplate the use of enrichment, burnup and soluble boron as criticality control measures. *See id.* While recognizing that these factors are not dispositive of the issue, the Licensing Board found that they reinforce the Board’s conclusion that GDC 62 encompasses administrative measures to ensure that criticality cannot occur. *See id.*

The Licensing Board’s ruling was based on a clear and reasoned interpretation of GDC 62, its history, and the Staff’s application of GDC 62.⁴ Having suffered no irreparable injury, BCOC must show that a reversal of the Licensing Board’s ruling on GDC 62 is a virtual certainty. The

³ *Consumers Power Co.* (Big Rock Point Nuclear Plant), ALAB-725, 17 NRC 562 (1983); *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Unit 1), LBP-89-12, 29 NRC 441, *aff’d on other grounds*, ALAB-921, 30 NRC 177 (1989).

⁴ Moreover, the Licensing Board in the *Millstone* case recently held that GDC 62 permits using burnup and enrichment as criticality control measures. *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit No. 3), LBP-00-2652 NRC 181 (2000). This matter is presently on review before the Commission.

Staff submits that BCOC has failed to show that a reversal of the Licensing Board's ruling is even likely and therefore is not entitled to a stay.

(ii) LBP-01-09

BCOC first alleges that the Licensing Board erred in applying the standard used in Subpart K hearings by determining the merits of the case rather than simply deciding whether there was a genuine dispute of a material fact warranting a hearing. Stay Motion at 5. The Commission's regulations governing Subpart K contemplate that the Licensing Board shall dismiss a proceeding once it determines that there are no disputed issues of fact or law requiring resolution in an evidentiary hearing. See 10 C.F.R. § 2.1115(a)(2). This necessarily requires the Board to dispose of issues not designated for a hearing by determining which set of facts shall prevail and resolving the issue.

Having determined that there were no genuine and substantial disputes of fact or law that could only be resolved with sufficient accuracy in an evidentiary hearing, the Licensing Board properly dismissed the proceeding. BCOC alleges that it met its burden of demonstrating a genuine and substantial dispute of material fact. Stay Motion at 6. Like a party seeking summary disposition, BCOC must present some probative evidence of "a genuine and substantial dispute of fact which can only be resolved with sufficient accuracy by the introduction of evidence in an adjudicatory hearing." 10 C.F.R. § 2.1115(a)(2). Yet, BCOC has failed to provide any citations to the record that would justify overturning the Licensing Board's finding that there were no genuine and substantial disputes of fact or law warranting an evidentiary hearing.

BCOC next alleges that the Licensing Board's ruling was based on an arbitrary and capricious selection of facts favorable to the NRC Staff. Stay Motion at 6-7. BCOC repeatedly alleges that the Board misrepresents, misconstrues, completely ignores or completely misunderstands the evidence that it presented. Although BCOC makes these allegations, it

consistently fails, with one exception,⁵ to cite to the record to support its allegations that the Licensing Board acted in an arbitrary and capricious manner. Stay Motion at 7 n.13. The Stay Motion merely makes allegations and refers to the Board's opinion without more. Having failed to provide any evidence to support its allegations of error on the part of the Board, BCOC has not met its burden of providing sufficient information and cogent argument to enable the Commission to determine the precise nature of the errors that it attributes to the Board. *See Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285 (1994), *aff'd*, *Advanced Medical Systems, Inc. v. NRC*, 61 F.3d 903 (6th Cir. 1995).

Moreover, BCOC repeatedly misrepresents the Licensing Board's analysis and decision. For example, BCOC alleges that the Board disregarded its criticism of the method used by the Staff to estimate onsite radioactivity levels. Stay Motion at 7 n.13. In fact, the Board directly addressed BCOC's criticisms and found them "unrealistically conservative" and "lack[ing] a reasonable scientific basis." LBP-01-09 at 26. Similarly, BCOC asserts that the Licensing Board made "its own arbitrary judgments on the merits of the case" without the benefit of systematic analysis by expert witnesses. Stay Motion at 7 n.14. Yet the Board had the benefit of extensive affidavits provided by numerous experts and other witnesses throughout this proceeding.

BCOC asserts that the Licensing Board "must do more than reach conclusions; it must 'confront the facts.'" Stay Motion at 7 n.14 (*citing Public Service Electric and Gas Co.* (Hope Creek Generating Station, Units 1 and 2) ALAB-429, 6 NRC 229, 237 (1977)). Yet it is clear from the Licensing Board's lengthy and thorough decision that the Board carefully weighed the facts and evidence presented by all the parties in reaching its decision. BCOC's allegations are not

⁵ In alleging that the Board ignored its evidence regarding the type of analysis needed to make a credible probability analysis, BCOC makes reference to Dr. Thompson's report submitted before the Board. Stay Motion at 7 n.13. BCOC does not explain how the Board's alleged action constituted arbitrary and capricious action and why such action entitles it to a stay. The Staff notes that the "evidence" is merely Dr. Thompson's opinion and the Board explained the level of analysis it expected. LBP-01-09, slip op. at 16-17.

supported by any evidence and amount to nothing more than a complaint that the Licensing Board is wrong because it did not accept BCOC's opinion and analysis.

Finally, BCOC alleges that the Licensing Board erred in accepting the premise that workers could be exposed to doses of 25 rem TEDE during accident conditions. Stay Motion at 7-8. BCOC alleges that the Board accepted "radiation exposure to plant workers beyond regulatory limits" without going through the process of disclosing the harm from this decision in an EIS. *Id.* at. As the Board stated in its opinion, however, a review of the applicable regulatory provisions shows that there is no regulatory bar prohibiting CP&L from using a twenty-five rem dose limit in an actual emergency or in planning a response to such an emergency. LBP-01-09 at 29; *see also* 10 C.F.R. §§ 20.1001(b); 20.1201(a)(1); 50.47(b)(11). The Board also noted that EPA's relevant Worker and Lifesaving Activity Protective Action Guide permits exposures of up to 25 rem TEDE under emergency conditions when needed to protect lives and large populations. *Id.* at 30. Rejecting what it characterized as BCOC's "mistaken interpretation" of NRC requirements and EPA PAG 2.5, the Board concluded that the 25 rem TEDE was within regulatory standards. *Id.* BCOC has offered no evidence to show that the 25 rem TEDE dose is not.

As previously discussed, BCOC has failed to show any irreparable injury. Having failed to show irreparable injury, BCOC must show that a reversal of the decisions that it challenges is a virtual certainty. The Staff submits that BCOC has failed to show that a reversal of the Licensing Board's decision is even likely, let alone a virtual certainty. Having failed to meet its burden of showing success on the merits, BCOC's request for a stay should be denied.

c. Harm to Other Parties

The Staff will suffer no harm if a stay of the license amendment is granted. Although an applicant's economic interests are not generally within the proper scope of issues to be litigated in NRC proceedings, the Commission may consider the potential economic harm to an applicant caused by the granting of a stay of the applicant's operating license. *See, e.g. Diablo Canyon,*

CLI-85-14, 22 NRC at 180; *Philadelphia Electric Co.* (Limerlck Generating Station, Units 1 and 2), ALAB-808, 21 NRC 1595, 1602-03 (1995). As BCOC itself has previously recognized in Dr. Thompson's declaration in support of BCOC's petition for review of the Staff's no significant hazards determination, CP&L could be harmed if a delay in opening pools C and D causes CP&L to run out of room for storing spent fuel from its Harris, Brunswick and Robinson facilities. Declaration of 22 December 2000 by Dr. Gordon Thompson in Support of Orange County's Petition for Review and Request for Immediate Suspension and Stay of December 22, 2000, at ¶ 12 .

d. Public Interest

BCOC asserts that issuance of a stay of the instant license amendment is in the public interest and will protect the integrity of BCOC's appeal and public confidence in the NRC's participatory decision-making process. Stay Motion at 10. In fact, the public interest more properly lies in expeditiously providing safe storage of spent nuclear fuel under appropriate NRC regulations. Furthermore, the Staff is confident that the issuance of the license amendment will have no impact on the Commission's ability to impartially consider and rule on BCOC's appeal.

CONCLUSION

For the foregoing reasons, the Staff respectfully requests that BCOC's request for stay of the license amendment be denied. The Staff further requests that paragraphs 15 through 76 of

Dr. Gordon Thompson's Declaration of 16 March 2001 in support of Orange County's Stay Motion
of 16 March 2001 be stricken.

Respectfully submitted,

/RA/

Norman D. St. Amour
Counsel for NRC Staff

/RA/

Susan L. Uttal
Counsel for NRC Staff

Dated at Rockville, Maryland
this 2nd day of April, 2001

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)	

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.713(b) the following information is provided.

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Respectfully submitted,

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Norman St. Amour
Counsel for NRC Staff

Dated at Rockville, Maryland
this 2ND day of April 2001

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF OPPOSITION TO ORANGE COUNTY'S MOTION FOR EMERGENCY STAY OF LBP-01-09 AND NRC STAFF MOTION TO STRIKE" and "NOTICE OF APPEARANCE" of Norman St. Amour in the above-captioned proceeding have been served on the following through deposit in the NRC's internal mail system, or by deposit in the NRC's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by deposit in U.S. Postal Service as indicated by double asterisk, with copies by electronic mail as indicated this 2nd day of April, 2001:

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