5/17/79

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of the Application of Public Service Company of Oklahoma, Associated Electric Cooperative, Inc. and Western Farmers Electric Cooperative (Black Fox Station, Units 1 and 2)	) Docket Nos.	STN 50-556 STN 50-557

APPLICANTS' REPLY TO THE NRC STAFF'S FINDINGS OF FACT CONCERNING ECCS MATTERS

On May 9, 1979, the NRC Staff filed findings of fact on Board Questions 2-1, 2-2 and 2-3, and evidence concerning results of the LPCI diversion analysis for Black Fox Station and the results of certain tests conducted in the Two Loop Test Apparatus facility located in Idaho.[1/] These findings of fact[2/] were attached to NRC Staff Counsel's letter of May 9, 1979 (hereinafter referred to as the "Letter" or the "May 9 Letter"). In that Letter, three technical areas are identified which allegedly cause concern as to whether

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1/ In the Notice of Filing Applicants' Reply to Proposed Findings of Facts and Conclusions of Law of the NRC Staff and the Intervenors, dated April 26, 1979, Applicants respectfully reserved the opportunity to reply to the proposed findings of fact filed by the NRC Staff on ECCS matters.

2/ In these findings of fact, the NRC Staff concludes generally that on the present hearing record reasonable assurance exists that Black Fox Station can be constructed without undue danger to the health and safety of the public. (Findings, Paragraphs 30, 35, 38, 43 and 45).

the testimony previously submitted by the NRC Staff needs modification. It is further stated that the Staff is "filing a draft of our proposed ECCS findings which reflect the record as it stood at the close of the hearing in February of this year" and that when the problems with GE are resolved, the NRC Staff "will submit to the Board any necessary amendments of the enclosed draft proposed findings." For the reasons set forth below, the Atomic Safety and Licensing Board ("Licensing Board") should disregard the Letter of May 9, 1979, and treat the findings enclosed therewith as final, thereby making the Black Fox record ripe for decisions.[3/]

The NRC Staff's actions in this matter are inconsistent with established NRC practice as set forth in 10 C.F.R. Part 2, and, consequently, the Letter presents a procedural anomaly. The Letter's purpose seems to be to present a notification under the McGuire doctrine,[4/] and a request for a stay of the Licensing Board's decision-making

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3/ Applicants are mindful, of course, that the Licensing Board's disposition of pending motions filed by the Attorney General of the State of Oklahoma and the Intervenors could, if granted, interrupt the decision-making process.

4/ In the Matter of Duke Power Company (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-143, 6 AEC 632, 625 (1973).

process so that if needed, additional f..dings of fact on extra-record information would be submitted in the "next month or two".[5/] Applicants do not object to the filing of information with the Licensing Board and parties, no matter how tangential to the issues at hand, to satisfy the requirements of McGuire.[6/] Doubt as to the significance or relevance of information should tilt in favor of disclosure.[7/]

Applicants do object, however, to the presumptuous course adopted by the NRC Staff. No motion was filed pursuant to 10 C.F.R. § 2.730 which would afford interested parties the opportunity to respond. No leave was requested of the Licensing Board to defer its decision-making process while the NRC Staff pursued its discussions with the General Electric Company. Instead, we are told that we will be kept "informed of progress in this matter". The NRC Staff does

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5/ Letter, p. 2, final paragraph. Applicants are puzzled by the implication in the Letter that somehow the NRC Staff can file amended findings of fact based on information developed after the hearing record is closed. Applicants are aware of no legal precedent that would support that view.

6/ It should be emphasized that the mere act of providing new information pursuant to the mandate of McGuire does not constitute a concession that the information is relevant and material to the issues under consideration. In the Matter of Carolina Power and Light Company (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4) LBP-78-2, 7 NRC 83, 88 (1978).

7/ Applicants believe the matters referred to in the May 9 Letter are more properly raised as generic matters under GESSAR-238.

not enjoy a preferred status as a party to a licensing proceeding. Like all such parties, the NRC Staff must conduct the course of their participation in accordance with NRC's Rules of Practice and administrative and judicial precedent. Their unilateral action of attempting to stay the Licensing Board's decision-making process by filing "draft" findings of fact on the basis of alleged new information is not the base of the licensing process and it should not be countenanced by this Licensing Board.

The proper course for the Staff was and still is either of two actions. They could move for a stay in the proceedings, and attempt to meet the test established by the United States Supreme Court for such a stay.[9/] A more responsible approach would be to evaluate immediately the matters and concerns referred to in the May 9 Letter. Then the Staff could either move to reopen the hearing record if they identify a matter of significance within the standard established by the Atomic Safety and Licensing Appeal Board

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8/ Applicants note that the explanation of the three matters related to the NRC Staff's generic review of GE's ECCS model under 10 C.F.R. § 50.46 and Appendix K was provided by counsel. No supporting affidavit from a qualified expert was offered.

9/ Landis v. North American Company, 299 U.S. 248 (1936). For a full discussion of the legal standard governing an application for a stay of an ongoing proceeding, see "Applicants' Answer To The Motion of The Attorney General For The State of Oklahoma For An Indefinite Stay of The Issuance Of An Initial Decision" filed on May 11, 1979.

in Vermont Yankee[10/]; or as Applicants believe to be the proper course, they could remove the cloud placed on this proceeding by the May 9 Letter by advising that no concerns exist or that the subject is more properly handled with GE as a generic matter.

Motions to stay proceedings or to reopen hearing records require substantial factual and legal justification to succeed on the merits. The NRC Staff cannot be permitted to avoid these responsibilities through the mechanism of a letter wherein they seek to achieve a delay in the proceedings by unilaterally declining to file "final" findings of fact.

It is sometimes the practice in NRC proceedings for a licensing board to treat an inartfully drawn request for relief as though it were properly drawn. This is not unusual when such requests are filed by intervenors who are either pro se or represented by counsel unfamiliar with the intricacies of the NRC's Rules of Practice. In these circumstances, the lack of support for the relief requested or assumed to be requested is not considered as a sufficient basis for denial by the cognizant Atomic Safety and Licensing Board; and as a consequence, the applicant and the NRC Staff

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10/ In the Matter of Vermont Yankee Nuclear Power Corp., (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973).

are then called upon to assume the burden of demonstrating why the postulated request for relief should not be granted on the merits. This practice should not be employed here. The indulgences granted pro se parties and counsel unfamiliar with NRC practice are hardly justified in the case of the NRC Staff. The NRC Staff as the preceptor and guardian of NRC's Rules of Practice should be held to the highest standard. If the NRC Staff believes their position has merit, a proper motion should be filed. Until then, the May 9 Letter should be disregarded and the Licensing Board should continue its decision-making process.

Respectfully submitted,

Joseph Gallo

Joseph Gallo
One of the Attorneys
for the Applicants

Isham, Lincoln & Beale
1050 17th Street, N. W.
Suite 701
Washington, D.C. 20036
(202) 833-9730

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing APPLICANTS' REPLY TO NRC STAFF'S FINDINGS OF FACT CONCERNING ECCS MATTERS has been served on each of the following persons by deposit in the United States mail, first class postage prepaid, this 17th day of May, 1979.

Sheldon J. Wolfe, Esquire
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. Frederick J. Shon, Member
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Paul W. Purdom, Director
Environmental Studies Group
Drexel University
32nd and Chestnut Streets
Philadelphia, Pennsylvania 19104

Docketing and Service Section
Office of the Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
(20 copies)

Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

L. Dow Davis, Esquire
William D. Paton, Esquire
Colleen Woodhead, Esquire
Counsel for NRC Staff
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Joseph R. Farris, Esquire
John R. Woodard, III, Esquire
Green, Feldman, Hall & Woodard
816 Enterprise Building
Tulsa, Oklahoma 74103

Mr. Clyde Wisner
NRC Region 4
Public Affairs Officer
611 Ryan Plaza Drive
Suite 1000
Arlington, Texas 76011

Andrew T. Dalton, Esquire
1437 South Main Street
Room 302
Tulsa, Oklahoma 74119

Mrs. Carrie Dickerson
Citizens Action for Safe
Energy, Inc.
P.O. Box 924
Claremore, Oklahoma 74107

Mrs. Ilene H. Younghein
3900 Cashion Place
Oklahoma City, Oklahoma 73112

Mr. Lawrence Burrell
Route 1, Box 197
Fairview, Oklahoma 73737

Martha E. Gibbs
Michael I. Miller
Isham, Lincoln & Beale
One First National Plaza
Suite 4200
Chicago, Illinois 60603

Mr. Gerald F. Diddle
General Manager
Associated Electric Cooperative, Inc.
P.O. Box 754
Springfield, Missouri 65801

Mr. Maynard Human
General Manager
Western Farmers Electric Cooperative
P.O. Box 429
Andarko, Oklahoma 73005

Mr. Vaughn L. Conrad
Public Service Company of Oklahoma
P.O. Box 201
Tulsa, Oklahoma 74102

Mr. T. N. Ewing, Manager
Black Fox Station Nuclear Project
Public Service Company of Oklahoma
P.O. Box 201
Tulsa, Oklahoma 74102

Mr. M. J. Robinson
Black & Veatch
P.O. Box 8405
Kansas City, Missouri 64114

George L. Edgar, Esquire
Kevin P. Gallen, Esquire
Morgan, Lewis & Bockius
Suite 700
1800 M Street, N.W.
Washington, D.C. 20036

Charles S. Rogers, Esquire
Assistant Attorney General
112 State Capitol Building
Oklahoma City, Oklahoma 73105

Mr. Gregory Minor
MHB Technical Associates
1723 Hamilton Avenue
Suite K
San Jose, California 95125

Joseph Gallo
Joseph Gallo
One of the Attorneys
for the Applicants