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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In The Matter Of

MINNESOTA v. NUCLEAR REGULATORY COMMISSION

NATURAL RESOURCES DEFENSE COUNCIL REQUEST FOR IMPLEMENTATION OF COURT DECISION

Introduction

In order to implement the Court's decision in Minnesota v. Nuclear Regulatory Commission, the Commission must first decide what is the holding of that case. In our judgment, the holding is clear. It affirms the decision of the Appeal Board in ALAB-455 which found that whether nuclear wastes can be safely stored is a relevant inquiry in licensing nuclear facilities. The Court further found that there has not been an NRC determination in generic proceedings sufficient to answer the following question (Slip Op., p. 14):

> . . . whether there is reasonable assurance that an off-site storage solution will be available by the years 2007-09, the expiration of the plants' operating licenses, and if not, whether there is reasonable assurance that the fuel can be stored safely at the sites beyond those dates.

It is critical for understanding the ramifications of the decision to aknowledge that the Court found that a finding on safe disposal of nuclear wastes is an essential safety finding and that there was not yet a legally sufficient finding.

Because the burden of proof is on the NRC and the applicant to demonstrate that the safety requirements for the proposed action have been met, the Court's agnostic view of the merits is a fatal blow to the licensing proposal.

Status of Licenses

Much has been made of the fact that the Court did not vacate or stay the already approved licensing amendments to support the view that the Court decision should have no impact on existing or pending license applications. This position is indefensible.

First, historically, when a generic deficiency has been found in NRC/AEC licensing actions, existing licenses and pending applications have been treated differently. Following the decision in Calvert Cliffs' Coord. Comm. v. U.S. Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir., 1971) (no stay was granted of any license), the AEC adopted Appendix D to 10 CFR Part 50 which recognized that decisions made on license applications subsequent to January 1, 1970, were in violation of the Court's interpretation of NEPA, effectively suspended all pending and future applications until compliance with NEPA and left in effect already issued licenses subject to a right of any party to seek suspension pursuant to certain criteria. The Commission followed essentially the same procedure after the Court decision in Natural Resources Defense Council v. Nuclear Regulatory Commission, 547 F.2d 633 (D.C. Cir., 1976), reversed and remanded, sub nom. Vermont Yankee Nuclear Power

Corporation v. Natural Resources Defense Council, 98 S.Ct. 1197 (1978) (no stay of the license granted), where it suspended the issuance of new licenses pending preparation of a legally sufficient S-3 Table but merely offered the opportunity to suspend those licenses already issued. While this historical dichotomy may be difficult to justify on the merits -- the license is either illegal or not, and if it is it should be suspended at once -- the fact is it is a long-standing Commission policy which cannot now be abandoned where compliance with it appears inconvenient. At least all proposed license issuances for nuclear facilities and all amendments related to spent fuel storage must be suspended until the required safety finding on waste disposal has been made, and all existing licenses should be susceptible to suspension based on required showings.

Surely the teaching of Power Reactor Development Co. v. International Union, 367 U.S. 396 (1960), is that when it comes to an operating license the safety finding must be made and it must be definitive. That case hinged on the principle that, when the hard questions were posed -- such as whether to refuse to allow a plant to operate in the absence of evidence to support a required safety finding -- the Commission would not shirk its duty and would refuse to issue the license.

There are now pending before the Commission and its boards several applications for licenses and for amendments to licenses involving increased storage of spent fuel either by

compaction, reracking or transshipment. For all of them the Court has said that a finding on the reasonable availability of a timely waste disposal solution is essential. Although the Court opinion dealt only with two reracking applications, it clearly treated this as a generic issue applicable to all license issuances and amendments related to increased storage of spent fuel at any reactor site. The key issue is whether the wastes can be safely disposed of where they are proposed to be stored and, if not, where and when will they be safe. That question relates to every licensing decision and every decision designed to expand or make available additional space for spent fuel storage.

Finally, while admittedly the opinion appears to be ambiguous about the need for permanent or interim off-site storage, the confusion does not obscure the substantive logic of the case. Any interim storage solution will have to be licensed and will not be acceptable unless there is a safe permanent disposal solution available before the time when the safety of the interim facility can no longer be assured. Thus, if there were an interim off-site storage facility, it would not resolve the issue remanded by the Court. In addition, the theoretical possibility of permanent or interim storage is not sufficient. It must be shown that such a solution is reasonably achievable, which includes resolution of both technical and institutional problems.

Conclusion

For over two decades the AEC/NRC has ducked and evaded the crucial connection between the safety of nuclear reactors and the availability of safe permanent waste disposal. In Minnesota v. Nuclear Regulatory Commission, the law has finally caught up with the Commission. In light of all the other controversy surrounding the credibility and acceptability of nuclear power, this is not the time to seek yet another evasion of the legal requirements. This is a time, like no other, which cries out for candor and for asking and seeking to answer the fundamental issues about nuclear power. The Commission should not miss this opportunity to forthrightly address the waste issue and to forthrightly acknowledge that, until it has been addressed, there can be no further licensing of nuclear faciliites and spent fuel handling proposals.

Respectfully submitted,

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