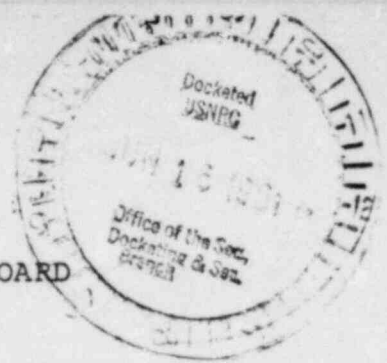


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of)
)
DUKE POWER COMPANY)
)
(William B. McGuire Nuclear)
Station, Units 1 and 2))

Docket Nos. 50-369
50-370



6/16/81

APPLICANT'S OPPOSITION TO CESG'S REQUEST
FOR STAY OF INITIAL DECISION

On June 6, 1981, Intervenor, Carolina Environmental Study Group ("CESG"), filed a request to stay the Atomic Safety and Licensing Board's ("Licensing Board") Initial and Supplemental Initial Decisions of April 19, 1979 and May 26, 1981, respectively. Applicant, Duke Power Company, pursuant to 10 CFR §2.788(d) hereby files its answer opposing the granting of a stay.

CESG's request for stay focuses essentially on 3 factors:

1. That the consequences of containment breach were not considered;
2. That the scope of the hearing was improperly limited to TMI-type accidents; and
3. That operation of the hydrogen mitigation system remains unresolved.



Applicant will respond to each as follows.

1. With respect to consideration of consequences, CESG challenges the Licensing Board's finding that the operation of McGuire will not pose an "undue risk" to the public health and safety. CESG's allegation concerning consequences is improper for the following reasons:

a. The record fails to disclose any instance where in Applicant will be in violation of Commission regulations.

Indeed, with respect to Contentions 3 and 4 (i.e., the matters

8106180 435

G

3503
50/1

allegedly addressing consequences), CESG's president, in his deposition of January 14, 1981, confirms this point. See Deposition Transcript at p. 138 wherein the following appears:

Q. Let me ask the question in a different fashion. Given your understanding of the McGuire Emergency Response Plan and the negotiation that has taken place between and among the NRC, Duke Power Company and FEMA, do you or do you not feel that the McGuire Emergency Response Plan satisfies current emergency response planning regulations in the NRC?

A. I think it satisfies regulations nominally. I think that the regulations are inadequate. 1/

1/ CESG has alleged that, due to potential for hydrogen generation and combustion, more is required in the area of emergency planning than is provided for by the regulations. CESG maintains that the impact associated with the degraded core/core melt scenario it foresees developing from a hydrogen generation and combustion accident must be considered in this proceeding. Applicant submits that CESG's contention is, pursuant to 10 CFR §2.758, an impermissible attack on the Commission regulations regarding emergency planning (i.e., Appendix E to 10 CFR Part 50; 10 CFR §50.47, and 45 Fed. Reg. 55402 (August 19, 1980)). Specifically, the amendments to 10 CFR §50.47 require that emergency planning zones of 10 and 50 miles be established for plume exposure and ingestion exposure pathways, respectively. The basis for these standards, as set forth in 10 CFR §50.47 note 1, is contained in NUREG-0654: FEMA-REP-1 entitled "Criteria For Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants" (January 1980). Therein, the Commission determined that the appropriate emergency planning zones are based upon consideration of a range of specified potential accidents to include a worst case core melt accident involving a breach of containment. NUREG-0654, supra. In short, CESG's contention that degraded core/core melt accidents be considered has been encompassed by the emergency planning regulations, and any further discussion of the matter is a direct attack upon the basis of the Commission regulations. Accordingly, CESG's position must fail. Potomac Electric Power Company (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 88-89 (1974). See also, Union of Concerned Scientists v. AEC,

Commission regulations are based upon a statutory mandate to assure "the common defense and security" and to "provide adequate protection to the health and safety of the public." See Atomic Energy Act of 1954, as amended, Sections 104d, 161b and 182a. 2/ Indeed, as the Supreme Court noted, the Atomic Energy Act "clearly contemplates that the Commission shall by regulation set forth what the public safety requires as a prerequisite to the issuance of any license or permit under the Act." Power Reactor Development Co. v. Electricians, 367 U.S. 396, 404 (1961). Therefore, present a showing that a particular facility presents risks outside the parameters of the regulations, not present here, a demonstration of compliance with the regulations entitles a Board to find reasonable assurance that the facility will be operated without undue risk to the public health and safety. 3/ See Citizens For Safe Power v. NRC, 524

(Footnote continued from previous page.)

499 F.2d 1069 (D.C. Cir. 1974). CESG alleges that special circumstances exist for consideration of consequences, i.e., the Commission's statement of Interim Policy regarding consideration of Class 9 accidents. This matter has been thoroughly briefed by both the Applicant and Staff (see pleadings of February 2, 1981), and disposed of by the Licensing Board in its Memorandum and Order of February 13, 1981.

2/ 42 U.S.C. 2134(d), 42 U.S.C. 2201(b) and 42 U.S.C. 2232(a).

3/ See Maine Yankee Atomic Power Company (Maine Yankee Atomic Power Station), ALAB-161, 6 AEC 1003, 1007 wherein the Appeal Board stated:

Thus, in the safety sphere, the evaluation of the risks attendant to reactor operation is not undertaken as an element of a NEPA-type process by which costs may be traded off against benefits. Rather, the function of the evaluation is to ascertain whether the ultimate, unconditional standards of the Atomic Energy Act and the regulations have been met; e.g., whether the public health and safety will be adequately protected.

F.2d 1291, 1299-1301 (D.C. Cir. 1975); see also, Maine Yankee, supra. 6 AEC at 1009-10. So postured, compliance with Commission regulations is supportive of the Licensing Board's finding regarding undue risk.

b. Neither the Atomic Energy Act as amended, nor the Commission regulations require an undue risk finding with respect to operating licenses. See Atomic Energy Act of 1954 as amended, Sections 161b, 182a 4/ and 10 CFR §50.57(a). Rather, the undue risk finding is required only for construction permits. See 10 CFR §50.35(a).

The Licensing Board's undue risk finding relates to public health and safety. As such, it can be equated with the required findings of 10 CFR §§50.57(a)(3) and (6). An examination of the extensive record developed in the instant reopened proceeding, as well as the Licensing Board's Supplemental Initial Decision, clearly provide the basis for the finding required by 10 CFR §50.57 and the Licensing Board's undue risk finding should be so viewed.

c. The term "undue risk" is meaningful only in the context of the matters raised before the Licensing Board. At issue in the instant reopened operating license proceeding was (i) whether hydrogen in excess of the limits of 10 CFR §50.44 could be generated and, if so, (ii) whether such hydrogen would result in containment breach and doses in excess of the values

4/ 42 U.S.C. 2201(b) and 42 U.S.C. 2232(a).

set forth in 10 CFR Part 100. The Licensing Board concluded that the generation of hydrogen in excess of 10 CFR §50.44 limits was so remote as to be incredible, i.e., highly improbable. Supplemental Initial Decision ("SID") at p. 20. Continuing, the Board made findings with respect to the highly improbable situation wherein hydrogen was generated in excess of 10 CFR §50.44 limits. SID at pp. 21-29. The Licensing Board found that the systems installed by Applicant to mitigate the effects of excessive hydrogen generation would result in the burning of hydrogen in a manner that would yield a peak pressure of less than 16 psig. SID at p. 25. The Licensing Board found that the containment would maintain its integrity when subjected to 48-67.5 psig. SID at pp. 21-22. On this basis it can be concluded that the McGuire containment would not breach in the event hydrogen in excess of the limits of 10 CFR §50.44 was generated. 5/ Absent a breach, and absent any demonstration by Intervenor that Part 100 values would be exceeded, it was logical for the Board to conclude that operation of McGuire does not pose an undue risk to public health and safety.

d. CESG's reliance upon Contentions 3 and 4 as the basis for consideration of consequences is without support. As

5/ The Licensing Board found that the probability of containment failure at 48 psig was calculated to be 4×10^{-5} per occurrence. Given the probability of a TMI-type accident to be 10^{-5} to 10^{-6} per year the overall probability of failure due to a TMI-type accident is 10^{-10} to 10^{-11} (i.e., 1 in 10 billion to 100 billion) per reactor year. SID at p. 22. Even this figure is conservative in that it presumes an event producing 48 psig. The record is clear that a hypothetical hydrogen generation accident will yield only 16 psig.

set forth in Applicant's pleading of June 1, 1981 at pp. 3-7, CESG has expressly stated that Contentions 3 and 4 are premised upon the occurrence of a breach of containment. Inasmuch as the Licensing Board found that excessive quantities of hydrogen would not be generated, and, even if generated, systems installed by Applicant would clearly prevent containment breach, there is no basis for the consideration of Contentions 3 and 4.

2. With respect to the scope of the accident, CESG maintains that its Contention 1 was not limited to consideration of one class of accidents and that it was improper for the Licensing Board to focus on TMI-type accidents to the exclusion of others. In opposition, Applicant advances the following:

a. The subject matter of CESG's stay request essentially involves matters associated with the reopened proceeding. It is important to note that CESG had moved that the proceeding be reopened. The grounds advanced by CESG for reopening focused on the matter of hydrogen generation control arising out of the Three-Mile Island accident. See "CESG's Motions To Admit New Contentions And To Reopen The McGuire Operating License Hearing" (June 9, 1980) wherein CESG raises as the basis for its motion "...the reasonable likelihood that there are additional lessons to be learned in the case of a TMI-2 type of accident involving hydrogen release and rapid combustion in a pressure suppression station such as McGuire." See also "CESG's Revised Motion To Reopen The Operating License Proceeding; Motion To Deny Applicant's Request For Fuel Loading, Etc.; And Revised Contentions" (August 15, 1980) wherein Intervenor states at p. 3

"In view of these many considerations, and given the uncertainties as to the capability of the McGuire containment to withstand an explosion of an amount of hydrogen no greater than that at TMI-2, it is appropriate for this Board more fully to develop the record." On the basis of these pleadings, the Licensing Board reopened the proceeding for the limited purpose of exploring "hydrogen generation control arising out of the Three Mile Island 2 (TMI-2) accident." See Board Memorandum and Order of November 25, 1980 at p. 4.

In his deposition of January 14, 1981, CESG's president indicated that in addition to a TMI-type accident he wished to raise loss of power, ATWS and equipment failure. See Deposition Transcript at pp. 55-56 wherein the following is set forth:

- Q. So as to enable Duke to understand your concerns and be able to address your concerns, I ask you is there any further matter in this regard, any further examples, that at this moment are of concern to you relative to the generation of hydrogen?
- A. None come to mind.
- Q. As I understand your responses, each one of them resulted from the failure of ECCS, either through the throttling (operator error), the loss of power to operate the motors, or the ATWS event, is that correct?
- A. Well, there is one other that I should have spelled out. Motors don't always perform as expected; pumps sometimes jam; bearings go bad. So that all would have to do with the operation of the mobile, the dynamic, the electrically driven type equipment. There are two ways that it could go out.

Inasmuch as none of these matters pertain to TMI, CESG was precluded from raising these matters as issues in the reopened

proceeding absent a showing that each met the reopening test set forth in Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320 (1978). See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 2), ALAB-486, 8 NRC 9, 22 (1978). CESC made no showing in this regard and, as noted, the Licensing Board did not base its decision to reopen on these matters. Furthermore, during the course of the adjudicatory proceeding Intervenor provided absolutely no admissible evidence with respect to the establishment of these accidents. Accordingly, it was appropriate for the Licensing Board to focus the adjudicatory hearing on TMI-type accidents.

b. The Commission decisions in the TMI-1 restart case 6/ state that hydrogen control matters can be litigated provided that "it is determined that there is a credible loss-of-coolant accident." The record reflects that the only accident to fall within this category was TMI 7/ and accordingly, it was appropriate for the Licensing Board to focus the proceeding on TMI-type accidents.

3. With respect to CESC's allegation concerning the resolution of the hydrogen mitigation system, reference is made to statements of a witness from Sandia National Laboratory. The Licensing Board found that the matter raised

6/ Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), CLI-80-16, 11 NRC 674 (1980) and Order of September 26, 1980 (Docket No. 50-289 (Restart)).

7/ With the exception of an Intervenor witness panel of psychologists, the only evidence concerning TMI was presented by Applicant and Staff.

by the Sandia witness was not germane to McGuire, both on the basis of hydrogen concentration and necessary geometry. See SID at p. 27. An examination of the record, which is replete with direct, cross, redirect and rebuttal testimony on this matter (See, e.g., Hearing Transcript 4023-29, 4035-44, 4079-4182, 4198-4317, 5046-5104), clearly supports the Licensing Board's finding in this regard.

4. With respect to the four items to be addressed in a stay (10 CFR §2.788(d)) Applicant makes the following comments:

a. The Licensing Board's decision is amply supported by the record. The alleged errors raised by Intervenor have been addressed above. On the basis of the Licensing Board's decision, the record and the above responses, it is clear that Intervenor cannot make a strong showing that it is likely to prevail on the merits.

b. Commission case law indicates that a showing of irreparable injury is most crucial in deliberations with regard to stays pending appeal. Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2) ALAB-437, 6 NRC 630, 632 (1977). The Appeal Board has noted that it is the established rule that a party is not ordinarily granted a stay without an appropriate showing of irreparable injury. Id.

The extreme remoteness of an accident resulting in the generation of hydrogen in excess of the limits of 10 CFR §50.44 (See SID at p. 20) cannot be viewed as establishing irreparable injury. See State of New York v. NRC, 550 F.2d 745, 755 (2nd Cir. 1977) wherein the court stated:

The case law informs us that the award of preliminary injunctive relief can and should be predicated only on the basis of a showing that the alleged threats of irreparable harm are not remote or speculative but are actual and imminent.

The above takes on added significance inasmuch as Intervenor's stay request does not contest that aspect of the Licensing Board's decision regarding the remoteness of an accident giving rise to excessive amounts of hydrogen. Rather, Intervenor focuses on the hypothetical situation wherein excessive hydrogen would be generated. As noted earlier, the Licensing Board also addressed this latter scenario and found the probability of containment failure to be 10^{-10} to 10^{-11} (i.e., 1 in 10 billion to 100 billion) 8/ per reactor year. Such a speculative condition cannot support a claim of irreparable injury. See Stat. of New York v. NRC, supra. 9/

c. The grant of a stay would adversely affect third parties, i.e., consumers, as discussed below.

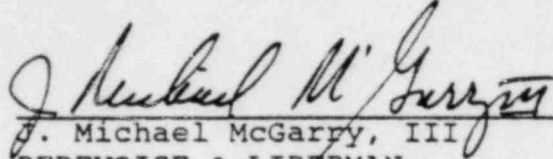
d. The public interest is best served by the prompt licensing and operation of the McGuire facility. In this regard see Applicant's comments to the Commission regarding the Immediate Effectiveness issue at pp. 4-6 (June 5, 1981) which clearly sets forth the need for the facility, the costs associated with delay and the impact on consumers.

8/ See fn. 5, supra, for the conservatism of even these numbers.

9/ Applicant notes that plants similar to McGuire are operating. Accordingly, it cannot be said that the threat of harm Intervenor raises is so clear and immediate.

On the basis of the above Applicant respectfully urges this
Appeal Board to promptly deny the stay request of CESG.

Respectfully submitted,

A handwritten signature in cursive script, reading "J. Michael McGarry, III". The signature is written in dark ink and is positioned above the printed name and address.

J. Michael McGarry, III
DEBEVOISE & LIBERMAN
1200 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 857-9833

Of Counsel

William L. Porter
Associate General Counsel
DUKE POWER COMPANY

June 16, 1981

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of)	
)	
DUKE POWER COMPANY)	Docket No. 50-369
)	50-370
(William B. McGuire Nuclear)	
Station, Units 1 and 2))	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicant's Opposition to CESG's Request For Stay Of Initial Decision" dated June 16, 1981 in the captioned matter, have been served upon the following by deposit in the United States mail this 16th day of June, 1981.

Alan S. Rosenthal, Chairman
Administrative Judge
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Dr. John H. Buck
Administrative Judge
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Christine N. Kohl
Administrative Judge
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Robert M. Lazo, Esq.
Chairman, Atomic Safety and
Licensing Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Dr. Emmeth A. Luebke
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Dr. Richard F. Cole
Administrative Judge
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Jesse L. Riley
President
Carolina Environmental
Study Group
854 Henley Place
Charlotte, North Carolina 28207

Edward G. Ketchen, Esq.
Counsel for NRC Regulatory
Staff
Office of the Executive
Legal Director
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

William L. Porter, Esq.
Associate General Counsel
Duke Power Company
Post Office Box 33189
Charlotte, North Carolina 28242

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

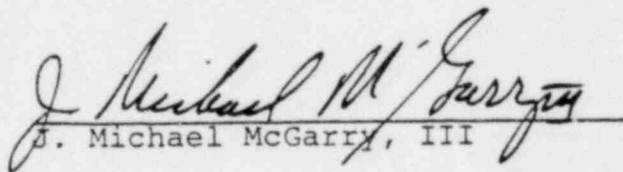
Diane B. Cohn, Esq.
William B. Schultz, Esq.
Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036

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

Dr. John M. Barry
Department of Environmental
Health
Mecklenburg County
1200 Blythe Boulevard
Charlotte, North Carolina 28203

Shelly Blum, Esq.
1402 Vickers Avenue
Durham, North Carolina 27707

Chase R. Stephens
Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555


J. Michael McGarry, III