September 1, 1983

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE
ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	Docket No.
VIRGINIA ELECTRIC AND POWER COMPANY	)	50-338/339-OLA-1
	)	
(North Anna Power Station, Units 1 and 2)	)	

APPLICANT'S RESPONSE REQUIRED BY THE APPEAL BOARD'S ORDER OF AUGUST 24, 1983

I.

Introduction

In its Order of August 24, 1983, the Appeal Board directed the Applicant, Virginia Electric and Power Company (Vepco), to file a written response to a claim made by Concerned Citizens of Louisa County (CCLC). The claim is that the Licensing Board ruling that Vepco challenges is without "practical consequences." This is Vepco's Response.

There are two reasons why the Licensing Board's ruling has important consequences, both of them quite "practical." First, contentions raised under the National Environmental Policy Act (NEPA) about the environmental effects of transshipment are likely to be resolved without litigation on the basis of Table S-4; this is not true of contentions raised under the Atomic Energy Act (AEA) about the public health and safety aspects of spent fuel transshipment. In this respect, reversal by the Appeal Board would have important implications both for this case

and for future cases. Second, putting aside Table S-4, neither Louisa County nor CCLC can at this late date raise any environmental issue it wishes. Their environmental contentions are limited by their prior pleadings. Moreover, their health and safety contentions raise issues that (a) they have not raised in their environmental contentions and (b) they are no longer free to raise as environmental contentions. Carving the health and safety issues out of this proceeding, therefore, will be a significant development.

II.

Certain Environmental Issues May Be Resolved Through The Use of Table S-4; Health and Safety Issues May Not

CCLC describes the division between health and safety and environmental issues in this case as one

> not based, at least as far as we can tell, on any practical difference between "health and safety" versus "environmental" impacts, nor on the way they would be evaluated or litigated.

CCLC Opposition to Applicant's Motion For Directed Certification (CCLC Opposition) at 3.

Vepco disagrees. Whether an issue is viewed as a health and safety issue raised under AEA or as an environmental issue raised under NEPA will make a practical difference in the way it would be "evaluated or litigated," for the following reasons.

The Nuclear Regulatory Commission (NRC) has treated the environmental effects of the nuclear fuel cycle generically. In particular, under 10 CFR § 51.20(g)(1), the accompanying Table

S-4 sets out values that are to be attributed to the environmental effects of transporting spent nuclear fuel. Even though § 51.20(a)(1) recites that the Table S-4 values apply to shipments to a reprocessing plant, the Table has been applied in evaluating proposals for transshipment to interim storage sites. In Catawba, the applicant sought permission to store fuel from Oconee and McGuire at Catawba on an interim basis. An intervenor filed a contention requesting "a full description and detailed analysis" of the environmental effects of transshipment to Catawba. The ASLB disallowed the contention, and held that Table S-4 applies to the transportation of spent fuel irrespective of whether a reprocessing plant is in fact the destination, noting that the impacts "would be substantially the same and therefore the Table S-4 values would apply."[1] Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-16, 15 NRC 566, 579 (1982). The Shearon Harris proceeding raises the same question and has thus far produced the same result. There the Board said:

> it is our tentative view on this legal question that the S-4 Table, or some multiple thereof, can be applied to this situation.[2]

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[1]The Board reiterated this conclusion in subsequent orders in the Catawba proceeding. See Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), Docket Nos. 50-413,-414, Memorandum and Order at 6 (July 8, 1982); Memorandum and Order at 2 (February 25, 1983).

[2]Vepco will take the position before the Licensing Board at the proper time that Table S-4 should be used to evaluate the environmental effects of its proposed shipments, at least if and to the extent the Licensing Board should decide that those effects were not adequately reviewed when the Surry operating licenses were granted. It ought not be necessary, in order to persuade the Appeal Board to grant directed certification, for

Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-400 OL,-401 OL, Memorandum and Order at 20 (September 22, 1982). Neither intervenor in this proceeding has contended that Table S-4 is inapplicable for any reason or ought to be waived. Table S-4 presents an opportunity for the Licensing Board in this case to put questions involving the evaluation of environmental effects of transshipment behind it without a hearing.[3] But Table S-4 was adopted to implement NEPA, not AEA. It cannot be used to decide, under AEA, whether there is reasonable assurance that Surry fuel can be shipped to North Anna without endangering the health and safety of the public.

In sum, Vepco can in all likelihood avoid a hearing on the environmental effects of its shipping plans.[4] On the other

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Vepco to demonstrate beyond question that the Licensing Board will accept its Table S-4 argument. The decisions in Catawba and Shearon Harris are sufficiently compelling to suggest that the question Vepco asks the Appeal Board to decide is not an abstract question by any means.

[3]Of course, the Licensing Board in this case may find that all environmental effects of the planned shipments have been evaluated earlier. If it does, so much the better; the Table S-4 question might not be reached. But the Appeal Board has asked that Vepco assume, for purposes of this Response, that some environmental issues will be admitted.

[4]Not all of the intervenors' environmental contentions can be dealt with through the use of Table S-4. One example is the issue of alternatives, raised by both Louisa County and CCLC. Another is the question whether environmental effects, once identified, are "significant." These issues may turn out to be resolved without a hearing nonetheless. And in any event, it is not necessary to a decision to direct certification that the Appeal Board find that reversal would remove all necessity for a hearing.

hand, absent a reversal of the Licensing Board ruling, Vepco is unlikely to avoid a hearing on transshipment questions raised in the AEA context of public health and safety. That is an important "practical consequence" of the Appeal Board's action. And, because the Table S-4 argument will be generically available, the "practical consequence" of Appeal Board action is not limited to this case. Action by the Appeal Board will have an important effect on future transshipment cases as well.

III.

The Intervenors Cannot Raise All Their Health and Safety Questions Simply By Treating Them As Environmental Questions

Even if Table S-4 did not exist, Appeal Board action could have an important effect on this proceeding. CCLC argues that if the Appeal Board were to reverse,

> it now appears that the parties to this proceeding would nevertheless litigate the same transshipment issues that Vepco wants so badly to avoid, except that we would do it under the rubric of "environmental" rather than "health and safety" issues.

CCLC Opposition at 9. CCLC is too sanguine on this score. Vepco might well concede, for argument's sake, that any health and safety concern could have been raised as an environmental concern at the outset of this proceeding. But it does not follow that the intervenors may thus transform their contentions now.

The date for filing contentions generally in this proceeding has passed. The filing date for the supplements contemplated by § 2.714(b) was January 17, 1983. To be sure, the Licensing Board said in its Memorandum of June 10, 1983, that the intervenors

"may assert in a timely manner new contentions" founded upon information set out in the Staff Safety Evaluation and Environmental Assessment. Memorandum at 7. The Staff documents have not yet been published. But we now know from Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460 (August 19, 1982), vacated in part, CLI-83-19, 17 NRC ____ (June 30, 1983), that intervenors' efforts to raise new contentions must be judged by all the criteria of 10 CFR § 2.714(a)(1), because the time for filing the supplement contemplated by § 2.714(b) has come and gone. We also know that a late-filed contention will not be admitted if the factual predicate for the contention was available on a timely basis. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC ____ (June 30, 1983). Necessarily, any issues already raised by intervenors in this case as AEA health and safety issues could have been raised as NEPA environmental questions on a timely basis. And so they cannot be raised as new environmental questions now.

It remains, then, only to determine whether the issues sought to be raised by the intervenors under the AEA heading have already been raised under the NEPA heading. Vepco will show that contentions have been stated in this proceeding with respect to the health and safety implications of transshipment that are not likely to be litigated as environmental questions if the Appeal Board reverses the Licensing Board ruling. That being so, the Appeal Board's action is likely to have considerable "practical consequence" for this proceeding.

A. Louisa County Contentions

Louisa County states a contention that transshipment will be "inimical to the public health and safety," almost precisely the licensing standard in 10 C.F.R. § 50.40(c), which implements AEA. As support, Louisa County contends that transshipment will violate Part 20, that Vepco's physical protection system is inadequate, that Vepco has not made adequate arrangements with local agencies for emergencies, that Vepco's quality assurance program and other plans will not satisfy 10 CFR Part 71, that Vepco's shipping casks may be unsafe and that criticality may be reached during shipment. Nowhere does Louisa County argue that the environmental effects of these alleged deficiencies will tip the NEPA balance.

Louisa County's environmental contentions, on the other hand, deal primarily with (a) the need for and alternatives to transshipment and (b) whether approval of Vepco's program would be a "major Federal action." These broad environmental contentions do not rely on the kind of narrowly drawn support that characterizes Louisa County's AEA health and safety contentions. The County supports the contention that Vepco's request represents a "major Federal action" by pointing only to the following: the effects of security arrangements for shipments, the effects of "an emergency" and the effects of shutting down North Anna. There is no mention by the County in connection with this contention of any of the other effects discussed in its health and safety contentions. Thus, if the Appeal Board were to intercede now and reverse the challenged

ruling, the form and scope of the proceeding would as a practical matter be altered considerably.

B. CCLC Contentions

A brief review of the contentions stated by CCLC indicates that, contrary to its assertion, all health and safety issues involving the proposed shipments are not subsumed within CCLC's environmental contentions.

CCLC states five major contentions. Two of them quite clearly are based on the AEA concern for public health and safety. One says that Vepco has not shown that it has an adequate emergency response plan and that if there is none, the requested amendment "will be inimical to the public health and safety." A second says that Vepco has not shown that it will comply with the physical protection requirements of 10 CFR § 73.37.

The other three CCLC contentions do deal in terms with environmental matters. One says that the alternative of using dry cask storage should be evaluated. One says that the shipping casks have not been shown to be safe and that if they are not "extensive environmental damage" could result. The last says that the license amendment would be a major federal action significantly affecting the human environment. This last contention is supported only by the arguments that NRC cask standards are inadequate and that other environmental costs could flow from sabotage and error by Vepco employees in sealing casks.

Thus, if the Appeal Board reverses the challenged ruling, Vepco believes that at least two CCLC contentions may be declared

inadmissible and that CCLC cannot "transform" them at this stage of the proceeding into NEPA contentions.

IV.

Conclusion

The answers to the CCLC argument are that (a) questions about the environmental effects of transshipment are likely to be resolved without a hearing in light of Table S-4 and (b) the intervenors cannot transform all of their AEA health and safety contentions into NEPA environmental arguments at this stage of the proceeding. Thus, reversal by the Appeal Board would in all likelihood diminish significantly the number of issues that would be heard in this proceeding and have important implications for other such proceedings.

Respectfully submitted,

VIRGINIA ELECTRIC AND POWER COMPANY

By: /s/ Michael W. Maupin
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Dated: September 1, 1983

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served Applicant's Response Required by the Appeal Board's Order of August 24, 1983, upon each of the persons named below by depositing a copy in the United States mail, properly stamped and addressed to him at the address set out with his name:

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Dated: September 1, 1983