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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
DUKE POWER COMPANY, et al.	)	Docket Nos. 50-413 OL
	)	50-414 OL
(Catawba Nuclear Station, Units 1 and 2)	)	

RESPONSE OF LICENSEES DUKE POWER COMPANY, ET AL. CONCERNING "USE" OF A COMMERCIAL UTILIZATION FACILITY

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I. Introduction

In an unpublished order dated June 3, 1985, the Atomic Safety and Licensing Appeal Board ("Appeal Board") provided licensees Duke Power Company, et al. ("Duke" or "Licensees") an opportunity to respond to a limited aspect of the NRC Staff's May 29, 1985 filing entitled "NRC Staff Views on Whether Notice of the Proposal to Use Catawba to Store Oconee and McGuire Spent Fuel Was Required or Discretionary" ("Staff Reply"). See Appeal Board's June 3, 1985 "Order" at 1 (unpublished). Specifically, the Appeal Board invited Licensees to respond to the narrow question of whether, as the Staff asserts, "the storage of spent fuel generated at another facility constitutes a 'use' of a commercial utilization facility and, for that reason, the authorization

thereof is subject to the notice requirements contained in the Atomic Energy Act of 1954, as amended." Id. Licensees herein respond to the Staff's argument.

Licensees emphasize initially that the question in issue is essentially an academic one. In the Catawba proceeding, Duke chose to combine its request for authority to store McGuire and Oconee spent fuel at Catawba with its Part 50 operating license application. For all of the reasons identified in Licensees' May 17 and May 29, 1985 filings,[1] notice of this request to receive and store spent fuel was fully adequate and was subject to the Licensing Board's jurisdiction. However, regardless of what was actually done in the Catawba proceeding, Licensees continue to maintain that if they had chosen to seek solely a separate Part 70 license for authority to receive and store spent fuel at Catawba, no prior notice of opportunity for a hearing would have been necessary under §189a of the Atomic Energy Act of 1954, as amended (the "Act" or "the Atomic Energy Act"). See 42 U.S.C. §2239(a); Kerr-McGee Corp. (West Chicago Rare Earth Facility), CLI-82-2, 15 NRC 232, 244-46 (1982), aff'd,

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1/ See "Memorandum of Duke Power Company, et al. Responding to April 25, 1985 Order of Atomic Safety and Licensing Appeal Board" (May 17, 1985)("Duke Memorandum"); "Reply Memorandum of Duke Power Company, et al., Responding to Palmetto Alliance/CESG and NRC Staff Memoranda of May 17, 1985" (May 29, 1985)("Duke Reply").

City of West Chicago v. NRC, 701 F.2d 632, 639 (7th Cir. 1983).

Contrary to the Staff's assumption (see Staff Reply at 5-6), the fact that the Staff normally merges the separate Part 70 license with the Part 50 facility operating license does not mean that a separate materials license must be merged with the Part 50 license. Section 161h of the Atomic Energy Act, 42 U.S.C. §2201(h), allows the Commission to combine in a single license various licensed activities, but it does not require the Commission to combine such licenses. Thus, as discussed in the Duke Memorandum at 13-18, had Licensees sought to maintain a separate Part 70 license to permit storage and receipt of spent fuel at Catawba, independent of the Part 50 facility license, there would have been no need for a separate prior public notice of the Part 70 license under §189a. That section of the Act applies only to specified facility licenses and facility license amendments. See 42 U.S.C. §2239(a).[2] The Staff's attempt to justify its argument by an unreasonably broad interpretation of the word "use" in §§101 and 103a of the

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2/ Indeed, the West Chicago case demonstrates that simply because a licensed activity generates public interest and dispute, that alone does not require the NRC to issue prior notice and an opportunity for a hearing. If it is not an activity licensed pursuant to Part 50, there is no requirement for prior notice and an opportunity for a hearing. See City of West Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983).

Atomic Energy Act, 42 U.S.C. §§2131, 2133(a)(see Staff Reply at 5-7), must fail, as explained below.

II. Storage of Spent Fuel at Catawba Does Not Constitute a "Use" of the Facility Within the Meaning of Sections 101 and 103 of the Atomic Energy Act.

A. Interpreting the Statutory Language

Two sections of the Atomic Energy Act are of primary importance to this issue: §101, 42 U.S.C. §2131, and §103a, 42 U.S.C. §2133(a). Section 101 provides:

> **License Required.**
>
> It shall be unlawful, except as provided in section 2121 of this title, for any person within the United States to transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, use, import, or export any utilization or production facility except under and in accordance with a license issued by the Commission pursuant to section 2133 or 2134 of this title.

42 U.S.C. §2131 (emphasis added). Section 103a provides:

> **Commercial Licenses.**
>
> The Commission is authorized to issue licenses to persons applying therefore to transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, use, import, or export under the terms of an agreement for cooperation arranged pursuant to section 2153 of this title, utilization or production facilities for industrial or commercial purposes. Such licenses shall be issued in accordance with the provisions of subchapter XV of this chapter and subject to such conditions as the Commission may by rule or regulation establish to effectuate the purposes and provisions of this chapter.

42 U.S.C. §2133(a)(emphasis added).

When these sections are read in light of one of the primary purposes of the Act -- "to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes" -- the most reasonable interpretation of the meaning of a "use" of a facility under §§101 and 103a is the "utilization of atomic energy for peaceful purposes." See §3d of the Atomic Energy Act, 42 U.S.C. §2013(d). Stated otherwise, the "use" of a facility is the conduct of a self-sustaining chain reaction in the reactor core and the utilization of the energy produced thereby. See generally 10 C.F.R. §50.2(b),(k). The "utilization of atomic energy for peaceful purposes" -- and thus the "use" of a nuclear-fueled electrical generation facility such as Catawba -- properly encompasses only the basic function of the plant: the generation of electricity.

There are numerous functions carried on at a nuclear generating plant that are secondary to the "use" of the plant to generate electricity, e.g., the receipt and storage of new, unirradiated fuel, the interim storage of low-level waste and spent fuel, the conduct of emergency drills, and the training of new reactor operators. These specific functions are only incidental to "the utilization of atomic energy for peaceful purposes" and thus should not be considered a "use" of the facility within the meaning of

§§101 and 103a of the Act. Were the Appeal Board to accept the Staff's broad, literalistic definition of the "use" of a facility (see Staff Reply at 5-7), divorced from the purposes and context of the Atomic Energy Act as a whole, then any conceivable function which may be conducted at a licensed facility (such as receiving and storing new fuel or training new reactor operators) would have to be noticed under §189a of the Act. Such a construction of the statute is not required by its language or by past practice; nor is it a reasonable reading of the intent of this provision.[3]

3/ The fact that the storage of spent fuel should not be considered a "use" of the facility under §101 of the Act should not be interpreted to mean that a separate notice should have been issued in the Catawba proceeding concerning Duke's request to store Oconee and McGuire spent fuel at Catawba. As discussed in the Duke Memorandum (pp.2-3, n.1, 4-14), Duke properly sought the necessary authority for this activity as part of its Part 50 operating license application, and adequate notice was provided by publication in the Federal Register at 46 Fed. Reg. 32974-75 (1981). Alternatively, had Licensees chosen to seek such authority under a Part 70 special nuclear materials license, there would have been no requirement for public notice. The notice issued by the Staff in the Oconee/McGuire transportation proceeding must be viewed as discretionary under 10 C.F.R. §2.104(a).

The limited statutory meaning of the word "use" in §§101 and 103a of the Act does not conflict with Licensees' argument that the storage of Oconee and McGuire spent fuel is "integral" to the Catawba facility. Cf. Duke Memorandum at 22-26; Duke Reply at 16. The Part 70 authority sought by Duke was "integral" to Catawba because it was sought as a part of the Part 50 license application. See id. This is consistent with the Commission's Diablo Canyon decision, wherein Part 70 authority that was not

(Footnote 3 continued on next page)

B. The Legislative History

The legislative history of §§101 and 103a provides further support for Licensees' interpretation of the term "use." Indeed, as originally enacted, §§101 and 103a were identical to their present wording except for the significant fact that the word "use" was absent from both sections. See the Atomic Energy Act of 1954, Pub. L. No. 83-703, §§101 and 103a, reprinted in 1954 U.S. Code Cong. & Ad. News 1076, 1097, 1098 (concerning licenses "to transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, import, or export" any facility). The word "use" was inserted in both sections by the Act of Aug. 6, 1956, Pub. L. No. 84-1006, §§11 & 12, reprinted in 1956 U.S. Code Cong. & Ad. News 1262, 1265.[4] The Atomic Energy Commission opposed insertion of the word

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(Footnote 3 continued from previous page)
sought in the original Part 50 license application was nonetheless within the Licensing Board's jurisdiction because it was "integral" to the plant's operation. See Duke Reply at 16, discussing Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Unit Nos. 1&2), CLI-76-1, 3 NRC 73, 74 n.1 (1976).

4/ This 1956 amendment was described in both the House and Senate Reports as legislation that "takes care of many minor problems on which it has been found necessary or desirable to have legislative action in order to clear up minor points of difficulties [sic] in the operations of the Atomic Energy Commission." S. Rep. No. 2530, 84th Cong., 2d Sess. 1 (1956), reprinted in 1956 U. S. Code Cong. & Ad. News 4426; H. R. Rep. No. 2695, 84th Cong., 2d Sess. 1 (1956).

"use" in either §101 or §103a, arguing that the need for a license in order to "use" a facility was already implicit in the language "transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, import, or export" any facility. See Letter from K.E. Fields, AEC, to Hon. Clinton P. Anderson, Chairman, Joint Committee on Atomic Energy (July 10, 1956), attached to S. Rep. No. 2530, supra n. 4, reprinted in 1956 U.S. Code Cong. & Ad. News 4433-34.

Accordingly, when Congress amended §§101 and 103a to insert the word "use," the insertion of the word "use" did not expand the list of activities requiring a license, but was simply a clarification of what "has been implicit in the language and operation of the statute" as originally enacted in 1954. See S. Report No. 2530, supra n. 4, reprinted in 1956 U.S. Code Cong. & Ad. News 4426, 4428; H. R. Rep. No. 2695, supra n. 4, at 3.

Thus the matters constituting a "use" of a facility under §§101 and 103a of the Act are only those functions implicit in the requirement for a license to "transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, import, or export...[a] utilization or production facility." See Atomic Energy Act, §§101, 103a, Pub. L. No. 83-703, reprinted in 1954 U.S. Code Cong. & Ad. News 1097, 1098. The need for a license to

"use" a facility such as Catawba then would be no broader than such matters as are implicit in the above quoted original language of §§101 and 103, in particular the "possess[ion]" of the facility. Nothing more particularized than the operation of the plant to generate electricity would seem to be the type of "use" implicit in a license to "possess" the facility. It would be contrary to Congress's intent to follow the Staff's argument and stretch the statutory language and explicit Congressional limitations on the meaning of "use" by encompassing the more specific subsidiary aspects of possession of the facility (e.g., the storage of spent fuel, new fuel, or the training of operators) as "uses" requiring facility license amendments and a notice of hearing under §189a.

III. The Staff's Interpretation of "Use" is Contrary to the Conduct of a Separate Part 70 Proceeding in the Oconee/McGuire Transshipment Case.

The Staff's assertion that the storage of Oconee and McGuire spent fuel at Catawba constitutes a "use" of the Catawba facility which, pursuant to §101 of the Act, must be licensed under §103 of the Act, is contrary to the Staff's own course of action in the Oconee-McGuire transportation proceeding.[5] That proceeding was treated by the Staff as a

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5/ In the Matter of Duke Power Co. (Amendment to Materials License SNM-1773/Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), Docket No. 70-2623.

request for an amendment to a Part 70 materials license, not an amendment request for a Part 50 operating license. See 43 Fed. Reg. 32905 (1978). Contrary to the Staff's current position, the SNM license amendment was not granted pursuant to §103 of the Act, but rather was issued pursuant to §53, 42 U.S.C. §2073.

Because Licensees take the position that the storage at one utilization facility of spent fuel generated at another facility does not constitute the "use" of the host facility under §101 of the Act, we disagree with the Staff's assertion that such storage "must" be licensed under §103 of the Act and that its authorization must be subject to the notice requirements of §§182c and 189a of the Act. When, as occurred in the Catawba proceeding, materials licensing authority is sought in conjunction with and as a part of a Part 50 operating license application (i.e., under the authority of §103 of the Act), only the notice requirements applicable to Part 50 licensing activities are activated. These notice requirements -- which are not altered by the fact that materials license authority is being sought along with operating license authority -- were satisfied in the Catawba proceeding. On the other hand, were such spent fuel storage authority to be sought under Part 70 (i.e., under the authority of §53 of the Act), no requirement of public notice or an opportunity for a hearing would be triggered. See Licensees' May 17 filing at 13-18.

IV. Conclusion

For all the above reasons, Licensees assert that the Staff has improperly construed the word "use" in §§101 and 103a of the Atomic Energy Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Response of Licensees Duke Power Company, et al. Concerning 'Use' of a Commercial Utilization Facility" in the above captioned matter have been served upon the following by deposit in the United States mail this 7th day of June, 1985.

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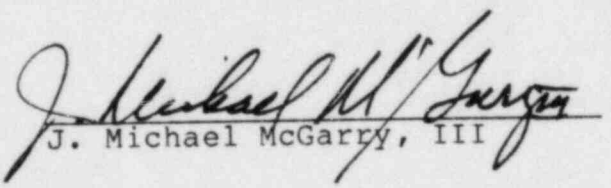

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