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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
(Catawba Nuclear Station, Units 1 and 2)	)	

NRC STAFF VIEWS ON WHETHER NOTICE OF THE PROPOSAL TO USE CATAWBA TO STORE OCONEE AND MCGUIRE SPENT FUEL WAS REQUIRED OR DISCRETIONARY

George E. Johnson
Counsel for NRC Staff

May 29, 1985

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I. INTRODUCTION

On May 20, 1985, the Atomic Safety and Licensing Appeal Board requested the NRC Staff to respond to the "Memorandum of Duke Power Company, et al. Responding to April 25, 1985 Order of Atomic Safety and Licensing Appeal Board" ("Applicants' Memorandum"), dated May 17, 1985, at least insofar as Applicants had taken a position different from that of the Staff. In particular, the Staff was invited to address whether the Staff's prior practice of publishing notice of opportunity for a hearing on applications to store fuel at a facility other than that at which the spent fuel was generated was done as a matter of discretion, as argued by Applicants (Applicants' Memorandum, at 2-3, n.1,13-18.), or pursuant to a regulatory or statutory requirement.

Inasmuch as the Applicants' position on the requirement for notice is the only area as to which the Staff's position substantially differs

from that of Applicants, [1] the Staff reply is directed to this matter. As further explained below, the past noticing practices of the Commission on the subject spent fuel storage applications do not support Applicants' position that publication of notice of the planned use of the Catawba facility to store spent fuel generated at the Oconee and McGuire facilities could have been left to the exercise of Commission discretion. [2]

1/ The Staff, however, does not agree with Applicants' assumption that "interested members of the public" are the same people who would have been interested in the Oconee-McGuire proceedings (see footnote 4), and that such people "would or should have had a heightened sensitivity to the possibility" that Duke would include the subject application to use Catawba to store Oconee and McGuire fuel in the operating license application for Catawba. Applicants' Memorandum, at 5. While persons interested in the prior Oconee-McGuire proceedings may indeed have had such heightened sensitivity, the notice must be adequate to "any person whose interest may be affected by the proceeding." 10 C.F.R. § 2.105(d)(2). Since it is reasonable to assume that there are members of the public who may be interested in this proceeding, who may not have had an "interest" in the transshipment of Oconee fuel to McGuire, it is the Staff's position that adequacy of the Catawba notice must be judged independently of any prior notices for other proceedings.

2/ The Staff has not responded to "Palmetto Alliance and Carolina Environmental Study Group Memorandum in Response to Appeal Board Spent Fuel Storage Questions," ("Intervenors' Response") dated May 17, 1985. While the Staff disagrees with Intervenors' Response on the adequacy of the Catawba notice, the basis for the Staff position is set out in the Staff's May 17, 1985 response. In addition, since Intervenors do not claim that they were denied due process by the notice in this proceeding (see Intervenors' Response, at 1, 4), the foundation for making a valid due process argument on the adequacy of the notice is lacking. See, Kerr-McGee Corporation (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 256-262 (1982), aff'd, City of West Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983), quoting, Mathews v. Eldridge, 424 U.S. 319, 334 (1976).

II. DISCUSSION

A. While Notice of a Part 70 License Application is Discretionary, Amendment of a Part 50 License to Authorize Use of the Facility in the Manner Contemplated by the Materials License Requires Notice

Applicants' Memorandum, at 2-3, n.1, suggests that although Duke sought the authority necessary to store Oconee and McGuire spent fuel at Catawba as part of their facility operating license application, they could also have sought the same authority in a separate Part 70 materials license application. Applicants argue that had the latter course been taken, there would have been no legal requirement for public notice. They argue further that the publication of notice in the Oconee-McGuire transshipment case "must be viewed as discretionary in that § 2.104(a) provides that the Commission may find a hearing is required in the public interest." Id.

As the Staff argued in its May 17, 1985 response, [3/] a proposal to store at a commercial utilization facility spent fuel which was generated at other facilities involves two separate, but necessary, authorities: the authority to store the nuclear material under Parts 30, 40 and 70, and the authority to use the facility at which storage is to take place in the requested manner. If no authority to use a commercial utilization facility is involved, then the only authority required is the authority to store the nuclear material under Parts 30, 40 and/or 70, as applicable. In such case, Applicants would be correct that there would

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3/ "NRC Staff Response to Appeal Board Questions on Adequacy of the Notice of Proposed Use of Catawba to Store Spent Fuel from Oconee and McGuire."

be no requirement to notice such an application. Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-765, 19 NRC 645, 651-2, notes 9, 10 (1984). See Staff's May 17, 1985 response, at 4. Thus, to the extent that the application to store Oconee spent fuel at McGuire involved an amendment to a materials license (SNM-1773), and not to a facility operating license, no notice requirements would have attached.

The Oconee-McGuire proceeding [4/] formally commenced with a July 28, 1978 Federal Register notice (43 Fed. Reg. 32905) of consideration of an amendment to Special Nuclear Materials License No. SNM-1773, which to that time authorized only the storage of new, unirradiated fuel intended for use in the McGuire facility. The notice recounts that Carolina Environmental Study Group (CESG), an intervenor in the McGuire operating license proceeding, had moved to reopen the environmental hearings in that proceeding in order to litigate the spent fuel transshipment and storage issues, but that the Commission had decided to treat CESG's motion as a "request for hearing pursuant to 10 CFR § 2.105." [5/] 43 Fed. Reg. at 32905. The notice went on to explain: "This notice is being issued based on the determination that an opportunity for hearing should be afforded pursuant to the Carolina Environmental Study Group's

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

5/ The Licensing Board in the McGuire case dismissed CESG's motion to reopen as moot based on publication on July 28, 1978 of the notice of opportunity for a hearing on the request to store Oconee spent fuel at McGuire. Duke Power Company (William B. McGuire Nuclear Station, Units 1 and 2), unpublished Memorandum and Order (August 8, 1978).

request." Id. Applicants' interpretation of the notice as an exercise of discretion is reasonable inasmuch as the language used in the notice follows almost verbatim the discretionary authority in 10 CFR § 2.105(a)(4) (1981), providing for public notice for "[a]ny other license or amendment as to which the Commission determines that an opportunity for a public hearing should be afforded." 6/

Had the matter not been the subject of a published Federal Register notice, however, it is doubtful that, upon issuance of the McGuire Unit 1 facility operating license on June 12, 1981, or upon amendment thereof, the authority to store Oconee spent fuel in McGuire Unit 1 could have been incorporated into the facility operating license without further public notice. This is because, as noted in the Staff's May 17, 1985 response, at 7, all "use" of a commercial utilization facility is required by Section 101 of the Atomic Energy Act to be licensed pursuant to Section 103 of the Act. 42 U.S.C. §§ 2131, 2133. Storage of spent fuel generated at another facility is such "use," and authorization therefor was subject to the notice requirements in Section 182c and Section 189a of the Act. 42 U.S. §§ 2232(c), 2239(a). The McGuire facility operating license application did not, at the time of publication of notice of that application, contain a request to store Oconee

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6/ To the extent that Counsel for the Staff can determine, the Staff did not separately address or consider the question whether the notice may have been required under the Atomic Energy Act or Section 2.105. The Staff, in fact, argued in the McGuire operating license proceeding that the issue would be considered in a separate proceeding. Duke Power Company (William B. McGuire Nuclear Station, Units 1 and 2), Docket Nos. 50-369, 50-370, "NRC Staff Response in Opposition to Intervenor's Motion to Reopen Environmental Hearing to Add Contention (2)," dated June 20, 1978, at 4.

spent fuel. The storage request was contained in an application for amendment to materials license SNM-1773, dated March 9, 1978. Therefore, the storage request was not covered by the notice of the operating license application. See, 39 Fed. Reg. 20833 (June 14, 1974). Since storage of Oconee spent fuel at McGuire was a "use" of the McGuire facility requiring licensing authorization, had no notice been published in connection with the 1978 materials license application, further notice would have been required. 7/

In sum, even though Special Nuclear Material License No. SNM-1773 and the amendment thereof may not have required prior public notice of an opportunity for a hearing, and thus the notice was given in the Commission's discretion, use of a facility licensed pursuant to Section 103 of the Act to store spent fuel in the manner contemplated by License No. SNM-1773 is subject to the notice provisions of Section 189a and 10 CFR § 2.105, and it is doubtful that the Commission could have issued the license amendment incorporating the spent fuel storage authority in the McGuire Unit 1 license without complying with the notice requirements for operating license amendments.

7/ As it happened, issuance of the requested amendment to the special nuclear materials license was authorized by order of the Appeal Board dated August 10, 1981. Duke Power Company (Amendment to Materials License SNM-1773--Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-651, 14 NRC 307 (1981). However, by that time, the operating license for McGuire Unit 1 had already been issued. Since the pertinent provision of SNM-1773 had already been incorporated into the McGuire license as Section 2.B(2) of License No. NPF-9, the amendment was issued, on October 27, 1981, as Amendment No. 8 (Sec. 2K) to the operating license.

Similarly, although Applicants may reasonably argue that had they, prior to issuance of any operating license for Catawba, applied separately for a nuclear materials license under Part 70 to store Oconee and McGuire spent fuel at the Catawba site, no notice would have been required, it does not follow that such authority, if granted, could have been incorporated into the Catawba operating license without public notice of the Part 50 licensing action.

B. Applicants Do Not Argue, and There Is No Basis for Contending, That Operating License Amendments to Store Spent Fuel from Other Facilities Do Not Require Notice

There is nothing in Applicants' Memorandum which suggests that their application to store Oconee and McGuire spent fuel at Catawba, when included in their application for facility operating licenses, was not subject to the notice provisions of Sections 182c and 189a of the Atomic Energy Act, or of 10 CFR § 2.105. They do not argue that the notice was discretionary insofar as the published notice encompassed the application for the materials licenses necessary to store Oconee and McGuire spent fuel at Catawba. They argue only that the public notice requirements do not "emanate from [the] materials license characteristic of the licensed activity." See, Applicants' Memorandum, at 13-14.

Similarly, while Applicants do not discuss the three examples of applications to amend facility operating licenses to permit storage of other facilities' spent fuel, cited in the Staff Response, at 6, Applicants' argument that public notice requirements do not "emanate from [the] materials license characteristic of the licensed activity" does not

suggest that Applicants would contend these applications required no notice.

In each of these operating license amendment cases, the notice was published as "Proposed Issuance of Amendments to Facility Operating Licenses." 41 Fed. Reg. 52113 (November 26, 1976) (storage of H. B. Robinson spent fuel at Brunswick); 8/ 43 Fed. Reg. 37245 (August 22, 1978) (storage of Dresden and Quad Cities spent fuel at either site); 47 Fed. Reg. 41892 (September 22, 1982) (storage of Surry spent fuel at North Anna). Given, first, that the applications themselves proposed to amend the facility operating licenses, and, second, that the use of the recipient licensed facility as a storage site was required to be authorized pursuant to Sections 101 and 103 of the Atomic Energy Act, it would be simply insufficient, as to both the facts and the law, to argue that notice in these cases was not required insofar as authority to possess or store was sought pursuant to Parts 30 and 70. 9/ More authority was requested and more authority was required to permit use of

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8/ See, Amendment No. 9 to License DPR-71, and Amendment No. 34 to License No. DPR-62. October 14, 1977. Amendment No. 8 to DPR-71 and Amendment No. 30 to DPR-62, referenced at page 6 of Staff's May 17, 1985 response, authorized modifications to accommodate storage of H. B. Robinson spent fuel in the Brunswick spent fuel pool, but not the storage of the Robinson fuel.

9/ Compare, Applicants' Memorandum, at 13-18.

the licensed facility as the site for storing other facilities' spent fuel. 10/

The question remains whether, even though incorporated into the Part 50 application (as in the case of Catawba), or applied for as an amendment to existing facility operating licenses (as in the cases of Brunswick, Quad Cities and Dresden, and North Anna), publication of notice of the proposed action may still have been discretionary.

Insofar as the authority to store spent fuel from Oconee and McGuire at Catawba was included in the application for the Catawba facility operating licenses, Section 182c and Section 189a leave no doubt that publication in the Federal Register of notice of the application was required at least 30 days prior to issuance. 42 U.S.C. §§ 2232(c), 2239(a). With respect to the applications to amend the facility operating licenses referenced above, such applications were subject to

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10/ Applicants' argument that the subject application "can be viewed simply as a plan to possess and store special nuclear material from other Duke power reactors at the Catawba plant" under Parts 30 and 70 (Applicants' Memorandum, at 14), is inconsistent with an argument that the Part 30 and 70 authority "is essentially subsumed within" the Part 50 operating license. Id. If the subject application for Part 30 and 70 authority here in controversy were, as a matter of law, subsumed within the Part 50 authority applied for, there would be no question that the notice here was adequate as a matter of law. Limerick, supra, ALAB-765, 19 NRC at 649, n.2; Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-76-1, 3 NRC 73, 74, n.2 (1976), cited in Applicants' Memorandum, at 14, n.10; Staff Response, at 13. Since storage of spent fuel at a facility other than that at which it was generated is not "integral" to the facility operating license as a matter of law, the adequacy of the notice in question must depend upon the fact that the notice of consideration of the Catawba facility operating license specifically incorporated by reference the application which contained the application to store Oconee and McGuire spent fuel at Catawba.

the notice provisions then applicable to all amendments to operating licenses.

Notice of all the aforementioned applications was given prior to the effective date of the so-called "Sholly amendment." Public Law 97-415 (96 Stat. 2067) (1983), section 12. Under Section 189a, as previously in effect, the Commission was permitted to dispense with prior notice and publication in the Federal Register on applications for amendments to operating licenses upon a determination that the amendment involved no significant hazards consideration. 42 U.S.C. § 2239(a); Public Law 87-615 (76 Stat. 409) (1962), section 2. Pursuant thereto, 10 CFR § 2.105 only required prior public notice of the proposed issuance of an amendment to a facility operating license which involved a significant hazards consideration. 10 CFR § 2.105(a)(3) (1982). 11/ Thus, if, upon consideration of the proposals to amend the Brunswick, Quad Cities/Dresden, and North Anna licenses, the Commission had made a finding of no significant hazards consideration, the amendment could have been issued without prior notice and publication in the Federal Register.

11/ Pursuant to Public Law 97-415 (42 U.S.C. § 2239(a)(2)), 10 CFR § 2.105 currently requires notice of opportunity for a hearing on an application for a facility license amendment even in cases where the Commission finds no significant hazards considerations, but permits the amendment to be made immediately effective and any requested hearing to be conducted after issuance when no significant hazards considerations are found. 10 CFR § 2.105(a)(4)(i).

Such prior notice and publication would have been required without such a finding. 10 CFR § 2.105(a)(3) (1982). 12/

However, this distinction does not lead to a conclusion that had the application to store Oconee and McGuire spent fuel at Catawba been considered as an amendment to the Catawba operating license, no notice would have been necessary. First, since the Catawba Unit 1 license issued after the Sholly amendment to the Atomic Energy Act and Commission regulations became effective, prior notice could not be dispensed with even on a finding of no significant hazards consideration. 42 U.S.C. § 2239(a), as amended by Public Law 97-415 (96 Stat. 2067) (1983). 10 CFR § 2.105(a) (1985). However, even if Applicants had sought a separate amendment to the Catawba facility operating license under prior regulations, a notice of issuance of the amendment would, at minimum, have been required under 10 CFR § 2.106(a)(2) (1982). Thus, the requirement of notice does not depend upon the option Applicants may have had to separately request the subject storage authority as an amendment to the Part 50 license.

In sum, the application to store Oconee and McGuire spent fuel at Catawba required some form of notice to be published in the Federal

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12/ Inquiries by Counsel for the Staff to members of the NRC Staff indicate that the Staff found the Quad Cities/Dresden application to involve significant hazards considerations. Notice of opportunity for hearing on the North Anna/Surry application was provided without considering whether a finding of no significant hazards consideration could be made. Counsel was unable to determine whether a finding of significant hazards consideration was made in connection with the notice of the application to store H. B. Robinson spent fuel at Brunswick.

Register, whether notice of the application was given as part of the notice of the facility license application, or as an amendment thereto, and whether received before or after the 1983 "Sholly amendment" and conforming changes to the provisions of 10 CFR § 2.105. See, 48 Fed. Reg. 14873 (April 6, 1983).

III. CONCLUSION

For the reasons set forth above, notwithstanding any options Applicants may have had to apply for authority to store Oconee and McGuire spent fuel at Catawba under Part 70, or through a separate operating license amendment, notice was required pursuant to the Atomic Energy Act and Commission regulations.

Respectfully submitted,

George E. Johnson
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Dated at Bethesda, Maryland
this 29th day of May, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF VIEWS ON WHETHER NOTICE OF THE PROPOSAL TO USE CATAWBA TO STORE OCONEE AND MCGUIRE SPENT FUEL WAS REQUIRED OR DISCRETIONARY" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, by deposit in the Nuclear Regulatory Commission's internal mail system, this 29th day of May, 1985:

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