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July 12, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC
SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
VIRGINIA ELECTRIC AND POWER COMPANY	)	Docket Nos. 50-338/339 OLA-1
	)	
(North Anna Power Station, Units 1 and 2)	)	

LICENSEE'S REPLY TO CONCERNED CITIZENS OF
LOUISA COUNTY'S POST-HEARING BRIEF

I.

Introduction

In its Post-Hearing Brief, Concerned Citizens of Louisa County (CCLC) takes no issue whatever with the Licensee's proposed findings with respect to sabotage and human error. There is, then, no basis upon which CCLC may challenge the Staff's conclusion that an Environmental Impact Statement is unnecessary in connection with Licensee's receipt and storage proposal.

CCLC's entire brief is directed to the Staff's failure to discuss the dry cask alternative in its Environmental Assessment. Even so, CCLC does not argue that this alleged deficiency requires the denial of the license amendment that Licensee seeks in this proceeding. On the contrary, CCLC argues only that (a) the Staff was required to perform an analysis of alternatives to the Licensee's receipt and storage proposal, (b) nothing less than the inclusion of such an analysis within the four corners of

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the Environmental Assessment prepared in connection with the receipt and storage proposal will suffice to meet the requirements of the National Environmental Policy Act (NEPA), and (c) the Environmental Assessment should be revised by the Staff. We have addressed these issues in our Post-Hearing Brief, and so we will merely reemphasize in this Reply the following positions: (a) in the circumstances no analysis of alternatives was required of the Staff, and (b) in any event the record compiled in this proceeding provides an adequate analysis of the dry cask alternative.

II.

Argument

A. No analysis of alternatives was required of the Staff.

Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (1982), requires a federal agency to include in a report on a major federal action significantly affecting the quality of the human environment, a detailed statement on "alternatives to the proposed action." Section 102(2)(E), 42 U.S.C. § 4332(2)(E) (1982), requires a federal agency to

> study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.

Thus, the Appeal Board has often indicated that no analysis of alternatives is required of the Staff when (a) circumstances do not require the preparation of an Environmental Impact Statement and (b) there is no "unresolved conflict concerning alternative uses of available resources." See, e.g., Duke Power Co.

(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, 321 (1981). In this proceeding, it is now clear that the first of these criteria for deciding whether an analysis of alternatives is required has not been satisfied. Only the risk of sabotage and human error were identified in Consolidated Contention 1 as environmental effects that might significantly affect the quality of the human environment. The evidence in the record, however, indicates that neither sabotage nor human error will in fact result in such effects, and CCLC has not taken issue with this conclusion. Thus, the Staff's decision that no Environmental Impact Statement is required has now been shown to be correct.

It follows that the Staff erred in declining to analyze alternatives in its Environmental Assessment only if there exists an "unresolved conflict concerning alternative uses of available resources." CCLC contends that the "unresolved conflict" criterion is satisfied if the proposed course of action involves "some environmental effects." CCLC PFF 8. It cites for this proposition the decision of the United States Court of Appeals for the Second Circuit in City of New York v. Department of Transportation, 715 F.2d 732 (2d Cir. 1983).

In the Licensee's view, neither CCLC's position nor the holding of the Court of Appeals in City of New York is a reasonable interpretation of § 102(2)(E). The fact is, any proposal one can imagine is likely to have "some environmental effects," construing the words liberally, and every proposal would thus

require a written analysis of alternatives. If Congress had intended such a result, it would have been far simpler to require in § 102(2)(E) that an analysis of alternatives accompany every proposal.

In any event, the important thing is that the Appeal Board has not gone so far as CCLC would have this Board go.[1] It has been unwilling to equate "some environmental effects," no matter how trivial, with an "unresolved conflict" over the use of resources. For example, in Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451 (1980), the Appeal Board had before it a proposal to enlarge the capacity of a spent fuel storage pool. The record showed, and the Appeal Board acknowledged, that the proposed pool modification would require some engineering talent, 5,000 hours of labor, and 161 tons of stainless steel. In short, taking the CCLC view, the proposal would have "some environmental effect." Nevertheless, the Appeal Board found that the record established "without contradiction" that the installation and use of the new racks would not present unresolved conflicts over the commitment of available resources within the meaning of § 102(2)(E). The Appeal Board said

> There is no obligation to search out possible alternatives to a course which itself will not either harm the environment or bring into serious question the manner in which this

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[1] CCLC refers to the position adopted by the "Appeal Board" in La Crosse. CCLC Brief at 4. In fact the La Crosse decision is an Atomic Safety and Licensing Board decision. Dairyland

(Footnote Continued)

> serious question the manner in which this country's resources are being expended.

Id. at 457.

The facts in the North Anna case are similar to the facts in this case. Certainly, the storage of Surry fuel at North Anna will involve "some environmental effects." Those effects, however, are not significantly different from the effects anticipated in North Anna. They were inadequate, in the Appeal Board's view, to trigger the § 102(2)(E) requirement in North Anna, and they ought to be found inadequate in this case as well.

B. In any event, the dry cask alternative has been analyzed adequately in this proceeding.

Even if one accepts for the sake of argument CCLC's position that an analysis of the dry cask alternative is required in this proceeding, no remand is required. In fact, the very analysis CCLC insists upon has been performed. The matter has been dealt with exhaustively in the record, and all of the necessary raw material is available for analysis and decision by the Board.

CCLC takes the novel position that the dry cask analysis must be set out within the four corners of the Environmental Assessment prepared in connection with the Licensee's proposal to receive and store Surry fuel at North Anna. CCLC, however, cites not one word of authority, either in its Brief or in its Proposed Findings, for that proposition. In fact, the law is squarely opposed to CCLC's position. As the Licensee pointed out in its

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(Footnote Continued)
Power Cooperative, (La Crosse Boiling Water Reactor), LBP-80-2, 11 NRC 44 (1980).

Post-Hearing Brief, the adequacy of an environmental inquiry is not to be judged on the material in the Environmental Assessment alone but on the basis of the entire record. See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-84-31, 20 NRC 446, 552-53 (1984); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-262, 1 NRC 163, 197 n.54 (1975).

Section 51.102 of the Commission's rules provides that a decision on any action for which an Environmental Impact Statement has been prepared shall be accompanied by a concise public record of decision. 10 C.F.R. § 51.102(a). Section 51.102(c) provides that when a hearing is held in connection with such an action, the initial decision of the presiding officer "will constitute the record of decision." We can think of no reason why a different rule should apply here simply because only an Environmental Assessment is required.

To follow CCLC's suggestion and remand this proceeding would be pointless. The Staff would merely revise the Environmental Assessment to incorporate the material that is already in the record in this proceeding, and thus before the Board, and publish a new version. All that would have been gained by CCLC would be delay. CCLC has had every opportunity to put on testimony and, through cross-examination, to probe the Staff's thinking on both dry cask and transshipment. Indeed, the evidence in the record on the dry cask alternative has enabled CCLC to set out a comparison of dry cask storage with transshipment in its Proposed Findings. See CCLC PFF 6 and 11 through 18. In short, CCLC has

received all the relief in this proceeding that it is entitled to.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served Licensee's Reply to Concerned Citizens of Louisa County's Post-Hearing Brief 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: July 12, 1985