

629

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

In the Matter of)

THE CLEVELAND ELECTRIC)
ILLUMINATING CO. ET AL.)

(Perry Nuclear Power Plant,)
Units 1 and 2))

Docket Nos. 50-440 085 SEP 27 A10:40
50-441 0L

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USNRC
OFFICE OF SECRETARY
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MOTION FOR A STAY PENDENTE LITE

I. INTRODUCTION

Pursuant to 10 CFR 2.788, Intervenor Ohio Citizens for Responsible Energy (*OCRE*) hereby seeks a stay of the effectiveness of LBP-85-35, 22 NRC --, September 3, 1985 Concluding Partial Initial Decision on Emergency Planning, Hydrogen Control and Diesel Generators (served September 4, 1985) and LBP-84-40, 20 NRC 1181 (October 4, 1984 Memorandum and Order (Denying Motion for Summary Disposition on OCRE Issue No. 6 and Dismissing the Contention)) pending administrative appeal of these decisions.

II. SUMMARY OF DECISIONS TO BE STAYED

A. LBP-85-35

This Concluding Partial Initial Decision addressed the issues litigated at evidentiary hearings held April 9-12, 1985 and April 30-May 3, 1985. The hydrogen control issue concerned compliance of the Perry Mark III containment degraded core accident hydrogen control measures (a distributed igniter system) with the new provisions of 10 CFR 50.44(c)(3)(iv)-(vii). Subjects addressed included igniter system design and operation, containment capacity, accident scenarios and analyses, containment response calculational models, and equipment survivability.

The diesel generator issue concerned the ability of the Perry Transamerica Delaval, Inc. (*TDI*) diesel generators to reliably generate on-site AC power, as required by GDC 17. Subjects addressed included TDI quality assurance, the

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program and plan of the TDI Owners Group to revalidate the engines, and the suitability of 16 Phase I components and certain Phase II components.

After "considering" the evidence on these issues, the Licensing Board, finding that Applicants had met their burden of proof and that there was reasonable assurance that Perry can be operated without endangering the public health and safety, dismissed Intervenor's contentions and authorized the Director of Nuclear Reactor Regulation to issue operating licenses for Perry 1 and 2 subject to seven license conditions.

B. LBP-84-40

This split decision concerned OCRE's Issue No. 6, which, as admitted by the Licensing Board, stated:

Applicant should install an automated standby liquid control system ["SLCS"] to mitigate the consequences of an anticipated transient without scram ["ATWS"].

After issuance of the Commission's new ATWS rule, 10 CFR 50.62, OCRE moved for summary disposition of this issue in its favor as the Perry SLCS has automatic capability. It is OCRE's interpretation of the ATWS rule that BWRs with automatic SLCS capability be required to utilize it.

As the replies of Applicants and Staff to OCRE's motion indicated a difference of interpretation of the phrase "already designed and built" in 10 CFR 50.62(c)(4), the Licensing Board requested briefs from the parties on this matter. OCRE submitted a detailed analysis of the legislative history of the ATWS rule, which supports OCRE's interpretation.

The former Chairman agreed that the legislative history supports OCRE's interpretation. The majority, however, ignored the legislative history and contrived an illogical argument to justify its dismissal of OCRE's contention.

III. GROUNDS FOR THE STAY

A. LIKELIHOOD OF PREVAILING ON APPEAL

1. LBP-85-35

The Licensing Board in this Partial Initial Decision ("PID") has disregarded the Atomic Energy Act, the Commission's regulations and case law, and the weight

of the evidence to such a degree that the PID will not withstand appellate scrutiny. The errors in the PID are too numerous and complex to be fully evaluated here. OCRE has outlined below some of the simpler and more egregious errors.

By using the vehicle of license conditions, the Licensing Board had delegated contented issues to the NRC Staff for post-hearing resolution, a practice prohibited by Consolidated Edison (Indian Point Unit 2), CLI-74-23, 7 AEC 947, 951 (1974). Several of the conditions involve analyses, which are not merely confirmatory matters but require an evaluation of sufficiency. Similarly, the fact that procedures are needed to operate the Perry igniter system (condition # 6) begs the question of their adequacy. The Board refused to consider this matter, however, and stated that 10 CFR 2.206 provides a mechanism for consideration of the procedures' adequacy in other proceedings, PID at 28-29.

This reasoning contravenes Section 169(a) of the Atomic Energy Act in that it denies a hearing on an issue that even the Board found material to licensing. See Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984) ("UCS"). The provisions of 10 CFR 2.206 do not guarantee a hearing, as there is no requirement that a proceeding be initiated in response to a 2.206 request. UCS at 1442-44.

The Board's arguments (PID at 28) that it need not be concerned with radioactive releases from containment venting is doubly flawed. First, it neglects the Board's own wording of the hydrogen control issue, which changed but little from the time when the standard for its litigation was Metropolitan Edison (TMI 1 Restart), CLI-80-16, 11 NRC 674 (1980), which specified 10 CFR 100 as the regulation under which hydrogen control could be then litigated. Second, it contains the circular reasoning that Perry will not be allowed to operate if the hydrogen control system proves inadequate, forgetting that it is the Board's responsibility to determine this for this contested issue.

The Board refused to accept its responsibility and rule on the proper scope of the preliminary analysis of the hydrogen control system, required before operation above 5% power by 10 CFR 50.44(c)(3)(vii)(B), so that a finding of compliance or non-compliance with the regulation could be determined, as required by 10 CFR 50.57(a)(2). Instead, the Board used an illegal and subjective "reasonable assurance of safety in the interim" standard. PID at 25-26.

The Board relied upon ipse dixit averments of the witnesses and other material that was not in the record and was incapable of being examined by OCRE.

Of course, a Licensing Board decision resting significant findings on expressions of expert opinion not susceptible of being tested on examination of the witness is a fit candidate for reversal. Virginia Electric and Power Co., (North Anna Nuclear Power Station, Units 1 and 2), ALAB-555, 10 NRC 23 (1979).

For example, the Board relied on a witness' description of analyses of stresses at defective welds in the containment vessel at 50 psig when the analyses were not even available for OCRE's scrutiny. PID at 96, Finding 103; Tr. 3315.

Similarly, the Board relied upon the statements of witness Lewis that flame speeds lower than that assumed in the CLASIX-3 containment response model used by Applicants have been measured, despite the fact that he could not identify the the experimental basis for his statements with sufficient particularity to determine the applicability to containment-scale conditions. PID at 102, Finding 132; Tr. 3521-22.

The Board also relied upon the assertions of Applicants' witnesses that drywell leakage of hydrogen (of the magnitude assumed by an unavailable General Electric calculation) would not affect the results of their analyses of hydrogen transport and combustion, despite the fact that the witnesses admitted that the effects had not been evaluated. PID at 45; Tr. 3500.

The Board relied upon analyses of drywell capacity, equipment survivability, and secondary fires performed for the Grand Gulf plant which were not a part of

the record and were not made available by Applicants during discovery. PID at 98, Finding 114, 103, Finding 136, and 106, Finding 148.

The Licensing Board clearly failed to confront the facts in this case, as required by Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 41 (1977). Instead, the Board ignored substantial evidence in the record contrary to its conclusions.

For example, the Board states that Sandia National Laboratories accepted the CLASIX code results with reservations, citing OCRE Ex. 21 at 11. PID at 39. However, all that is stated on that page of the exhibit is that the distributed igniter system (not the CLASIX code) is considered marginally adequate. The Board ignores the severe criticisms of the CLASIX code and its input assumptions throughout that exhibit.

The Board ignored the evidence that hydrogen igniter location and the spray shield of the igniter assembly would affect combustion characteristics (OCRE Ex. 21 at 195-96) and accepted, without explanation, Applicants' witnesses' statements to the contrary (PID at 41-42, 90 (Finding 81), 91 (Finding 84), 102 (Finding 131)), despite the Board's own recognition of Sandia's expertise in the field of hydrogen combustion. Tr. 3687. The Board similarly ignored experimental data (NTS tests, Tr. 3627) substantiating Sandia's concerns.

The Board found that the APTECH analysis of defective containment welds did not take credit for the annulus concrete, ignoring the fact that OCRE Ex. 18 contains contrary information. PID at 32.

The Board contrived an argument for avoiding the issue of containment spray availability as an input to containment response analyses, despite its own admission that sprays are an important heat transfer mechanism and despite the Staff's belief that spray availability is questionable in a degraded core accident and should not be taken credit for in such analyses. PID at 43-44; OCRE Ex. 19 at 4.

On the TDI diesel issue, the Board relied upon a witness' statement

(concerning the length of time emergency power is needed for core cooling) which the witness later retracted under questioning by the Board, PID at 72; Tr. 2274.

The Board also ignored Staff witness Kirkwood's disapproval of Applicants' evaluation (which the Board accepted) of the Perry engine foundation, PID at 75, 120-121, Finding 200; Tr. 2417-19.

Of course, for a Board to admit evidence and then fail to explain why it was rejected is grounds for reversal. Public Service Electric and Gas, (Hope Creek Generating Station, Units 1 and 2), ALAB-429, 6 NRC 229, 237 (1977).

2. LBP-84-40

The majority in this Memorandum and Order ("M&O") commits numerous errors to justify its conclusion. First, the legislative history of the ATWS rule pertaining to the interpretation of "already designed and built" is completely ignored. The majority instead relied upon a legal interpretation of 10 CFR 50.62 (c)(4) by one Staff engineer, an interpretation obviously contrived to fit the circumstances of Perry Unit 1. M&O at 9, 11-12. The majority concludes, without basis, that the Commission considered in its rulemaking the situation at hand: a CP holder having a SLCS capable of automation at extremely low cost but which refuses to utilize that feature.

Second, the majority only applies its interpretation to Perry Unit 1, leaving it "to future cases to determine whether reactors which are not in an advanced stage of construction" should automate the SLCS. M&O at 12. However, this category includes Perry Unit 2, and this is an OL proceeding for both Perry units. The majority completely avoided its responsibility to decide this issue for Unit 2, and such avoidance is tantamount to the illegal action of delegating the issue to the Staff for post-hearing resolution.

Finally, the majority rejects Applicants' own figure of \$100,000 (mischaracterized as OCRE's estimate) for SLCS automation by concluding that a "full rigorous site specific value impact analysis" would have to be performed

to confirm the estimate (M&O at 13), despite the obvious fact that generic rulemaking is undertaken to avoid such site specific analyses. The majority then advances the incredible theory that, in this Perry-specific analysis, sunk costs relating to automation of the SLCS should be considered forward costs. M&O at 14.

The examples above demonstrate the bizarre and illogical reasoning comprising the majority opinion, which will surely fall upon appellate review.

B. IRREPARABLE HARM ABSENT A STAY

1. Exposure to Routine Emissions of Radiation

If the PID becomes effective, the Perry plant will be allowed to operate, thereby exposing the population to routine, non-natural radioactive emissions. This exposure has been termed "a direct and present injury" by the Supreme Court. Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 74 (1978). As is demonstrated by Exhibit 1, the affidavit of Dr. Carl J. Johnson, this injury is irreparable due to the carcinogenic action of low level radiation.

The exposure of persons made especially susceptible to cancer by genetic factors (as revealed by adverse family history) to the radioactive releases postulated in the Perry FES constitutes severe irreparable harm. Affidavit of Dr. Johnson at P. 4. Exhibit 2, the affidavit of Susan L. Hiatt, shows that an OCRE member having genetic susceptibility to cancer will be exposed to the radioactive effluents from Perry.

OCRE will therefore suffer harm from the operation of Perry pendente lite which cannot be rectified by a victory on appeal, as the seeds of cancer will have already been planted. This fact alone demands a stay.

2. Risk of Severe Accidents

If Perry is permitted to operate, OCRE members (and the general population) will be exposed to a risk that is now non-existent: the risk of a severe nuclear reactor accident.

There is no doubt that the consequences of a severe reactor accident can be

devastating. As estimated in the FES, NUREG-0884, a severe accident could cause 370 early fatalities, 18,000 latent cancers, and about 36,000 genetic effects, expose 8100 people to doses exceeding 200 rems and 650,000 people to doses over 25 rems, and cost \$10 billion for offsite mitigating actions. FES, Table 5.9, p. 5-53. Members of OCRE would undoubtedly be among the victims due to their proximity of residence to the Perry site.

Should a severe accident occur pendente lite, a victory on appeal cannot compensate for the damage done to OCRE by the accident. The operation of Perry therefore creates the risk of severe irreparable harm.

3. Loss of Status Quo Ante Necessary for a Correct Decision on Issue No. 6

As noted above, the correct resolution of Issue No. 6, on automation of the Perry SLCS, hinges on the interpretation of 10 CFR 50.62(c)(4) consistent with its legislative history. This regulation states:

The SLCS initiation must be automatic and must be designed to perform its function in a reliable manner for plants granted a construction permit after July 26, 1984, and for plants granted a construction permit prior to July 26, 1984, that have already been designed and built to include this feature.

A literal interpretation, as advocated by Applicants and Staff, would exempt BWRs that did not have an automatic SLCS already designed and built as of the effective date of the rule.

However, information in the Federal Register notice indicates that the decision to exempt certain plants from automation (despite the significant risk reduction achieved therefrom) stems from a generic value-impact analysis. 49 FR 26038 (June 26, 1984).

The legislative history contained in SECY-83-293, specifically, Enclosure D, the ATWS Task Force Report, provides insight into this decision. The costs for SLCS automation (upon which the rule is based) include \$3.35 million for design, engineering, and installation; \$10.0 million for downtime for installation; \$5.0 million for spurious trip; and \$4.2 million for AFUDC, operation, and maintenance. Thus, the source of the phrase "designed and built" is the lump sum for these activities considered in the value/impact analysis.

The Task Force assumed that existing plants would be subject to the full \$23 million for automating the SLCS. New plants (which are assumed to already be designed with this feature; see 49 FR 26038), clearly, would be subject to far less. Most significantly, there would be no downtime for installation.

The situation now existing for Perry with respect to the costs of SLCS automation is closer to a new plant than to an operating plant. The automatic SLCS is already designed; parts of it are installed; to finish the installation would cost, by Applicants' estimates, \$100,000. Dissenting Opinion of Chairman Bloch, M&O at 19. If installed before operation, there are no costs of downtime.

An interpretation of the ATWS rule consistent with this history would thus mandate automation of the Perry SLCS. However, if Perry is permitted to operate, it will be subject to the costs of downtime and will fall into the class of reactors clearly meant to be exempted from automation: operating plants. The immediate effectiveness of the PID will therefore result in the loss of the status quo ante necessary to a correct decision on this issue. The opportunity to gain a significant improvement in safety will, absent a stay, be forever lost.

C. HARM TO OTHER PARTIES

Clearly, the only party which could be harmed by a stay is the Applicants. However, the only harm to which they would be subjected is that with which they have lived from the inception of the Perry plant: that the billions of dollars spent on Perry will go for naught. With eyes open, Applicants have accepted this risk, however great. Compare Power Reactor Development Co. v. International Union of Electrical, Radio, and Machine Workers, 367 U.S. 396, 415 (1961).

It is expected that Applicants will complain of increased costs if operation is delayed pending appeal. However, the only situation in which this becomes relevant is if operation is inevitable, i.e., if intervenors have no chance of prevailing on appeal. As long as the risk of denial of the OL exists, it far outweighs any possible cost increases resulting from a stay. As demonstrated

above, the probability of reversal of the PID is high.

D. WHERE THE PUBLIC INTEREST LIES

Since the public, as well as OCRE, will suffer injuries resulting from routine radioactive emissions and will be exposed to the risk of severe accidents, it is obviously not in the public interest to permit the operation of Perry pendente lite.

As demonstrated above, and by OCRE's Findings of Fact and Conclusions of Law (Issue 8, June 13, 1985; Issue 16, May 22, 1985), Applicants are in violation of 10 CFR 50.62(c)(4), 10 CFR 50.44(c)(3)(iv)-(vii), and GDC 1 and 17, and the Licensing Board has violated Section 189(a) of the Atomic Energy Act. These provisions were, of course, enacted to protect the public interest. So strong is the public interest in the enforcement of these measures that the Commission's regulations explicitly authorize injunctive relief when they have been violated:

An injunction or other court order may be obtained prohibiting any violation of the Atomic Energy Act of 1954, as amended, or Title II of the Energy Reorganization Act of 1974, or any regulation or order issued thereunder, 10 CFR 55.5a.

Thus, a stay is mandatory to vindicate the public interest implicit in compliance with the Atomic Energy Act and the Commission's regulations.

IV. CONCLUSION

As demonstrated above, OCRE has made an affirmative showing on all four factors of 10 CFR 2.788(e): the probability of reversal of the illegal and erroneous actions of the Licensing Board is high; OCRE will suffer irreparable harm absent a stay; Applicants will not be harmed by a stay; and the public interest demands a stay.

The evidence and the law thus require that the requested relief be granted. OCRE prays that the Appeal Board is so moved.

Respectfully submitted,

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