

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 08/30/00

COMMISSIONERS:

SERVED 08/30/00

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of)
)
Vermont Yankee Nuclear Power Corporation)
and)
AmerGen Vermont, LLC)
)
(Vermont Yankee Nuclear Power Station))
_____)

Docket No. 50-271-LT

CLI-00-17

MEMORANDUM AND ORDER

On July 14, 2000, the Citizens Awareness Network (CAN) filed a motion for stay, a motion for clarification and a request for investigation -- all concerning the NRC staff's July 7th order approving the transfer of Vermont Yankee Nuclear Power Station's license from Vermont Yankee Nuclear Power Corporation (Vermont Yankee) to AmerGen Vermont, LLC (AmerGen Vermont). CAN asserts that the staff issued its order without issuing a Safety Evaluation Report (SER), without notifying the parties who had sought intervention and a hearing regarding the license transfer, and without "subsequent proper notice" of the order's issuance.

CAN seeks clarification as to the staff's procedures. In particular, CAN seeks an explanation of the procedures which led to the staff's purported "failure to provide a notice or order" prior to the Commission's issuance of a ruling on CAN's hearing request in this proceeding. CAN also seeks a Commission order directing the staff to issue an SER prior to approving the license transfer at issue here. CAN further requests both the details and basis of the staff's decision and an opportunity to appeal that decision. Finally, CAN requests that the Commission initiate an independent investigation of the staff's decisionmaking process that led to the issuance of the staff order in question.

Vermont Yankee and AmerGen Vermont oppose CAN's various requests. For the reasons set forth below, CAN's motion for stay and request for investigation are denied, and its motion for clarification is granted.

DISCUSSION

CAN's requests for clarification and investigation (and its motion for stay as well) are based on CAN's erroneous assumption that the July 7th order represented the Commission's last word on the license transfer application. The error apparently stemmed from CAN's incomplete reading of an NRC press release whose opening sentence stated that "the Commission had decided to grant the license [transfer] application." See Motion at 3-4. See also OPA [Office of Public Affairs Notice] No. 00-109 (July 10, 2000)). This statement, when taken out of context, gives the erroneous impression that it was the Commission, not the staff, that had issued the approving order.⁽¹⁾ However, the press release later states:

The Commission received two requests for hearing. One hearing request was from the State of Vermont Department of Public Service, dated February 23. A second hearing request was filed by the Citizens Awareness Network, dated February 22. Commission review of these hearing requests is pending.

The technical staff's approval becomes effective immediately. However, the petitioners could request the Commission issue a stay preventing the license transfer from proceeding, or, **if the Commission decides to grant a hearing and rules in favor of the petitioners, the Commission could rescind the license transfer.**

(Emphasis added). This language made clear that the Commission itself had not yet issued its adjudicatory decision. Similar information was also set forth in the NRC staff's July 7th order itself, which stated that "Commission review of [CAN's and the State of Vermont's] hearing requests is pending." Staff Order at 2.

Although the staff faxed CAN a copy of the order on July 7th, the fax apparently never arrived. When the staff learned on July 14th that CAN had not received the earlier fax, the staff immediately faxed CAN both the July 7th order and the July 7th SER (with proprietary information deleted), and confirmed that a CAN representative had received all faxed pages of both documents. From these facts, we conclude that CAN's request for an investigation of the events leading up to the issuance of the staff's July 7th order is based on a misunderstanding of what documents the staff issued and when they were issued. We therefore decline to conduct the requested investigation.

Based on CAN's submittal, it appears that CAN does not have a full understanding of how this agency reviews license transfer applications. Once an applicant or group of applicants submit a license transfer application to the NRC, our staff conducts a review of the application to determine whether it satisfies various requirements (e.g., financial qualifications, technical qualifications, foreign ownership restrictions). If no person seeks a hearing on the application, the staff's review is the only review the application will receive (unless the Commission itself takes the unusual step of reviewing the application sua sponte). If a person does seek intervention and a hearing on the application, then the Commission itself conducts an independent adjudicatory review of the petition to intervene and request for hearing, to determine whether the petitioner both has standing and has raised at least one admissible issue. If the Commission grants intervention and a hearing, it will then adjudicate any admissible issues which petitioner raises regarding the application. This latter review often occurs simultaneously with, but is always separate from, the staff's review.

Even if, prior to the staff's completion of its own review of the license transfer application, the Commission issues an adjudicatory order either finding all challenges to the application to be inadmissible or finding all admitted issues to be without merit, the staff will still need to grant the application if the application is to receive the agency's final approval. (This is because the staff review may cover issues not raised in the adjudication.) Likewise, if the staff approves the application prior to the Commission completing its adjudication, the application will lack the agency's final approval until and unless the Commission concludes the adjudication in the applicant's favor. In the latter situation, our procedural rules (10 C.F.R. Part 2, Subpart M) leave license transfer applicants who have received staff approval but are still awaiting the results of a Commission adjudication free to act in reliance on the staff's order. See generally 10 C.F.R. § 2.1327. However, they do so at their peril in the event that the Commission later determines that intervenors have raised valid objections to the license transfer application. In such a case, the Commission may require that the license be rescinded.

Even though the staff here has concluded its review of the Vermont Yankee application and issued both its SER and its order approving the license transfer on July 7th, the adjudicatory portion of this license transfer proceeding is still very much alive. We are still considering the admissibility of issues proffered by CAN and the State of Vermont. Consequently, the Commission has not violated CAN's procedural rights either to a reasoned adjudicatory decision or to proper notice of that adjudicatory decision.

Finally, we turn to CAN's request for stay of the staff's order. When ruling on stay motions in license transfer proceedings, the Commission applies a four-pronged test set forth in 10 C.F.R. § 2.1327(d):

- (1) whether the requestor will be irreparably injured unless a stay is granted;
- (2) whether the requestor has made a strong showing that it is likely to prevail on the merits;
- (3) whether the granting of a stay would harm other participants; and
- (4) where the public interest lies.

In ruling on stay requests, the Commission has held that irreparable injury is the most crucial factor. See *Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2)*, CLI-81-27, 14 NRC 795, 797 (1981).⁽²⁾ Here, at this time, we see no irreparable injury to CAN if its stay request is denied. CAN's alleged concerns are procedural harms which we have either remedied (the staff providing a copy of the order) or which did not occur (failure to serve a final Commission adjudicatory order; denial of an opportunity to be heard; failure to issue a rational adjudicatory decision; failure to give proper notice of the denial of a hearing request; improper notice that the staff intended to become a party). Moreover, the issuance of the staff's July 7th order does not prejudice CAN's ability to participate meaningfully in this proceeding. CAN has taken full advantage of its opportunity to challenge the license transfer application -- filing a 55-page petition to intervene, replete with numerous attachments.

Turning to the remaining factors, we see no harm to any other participant if the stay were granted (factor 3).⁽³⁾ CAN fails to make any showing concerning the likelihood of success on the merits (factor 1). CAN focuses instead on the perceived procedural deficiencies, addressed above. Finally, we see no particular reasons why the public would either benefit or suffer as a result of the issuance of a stay (factor 4). Under these circumstances, CAN's stay request is denied.

IT IS SO ORDERED.

For the Commission⁽⁴⁾

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 30th day of August, 2000.

1. On a separate matter, CAN describes a telephone call to CAN from NRC's Region I, in which the Region stated that the "staff had decided to enter the proceeding and would be taking the position that the license transfer at issue should be approved." Motion at 3. Although we cannot be sure what was said during the telephone call described in the Motion, the staff has not sought to become a party in this adjudication and, so far as we are aware, has no intention of doing so. The staff may be required to provide one or more witnesses to sponsor and support the SER if the proceeding goes to hearing (see 10 C.F.R. § 2.1316(b)), but this is not the same as the staff actually participating as a party in the case.

2. While the Farley decision involved a stay request filed under 10 C.F.R. § 2.788, the factors for a stay under Subpart M are essentially identical.

3. According to applicants' Status Report of July 28, 2000, the instant license transfer awaits not only our approval but also, in one manner or another, the approval of the Federal Energy Regulatory Commission, the Internal Revenue Service, the Securities and Exchange Commission, the Vermont Public Service Board, the Massachusetts Department of Telecommunications and Energy, the Connecticut Department of Public Utilities Control, the New Hampshire Public Utilities Commission, and the Pennsylvania Public Utility Commission.

On a related matter, we grant CAN's July 31st motion to strike the final paragraph of the applicants' Status Report. Applicants' discussion went beyond the parameters of a Status Report and constituted an unauthorized second response to CAN's Stay Motion. See 10 C.F.R. § 2.1327(c).

4. Commissioners Diaz and McGaffigan were not present for the affirmation of this Order. If they had been present, they would have approved it.