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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
CAROLINA POWER & LIGHT COMPANY)	Docket No. 50-400-LA
)	
(Shearon Harris Nuclear Power Plant))	ASLBP No. 99-762-02-LA
)	

NUCLEAR REGULATORY COMMISSION STAFF RESPONSE
TO ORANGE COUNTY'S PETITION FOR REVIEW OF LBP-00-12

Susan L. Uttal
Counsel for NRC Staff

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INTRODUCTION

On May 22, 2000, the Board of Commissioners of Orange County ("BCOC") filed a petition with the Commission for interlocutory review of the Atomic Safety and Licensing Board's ("Licensing Board") Memorandum and Order (Ruling on Designation of Issues for an Evidentiary Hearing), LBP-00-12, 51 NRC __ (May 5, 2000) ("Board Order"). In that Order the Licensing Board concluded, pursuant to 10 C.F.R. § 2.1115, that there was no genuine and substantial dispute of fact or law that required the introduction of evidence in an evidentiary hearing, and resolved the contentions in favor of Carolina Power & Light Co. ("CP&L" or "Licensee").¹ BCOC asserts in the Petition that the Licensing Board's rulings were clearly erroneous. The Nuclear Regulatory Commission staff ("Staff") hereby responds to BCOC's petition. As more fully set forth below, the Staff submits that interlocutory Commission review of the Licensing Board's decision is not warranted in this case because: interlocutory review is not permitted by the regulations; BCOC has failed to address the

¹ Orange County's Petition for Review of LBP-00-12, ("Petition"), May 22, 2000.

standards for interlocutory review; and the Licensing Board's rulings were not erroneous. Therefore, the Staff requests that BCOC's Petition be denied.

BACKGROUND

This case arose from a license amendment application filed by CP&L for the Shearon Harris Nuclear Power Plant ("Harris") to increase spent fuel storage capacity by adding high density rack modules to two unused spent fuel pools and placing the two pools into service. CP&L proposed to take credit for fuel burnup in order to be able to place the fuel assemblies in higher density racks. It also proposed to utilize portions of the cooling and cleanup piping for the fuel pools on which construction had been started during original construction but had not been finished and had lain idle for the intervening time period. B C O C w a s permitted to intervene in the proceeding and the Licensing Board admitted two technical contentions for litigation.² The first, TC-2, contended that 1) the use of credit for burnup of spent fuel to prevent criticality is an administrative measure and General Design Criterion ("GDC") 62 does not permit the use of administrative measures to prevent criticality in spent fuel pools,³ 2) Regulatory Guide 1.13 prohibits the use of credit for burnup because such use would violate the double contingency rule, which requires that criticality not occur without two

² A third technical contention, TC-1, concerning component cooling water system heat load capacity, was rejected by the Licensing Board in a prior ruling on standing and contentions, and is not in issue herein. See *Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant)*, LBP-99-25, 50 NRC 25, 32-35 (1999). Five environmental contentions were also dismissed without prejudice to being raised after issuance of the Staff's Environmental Assessment ("EA"). *Id.* at 38-39. On January 31, 2000, subsequent to the issuance of the EA, BCOC filed "Orange County's Request for Admission of Late-Filed Environmental Contentions."

³ The Staff notes that identical issues pertaining to GDC 62 and criticality prevention, are currently pending before another Licensing Board in the matter of *Northeast Nuclear Energy Company* (Millstone Nuclear Power Station, Unit No. 3), Docket No. 50-423-LA-3.

independent failures and the misplacement of one fuel assembly could cause criticality if credit for burnup is taken. Board Order, slip op. at 3-4. The second, TC-3, contended that the proposal to use the previously completed sections of the cooling and clean-up piping and equipment was inadequate because: the piping failed to satisfy 10 C.F.R. Part 50, Appendix B, Criteria XIII, XVI and XVII; the alternative plan did not describe any program for maintaining the piping during the years it was idle and was deficient because certain Quality Assurance records were missing; and the embedded welds could not be adequately inspected. *Id.* at 4.

Upon application by CP&L, the matter proceeded pursuant to 10 C.F.R. § 2.1101, *et seq.* (Subpart K). Subsequent to the submittal of written presentations and oral argument, pursuant to 10 C.F.R. § 2.1113(a), the Licensing Board issued its decision in LBP-00-12, in which it declined to designate any issues for evidentiary hearing, pursuant to 10 C.F.R. § 2.1115. The Licensing Board found that GDC 62 does not prohibit the use of credit for burnup. *Id.* at 17-20. In making that finding, the Licensing Board found no clear cut demarcation between the administrative and non-administrative measures of criticality prevention processes that would place the measures within or without “physical procedures and processes” as used in GDC 62. *Id.* at 17-18. The Licensing Board concluded that the Staff and CP&L analyses of fuel assembly misplacement scenarios demonstrated that criticality would not be reached 1) if one assembly was misplaced and no boron was present in the pool water and 2) if all assemblies were misplaced and the required minimum amount of boron was present. *Id.* at 31-32. The Licensing Board also ruled that: in the context of this case, compliance with 10 C.F.R. § 50.55a affords compliance with 10 C.F.R. Part 50, Appendix B. *Id.* at 37; the alternative plan was adequate to meet the requirements of 10

C.F.R. § 50.55(a)(3), and that the present day procedures and tests used in the plan combined with the adequacy of the original QA program was sufficient to provide assurance that the quality of the piping and welds was adequate, despite the long period of improper lay-up. *Id.* at 42-46. The Licensing Board concluded that BCOC's claim that a construction permit was required was not within the scope of the original contention and would not be considered. *Id.* at 51. In deciding the case, the Licensing Board made it clear that it was not dismissing the proceeding due to the pendency of the motion to admit late-filed environmental contentions. *Id.* at 52, n. 14.

DISCUSSION

The Petition Does Not Meet the Standards for Commission Interlocutory Review

The Petition asserts that the rulings in the Board Order are clearly erroneous, the case raises important and novel legal issues, and the Licensing Board erroneously ignored BCOC's evidence regarding the embedded piping and the need for a construction permit. Licensing Board. Petition at 4-10. As discussed more fully below, the Petition seeks interlocutory review of the Board's Order. In this regard, the Petition completely fails to address the standards of 10 C.F.R. § 2.786(g), which govern interlocutory Commission review. That section requires that the petitioner demonstrate that the rulings either 1) threaten the petitioner with "immediate and serious irreparable impact" which can not be alleviated through a petition for review of the final decision or 2) affect the basic structure of the proceeding in a pervasive or unusual manner. *See Private Fuel Storage L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-02, 51 NRC ____, slip op. at 2-3 (Mar. 2, 2000). It is essential for the petitioner to address one of these standards, because

one of them must be met in order to obtain Commission review. Since BCOC has failed to address the standards, its Petition should be denied.

Interlocutory appeals are not favored by the Commission and will be undertaken “only in the most compelling circumstances.” *Sequoyah Fuels Corp. (Gore, Oklahoma Site)*, CLI-94-11, 40 NRC 55,59 (1994). The Commission’s regulations generally prohibit such reviews. *PFS*, CLI-00-02, slip op. at 2. See also 10 C.F.R. § 2.730(f) (No interlocutory appeal from a ruling on a motion is permitted); 10 C.F.R. § 2.786(g) (interlocutory review may be entertained if criteria met); 10 C.F.R. § 2.1115(g) (no interlocutory review in Subpart K proceedings). BCOC has not demonstrated that any compelling circumstances exist in this case. Moreover, the denial of an evidentiary hearing for BCOC’s technical contentions is akin to the granting of a partial summary disposition, because the motion to admit late-filed environmental contentions is pending. Subpart K proceedings are, in fact, a form of summary disposition. See Final Rule, “Hybrid Hearing Procedures for Expansion of Spent Nuclear Fuel Storage Capacity at Civilian Nuclear Power Reactors,” 50 Fed. Reg. 41662, 41664 (1985) (“Final Rule”). The Appeal Board has held that the granting of partial summary disposition is not appealable and appeal must await the issuance of an initial decision. See *Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2)*, ALAB-736, 18 NRC 165 (1983); *Louisiana Power & Light Co. (Waterford Steam Electric Generating Station, Unit 3)*, ALAB-220, 8 AEC 93 (1974). In the instant case, the determination whether to admit late-filed environmental contentions is still pending before the Licensing Board. Therefore, the matter has not been completed and BCOC is still a party. Where contentions remain in the case, interlocutory review is not warranted. As the Commission pointed out in *PFS*: “None of our prior decisions has found the admission or denial of a contention, where

the intervenor has other contentions pending in the proceeding, to be anything more than a routine interlocutory ruling not subject to immediate appellate review; such rulings must 'abide the end of the case.'" *PFS*, CLI-00-02, slip op. at 3, citing *Northern States Power Co.*, (Tyronne Energy Park, Unit 1), ALAB-492, 8 NRC 251 (1978).⁴ Therefore, the Petition must be denied.

This proceeding was conducted pursuant to 10 C.F.R. § 2.1101, et seq. (Subpart K).

Section 2.1115(e) of Subpart K prohibits interlocutory reviews.

Unless the presiding officer disposes of all issues and dismisses the proceeding, appeals from the presiding officer's order disposing of the issues and designating one or more issues for resolution in an adjudicatory hearing are interlocutory and must await the end of the proceeding.

10 C.F.R. § 2.1115(e). In the instant case, the Board issued an order finding no issues for hearing, but specifically noting that:

Although this ruling completes action regarding all the technical contentions before us relative to the December 1998 CP&L amendment request, because the admissibility of four BCOC late-filed environmental contentions is yet to be resolved, this proceeding is not subject to dismissal in accordance with 10 C.F.R. § 2.1115(a)(2).

Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-00-12,

⁴ BCOC's claim that the Petition should be granted due to the important and novel issues of law and fact (Petition at 9) must similarly await the end of the case. "The fact that a ruling involves a matter that may be novel or important does not alter the strict standards for directed certification." *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-791, 20 NRC 1579, 1583 (1984). *See also Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-734, 18 NRC 11, 15 (1983). Therefore, whether or not an issue is important or novel, the standard of 10 C.F.R. § 2.786(g)(1) or (2) must be met before interlocutory Commission review may be considered.

51 NRC___ (2000), slip op. at 52, n.14. This footnote emphasizes that the matter is still pending and has not been dismissed due to the pendency of the motion to admit late-filed contentions. BCOC's Petition is, therefore, interlocutory and should be denied.

Although there have been no cases construing 10 C.F.R. § 2.1115(e), it appears that it may be more stringent than the general requirements for discretionary interlocutory review, such as 10 C.F.R. § 2.786(g). Indeed, the intention of Subpart K, as a whole, is to "encourage and expedite onsite expansion of spent nuclear fuel storage capacity."

10 C.F.R. § 2.1101. Allowing an interlocutory appeal in this instance would run contrary to the purpose of the subpart by permitting piecemeal appellate consideration of issues.

Since BCOC has completely failed to address the standards of 10 C.F.R. § 2.786(g), it cannot overcome the prohibition against interlocutory review contained in 10 C.F.R. § 2.1115(e). Therefore, the Petition should be denied.

The Licensing Board Did Not Err in Reaching its Conclusions

The Petition asserts that the Licensing Board's rulings are in error, in that: its interpretation of GCD 62 is clearly erroneous (Petition at 4); the case raises important and novel issues (Petition at 9); BCOC's evidence regarding failure to inspect embedded piping was erroneously ignored (Petition at 9); and the Licensing Board erred in refusing BCOC's argument that CP&L must amend its construction permit (Petition at 10). The Staff submits that the Licensing Board's rulings are consistent with Commission precedent, common methods of regulatory analysis, and are well grounded in the record, law and fact.

BCOC complains that the Licensing Board did not specifically address or completely ignored several of BCOC's arguments. Petition at 7, 8, 9. The Staff submits that the

Licensing Board addressed all relevant issues and considered all probative evidence.⁵ In any event, the Licensing Board was not required to make detailed findings in this case where no issues were designated for hearing. 10 C.F.R. § 2.1115(a)(2) requires, where issues are not designated for hearing, that the Board make a “brief statement of the reasons for the disposition.” “Thus, the presiding officer may simply dispose of issues not designated for adjudication with an adequate explanation of the reasons why a hearing is not required.” Final Rule, 50 Fed. Reg. at 41667. In the instant case, the Licensing Board did more than required by the regulation in issuing its detailed, well-reasoned memorandum and order that fully describes the positions of the parties and the evidence presented in the written presentations and oral argument.⁶

BCOC also asserts that LBP-00-12 is inconsistent with the plain language of GDC 62. Petition at 5-9. But, as the Licensing Board concluded, in the context of this case, the language is not as clear as asserted by BCOC. Board Order, slip op. at 17-20. The Licensing Board’s ruling was based on a clear and reasonable interpretation of GDC 62, its

⁵ BCOC states that the Licensing Board did not address its “considerable evidence that only the welds were inspected” in the embedded pipes. Petition at 9. The Staff disagrees with BCOC that the evidence was “considerable.” Moreover, there is no indication that the evidence was ignored - only that it was refuted by the demonstrative evidence and other evidence presented by the Staff and CP&L. See Board Order, slip op. at 44-47.

⁶ Contrary to BCOC’s conclusion, the Licensing Board did not ignore the matters cited in the Petition. BCOC’s positions are fully delineated in the Board Order. Board Order, slip op. at 20-23, 34, 36-37, 38-39, 47-49, 50-51. After laying out the parties’ positions, the Licensing Board discussed its conclusions based on the record. The fact that the Licensing Board rejected some arguments and refused to rely on others does not, without more, amount to error, but merely to a refusal to adopt to BCOC’s unsupported, irrelevant or incorrect positions. It is not grounds for the granting of interlocutory review.

history, existing case law and the history of the Staff's application of GDC 62. *Id.*⁷ The claim that it was erroneous error for the Licensing Board to decide the issue contrary to BCOC's interpretation is not supported by the record. Any claim that the Licensing Board's ruling requires interlocutory Commission review is without merit.

The claim made by BCOC that the Licensing Board ignored its evidence regarding the failure to inspect embedded piping (Petition at 9-10) is also without merit. To the contrary, the Board Order discusses and explains, in detail, the reasons for its decisions regarding the piping. Slip op. at 36-47. As clearly indicated from the weight of the evidence in the record, BCOC did not carry its burden of demonstrating "the existence of disputed material facts requiring an evidentiary hearing. Board Order, slip op. at 11.

Finally, the Licensing Board's rejection of BCOC's late-filed contention regarding the construction permit was reasonable, especially in light of BCOC's failure to address the factors in 10 C.F.R. § 2.714(a)(1). Board Order, slip op. at 50-52.

None of the issues raised in the Petition demonstrate that the Licensing Board's rulings either threaten BCOC with "immediate and serious irreparable impact" requiring immediate interlocutory review or affect the basic structure of the proceeding in a pervasive or unusual manner. Therefore, BCOC has not met the standards for interlocutory Commission review.

CONCLUSION

⁷ See also NRC Staff Brief and Summary of Relevant Facts, Data and Arguments Upon Which the Staff Proposes to Rely at Oral Argument on Technical Contentions 2 and 3 at 31-40 (Jan. 4, 2000).

Based upon the foregoing, the Staff submits that interlocutory Commission review is not warranted in this case. BCOC's Petition for Review of the Licensing Board's memorandum and order should be denied based upon the failure to address or meet the

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standards for interlocutory Commission review.

Respectfully submitted,

/RA/

Susan L. Uttal
Counsel for NRC staff

Dated at Rockville, Maryland
this 6th day of June 2000.

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NUCLEAR REGULATORY COMMISSION STAFF RESPONSE TO ORANGE COUNTY'S PETITION FOR REVIEW OF LBP-00-12)" in above-captioned proceeding have been served on the following through deposit in the NRC's internal mail system, or by deposit in the NRC's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by deposit in U.S. Postal Service as indicated by double asterisk, with copies by electronic mail as indicated this 6TH day of June, 2000:

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