

RAS 2172

September 7, 2000

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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In the Matter of:)
)
Northeast Nuclear Energy Company,)
)
and)
)
Consolidated Edison Company of)
New York, Inc.)
)
(Millstone Nuclear Power Station,)
Units No. 1, 2, and 3))

Docket Nos. 50-245
50-336
50-423

ANSWER OF NORTHEAST NUCLEAR ENERGY COMPANY AND
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. IN
OPPOSITION TO REQUEST FOR A STAY OF ORDER
AND REQUEST FOR INDEPENDENT INVESTIGATION

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.1327(c), Northeast Nuclear Energy Company ("NNECO") and Consolidated Edison Company of New York, Inc. ("Con Edison") hereby file their opposition to the Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone (collectively "Petitioners") Request for a Stay of Order and Request for Independent Investigation filed on August 28, 2000 ("Stay Request").

Petitioners, on April 27, 2000, previously sought a hearing and leave to intervene regarding the NNECO and Con Edison application for Nuclear Regulatory Commission ("NRC") approval, pursuant to 10 C.F.R. § 50.80, of an indirect transfer of the operating licenses for the three unit Millstone Nuclear Power Station. NNECO and Con Edison, by filing dated May 8, 2000, opposed that request based on the lack of a demonstration of a sufficient "interest" that

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could be affected by the transfer and the lack of a litigable contention. The Commission has not yet ruled on the hearing request.

The indirect transfers are associated with the proposed merger of Northeast Utilities ("NU") and Consolidated Edison, Inc. -- the parent companies of NNECO and Con Edison, respectively. Under the merger, the NU subsidiaries, including the present NRC licensees for Millstone, will retain their current identity, simply existing within the merged corporate structure. The proposed merger will have no effect on the management, organization, or technical qualifications of, *inter alia*, NNECO, the entity currently responsible for operating, maintaining, and decommissioning the three Millstone units. The merger will also not impact the financial qualifications of the affected Millstone licensees, which will remain "electric utilities" within the definition of 10 C.F.R. § 50.2.¹ In accordance with 10 C.F.R. § 2.1316, on August 22, 2000, the NRC Staff approved the transfer of the licenses for the Millstone units.²

NNECO and Con Edison oppose the Stay Request because it completely fails to meet the Commission's standards for such relief. The NRC Staff has completed its review of the transfer application and acted in full accord with the Commission's regulations. The Petitioners have failed to identify any irreparable harm from the transfer consent and have failed to identify any issue that would justify a hearing and that would lead to Petitioners ultimately prevailing on the merits.

¹ A further description of the proposed merger can be found in the January 13, 2000 Notification/Application pursuant to 10 C.F.R. § 50.80 regarding Operating License Nos. DPR-5 for Indian Point-1 (Docket No. 50-3), DPR-26 for Indian Point-2 (Docket No. 50-247), DPR-21 for Millstone Unit 1 (Docket No. 50-245), DPR-65 for Millstone Unit 2 (Docket No. 50-336), NPF-46 for Millstone Unit 3 (Docket No. 50-423), and NPF-86 for Seabrook (Docket No. 50-443), as revised and supplemented, and in the Answer of Northeast Nuclear Energy Company and Consolidated Edison Company of New York, Inc. to Petition for Leave to Intervene and Request for Hearing, dated May 8, 2000.

² 65 Fed. Reg. 52,138 (August 28, 2000).

II. PETITIONERS HAVE FAILED TO MAKE THE NECESSARY SHOWING FOR A STAY

As set forth in the NRC Notice of Consideration of an Order Approving the Application, 65 Fed. Reg. 1838 (April 7, 2000), and the NRC Rules of Practice, if a hearing on the present matter were granted, it would be held in accordance with 10 C.F.R. Part 2, Subpart M. Section 2.1327 of Subpart M specifically establishes the showing necessary for the issuance for a stay:

- (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.

These are essentially identical to the criteria for a stay contained in 10 C.F.R. § 2.788 for a Subpart G proceeding. In accordance with longstanding Commission interpretation of that section, it is clear that Petitioners are not entitled to a stay.

As an initial matter, Petitioners ground their entire request on an unsubstantiated assertion that the "NRC Staff acted prematurely and in violation of 10 C.F.R. 2.1316." Stay Request, at 4. However, to the contrary, the NRC Staff acted entirely in accordance with 10 C.F.R. § 2.1316 and complied with the requirement of that regulation that notwithstanding the pendency of a hearing request, it "promptly issue approval or denial of license transfer requests." 10 C.F.R. § 2.1316(a). The structure of Subpart M and the Statement of Considerations supporting it make clear that the Commission has found that for this type of matter there is no

impediment to interim NRC Staff approval and implementation of the transfer consent.³ A similar stay request was recently rejected by the Commission for this reason. . See Vermont Yankee Nuclear Power Corp. and AmerGen Vermont, LLC (Vermont Yankee Nuclear Power Station), CLI-00-17, slip op. Aug. 30, 2000. There is no limitation on the stage of a proceeding as to when the NRC Staff may act, and therefore the "absence of a factual record" cited in the Stay Request (at page 3) is not a bar to the issuance of the approval.

Petitioners therefore do not carry their burden in seeking a stay from the Commission. On a motion for a stay, the burden of persuasion on the four factors of 10 C.F.R. §§ 2.1327 and 2.788 is on the party seeking a stay. Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI 81-27, 14 NRC 795, 797 (1981); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 270 (1978).⁴ For each of the four required factors, Petitioners merely make conclusory, self-serving statements without providing any foundation. Each of the four stay factors is discussed below.

A. Petitioners Will Not Be Irreparably Harmed

Petitioners fail to show any irreparable harm to themselves. A party must reasonably demonstrate, and not merely allege, irreparable harm. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-814, 22 NRC 191, 196 (1985), citing, Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-794, 20 NRC 1630, 1633-35 (1984). See General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), ALAB-914, 29 NRC 357, 361-62 (1989). An argument that an appeal might become moot following denial of a motion for a stay does not per se constitute irreparable injury: a party must

³ 63 Fed. Reg. 66,721 (December 3, 1998).

⁴ See also Virginia Petroleum Jobbers v. FPC, 259 F. 2d 921, 925 (D.C. Cir. 1958).

also establish that the activity that will take place in the absence of a stay will bring about concrete harm. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-810, 21 NRC 1616, 1620 (1985), citing, Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-794, 20 NRC 1630, 1635 (1984). See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-8, 29 NRC 399, 411-12 (1989).

Petitioners have not demonstrated that the consent will lead to irreparable harm pending final Commission action on the hearing request. Petitioners' claim of harm is merely a conclusory statement that a hearing will be "meaningless" without a stay of the Staff's action. Petitioners fail to explain why this is so or to identify any concrete harm that will take place without a stay. Petitioners merely express a disposition for their preferred sequence of events. The Commission, by directing the Staff to "promptly issue" license transfer approvals during the pendency of associated hearings, 10 C.F.R. § 2.1316(a), has clearly demonstrated that it does not consider that the specified sequence substantively reduces the meaningfulness of hearings. The Commission also specifically rejected this argument as a basis for a showing of irreparable harm in Vermont Yankee, CLI-00-17.

Petitioners also refer to the pendency of a proceeding before the Connecticut Department of Public Utility Control, which still must be completed prior to the consummation of the merger, and urge that the NRC not act until the other proceeding is completed. Leaving aside the question of how issuance of the NRC's order notwithstanding the pendency of other regulatory approvals necessary to complete the transaction could comprise irreparable harm as Petitioners claim, it has never been found that the NRC's dispatch of its functions under 10 C.F.R. § 50.80 must follow any particular sequence relative to the distinct and unrelated approvals of other agencies. It is well settled that the NRC, other federal agencies, and their

adjudicatory boards must decide the particular regulatory questions before them, without presuming or awaiting the decisions of others with differing concerns and responsibilities. The NRC has consistently proceeded expeditiously to consider matters before it, even during the contemporaneous conduct of proceedings on related issues before other agencies. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-46, 22 NRC 830, 832 (1985). See Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-785, 20 NRC 848, 884-85 (1984). Kerr-McGee Corp. (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 269 (1982), aff'd sub nom. City of West Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983) (citing cases). See also Cross-Sound Ferry Services, Inc. v. United States, 573 F.2d 725, 732-33 (2d Cir. 1978). In this instance, when the NRC Staff concluded that there was sufficient basis to warrant the exercise of its 10 C.F.R. § 50.80 authority, it acted appropriately and without delay. Consequently, Petitioners' suggestion that the NRC should have instead deferred issuance of its approval cannot be considered sufficient to establish irreparable harm.

Irreparable injury is the most important of the four factors set forth in section 2.788(c). Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site), 40 NRC 1, 7; Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 258 (1990), aff'd on other grounds sub nom. Massachusetts v. NRC, 924 F.2d 311 (D.C. Cir.), cert. denied, 112 S. Ct. 275 (1991). Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 746 n.8 (1985). Petitioners do not meet their burden for this factor.

B. Petitioners Have Not Made Any Showing That They Are Likely To Prevail On The Merits

Where there is no showing of irreparable injury absent a stay, and the other factors do not favor the party seeking a stay, an overwhelming showing of the likelihood (*i.e.*, a virtual certainty) of success on the merits is required to obtain a stay. To make a strong showing of likelihood of success on the merits, the party seeking the stay must do more than list the possible grounds for reversal. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), ALAB-928, 31 NRC 263, 269 (1990); Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981). A party's mere expression of confidence or expectation of success on the merits before the Commission is too speculative and is insufficient. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-814, 22 NRC 191, 196 (1985); *citing*, Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804-805 (1984).

Petitioners have not made any showing that they will prevail on the merits. Petitioners have failed to refer to, let alone demonstrate, any deficiency in the NRC Staff's safety evaluation accompanying the transfer consent order. Petitioners' entire argument consists of two conclusory assertions that they will "prevail on the merits" and that the NRC and the Staff "have clearly acted outside the scope of their permissible authority." Stay Request, at 5. These statements express little more than wishful thinking and in fact are contrary to Subpart M, as discussed above. Petitioners do not demonstrate a legal or practical bar to the NRC Staff's

action. This is clearly insufficient to meet even the lowest standard of persuasion, much less the virtual certainty required to prevail on the instant motion.⁵

C. There Is No Showing That Granting of a Stay Will Not Harm Other Participants

Petitioners' conclusory claim that a stay will not harm other parties is neither correct nor supported by cogent argument. In adopting 10 C.F.R. § 2.1316(a), the Commission recognized the importance of prompt action on transfer applications. Petitioners provide no basis as to why this generic finding does not apply in this case. Petitioners also do not deny that the granting of a stay could potentially forestall delivery of significant merger benefits, including improvements in electric service and cost efficiencies.

When a party seeking a stay fails to meet its burden on the two most important factors, irreparable injury and likelihood of success on the merits, the Commission need not give lengthy consideration to the other two factors. In re Hydro Resources, Inc., LBP-98-5, 47 N.R.C. 119, 131 (1998); Sequoyah Fuels Corp & General Atomics (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 8 (1994). Petitioners' argument is limited to the purported impact of pending state proceedings on the NRC. This argument, as in Hydro Resources, "carries no weight," 47 N.R.C. at 133, and should receive little consideration. Petitioners here, therefore, also "have failed to carry their burden" with respect to a showing that a stay will not potentially harm the Applicant. *Id.*

⁵ As described in the May 8, 2000 filing of NNECO and Con Edison, Petitioners did not previously raise a litigable issue and it is highly unlikely that Petitioners could be deemed to have satisfied the requirements for intervention.

D. The Public Interest Lies In Completing The License Transfer In Accordance With The Approved Regulatory Process

Petitioners fail to identify any specific public interest that would benefit from a stay in this matter. Indeed, the public interest actually lies with the issuance of the approval, since the NRC approval provides some certainty with respect to at least one of the required regulatory approvals for the proposed merger. To the extent that a claim is made that the public will benefit from "confidence that the NRC's review process and hearing procedure have meaning" (Stay Request, at 5), this is merely an attack on the NRC's stewardship of its Section 50.80 process and on the Commission's Subpart M regulation. Petitioners also fail to recognize that the "public interest" would be better served by faithful adherence to regulations vetted through public notice and comment (*e.g.*, 10 C.F.R. § 2.1316). Petitioners have again failed to carry the burden of persuasion.

III. THE REQUEST FOR AN INDEPENDENT INVESTIGATION SHOULD BE DENIED

Petitioners' request for an "independent investigation" has no basis in law and should be dismissed. Petitioners cite no authority or precedent for the Commission to order an investigation of the NRC or its Staff where the Staff's actions have been entirely consistent with the regulations of Part 50 and Part 2, Subpart M. The Commission should decline this request.

IV. CONCLUSION

For the reasons stated herein, the Commission should deny Petitioners' motion for a stay and request for an independent investigation. Petitioners have utterly failed to carry their burden of persuasion for any of the four factors necessary for a stay to issue. Likewise, Petitioners have not identified any legal basis for the Commission to order an "independent investigation."

Respectfully submitted,



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ATTORNEYS FOR NORTHEAST NUCLEAR
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NEW YORK, INC.

Dated in Washington, District of Columbia
this 7th day of September 2000

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "ANSWER OF NORTHEAST NUCLEAR ENERGY COMPANY AND CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. IN OPPOSITION TO REQUEST FOR A STAY OF ORDER AND REQUEST FOR INDEPENDENT INVESTIGATION" in the captioned proceeding, have been served on the following by deposit in the United States mail, first class, this 7th day of September 2000. Additional e-mail service has been made this same day as shown below.

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The Honorable Richard A. Meserve
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Office of the Secretary
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The Honorable Edward McGaffigan, Jr.
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Adjudicatory File
Atomic Safety and Licensing Board Panel
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