HARMON, CURRAN, SPIELBERG & EISENBERG, LLP
1726 M Street, NW, Suite 600 Washington, DC 20036 (202) 328-3500 (202) 328-6918 fax

June 18, 2001

Mark Langer, Clerk
U.S. Court of Appeals
For the District of Columbia Circuit
3rd and Constitution Avenues N.W.
Washington, D.C. 20001

SUBJECT: *Request for Stay and Expedition,*
Orange County v. NRC, No. 01-1246

Dear Mr. Langer,

On behalf of Orange County, North Carolina, I am enclosing the original and four copies of a Orange County's Reply to Oppositions to Stay Motion. Copies have also been served on the parties.

Sincerely,

Diane Curran

Encl: As Stated
Cc. w/Encl.: Service list

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ORANGE COUNTY, NORTH CAROLINA, Petitioner, v. UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, Respondents	)	No. 01-1246

ORANGE COUNTY'S REPLY TO OPPOSITIONS TO STAY MOTION

In opposing Orange County's Request for Stay and Expedition (June 1, 2001) ("Stay Motion"), the Nuclear Regulatory Commission ("NRC") and Carolina Power & Light ("CP&L") dangerously minimize the irreparable harm resulting from a reasonably foreseeable catastrophic accident in the spent fuel pools at the Harris nuclear power plant.[1] Moreover, they completely fail to justify the Atomic Safety and Licensing Board's ("ASLB's") refusal to permit Orange County any opportunity to submit rebuttal evidence regarding the seriously flawed risk predictions made by the NRC Staff and CP&L. Therefore, the Court should grant a stay.

I. ORANGE COUNTY HAS DEMONSTRATED IRREPARABLE HARM.

As Dr. Thompson states in his Declaration, a fire in pools A and B is reasonably foreseeable, and would inevitably cause a fire in pools C and D, with catastrophic consequences.[2]

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1 Federal Respondents' Opposition to Motion for Stay of Administrative Order (June 11, 2001) ("NRC Resp."); Carolina Power & Light Company's Opposition to Orange County's Motion for a Stay (June 11, 2001) ("CP&L Resp.")

2 Declaration of 31 May 2001 by Dr. Gordon Thompson in Support of Orange County's Stay Motion, pars. 3, 47, 80-81 ("Thompson Decl.").

The NRC's and CP&L's challenge to these claims contradict the record below and distort the immense consequences of a pool fire at Harris. The NRC argues that the Court should accept the ASLB's determination that the "true odds" of a pool fire are about one in five million per reactor year. NRC Resp. at 12. Setting aside the fact that even the best probabilistic risk assessment can give no more than an estimate and is far too fraught with uncertainty to be relied on as "true," *see* Thompson Decl., pars. 32-33, the ASLB's determination is neither probative nor reliable. Not only is LBP-01-09 based on a seriously flawed NRC Staff study that Orange County was not permitted to rebut, but the decision itself is riddled with serious errors. *See* Thompson Decl., pars. 3, 53-87. Moreover, the NRC's equivocation about whether a pool fire in pools A and B would cause a fire in pool C, *see* LaVie Decl., par. 9, contradicts earlier sworn testimony by the NRC Staff.[3]

The NRC claims that, even if one accepts Orange County's estimate that the probability of a spent fuel pool fire at Harris is on the order of 1.6 in 100,000 per year, this degree of probability is not "certain" or "imminent." NRC Resp. at 12. However, as the Court recognized in *State of Ohio ex rel. Celebrezze v. NRC,* 812 F.2d 288, 291 (6th Cir. 1987), however, where the "potential severity is enormous," even a low likelihood accident warrants a stay.[4] The

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3 *See* Affidavit of Gareth W. Parry, et al. ..., par. 29 (November 17, 2000) ("Parry Aff."): "[L]oss of water in pools A and B would almost certainly result in an exothermic reaction. At that point, it is not likely that cooling could be restored to pools C and D." CP&L argues that the fuel in pools C and D would not burn because of its age. CP&L Resp. at 16 note 36. This assertion is undermined by the Parry Affidavit, however, which asserts that "[p]recisely how old the fuel has to be to prevent a fire is still not resolved." Parry Aff., par. 29.

4 In *Celebrezze*, the Court stayed the issuance of a full-power nuclear power plant license where the petitioner challenged the lack of adequate emergency plans. NRC emergency planning regulations were developed to provide offsite response capability for design basis accidents and less severe core melt accidents. *See* NUREG-0396, Planning Basis for the Development of State and Local Government Radiological Emergency Response Plans in Support of Light Water Nuclear Power Plants at I-9 (December 1978) (relevant pages attached as Exhibit 2). The

consequences of a fire in a pool that is only partially packed with 150 fuel assemblies would be comparable to the largest release of long-lived radioactive material that could occur during a severe accident at the Harris reactor, whose core holds 157 fuel assemblies. Thompson Decl., par. 93. The health and societal effects of environmental contamination and mass evacuation would be severe and irreversible. The NRC concedes that the consequences of a fire in pools A and B "could be very large," LaVie Decl., par. 8, but argues that an accident in pool C would only increase those consequences "marginally." To suggest that an environmental release of the radiological equivalent of a full reactor core would have a "marginal" impact, however, is patently absurd. [5]

CP&L asserts that it would be harmed financially by a stay, and that it may be forced to shut down its units due to loss of fuel storage space. CP&L Resp. at 16-17. These impacts, however, are reversible: money can be recovered, and substitute power can be purchased. Moreover, the impacts to CP&L pale beside the potential societal consequences of a spent fuel fire at Harris. In any event, it is not apparent from CP&L's pleading that forced shutdown would occur during the period in which this Court will review Orange County's appeal.

II. ORANGE COUNTY HAS A STRONG LIKELIHOOD OF PREVAILING ON THE MERITS.

A. Orange County Adequately Exhausted Its Administrative Remedies.

Neither the NRC nor CP&L dispute that Orange County squarely raised before the ASLB

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estimated probability of core melt accidents, as set forth in NUREG-0396, is one chance in 20,000 per reactor year, which is comparable to Orange County's estimate of a pool fire at Harris.

5 The NRC also argues that a stay should not be granted because the ultimate remedy is not certain. NRC Resp. at 14. Certainly, if an EIS is prepared, it is possible that the NRC will find that the risk of a pool fire at Harris is acceptable. However, it is also possible that the NRC will deny the license amendment based on an EIS. The purpose of NEPA is defeated if an action is

the central merits claim of its Stay Motion, or that the ASLB unlawfully relied for its decision on evidence presented by the NRC Staff, the party with the burden of proof without providing Orange County an opportunity for the submission of rebuttal evidence. *See* Stay Motion at 10, 12-16. Both parties argue, however, that Orange County failed to exhaust its administrative remedies because it did not raise a precise claim for rebuttal testimony in its administrative petition for review to NRC Commissioners. NRC Resp. at 14-15, CP&L Resp. at 7-8. In making these arguments, the NRC and CP&L misconstrue the NWPA and common law principles governing issue exhaustion.

The NRC first argues that review of Orange County's argument is barred by Section 134(c) of the Nuclear Waste Policy Act ("NWPA"), which provides that:

> No court shall hold unlawful or set aside a decision of the Commission in any proceeding described in subsection (a) because of a failure by the Commission to use a particular procedure pursuant to this section unless –
>
> (1) an objection to the procedure used was presented to the Commission[6] in a timely fashion or there are extraordinary circumstances that excuse the failure to present a timely objection.

NRC Staff Response at 15, *citing* 42 U.S.C. § 10154(c). On its face, however, this provision is not an exhaustion statute, but a requirement to make a procedural objection at the time a ruling is made or sought, analogous to F.R.C.P. 46. Indeed, the use of the word "timely" would be redundant in an exhaustion statute, because timeliness for purposes of exhaustion simply means sometime before going to the Court of Appeals. Moreover, Section 134(c) is unlike exhaustion statutes, which generally state a requirement that the agency have an opportunity to pass on an

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permitted to go ahead before preparation of an EIS.

6 The word "Commission" is defined in the NWPA as "the Nuclear Regulatory Commission." 42 U.S.C. § 1010(7). Thus, the term refers to the agency as a whole, rather than the five people who sit at the head of the agency.

issue before it goes to a court.[7] Thus, Orange County satisfied Section 134(c) by raising its request for an opportunity to rebut the Staff's and CP&L's evidence at the oral argument.[8]

Nor is review precluded by the common law doctrine of issue exhaustion. As the Supreme Court held in *Sims v. Apfel,* 530 U.S. 103, 109 (2000), "the requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding."[9] Here, the NRC's regulatory scheme ensured that the only fully "adversarial" aspect of the case below was the Subpart K proceeding before the ASLB. Review by the five NRC Commissioners pursuant to 10 C.F.R. § 2.786 was a discretionary process for which the regulations provided Orange County with only the most abbreviated opportunity to raise the issues on which it now seeks this Court's review.

NRC procedures for Subpart K proceedings focus the agency's decisionmaking function on the ASLB rather than the NRC Commissioners. Although the NWPA directs "the Commission" to conduct Subpart K proceedings and make decisions under them, *see* 42 U.S.C. §

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7 *See* 47 U.S.C. § 405, Federal Communications Commission ("The filing of a petition for rehearing shall not be a condition precedent to judicial review of [an FCC decision] except where the party seeking such review ... relies on questions of law or fact upon which the Commission ... has been afforded no opportunity to pass"); 49 U.S.C. § 521(b)(8), U.S. Department of Transportation ("No objection that has not been urged before the [agency] shall be considered by the court, unless reasonable grounds existed for failure or neglect to do so"); 49 U.S.C. § 1153(b)(4), National Transportation Safety Board ("[I]n reviewing an order under this subsection, the court may consider an objection to an order of the Board only if the objection was made in the proceeding conducted by the Board or if there was a reasonable ground for not making the objection in the proceeding").

8 Notably, neither the NRC nor CP&L argue that Orange County failed to satisfy the NRC's regulation for exhaustion of administrative remedies, 10 C.F.R. § 2.786(b)(1) (a petition for review is "mandatory for a party to exhaust its administrative remedies before seeking judicial review"). The regulation requires the filing of a petition for review, but does not require issue exhaustion. Orange County satisfied 10 C.F.R. § 2.786(b)(1) by filing an administrative petition for review of the ASLB's decision, on March 16, 2001.

9 *See also McKart v. U.S.,* 395 U.S. 185, 193 (1967) (application of doctrine of exhaustion of administrative remedies "requires an understanding of its purposes and of the particular

10154(a) and (b), the Commission delegates these functions to the "presiding officer" of the ASLB. *See* 10 C.F.R. §§ 2.1109-2.1115. Under NRC regulations, the ASLB's decision becomes the final action of the agency unless any party petitions for review or the Commission takes *sua sponte* review. 10 C.F.R. § 2.760. Although NRC regulations previously provided for mandatory administrative review of ASLB decisions[10], procedures promulgated in 1991 changed the Commission's review function to a discretionary role.[11] 10 C.F.R. § 2.786. These procedures severely constrain petitioners' ability to raise their claims before the Commission. Petitions for review are limited to ten pages, and replies are prohibited. 10 C.F.R. § 2.786(b)(2) and (3). Only if the Commission grants a petition is a party allowed to file a brief of any length. 10 C.F.R. § 2.786(d). Moreover, the regulations expressly forbid petitions for reconsideration of decisions denying petitions for review. 10 C.F.R. § 2.786(e). Thus, the brevity required by NRC rules for administrative petitions for review make it unlikely that a party will have had the opportunity to precisely address, before the NRC Commissioners, every issue that it later raises on judicial appeal.[12]

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administrative scheme involved").

10 *See, e.g.,* former NRC regulations at 10 C.F.R. § 2.762, which allow 70-page briefs in administrative appeals of operating license amendments and other licensing actions. A copy of NRC's former regulations for initial decisions and Commission review is attached as Exhibit 1.

11 The regulations make one exception: the right of appeal is provided where a petition to intervene in an NRC proceeding has been wholly denied, or a party believes it should have been wholly denied. 10 C.F.R. § 2.714a.

12 The NRC's procedures for exhaustion of administrative remedies contrast markedly with the procedures of the Federal Communications Commission ("FCC"), the respondent in the three cases cited by the NRC and CP&L in support of their argument. *See* NRC Resp. at 15, *citing Coalition for Noncommercial Media v. FCC*, 2001 WL 584402, at 3-4 (D.C. Cir., June 1, 2001); CP&L Resp. at 7, *citing U.S. Airwaves, Inc. v. FCC*, 232 F.3d 227, 236 (D.C. Cir. 2000); *Washington Ass'n for Television & Children v. FCC*, 712 F.2d 677, 680 (D.C. Cir. 1983). Pursuant to 47 C.F.R. § 1.276, a party dissatisfied with a FCC hearing officer's initial decision has the right to "appeal" the decision to the FCC Commissioners. No page limit is specified. If the FCC Commissioners issue an adverse decision, the party may file a petition for

Here, Orange County's ability to raise issues comprehensively in its March 16, 2001, petition for review was severely constrained. All decisions made by the ASLB during the two-year course of the Harris proceeding became ripe for review upon issuance of LBP-01-09, including a decision denying a full hearing on two of Orange County's technical safety contentions, and the decision in which Contention EC-6 was admitted. Because Orange County's petition for NRC review had to embrace the errors made in three separate decisions by the ASLB, the amount of space that could be devoted to any particular issue was limited. Nevertheless, Orange County provided general notice to the Commission of its claim that the ASLB had (a) misapplied the Subpart K standard, (b) illegally shifted the burden of proof to Orange County, and (c) wrongly purported to resolve disputes for which it lacked a sufficient factual basis.[13] Given the constraints imposed by 10 C.F.R. § 2.786 on Orange County's ability to fully make its adversarial case at the Commission level, and given that Orange County had made its claim clearly and precisely to the ASLB, the County should be deemed to have exhausted the rebuttal issue before the Commission. *See Sims v. Apfel, supra,* 530 U.S. at 112.

B. Respondents Fail to Justify the ASLB's Refusal to Permit Rebuttal.

As Orange County demonstrated in its Stay Motion, the ASLB unlawfully affirmed the NRC Staff's refusal to prepare an Environmental Impact Statement ("EIS") for the Harris spent fuel pool expansion, based on an NRC Staff study that Orange County was given no opportunity to rebut through the introduction of factual evidence. By crediting the evidence proffered by the

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reconsideration of 25 pages, with the right to a ten-page reply. 47 C.F.R. § 1.106(g) and (h). Thus, the litigation process remains strongly adversarial throughout the agency proceeding, with ample opportunity for the parties to make their case before the highest level of the agency.

13 *See* Orange County's Petition for Review of LBP-00-12, LBP-00-19, and LBP-01-09 at 4, 8-9, 10 and note 9 (March 16, 2001). A copy of the petition for review is attached as Exhibit 3 to the NRC's Response.

party with the burden of proof, without allowing any evidentiary criticism, the ASLB violated Orange County's hearing right and the requirements of the National Environmental Policy Act. The NRC offers no plausible justification for the ASLB's action, but tries to cloak the ASLB with an inappropriate degree of deference and mischaracterizes Orange County's case. [14]

The NRC attempts to shield the ASLB's decision from scrutiny by claiming that it constituted a "technical" judgment that disputed issues could be resolved with "sufficient accuracy" without need for an additional hearing, and was therefore entitled to great deference. NRC Resp. at 17, *citing Iron and Steel Institute v. EPA,* 115 F.3d 979, 1006 (D.C. Cir. 1997); *Baltimore Gas & Electric Co. v. NRDC,* 462 U.S. 87, 103 (1983). Both of these cases require the Courts to be at their "most deferential" on review of any "scientific determination." *Iron and Steel Institute,* 115 F.3d at 1006. But the question raised by Orange County is legal in nature rather than factual: *i.e.,* whether the ASLB could fairly or lawfully base a technical decision on evidence proffered by the party with the burden of proof, without providing the opposing party an opportunity to rebut it. This requires a legal interpretation of NRC's procedural requirements, to

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14 CP&L, for its part, tries to rehash the question of whether the ASLB should have admitted Orange County's contention EC-6 in the first place. CP&L's meritless claims that NRC precedents demand the refusal to consider the potential for a pool accident (CP&L Resp. at 9), that the spent fuel pool inventory permitted by the license amendment is smaller than the inventory considered in the original EIS for Harris (*Id.* at 12), and that previous NRC EIS's make an adequate assessment of the risks of spent fuel pool storage (*id.* at 19), were made in support of its opposition to the admission of Contention EC-6. *See* Applicant's Response to BCOC's Late-Filed Environmental Contentions at 4, 5, and 6 (March 3, 2000). The ASLB resolved these objections against CP&L by admitting Contention EC-6 for litigation in LBP-00-19, 52 NRC 85, 93-98 (2000).

CP&L also claims that Orange County's likelihood of success on the merits is defeated by the alleged lack of expertise of Dr. Thompson, the County's expert. CP&L Resp. at 11. Space limits do not permit Orange County to respond to each of CP&L's misrepresentations and distortions. However, this baseless attack was laid to rest in LBP-01-09, in which the ASLB concluded that Dr. Thompson was qualified. *Id.*, 53 NRC 239, 250-51 (2001).

which the Court need defer only if it is "reasonable."[15]

The NRC then attempts to mischaracterize Orange County's appeal as a frontal challenge to the NWPA and Subpart K regulations. NRC Resp. at 16. To the contrary, Orange County has challenged the ASLB's *application* of Subpart K procedures in a manner that denied the County an opportunity for rebuttal. Thus, the legitimacy of NRC's hybrid or informal hearing procedures *per se* is not at issue here.[16] *See* NRC Resp. at 17-18. Moreover, the NRC's attempt to defend the ASLB's decision by analogizing it to a rulemaking illustrates rather than undermines Orange County's point. NRC Resp. at 18. According to the NRC, "in rulemakings proceedings, agencies like the NRC regularly resolve technical and other fact controversies without ... providing an opportunity for rebuttal." Id. While commenters on a proposed rule may not be able to rebut testimony by other commenters, they unquestionably have the right to rebut the evidence presented by the agency in support of its proposed rule. *American Water Works Association v. EPA,* 40 F.3d 1266 (D.C. Cir. 1994). Thus, if the ASLB had proposed to affirm the NRC Staff's refusal to prepare an EIS in a rulemaking, it would have had to offer for public comment the evidence on which it planned to rely for its decision, *i..e.*, the NRC Staff's affidavits and reports regarding the probability of a Harris pool fire. It also would have been required to respond to critical comments in its final rule. *American Mining Congress v. EPA,* 907 F.2d 1179, 1191 (D.C. Cir. 1990). Orange County was entitled to equivalent procedural protections, rather than vague assurances from the NRC that the ASLB "reasonably" assigned the

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15 *See* NRC Resp. at 19 and note 11, and cases cited therein.

16 The question at issue in the three decisions cited by the NRC in support of the legality of informal hearing procedures was whether the petitioners were entitled to a live hearing with cross-examination. NRC Resp. at 18, *citing Environmental Action v. FERC,* 996 F.2d 401, 413 (D.C. Cir. 1993); *Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993); and *Employers Insurance of Wausau v. Browner*, 52 F.3d 656, 667 (7th Cir. 1995). That issue is not in

burden of proof to the NRC Staff in the course of weighing the evidence. NRC Resp. at 19.

The NRC also argues that rebuttal testimony is not "contemplated" by the NWPA or NRC regulations. NRC Resp. at 16. The NRC cites the Commission's decision, in promulgating Subpart K, not to "provide for responsive pleadings" prior to the oral argument. *Id.* However, the very fact that the Commission considered establishing such a procedure shows that it is not forbidden by the NWPA. In any event, although the NRC decided not to allow rebuttal filings before the oral argument, it did not prohibit supplemental evidentiary filings after the oral argument, as sought by Orange County. Nor did it otherwise circumscribe the ASLB's authority under 10 C.F.R. §§ 2.718 and 2.721 to "conduct a fair and impartial hearing." In fact, the Commission ignores a statement in the Subpart K preamble in which the Commission explicitly contemplated that ASLBs might seek further evidence after the oral argument.[17]

Finally, the NRC contends that Orange County did, in fact, receive a "form of rebuttal," in oral argument on December 7, 2000. NRC Resp. at 18. By no conceivable standard, however, can an oral argument by an attorney be considered the equivalent of an opportunity to submit factual evidence by an expert witness.[18]

IV. CONCLUSION

For the foregoing reasons, the Court should stay the effectiveness of LBP-01-09, pending its consideration of this appeal.

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contention.

17 *See* Final Rule, Hybrid Hearing Procedures for Expansion of Spent Fuel Storage Capacity at Civilian Nuclear Power Reactors, 50 Fed. Reg. 41,662, 41,666 (October 15, 1985) ("Minor maters can still be resolved without formal adjudication by directing the parties to file supplemental sworn testimony or affidavits.")

18 As the NRC is well aware, experts are forbidden to speak at Subpart K oral arguments. 10 C.F.R. § 2.1113(b); moreover, the ASLB is precluded by 10 C.F.R. § 2.1113(b) from crediting any of the factual assertions made by counsel.

Respectfully submitted,

Diane Curran
Anne Spielberg
Harmon, Curran, Spielberg, & Eisenberg, L.L.P.
1726 M Street N.W., Suite 600
Washington, D.C. 20036
202/328-3500

June 18, 2001

(b) A party to an adjudicatory proceeding involving initial licensing subject to this subpart may petition that the application of a specified Commission rule or regulation or any provision thereof, of the type described in paragraph (a) of this section, be waived or an exception made for the particular proceeding. The sole ground for petition for waiver or exception shall be that special circumstances with respect to the subject matter of the particular proceeding are such that application of the rule or regulation (or provision thereof) would not serve the purposes for which the rule or regulation was adopted. The petition shall be accompanied by an affidavit that identifies the specific aspect or aspects of the subject matter of the proceeding as to which application of the rule or regulation (or provision thereof) would not serve the purposes for which the rule or regulation was adopted, and shall set forth with particularity the special circumstances alleged to justify the waiver or exception requested. Any other party may file a response thereto, by counter-affidavit or otherwise.

(c) If, on the basis of the petition, affidavit and any response thereto provided for in paragraph (b) of this section, the presiding officer determines that the petitioning party has not made a prima facie showing that the application of the specific Commission rule or regulation or provision thereof to a particular aspect or aspects of the subject matter of the proceeding would not serve the purposes for which the rule or regulation was adopted and that application of the rule or regulation should be waived or an exception granted, no evidence may be received on that matter and no discovery, cross-examination or argument directed to the matter will be permitted, and the presiding officer may not further consider the matter.

(d) If, on the basis of the petition, affidavit and any response provided for in paragraph (b) of this section, the presiding officer determines that such a prima facie showing has been made, the presiding officer shall, before ruling thereon, certify directly to the Commission[1] for determination the matter of whether the application of the Commission rule or regulation or provision thereof to a particular aspect or aspects of the subject matter of the proceeding, in the context of this section, should be waived or an exception made. The Commission may, among other things, on the basis of the petition, affidavits, and any response, determine whether the application of the specified rule or regulation (or provision thereof) should be waived or an exception be made, or the Commission may direct such further proceedings as it deems appropriate to aid its determination.

(e) Whether or not the procedure in paragraph (b) of this section is available, a party to an initial licensing proceeding may file a petition for rule making pursuant to § 2.802.

§ 2.759 Settlement in initial licensing proceedings.

The Commission recognizes that the public interest may be served through settlement of particular issues in a proceeding or the entire proceeding. Therefore, to the extent that it is not inconsistent with hearing requirements in section 189 of the Act (42 U.S.C. 2239), the fair and reasonable settlement of contested initial licensing proceedings is encouraged. It is expected that the presiding officer and all of the parties to those proceedings will take appropriate steps to carry out this purpose.

Initial Decision and Commission Review

§ 2.760 Initial decision and its effect.

(a) After hearing, the presiding officer will render an initial decision which will constitute the final action of the Commission forty-five (45) days after its date when it authorizes the issuance or amendment of a license or limited work authorization for a facility, or thirty (30) days after its date in any other case, unless an appeal is taken in accordance with § 2.762 or the Commission directs that the record be certified to it for final decision.

(b) Where the public interest so requires, the Commission may direct that the presiding officer certify the record to it without an initial decision, and may—

(1) Prepare its own initial decision, which will become final unless a notice of appeal is filed; or

(2) Omit an initial decision on a finding that due and timely execution of its functions imperatively and unavoidably so requires.

(c) An initial decision will be in writing and will be based on the whole record and supported by reliable, probative, and substantial evidence. The initial decision will include:

(1) Findings, conclusions and rulings, with the reasons or basis for them, on all material issues of fact, law, or discretion presented on the record;

(2) All facts officially noticed and relied on in making the decision;

(3) The appropriate ruling, order or denial of relief with the effective date;

(4) The time within which a notice of appeal from the decision and a supporting brief may be filed, the time within which briefs in support of or in opposition to an appeal filed by another party may be filed and, in the case of an initial decision which may become final in accordance with paragraph (a) of this section, the date when it may become final.

§ 2.760a Initial decision in contested proceedings on applications for facility operating licenses.

In any initial decision in a contested proceeding on an application for an operating license for a production or utilization facility, the presiding officer shall make findings of fact and conclusions of law on the matters put into controversy by the parties to the proceeding and on matters which have been determined to be the issues in the proceeding by the Commission or the presiding officer. Matters not put into controversy by the parties will be examined and decided by the presiding officer only where he or she determines that a serious safety, environmental, or common defense and security matter exists. Depending on the resolution of those matters, the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, after making the requisite findings, will issue, deny, or appropriately condition the license.

§ 2.761 Expedited decisional procedure.

(a) The presiding officer may determine a proceeding by an order after the conclusion of a hearing without issuing an initial decision, when:

(1) All parties stipulate that the initial decision may be omitted and waived their rights to file a notice of appeal, to request oral argument, and to seek judicial review;

(2) No unresolved substantial issue of fact, law, or discretion remains, and the record clearly warrants granting the relief requested; and

(3) The presiding officer finds that dispensing with the issuance of the initial decision is in the public interest.

[1] The matter will be certified to the Commission notwithstanding the provisions of § 2.785.

EXHIBIT 1

27 FR 377

(b) An order entered pursuant to paragraph (a) of this section shall be subject to review by the Commission on its own motion within thirty (30) days after its date.

28 FR 1015

(c) An initial decision may be made effective immediately, subject to review by the Commission on its own motion within thirty (30) days after its date, except as otherwise provided in this chapter when:

48FR52282

(1) All parties stipulate that the initial decision may be made effective immediately and waive their rights to file a notice of appeal, to request oral argument, and to seek judicial review;

27 FR 377

(2) No unresolved substantial issue of fact, law, or discretion remains and the record clearly warrants granting the relief requested; and

(3) The presiding officer finds that it is in the public interest to make the initial decision effective immediately.

35 FR 6317

(d) The provisions of this section do not apply to an initial decision directing the issuance or amendment of a construction permit or construction authorization, or the issuance of an operating license or provisional operating authorization.

§ 2.761a Separate hearings and decisions.

In a proceeding on an application for a construction permit for a utilization facility which is subject to § 51.20(b) of this chapter, and is of the type specified in § § 51.21(b) (2) or (3) or 50.22 of this chapter or is a testing facility, the presiding officer shall unless the parties agree otherwise or the rights of any party would be prejudiced thereby, commence a hearing on issues covered by § 50.10(e)(2)(ii) and Subpart A of Part 51 of this chapter as soon as practicable after issuance of the staff of its final environmental impact statement, but no later than thirty (30) days after issuance of such statement, and complete such a hearing and issue an initial decision on such matters. Pehearing procedures regarding issues covered by Subpart A of Part 51 and § 51.10(e)(2)(ii) of this chapter, including any discovery and special prehearing conferences and prehearing conferences as provided in § § 2.740, 2.740a, 2.740b, 2.741, 2.742, 2.751a, and 2.752, shall be scheduled accordingly. The provisions of § § 2.754, 2.755, 2.760, 2.762, 2.763, and 2.764(a) shall apply to any proceeding conducted and any initial decision rendered in accordance with this section. Paragraph 2.764(b) shall not apply to any partial initial decision rendered in accordance with this section. This section shall not preclude separate hearings and decisions on other particular issues.

49 FR 9352

§ 2.762 Appeals to the Commission from initial decisions.

(a) *Notice of Appeal.* Within ten (10) days after service of an initial decision, any party may take an appeal to the Commission by filing a notice of appeal. The notice shall specify—

(1) the party taking the appeal; and

(2) the decision being appealed.

(b) *Filing Appellant's Brief.* Each appellant shall file a brief supporting its position on appeal within thirty (30) days (40 days if Commission staff is the appellant) after the filing of notice required by paragraph (a) of this section.

(c) *Filing Responsive Brief.* Any party who is not an appellant may file a brief in support of or in opposition to the appeal within thirty (30) days after the period has expired for the filing and service of the brief of all appellants. Commission staff may file a responsive brief within forty (40) days after the period has expired for the filing and service of the briefs of all appellants. A responding party shall file a single responsive brief regardless of the number of appellants' briefs filed.

48 FR 52282

(d) *Brief Content.* A brief in excess of ten (10) pages shall contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes, regulations, and other authorities cited, with references to the pages of the brief where they are cited.

(1) An appellant's brief must clearly identify the errors of fact or law that are the subject of the appeal. For each issue appealed, the precise portion of the record relied upon in support of the assertion of error must also be provided.

(2) Each responsive brief must contain a reference to the precise portion of the record which supports each factual assertion made.

(e) *Brief Length.* A party shall not file a brief in excess of seventy (70) pages in length, exclusive of pages containing the table of contents, table of citations and any addendum containing statutes, rules, regulations, etc. A party may request an increase of this page limit for good cause. Such a request shall be made by motion submitted at least seven (7) days before the date upon which the brief is due for filing and shall specify the enlargement requested.

(f) *Certificate of Service.* All documents filed under this section must be accompanied by a certificate reflecting service upon all other parties to the proceeding.

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(g) *Failure to Comply.* A brief which in form or content is not in substantial compliance with the provisions of this section may be stricken, either on motion of a party or by the Commission on it own initiative.

§ 2.763 Oral argument.

In its discretion the Commission may allow oral argument upon the request of a party made in a notice of appeal or brief, or upon it own initiative.

§ 2.764 Immediate effectiveness of initial decision directing issuance or amendment of construction permit or operating license.

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(a) Except as provided in paragraphs (c) through (f) of this section, or as otherwise ordered by the Commission in special circumstances, an initial decision directing the issuance or amendment of a construction permit, a construction authorization, or an operating license shall be effective immediately upon issuance unless the presiding officer finds that good cause has been shown by a party why the initial decision should not become immediately effective, subject to the review thereof and further decision by the Commission upon notice of appeal filed by any party pursuant to § 2.762 or upon its own motion.

(b) Except as provided in paragraphs (c) through (f) of this section, or as otherwise ordered by the Commission in special circumstances, the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, notwithstanding the filing of a notice of appeal, shall issue a construction permit, a construction authorization, or an operating license, or amendments thereto, authorized by an initial decision, within ten (10) days from the date of issuance of the decision.

EXHIBIT 2

NUREG-0396
EPA 520/1-78-016

DEVELOPMENT OF
RESPONSE PLANS
POWER PLANTS

Prepared by a
U. S. Nuclear Regulatory Commission and
U. S. Environmental Protection Agency
Task Force on Emergency Planning

DECEMBER 1978

Office of State Programs
Office of Nuclear Reactor Regulation
U. S. Nuclear Regulatory Commission
Office of Radiation Programs
U. S. Environmental Protection Agency

accidents have the potential to release very large quantities (hundreds of millions of curies) of radioactive materials. There is a full spectrum of releases between the lower and upper range with all of these releases involving some combination of atmospheric and melt-through accidents. These very severe accidents have the potential for causing serious injuries and deaths. Therefore, emergency response for these conditions must have as its first priority the reduction of early severe health effects. Studies[6,7] have been performed which indicate that if emergency actions such as sheltering or evacuation were taken within about 10 miles of a power plant, there would be significant savings of early injuries and deaths from even the most "severe" atmospheric releases.

For the ingestion pathways, (due to the airborne releases and under Class 9 accident conditions), the downwind range within which significant contamination could occur would generally be limited to about 50 miles from a power plant, because of wind shifts during the release and travel periods. There may also be conversion of iodine in the atmosphere (for long time periods) to chemical forms which do not readily enter the ingestion pathway. Additionally, much of the particulate materials in a cloud would have been deposited on the ground within about 50 miles.

C. Probability Considerations

An additional perspective can be gained when the planning basis is considered in terms of the likelihood (probability) of accidents which could require some emergency response.

Probabilities can be used to give a perspective to the emergency planner by comparing the chance of a reactor accident to other emergencies for which plans and action may be required. This consideration forms an additional basis upon which the Task Force selected the planning basis. The Reactor Safety Study (RSS) estimated the probabilities* of various severe accidents occurring at nuclear power plants. The probability of a loss-of-coolant accident (LOCA) from a large pipe break was estimated to be approximately one chance in 10,000 ($1x10^{-4}$) of occurring per reactor-year. LOCA accidents would not necessarily lead to the melting of the reactor core since emergency core cooling systems (ECCS) are designed to protect the core in such an event. In fact, other accident initiating events such as the loss-of-coolant accident from a small pipe break or transient events have a higher chance of leading to core-melting than do large LOCA accidents. Core-melt type accidents were calculated to have a probability of about one chance in 20,000 of occurring per reactor-year. There is a significant degree of uncertainty associated with both of the above probability estimates.

* Use of the RSS probability estimates, in the context of emergency planning, has been thoroughly examined. It is recognized that there is a large range of uncertainties in these numbers (as indicated in the Risk Assessment Review Group Report, NUREG/CR-0400), but the perspective gained when considering the probabilities is important in making a rational decision concerning a basis for emergency planning.

The degree of uncertainty is such that no differentiation can be confidently made, on a probabilistic basis, between the DBA/LOCA and the releases associated with less severe core-melt categories.

As discussed in Appendix III, the Task Force has concluded that both the design basis accidents and less severe core-melt accidents should be considered when selecting a basis for planning predetermined protective actions and that certain features of the more severe core-melt accidents should be considered in planning to assure that some capability exists to reduce the consequences of even the most severe accidents. The low probabilities associated with core-melt reactor accidents (e.g. one chance in 20,000 or 5×10^{-5} per reactor-year) are not easy to comprehend and additional perspectives are useful. Within the next few years, there will have been accumulated approximately 500 reactor-years of civilian nuclear power plant operation in this country. Less than 30% of all core melt accidents would result in high exposure outside the recommended planning distances. Therefore, over this time period* the probability of an accident within the USA with exposures exceeding the plume or ingestion PAGs <u>outside</u> the planning basis distances would be about 1.5×10^{-5}** $\times$ 500 or about 1 chance in

* The Reactor Safety Study explicitly limits its analyses to the first 100 reactors and five years (through 1980).

** This estimate is based upon the assumptions of the RSS. It should be noted that there is a large uncertainty on this number.

100. To restate this, there is about a 1% chance of emergency plans being activated in the U.S. beyond the recommended EPZs within the next few years. For a single State, this probability drops appreciably. For a State with ten reactors within or adjacent to its borders, the probability of exceeding PAGs outside the planning basis radius for the plume exposure pathway is about $1.5 \times 10^{-5} \times 10$ or about one chance in 6000 per year according to the Reactor Safety Study analysis.

For perspective, a comparison between reactor accidents and other emergency situations can be made. Considerations of emergency planning for reactor accidents are quite similar to many other emergencies; floods, for example, have many characteristics which are comparable. Timing, response measures and potential consequences, such as property damage are similar for both events.

Flood risk analysis has been carried out by the Flood Insurance Program of the Department of Housing and Urban Development and the Corps of Engineers. Flood plains have been designated for all areas of the country by computing the probability of being flooded within a certain period of time; ie., the 100-year flood plain designates those areas which can be expected to be under water when the worst flood in a century occurs. Even with this relatively high probability of severe flood occurrence there are no explicit requirements for emergency response planning.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ORANGE COUNTY, NORTH CAROLINA,	)	
Petitioner,	)	No. 01-1246
v.	)	
UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA,	)	
Respondents	)	

CERTIFICATE OF SERVICE

I certify that on June 1, 2001, copies of the foregoing Orange County's Reply to Oppositions to Stay Motion were served on the following by hand delivery:

Ronald Spritzer, Esq.
Appellate Division
Environment and Natural Resources
U.S. Department of Justice
Room 8912
601 D Street N.W.
Washington, D.C. 20026

Charles E. Mullins, Esq.
E. Leo Slaggie, Esq.
John F. Cordes, Esq.
Office of General Counsel
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD

John H. O'Neill, Esq.
Douglas Rosinski, Esq.
ShawPittman
2300 N Street N.W.
Washington, D.C. 20036

Diane Curran
Harmon, Curran, Spielberg & Eisenberg, L.L.P.
1726 M Street N.W., Suite 600
Washington, D.C. 20036
202/328-3500