

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

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

**FEDERAL RESPONDENTS' OPPOSITION TO
MOTION FOR STAY OF ADMINISTRATIVE ORDER**

I. INTRODUCTION AND SUMMARY

The Board of Commissioners of Orange County, North Carolina ("Orange County"), has brought this lawsuit challenging a decision by the Nuclear Regulatory Commission ("NRC" or "Commission")¹ to amend the license of the Shearon Harris Nuclear Power Plant. The amendment permits the plant to expand its capacity to store spent nuclear fuel in onsite spent fuel pools. The County asks this Court to stay the Commission order allowing the expansion, pending full judicial review. According to the County, the Commission cut short the County's hearing rights and improperly denied its demand for a full-scale environmental review and issuance of an Environmental Impact Statement ("EIS") under the National Environmental Policy Act ("NEPA").

The County presented its arguments to a 3-judge tribunal of the NRC's Atomic Safety and Licensing Board Panel ("Licensing Board") and then before the Commission itself. After a 28-month hearing process, which included multi-party discovery, the submission of technical studies and affidavits, oral arguments, and an appeal to the Commission, the County lost.

¹We will use "NRC" to refer to the agency as a whole and "Commission" when referring to the five-member body appointed by the President to administer the agency.

Now, the County maintains that it was entitled to submit additional evidence on a NEPA question – i.e., whether the NRC staff was wrong to find a hypothetical spent fuel accident proposed by the County “remote and speculative” and thus outside the agency’s NEPA responsibilities. The County also contends that the possibility of its hypothetical accident constitutes “irreparable injury” justifying a stay pending appeal.

The indispensable prerequisite to obtaining a judicial stay is a showing that the stay is necessary to prevent irreparable injury. Here, the County points to the possibility of a “significant release of radioactive material” from the Shearon Harris spent fuel pools. See Petitioner’s Motion (“Pet. Motion”) at 18. But staying the Shearon Harris license amendment will not eliminate whatever risk may exist of a “significant release,” because even without the amendment Shearon Harris can and does store thousands of spent fuel assemblies in its pools under its current license. The additional fuel assemblies stored under the amendment will, during 2001, amount to a tiny portion (less than 4%) of the fuel already stored. This small additional storage would add little or nothing to the risk of Orange County’s hypothetical spent fuel pool accident. A stay pending full litigation of this case thus would not eliminate or even significantly reduce the alleged “injury” to the County.

In any event, the hypothetical accident raised by Orange County is quite improbable in its own right. Even viewing the administrative record entirely from the County’s perspective, the probability of the County’s hypothetical accident is on the order of 1.6 in 100,000 reactor years. The better view of the evidence (and the one taken by the Licensing Board) shows a probability much less than that, perhaps 1 in 5,000,000. Either way, Orange County has hardly demonstrated the kind of certain, great, or imminent injury necessary to justify an immediate stay.

The County's merits position is similarly untenable. To prevail, the County ultimately must persuade this Court either to overturn engineering and risk judgments that lie at the core of the NRC's technical expertise or to set aside the NRC's interpretation of its own enabling legislation and its own regulations. Neither result is likely. Indeed, historically, this Court has given NRC licensing decisions "the highest judicial deference."² Here, ample technical evidence in an extensive record supports the Licensing Board's finding, left undisturbed by the Commission, that expanding Shearon Harris's spent fuel storage capacity causes no undue risk of accident or radiation exposure.

The County's stay motion does not attack the Board's basic safety findings. Rather, the motion argues that the Board and the Commission failed to provide the County an adequate opportunity to show that the NRC staff was wrong to find Orange County's hypothetical accident "remote and speculative" and thus outside the purview of NEPA. But the County's principal argument -- that the Board should have given the County a chance to "rebut" the NRC staff experts -- nowhere appeared in the County's petition for Commission appellate review. The County cannot litigate in this Court what it failed to raise before the Commission.

More fundamentally, the County's insistence that the Commission unlawfully aborted the County's right to a full hearing fails to come to grips with what the relevant provisions of the controlling legislation (the Nuclear Waste Policy Act) and NRC rules (10 C.F.R. Part 2, Subpart K) actually say. Those provisions expressly give NRC hearing boards discretion in spent fuel storage cases to "resolve" or "dispose" of factual and legal controversies after reviewing pleadings and conducting oral argument, when it is possible to do so with "sufficient accuracy."

² Massachusetts v. NRC, 924 F.2d 311, 324 (D.C. Cir.), cert. denied, 502 U.S. 899 (1991).

That is just what the Board did here. Nothing in the legislation or rules calls for a further hearing process or for another round of affidavits or pleadings, as now demanded by Orange County.

The Licensing Board in this case consisted of two technical experts and one lawyer. It weighed the parties' competing technical presentations on the question whether Orange County's hypothetical severe accident involving the Shearon Harris spent fuel pool is so "remote and speculative" that no full NEPA review is necessary. As called for by the Nuclear Waste Policy Act and NRC rules, the Board reviewed the statements and reports submitted by the parties' expert witnesses, heard lengthy oral arguments pro and con presented by all parties, and found expressly that no further proceedings were necessary to resolve the question accurately. The Board ultimately ruled that Orange County's proposed scenario was, in fact, "remote and speculative."

In short, having failed to show either irreparable injury or a likelihood of success on the merits, the County meets neither of the two critical standards for a judicial stay. The stay motion should be denied.

II. STATUTORY AND REGULATORY FRAMEWORK

Under Section 189a(1)(A) of the Atomic Energy Act ("AEA") of 1954, as amended, 42 U.S.C. §2239(a)(1)(A), members of the public whose interest is affected by a proposed NRC licensing action have a right to a hearing on the proposed action. Most licensing actions involving nuclear power plants are conducted under the formal trial-type procedures of 10 C.F.R. Part 2, Subpart G. As part of hearings convened on a proposed licensing action, the parties may challenge an NRC staff decision not to prepare an EIS. See 10 C.F.R. §51.104(b).

In 1983, Congress passed the Nuclear Waste Policy Act ("NWP"), 42 U.S.C. §10101, et seq., which adds an alternative method for conducting a hearing that involves the expansion of spent fuel storage capacity at a nuclear plant. Under 42 U.S.C. § 10154(a), any party may request an "oral argument," which triggers a summary proceeding consisting of discovery, submission of sworn testimony or affidavits, and written summaries of facts, data, and arguments on which the party intend to rely.

The Commission (acting through its Licensing Board) then holds oral argument to review the parties' submissions and to determine whether further adjudicatory proceedings are necessary:

At the conclusion of any oral argument under subsection (a) of this section, the Commission shall designate any disputed question of fact, together with any remaining questions of law, for resolution in an adjudicatory hearing only if it determines that -- (A) there is a genuine and substantial dispute of fact which can only be resolved with sufficient accuracy by the introduction of evidence in an adjudicatory hearing; and (B) the decision of the Commission is likely to depend in whole or in part on the resolution of such dispute.

42 U.S.C. § 10154(b) (emphasis added). Thus, Congress directed the Commission to move beyond the "oral argument" proceeding, and to conduct a trial-type adjudicatory hearing, "only" when that kind of hearing is necessary to resolve material disputes "with sufficient accuracy." In essence, the Commission is to review the parties' submissions, both written and oral, and resolve as many disputes as possible without further hearings.

The NRC's implementing regulations, which are found in Subpart K of 10 C.F.R. Part 2, are virtually identical to the language of the NWP, as Orange County concedes. See Pet. Motion at 3-4. The key provision directs hearing boards to "dispose of any issues of law or fact," except where a board makes an express finding that there is a "genuine question of fact that can only be resolved with sufficient accuracy at an adjudicatory hearing." See 10 C.F.R. § 2.1115 (a), (b) (emphasis added).

III. FACTUAL BACKGROUND

A. The Amendment Request.

The Carolina Power & Light Company ("CP&L") owns and operates the Shearon Harris Nuclear Power Plant under a license issued by the NRC. Originally, CP&L planned to build four units at the site, which is located in central North Carolina, but canceled Units 3 and 4 in 1981 and canceled Unit 2 in 1983. Prior to the cancellation of the last three units, however, CP&L had already completed construction of all four spent fuel pools (designated as Pools A, B, C, and D) and had completed construction of the spent fuel pool cooling and cleanup systems ("SFPCS") for Pools A and B. These pools are designed to store spent fuel after it is removed from the reactor. The current Shearon Harris license (prior to the amendment at issue here) authorizes the storage of spent fuel only in Pools A and B, including the storage of spent fuel assemblies from both Shearon Harris and from CP&L's other NRC-licensed facilities, Robinson Unit 2, and Brunswick Units 1 and 2. Pools A and B are licensed to hold 3,669 fuel assemblies.

In recent years, Pools A and B have been filled almost to capacity, due in part to delays in the development of a national repository to dispose of spent fuel from American nuclear power plants. See generally Indiana Michigan Power Co. v. DOE, 88 F.3d 1272 (D.C. Cir. 1996). On December 23, 1998, CP&L applied for an amendment to the Shearon Harris license that would (1) allow the expansion of the SFPCS to serve Pools C and D, and (2) authorize CP&L to store spent fuel in them (for the time being, CP&L plans to use only Pool C). The NRC published notice of the requested amendment, together with a notice of an opportunity for a hearing and a proposed finding that issuing the amendment involved no significant hazards considerations. See 64 Fed. Reg. 2237 (Jan. 13, 1999).

B. The Administrative Hearing.

Orange County filed a timely request for a hearing, and the Commission referred the request to the Licensing Board. In accordance with the NWPA and the NRC's regulations, CP&L submitted a timely request for an "oral argument"-type hearing as set out in 10 C.F.R. Part 2, Subpart K.

The Licensing Board granted Orange County's request for a hearing and admitted two "contentions" or challenges to the technical adequacy of the proposed amendment. See LBP-99-25, 50 NRC 25 (1999).³ The first contention challenged the sufficiency of measures proposed by CP&L to control the criticality of the spent fuel that would be stored in Pool C, and the second contention challenged steps taken by CP&L to monitor and preserve piping in Pools C and D that had been left in place after abandonment of construction in the early 1980's. After discovery, the submission of affidavits and other written materials, and oral argument, the Board rejected both technical contentions on their merits. See LBP-00-12, 51 NRC 247, 282-83 (2000).

Subsequently, the NRC Staff issued an Environmental Assessment finding that the requested amendment involved "no significant impact" to the environment. Accordingly, the Staff did not prepare an EIS. Orange County submitted several contentions challenging that decision, one of which was admitted by the Licensing Board. See LBP-00-19, 52 NRC 85 (2000). The crux of the admitted contention was whether the probability -- concededly small -- of a seven-step accident sequence culminating in initiation of an exothermic oxidation reaction in spent fuel pools C and D (a "pool fire")⁴ was sufficient to require the preparation of an EIS

³ Decisions of the Licensing Board are designated by an "LBP" heading while decisions by the Commission are designated by a "CLI" heading.

⁴The seven-step sequence is as follows: (1) a degraded core accident; (2) containment failure or bypass; (3) loss of all spent fuel cooling and makeup systems; (4) extreme radiation

for the license amendment. See id. at 95. After discovery, submission of extensive written submissions by all parties, and oral argument, the Board rejected Orange County's environmental contention on the merits. See LBP-01-09, 53 NRC 239 (March 1, 2001) (Exhibit 1 to this Opposition).

The Board addressed several questions, including (1) which party had the burden of proof in the proceeding, and (2) whether the accident scenario proposed by Orange County was "remote and speculative." (If an accident is "remote and speculative," the NRC Staff is not required to prepare an EIS dealing with its effects. See Carolina Study Group v. United States, 510 F.2d 796, 800 (D.C. Cir. 1975).)

First, the Licensing Board held that the Staff and CP&L had the ultimate burden of proof:

We agree with [Orange County] that as the proponent of the need for an evidentiary hearing it bears the burden of establishing that need, but the Staff bears the ultimate burden to demonstrate its compliance with NEPA in its determination that an EIS was not necessary relative to the ... expansion request.

LBP-01-09, 53 NRC at 249. Second, the Board discussed at length each step of Orange County's proposed accident scenario and the material submitted on the record dealing with it. See id. at 251-69. At each step, the Board described the particular step in the accident sequence and then discussed (1) Orange County's arguments regarding that step, (2) CP&L's arguments, (3) the NRC Staff's arguments, and (4) its own analysis of the three positions. See id. at 253-66.

After explaining the method of calculations and providing a table comparing the three contrasting analyses, the Board found the NRC Staff's analysis persuasive. See id. at 267.

doses precluding personnel access; (5) inability to restart any pool cooling or makeup systems due to extreme radiation doses; (6) loss of most or all pool water through evaporation; and (7) initiation of an exothermic oxidation reaction in pools C and D.

The Board agreed with the staff that the probability of Orange County's hypothetical accident was, "conservatively," 2 occurrences in 10 million reactor years "or less." See id. The Board concluded that given its small probability Orange County's hypothetical accident was indeed "remote and speculative," meaning that the NRC Staff was not required to prepare an EIS under NEPA. See id. at 267-69. The Board found no "genuine issue" that "can only be resolved with sufficient accuracy" at a further hearing. See id. at 270-71.

C. Commission Review and Decision.

Orange County filed a petition for Commission review (Exhibit 3 to this Opposition) of three applicable Licensing Board decisions, LBP-00-12, LBP-00-19, and LBP-01-09. The County also asked the Commission to stay the amendment pending review. Before the Commission, the County challenged the Board's decision in LBP-01-09 not to proceed further with an evidentiary hearing. The County argued, in essence, that under Subpart K, it needed only to establish that a dispute existed to force the Board to hold a further adjudicatory proceeding.

Here, the Licensing Board went far beyond the bounds of determining whether there is a genuine and substantial dispute of material fact. Instead, the Board entered the merits of the dispute, weighed the credibility of each side in the dispute, and then chose for one of the parties. ... Resolution of disputed factual issues must be reserved for trial, after hearing testimony of the experts.

Petition For Review at 8 (footnote omitted). The County treated the Subpart K process as equivalent to the Commission's summary disposition process, which precludes a final determination where there are material fact disputes. See id.

The Commission denied review on May 10, 2001. See CLI-01-11 (Exhibit 2 to this Opposition). The Commission held that the NWPA and Subpart K empowered the Board to do exactly what Orange County accused it of doing -- to resolve fact disputes without a formal evidentiary hearing. See CLI-01-11, slip op. at 5-10, citing 42 U.S.C. § 10154(b) and 10

C.F.R. § 2.1115(b). The Commission stated that “it seems unlikely” that Congress intended the NWPA “simply to replicate the NRC’s existing summary disposition practice.” See CLI-01-11, slip op. at 8. Pointing out that it customarily “declined to second guess plausible Board decisions” on fact questions (id. at 5), the Commission said it saw “no basis ... to redo” the Board’s “well-supported findings” on the NEPA “remote and speculative” question. See id. at 13.

The Commission also held that the Board had made a “reasonable finding” that none of the disputed NEPA issues “could be resolved with sufficient accuracy only by the introduction of additional evidence at a formal hearing.” See id. at 13 (emphasis the Commission’s). The Commission stated that Orange County “did not challenge the qualifications of any of the staff’s or CP&L’s technical witnesses,” and that the staff witnesses, unlike Orange County’s, had subjected their analytical work to a form of “peer review” -- i.e., “internal review ... by staff senior technical or supervisory personnel who were not involved in preparing the staff’s analysis.” See id. at 13-14.

Accordingly, the Commission declined to take review of the NEPA issue (and of all other merits issues). The Commission also denied the County’s stay request, indicating that it was “moot” and that there was “no possibility of irreparable injury.” See id. at 18-19. Three weeks later Orange County filed this lawsuit.

IV. ARGUMENT

A. Standard of Review.

Four well-known factors govern the issuance of a stay pending judicial review of an agency decision. As set forth in Circuit Rule 18, they are “(i) the likelihood that the moving party will prevail on the merits; (ii) the prospect of irreparable injury to the moving party if relief is withheld; (iii) the possibility of harm to other parties if relief is granted; and (iv) the public

interest." A judicial stay of a decision by a federal agency is an "extraordinary" remedy, and it is "the movant's obligation" to demonstrate that the four stay factors warrant relief. Cuomo v. NRC, 772 F.2d 972, 978 (D.C. Cir. 1985).

A petitioner seeking a stay against action by an agency with special expertise faces an obligation that is especially great:

[A] reviewing court must remember that the Commission is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential.

Baltimore Gas & Electric v. NRDC, 462 U.S. 87, 103 (1983).

In this case, Orange County has not met its obligation to satisfy any of the stay standards, as we explain in detail below. We start with irreparable injury, because absent that, a stay should be denied without any consideration of the other criteria: "a party is not ordinarily granted a stay of an administrative order without an appropriate showing of irreparable injury." Permian Basin Rate Cases, 390 U.S. 747, 773 (1968).

B. Orange County Fails to Demonstrate Irreparable Injury Absent A Stay.

Many courts have referred to irreparable injury as the "sine qua non" of interim injunctive or stay relief. See, e.g., Siegel v. LePore, 234 F.3d 1163, 1176 (11th Cir. 2000); USA Recycling, inc. v. Town of Babylon, 66 F.3d 1272, 1295 (2d Cir. 1995). The Supreme Court has described irreparable injury as the "necessary predicate" for injunctive relief, Sampson v. Murray, 415 U.S. 61, 91-92 (1974), noting that "the key word in this consideration is irreparable." Id. at 90.

"A party moving for a stay is required to demonstrate that the claimed injury is both 'certain and great.'" Cuomo v. NRC, 772 F. 2d at 976 (quoting Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985)). The injury must be of "such imminence that there is a

clear and present need for equitable relief to prevent irreparable harm.” Wisconsin Gas, 758 F.2d at 674 (internal quotation marks omitted). “[M]erely raising the specter of a nuclear accident” is not enough to show irreparable injury. Massachusetts Coalition of Citizens With Disabilities v. Civil Defense Agency, 649 F.2d 71, 75 (1st Cir. 1981).⁵

Orange County’s claim of a catastrophic spent fuel accident (Pet. Motion at 18-19) does not come close to meeting the irreparable injury standard. The County argues that the seven-step accident sequence postulated by its expert is “reasonably foreseeable.” See Pet. Motion at 18. But the County’s own expert says that the odds that his complicated accident scenario will occur are just 1.6 in every 100,000 reactor years. See Pet. Motion at 9. Whether or not those odds could reasonably be called “remote and speculative” for purposes of NEPA,⁶ they surely do not evince the sort of “great,” “certain,” or “imminent” harm called for by the irreparable injury standard. In fact, the true odds of Orange County’s hypothetical accident appear to be much less than the County believes. The Board here reviewed all evidence and found the probability to be about 1 in 5 million reactor years. See LBP-01-9, 53 NRC at 267. That also is the view of the NRC’s expert technical staff. See id. at 267; see also Declaration of Stephen F. La Vie, ¶ 6 (Exhibit 4 to this Opposition).

In short, the probability of Orange County’s feared spent fuel accident is slight. And, significantly, whatever risk exists has little or nothing to do with the license amendment at issue here -- which, during the pendency of this lawsuit, would not significantly increase the

⁵ Accord Cuomo v. NRC, 772 F.2d at 976; New York v. NRC, 550 F.2d 745, 756-57 (2d Cir. 1977); Crowther v. Seaborg, 415 F.2d 437, 439 (10th Cir. 1969); Virginia Sunshine Alliance v. Hendrie, 477 F.Supp. 68, 70 (D.D.C. 1979).

⁶ Orange County alleges that “[f]his probability is comparable to industry and NRC estimates of the probability of a severe accident, which is generally addressed in an EIS.” See Pet. Motion at 9. But the County provides no citation or support for this statement, other than its own ipse dixit.

probability or consequences of the County's hypothetical accident. The County notes that "[d]uring the first year, CP&L plans to put only about 150 assemblies in pools C and D." See Pet. Motion at 18.⁷ The County also recognizes that Pools A and B currently are licensed to hold 3,669 assemblies. See id. at 5. Obviously, the planned first year's increase is tiny (less than 4%) when compared to the fuel assemblies already stored under the current license. For three reasons, this is fatal to Orange County's irreparable injury claim.

First, CP&L's relatively minimal storage in Pool C over the short term cannot be said to increase the current probability of a pool fire under the County's hypothetical accident. That probability depends on a severe reactor accident, plus the presence of a high inventory of spent fuel in Pools A and B. But those Pools, as well as the Shearon Harris reactor itself, already operate under existing licensing authority, quite apart from the current license amendment. That amendment brings Pools C and D online, but does not increase the probability of the County's hypothetical accident, which depends on previously licensed facilities. See Declaration of Stephen F. La Vie, ¶ 8.

Second, the consequences of a fire involving Pools A and B, containing more than 3,000 spent fuel assemblies, would be increased only marginally, if at all, by the addition of 150 assemblies in Pool C. Orange County's assertion to the contrary (Pet. Motion at 18) is unexplained and very unlikely. See Declaration of Stephen F. La Vie, ¶¶ 10-12.

Third, while CP&L will have committed some resources to the project during the pendency of this lawsuit, the storage of 150 spent fuel assemblies is not irreversible. In the unlikely event this Court were to order the NRC to prepare an EIS after a full merits review,

⁷ CP&L informs us that it not only expects to store no more than 150 assemblies by December 31, 2001, but also that it intends to store no more than 500 assemblies by July 1, 2002.

and the resulting EIS were to cause the NRC to revoke the amendment, CP&L will be able to remove the 150 assemblies in an orderly fashion.

Finally, even if the County were to prevail in this Court, the ultimate remedy is not certain. NEPA is a procedural statute. If this Court were to find a violation of NEPA procedures, it may decide as a remedial matter not to vacate the license amendment, but merely to mandate preparation of an EIS. Or, without reaching any NEPA issues on the merits, the Court might simply order the resumption of the NRC hearing process. Contrary to Orange County's apparent view (Pet. Motion at 19), NEPA claims do not require automatic injunctive or stay relief. See Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 542-45 (1987); see also Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 206 (D.C. Cir. 1991); Arizona Public Service Company v. FPC, 438 F.2d 1275, 1283 (D.C. Cir. 1973). It would not be sensible for this Court to order interim stay relief more drastic than what may emerge from a final judgment.

In sum, Orange County has not shown that it will suffer irreparable injury if it does not obtain a judicial stay. Simply put, there is no tangible injury to the County that a stay would eliminate.

C. Orange County Fails to Demonstrate A Likelihood of Success On The Merits.

On the merits, Orange County argues primarily that "by crediting the NRC staff's evidence, without providing Orange County any opportunity for a factual rebuttal, the [Licensing Board] applied the Subpart K procedures in a manner that deprived Orange County of a meaningful hearing." See Pet. Motion at 12. The record here does not sustain the County's position. The Board followed the Subpart K procedures to the letter, and gave the County ample opportunity to make its case. Nothing in Subpart K calls for the "factual rebuttal" opportunity the County now demands.

Indeed, when Orange County petitioned for Commission appellate review of the Licensing Board's merits decision, the County said nothing about "factual rebuttal." See Orange County's Petition for Review (Exhibit 3 to this Opposition), at 7-10. The words "rebut" and "rebuttal" do not appear in that petition. By contrast, in the County's stay motion before this Court, "rebuttal" or "rebut" appears at least ten times. The County's petition before the Commission pressed a different point. Analogizing Subpart K to summary disposition, the County argued that it had "met its burden of demonstrating a genuine and substantial dispute of material fact that could only be resolved at a full evidentiary hearing." Id. at pp. 8-9. Now, however, the County's position has evolved. "Rebuttal" has become the linchpin of the County's case, and on that basis it demands either "a hearing" or "another round of evidentiary presentations." See Pet. Motion at 15-16.

The shift in argument is impermissible. The NWPA prohibits judicial challenges to the hearing procedure used by the Commission unless timely objection is made:

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 in a timely fashion or there are extraordinary circumstances that excuse the failure to present a timely objection.

42 U.S.C. § 10154(c). NRC rules require an intra-agency appeal as a prerequisite to judicial review. See 10 C.F.R. § 2.786(b)(1). These provisions codify the general judicial practice requiring parties seeking judicial review of agency action first to make their arguments to the agency. See, e.g., Coalition for Noncommercial Media v. FCC, 2001 WL 584402, at *3-*4 (D.C. Cir., June 1, 2001). There is a substantial question here, therefore, whether this Court will entertain Orange County's rebuttal claim.

But even if Orange County had preserved its rebuttal claim before the Commission, the claim would not succeed in this Court because it is unpersuasive. The claim, at bottom, largely amounts to an attack on the fairness of the NRC's Subpart K process – which provides no rebuttal opportunity as such, but does allow discovery, detailed factual submissions, and oral argument. It also authorizes evidentiary hearings, but only when a hearing board cannot accurately “dispose” of factual questions after oral argument. See 10 C.F.R. § 2.1115(a) & (b). The Board and the Commission adhered to the Subpart K process here. That process gave the County a fair chance to make its case.

As Orange County concedes, Subpart K is “virtually identical” to the directives given by Congress in the NWPA. See Pet. Motion at 3-4. To claim that Subpart K is unfair is to claim that the NWPA itself is unfair. But in the NWPA Congress reasonably responded to a perceived shortage of spent fuel storage capacity by authorizing expedited NRC licensing hearings. Congress did not exclude public participants like Orange County. It invited them into the licensing process by providing an opportunity to obtain pertinent information (discovery) and to participate meaningfully in agency hearings (written submissions, oral argument, and under certain conditions, an evidentiary hearing).

Orange County's stay motion does not allege that the Licensing Board violated Subpart K or the NWPA. Instead, the County argues that the Board should have departed from Subpart K by inviting “another round of evidentiary submissions” not already a part of the record. See Pet. Motion at 16. But Subpart K and the NWPA do not contemplate the rebuttal process envisioned by the County. Indeed, during the rulemaking leading to Subpart K's issuance, the Commission deliberately decided not to “provide for responsive pleadings,” because they “would delay oral argument and would not materially aid the presiding officer's

decision.”⁸ The County’s stay motion does not specify the Board’s authority to solicit rebuttal pleadings.

What Subpart K and the NWPAs do contemplate, in limited circumstances, is a formal evidentiary hearing if “sufficient accuracy” demands one. Here, though, both the Commission and the Board found that “sufficient accuracy” did not call for an additional hearing.⁹ Orange County cannot reasonably contest this finding, for it rests on the NRC’s judgment that it had sufficient information to resolve technical questions. Courts are at their “most deferential” when reviewing an expert agency’s “scientific judgments.” See Iron and Steel Institute v. EPA, 115 F.3d 979, 1006 (D.C. Cir. 1997) (collecting cases); see also Baltimore Gas & Elec. Co. v. NRDC, 462 U.S. at 103.

Orange County took an oversimplified view of Subpart K when (below) the County treated it as a summary judgment-type process. Unlike the County’s “rebuttal” argument -- which, as we have pointed out, the County did not raise in its intra-agency appeal to the Commission -- the County’s “summary judgment” analogy received direct Commission attention. The Commission construed “Subpart K to extend beyond the NRC’s pre-existing summary disposition practice,” and characterized it as a “totally new procedure” authorizing “the board to resolve disputed facts based on the evidentiary record.” See CLI-01-11, slip op. at 8 (emphasis the Commission’s).

Subpart K is hardly unique in the law. A number of federal agencies, including the Commission itself in other rules (see id. at 9), resolve fact questions litigated in informal or written form, rather than in traditional trial-type hearings. The judiciary has generally upheld

⁸ 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 (Oct. 15, 1985).

⁹ See CLI-01-11, slip op. at 13-14; LBP-01-09, 53 NRC at 254, 256, 258, 260, 263, 265, 266, 268-69, 271.

informal agency factfinding of this kind. See, e.g., 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) (collecting cases). See also Employers Insurance of Wausau v. Browner, 52 F.3d 656, 667 (7th Cir. 1995). In fact, in rulemaking proceedings, agencies like the NRC regularly resolve technical and other fact controversies without live testimony and without providing an opportunity for rebuttal. No court agrees with Orange County that proceedings of this type violate "fundamental principles of fairness." See Pet. Motion at 13.

In actuality, the very premise of Orange County's rebuttal claim -- that the Commission deprived the County of its right "to be heard" (Pet. Motion at 13) -- cannot be squared with the course of proceedings before the Commission. After a 60-day discovery period (which included depositions), all parties submitted hundreds of pages of statements, reports and pleadings on November 20, 2000, well before the December 7 oral argument. At the oral argument, which takes up more than 250 transcript pages, counsel for the parties gave lengthy arguments in favor of their own presentation, and against their opponents'. All counsel, including Orange County's, were accompanied by their experts. As the County acknowledges in its stay motion, its counsel "used the oral argument to methodically identify areas in which the County disputed the adequacy of CP&L's and the Staff's submissions." See Pet. Motion at 14. This, of course, amounts to a form of "rebuttal." The Board's final decision took account of the oral argument.¹⁰ It is difficult to find in this process an agency refusal to provide a meaningful hearing.

Finally, Orange County suggests that, by commenting on the unpersuasiveness of the County's evidence, the Board and Commission wrongly assigned the County the NEPA burden of proof. See Pet. Motion at 17-18. But the Board held explicitly that the NRC staff has the

¹⁰ See LBP-01-9, 53 NRC at 253, 254, 256, 258, 260, 263 n.8, 264, 265, 268-69.

burden to show NEPA compliance. See LBP-01-9, 53 NRC at 247-48. Statements by the Board and Commission about flaws in the County's approach reflect a reasonable weighing of evidence, not a misunderstanding of the burden of proof.

In these circumstances, there is no legal basis for this Court to step in and mandate more extensive hearing or rebuttal requirements. This Court generally defers to reasonable NRC constructions of its own enabling statutes and its own regulations.¹¹ And the Supreme Court has emphatically prohibited judicial imposition of administrative procedures not otherwise required by law. See Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978). For Orange County to prevail in this lawsuit it faces the uphill task of persuading this Court to overturn well-considered Commission interpretations of its own enabling legislation and its own regulations. This seems a quite unlikely outcome.

In summary, Orange County now presses a "rebuttal" argument not squarely presented to the Commission below, an argument that in any event lacks substance. The County has not presented a "substantial case on the merits." Cuomo v. NRC, 772 F.2d at 974, quoting WMATA v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977). It has failed to show that its merits claim supports the granting of a stay.

D. The Possibility of Harm To Others And the Public Interest Cut Against a Stay.

The NRC's preeminent interest is protecting the public health and safety. It has satisfied itself that expanding Shearon Harris's spent fuel capacity does not jeopardize that interest. It is our understanding that CP&L currently plans to begin storing spent fuel in Pool C

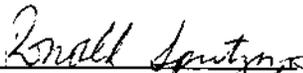
¹¹See, e.g., Envirocare of Utah, Inc. v. NRC, 194 F.3d 72, 75-76 (D.C. Cir. 1999); Nuclear Information & Resource Service v. NRC, 969 F.2d 1169, 1173 (D.C. Cir. 1992) (en banc); Massachusetts v. NRC, 924 F.2d at 324. See generally Chevron USA, Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1983) (deference to agency interpretation of its organic statute except where Congress has provided a specific contrary interpretation); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945) (deference to agency's interpretation of its own regulations).

on or about July 2, 2001. CP&L presumably will move to intervene in this case, and address in its pleadings economic or other injuries it would suffer should its planned use of Pool C be postponed by a judicial stay.

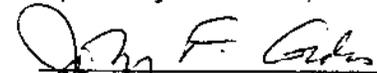
The NWPA and Subpart K call for expeditious licensing of new spent fuel storage capacity for the nation's nuclear power reactors. See Final Rule, 50 Fed. Reg. at 41665. To provide electricity reliably, nuclear power reactors require sufficient storage capacity. The NRC's approval of the Shearon Harris license amendment stands on a sound footing, technically and legally. There is no "public interest" in delaying the effect of a valid NRC licensing decision.

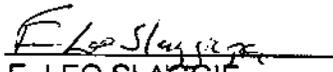
V. CONCLUSION

It is Orange County's obligation to substantiate its claim to the "extraordinary" remedy of a stay. Cuomo v. NRC, 772 F.2d at 978. Here, the County has not shown nearly enough. The stay should be denied.


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June 11, 2001

STATUTORY AND REGULATORY ADDENDUM

1. Nuclear Waste Policy Act, § 134, 42 U.S.C. § 10154
2. 10 CFR Part 2, Subpart K (NRC regulations)

LICENSING OF FACILITY EXPANSIONS AND TRANSSHIPMENTS

SEC. 134. (a) ORAL ARGUMENT.—In any Commission hearing under section 189 of the Atomic Energy Act of 1954 (42 U.S.C. 2239) on an application for a license, or for an amendment to an existing license, filed after the date of the enactment of this Act, to expand the spent nuclear fuel storage capacity at the site of a civilian nuclear power reactor, through the use of high-density fuel storage racks, fuel rod compaction, the transshipment of spent nuclear fuel to another civilian nuclear power reactor within the same utility system, the construction of additional spent nuclear fuel pool capacity or dry storage capacity, or by other means, the Commission shall, at the request of any party, provide an opportunity for oral argument with respect to any matter which the Commission determines to be in controversy among the parties. The oral argument shall be preceded by such discovery procedures as the rules of the Commission shall provide. The Commission shall require each party, including the Commission staff, to submit in written form, at the time of the oral argument, a summary of the facts, data, and arguments upon which such party proposes to rely that are known at such time to such party. Only facts and data in the form of sworn testimony or written submission may be relied upon by the parties during oral argument. Of the materials that may be submitted by the parties during oral argument, the Commission shall only consider those facts and data that are submitted in the form of sworn testimony or written submission.

(b) ADJUDICATORY HEARING.—(1) At the conclusion of any oral argument under subsection (a), the Commission shall designate any disputed question of fact, together with any remaining questions of law, for resolution in an adjudicatory hearing only if it determines that—

(A) there is a genuine and substantial dispute of fact which can only be resolved with sufficient accuracy by the introduction of evidence in an adjudicatory hearing; and

(B) the decision of the Commission is likely to depend in whole or in part on the resolution of such dispute.

(2) In making a determination under this subsection, the Commission—

(A) shall designate in writing the specific facts that are in genuine and substantial dispute, the reason why the decision of the agency is likely to depend on the resolution of such facts, and the reason why an adjudicatory hearing is likely to resolve the dispute; and

(B) shall not consider—

(i) any issue relating to the design, construction, or operation of any civilian nuclear power reactor already licensed to operate at such site, or any civilian nuclear power reactor for which a construction permit has been granted at such site, unless the Commission determines that any such issue substantially affects the design, construction, or operation of the facility or activity for which such license application, authorization, or amendment is being considered; or

(ii) any siting or design issue fully considered and decided by the Commission in connection with the issuance of a construction permit or operating license for a civilian nuclear power reactor at such site, unless (I) such issue results from any revision of siting or design criteria by the Commission following such decision; and (II) the Commission determines that such issue substantially affects the design, construction, or operation of the facility or activity for which such license application, authorization, or amendment is being considered.

(3) The provisions of paragraph (2)(B) shall apply only with respect to licenses, authorizations, or amendments to licenses or authorizations, applied for under the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.) before December 31, 2005.

(4) The provisions of this section shall not apply to the first application for a license or license amendment received by the Commission to expand onsite spent fuel storage capacity by the use of a new technology not previously approved for use at any nuclear powerplant by the Commission.

(c) JUDICIAL REVIEW.—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 in a timely fashion or there are extraordinary circumstances that excuse the failure to present a timely objection; and

(2) the court finds that such failure has precluded a fair consideration and informed resolution of a significant issue of the proceeding taken as a whole.

[42 U.S.C. 10154]

(3) The provisions of paragraph (2)(B) shall apply to licenses, authorizations, or amendments to licenses, applied for under the Atomic Energy Act (42 U.S.C. 2011 et seq.) before December 31, 2005.

(4) The provisions of this section shall not apply to an application for a license or license amendment received by the Commission to expand onsite spent fuel storage capacity by a new technology not previously approved for use at a powerplant by the Commission.

(c) JUDICIAL REVIEW.—No court shall hold unlawful or aside a decision of the Commission in any proceeding under subsection (a) because of a failure by the Commission to follow a particular procedure pursuant to this section unless—

(1) an objection to the procedure used was presented to the Commission in a timely fashion or there are extraordinary circumstances that excuse the failure to present a timely objection; and

(2) the court finds that such failure has precluded a fair consideration and informed resolution of a significant issue in the proceeding taken as a whole.

[42 U.S.C. 10154]

Subpart K—Hybrid Hearing Procedures for Expansion of Spent Nuclear Fuel Storage Capacity at Civilian Nuclear Power Reactors

SOURCE: 50 FR 41670, Oct. 15, 1985, unless otherwise noted.

§2.1101 Purpose.

The regulations in this subpart establish hybrid hearing procedures, as authorized by section 134 of the Nuclear Waste Policy Act of 1982 (96 Stat. 2230), to be used at the request of any party in certain contested proceedings on applications for a license or license amendment to expand the spent nuclear fuel storage capacity at the site of a civilian nuclear power plant. These procedures are intended to encourage and expedite onsite expansion of spent nuclear fuel storage capacity.

§2.1103 Scope.

The procedures in this subpart apply to contested proceedings on applications filed after January 7, 1983, for a license or license amendment under part 50 of this chapter, to expand the spent fuel storage capacity at the site of a civilian nuclear power plant, through the use of high density fuel storage racks, fuel rod compaction, the transshipment of spent nuclear fuel to another civilian nuclear power reactor within the same utility system, the construction of additional spent nuclear fuel pool capacity or dry storage capacity, or by other means. This subpart also applies to proceedings on applications for a license under part 72 of this chapter to store spent nuclear fuel in an independent spent fuel storage installation located at the site of a civilian nuclear power reactor. This subpart shall not apply to the first application for a license or license amendment to expand the spent fuel storage capacity at a particular site through the use of a new technology not previously approved by the Commission for use at any other nuclear power plant. This

subpart shall not apply to proceedings on applications for transfer of a license issued under part 72 of this chapter. Subpart M of this part applies to license transfer proceedings.

[50 FR 41670, Oct. 15, 1985, as amended at 63 FR 66730, Dec. 3, 1998]

§2.1105 Definitions.

As used in this part:

(a) *Civilian nuclear power reactor* means a civilian nuclear power plant required to be licensed as a utilization facility under section 103 or 104(b) of the Atomic Energy Act of 1954.

(b) *Spent nuclear fuel* means fuel that has been withdrawn from a nuclear reactor following irradiation, the constituent elements of which have not been separated by reprocessing.

§2.1107 Notice of proposed action.

In connection with each application filed after January 7, 1983, for a license or an amendment to a license to expand the spent nuclear fuel storage capacity at the site of a civilian nuclear power plant, for which the Commission has not found that a hearing is required in the public interest, for which an adjudicatory hearing has not yet been convened, and for which a notice of proposed action has not yet been published as of the effective date of this subpart, the Commission will, prior to acting thereon, cause to be published in the FEDERAL REGISTER a notice of proposed action in accordance with §2.105. The notice of proposed action will identify the availability of the hybrid hearing procedures in this subpart, specify that any party may invoke these procedures by filing a timely request for oral argument under §2.1109, and provide that if a request for oral argument is granted, any hearing held on the application shall be conducted in accordance with the procedures in this subpart.

§2.1109 Requests for oral argument.

(a)(1) Within ten (10) days after an order granting a request for hearing or petition for leave to intervene, any party may invoke the hybrid hearing procedures in this subpart by requesting an oral argument. Requests for oral argument shall be in writing and shall be filed with the presiding officer. The

presiding officer shall grant a timely request for oral argument.

(2) The presiding officer may grant an untimely request for oral argument only upon a showing of good cause by the requesting party for failure to file on time and after providing the other parties an opportunity to respond to the untimely request.

(b) The presiding officer shall issue a written order ruling on any requests for oral argument. If the presiding officer grants a request for oral argument, the order shall include a schedule for discovery and subsequent oral argument with respect to the admitted contentions.

(c) If no party to the proceeding requests oral argument, or if all untimely requests for oral argument are denied, the presiding officer shall conduct the proceeding in accordance with subpart G of 10 CFR part 2.

§2.1111 Discovery.

Discovery shall begin and end at such times as the presiding officer shall order. It is expected that all discovery shall be completed within 90 days. The presiding officer may extend the time for discovery upon good cause shown based on exceptional circumstances and after providing the other parties an opportunity to respond to the request.

§2.1113 Oral argument.

(a) Fifteen (15) days prior to the date set for oral argument, each party, including the NRC staff, shall submit to the presiding officer a detailed written summary of all the facts, data, and arguments which are known to the party at such time and on which the party proposes to rely at the oral argument either to support or to refute the existence of a genuine and substantial dispute of fact. Each party shall also submit all supporting facts and data in the form of sworn written testimony or other sworn written submission. Each party's written summary and supporting information shall be simultaneously served on all other parties to the proceeding.

(b) Only facts and data in the form of sworn written testimony or other sworn written submission may be relied on by the parties during oral argu-

ment, and the presiding officer shall consider those facts and data only if they are submitted in that form.

§2.1115 Designation of issues for adjudicatory hearing.

(a) After due consideration of the oral presentation and the written facts and data submitted by the parties and relied on at the oral argument, the presiding officer shall promptly by written order:

(1) Designate any disputed issues of fact, together with any remaining issues of law, for resolution in an adjudicatory hearing; and

(2) Dispose of any issues of law or fact not designated for resolution in an adjudicatory hearing.

With regard to each issue designated for resolution in an adjudicatory hearing, the presiding officer shall identify the specific facts that are in genuine and substantial dispute, the reason why the decision of the Commission is likely to depend on the resolution of that dispute, and the reason why an adjudicatory hearing is likely to resolve the dispute. With regard to issues not designated for resolution in an adjudicatory hearing, the presiding officer shall include a brief statement of the reasons for the disposition. If the presiding officer finds that there are no disputed issues of fact or law requiring resolution in an adjudicatory hearing, the presiding officer shall also dismiss the proceeding.

(b) No issue of law or fact shall be designated for resolution in an adjudicatory hearing unless the presiding officer determines that:

(1) There is a genuine and substantial dispute of fact which can only be resolved with sufficient accuracy by the introduction of evidence in an adjudicatory hearing; and

(2) The decision of the Commission is likely to depend in whole or in part on the resolution of that dispute.

(c) In making a determination under paragraph (b) of this section, the presiding officer shall not consider:

(1) Any issue relating to the design, construction, or operation of any civilian nuclear power reactor already licensed to operate at the site, or any civilian nuclear power reactor for which a construction permit has been granted

at the site, unless the presiding officer determines that any such issue substantially affects the design, construction, or operation of the facility or activity for which a license application, authorization, or amendment to expand the spent nuclear fuel storage capacity is being considered; or

(2) Any siting or design issue fully considered and decided by the Commission in connection with the issuance of a construction permit or operating license for a civilian nuclear power reactor at that site, unless (i) such issue results from any revision of siting or design criteria by the Commission following such decision; and (ii) the presiding officer determines that such issue substantially affects the design, construction, or operation of the facility or activity for which a license application, authorization, or amendment to expand the spent nuclear fuel storage capacity is being considered.

(d) The provisions of paragraph (c) of this section shall apply only with respect to licenses, authorizations, or amendments to licenses or authorizations applied for under the Atomic Energy Act of 1954, as amended, before December 31, 2005.

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

[50 FR 41671, Oct. 15, 1985; 50 FR 45398, Oct. 31, 1985]

§2.1117 Applicability of other sections.

In proceedings subject to this subpart, the provisions of subparts A and G of 10 CFR part 2 are also applicable, except where inconsistent with the provisions of this subpart.

CERTIFICATE OF SERVICE

I hereby certify that copies of the Federal Respondents' Opposition to Motion for Stay of Administrative Order were served by hand, this 11th day of June, 2001, upon the following:

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