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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

CAROLINA POWER & LIGHT COMPANY'S OPPOSITION TO ORANGE COUNTY'S MOTION FOR A STAY

Carolina Power & Light Company ("CP&L") submits its Opposition to Orange County's motion for a stay[1] in the above captioned matter. CP&L respectfully submits that the Court should deny the Board of Commissioners of Orange County's ("BCOC") Stay Motion because BCOC fails to meet any of the applicable legal standards for such an extraordinary action.

I. INTRODUCTION AND SUMMARY

BCOC comes to this Court after more than two years of administrative litigation and appeals before the Nuclear Regulatory Commission ("NRC" or "Commission") opposing CP&L's license amendment request to expand its onsite storage of spent nuclear fuel at its Shearon Harris Nuclear Power Plant ("Harris Plant," or "Harris") in North Carolina. The need to expand spent fuel storage at Harris results from the failure of the U.S. Department of Energy ("DOE") to begin taking delivery of spent fuel in 1998, as required by the contract between DOE and CP&L, and

[1] Orange County's Motion for a Stay and Expedition, Docket No. 01-1246 (Jun. 1, 2001) ("Stay Motion").

by the Nuclear Waste Policy Act of 1982, as amended ("NWPA"), 42 U.S.C. § 10101, et seq.[2] Expanded onsite storage of spent nuclear fuel was specifically promoted by Congress to cope with delays in the siting and construction of a permanent long-term repository for nuclear waste.[3] Congress also established a new and unique hearing process for NRC licensing of expanded spent fuel storage at nuclear plants to achieve that end.[4] CP&L elected the 10 C.F.R. Part 2, Subpart K, ("Subpart K") "expedited" licensing process when BCOC was granted intervention in opposing its license amendment request.[5] BCOC directly challenges here both the expansion of onsite spent fuel storage at the Harris Plant, which Congress specifically encouraged, and the expedited NRC licensing process, which Congress adopted to achieve that objective.

BCOC's Stay Motion must fail because it is highly unlikely that BCOC will ultimately prevail on the merits of its appeal challenging the Subpart K licensing process established by Congress. BCOC will not be injured in the slightest, much less irreparably injured, by the additional spent fuel that will be stored at Harris during the pending appeal. CP&L currently stores approximately 3,200 spent fuel elements under water in Harris spent fuel pools A and B.[6] The additional 150 spent fuel elements that will be stored in newly-licensed Harris spent fuel pool C during the second half of 2001 will not increase even the imagined risk of which BCOC com-

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[2] Affidavit of R. Steven Edwards and Robert K. Kunita (Jun. 8, 2001) ("CP&L Aff.") ¶ 5. See Northern States Power Co. v. US, 224 F.3d 1361 (Fed. Cir. 2000) (plaintiff utilities could sue DOE for failing "to begin performance at all by the statutory and contractual deadline of January 31, 1998"); Indiana Michigan Power Co. v. DOE, 88 F.39 1272 (D.C. Cir. 1996) (DOE had an obligation to begin disposing of spent nuclear fuel "no later than January 31, 1998").

[3] The NWPA provides that "the Federal Government has the responsibility to encourage and expedite the effective use of existing storage facilities and the addition of needed new storage capacity at the site of each civilian nuclear power reactor." 42 U.S.C. § 10151(a)(2).

[4] 42 U.S.C. § 10154.

[5] Subpart K implements the directives of 42 U.S.C. § 10154. 10 C.F.R. § 2.1101.

[6] CP&L Aff. ¶ 15.

plains.[7] A stay would irreparably harm CP&L in two ways. First, CP&L's spent fuel storage activities would be delayed incurring a significant unnecessary expense. Moreover, there is a real threat of a forced shutdown of one or more of CP&L's nuclear units.[8] The public interest would not be served by the threat of shutdown of one or more of CP&L's large electricity-generating nuclear plants. The public interest in safety is assured by the highly-regulated safe storage of spent nuclear fuel under water at Harris, where the safety standards are the same as at every other nuclear power plant in the country.

II. FACTUAL BACKGROUND

This proceeding stems from CP&L's December 23, 1998, application for a license amendment to place spent fuel pools C and D in service at CP&L's Harris Nuclear Plant.[9] CP&L invoked Subpart K adjudicatory procedures after the appointed Atomic Safety and Licensing Board ("Licensing Board" or "Board") granted BCOC's petition to intervene and admitted two technical contentions proffered by BCOC.[10] The parties conducted discovery and on January 4, 2000, submitted to the Board detailed, written summaries of the facts and law upon which they intended to rely at oral argument, along with numerous notebooks of supporting materials. On January 21, 2000, the Licensing Board heard oral argument concerning the two technical contentions. In a Memorandum and Order dated May 5, 2000, the Board ruled that BCOC

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[7] Id. CP&L's current plans would result in approximately 500 fuel elements stored in pool C by July 1, 2002, and approximately 850 fuel elements stored in pool C by December 31, 2002.

[8] Id. ¶¶ 12 – 18. Spent Fuel from CP&L's Brunswick and Robinson nuclear plants is also stored in the large Harris spent fuel storage handling building, originally built to accommodate four nuclear units at Harris. Transshipment of spent fuel to available onsite storage facilities is also encouraged by the NWPA. 42 U.S.C. § 10154.

[9] Shearon Harris Nuclear Power Plant Docket No. 50-400/License No. NPF-63 Request For License Amendment Spent Fuel Storage (Dec. 23, 1998) ("License Amendment Application").

[10] Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-99-25, 50 NRC 25, 40 (1999).

had failed to show that there was any genuine and substantial dispute of fact or law that required an evidentiary hearing.[11]

The Board admitted a late-filed environmental contention on August 7, 2000, whereby "BCOC challenge[d] the Staff's [environmental assessment] conclusion that the proposed CP&L license amendment to use spent fuel pools C and D does not require a complete [environmental impact statement ("EIS")]."[12] As admitted, the Board further narrowed the contention to whether "BCOC has established an adequate basis to allow merits litigation" on whether its postulated seven-step beyond-design-basis accident scenario was too "remote and speculative" to require an environmental analysis.[13]

The parties conducted discovery and on November 20, 2000, submitted to the Board detailed written summaries of the facts and law upon which they intended to rely at oral argument. Both the NRC Staff and CP&L submitted voluminous, detailed, and peer-reviewed analyses supporting their independent conclusions that BCOC's seven-step postulated accident scenario was too remote and speculative to warrant consideration in an environmental analysis. For its part, BCOC essentially submitted nothing beyond a recycled, conclusory report by its sole technical consultant.

The Licensing Board heard oral argument concerning the admitted environmental contention for a full day on December 7, 2000, in Raleigh, North Carolina. At oral argument, the NRC Staff and CP&L answered each question addressed to them by the Board and identified the analyses supporting each response. BCOC failed to offer any credible response. Instead BCOC

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[11] Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-00-12, 51 NRC 247, 249 (2000). This decision is not being appealed.

[12] Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-00-19, 52 NRC 85, 94 (2000).

[13] Id. at 95.

focused its argument on complaints that its technical consultant could not understand the analyses proffered by the other parties and that, in any event, more time was required for more investigation. The NRC Staff issued the final no significant hazards determination and the Harris spent fuel pool expansion license amendment on December 21, 2000, just days short of two years after the license amendment application was filed.[14] On December 22, 2000, BCOC filed with the NRC a Petition for Review and Motion for Immediate Suspension and Stay,[15] which the Commission rejected "summarily."[16]

On March 1, 2001, the Licensing Board issued its decision regarding BCOC's environmental contention, finding that: (1) BCOC failed to show that there was a genuine and substantial dispute of fact or law that could only be resolved satisfactorily by an evidentiary hearing, and (2) the NRC Staff met its burden by demonstrating that BCOC's postulated seven-step accident scenario was remote and speculative and did not warrant the preparation of an EIS.[17] The Board also authorized the requested license amendment and dismissed the proceeding because there were "no remaining disputed issues of fact or law requiring resolution in an adjudicatory hearing."[18] On March 16, 2001, BCOC filed a Petition for Review with the Commission and a Request for Emergency Stay of the Licensing Board decisions.[19] On May 10, 2001, the Commis-

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[14] 65 Fed. Reg. 82,405 (2000).

[15] Orange County's Petition For Review and Request For Immediate Suspension and Stay of the NRC Staff's No Significant Hazards Determination and Issuance of License Amendment for Harris Spent Fuel Pool Expansion (Dec. 22, 2000) ("BCOC Dec. 2000 Filing").

[16] Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-07, slip op. at 1 (Feb. 14, 2001).

[17] Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-01-09, slip op. at 2 (Mar. 1, 2001).

[18] Id. at 42.

[19] Orange County's Petition For Review of LBP-00-12, LBP-00-19, and LBP-01-09 (Mar. 16, 2001) ("BCOC's NRC Petition"); Orange County's Request for Emergency Stay of LBP-01-09 (Mar. 16, 2001).

sion denied the petition for review and the request for a stay.[20] The Commission stated that it "took no action on [BCOC's] stay motion" because it "saw no possibility of irreparable injury."[21]

CP&L originally requested that the license amendment be issued no later than December 31, 1999, and had planned to begin loading spent fuel in pool C in 2000. As discussed below, further delay would adversely impact CP&L's ability to maintain adequate spent fuel storage capacity and, with the loss of core discharge capability, could lead to a forced shutdown of one or more of CP&L's nuclear units.

III. ARGUMENT

A stay of an agency decision pending judicial review constitutes extraordinary relief, the appropriateness of which is determined by consideration of four factors: (1) whether the petitioner has made a strong showing that it is likely to prevail on the merits of its petition; (2) whether the petitioner has shown that, in the absence of extraordinary relief, it will be irreparably injured; (3) whether issuance of the stay would substantially harm other interested parties; and (4) where the public interest lies. Circuit Rule 18(a)(1); Cuomo v. NRC, 772 F.2d 972, 974 (D.C. Cir. 1985) (citing Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). A petitioner bears the burden of proving its entitlement to a stay. Williams v. Phillips, 482 F.2d 669, 670 (D.C. Cir. 1973). The right to such relief must be established in a clear and unequivocal fashion. See Smith, Bucklin & Assocs. v. Sonntag, 83 F.3d 476, 479 (D.C. Cir. 1996). BCOC fails to meet any of these factors.

A petitioner's burden is especially great where, as here, the agency enjoys special expertise. Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 97, 103 (1983). In applying the four factors, the Court should give deference to the judgments of the

[20] Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC ___ (May 10, 2001).

[21] Id., slip op. at 19.

NRC. In passing the Atomic Energy Act of 1954 ("AEA"), Congress enacted a regulatory scheme that is virtually unique in the degree to which responsibility is reposed in the administrative agency, free of close prescription in its charter as to how it shall proceed in achieving its statutory objectives. Union of Concerned Scientists v. NRC, 920 F.2d 50, 54 (D.C. Cir. 1990); Siegel v. AEC, 400 F.2d 778, 783 (D.C. Cir. 1968); see also, e.g., Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 557-58 (1978) (the role of a reviewing court is a limited one and an agency decision can be set aside only for substantial reasons mandated by statute). BCOC identifies no substantial reason to interfere with the Commission's well-reasoned decision in this matter.

BCOC fails to satisfy any of the legal requirements for a stay pending review of the Commission's action, for the reasons set forth below.

A. BCOC Is Not Likely to Prevail on the Merits

As an initial matter, BCOC's challenge is not properly before this Court. BCOC's Petition for Review and Stay Motion are based on the assertion that the NRC, through its Subpart K procedures, "violated Orange County's right to a hearing under § 189a of the Atomic Energy Act, as well as [the National Environmental Policy Act ("NEPA")]." Stay Motion at 12. BCOC argues that "[b]y failing to provide an opportunity for rebuttal in any form whatsoever, and by disregarding Orange County's well-supported requests for rebuttal during the Oral Argument, the [Licensing Board] committed clear and reversible error." Id. at 16. This argument was not made to the Commission in "Orange County's Petition for Review of LBP-00-12, LBP-0019, and LBP-01-09" ("NRC Petition"). Thus, this argument is not properly before this Court. U.S. Airwaves, Inc. v. FCC, 232 F.3d 227, 236 (D.C. Cir. 2000); accord Washington Ass'n for Television & Children v. FCC, 712 F.2d 677, 680 (1983) ("[C]laims not presented to the agency may not be made for the first time to a reviewing court"). When agency regulations require issue exhaustion in administrative appeals, reviewing courts "ensure against the bypassing of that re-

quirement by refusing to consider unexhausted issues." Sims v. Apfel, 530 U.S. 103, 108 (2000). Even in the absence of a regulation, the United States Supreme Court "has imposed an issue-exhaustion requirement" on appeals of agency action.[22] Id.

Yet, BCOC's NRC Petition did not challenge the Subpart K process as a violation of the AEA or NEPA before the Commission. BCOC did not argue to the Commission that Subpart K's failure to provide an opportunity for rebuttal violated its right to a "meaningful public participation." BCOC cannot now choose to attack Subpart K's process before this Court, having not raised it in over two years of litigation before the agency.

Even if this Court would decide to consider the Stay Motion on its merits, BCOC fails to meet its burden. Turning to the first of the four factors to be weighed in considering a stay, BCOC is highly unlikely to succeed in convincing this Court that the Subpart K proceeding mandated by Congress in the NWPA violates the AEA or NEPA. Subpart K establishes "a two-part test for determining whether an evidentiary hearing is required for resolution of the issues" raised in the proceeding.[23] The Commission's regulations mirror the language of the NWPA in setting a threshold for obtaining an evidentiary hearing in a Subpart K proceeding that is uniquely high.

> 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

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[22] NRC regulations clearly require exhaustion of issues. See 10 C.F.R. §§ 2.786(b)(2)(ii), (b)(5). BCOC was clearly on notice that it could not withhold issues from the Commission when seeking review.

[23] Shearon Harris, LBP-01-09, slip op. at 11; see also Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit No. 3), CLI-01-03, slip op. at 3-4 (2001); Shearon Harris, LBP-00-12, 51 NRC 247 at 254-55.

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

10 C.F.R. §§ 2.1115(b). Any issues not meeting this test are to be disposed of by the Licensing Board "promptly by written order" after the oral argument. 10 C.F.R. § 2.1115(a)(2). The Licensing Board and the Commission provided BCOC every opportunity to show that a genuine factual dispute existed which could only be resolved in an adjudicatory hearing. BCOC simply was not able to meet the test mandated by Congress.

BCOC has provided no legal support whatsoever for its assertion that Subpart K violates the AEA or NEPA. The only support for BCOC's claim that Subpart K's failure to provide an opportunity for rebuttal violated its right to "'meaningful' public participation" are cases decided under the Commission's rules at 10 C.F.R. Part 2, Subpart G, see Stay Motion at 12-13 n.15, and are thus inapposite.[24] BCOC offers nothing to suggest that it is likely to have this Court reject the NWPA mandate for expedited decisions involving spent fuel storage.

BCOC's arguments before this Court merely recycle its shop-worn thesis that a catastrophic, self-sustaining, exothermic oxidation reaction will result from implementation of high density fuel storage at Harris. The substance of BCOC's argument and environmental contention has been raised, considered, and dismissed by the NRC Staff and Licensing Boards numerous times over the past two decades.[25] BCOC does not provide any cogent argument as to why the

[24] The Commission rules specifically state that each "subpart other than subpart G sets forth special rules applicable to the type of proceeding described" in the scope section of each subpart and that in "any conflict between a general rule in subpart G and a special rule in another subpart . . . applicable to a particular type of proceeding, the special rule governs." 10 C.F.R. §§ 2.2, 2.3.

[25] See, e.g., Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), LBP-00-02, 51 NRC 25, 45 (2000) (rejecting the *same scenario* based on the *same report* prepared by the *same expert* retained by BCOC in this proceeding); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200 (1993) (discussing a contention that a loss of offsite power risks "a Zircoloy cladding fire"); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-90-04, 31 NRC 333 (1990) (reviewing a postulated accident sequence that included a "zircoloy-clad fire"); Florida Power

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Court should issue a ruling in complete contravention of over twenty years of consistent agency decision-making.

Indeed, the NRC Staff prepared a discretionary environmental assessment ("EA") of the Harris spent fuel pool expansion and made a finding of no significant environmental impacts.[26] BCOC claims that it is likely to be successful in challenging the conclusions of the NRC Staff, the Licensing Board, and Commission and that this Court will find, for the first time in over a hundred similar situations, that an EIS must be prepared in connection with a license amendment to expand spent fuel pool storage at an existing facility.[27] The detailed analyses performed by the NRC Staff and CP&L and its consultant demonstrate that the probability of the postulated scenario at Harris is remote and speculative in the extreme.[28] In contrast, BCOC's analysis ad-

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& Light Co. (St. Lucie Nuclear Power Plant, Unit 1), LBP-88-10A, 27 NRC 452, 467 (1988) (addressing a contention that the "accident analysis should address the burning of the total number of assemblies authorized to be stored in the pool").

[26] CP&L originally sought to have the license amendment treated as a "categorical exclusion" not requiring an environmental review, but the Staff conservatively decided to prepare an EA. See 10 C.F.R. § 51.22(c)(9).

[27] There is nothing in BCOC's postulated scenario that is unique to Harris. Well over 100 license amendment applications have been reviewed and approved by the Commission to expand on-site spent fuel pool storage without requiring an EIS. See, e.g., Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 7 (1986). In addition, the Commission has made the express generic determination that the environmental and radiological effects of onsite spent fuel storage need not be considered in the context of license renewal. See "Environmental Review for Renewal of Nuclear Power Plant Operating Licenses," 61 Fed. Reg. 66,537, 66,538 (1996).

[28] In the Subpart K proceeding below, both CP&L and the NRC Staff stated that the probability of BCOC's postulated accident could reasonably be *zero* (i.e., not possible), but that a conservative methodology yielded some finite possibility of occurrence. Summary of Facts, Data, and Arguments On Which Applicant Proposes to Rely At The Subpart K Oral Argument Regarding Contention EC-6 ("CP&L Summ.") at 67-68; NRC Staff Brief and Summary of Relevant Facts, Data and Arguments Upon Which The Staff Proposes To Rely At Oral Argument On Environmental Contention EC-6 (Nov. 20, 2000) ("NRC Summ.") at 34.

dressing the Licensing Board's questions relating to probabilistic safety analysis was simplistic and lacked a technical basis. The Licensing Board found that the facts, data, and arguments of the parties only demonstrated the exceedingly low probability of the BCOC postulated scenario and that an EIS was not necessary.

BCOC's likelihood of success on the merits is inextricably tied to the expertise of its consultant, Dr. Gordon Thompson, who formulated and has attempted to defend BCOC's postulated scenario. Simply stated, Dr. Thompson is no expert in the technical disciplines relevant to the issues raised here by BCOC. In response to an NRC Staff motion to strike his testimony in the safety contention phase of the Subpart K proceeding, the Board noted politely: Dr. Thompson's "expertise relative to reactor technical issues seems largely policy-oriented."[29] Shearon Harris, LBP-01-09, slip op. at 13; Shearon Harris, LBP-00-12, 51 NRC at 267 n.9. Both the Staff and CP&L brought to the attention of the Licensing Board, in some detail, Dr. Thompson's lack of qualifications and flawed analyses. See, e.g., NRC Summ. at 18-23; CP&L Summ. § II.E. In response to the Licensing Board's questions relating to BCOC's environmental contention, Dr. Thompson did not perform a probability study or probabilistic safety assessment. Rather, he made assumptions and performed "scoping" calculations, which produced nonsensical results.[30]

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[29] While the Licensing Board did not strike his testimony, it properly took into account Dr. Thompson's lack of education, experience and training in relevant disciplines in weighing his affidavit.

[30] E.g., Dr. Thompson's post-accident dose calculations assumed that all radioactive material released during his postulated reactor accident was uniformly deposited in a 200 meter radius around the release point. BCOC Dec. 2000 Filing, Attach. B, App. D. His assumption requires, inter alia, that the wind blow in all directions simultaneously for over four days and carry superheated fuel particles over buildings higher than the release point, but cause immediate and complete deposition between the buildings and his 200 meter boundary. In his most memorable effort, Dr. Thompson calculated that in his scenario "the temperature of steam leaving the top of the fuel assembly" in the Harris spent fuel pool would be "9,800 degrees C," a result which would certainly be problematic if only because it is over one and a half times the temperature of the surface of the sun. Id. § 4.4; CP&L Summ. at 27.

Dr. Thompson's lack of expertise and inadequate analysis foreordains BCOC's inability to make a strong case of its likelihood of success on the merits.

The NRC Staff, in contrast, performed a detailed analysis using risk assessment methodology and industry data that found, on a conservative bounding case, the probability of the BCOC postulated scenario was on the order of one in five million (2×10^{-7}) per year. Shearon Harris, LBP-09-01, slip op. at 36. Independent of the Staff's analysis, CP&L retained ERIN Engineering, Inc. ("ERIN")[31] to perform a Harris-specific probabilistic safety assessment to determine the probability of occurrence of BCOC's postulated scenario. The ERIN analysis, and other detailed plant-specific calculations performed by Harris personnel, demonstrate that the best-estimate overall probability of the postulated scenario was less than one in thirty million (2.7×10^{-8}) per year. Shearon Harris, LBP-09-01, slip op. at 36. It was ERIN's professional opinion that the postulated scenario was so unlikely that it would not be reasonable to consider it further in decision-making. CP&L Summ. at 72.

Further, BCOC claims as a "fact" its patently incorrect statement that the license amendment "increases the total spent fuel storage capacity of the Harris plant to 8,343 assemblies, over a thousand more assemblies than were assumed in the original EIS." Stay Motion at 6. BCOC fails to disclose, however, that this number includes both the 3,690 total assembly positions in pool C and the 1,025 total assembly positions in pool D. However, the number of fuel elements that can be stored pursuant to the license amendment is limited by a technical specification on

[31] ERIN is an industry leader in risk management and applying reliability and performance-based technologies to various situations and activities at nuclear power plants. ERIN personnel have been involved in numerous risk analysis projects performed since WASH-1400, "The Reactor Safety Study," in 1975. ERIN's experience, and that of the lead analyst for this project, Dr. Edward Burns, are unsurpassed in the industry. ERIN has developed many of the state-of-the-technology methods used in Probabilistic Safety Assessments and is actively involved in the American Society of Mechanical Engineers ("ASME") Committees which are developing the PSA standard. CP&L Summ. at 51.

heat load. This heat load limit will be reached well before pool C is filled, as acknowledged by Dr. Thompson.

> The license amendment issued on 21 December 2000 does not allow CP&L to exceed a 1.0 million BTU/hour limit on the heat load in pools C and D. CP&L will need a further license amendment, increasing this limit on the heat load, if it is to utilize more than a fraction of the allowed storage capacity in pools C and D.

Thompson May 31, 2001, Decl.[32] at 7 n. 8 (emphasis supplied). See also Thompson 1999 Report,[33] Appd. A, at A-11. CP&L has identified the total number of spent fuel assemblies that could be physically stored in pools A, B, and C combined is 7,359. But, as noted above, the heat load technical specifications will limit the total assemblies stored in pool C. Consequently, the original Harris EIS prepared in anticipation of two-unit and four spent fuel pools operation contemplated more spent fuel in storage than is authorized by the license amendment at issue here.[34]

BCOC has utterly failed to make a showing of any likelihood of success on the merits.

B. BCOC Will Not Be Irreparably Injured Unless a Stay is Granted

It is fundamental that interlocutory relief may not be granted in the absence of a showing that the moving party is likely to suffer irreparable harm before a decision on the merits can be rendered. Reynolds Metals Co. v. FERC, 777 F.2d 760, 763 (D.C. Cir.1985); Friendship Materials, Inc. v. Michigan Brick, Inc., 679 F2d 100, 102-03 (6th Cir. 1982). Irreparable injury is particularly important where a party seeks to stay an order reviewable under the Hobbs Act. That statute specifically provides that interlocutory relief by the Court of Appeals "shall contain

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[32] Thompson Declaration in Support of Orange County's Stay Motion (May 31, 2001) ("Thompson May 31, 2001, Decl.").

[33] Gordon Thompson, Risks and Alternative Options Associated with Spent Fuel Storage at the Shearon Harris Nuclear Power Plant (1999) ("Thompson 1999 Report").

[34] BCOC admits that the original EIS "called for storage of up to 7,640 assemblies in the pools." Stay Motion at 6 n.7.

a specific finding, based on evidence submitted to the Court of Appeals, and identified by reference thereto, that irreparable damage would result to the petitioner and specifying the nature of the damage." 28 U.S.C. § 2349(b).

The burden to demonstrate irreparable injury is a heavy one that falls squarely on the shoulders of the party requesting the stay. Friendship Materials Inc., 679 F.2d at 103-04. As pointed out in Virginia Petroleum Jobbers,

> The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.

259 F.2d. at 925. Thus, a mere possibility that a harm may occur is not the "actual and imminent" injury necessary to justify a stay, but rather is "something merely feared as something liable to occur at some indefinite time." Wisc. Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985) (quoting Connecticut v. Massachusetts, 282 U.S. 660, 674 (1931)). The threat of injury must be actual and imminent. Id. "[B]are allegations of what is likely to occur are of no value since the court must decide whether the harm will in fact occur." Id. (emphasis original).

BCOC will not be harmed at all by the Court denying the motion for a stay. The Commission rejected an essentially identical BCOC request stating that it "took no action on [BCOC's] stay motion" because it "saw no possibility of irreparable injury." CLI-01-11, slip op. at 19 (emphasis supplied). Indeed, BCOC's Dr. Thompson has stated that "[a]ctivation of pools C and D would not significantly alter the probability of a pool fire at Harris." Thompson Dec. 22, 2000, Decl. ¶ 7.[35] Thus, BCOC has failed to allege any harm that stems from the license amendment itself. Even assuming, arguendo, that the possibility of a pool fire exists based on

[35] Declaration of 22 December 2000 by Dr. Gordon Thompson Regarding the Potential for a Severe Accident at Spent Fuel Pools C & D at the Harris Nuclear Power Plant (Dec. 22, 2000) ("Thompson Dec. 22, 2000, Decl.").

BCOC's speculative scenario, the purported harm arises not from the license amendment, but from existing licensed activities in pools A and B. These activities are not within the scope of the license amendment and would not be affected by the stay BCOC seeks. Indeed, the probability of BCOC's postulated scenario is actually less with the license amendment's implementation because it makes available another, redundant, spent fuel pool cooling system. See CP&L Summ. at 57.

In any event, the harm asserted by BCOC is far too remote to warrant a stay pending review. "Speculation about a nuclear accident does not, as a matter of law, constitute the imminent, irreparable injury required for staying a licensing decision." Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 748 n.20 (1985) (citing Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-84-5, 19 NRC 953, 964 (1984)). BCOC claims that its postulated accident scenario could produce consequences of "apocalyptic proportions" based solely on Dr. Thompson's "scoping" calculations. Stay Motion at 18. Even assuming, arguendo, that Dr. Thompson accurately performed this calculation, he assumed that "an approximate doubling of the number of spent fuel assemblies," Thompson Mar.16, 2001, Decl. ¶ 77, instantaneously occurs following implementation of the Harris license amendment, which is a physical and regulatory impossibility. Contrary to this arbitrary assumption, the license amendment limits the total heat load of spent fuel pools C and D to 1.0 MBTU and CP&L plans to store no more than 150 elements in pool C by the end of 2001. CP&L Aff. ¶ 15. The 150 additional elements are insignificant in comparison to the approximately 3,200 elements already stored under the existing Harris license.

BCOC also baldly asserts that "if a fire starts in pools A and B" the elements in pools C and D are "virtually certain to catch fire" and the 150 assemblies that CP&L may store in pool C

this year "could yield" a "significant" release. Stay Motion at 18 (emphasis supplied). There is no basis cited for this conclusion. Dr. Thompson simply asserts it as so.[36]

There is nothing "immediate" or "apocalyptic" about the purported harm to BCOC from this license amendment. Approximately 3,200 spent fuel assemblies are currently stored in water pools at Harris. Spent fuel is being stored in the same manner at every nuclear plant in the United States. No harm has resulted to the public from such storage. BCOC's reliance on Ohio ex rel. Celebrezze v. NRC, 812 F.2d 288, 291 (6th Cir. 1987), for support of its irreparable harm proposition is, therefore, particularly inapt because there has never been an event of the sort that BCOC asserts poses "actual and imminent" harm.

BCOC has not carried its burden to show irreparable injury.

C. CP&L Will Suffer Irreparable Harm If a Stay Were Granted

By contrast, CP&L's need for the license amendment is urgent. Real harm and tangible costs will accrue if the Court were to issue a stay. CP&L Aff. ¶¶ 12 – 18. Harris spent fuel pool C is urgently needed to restore Prudent Operating Reserve[37] at CP&L's Brunswick Units 1 and 2

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[36] Throughout his declaration, Dr. Thompson states, without citation, that there is agreement between CP&L, NRC Staff, and himself on many technical issues, including "that a fire would occur in all four pools at Harris if water were lost from at least one pool" and that "partial or total exposure of the spent fuel to air, would inevitably cause a pool fire." Thompson May 31, 2001, Decl. ¶¶ 49, 89. His assertions of agreement, and his technical conclusions, are dead wrong and have no documented basis. Contrary to this assertion, CP&L concluded that "because of the low heat load in the old, cold spent fuel to be stored in Harris spent fuel pools C and D, it is highly unlikely that the spent fuel in pools C and D could sustain a zircaloy cladding exothermic oxidation reaction, even if a loss of most or all pool water through evaporation occurred." CP&L Summ. at 67-68.

[37] Practical management of spent nuclear fuel requires the maintenance of a Prudent Operating Reserve in a facility's spent fuel pool. As used herein, a Prudent Operating Reserve is sufficient space in a spent fuel pool to allow storage of the new fuel to be loaded during the next refueling and to unload the entire reactor core. This permits full operational flexibility should a situation arise where such action would be prudent (e.g., a leak from the reactor coolant system). Id. ¶ 12.

and Robinson Plants and any stay of the license amendment would have a direct and immediate impact on restoring this capability.[38] Id. ¶ 13. BCOC previously admitted that CP&L "is running out of core off-load space," but dismissed the impact on the licensee with a conclusory statement that "CP&L will not suffer irreparable harm." BCOC Dec. 2000 Filing at 19. To the contrary, a stay would result in tangible harm to not only CP&L, but to the public that it serves.

BCOC fails to address the substantial and immediate harm to CP&L from a stay and asserts CP&L erred in choosing "to count on the unconditional granting of a license amendment." Stay Motion at 19. Oddly, BCOC further asserts that CP&L's efforts to obtain a license amendment several years before it was required was "poor planning." Id. BCOC further asserts that the Court should overlook real and imminent harm to CP&L and its customers because the very licensing process that BCOC argues to this Court was too cursory, took too long.

BCOC does not, because it cannot, dispute the real and imminent harm of a stay to CP&L. Three shipments of Robinson spent fuel planned for 2000 to be shipped to Harris were cancelled as a result of previous delays in approval of the license amendment. CP&L Aff. ¶ 13. Earlier this year, Robinson lost its Prudent Operating Reserve. Without the license amendment, Harris will lose its Prudent Operating Reserve in the fall of 2001. Id. The CP&L spent fuel shipping program would have to be revised yet again and at significant additional expense to CP&L, to compensate for further delays in spent fuel pool availability because of resource and shipping window limitations. Id. ¶ 16. The impact of "running out of spent fuel storage space" has the potential to cause premature shutdown of CP&L's nuclear units. Nuclear generating units typically provide a base load of electricity to the power grid, meaning that the units are assumed to provide electricity at all times. If CP&L were to lose the ability to operate one or more

[38] As described earlier, CP&L had hoped to receive the license amendment in time to avoid the loss of the Prudent Operating Reserve at all.

of its plants due to spent fuel storage limitations, the impact on electrical customers served by CP&L would be real and immediate. This is a significant harm to CP&L and its customers.

D. The Public Interest Lies in Timely Issuance of Spent Fuel Storage License Amendments

In the NWPA, Congress recognized that it would be many years before a permanent repository was ready to accept spent nuclear fuel. The NWPA provided special expedited licensing procedures designed "to encourage utilities to expand storage capacity at reactor sites." H.R. Rep. No. 97-785, 39 (1982). Promptness, or the lack thereof, is an issue of significant weight in light of the two-year length of these proceedings and the associated burdens already placed upon CP&L. The Commission, in adopting Subpart K, acknowledged that the purpose of NWPA section 134 "is to encourage and expedite the licensing of onsite spent fuel expansions and transshipments." 50 Fed. Reg. 41,662, 41,665 (1985) (emphasis supplied). Further, the Commission reiterated "its long-standing commitment to the expeditious completion of adjudicatory proceedings" only a few months before CP&L submitted the license amendment application.[39] The Court's intervention and the resulting delays, based only on BCOC's discredited analyses, would only further circumvent Congressional intent for an expedited resolution of spent fuel expansion license amendment proceedings.

In addition, the national policy as set out by Congress in the NWPA favors the continued effectiveness of the Commission's interpretation of Subpart K and denial of BCOC's motion for a stay. The NRC has approved the use of high-density storage to allow reactor licensees to use this system at their sites while the DOE is developing a permanent repository. The NRC has determined that the design of such storage racks provides adequate protection to the public health and safety. The public interest, therefore, resides in encouraging and expediting the use of the

[39] "Policy on Conduct of Adjudicatory Proceedings; Policy Statement," 48 NRC 18, 24 (1998).

high-density storage systems as requested by CP&L. In light of the difficult situation in which CP&L finds itself regarding Prudent Operating Reserve at its nuclear units, the public interest in a safe, reliable supply of electricity to CP&L's customers strongly militates against a stay. Recent events in California attest to the public interest in a secure and reliable supply of electricity.

BCOC argues that the "most crucial" public interest concern is public safety. We agree. However, BCOC has not challenged before this Court the NRC's decisions on safety issues raised by BCOC below. BCOC only contends that it deserved a hearing to argue that its beyond-design-basis accident scenario – a postulated event that the Commission's rules do not require to be considered at all for purposes of safety analyses – should be evaluated under NEPA. If BCOC were to be ultimately successful, this case would be remanded to the Commission to prepare an EIS. The Commission inevitably would find, as it has found in numerous generic and site-specific EIS's, that spent fuel storage in water pools can be conducted for decades without any unreasonable risk to public health and safety or the environment.[40] The net result would be meaningless process.

In summary, BCOC has not met its burden of persuasion with regard to any of the factors to issue a stay. There is, therefore, no basis for such an action and the Court should deny the motion.

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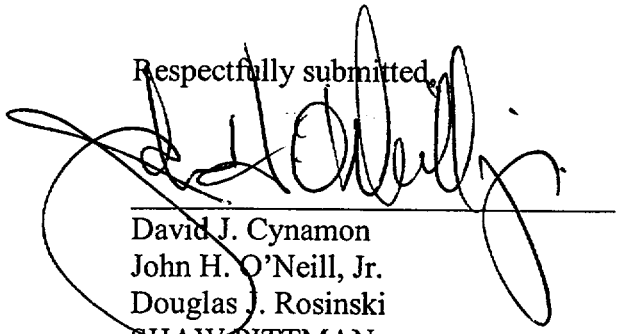
[40] See, e.g., U.S. NRC, NUREG-1437, "Generic Environmental Impact Statement for License Renewal of Nuclear Power Plants," Supp. 2 (1999); U.S. NRC, NUREG-0575, "Generic Environmental Impact Statement on Handling and Storage of Spent Light Water Power Reactor Fuel" (1979); 10 C.F.R. § 51.23(a), "Temporary storage of spent fuel after cessation of reactor operation – generic determination of no significant environmental impact."

IV. CONCLUSION

For all the foregoing reasons, CP&L submits that the Stay Motion should be denied.

Respectfully submitted,



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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. 01-1073

CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing Unopposed Motion of Carolina Power & Light Company for Leave to Intervene and Carolina Power & Light Company's Corporate Disclosure Statement were served upon the following by hand delivery or United States mail, first class, postage prepaid, on this 11th day of June 2001:

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