BEFORE THE UNITED STATES
NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF	)	
	)	Docket No. 50-285
OMAHA PUBLIC POWER DISTRICT	)	
	)	June 3, 2014
FORT CALHOUN STATION, UNIT 1	)	

REPLY TO NRC STAFF'S ANSWER TO SIERRA CLUB'S PETITION TO INTERVENE AND REQUEST FOR HEARING

INTRODUCTION

On April 25, 2014, the Petitioner, Sierra Club, filed a Petition to Intervene and Request for Adjudicatory Hearing to require a license amendment for the Fort Calhoun Station. The Petition presented four contentions regarding safety issues at Fort Calhoun that would require a license amendment.

The NRC Staff filed an Answer to the Sierra Club's Petition. That Answer attempts to short circuit the Commission's consideration of the Sierra Club's Petition with technical procedural arguments that ignore the facts and the Commission's precedents. This Reply will address the arguments in the Staff's Answer as they are presented in the Answer.

THE CONFIRMATORY ACTION LETTER AND 0350 PROCESS ARE A LICENSE AMENDMENT PROCEEDING

Pursuant to the Commission's regulation, 10 C.F.R. § 50.59, a license amendment is required for any

modifications that affect the safety of a nuclear reactor. In this case, the Petitioner has presented four issues that have resulted in, or will result in, significant modifications to structures, systems and components at Fort Calhoun. The Confirmatory Action Letter (CAL) and the ongoing 0350 oversight process regarding Fort Calhoun have incorporated the license amendment process.

The Staff Answer contends that there is no license amendment proceeding pending, and therefore, the Petitioner cannot intervene. The Staff's argument, however, ignores the nature of the CAL and 0350 processes. These processes constitute a de facto license amendment proceeding. The courts have long recognized that the label given to a proceeding is not dispositive. See, e.g., Commonwealth of Mass. v. NRC, 878 F.2d 1516, 1521 (1st Cir. 1989)(stating that the "fact that the NRC did not call its decision to restart a 'reinstatement' of the license is not controlling"); Columbia Broadcasting Syst., Inc. v. United States, 316 U.S. 407, 416 (1942)(stating that "[t]he particular label placed upon it by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive."); Citizens Awareness Network, Inc. v. NRC, 59 F.3d 284, 295 (1st Cir. 1995)(stating that "it is the

substance of the NRC action that determines entitlement to a section 189a hearing, not the particular label the NRC chooses to assign to its action.").

In response to the Staff's argument it is important to note that the term "CAL" is considered by the NRC Enforcement Manual as a process. See, NRC Enforcement Manual at 3-32. As described by the NRC Enforcement Manual, the CAL process involves (1) the identification of a significant concern regarding health and safety, safeguards, or the environment; (2) the NRC Staff's issuance of a specific CAL; (3) a licensee responding by taking action and/or providing information as prescribed in the CAL; and (4) when the circumstances that prompted the NRC to issue the CAL have been addressed, the closing out of the CAL. See, NRC Enforcement Manual at 3-29 to 3-36; see also, NRC Enforcement Policy at 68.

In this case, the 0350 panel was created in November of 2011. A CAL was initially issued on June 11, 2012. The CAL was revised and updated on February 26, 2013. In addition, the 0350 panel issued a Restart Checklist Basis Document on November 13, 2012, describing in more detail what OPPD had to do before the Fort Calhoun reactor would be allowed to restart. The Basis Document was revised and updated on March 7, 2013, and again on November 15, 2013.

After Fort Calhoun was allowed to restart on December 17, 2013, a new CAL was issued, and the 0350 process is still ongoing. The new CAL is a continuation of the ongoing process. Closing out the previous CAL does not close out the process.

The current CAL, issued on December 17, 2013, confirms the commitments made by OPPD in its "Integrated Report to Support Restart of Fort Calhoun Station and Post-Restart Commitments for Sustained Improvement." (ML13336A785). The Integrated Report is therefore part of the CAL process. The Integrated Report documents that OPPD is committed to revising and modifying its flood protection systems and procedures. OPPD also commits to modifications to its containment internal structures (support beams and columns) to address the problems described in Petitioner's Petition. In addition, OPPD commits to updating and revising the design and licensing basis documents for Fort Calhoun.

All of the above are issues that were set out in the previous CALs, but were not addressed prior to restart. Fort Calhoun was allowed to restart with the understanding that those issues would be addressed in connection with the current CAL. All of this clearly shows that the CAL is a process and that the issues raised by the Sierra Club in its Petition are an integral part of that CAL process.

There is guidance in case law to determine whether a CAL process constitutes a de facto license amendment proceeding. In Cleveland Elec. Illum. Co. (Perry Nuclear Power Plant), CLI-96-13, 44 NRC 315 (1996), the Commission considered whether the NRC Staff's decision to authorize changes to a material specimen withdrawal schedule was a de facto license amendment. Based on court decisions, the Commission determined the factors that are material to deciding whether NRC actions are a de facto license amendment:

> In evaluating whether challenged NRC authorizations effected license amendments within the meaning of section 189a, courts repeatedly have considered the same key factors: did the challenged approval grant the licensee any "greater operating authority," or otherwise "alter the original terms of a license"? If so, hearing rights likely were implicated. For example, in Citizens Awareness Network, Inc. v. NRC, 59 F.3d 284, 295 (1st Cir. 1995)(CAN), . . . the court found that the challenged NRC approval "undeniably supplement[ed]" the original license. The agency had permitted the licensee to dismantle major structural components, an activity that the court found unauthorized by the original license and agency rules. Similarly, in another case [San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984)(SLO)], where the NRC Staff extended the duration of a low-power license, a reviewing court viewed the Staff approval to be a license amendment changing a term of the license, and therefore triggering an opportunity for a hearing under section 189a.

44 NRC at 326-27.

The lesson from Perry, then, is that determining whether a CAL process is a de facto license amendment

requires a review of whether action taken by the NRC Staff or commitments made by OPPD in response to the CAL and the 0350 process would permit Fort Calhoun to operate (1) in a manner that deviates from a technical specification in its existing license; (2) beyond the ambit, or outside the restrictions, of its existing license; or (3) in a manner that is neither delineated nor reasonably encompassed within the prescriptive terms of its existing license.

The above-described review would include consideration of the provisions of 10 C.F.R. § 50.59. Section 50.59 requires that a licensee cannot make structural or procedural changes to a nuclear facility, or conduct tests or experiments at the facility, which would be contrary to its USAR, and would be a change in the technical specifications of the license, without a license amendment, unless the exceptions set out in § 50.59(c)(2) apply.

This review would clearly require an adjudicatory hearing, allowing public participation. And the CAL and 0350 processes incorporate a § 50.59 analysis.

A § 2.206 PETITION IS NOT AN ADEQUATE OR AVAILABLE REMEDY

A petition pursuant to 10 C.F.R. § 2.206 is not an appropriate vehicle to participate in a license amendment proceeding. Contrary to the assertion of the NRC Staff in its Answer, the Petitioner is not challenging any § 50.59

action taken by OPPD or the NRC. On the contrary, the basis of the Sierra Club's Petition is that the CAL and 0350 processes regarding Fort Calhoun are a de facto license amendment proceeding for which the Sierra Club should be allowed to intervene. As stated previously, the CAL and 0350 processes incorporate a § 50.59 analysis.

STANDING TO INTERVENE

The Commission must grant a hearing in a license amendment proceeding "upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding." 42 U.S.C. § 2239(a)(1)(A). In determining whether a petitioner has met the requirements for establishing standing, the Commission "construe[s] the petition in favor of the petitioner." Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station, 60 NRC 548, 553 (2004).

Furthermore, there is a presumption that persons living within 50 miles of a nuclear reactor have standing due to their proximity to the reactor. Pacific Gas & Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), 56 NRC 142, 168 (2002). The Commission has also said "[b]ecause of the value perceived in such [public] participation, this Commission and its

predecessor, the Atomic Energy Commission, have always followed a liberal construction of judicial standing tests in determining whether a petitioner is entitled to intervention as a matter of right in our domestic licensing proceedings."). Portland General Electric Co., et al. (Pebble Springs Nuclear Plant, Units 1 & 2), 4 NRC 610, 615 (1976). Significantly, the NRC Staff has presented nothing to diminish the effect of these policies on the Petitioner's standing.

The declarations accompanying the Petition in this case show that Nebraska Sierra Club member Candy Bless lives within 35 miles of the Fort Calhoun reactor. Her exact address is 8519 Birch Dr., Apt. 316, La Vista, Nebraska 68128. She further stated that she is aware of, and concerned about, the safety related problems at Fort Calhoun. She relates her safety concerns to the allegations of the Petition in this case, specifically mentioning the risks of flooding, inadequate structural conditions, and improper operation of the reactor. Therefore, Ms. Bless' declaration clearly states her interest in the specific issues set forth in the Petition in this case.

Pamela Mackey Taylor, in her declaration, confirms that there are 110 Sierra Club members in Iowa who live within 50 miles of the Fort Calhoun reactor. She further

describes their interest in a safe environment around Fort Calhoun. Ms. Taylor also describes her knowledge of the problems at Fort Calhoun and relates the concerns of the Iowa Sierra Club members to the issues set forth in the Petition in this case.

ADMISSIBILITY OF CONTENTIONS

Pursuant to 10 C.F.R. § 2.309(f), a petitioner's contentions must: (1) provide a specific statement of the issue of law or fact to be raised or controverted; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised in the contention is within the scope of the proceeding; (4) demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) provide a concise statement of the alleged facts or expert opinions which support the petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to specific sources and documents on which the petitioner intends to rely; (6) provide sufficient information to show that a genuine dispute exists with the licensee on a material issue of law or fact.

For each of the Petitioner's contentions in this case, the Petitioner has clearly stated the contention with a

description of the contention. Then for each contention, the Petitioner has presented an extensive discussion of the issues and facts supporting the contention, with references to the sources and documents, and the legal basis, supporting each contention. The Petitioner has cited to all of the sources that are available to the public and referenced some that are not. For example, the FSAR, the Loveless report on flooding at Fort Calhoun, and internal technical documents and reports in the possession of OPPD and its consultants, are not available to the public. Those documents and other information not publicly available will have to be obtained through discovery pursuant to 10 C.F.R. §§ 2.336 and 2.706. It is obvious that if a petitioner is required to have access to all of the facts when a petition is filed, as inferred by the NRC Staff's Answer, there would be no need for the discovery procedures provided in §§ 2.336 and 2.706.

The Commission has also made clear that the burden on a petitioner in stating its contentions is not as heavy as the NRC Staff's Answer asserts. In Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, the Commission described the contention admissibility standards as "insist[ing] upon some 'reasonably specific factual and legal basis' for the

contention." Id., 54 NRC 349, 359. The Commission further explained in Millstone that the standards for contention admissibility were meant to prevent contentions based on "little more than speculation" and intervenors who had "negligible knowledge of nuclear power issues and, in fact, no direct case to present." Id. at 358. Rather, petitioners are required only to "articulate at the outset the specific issues they wish to litigate." Id. at 359.

The Commission and the courts have also made clear that the burden of persuasion is on the licensee, not the petitioner. The petitioner only needs to "com[e] forward with factual issues, not merely conclusory statements and vague allegations." Northeast Nuclear Energy Company, 53 NRC 22, 27 (2001). The Commission described the threshold burden in stating a contention as requiring a petitioner to "raise any specific, germane, substantial, and material factual issues that are relevant to the . . . request for a license amendment and that create a basis for calling on the [licensee] to satisfy the ultimate burden of proof." Id.

Courts have found, however, that this burden may not be appropriate where, as here, the information was in the hands of the licensee or NRC Staff and was not made available to the petitioner. See, e.g., York Comm. for a

Safe Env't. v. NRC, 527 F.2d 812, 815 n. 12 (D.C. Cir. 1975)(where the information necessary to make the relevant assessment is "readily accessible and comprehensible to the license applicant and the Commission staff but not to petitioners, placing the burden of going forward on petitioners appears inappropriate."). Also, in Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 554 (1978), the United States Supreme Court affirmed the NRC in finding that the proper standard to apply required intervenors to simply make a "showing sufficient to require reasonable minds to inquire further," a burden the NRC found to be significantly less than that of making a prima facie case.

In this case, there is no question that the Petitioner has set forth facts, sources, law, and specific allegations more than sufficient to meet the standards for a proper contention as described above. Indeed, the contentions presented in the Petition are exceedingly more than "conclusory statements and vague allegations." Northeast Nuclear Energy Company, 53 NRC 22, 27 (2001).

PETITIONER'S CONTENTIONS

Contention 1

There is no question from the facts presented in the Petition that OPPD has and/or will undertake significant

modifications and tests or experiments to address protection from flooding of the Missouri River. These actions are all part of the CAL and 0350 processes as described above and in the Petition. Contrary to the assertion in the NRC Staff's Answer, the Petitioner is not challenging § 50.59 activities. Also, because the Petition is based on the CAL and 0350 processes, the Petitioner is not constrained by a requirement to wait until OPPD chooses to apply for a license amendment. A de facto license amendment proceeding is already underway.

To the extent that the Staff is arguing that the contention is vague and conclusory, the discussion above lays that argument to rest. Based on the standards for contention admissibility adopted by the courts and the Commission, especially when the Petitioner does not have access to information available to the licensee and the NRC staff, the contention is more than sufficient.

Contention 2

The NRC Staff is incorrect in arguing that there is nothing in the Fort Calhoun operating license that prohibits reconstituting design and licensing basis documents. That is not the point. The point is that in reconstituting the documents, OPPD is undertaking a modification that will change "the procedures as described

in the final safety analysis report as updated," requiring a license amendment. 10 C.F.R. § 50.59(c)(1).

And again, when the Petitioner does not have access to all of the information regarding this issue, the contention is more than sufficient to "require reasonable minds to inquire further." Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 554 (1978).

Contention 3

There is no question that the structural support beams and columns are important to the safe operation of Fort Calhoun. Nor is there any question that the beams and columns described in the Petition are inadequate and unsafe. Finally, there is no question, as affirmed by OPPD's own consultants, that modifications will have to be implemented to address the unsafe columns and beams. Such a modification requires a license amendment.

The NRC Staff is incorrect in arguing that the Petitioner's remedy on this issue is a § 2.206 petition. Unlike the petition at issue in Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3, CLI-12-20, 76 NRC 437 (2012), the Petition in this case is not claiming violations of § 50.59. Rather, the Petitioner asserts that license amendments must be obtained as part of the CAL and 0350 processes. It is significant that in San

Onofre, the Commission referred the question of whether the CAL process was a de facto license amendment proceeding to an Atomic Safety and Licensing Board Panel. And that panel did determine that the CAL process was a de facto licensing amendment proceeding. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3, LBP-13-7, 77 NRC 307 (2013). Although the Commission vacated the licensing board decision, the Commission emphasized that "[f]uture litigants can cite the decision as support for an argument; we or a licensing board then may consider whether such an argument is persuasive." CLI-12-20 at 11.

Contention 4

Regarding this contention, the NRC Staff again incorrectly argues that Petitioner's remedy is a § 2.206 petition. For the same reasons as discussed above, that argument in incorrect. The Petitioner is basing this contention on the CAL and 0350 processes.

The only other argument presented by the Staff is that the Petitioner's contention is vague. On the contrary, the Petitioner cited to two geotechnical reports for 1967 and 1968, and the links where the reports can be read in full, that clearly show that the Fort Calhoun reactor was constructed on karst terrain. The Petition then explained in some detail from the reports the problems and challenges

in siting a nuclear reactor on karst terrain. The Petition also quoted at length from the Commission's own guidance the precautions that must be taken in siting a reactor on karst terrain. Finally, the Petition notes that there is no indication that any steps were taken to address the problem of the karst geology prior to construction of the Fort Calhoun reactor.

These facts certainly "require reasonable minds to inquire further." Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 554 (1978). This is especially true when the Petitioner does not have access at this point, without the availability of discovery procedures attendant to a hearing and intervention opportunity, to all of the facts in the possession of OPPD and the NRC Staff. The Petitioner had requested information and was stonewalled by the Staff.

It is clear from the discussion previously regarding the admissibility of contentions that the Petitioner is not required at this point to prove its case, and in fact, the burden of proof is on the licensee. A contention simply must present a cogent and specific allegation that merits further inquiry. This contention certainly does that.

TIMELINESS

The NRC Staff misapprehends the nature of the Sierra Club's Petition to Intervene. The Staff's Answer alleges that the Petition is untimely, pursuant to 10 C.F.R. § 2.309(b), because it was not filed within 60 days of a Federal Register notice. Of course, as noted in the Petition, there has been no formal license amendment proceeding for which notice has been given. That is why the Petitioner alleges that the CAL and 0350 processes are a de facto license amendment proceeding.

The NRC Staff also alleges that the Petition is untimely pursuant to 10 C.F.R. § 2.309(c), which allows petitions to be filed after the deadlines imposed in § 2.309(b) upon a showing of good cause. The Staff's argument misses the mark, however. In this case, there was no deadline imposed by § 2.309(b) because there was no formal notice in the Federal Register. Therefore, the Petitioner is not asking to file an untimely petition after a deadline.

Furthermore, if the CAL and 0350 processes are determined to be a de facto license amendment proceeding, that would trigger a hearing opportunity under 42 U.S.C. § 2239(a). Given that opportunity, the Petitioner would then be able to file a timely intervention petition and

contentions pursuant to § 2.309(b). That is what happened in the San Onofre case. The Commission referred to an Atomic Safety and Licensing Board Panel the question of whether the CAL in that case was a de facto license amendment that would be subject to a hearing opportunity. CLI-12-20 at 5. The Commission said:

> However, our referral to the Licensing Board Panel (to consider the Confirmatory Action Letter claim) could result in a determination that a license amendment is necessary. Such a determination would require the NRC to publish a Federal Register notice providing an opportunity to seek a public hearing that Friends of the Earth seeks, and would render the request for a discretionary hearing moot.

Id.

The ASLBP found that the CAL process was a de facto license amendment proceeding subject to a hearing opportunity. Based on that finding, the Board held that the questions of standing and timing were moot since those questions would be resolved in the hearing procedure. LBP-13-7 at 37. Thus, the issue of timing in this case at this stage of the proceedings is irrelevant.

COMMISSION'S INHERENT SUPERVISORY AUTHORITY TO GRANT PETITION

Even if the NRC Staff were successful in its vigorous attempt to foreclose public participation in trying to ensure the safety of Fort Calhoun, the Commission should invoke its inherent authority to initiate an adjudicatory

hearing. It is clear from the foregoing discussion herein that every effort is being made by the NRC staff to prevent the issues raised by the Petitioner from being heard. It is also clear from the contents of the Petition that the Petitioner has raised serious and significant issues related to the safe operation of Fort Calhoun.

If, because of the unique circumstances of this case, the rules of the Commission would prevent adjudication of the issues raised by the Petitioner, the Commission would be at risk of not protecting the public and the environment, as the Commission's mission statement alleges. We are sure that is not the Commission's desire. Therefore, although the Commission is cautious about using its inherent authority, this is a case where the exercise of such authority would be justified.

CONCLUSION

It is disappointing that the NRC Staff, representing a regulatory agency that is supposed to be acting in the public interest, would try so hard to prevent public participation. On the contrary, the Commission prides itself on promoting transparency and public participation, as it should.

Specifically, with respect to licensing decisions, the Atomic Energy Act, 42 U.S.C. § 2239(a), requires that the

Commission must grant a hearing upon “the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.” Congressional intent to promote public participation could not be clearer.

In this case the Sierra Club has demonstrated the interest of the organization and its members in the safe operation of the Fort Calhoun reactor. Furthermore, the Petition in this case amply sets forth why the CAL and 0350 processes are a de facto license amendment proceeding, and sets forth the Sierra Club’s contentions in sufficient detail to support the Petition’s request to intervene and for an adjudicatory hearing.

Therefore, the Sierra Club respectfully requests that the Commission direct the NRC Staff to convene a license amendment proceeding, and issue the requisite public notice in the Federal Register, so that the Petitioner and others may participate in a public hearing, as required under § 189(a) of the Atomic Energy Act.

The Petitioner further requests any other relief that the Commission may deem appropriate.

/s/ *Wallace L. Taylor*

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