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SUBJECT: Memorandum & order concluding stay of ASLB 001125 order not warranted, affirming order to extent reviewed & advising Commission that order raises no issues requiring prompt policy guidance.

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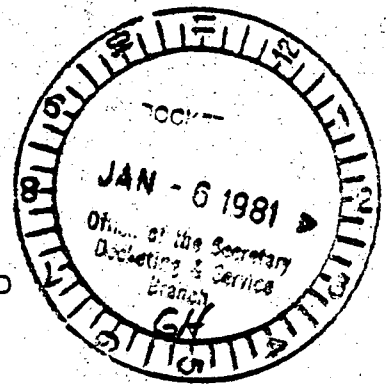
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING APPEAL BOARD



Administrative Judges:

Alan S. Rosenthal, Chairman
Dr. John H. Buck
Richard S. Salzman

SERVED

JAN 6 1981

In the Matter of

DUKE POWER COMPANY

(William B. McGuire Nuclear Station,
Units 1 and 2)

Docket Nos. 50-369 OL
50-370 OL

MEMORANDUM AND ORDER

January 6, 1981

(ALAB-626)

1. On November 5, 1979, the Commission amended its Rules of Practice (10 CFR Part 2) by, inter alia, the addition of an Appendix B entitled "Suspension of 10 CFR §2.764 and Statement of Policy on Conduct of Adjudicatory Proceedings."^{1/} 44 Fed. Reg. 65050 (November 9, 1979). In relevant part, Appendix B provides that Licensing Board decisions "shall not become effective until the Appeal Board and Commission actions outlined [in the Appendix] have taken place." Insofar as the appeal boards are concerned, that action is as follows:

^{1/} Section 2.764 provides for the immediate effectiveness of initial decisions directing the issuance or amendment of a construction permit or operating license.

Within sixty days of the service of any Licensing Board decision that would otherwise authorize licensing action, the Appeal Board shall decide any stay motions that are timely filed. For the purpose of this policy, a "stay" motion is one that seeks to defer the effectiveness of a Licensing Board decision beyond the period necessary for the Appeal Board and Commission action described herein. If no stay papers are filed, the Appeal Board shall, within the same time period (or earlier if possible), analyze the record and decision below on its own motion and decide whether a stay is warranted. It shall not, however, decide that a stay is warranted without giving the affected parties an opportunity to be heard.

In deciding these stay questions, the Appeal Board shall employ the procedures set out in 10 CFR 2.788. However, in addition to the factors set out in 10 CFR 2.788(e), the Board will give particular attention to whether issuance of the license or permit prior to full administrative review may: (1) Create novel safety or environmental issues in light of the Three Mile Island accident; or (2) prejudice review of significant safety or environmental issues. In addition to deciding the stay issue, the Appeal Board will inform the Commission if it believes that the case raises issues on which prompt Commission policy guidance, particularly guidance on possible changes to present Commission regulations and policies, would advance the Board's appellate review. If the Appeal Board is unable to issue a decision within the sixty-day period, it should explain the cause of the delay to the Commission. The Commission shall thereupon either allow the Appeal Board the additional time necessary to complete its task or take other appropriate action, including taking the matter over itself. The running of the sixty-day period shall not operate

to make the Licensing Board's decision effective. Unless otherwise ordered by the Commission, the Appeal Board will conduct its normal appellate review of the Licensing Board decision after it has issued its decision on any stay request.

Ibid; footnote omitted.


2. On November 25, 1980, the Licensing Board entered an unpublished order in this operating license proceeding involving the McGuire nuclear facility. In that order, the Board acted upon the motion of the applicant for summary disposition with regard to its entitlement to a license for Unit 1 authorizing fuel loading, initial criticality, zero power physics testing and low-power testing. The Board resolved the matter in the applicant's favor as to all of those activities except low-power testing. Respecting that phase, it concluded that a genuine issue of material fact had been raised by the intervenor, Carolina Environmental Study Group.

Although the order does not bear the "decision" label, it does authorize "licensing action" and therefore comes within the ambit of Appendix B. No motion for a stay (or indeed exceptions) having been filed by any party, our task is to review the order and the underlying record on our own initiative to determine whether a stay is nonetheless warranted.

Our examination of the portion of the record pertaining to the motion for summary disposition persuades us that the Board below correctly granted the motion insofar as fuel loading, initial criticality and zero power physics testing are concerned. (We are not called upon to consider, and thus express no opinion on, the Board's denial of the balance of the motion.) Applying the criteria specified by the Commission in its Statement of Policy, we (1) conclude that no stay of the November 25 order is warranted; (2) affirm the order to the extent here reviewed; and (3) advise the Commission that, in our judgment, the order raises no issues requiring its prompt policy guidance.

It is so ORDERED.

FOR THE APPEAL BOARD


C. Jean Bishop
Secretary to the
Appeal Board