

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

In the Matter of )  
 )  
Public Service Electric and ) Docket No. 50-272  
Gas Company, et al. ) (Proposed Issuance of  
 ) Amendment to Facility  
(Salem Nuclear Generating ) Operating License  
Station, Unit 1) No. DPR-70)

LICENSEE'S SUPPLEMENTAL BRIEF REGARDING  
ITS MOTION FOR A DIRECTED CERTIFICATION AND FOR A STAY

On March 3, 1980, the Licensee in the captioned proceeding, Public Service Electric and Gas Company, et al., filed "Licensee's Motion For A Directed Certification And For A Stay," relating to an evidentiary hearing scheduled by the presiding Atomic Safety and Licensing Board to consider the following question: <sup>1/</sup>

In the event of a gross loss of water from the spent fuel storage pool at Salem 1, what would be the difference in consequences between those occasioned by the pool with the expanded storage proposed by the Licensee and those occasioned by the present pool?

Only the Nuclear Regulatory Commission ("NRC") Staff responded to the Licensee's Motion. <sup>2/</sup>

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1/ This question is being referred to by the Licensing Board and parties as "Question 5."

2/ NRC Staff Opposition to Licensee's Motion for Directed Certification and for a Stay dated March 13, 1980 (hereinafter "Staff Reply").

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The Licensee's Motion discussed a decision by the Atomic Safety and Licensing Appeal Board, Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC \_\_\_\_ (December 7, 1979), and noted the pendency of the Appeal Board's referral of the Class 9 issue to the Commission. <sup>3/</sup>

On March 21, 1980, the Commission issued its Memorandum and Order in the Black Fox proceeding; <sup>4/</sup> in finding that the Appeal Board had misinterpreted its decision in Offshore Power, <sup>5/</sup> the Commission vacated that portion of ALAB-573 which directed the Staff to file its views on whether Class 9 accidents should be considered at Black Fox. <sup>6/</sup> As discussed below, this decision leaves no doubt that the Licensing Board's proposed consideration of Question 5 is contrary to the directive of the Commission and, therefore, the relief requested by the Licensee is fully warranted.

In reiterating that the existing policy against consideration of Class 9 accidents for land-based plants was not changed by Offshore Power and stating its belief that its policy on consideration of Class 9 accidents for land-based

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<sup>3/</sup> Licensee's Motion at 7-9.

<sup>4/</sup> Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), CLI-80-8, 11 NRC \_\_\_\_ (March 21, 1980). Because this decision may not yet have received wide distribution, a copy is attached.

<sup>5/</sup> Offshore Power Systems (Floating Nuclear Power Plants), CLI-79-9, 10 NRC 257 (1979).

<sup>6/</sup> CLI-80-8 at 1-2.

plants would not properly be developed by rulings on a case-by-case basis because "piecemeal consideration is not appropriate to such an important policy area,"<sup>7/</sup> the Commission stated:

Because the existing policy on Class 9 accidents was not displaced in Offshore Power and would not be displaced pending generic consideration of Class 9 accident situations in policy development and rulemaking, the Commission envisioned that the staff would bring an individual case to the Commission for decision only when the staff believed that such consideration was necessary or appropriate prior to policy development. <sup>8/</sup>

Thus, if there was any room for argument before, there can be no doubt now that the Commission has reserved to itself the decision of whether Class 9 accidents may be considered in each case. Absent affirmative action by the Commission, however, the Staff and Licensing Boards are prohibited from proceeding with any such consideration.

The Commission's Black Fox decision also specifies that the recommendation to the Commission must come from the Staff, which has an affirmative duty to bring to the Commission those cases which it believes warrant consideration of Class 9 accidents. The Black Fox Appeal Board was not, and by implication, licensing boards, are not, empowered to order the Staff to make such an affirmative recommendation to the Commission.

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<sup>7/</sup> Id. at 3.

<sup>8/</sup> Id. at 3-4 (emphasis supplied). See also n.3 at 3.

From a review of the criteria which the Staff is to utilize in identifying exceptional cases that warrant a discretionary recommendation for considering Class 9 accidents,<sup>9/</sup> it is evident that the Commission has left the initial step solely within the Staff's purview; the Commission mandated that the Staff consider various site characteristics in comparison with those of "an average plant." Only if the environmental risk "would be substantially greater,"<sup>10/</sup> in the facility under review would a recommendation of Class 9 consideration be appropriate.

The Staff, by virtue of its unique position, is the repository of the data needed to make the required comparison. The reservation of this jurisdiction to the Staff is even more persuasive in cases such as Salem, where the licensing board is considering only a very limited issue, i.e., expansion of the spent fuel pool, and does not have before it the record material, e.g., Final Safety Analysis Report, Environmental Report, Safety Evaluation Report and Environmental Impact Statement, necessary to make the required determination.

Thus, the Board's Question 5, which would examine the consequences of a "gross loss of water" from the spent fuel pool, oversteps into a prohibited area of inquiry without a

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<sup>9/</sup> At page 3 of its Memorandum and Order, the Commission indicated that the Staff was to use existing guidance in evaluating comparative site characteristics such as higher population density, proximity to man-made or natural hazard, unusual site configurations or unusual design features.

<sup>10/</sup> Id. at 3.

Commission directive that Class 9 accidents are to be considered in this case.

Two observations on the Staff position in this regard are relevant here. First, even though the Staff opposes the Licensee's Motion, there is no indication whatsoever that the Staff considers that this proceeding is one in which Class 9 accidents should be considered. Second, in its reply to the Licensee's Motion, the Staff takes the position that the Board intended to consider something short of a Class 9 accident. This conclusion is simply inconsistent with the record as well as the Staff's position in other similar cases. For example, in the La Crosse proceeding related to the expansion of the spent fuel capacity at that facility, the Board stated that "the Staff considers leakage from the pool to constitute a Class 9 accident."<sup>11/</sup>

Moreover, the genesis of Question 5 removes any doubt that the Board's question was indeed derived from a consideration of a "meltdown" accident that goes significantly beyond Class 8 design basis accidents,<sup>12/</sup> and that the Board did not

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<sup>11/</sup> Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-80-2, 11 NRC \_\_\_\_\_, slip op. at 34 (January 10, 1980).

<sup>12/</sup> See the formulation of Board question 3 (Memorandum and Order at 11), and its reliance on the testimony of Dr. Webb which speaks to the consequences of meltdown accidents. The Staff makes the point that the "Licensing Board does not address what action it would take if it determined that the described accident should be addressed as a potential environmental impact (Staff Reply at 7). The Board's Memorandum and Order at 19 makes it clear that the Board believes that it has the authority to decide whether this accident should be addressed as a potential environmental impact.

exclude "possible melting" from the evidentiary presentation  
of the parties. <sup>13/</sup>

Relief

The Commission's recent decision in Black Fox confers jurisdiction on the Appeal Board to preclude the Licensing Board from considering Question 5. If, on the other hand, the Appeal Board declines to grant this requested relief, Licensee submits that the matter must be referred to the Commission for its decision in order to provide guidance to the Staff and to all licensing boards and to avoid substantial confusion and delay in pending cases. If referred to the Commission, an interim stay of the proceeding should be entered for the reasons previously discussed in Licensee's Motion.

Respectfully submitted,

CONNER & MOORE



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March 24, 1980