5/12/76

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
TENNESSEE VALLEY AUTHORITY	)	Docket Nos. 50-259
	)	50-260
(Browns Ferry Nuclear Plant Units 1 and 2)	)	

LICENSEE'S RESPONSE TO THE BOARD'S ORDER OF MAY 7, 1976

This brief involves one simple question--does the Atomic Energy Act authorize a lone individual Intervenor to prevent the fuel loading and operation of two already licensed reactors by doing nothing more than filing unsupported allegations that this Board has described as having "the rhetoric and tone of a general anti-TVA tirade" and as a "general anti-TVA diatribe" (Order of March 11, 1976, at 19, 21).[1]

The answer should be a resounding "No."

This Board has broad authority under the Atomic Energy Act and the Commission's regulations to grant TVA's motion to authorize the Director of Nuclear Reactor Regulation to make appropriate findings and permit fuel loading and full power operation of both units. Under the Board's equitable powers the motion should be granted, for operation of the plant pending

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1 Emphasis added unless otherwise noted.

hearing will not injure the Intervenor, while enforced idleness of the units will cost TVA power consumers up to $70 million and dangerously erode the system reserve margin to 7 percent. The public interest clearly lies in granting the motion.

The Intervenor has not yet raised a genuine factual issue. On the other hand, the NRC Staff, the ACRS, the NRC Chairman, and other high NRC officials have concluded that the plant may be operated without endangering the public health and safety. The Board, in fashioning an order granting the relief requested, is entitled to rely on such assurances in the circumstances of this proceeding.

The NRC Staff in its Response to Licensee's Motion for an Order Authorizing Fuel Loading and Operation would ignore the Board's broad authority and equitable powers by forcing a procedural straitjacket on the proceeding in the form of 10 C.F.R. § 50.57(c) (1975). The Staff maintains that low power testing and operation can be permitted only pursuant to § 50.57(c), which requires, according to the Staff, affidavits from TVA regarding the health and safety of plant operation. Moreover, the Staff asserts that under no circumstances can full power operation be permitted.

The Staff's position, in addition to ignoring the Board's authority to fashion an appropriate remedy, equates units 1 and 2 with a plant that has never before operated in forcing § 50.57(c) onto the proceeding. Both units, however, have valid, existing operating licenses and have successfully operated at full power in the past.

It is TVA's position that the Board thus has full authority to authorize the Director of Nuclear Reactor Regulation to make appropriate

findings and permit fuel loading and full power operation. The questions which the Board has requested to be briefed are discussed below.

ARGUMENT

I

What Particular Commission Regulation (by section and subsection), If Any, Would Authorize the Board to Grant the Relief Requested By the Licensee?

There is no particular Commission regulation which covers the specific situation presented by the status of Browns Ferry units 1 and 2--i.e., units which have valid operating licenses, have successfully operated in the past, and are shutdown now because of a nonnuclear-related event. The Board, however, has broad authority under the Atomic Energy Act and its inherent equitable powers, as well as 10 C.F.R. § 50.91 (1975), to grant the requested relief.

A. The Board has broad authority to grant the motion

There is no doubt that this Licensing Board has authority to authorize the actions requested by Licensee. Fuel loading and operation are activities involving the "possession and use of special nuclear materials" which the Commission is expressly empowered to govern by means of rule, regulation, and "orders," Atomic Energy Act of 1954 (AEA), § 161(b), as amended, 42 U.S.C. § 2201(b) (1970), and Congress has accorded the Commission considerable discretion as to the manner in which it carries out these vital tasks. Section 3 of the AEA provides that:

> It is the purpose of this Act to effectuate the policies set forth above by providing for . . .
>
> c. a program for Government control of the possession, use and production of atomic energy . . . so directed as to make the maximum contribution to the common defense and security and the national welfare . . . [42 U.S.C. § 2013(c) (1970)].

Section 161 of the AEA provides that:

> In the performance of its functions the Commission is authorized to . . .
>
> i. prescribe such regulations or orders as it may deem necessary . . . to govern any activity authorized by this Act, including standards and restrictions governing . . . operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life or property [42 U.S.C. § 2201(i) (1970; Supp. IV, 1974)].

In construing virtually identical language regarding the powers of the Federal Power Commission under the Federal Power Act (16 U.S.C. § 825h (1970)) the District of Columbia Circuit held:

> While such "necessary and appropriate" provisions do not have the same majesty and breadth in statutes as in a constitution, there is no dearth of decisions making clear that they are not restricted to procedural minutiae, and that they authorize an agency to use means of regulation not spelled out in detail, provided the agency's action conforms with the purposes and policies of Congress and does not contravene any terms of the Act [cited cases omitted; Niagara Mohawk Power Corp. v. Federal Power Comm'n, 379 F.2d 153, 158 (D.C. Cir. 1967)].

The Appeal Board adopted the reasoning of this decision in Wisconsin Electric Power Co., et al. (Point Beach Unit 2) ALAB-82, 5 AEC 350, 352 (1972):

> As in the case of the "necessary or appropriate" language of the Federal Power Act, the Atomic Energy Act language is "not restricted to procedural minutiae." Rather, it authorizes the Atomic Energy Commission "to use means of regulation not spelled out in detail,

> provided that [its] action conforms with the purposes and policies of Congress and does not contravene any terms of the Act."

In addition, the Rules of Practice are sufficiently broad to provide the Board the requisite authority. Section 2.721 of the Rules of Practice provides that Atomic Safety and Licensing Boards may be designated to preside in proceedings for amending licenses, and such Boards shall have the duties and may exercise the powers of a presiding officer as granted by section 2.718 and otherwise by the Rules of Practice. Under section 2.718, a presiding officer has all powers necessary "to take appropriate action to avoid delay, and to maintain order," including the powers to take any action consistent with the Atomic Energy Act, the Commission's regulations in Title 10 of the Code of Federal Regulations, and Chapter 5 of the Administrative Procedure Act. Thus in the circumstances of this proceeding, the Licensing Board has the same powers as the Commission to authorize fuel loading, testing, and power operations, and to otherwise grant the requested relief. This power has been exercised in the past, see, e.g., Commonwealth Edison Co., 1 AEC 672 (1961) (where the presiding officer issued an order for interim and limited operations, presumably on the basis of the inherent authority of a presiding officer to so act) and is most appropriate to the present situation.

Thus the Board does not have to rely on a specific regulation exactly fitting this situation, but may provide the relief granted under the broad authority granted by the Atomic Energy Act and the Rules of Practice, since there is no specific regulation denying it such authority.

B. The Board has equitable authority to grant the motion.

It is clear that Licensing Boards have certain equitable powers, just as does a Federal Court. Wisconsin Electric Power Co. et al. (Point Beach Unit 2) ALAB-82, 5 AEC 350, 351 (1972), citing generally Ford Motor Co. v. N.L.R.B., 305 U.S. 364 (1939); Niagara Mohawk Power Corp. v. Federal Power Comm'n, 379 F.2d 153 (D.C. Cir. 1967); see also Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1) ALAB-224, RAI-74-8 .244, 272 (Aug. 29, 1974). As the Appeal Board stated in Point Beach Unit 2, supra:

> The Atomic Energy Act provides a broad charter for Commission action in carrying out its regulatory responsibilities. The Act has been described as "virtually unique in the degree to which broad responsibility is resposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objective" [citing Siegel v. Atomic Energy Comm'n, 400 F.2d 778 (D.C. Cir. 1968); 5 AEC at 351-52].

This proceeding is appropriate for the exercise by the Board of its equitable powers. Here a single individual, as an Intervenor, is able to acquire in effect a preliminary injunction which prohibits operation of these units and keeps vital electric generating capacity from the public--and all by simply filing an unsupported pleading which merely "somewhere within the four corners" contains "the germ" of a "marginally adequate contention" (Order of March 11, 1976, at 23).

In exercising its equitable powers, the Board should look to the criteria established by the District of Columbia Circuit in Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n, 259 F.2d 921 (D.C. Cir. 1958), and adopted by the Appeal Board in Philadelphia Electric Co., et al. (Peach

Bottom Atomic Power Station, Units 2 and 3) ALAB-221, 8 AEC 95 (1974). Those criteria are:

> (1) Has the movant made a strong showing that it is likely to prevail on the merits of its appeal?
>
> (2) Has the movant shown that, without such relief, it would be irreparably injured?
>
> (3) Would the issuance of a stay substantially harm other parties interested in the proceeding?
>
> (4) Where lies the public interest [8 AEC at 96]?

All of these criteria support TVA's motion.

(1) Likelihood of prevailing on the merits--The Board has noted that the pleadings filed by the Intervenor contain "the rhetoric and tone of a general anti-TVA diatribe" (Ruling on Petition to Intervene, March 11, 1976 at 19). The Board has stressed that:

> [A]ll we decide now is that there does exist within the borders of Mr. Garner's multiple pleadings one contention adequate to entitle him to intervene. It remains for him to establish . . . that a genuine issue actually exists [id. at 21].

At this stage of the proceeding, then, there exists only contentions from the Intervenor. On the other hand, Chairman Anders and other high NRC officials have stated, as discussed in detail infra, that the safety margins inherent in the Browns Ferry reactors were sufficient to protect public health and safety, and that the likelihood and consequences of any future fire should be reduced as a result of the NRC's investigation and related corrective action. See, e.g., Hearing on the Browns Ferry Nuclear Plant Fire Before the Joint Comm. on Atomic Energy, 94th Cong., 1st Sess., pt. 1, at 5-6 (1975). In addition, the Regulatory Staff has concluded that, subject to the satisfactory resolution of certain items which will be covered in a supplement to the Safety Evaluation Report, the

restoration of Browns Ferry, including the modifications being completed by TVA, is acceptable and that there is reasonable assurance that the health and safety of the public will not be endangered by operation of the facility as restored and modified. Safety Evaluation Report Related to Operation of Browns Ferry, Units 1 and 2, following the March 22, 1975 Fire, NUREG-0061, at 10-1 (March 1976). In light of this, it appears highly unlikely at this point that the Intervenor will prevail on the merits of the stipulated contentions.

(2) Irreparable injury to the Intervenor--The Board has stated that:

> Frankly, we do not envision any potential adverse consequences on Petitioner or his family from any normal or routine operations at the plant, or even from any reasonably anticipated safety-related occurrences or accidents. It is only from the so-called "catastrophic accident" that Petitioner or his family might possibly experience some adverse effect, in view of the geographical relationships alleged [Ruling on Petition to Intervene at 11 n.8].

Thus the Board itself has acknowledged that operation of the units could not cause irreparable harm to the Intervenor.

(3) Harm to other parties--Enforced idleness of these units will result in irreparable harm to TVA and to the consumers of TVA-produced electricity, as set forth in Licensee's Brief in Support of A Motion For An Order Authorizing Fuel Loading and Operation and the supporting affidavits. It is demonstrated there that the unavailability of these units will cost the power consumers up to $70 million and reduce system reliability by eroding the reserve margin to 7 percent.

(4) The public interest--It is clear that the public interest lies in permitting these units to operate. The public is irreparably harmed and suffers severe economic penalties if the units do not operate--the

Intervenor, on the other hand, suffers no harm at all from operation.

It is clear that the equities all run in TVA's favor. Accordingly, the Board should grant TVA the relief requested.

C. Section 50.91 does not mandate the use of section 50.57

The Staff in its response to TVA's motion blinks the realities and contends that 10 C.F.R. § 50.57(c) (1975) applies in this case to the same extent it would apply in an operating license proceeding, and that 10 C.F.R. § 50.91 (1975) makes § 50.57(c) applicable. The Staff is in error, for the circumstances here clearly distinguish this from the typical operating license proceeding to which § 50.57(c) applies.

The first and most obvious distinction is that TVA is not an applicant for an operating license. Two valid operating licenses already exist--DPR-33 and DPR-52. Here, both units have successfully operated in the past at full power, whereas in the operating license proceeding to which § 50.57 applies, units have never operated. TVA's financial and technical capabilities and other matters have already been determined with issuance of the existing operating licenses. These findings will be repeated only to the extent that the technical specification changes and modifications require. In the issuance of an operating license, however, such findings must be made ab initio.

Section 50.91 provides that:

> In determining whether an amendment to a license . . . will be issued . . . the Commission will

> be guided by the considerations which govern the issuance of initial licenses . . . to the extent applicable and appropriate.

The Staff's response simply ignores the distinction between the proposed license modification here and the issuance of an initial operating license, and thus ignores the relevant portion of § 50.91, emphasized above. The same requirements for operation of units which have never operated and for which no licenses have been issued and no findings made are neither "applicable" nor "appropriate" to the Browns Ferry situation. It is not appropriate to encumber this proceeding with § 50.57(c) and ignore the Board's broad authority to issue orders and grant equitable relief. The Staff would place the Board in a strait jacket of unnecessary procedures by blindly applying § 50.57(c). Indeed, since under 10 C.F.R. § 50.59 (1975), "unreviewed safety questions" involve issues that increase risks or decrease safety margins, while, as pointed out infra, the whole issue of this case is directed to decreasing risks and increasing safety margins, the Staff's argument approaches a frivolous one.

II

What Findings Must the Board First Make, and Must the Director of Nuclear Reactor Regulation First Make, Before Authorizing: (a) Fuel Loading, (b) Low Power Testing, (c) Further Operations Short of Full Power, (d) Full Power Operation.

At the outset, it must be emphasized that the scope of this proceeding is limited by the issues in controversy. Until the prehearing conference to be held pursuant to 10 C.F.R. § 2.752 (1975) is completed,

there are no issues in controversy but only three stipulated contentions. Thus the Board's authority will be limited by the issues to be tried. Moreover, in the absence of a hearing the Director of Nuclear Reactor Regulation would make all appropriate findings and modifications to the existing operating licenses.

A. Board findings

The Board should find that it has authority as discussed in section I to grant the requested relief--i.e., authorize the Director of Nuclear Reactor Regulation to make appropriate findings and permit fuel loading and full power operation.

The Board should find that the Intervenor's mere allegations are not sufficient reasons to force the Browns Ferry units to remain idle; that at this stage of the proceeding the Intervenor has not shown the existence of a genuine factual issue; that in the light of statements by Chairman Anders and other high NRC officials, the Intervenor is not likely to prevail on the merits; that operation of the units will not cause Intervenor irreparable harm; that the Licensee and consumers of TVA power will suffer irreparable injury if the units are forced to remain idle; and that the public interest lies in permitting these units to operate during the proceeding.

The Board should find that § 50.57(c) procedures are neither applicable nor appropriate in the circumstances of this proceeding in view of the fact that these units have operating licenses, have successfully operated in the past, and are being modified, according to Chairman Anders, to improve safety.

B. Director of Nuclear Reactor Regulation

In addition to those findings in the March 1976 Safety Evaluation Report (SER), supra, the Director of Nuclear Reactor Regulation should find that the open items in the SER have been satisfactorily resolved and issue the supplemental Safety Evaluation Report when completed. The Regulatory Staff should then proceed as in its normal course in permitting fuel loading, testing, and full power operation.

Under the authority cited in section I of this brief, the Board can authorize the Director of Nuclear Reactor Regulation to make appropriate findings and permit operation of these units up to full power. Reliance by the Board upon the Director's findings is fully justified in the circumstances of this proceeding.

III

What Section and Subsection is the Regulatory Basis for the Board Authorizing "Full Power Operation" in the Present Circumstances of This Proceeding and Before An Evidentiary Hearing on the Merits of Intervenor's Contentions?

The regulatory basis for the Board's authorizing full power operation is set forth in section I of this brief. There it is demonstrated that the existence of a particular regulation is not a prerequisite for this Board's granting the requested relief.

In the circumstances of this proceeding, there is no basis for restricting the operation of the plant. The circumstances clearly illustrate that all of the equities are in TVA's favor. The Intervenor

has shown no genuine factual issue, and will suffer no irreparable injury should the units operate at full power. The Licensee and consumers of TVA power will suffer irreparable injury if the units do not operate. It is clear that the public interest demands that the units operate during this proceeding.

There is something fundamentally wrong with a regulatory scheme that would, in the circumstances present here, permit one person to halt operation of these units on the basis of mere allegations. There has been no prima facie showing of anything wrong in the manner in which TVA and NRC are proceeding with restoration and modification of these units. On the contrary, there is a favorable safety evaluation by the Regulatory Staff, a favorable review by the Advisory Committee on Reactor Safeguards, statements by Chairman Anders regarding the safety of the units, and similar statements by other high NRC officials. It is ludicrous for all of this to amount to nothing before the mere allegations of one person engaged in "an anti-TVA diatribe."

In light of the foregoing, and the discussion under the next section, the Board is fully warranted under its broad authority and its equitable powers to authorize full power operation of these units. To do anything less gives undue credence to Intervenor's contentions, effectively enjoins full operation of the units without any showing whatsoever of the traditional factors one must demonstrate in order to be granted such relief, and permits the Intervenor to in large measure accomplish his purpose without having to move forward with his proof or, indeed, make any showing whatsoever outside a mere allegation.

If during or after the evidentiary hearing the Intervenor is able to move forward and establish his case on any or all of the stipulated contentions, the Board can modify or revoke any operation that may be authorized. Until the Intervenor can make that case, however, there is no impediment to authorizing full power operation.

IV

Where in the Record of the Proceeding Thus Far, or in the Affidavits of the Licensee or Staff, is There Evidentiary or Documentary Support for Licensee's Position (April 26 Motion at 1) That: "There is Reasonable Assurance that Operation of These Units During this Proceeding will not Endanger the Health and Safety of the Public?

Materials incorporated by Intervenor in his own pleadings in this proceeding support TVA's position that there is reasonable assurance that operation during the proceeding will not endanger the health and safety of the public. Moreover, it is clear that the Board is by no means restricted to this record, but can take official notice of the NRC's own records and documents as coming within the Board's own knowledge. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station) ALAB-68, 5 AEC 275, 277 (1972); Consolidated Edison Co. (Indian Point Unit No. 2) ALAB-75, 5 AEC 309, 310 (1972); Washington Public Power Supply System (Hanford No. 2 Nuclear Power Plant) ALAB-113, 6 AEC 251, 252 (1973); Consumers Power Co. (Midland Plant, Units 1 and 2) ALAB-123, 6 AEC 331, 332 (1973); and Duke Power Co. (Catawba Nuclear Station, Units 1 and 2) LBP-74-22, 7 AEC 659, 667 (1974). Likewise, the Board can take official

notice of Congressional materials. See, e.g., Osage Nation of Indians v. United States, 97 F. Supp. 381, 403 (D. Alaska 1951), cert. denied, 342 U.S. 896; Overfield v. Pennroad Corp., 146 F.2d 889, 898 (3d Cir. 1944), and numerous cases cited therein.

The NRC's own records are replete with information which establishes that there is reasonable assurance that the Browns Ferry units can be operated without endangering the public health and safety. The Staff's March 1976 Safety Evaluation Report, supra, concludes that:

> In summary, the fire damage at the Browns Ferry Units 1 and 2 has been removed, and the facility has been restored and modified. This has included substantial additional protection against adverse affects of fire. The circuity has been modified to assure adequate divisional isolation. The cabling will be thoroughly coated in all vital safety areas with Flamemastic. This fire retardant coating will assure that the combustible materials of the cabling do not become sources of fire propagation. The substantially enhanced fire fighting and fire detection capabilities along with the increased effectiveness of the fire brigade will assure that any fire that may occur will be extinguished promptly, well before any damage can occur to vital systems of the facility.
>
> We have indicated in the foregoing sections some items that must be resolved prior to authorizing return to operation. We will issue a supplement to this report to present our evaluation of the resolution of those items prior to authorizing such return to operation. We have concluded, subject to their satisfactory resolution, that the restoration of Browns Ferry Nuclear Plant Units 1 and 2 including the modifications, as described in TVA's Plan for Evaluation, Repair, and Return to Service of Browns Ferry Units 1 and 2 as a Result of the March 22, 1975 Fire, dated April 13, 1975 and Revisions thereto up to and including Revision 37, is acceptable and that there is reasonable assurance that the health and safety of the public will not be endangered by operation of the Facility as restored and modified [at 10-1].

The Advisory Committee on Reactor Safeguards, in its report to NRC Chairman William Anders of March 11, 1976, stated that with due regard given to certain ACRS concerns, there is reasonable assurance that the units can be operated at full power without undue risk to the health and safety of the public.

Chairman Anders in a statement before the Joint Committee on Atomic Energy, which is incorporated by Intervenor in his affidavit, stated that:

> [T]he safety margins inherent in the Browns Ferry reactors were sufficient to protect public health and safety . . . .
>
> * * *
>
> Further, both the likelihood and consequences of any future fire should be reduced as a result of this fire investigation and related corrective actions [Hearing on the Browns Ferry Nuclear Plant Fire Before the Joint Comm. on Atomic Energy, 94th Cong., 1st sess., pt. 1, at 5-7 (1975)].

Benard Rusche, Director, NRC Office of Nuclear Reactor Regulation, has stated that at no time during the Browns Ferry fire was there any danger to the public health and safety (id. at 78, 82) and that:

> The design changes and improvements in circuit separation and resulting improved fire protection, along with design improvements in fire detection systems and fire extinguishing systems proposed by TVA, will substantially enhance the capability of the facility to withstand fires [id. at 80].

Dr. Stephen H. Hanauer, Technical Advisor to the NRC Executive Director of Operations testified before the Joint Committee that:

> There is another way of looking at the lessons of the Browns Ferry fire. The outcome with regard to the protection of public health and safety was successful.

> The question naturally arises: How can a serious fire that involved inoperability of so many important systems result in no adverse effect on the public health and safety? The answer is to be found in the defense-in-depth approach used to provide safety in our nuclear powerplants today. It provides for achieving the required high degree of safety assurance by echelons of safety systems. The defense-in-depth afforded in this way does not depend on the achievement of perfection in any single system or component, but the overall safety is high.
>
> * * *
>
> The lesson of Browns Ferry show that all three lines of defense had gaps, and yet the outcome of the Browns Ferry fire shows that the overall defense-in-depth was adequate to protect the public health and safety [id. at 87].

The statements clearly demonstrate two important points--first, the public health and safety was not endangered even during the Browns Ferry fire, and second, improvements as a result of the fire will enhance safety.

The Staff safety evaluation report, coupled with the foregoing statements of Chairman Anders and other high NRC officials and the ACRS demonstrate that the units can be operated during the hearing without endangering the health and safety of the public. Completion by the Staff of the supplement to the safety evaluation will complete the requisite assurance. The Intervenor himself has placed these matters before the Board, which may properly take official notice of them in reaching a decision on TVA's motion.

Against this wealth of expert opinion stands the unsupported allegations of a single individual. It is submitted that this demonstrates overwhelmingly that these units should be permitted to operate at full power during this proceeding.

CONCLUSION

The Board should exercise its broad authority and equitable powers to grant TVA's motion. The equities involved are clearly all in TVA's favor. The Board can take official notice of and rely on the Staff's safety evaluation and statements of NRC officials in regard to protection of the public health and safety, and authorize operation at full power.

Respectfully submitted,

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May 12, 1976

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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TENNESSEE VALLEY AUTHORITY	)	Docket Nos. 50-259
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CERTIFICATE OF SERVICE

I hereby certify that I have served the original and 20 conformed copies of the following document on the Nuclear Regulatory Commission by depositing them in the United States mail, postage prepaid and addressed to Secretary, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Chief, Docketing and Service Section:

Licensee's Response to the Board's Order of May 7, 1976

and that I have served a copy of the above document upon the persons listed below by depositing it in the United States mail, postage prepaid and addressed:

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This 12th day of May, 1976.

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