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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Atomic Safety and Licensing Board



In the Matter of	)	
	)	
COMMONWEALTH EDISON COMPANY	)	Docket Nos. 50-295-SP
	)	50-304-SP
(Zion Station, Units 1 and 2)	)	

MEMORANDUM AND ORDER DENYING THE  
STATE OF ILLINOIS' MOTION FOR  
STAY OF PROCEEDINGS

The State of Illinois (Intervenor) filed a motion for stay of proceedings, dated July 27, 1979, and cited the Nuclear Regulatory Commission's regulations set out at 10 CFR § 2.788 as the basis for such action.

Intervenor relies on the United States Court of Appeals, District of Columbia Circuit opinion in Minnesota v. NRC, et al., \_\_\_ F.2d \_\_\_, Nos. 78-1296 and 78-2032 (D. C. Cir., May 23, 1979) to support its motion.

It argues that:

"... the issue of permanent storage must be dealt with in this case. The Board must defer ruling until the Commission has held a proceeding to determine whether a permanent off site repository will be available by 2007. It must then apply the finding to the facts of this case. If it is found that no repository will be available, then the facts in issue must be viewed with an eye towards on-site storage of a permanent nature."

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The Intervenor's argument continues:

"It is the obligation of this Board to stay the current proceedings and to defer making any decisions regarding the requested license amendment until it can assure itself and the public that all pertinent findings of fact have been made, including those to be made by the Commission as ordered by the Court of Appeals in Minnesota v. NRC."

No support in decided cases<sup>1/</sup> has been found for Intervenor's position that this Board has an obligation to stay the instant proceedings until it can be sure all pertinent findings of fact have been made, including any ordered by the Commission in connection with the remand in Minnesota v. NRC.

This Board will, of course, make all pertinent findings of fact in its decision. Any action it takes in this matter will be subject to whatever conditions the Commission may impose as a result of the generic rule making on the remanded issues relating to waste disposal in the Minnesota v. NRC case, supra.

There are several procedural points that appear to preclude the granting of Intervenor's motion to stay the proceedings:

- (1) Section 2.788 does not provide explicit authority to stay the issuance of a decision following the close of an evidentiary hearing and the filing of

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<sup>1/</sup> Minnesota v. NRC, F.2d \_\_\_\_\_, D. C. Circuit Nos. 78-1269, 2032 (May 23, 1979); Cf. NRDC v. NRC, 582 F.2d 166 (2nd Cir. 1978); Union of Concerned Scientists v. AEC, 499 F.2d 1069 (D. C. Cir. 1974).

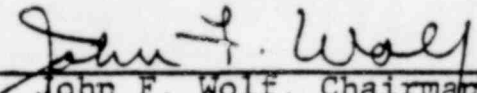
proposed findings of fact and conclusions of law. The Licensing Board in this case has not issued its decision. Therefore, the motion may well be premature.

- (2) In Portland General Electric Company (Trojan Nuclear Plant), ALAB-524, 9 NRC 65 (1979), the Appeal Board pointed out that "the right to seek stay relief is conferred only upon those who have filed (or intend to file) a timely appeal from the decision or order sought to be stayed." In the instant matter, there is no indication that Intervenor plans to appeal the decision when it is issued.
- (3) For the above stated reasons and after weighing the factors set out in 10 CFR § 2.788(e) to determine whether to grant or deny Intervenor's application for a stay, it is concluded that the motion for stay must be denied. The moving party has not made any showing that it is likely to prevail on the merits; nor has it shown that it will be irreparably injured unless a stay is granted. No evidence has been forthcoming to show whether the granting of a stay would harm other parties. Without any showing to the contrary, it appears that the public interest would lie in having the question of modification of the spent fuel pool decided as soon as practicable.

The Intervenor's motion for stay is denied.

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY AND  
LICENSING BOARD

  
John F. Wolf, Chairman

Issued the 27th day of  
August 1979, at  
Bethesda, Maryland.

1091 199