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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of
DUKE POWER COMPANY

(Amendment to Materials License
SNM-1773 for Oconee Nuclear Station
Spent Fuel Transportation and Storage
at McGuire Nuclear Station)

Docket No. 70-2623

NRC STAFF PETITION FOR REVIEW
AND REQUEST FOR AN INTERIM PROTECTIVE ORDER

I. Introduction

On September 6, 1979 the Appeal Board denied the NRC Staff's motion for directed certification of a Licensing Board ruling which denied the NRC Staff's request for an in camera hearing and the issuance of an appropriate protective order. The requested protective relief was sought as to certain route information for the shipment of spent fuel which the NRC Staff argued was entitled to protection under the Commission's regulations. The NRC Staff believes that Commission review of this matter should be had in that the issue presented involves the protection of security information which may not otherwise be protected at the hearings scheduled to recommence on September 10, 1979, and because the matter raises an important legal and policy issue requiring Commission resolution. The NRC Staff further requests an interim protective order pending the Commission's consideration of the matters raised by the petition for review.

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II. Background

Licensing hearings are being conducted in this proceeding to review Duke Power Company's proposal to transship and store three-hundred, 270-day old Oconee reactor spent fuel assemblies in the McGuire Unit 1 spent fuel. The hearings began on June 20, 1979.^{1/} On July 16, 1979, new safeguards regulations ("Physical Protection of Irradiated Reactor Fuel in Transit", 44 Fed. Reg. 34467; June 15, 1979) specifically 10 CFR § 73.1 and § 73.37, went into effect. The NRC Staff reviewed Duke Power Company's (DPC) proposal to implement these regulations against the criteria of 10 CFR § 73.37. Based on the criteria set forth in the new regulations, the NRC Staff did not approve of DPC's proposed primary route. Instead, three alternative routes proposed by DPC were approved by the NRC Staff.

During the course of the continuing evidentiary hearings, the question arose as to the procedures under which the NRC Staff would be required to disclose the three alternative routes approved by the Staff under the new regulations.^{2/} (Tr. 3030; Tr. 3021-49, specifically 3041-47; 3196-3240, specifically 3237-40; 3815-22). The arguments at the evidentiary session addressed the issue of whether the alternative routes now approved by the Staff are subject to exemption from disclosure pursuant to the requirements of 10 CFR

^{1/} The hearings were recessed on June 29, 1979. Four additional days of hearings were conducted on August 6-9, 1979. Additional hearings on the proposed licensing action are scheduled for September 10-14, 1979.

^{2/} The question of the location of routes involves two Staff witness panels. One NRC Staff panel sponsored testimony relative to Carolina Environmental Study Group Contention (CESG) No. 2. A second NRC Staff evidentiary panel will be proffered to address the Natural Resources Defense Council (NRDC) Contention No. 6 relative to the sabotage of transshipments. In both cases, routing details are viewed as relevant by the Staff.

§ 2.790. While the Licensing Board did not expressly find that the exemption from disclosure requirements of the NRC regulations were not applicable, it denied the Staff's request for a protective order and in camera sessions relative to the route alternatives information. (Tr. 3237.) The basis given by the Board for its denial was that: (i) the information as to routing had already been made public; (ii) the information had already been the subject of direct and cross-examination and limited appearance statements at the hearings; and (iii) the vehicles used for transportation of the spent fuel could be observed by members of the public as a practical matter anyway. (Tr. 3237). The Board stayed the effect of its ruling for thirty days to allow the parties to seek any remedies available to them. (Tr. 3238).

Following an extensive review of both the policy and security implications of this decision, the NRC Staff, on September 4, 1979, sought directed certification of the ruling. The Appeal Board denied the Staff's motion in a Memorandum and Order issued on September 6, 1979. While the Appeal Board was critical of the Staff for failing to file such a motion on a more expedited basis, the essential reason for the denial was agreement with the Licensing Board that information already in the public domain is not entitled to proprietary treatment under the provisions of 10 CFR § 2.790(d). Citing Kansas Gas and Electric Co. (Wolf Creek Unit 1), ALAB-327, 3 NRC 408, 416-17 (1976). (Memorandum and Order, p. 2) The Appeal Board also was critical of the NRC Staff's failure to address adequately the Licensing Board's finding that the route information is already in the public domain. The Appeal

Board did indicate in a footnote to its decision that the precise route (among those which will be available to the applicant) of any particular shipment taking place at any specific time was not in the public domain nor should it be. (Memorandum and Order, p. 3, n.3) The Appeal Board indicated that it would address this latter issue in a forthcoming opinion on the matter.

III. Issue Presented

Whether information which requires safeguarding under the Commission's regulations should receive protection?

IV. Discussion

A. Review of the Licensing Board's decision relative to the NRC Staff's request for a protective order and in camera hearings, and a subsequent denial of such relief by the Appeal Board presents a question of law and policy meriting review by the Commission. Moreover, given the harm to the public interest inherent in the denial of the relief requested, an interim protective order is required to insure that the interests of the public are properly safeguarded and that the adjudicatory proceedings of this Commission are properly conducted.^{3/}

The standards applicable to a petition for review under 10 CFR § 2.786 are similar to those set forth by the Appeal Board when considering whether to

^{3/} See, Public Service Company of New Hampshire (Seabrook Units 1 & 2), 5 NRC 503, 516 (1977) in which this Commission observed that while 10 CFR § 2.786(a) "...states the ordinary practice for [Commission] review, it does not -- and could not -- interfere with our inherent supervisory authority over the conduct of adjudicatory proceedings before the Commission." Citing CLI-76-13.

exercise discretionary interlocutory review by directed certification pursuant to 10 CFR § 2.718(i). Under that authority, the Appeal Board has frequently held that directed certification will lie where the question for which certification is sought is one which must be reviewed now or not at all. Kansas Gas & Electric Co., (Wolf Creek Unit 1), ALAB-327, 3 NRC 408, 413 (1976); ALAB-311, 3 NRC 85, (1976); and ALAB-391, 5 NRC 754 (1977). While the Commission's review of Appeal Board's decisions lies purely within its discretion, the NRC Staff believes that it clearly follows that a similar standard of review by the Commission would be appropriate when considering whether to issue an interim protective order.

At issue here is a Commission regulation which specifically precludes disclosure of information to the public. Failure to apply the regulation makes it obvious that the harm the regulation seeks to prevent will accrue, if at all, at the time the information is revealed in open session at the hearings. Thus it follows, that the issue must be considered and resolved prior to the restart of the scheduled hearing on this issue on September 10, 1979. Any detriment to the public interest resulting from the disclosure of this information will have occurred by the time this matter could be considered on appeal following the conclusion of the present scheduled hearing.

Moreover, revealing safeguards information contrary to express Commission regulations would cause injury to the public interest by increasing the risk that a spent fuel shipment could be attacked. Safeguards systems, even

those involving offsite handling of nuclear materials, are sensitive matters which are clearly not required to be made available to the public at large. (Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-410, 5 NRC 1398, 1403-04 (1977).

B. The present case presents an important issue of law and policy in that neither the Licensing nor the Appeal Board should have refused to apply a Commission regulation.

Revealing the specific details about the approved routes for the proposed transshipment action or other transportation security provisions to the public at large clearly contravenes present regulatory requirements and Commission policy relative to safeguarding nuclear material.^{4/} It is also detrimental to the public interest. Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 483 (1975). The Licensing Board did not specifically reject the Staff's argument that the Commission's rule (10 CFR 73.37), which was promulgated during the course of this proceeding, was now fully applicable to this issue. Rather, the Licensing Board rested its decision on the ground that

^{4/} The Staff's treatment of safeguards information, including that related to routes, has been treated consistently by the Staff since issuance of the Commission's safeguards regulations on June 15, 1979, 44 Fed. Reg. 34467. See, June 15, 1979 Memorandum For: Samuel J. Chilk, Secretary to the Commission from William J. Dircks, Director, Office of Nuclear Material Safety and Safeguards, Subject: SECY 79-278 and 278A. Physical Protection of Irradiated Fuel Shipments Secy Memo of May 25, 1979, Staff Exhibit No. 23 for Identification, Hearing Transcript (August 7, 1979), pp. 3201-02. See also, Virginia Sunshine Alliance et al v. Hendrie, et al., Civil No. 79-1989, August 31, 1979.

much of the information was already generally available to the public. (Tr. 3237-38) The Licensing Board finding is not supported by the record.

The route originally proposed by the applicant before the effective date of the Commission's regulations is public knowledge in accordance with the then prevailing regulations. That route was also identified by the Staff in the EIA.^{5/} Some testimony and cross-examination was had during hearings in June on this subject. This route, however, was proposed by Duke in 1978, well before the effective date of the new spent fuel transit security regulations and the changes which the NRC Staff required in routings as a result. Since the promulgation of the new regulations, Duke has proposed additional or alternative routes although still favoring the original route. At no time have these additional routes or even the fraction of these routes which might run concurrently with the original proposal become a part of the public record.^{6/} There has been no NRC Staff testimony or oral or written communications disclosing information about the alternative routes to the public. As the NRC Staff attempted to argue to the Licensing Board (Tr. 3202), it is NRC Staff practice to maintain such information in confidence. The only conclusion that can be drawn from this record is that the original route proposed by applicant was not approved and that the alternative routes may or

^{5/} Environmental Impact Appraisal related to Spent Fuel Storage of Oconee Spent Fuel at McGuire Nuclear Station - Unit 1 Spent Fuel Pool (EIA), pp. 8-9. Staff Exhibit No. 3

^{6/} At one point, NRDC's counsel argued that 90% of the alternative routes had been disclosed. The only bases for this assertion were the representations of other counsel. (Tr. 3322-23).

may not coincide with the original proposal on some segments. The NRC Staff does not believe that such a record supports the finding reached by the Licensing Board on this subject.

1. Commission regulations, Commission policy, and Commission decisions on safeguards information clearly support the conclusion that the information on specific routes approved by the NRC Staff, and transportation security information in general, should not be made available to the public at large. 10 CFR § 2.790(d)(1); Diablo Canyon, supra. Such information, however, can be released to interested parties with appropriate protective safeguards. Diablo Canyon, supra, 1403-04.

The material the Staff seeks to protect in the present proceeding involves the procedures established for safeguarding licensed special nuclear material pursuant to 10 CFR § 2.790(d)(1). The specific route alternatives approved for use by DPC are part of its overall procedures being implemented in accordance with the new regulations set forth in 10 CFR § 73.37 for safeguarding such material from sabotage during transportation.

2. While safeguards information involving nuclear materials is to be shielded from unlimited public disclosure, appropriate protective conditions should be fashioned so that safeguards information may be revealed, if necessary, to Intervenor in a particular case in order that they may properly litigate issues in controversy. Diablo Canyon, supra, 5 NRC 1404-06.

The Staff's arguments relative to the balancing of the interest of full and open Commission hearings against the regulation's requirements for protection of the public by non-disclosure of information does not mean that the Staff seeks to withhold information from the Intervenors whose participation is important in Commission proceedings. Prevention of access to such information in absolute terms is contrary to Commission regulations. Diablo Canyon, supra. Intervenors should have a reasonable opportunity to be heard on DPC's transportation system as it may affect their contentions and the Commission's regulations provide a means by which access to security information can be obtained in order to pursue a contention.

To exercise their reasonable opportunity, the Intervenors would be required to show that they have a right to review the protected information subject to non-disclosure. Diablo Canyon, supra; Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-504, 8 NRC 406 (1978); Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-514, 8 NRC 697 (1978). There is no reason to believe that the Intervenors in this proceeding cannot meet the tests set forth in Diablo Canyon, ALAB-410.

V. Conclusion

For the reasons set forth, the NRC Staff requests the following relief:

- (1) That the Commission grant the NRC Staff's petition for review of the decision denying protection of safeguards information.

(2) That the Commission grant an interim protective order that the transportation routes approved by the NRC Staff for the proposed transshipment, and transportation security information in general, not be revealed except under an appropriate protective order meeting the requirements of Diablo Canyon, ALAB-410, supra, pending resolution of the issue before the Commission.

(3) That the Commission determine that any information directly or indirectly involving the specific routes and transportation security information associated with the McGuire-Ocone proposal is exempt from disclosure pursuant to 10 CFR § 2.790(d)(1) except under an appropriate protective order meeting the requirements of Diablo Canyon, ALAB-410, supra.

Respectfully submitted,



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Edward S. Christenbury
Chief Hearing Counsel

Dated at Bethesda, Maryland
this 7th day of September, 1979.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF PETITION FOR REVIEW AND REQUEST FOR AN INTERIM PROTECTIVE ORDER" dated September 7, 1979 and "NOTICE OF APPEARANCE OF EDWARD S. CHRISTENBURY" dated September 7, 1979, in the above-captioned proceeding, have been served on the following, by deposit in the United States mail, first class, or, as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, this 7th day of September, 1979:

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