11/29/79

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
CONSUMERS POWER COMPANY	)	Docket No. 50-155
	)	
(Big Rock Point Nuclear Power Plant)	)	

Licensee's Response To Contentions Of Christa-Maria

Consumers Power Company ("Licensee"), the NRC Staff and Christa-Maria entered into a stipulation[1/] with respect to the contentions filed by Christa-Maria on October 30, 1979. The stipulation provides, inter alia, that the Licensee objects to Contentions 1, 7, 8 and 9 as set forth therein, and that a separate pleading would be filed in support of these objections.[2/] Pursuant thereto and the Licensing Board's Order of November 5, 1979, Licensee submits this response in opposition to the admissibility of Contentions 1 and 7-9 as issues in this proceeding.

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1/ See the "Stipulation Among NRC Staff, Christa-Maria and Consumers Power Company" dated and filed with the Licensing Board by the motion of the NRC Staff on November 26, 1979.

2/ The stipulation sets forth the positions of the parties on the remaining contentions, i.e., Contentions 2-6.

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Contention 1.

This contention[3/] asserts that the Nuclear Regulatory Commission ("Commission or "NRC") is prohibited from granting the proposed amendment to the operating license for the Big Rock Point Nuclear Plant which would authorize the Licensee to expand the capacity of the spent fuel pool until NRC has completed the rulemaking proceeding announced in the Federal Register on October 25, 1979 (44 Fed. Reg. 61372). The rulemaking was triggered by a recent court decision[4/] that requires NRC consideration of whether off-site storage for nuclear wastes will be available by the expiration dates (2007-09)

3/ Contention 1. states:

> 1. The NRC is prohibited from allowing the expansion of the spent fuel pool at the Big Rock Nuclear Power Plant until it has completed its "waste confidence" rulemaking proceedings (44 Fed. Reg. 61372, October 25, 1979). If the Commission finds in this generic proceeding that there is no reasonable assurance that facilities for off-site storage or permanent disposal of the spent fuel will be available before the expiration of Big Rock's operating license, the procedures to be established by the Commission (44 Fed. Reg. 61373) must be followed to determine whether spent fuel can be stored safely at this site.
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> The basis for this contention is the decision of the Court of Appeals for the District of Columbia Circuit in State of Minnesota v. U.S. Nuclear Regulatory Commission, 602 F.2d 412 (D.C. Cir., 1979), which directs the NRC to address these issues. In response to the Court's order the NRC has initiated a generic proceeding.

4/ Minnesota v. NRC, 602 F.2d 412 (D.C. Cir. 1979).

of certain reactor operating licenses, and if not, whether nuclear wastes could be stored at those sites until an off-site solution is available. Although the Court of Appeals was considering only the spent fuel pool licensing actions at the Vermont Yankee and Prairie Island nuclear plants, the rulemaking is not limited to these two actions. Rather the scope of the rulemaking is plenary, and its purpose is to assess generically the degree of assurance now available that nuclear waste can be safely disposed of, to determine when such disposal or off-site storage will be available, and to determine whether nuclear waste can be safely stored on-site past the expiration of existing facility licenses, including the Big Rock Point Nuclear Plant, until off-site disposal or storage is available.

Christa-Maria's belief that the licensing action in this proceeding must await the outcome of the rulemaking is at odds with the NRC's notice of proposed rulemaking, which states that:

> During this proceeding the safety implications and environmental impacts of radioactive waste storage on-site for the duration of a license will continue to be subjects for adjudication in individual facility licensing proceedings. The Commission has decided, however, that during this proceeding the issues being considered in the rulemaking should not be addressed in individual licensing proceedings. These issues are most appropriately addressed in a generic proceeding of the character here envisaged. Furthermore, the court in the State of Minnesota case by

> remanding this matter to the Commission but not vacating or revoking the facility licenses involved, has supported the Commission's conclusion that licensing practices need not be altered during this proceeding. However, all licensing proceedings now under way will be subject to whatever final determinations are reached in this proceeding.5/

Therefore, it is manifest that the Licensing Board, as a subordinate adjudicatory tribunal of the NRC, is bound by the Commission's statement of policy that this proceeding should not be stayed, as suggested in Contention 1., pending completion of the rulemaking. This Licensing Board is without jurisdiction to consider the issue further.6/

Contention 7.

This contention7/ alleges that the amount of radiation released to the atmosphere through the containment

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5/ 44 Fed. Reg. 61372, 61373 (October 25, 1979).

6/ The Licensing Board, of course, has jurisdiction to determine whether or not it has jurisdiction to consider this matter, and it could be argued that Christa-Maria should be given the opportunity to brief the question of jurisdiction. The Licensee might be inclined to support such a course except that the issue has been taken directly to the Commission for adjudication by Christa-Maria. See "Motion of Christa-Maria For Reconsideration of Decision" filed on November 7, 1979 with the NRC (copy attached). Thus, further briefing in this forum would serve no useful purpose.

7/ Contention 7. states:

> The levels of airborne radiation released to the atmosphere through the containment ventilation system will be increased as a result of the storage of additional spent fuel. This increased level of radiation presents an unacceptable risk to the health of residents in the vicinity of the plant.

ventilation system will increase if the storage of additional spent fuel is permitted at the Big Rock Point Station, and that such increase presents an unacceptable health risk to the public. This contention fails to meet the requirements of 10 C.F.R. § 2.714 because it is vague and lacks basis. In addition to not specifying the radioisotopes and their concentrations or the off-site doses of concern, there is no indication as to whether Christa-Maria believes the "increased level of radiation" will violate exposure limitations to the public in 10 C.F.R. Part 20, or the ALARA guidelines specified in Appendix I to 10 C.F.R. Part 50; or whether she believes that the release of radiation in any amount is unacceptable.[8/] This lack of specificity is prejudicial to the Licensee because the primary purpose of the "specificity and bases" requirements in 10 C.F.R. § 2.714 is to provide the Licensee with a fair opportunity to know precisely what the issues are, exactly what proof, evidence or testimony is required to meet the issues and exactly what support the intervenor might intent to adduce for its allegations.[9/] Contention 7. lacks the required preciseness and it should be rejected.

8/ If the thrust of the contention is to challenge the sufficiency of the NRC's regulations in 10 C.F.R. Part 20 or Appendix I to Part 50, the contention is objectionable for the additional reason that Christa-Maria has failed to offer the requisite showing as required by 10 C.F.R. § 2.758, to warrant a challenge to NRC regulations.

9/ Gulf States Utilities Company (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 771-2 (1977).

Contention 8.

This contention[10/] raises the specter of Class 9 accidents. Contentions raising this issue have been regularly rejected as issues in licensing proceedings.[11/] This precedent is based on the proposed Annex to 10 C.F.R. Part 50, Appendix D (36 Fed. Reg. 22851, December 1, 1971), which states that Class 9 accidents need not be discussed as a part of the review required by the National Environmental Policy Act of 1969 because of their low probability of occurrence. Although the proposed Annex has not been formally adopted, the NRC stated at the time of the Annex's promulgation that its provisions "will be useful interim guidance until such time as the NRC takes further action."[12/] Reliance on the Annex has been sanctioned by NRC adjudicatory

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10/ Contention 8. states:

> The requested license amendment may not be granted until the NRC has considered the consequences of a Class 9 accident at the Big Rock plant. The occurrence of a Class 9 accident at Three Mile Island Unit No. 2 on March 28, 1979, establishes that such accidents are credible events and must be considered by the NRC. Due to the increase in the total amount of highly radioactive spent fuel that would be stored at the plant, a Class 9 accident in any way related to the spent fuel could result in significantly greater risk to the public health and safety than would be the case if the increased storage were not allowed.

11/ See n.13 infra.

12/ 36 Fed. Reg. 22851 (December 1, 1971).

decisions and upheld by the courts.[13] In the Offshore Power Systems case,[14] the NRC stated it would reexamine its policy with respect to Class 9 accidents in the context of its continuing rulemaking proceeding. In the meantime, the NRC has left in force its policy proscribing consideration of Class 9 accident scenarios for land-based plants.

More recently in the wake of the accident at Three Mile Island, a segment of the NRC Staff opined that the accident was a Class 9 accident.[15] Subsequently, the Atomic Safety and Licensing Board in the Susquehanna case

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13/ See e.g., Hodder v. NRC, Nos. 76-1709 and 78-1149, ___ F.2d ___ (D.C. Cir. December 26, 1978), cert. den. 48 USLW 3218 (October 2, 1979); Porter County Chapter v. AEC, 553 F.2d 1011, 1017-8 (7th Cir. 1976); Carolina Environmental Study Group v. AEC, 510 F.2d 796, 798-800 (D.C. Cir. 1975); Ecology Action v. AEC, 492 F.2d 998 (2d Cir. 1974); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 415-16 (1976); and Long Island Lighting Company (Shoreham Nuclear Power Station) ALAB-156, 6 AEC 831 (1973).

14/ Offshore Power Systems (Floating Nuclear Power Plants), CLI-79-9, 10 NRC ___ (September 14, 1979).

15/ See "NRC Staff Response To Board Question No. 4 Regarding The Occurrence Of A Class 9 Accident At Three Mile Island," dated August 24, 1979, which was filed in the Salem proceeding (Public Service Electric & Gas Company (Salem Nuclear Generating Station, Unit No. 1) Docket No. 50-272. The Licensee understands that a member of the accident analysis branch within the NRC Staff disagrees with the Salem position. The reasoning of the Salem position does appear to be specious since it fails to address the fundamental factor in the definition of Class 9 accidents, i.e., the probability of occurrence. Thus, the proper question is whether the probability of occurrence of a Three Mile Island-type accident is such that it should be categorized as a Class 9 accident. The NRC Staff did not address this question in its Salem position.

assumed, without deciding, that the Three Mile Island accident was a Class 9 accident, and admitted a contention based on the accident scenario at Three Mile Island.[16/] The Susquehanna Board held that a general consideration of the consequences of Class 9 accidents at land-based plants was improper,[17/] but that the intervenor had made a sufficient showing of special circumstances to allow a narrow exploration of a TMI-type accident.[18/]

The reasoning of the Susquehanna Board does not aid Christa-Maria with respect to Contention 8. Susquehanna is an operating license proceeding -- a proceeding involving a scrutiny of the entire operation of the facility. The instant proceeding is limited to an inquiry as to whether the capacity of the spent fuel pool at the Big Rock Point Nuclear Plant should be increased. Although an inquiry into a Three Mile Island-type accident may be appropriate in an operating license proceeding (a proposition we do not concede),[19/] it cannot rationally be related to this proceeding.

16/ See slip opinion entitled "Memorandum and Order Concerning Class 9 Accident Contention," Pennsylvania Power & Light Company and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-29, 10 NRC ___ (October 19, 1979).

17/ Id. at 9-10.

18/ Id. at 11-13.

19/ The Licensee believes the suggestion that the Three Mile Island accident scenario is a Class 9 accident is erroneous. It is not necessary to join that issue because as shown infra Contention 8. should be rejected because it is beyond the scope of this proceeding. Should the Licensing Board disagree, the Licensee requests that a further opportunity for the briefing of this issue be provided.

The effort of Christa-Maria to provide a nexus between Contention 8. and this proceeding fails. The assertion that "the increase in the total amount of highly radioactive spen fuel that would be stored at the plant" would increase the risk to the public in the event of a Class 9 accident is without basis. For as was stated when the "basis" requirement was promulgated in 1972:

> "definition of the matters in controversy is widely recognized as the keystone to the efficient process of a contested proceeding. In order to put a matter in issue, it will not be sufficient merely to make an unsupported allegation."[20/] (emphasis added).

The lack of basis is a direct result of the inability to establish a nexus between the limited purpose of this proceeding and the overall question of accident analyses. The latter analyses are conducted in the context of the operation of the facility and the consideration of such matters is beyond the scope of this proceeding.

Contention 9.

This contention[21/] challenges the adequacy of the

20/ 37 Fed. Reg. 15127, 15128 (July 28, 1972).

21/ Contention 9. states:

> The events at TMI-2 showed the inadequacy of NRC emergency planning requirements. Emergency planning beyond the LPZ is a recognition of the residual risk associated with major reactor accidents whose consequences could exceed those associated with so-called design basis events. In the context of spent fuel pool expansion, emergency planning must be based on a worst case analysis of potential accident consequences related to the spent fuel pool. In particular, it must take into account the significant increase in radioactive spent fuel that will be stored at the plant if this License Amendment is granted.

emergency preparedness and planning at the Big Rock Point Nuclear Plant. The NRC is presently reviewing its emergency preparedness policy on generic basis and that policy is being implemented on a facility by facility examination of emergency preparedness procedures called for in the context of the total operation of the plant.[22/] This review will consider, among other things, the principal characteristics of a spectrum of design basis and core melt accidents based on the guidance contained in a task force report[23/] and the results of an ongoing rulemaking proceeding.[24/] The analyses of the various accident scenarios would include any potential accidents involving spent fuel pools. Christa-Maria would have this Licensing Board review this latter aspect in the isolation of this proceeding. A review of spent fuel pool accidents only would be meaningless for, as stated in the Commission's October 18, Policy Statement, emergency planning must be based on an overall consideration of accident scenarios.

22/ See NRC Policy Statement, "Planning Basis For Emergency Responses To Nuclear Power Reactors," dated October 19, 1979, 44 Fed. Reg. 61123 (October 23, 1979).

23/ "Planning Basis for the Development of State and Local Government Radiological Emergency Response Plans in Support of Light Water Nuclear Power Plants," NUREG-0396, EPA 520/1-78-016 (December 1978).

24/ See Advance Notice of Proposed Rulemaking Concerning Emergency Planning, 44 Fed. Reg. 41484 (July 17, 1979).

As indicated supra, this Licensing Board's jurisdiction is limited to the issues associated with the expansion of the spent fuel pool, and it may not embark in this docket on a reexamination of evolving NRC policy on emergency planning and its implementation at the Big Rock Point facility. Contention 9. is nothing more than a collateral attack on these policies and their implementation at the Big Rock Point Nuclear Plant, and for this reason it is outside the scope of this proceeding.

Conclusion

For the foregoing reasons, Contentions 1 and 7-9 should be rejected.

Respectfully submitted,

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Dated: November 29, 1979

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE NUCLEAR REGULATORY COMMISSIONERS

In the Matter of PROPOSED RULEMAKING: STORAGE AND DISPOSAL OF WASTE	)	Re: Federal Register Notice 44 Fed. Reg. 61372, October 25, 1979.

MOTION OF CHRISTA-MARIA
FOR RECONSIDERATION OF DECISION

Christa-Maria, intervenor in spent fuel pool expansion proceedings in the Matter of Consumers Power Company (Big Rock Nuclear Plant) Docket No. 50-155, requests the Commission immediately to reconsider the decision announced in the Notice of Proposed Rulemaking, 44 Fed. Reg. 61373, October 25, 1979, to allow the expansion of spent fuel storage pools at nuclear plants prior to a determination in generic rulemaking proceedings that indefinite on-site storage is safe or that off-site storage or disposal will be available before on-site storage becomes unsafe. The Commission has determined not to permit consideration of these generic issues in individual licensing proceedings, but has concluded that licensing practices for individual actions need not be changed while the generic proceedings are under way.

As support for its decision the Commission relies upon a ruling of the Court of Appeals for the District of Columbia Circuit in State of Minnesota et al v. NRC, 602 F. 2d. 412 (D.C. Cir. 1979). Apparently the Office of the General Counsel has advised the Commission that the Court of Appeals approved continued licensing of spent fuel pool expansions in the absence of an assessment of the health, safety and environmental effects of indefinite on-site storage, because it did not revoke or vacate the licenses of the plants involved in the lawsuit. This advice is a misrepresentation of the decision of the Court. It is also contrary to established principles of administrative law as recognized and carried out by the Commission in the past.

No party to State of Minnesota et al v. NRC, supra, requested that the license amendments authorizing expansion of the spent fuel pool at Vermont Yankee and Prairie Island be vacated or revoked. That question was not before the Court for decision. Rather, the petitioners argued that, in the absence of available off-site storage and/or disposal methods, the consequences of indefinite on-site storage (i.e., storage past the expiration of facility licenses) had to be considered before license amendments could be granted.

The Court of Appeals agreed with the petitioners that the NRC was required to consider the consequences of indefinite on-site storage:

> The question is whether there has been an NRC disposition in generic proceedings that is adequate to dispose of the objections to the licensing action. 602 F. 2d. at 418.

The Court rejected the NRC's contention that the Commission's denial of a rulemaking petition on waste disposal filed by NRDC provided adequate support for its conclusion that off-site disposal would be available when necessary.

> [T]he NRC in its denial of rule-making chose not to make the kind of comprehensive inquiry into the question that would be required to give content to a "generic" determination. 602 F. 2d. at 417.

The Court remanded the issues to the Commission for consideration "of the specific problem isolated by petitioners:"

> In particular, the court comtemplates consideration on remand of the specific problem isolated by petitioners--determining whether there is reasonable assurance that an off-site storage solution will be available by the years 2007-09, the expiration of the plants' operating licenses, and if not, whether there is reasonable assurance that the fuel can be stored safely at the sites beyond those dates. 602 F. 2d. at 418.

Nowhere in its opinion did the Court state or infer that licensing of the expansion of spent fuel pools could continue in the absence of evidence on the issues it directed the Commission to consider generically. The Court's decision establishes as a matter of law that the Atomic Energy Act and the National Environmental Policy require the NRC to consider these issues. It obviously follows that this consi-

deration must precede the licensing of any additional spent fuel pool expansion so that the results of the generic proceeding can be used as a basis for the adjudicatory decision.

The NRC's position renders the Court's decision a nullity, at least with respect to plants such as Big Rock Point for which spent fuel pool license amendments have not been granted. A Licensing Board may grant a license amendment without assessing the full health, safety and environmental consequences of the action precisely as the Licensing Board did for the Vermont Yankee and Prairie Island plants. The Court of Appeals did not intend such a result.

Nor did the Court intend that the Commission hold a sham proceeding. Courts have previously recognized that NEPA cannot undo an action which has already been taken. Ogunquit Village Corporation v. Davis, 553 F. 2d 243 (1977). For that reason they have consistently halted actions before a commitment of resources tilted the cost-benefit balance to the advantage of the action. NEPA mandates that an analysis of the impacts of the action be carried out prior to the action. CF. Calvert Cliffs Coordinating Committee v. AEC, 449 F. 2d 1109 (D.C. Cir., 1971); Coalition for Safe Nuclear Power v. AEC, 463 F. 2d 954 (D.C. Cir., 1971); Arlington Coalition v. Volpe, 458 F.2d 1323 (4th Cir., 1972) cert. denied, sub nom. Fugate v. Arlington Coalition, 406 U.S. 1000 (1972); Environmental Defense Fund v. TVA, 468 f. 2d 1164 (6th Cir., 1972). As a practical matter, once the capacity of a spent fuel storage pool has been increased, the racks cannot be removed, no matter what

the NRC concludes in the generic rulemaking proceeding. The result of the Commission's decision to allow licensing prior to its generic assessment of the spent fuel issue is to make the rulemaking proceeding a useless gesture.

The Commission has previously recognized that it may not ignore in an individual proceeding an issue which it has been ordered to address, simply because it will eventually decide it in a generic proceeding. For example, after the Court of Appeals declared invalid the Commission's S-3 Table, NRDC v. NRC 547 F. 2d. 633 (D.C. Cir. 1976), the Commission announced that, pending the development of an adequately supported table, no new full-power operating licenses. construction permits, or limited work authorizations would be issued. 41 F.R. 34707, 34708, August 16, 1976. This conclusion was based on a

> recognition that the grant of each of these authorizations, permits, or licenses is premised upon the completion of an adequate environmental impact statement, and that under the subject decisions, absent an acceptable substitute for those portions of the Table S-3 which the Court has found inadequately supported, the basis for a complete environmental impact statement will not be in place. Id.

The Commission halted all licensing actions, despite the fact that it might have "significant impacts on the availability and costs of nuclear power facilities." Id. With respect to outstanding licenses, the Commission decided that the question of suspending activity should be resolved on a case-by-case basis. Id. at 34709.

Similarly, when the Commission determined that the Radon-222 value in the S-3 Table was incorrect, it authorized the consideration in individual licensing proceedings of the health, safety and environmental consequences of radon releases, even though generic consideration of these issues was pending. 43 Fed. Reg. 73, April 14, 1978.

The Commissions past practice is in keeping with principles of administrative law which require that ajudicatory decisions be based upon record evidence on all the issues relevant to the action to be taken. Marathon Oil Co. v. Environmental Protection Agency, 564 F.2d 1253, 1263-64 (9th Cir. 1977); NLRB v. Johnson, 310 F.2d 550, 552 (6th Cir. 1962); International Union, United Auto, A.&A.I. Workers v. NRLB, 147 U.S. App. D.C. 289, 455 F.2d 1357 (1971).

With respect to the matter at hand, application of these principles means that spent fuel pools may not be expanded unless the Commission is able to find that radioactive wastes can be safely stored on-site or disposed of off-site prior to the expiration of the license of the facility. The evidence to support either of these conclusions may be developed generically or in an individual proceeding. However, it must be available for use in making the decision, and it must support it. Unless the Commission alters its position, decisions on spent fuel pool license amendment requests will be granted without the requisite assurance that the health and safety of the public will be protected.

Christa-Maria is an intervenor in fuel pool expansion proceedings for the Big Rock Point nuclear plant. She is entitled to an adjudicatory decision on the record which considers the full range of consequences of the proposed action. Until the Commission has completed its generic review it has no basis for concluding that off-site waste disposal facilities will be available and thus that the impacts of long-term on-site storage need not be assessed.

For the foregoing reasons Christa-Maria urges an immediate reconsideration of the Commission's decision.

Respectfully submitted,

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Dated: November 7, 1979

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
CONSUMERS POWER COMPANY	)	Docket No. 50-155
	)	
(Big Rock Point Nuclear Power Plant)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the following: LICENSEE'S RESPONSE TO CONTENTIONS OF CHRISTA-MARIA in the above-captioned proceeding was served upon the persons shown on the attached list by depositing copies thereof in the United States mail, first class postage prepaid, this 29th day of November, 1979.

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