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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board



In the Matter of the Application of)
Public Service Company of Oklahoma,)
Associated Electric Cooperative, Inc.) Docket Nos. STN 50-556
and) STN 50-557
Western Farmers Electric Cooperative)
)
(Black Fox Station, Units 1 and 2))

APPLICANTS' REPLY TO
NRC STAFF'S ANSWER

The Attorney General for the State of Oklahoma ("Attorney General")^{1/} and Citizens' Action for Safe Energy, Lawrence Burrell and Ilene Younghein ("Intervenors")^{2/} have filed separate requests for relief seeking, respectively, a stay in the issuance of the partial initial decision and a reopening of the record on certain issues. Public Service Company of Oklahoma ("PSO"), Associated Electric Cooperative, Inc. and Western Farmers Electric Cooperative ("Applicants") have answered both of those pleadings.^{3/} On May 18, 1979, the

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- 1/ "Motion of the State of Oklahoma for an Indefinite Stay in the Issuance of an Initial Decision in the Above-Captioned Proceeding," April 19, 1979.
 - 2/ "Response to Motion of the State of Oklahoma for an Indefinite Stay in the Issuance of an Initial Decision in the Above-Captioned Proceeding," April 27, 1979.
 - 3/ "Applicants' Answer to the Motion of the Attorney General for the State of Oklahoma for an Indefinite Stay of the Issuance of an Initial Decision," May 11, 1979. "Applicants' Reply to Intervenors' Response of April 27, 1979," May 18, 1979.

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NRC Staff filed its "Answer to State of Oklahoma's Motion for Indefinite Stay on Issuance of an Initial Decision and Intervenors' Motion to Reopen the Record." By motion of May 21, 1979, Applicants requested permission from this Atomic Safety and Licensing Board ("Licensing Board") to file a reply to the NRC Staff's answer. That motion was granted by Order dated May 22, 1979. Applicants hereby file this reply opposing the grant of the relief sought by the NRC Staff.

The NRC Staff requests a "delay" or "deferral" of the decision on the question of reopening the record for the Three Mile Island and post-accident monitoring issues.^{4/} This relief must be denied for two reasons. First, the legal test set out by the NRC Staff to justify such a course of action has not been met. Second, the NRC Staff misapprehends its duty to the Licensing Board in a Nuclear Regulatory Commission ("NRC" or the "Commission") proceeding under the doctrine enunciated in Duke Power Company (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-143, 6 AEC 623 (1973).

^{4/} NRC Staff Answer at 9-10.

I. THE NRC STAFF HAS SHOWN NO
JUSTIFICATION FOR A DELAY
OR DEFERRAL OF THE LICENSING
BOARD'S DECISION

The NRC Staff analyzes the motions of the Attorney General and Intervenors and concludes that both requests for relief should be judged by the standards for reopening the record set forth in Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520 (1973). This is explained by stating that if the Attorney General and Intervenors do not meet the legal requirements to reopen, a stay would serve no useful purpose. While in agreement that Vermont Yankee provides the correct test for passing upon Intervenors' request to reopen the record, Applicants take issue with the use of Vermont Yankee to judge the Attorney General's motion for a stay of the partial initial decision. The error of applying Vermont Yankee to decide a stay motion is obvious, for how can one decide today whether or not a particular matter involves a significant safety issue when the purpose of the requested delay is to obtain time to decide that very question.^{5/}

However, even accepting the NRC Staff's legal analysis, it is apparent that the NRC Staff's request for relief does not meet its own legal standard. Vermont

^{5/} As Applicants pointed out in their Answer to the Attorney General's Motion, a request for a stay of the proceedings should be judged by the criteria set forth in Landis v. North American Company, 299 U.S. 248 (1936).

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Yankee, as the NRC Staff acknowledges, requires a showing of a serious new environmental or safety concern in order to warrant reopening the record. The NRC Staff has made no such showing concerning Three Mile Island or post-accident monitoring.

That this lack of an adequate showing means that the NRC Staff's request for a delay must be denied is made clear in its appraisal of the Attorney General's and Intervenor's motions regarding financial qualifications. The NRC Staff opposes this aspect of those motions because there was no showing that inflation, construction delays, or the impacts of Three Mile Island on the financial community would have an effect on Black Fox.^{6/} As the NRC Staff points out, the argument that the Licensing Board should stay the issuance of the initial decision on the chance that hearings which may be held by the Oklahoma Corporation Commission may raise new information about financial qualifications can only be termed speculative.^{7/} A consideration of the possible impacts of Three Mile Island on financial qualifications was also found to be speculative by the NRC Staff.^{8/} For these reasons, the NRC Staff concluded that the motions did not meet the requirements of Vermont Yankee and should be denied

^{6/} NRC Staff Answer at 4-5.

^{7/} Id. at 5.

^{8/} Id. at 7.

without prejudice to raising the matter again if the State's hearings or the Staff's re-review of the new financial data submitted by Applicants establishes solid evidence which could be shown to have a realistic effect on changing the financial qualifications status of the Applicants.^{9/}

Given the reasons articulated by the NRC Staff for opposing a stay of the proceedings or a reopening of the financial qualifications' issue, it is inexplicable that the NRC Staff would ignore these same arguments in connection with the Three Mile Island matter. Under the Staff's legal theory, the Vermont Yankee strictures must be met -- not ignored -- in order to justify its request that the Licensing Board delay its decision on the question of reopening the record on the Three Mile Island and post-accident monitoring issues pending the NRC Staff's review to determine whether those issues require supplementation or correction of the Black Fox record.^{10/} Significantly, however, the NRC Staff does not attempt to make a showing of any connection between Three Mile Island and Black Fox. Indeed, the NRC Staff

^{9/} Id.

^{10/} Id. at 9-10. This delay or deferral of the Licensing Board's decision, under the NRC Staff's legal theory, is equivalent to a motion to reopen the record because, as the NRC Staff says with respect to the Attorney General's and Intervenors' motions, "if they do not meet the legal requirements to reopen, then a stay would serve no useful purpose." Id. at 4. Similarly, if the NRC Staff cannot show a connection between Three Mile Island and Black Fox which warrants reopening the record, there can be no reason to delay or defer the decision.

states that:

[T]he situation at TMI can be distinguished in several different ways from Black Fox in terms of the type of reactor under review, the stage of completion of TMI versus Black Fox and the intervening time period between construction and operation.^{11/}

These differences cannot be easily dismissed.

As Applicants have explained in their responses to the Attorney General's and Intervenors' motions, there are significant design differences between the pressurized water reactor involved in the Three Mile Island accident and the boiling water reactors which will be used at the Black Fox Station.^{12/} Similarly, the fact that this is a construction permit proceeding also serves to differentiate Black Fox from Three Mile Island.^{13/}

The NRC Staff believes apparently that in the discharge of its regulatory responsibilities "a reasoned review" of the Three Mile Island accident is needed to determine if any of the lessons learned have any application to Black Fox. Such a review is to be expected and Applicants do not take issue with the Staff's perception of its regulatory responsibilities. However, Applicants do take issue with

^{11/} Id. at 8.

^{12/} See Applicants' Answer to the Motion of the Attorney General at 14-15 and Applicants' Reply to Intervenors' Response at 12.

^{13/} See Applicants' Answer to the Motion of the Attorney General at 15 and Applicants' Reply to Intervenors' Response at 12-13.

the notion that this proceeding must come to a standstill pending the Staff's review. While a review of the situation may be a prudent course in the discharge of its responsibilities, the NRC Staff must offer more to justify a stay in this proceeding. Ignoring the legal standard it enunciated, the NRC Staff points to no specific and significant safety problem associated with Three Mile Island that might arguably exist with respect to Black Fox.

In addition to the fact that a delay of the decision on the question of reopening the record is not technically justified, this relief is not necessary for the reasons recognized by the NRC Staff in its response to the Attorney General's motion. The NRC Staff pointed out that motions to the Licensing Board to reconsider or reopen because of safety related issues could be made under 10 C.F.R. §§2.771 or 2.730. If the matter were no longer pending before the Licensing Board, the Atomic Safety and Licensing Appeal Board ("Appeal Board") or the Commission could, on the basis of their sua sponte review powers, or on the motion of the NRC Staff, consider all issues which have a bearing on the safety of the plant. 10 C.F.R. §2.785(b)(2). If the construction permit had issued, the NRC Staff could issue an order under 10 C.F.R. §2.202 modifying or amending the license to incorporate any lessons learned from its Three Mile Island review. Consequently, there is no warrant to

halt the proceeding at this time while the NRC Staff determines whether or not any connection exists between Three Mile Island and Black Fox. If and when that connection is demonstrated, the NRC Staff can take appropriate action under the NRC's Rules of Practice.

Another factor which should be considered in evaluating the NRC Staff's request that this Licensing Board defer its decision on the pending motions is the amount of time involved. The NRC Staff states that it will conduct a review to determine whether supplementation or correction of this record is necessary because of Three Mile Island, and suggests that the review will take approximately 30 days. If that review is not completed within 30 days, however, "the NRC Staff will inform the Board and parties of the proposed schedule of review at that time."^{14/} Applicants believe that this request for a 30-day delay is only the tip of the iceberg. The casual manner adopted by the NRC Staff with respect to developing a dispositive position on emergency core cooling system matters would seem to indicate the very real possibility of a prolonged delay that could extend the Licensing Board's decision-making process for months. Such a delay would be unfair to both Applicants and the public interest, and would take unwarranted liberties with the principles of administrative due process.^{15/}

^{14/} Id. at 9.

^{15/} See Applicants' Answer to the Motion of the Attorney General at 10-12.

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II. THE NRC STAFF ERRED IN
INTERPRETING ITS DUTY
UNDER THE MCGUIRE DOCTRINE

The only reason advanced by the NRC Staff to support its request for a delay or deferral of a decision on the question of reopening the record is the following statement:

It is well settled that the NRC Staff is under a legal obligation to keep the Licensing Board, Appeal Board and Commission apprised of the status of relevant and material safety matters.^{16/}

This statement, in turn, is supported by a citation to McGuire, ALAB-143, supra. An examination of McGuire and its progeny, however, reveals that the NRC Staff has transformed the duty imposed upon all parties to inform NRC tribunals of new information and changing circumstances which may bear upon their cases into an expanded obligation which would require the NRC Staff to review and analyze the subject of the notification, and report the results of that analysis to the Licensing Board before the hearing process could continue. This is an erroneous interpretation of McGuire.

The Appeal Board in McGuire laid down the following general rule:

In all future proceedings, parties must inform the presiding board and other parties of new information which is relevant and material to the matter being adjudicated.^{17/}

^{16/} NRC Staff Answer at 9 (footnote omitted).

^{17/} 6 AEC at 625.

This principle was reiterated by the Appeal Board in Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397 (1976), in which the duty was expressed as follows:

It cannot be overemphasized that it is of utmost importance for parties to keep the board abreast of changing circumstances bearing on their cases.^{18/}

That this duty is a duty to report was made explicit by the Appeal Board in Georgia Power Company (Alvin W. Vogtle Nuclear Plant, Units 1 and 2), ALAB-291, 2 NRC 404 (1975).

The Appeal Board stated:

The staff itself has readily acknowledged that McGuire establishes no more than a reporting requirement: as previously seen, it imposes a duty upon the parties to a still uncompleted licensing proceeding to bring to the attention of the appropriate tribunal -- the Licensing Board or the Appeal Board as the case may be -- 'the new information which is relevant and material to the matters being adjudicated.'^{19/}

Significantly, in Vogtle the Appeal Board denied the NRC Staff's motion to reopen the record in order to consider newly evolved generic safety concerns which were applicable to the reactors under consideration. The Appeal Board reasoned that the NRC Staff had discharged any obligation it had under McGuire by bringing the information to the attention of the Appeal Board.^{20/} Because the emergence of

^{18/} 4 NRC at 406 n.26.

^{19/} 2 NRC at 411 (emphasis supplied).

^{20/} Id.

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new generic safety concerns did not amount to the kind of extraordinary development which would warrant reopening the record under Vermont Yankee, however, the Appeal Board declined to do so.^{21/} It should also be noted that in reaching this decision the Appeal Board emphasized that a construction permit proceeding was involved; thus, there would be enough time for the issues to be resolved at the operating license stage.^{22/}

After considering McGuire, Catawba and Vogtle, it is obvious that the NRC Staff's only duty under those decisions is to report the new information to the Licensing Board. In this case, the events at Three Mile Island have been fully disclosed to the Licensing Board and parties through board notification reports. The NRC Staff has thus discharged its duty, and that party cannot use the possible existence of generic safety concerns based on its continuous review of Three Mile Island and other matters (which may or may not be applicable to Black Fox) as an excuse to stop this proceeding in its tracks. As Applicants have shown, the NRC Staff's investigation of Three Mile Island can go forward, and any lessons learned can be factored into the Black Fox Station, without any need for this Licensing Board to delay its decision on the question of reopening the record or to stay issuance of the partial initial decision.

^{21/} Id. at 413.

^{22/} Id. at 412-13.

III. IF THE LICENSING BOARD
RULES AGAINST APPLICANTS
ON ANY OF THE PENDING MOTIONS,
THAT RULING SHOULD BE
REFERRED TO THE APPEAL BOARD

The Commission's Rules of Practice provide that a Licensing Board may refer a ruling to the Appeal Board when, in the judgment of the Licensing Board, a "prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense."^{23/} Applicants believe that, should the Licensing Board rule against them on any of the pending motions to stay the partial initial decision, to reopen the record or to delay deciding those motions, it would be appropriate for that ruling to be referred to the Appeal Board. Not only would an adverse ruling be detrimental to the public interest in having a prompt decision on the license application,^{24/} the resultant delay would be injurious to Applicants, for they, too, are entitled to a prompt decision.^{25/}

Furthermore, referral is warranted because the instant situation meets not only the requirements of 10 C.F.R. §2.730(f), but also the guidelines established by the Appeal Board for determining when it will undertake discretionary interlocutory review. As the Appeal Board explained

^{23/} 10 C.F.R. §2.730(f).

^{24/} Allied-General Services (Barnwell Nuclear Fuel Plant Separations Facility), ALAB-296, 2 NRC 671 (1975).

^{25/} Id.

in Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977), such review has been undertaken only where the ruling below:

either (1) threatened the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal or (2) affected the basic structure of the proceeding in a pervasive or unusual manner. (footnote omitted)

The grant of any of the pending motions by the Licensing Board would affect the basic structure of the proceeding in a pervasive and unusual manner. In addition to the fact that the delay would be pervasive it would also be unusual, for to date there have been no Licensing Board decisions granting motions to stay, reopen or delay due to the Three Mile Island accident. In the circumstances, a referral to the Appeal Board would serve to clarify the Commission's policy regarding the impact of Three Mile Island on pending license applications. For these reasons, Applicants request this Licensing Board to refer any adverse ruling to the Appeal Board.

CONCLUSION

For the reasons set forth above, the motion of the NRC Staff to delay or defer this Licensing Board's decision

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on the issue of reopening the record must be denied.
If any of the pending motions are decided adversely to
Applicants, that ruling should be referred to the Appeal
Board.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing
APPLICANTS' REPLY TO NRC STAFF'S ANSWER has been served on
each of the following persons by deposit in the United
States mail, first-class postage prepaid, this 31st day
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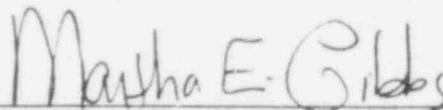
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