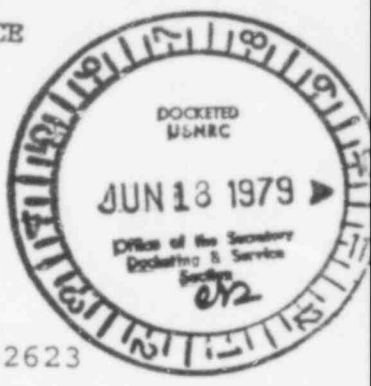
RELATED CORRESPONDENCE



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In The Matter Of)
)
DUKE POWER COMPANY) Dkt. No. 70-2623
)
(Amendment to Operating License SNM-1773)
for Oconee Spent Fuel Transportation and)
Storage at McGuire Nuclear Station))

NATURAL RESOURCES DEFENSE COUNCIL
OPPOSITION TO APPLICANT'S MOTION
FOR SUMMARY DISPOSITION RESPECTING INTERVENOR
NATURAL RESOURCES DEFENSE COUNCIL

Introduction

Most of the arguments advanced by Applicant have been addressed in our opposition to the Staff's Motion for Summary Disposition and in our Motions for Summary Disposition. We will focus here only on those points made by Applicant which we have not already addressed.

As we read Applicant's papers, the following new points emerge:

1. Is NRDC required to present an analysis of the cost and benefits of the proposed action and reasonably available alternatives to it before those issues are required to be addressed in this proceeding?

2. Did the Commission foreclose a decision on an individual spent fuel storage application which would have generic impact?

3. Did the Commission intend to exclude any interim spent fuel storage solution which was a complete answer to the problem and leave open only proposed solutions which do less than resolve the entire interim storage problem?

457 271

(11)

4. In light of DoE's stated intention to prepare a Final Environmental Statement on Interim Storage of Spent Fuel, should the Nuclear Regulatory Commission factor into its consideration of an interim storage proposal whether that proposal will substantially foreclose options being considered by DoE?

We discuss these points below.

Argument

The foundation of the Applicant's complaint with the NRDC evidentiary case is its assertion, erroneously based on Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 98 S.Ct. 1197 (1978), that NRDC must not only identify an alternative to the proposed action and specifically develop and explain how and why that alternative could better substitute for the proposed action, but must also develop a full evidentiary record to support the alternative. Nothing in Vermont Yankee or any other case supports that absurd position. NEPA has been long recognized as an "action-forcing" measure which imposes upon agencies the duty to thoroughly analyze and develop alternatives to proposed actions. §§ 102 (2)(C)(iii) and (2)(E) of NEPA. Those duties exist irrespective of the presence of an intervenor.

In this case, NRDC has developed its case based upon data provided by Applicant and the Staff in discovery and based upon its own research. When discovery was taken of NRDC, much of this data had not been received and analyzed by NRDC, so, not surprisingly, NRDC did not have analyses in all areas.

We, in effect, supplemented that discovery with our subsequently filed affidavits and even attached copies of key documents obtained in discovery to further support our conclusions. We established that:

1. Duke has a cascade plan, not merely a 300-fuel assembly transshipment plan;

2. Duke is undertaking transshipment in order to wait for construction of a government AFR;

3. Duke's transshipment proposal with its limited reach is used by DoE to justify the need for an AFR;

4. If there is no AFR, the cascade plan will run out before there is a permanent waste disposal solution, at which time expanded at-reactor storage will be essential and more expensive in terms of economics and health than if undertaken now;

5. The cascade plan itself will entail substantial health and safety risks, particularly to workers.

For these and other findings identified in previous filings, we argued that the Staff is obligated to conduct a more thorough analysis of the costs and benefits of the cascade proposal and options to it both under NEPA (§§ 102(2)(C)(iii) (if an impact statement is required) and 102(2)(E)(whether or not an impact statement is required)) and under the Atomic Energy Act (10 CFR § 20.1(c)). The Applicant's position is that we cannot prevail because we must ourselves conduct that more thorough analysis. The case law is to the contrary.

In York Committee for a Safe Environment v. Nuclear Regulatory Commission, 527 F.2d 812, 817 fn. 13 (D.C. Cir., 1975), the Court considered the problem of a public interest intervenor making a record on the as low as practicable (the precursor to ALARA) issue:

> We note, however, that it would be unrealistic to expect public interest litigants to underwrite the expense of mounting the kind of preparation and presentation of evidence that is ordinarily required in this type of case.

In Office of Communications of the United Church of Christ v F.C.C., 425 F.2d 543, 546-47 (D.C. Cir. 1969, then Judge Burger wrote:

> . . . a "Public Intervenor" who is seeking no license or private right is, in this context, more nearly like a complaining witness who presents evidence to police or a prosecutor whose duty it is to conduct an affirmative and objective investigation of all the facts and to pursue his prosecutorial or regulatory function if there is probable cause to believe a violation has occurred.
>
> . . . .
>
> It was not the correct role of the Examiner or the Commission to sit back and simply provide a forum for the intervenors; the Commission's duties did not end by allowing Appellants to intervene; its duties began at that stage.

In Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 620 (2d Cir. 1965), the Court held that the failure of the agency to fully develop the record on the availability of alternatives (note this case arose even before NEPA) was a fatal flaw:

> The Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant facts.

In this case, NRDC has gone far beyond meeting the threshhold of alerting the agency to viable alternatives and has actually developed some of the evidence to demonstrate why those alternatives are preferable to the proposed action.[1] Surely here it cannot be doubted that, if the alternatives are relevant, the Staff has the duty to develop a credible and thorough record with respect to them.[2] Public Service Co. of New Hampshire (Seabrook), CLI-78-14, NRC 952, 974 et seq., Commissioner Bradford concurring in part and dissenting in part.

However, Applicant argues the alternatives and approach to alternatives suggested by NRDC are not relevant because to accept our view would necessarily produce a conflict with the Commission's policy articulated when it established the procedures for evaluating interim spent fuel storage proposals.

1/ One alternative, reracking at Oconee 1 and 2, was originally rejected by the Applicant and Staff as unavailable, although NRDC insisted that it was available. Subsequent events have proven NRDC right and enforce the view that the examination of alternatives should be more thorough and unbiased.

2/ Then Chief Judge Bazelon has suggested that the burden of proof required to prevail cannot legally be placed beyond the financial ability of the participant to meet (American Public Power Ass'n v. FPC, 522 F.2d 142, 147 (D.C. Cir. 1975)(Bazelon, C.J., concurring); Citizens for Safe Power v. NRC, 524 F.2d 1291, 1304 (D.C. Cir. 1975)(Bazelon, C.J., concurring)) and that the NRC may have to provide intervenors with the experts needed to make their case (Friends of the Earth v. Atomic Energy Commission, 485 F.2d 1031 (D.C. Cir. 1973)(Opinion of Chief Judge Bazelon)). While these remedies are different from what we seek here, they do underscore the invalidity of the Applicant's view that at this state of the record the Staff may not be required to fulfill its NEPA and Atomic Energy Act duties by preparing the thorough analyses required to determine whether the proposed action should be approved.

The error in Applicant's analysis stems from its misinterpretation of what the Commission did. All the Commission did was conclude that at that time there was no basis for declaring a generic moratorium on processing interim spent fuel storage proposals but that the facts of specific cases could alter the situation and thus in each such case the Boards should weigh the five factors. Applicant argues that, because our definition of independent utility requires the action to be licensed to be a solution to the spent fuel storage problem for that applicant, it could not merely "ameliorate" the problem, and the Commission clearly endorsed mere amelioration.[3] In fact, Applicant takes its argument to the logical but absurd

---

3/ It is not clear what the Commission meant by ameliorate the problem. In one significant sense the only solutions to the spent fuel storage problem are reactor shutdown or an available permanent waste repository, and thus anything short of that ameliorates the problem. At the time the Commission addressed the issue, it clearly considered reprocessing a live possibility, and from its perspective reprocessing would solve the problem. See NRC Order Respecting Reactor Licensing and GESMO dated November 11, 1975, reversed in part, Natural Resources Defense Council v. Nuclear Regulatory Commission, 539 F.2d 824 (2d Cir. 1976), judgment vacated and remanded for consideration of mootness, sub nom. Allied-General Nuclear Services v. Natural Resources Defense Council, 46 U.S.L.W. 3447 (Jan. 17, 1978), withdrawn by order dated December 23, 1977, withdrawal affirmed Westinghouse Electric Corp. v. Nuclear Regulatory Commission, ___ F.2d ___ (3d Cir., decided April 19, 1979). Shortly after that time the Commission rejected the NRDC petition on a safety finding on nuclear waste based on its conclusion that a nuclear waste solution would be available "when needed," which at that time meant approximately 1985. What this illustrates, of course, is that many things have changed since 1975 and that it is at best a hazardous business to attempt to determine precisely how the Commission would have decided this case if the case had been presented in 1975, which is the reason the Commission left to this Board the duty to consider the five factors, unhampered by any Commission prejudgements of the issues.

conclusion that it was the "Commissioner's concern that such actions not solve the spent fuel storage problem" (Applicant's Memorandum in Support of Summary Disposition Respecting Natural Resources Defense Council). Thus, so Applicant reasons, if Duke sought approval of a storage expansion of Oconee that would accommodate the lifetime of Oconee fuel, NRC would have to reject it because it does more than ameliorate the problem. Obviously such ludicrous results turning on semantics were not intended by the Commission.

In addition, Applicant fails to recognize that independent utility is only one of five factors to be considered, and approval of other spent fuel storage proposals merely proves that in those cases the five factors favored approval. Here the five factors, particularly factors 1, 2, and 5, do not favor the approval because there is no independent utility for the 300 assembly transshipment, future courses of action are significantly foreclosed, and there is no need for the proposed action in light of the Oconee 1 and 2 reracking.[4]

4/ Applicant articulates the problem which transshipment is designed to meet as follows (Memo in Support of Summary Disposition Respecting NRDC, p. 21):

> The underlying purpose of the proposed action is to provide an interim solution to an immediate problem, vis [sic], the possible loss of a full core reserve capability in 1979 and termination of operations of Oconee in early 1981 due to insufficient spent fuel storage space. The only other viable option that provides a solution to this problem is reracking of Oconee 1 and 2 spent fuel pool with "non-poison" racks.

Reracking is essentially approved and, even were it to be slightly dealved, the only risk Applicant faces is the need to off-load an FCR during the period of delay, an essentially low probability

[footnote continued on next page]

Applicant also claims that the scope of the inquiry is merely the limited proposal before the Board and not the entire cascade plan. Throughout the internal Duke documents which we have analyzed, the cascade plan is treated as the Duke plan. Mr. Bostian's litigation affidavit (attached to Applicant's Response to NRDC's May 21 Motion for Summary Disposition) is merely an articulation of possibilities and flexibilities which have been essentially rejected by Duke in its development of a plan for handling spent fuel. This case is markedly different[5] from that part of Minnesota v. Nuclear Regulatory Commission, ___ F.2d ___ (D.C. Cir., decided May 23, 1979), where the Court found that the Staff's findings on the five factors were essentially uncontroverted. Here they are not only controverted with respect to the existence of a complete plan for several

---

[footnote continued from previous page]

event. Even to cover that, at most Applicant needs a conditional approval to transship a limited amount of Oconee fuel -- probably no more than the equivalent of one reload.

5/ Another significant difference between that case and this one is that, at least in the Vermont Yankee appeal, there was no request made to overturn the license and suspend plant operation. Even in cases where no stay of construction or operation is requested or granted, a court decision finding the Commission action flawed in a vital area will require a suspension of future licensing actions. See, e.g., the decision in Natural Resources Defense Council v. Nuclear Regulatory Commission, 547 F.2d 663 (D.C. Cir. 1976), reversed and remanded sub nom. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 98 S.Ct. 1197 (1978), where no shutdown was ordered and the regulations promulgated by the Commission after that decision (General Statement of Policy "Environmental Effects of the Uranium Fuel Cycle," August 13, 1976) which concluded, inter alia, "no new full-power operating license, construction permit, or limited work authorization should be issued" pending further development of a basis for an S-3 rule.

interim storage measures, but the Staff in its papers concedes the existence of such a plan. Once that point is reached, the relevance of the entire plan to this proceeding should be uncontrovertible.

Finally, Applicant asserts that the only generic impact statement relevant in this case is the one being prepared by the NRC. Memo in Support of Summary Disposition Respecting NRDC, p. 8. Clearly that was the case when the Commission issued its policy statement, but since then DoE has made interim spent fuel storage a policy matter over which it asserts jurisdiction and for which it is preparing a generic impact statement evaluating the range of spent fuel storage options, including those proposed by Duke, those proposed by NRDC and government and private AFRs. Once before, the Commission was faced with the issue of how to handle its own licensing of a discrete proposal for action in the face of a generic review of the overall policy which underlay that proposal. In U.S. Energy Research and Development Administration (CRBR), CLI-76-13, 4 NRC 67, 82-84, the Commission concluded that pursuant to the Energy Reorganization Act, particularly Section 103, the responsibility for policy planning and development was with ERDA (now part of DoE) and that NRC should defer to that policy judgment and not second-guess it or take actions inconsistent with it.

In this case, DoE has not yet concluded its generic review but, as we demonstrate and as Applicant's internal documents concede, action by the NRC at this time on this

transshipment proposal will affect the final DoE decision on the broader policy question. Thus at this time, if the Commission is to even-handedly apply the logic of its decision in the CRBR case, then this licensing action must not be consummated, at least until completion of the DoE review and than only consistent with it. To date, the tentative DoE position on the question we raise here -- offsite versus onsite storage of spent fuel -- has been to favor onsite storage with the use of offsite storage only as a last resort (Preliminary Estimates of the Charge for Spent-Fuel Storage and Disposal Services (DOE/ET-0055) July 1978):

> There is considerable DOE interest in minimizing AFR storage requirements and shipments by encouraging the use of at-reactor storage by further densification and/or expansion. It is assumed that there would be economic and other advantages to the utilities of keeping their spent fuel at their own reactor sites rather than shipping it to interim AFR storage basins.

This general issue is addressed in more detail in DoE's Draft Environmental Impact Statement Supplement, Storage of U.S. Spent Power Reactor Fuel (DOE/EIS-0015-DS Supplement) December 1978. As a result of reracking Oconee 1 and 2, the Applicant's cascade proposal could be avoided, were a commitment now made to an ISFSI at Oconee. The longer Applicant has open the option to transship, the more cascading will occur and the less time will be available to build an ISFSI, thus forcing more transshipping. The Applicant's proposal is contrary to the

4/57 280

present DoE preference on spent fuel storage, artificially creates the appearance of a need for an AFR, and should not be approved.

Respectfully submitted,

Anthony Z. Roisman

Anthony Z. Roisman
Natural Resources Defense Council
917-15th Street, NW
Washington, D.C. 20005
(202)737-5000

Dated: June 15, 1979