July 5, 1979

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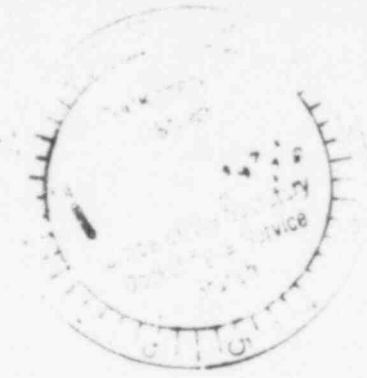

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Doc. Nos. 50-338 SP
VIRGINIA ELECTRIC AND POWER COMPANY)		50-339 SP
	)	
(North Anna Power Stations, Units 1 and 2)	)	(Proposed Amendment to Operating License NPF-4)

VEPCO'S ANSWER OPPOSING INTERVENORS' MOTION TO AMEND PETITION TO INTERVENE

Intervenors Potomac Alliance and Citizens' Energy Forum, Inc., filed their "Intervenors' Motion to Amend Petition to Intervene" on June 15, 1979.* Relying on the recent case of Minnesota v. Nuclear Regulatory Commission, Nos. 78-1269 & 78-2032 (D.C. Cir. May 23, 1979), they ask the ASLB (1) to add a contention on "seismicity" to the contentions in dispute in this proceeding and either (2) to modify the issues already in controversy so that they "address the suitability of the North Anna spent fuel pool for permanent waste storage" (Motion 6) or (3) to postpone the evidentiary hearing in th- -o-ceeding until the NRC completes the generic rulemakin, called for in Minnesota v. NRC. The applicant, Virginia Electric and Power Company (Vepco), opposes the intervenors' motion for the

*The ASLB's "Order Allowing Additional Time for Certain Answers and Resetting Time for Hearing," June 29, 1979, gave the Staff and applicant five additional days to answer the intervenors' motion.

reasons set out below.

I. Minnesota v. NRC

Intervenors have mistaken the holding of Minnesota v. NRC, which involved the appeal of the NRC's approval of spent fuel pool expansions for the Vermont Yankee and Prairie Island stations. Intervenors read the case thus:

> [T]he mandate of the Court of Appeals stands out with clarity: no licensing board may permit expansion of the capacity of any spent fuel pool unless it determines that this storage method is safe and environmentally satisfactory on a permanent basis, or that it is safe and environmentally satisfactory as an interim measure to be employed until such time, to be determined in accordance with the Administrative Procedure Act, as the development of a permanent method is reasonably assured.

(Motion 6 (emphasis in original).) This is a considerable overstatement of what the Court of Appeals actually said.

Indeed, the Court in Minnesota v. NRC rejected an essentially identical argument by the petitioners in that case:

> Petitioners . . . submit: Prior to the issuance of a license amendment permitting expansion of on-site storage capacity, the NRC must make a determination of probability that the wastes to be generated by the plants can be safely handled and disposed of.
>
> . . . .
>
> . . . Petitioners propound a number of theories for why the "fact" of this likelihood must be tested within the context of an adjudicatory proceeding and its evidentiary procedures. We do not consider these contentions in detail. We agree with the Commission's position that it could properly consider the complex issue of nuclear waste disposal in a "generic" proceeding such as rulemaking, and then apply its deter-

> minations in subsequent adjudicatory proceedings. Where factual issues do not involve particularized situations, an agency may proceed by a comprehensive resolution of the questions rather than relitigating the question in each proceeding in which it is raised. . . .
>
> . . . The breadth of the questions involved and the fact that the ultimate determination can never rise above a prediction, suggest that the determination may be a kind of legislative judgment for which rulemaking would suffice.

(Slip op. 9-11.) The court thereupon remanded the case to the Commission for "clarification and consideration" (slip op. 3). Noting that the current feasibility and likelihood of implementation of nuclear waste disposal solutions was a matter contested in the "Table S-3" rulemaking, now pending before the Commission, the court directed the NRC to consider, in light of the S-3 proceeding, whether there is reasonable assurance that an offsite storage solution will be available by the expiration of the plant's operating licenses and, if not, whether there is reasonable assurance that the fuel can be stored safely at the site beyond those dates (slip op. 14). The court added:

> We neither vacate nor stay the license amendments, which would effectively shut down the plants.

(Slip op. 14.)

Since the court in Minnesota v. NRC did not stay the license amendments at issue in that case, it is hard to understand why the intervenors think that the case should have the opposite effect in the North Anna proceeding. The intervenors do

not give their reasons for thinking so. To the contrary, Vepco believes that the court would treat the North Anna proceeding the same as the Prairie Island and Vermont Yankee cases. That is, assuming the license amendment for North Anna 1 and 2 were granted and the case appealed to the D.C. Court of Appeals, we believe that the court would, as it did in Minnesota v. NRC, leave the license amendment in effect but remand the case to the Commission to await the outcome of the generic proceeding. Although the "clarification and consideration" called for by Minnesota v. NRC could in theory require conditions to be imposed on existing licenses, it is not itself a condition to further licensing.

We note for the Board's information that the NRC Solicitor appears to read Minnesota v. NRC the same way Vepco does. A copy of his recent memorandum to the Commission is attached to this answer. Note his conclusion on page 7:

> It hardly seems open to question that the generic waste disposal issue should be handled in a generic proceeding rather than litigated in these eight individual proceedings and what others are to come. The court of appeals has made quite clear that a generic proceeding is proper. Moreover, at this point, the court has declined to interfere with the grant of license amendments to expand spent

> fuel storage capacity while the Commission considers whether and when an offsite waste disposal solution will be accomplished. Given the Commission's present thinking on the government's movement toward a waste disposal solution and its linkage to reactor licensing, spent fuel pool expansion proposals should continue to be acted upon now but be made subject to the outcome of whatever conditions the Commission may later impose as a result of its future generic waste disposal proceeding [footnotes omitted].

Finally, before leaving Minnesota v. NRC, Vepco wishes to point out one crucial point that the intervenors have completely ignored: The question involved in Minnesota v. NRC does not become relevant to this licensing proceeding at all until the point at which the presently licensed capacity of the fuel pool (416 assemblies) is exceeded. That is, the ultimate waste disposal situation is changed not one bit by the installation of the high-density fuel racks and the storage of 416 fuel assemblies, because the production and storage of that amount of spent nuclear fuel is already licensed. Accordingly, there is no conceivable basis for postponing the hearing as the intervenors request. At the very least this Board has the authority to authorize the installation of the high-density racks to store the same amount of fuel that can be stored in the old racks.

II. New Issues

We have said that the Minnesota v. NRC decision has no effect on the issues in this licensing proceeding, because the court rejected the argument that the ultimate disposal issue must be litigated in individual proceedings. Even were it otherwise, though, the peculiar manner in which the Potomac Alliance and CEF propose that it be litigated in this particular proceeding is totally unjustified.

A. Seismicity.

The intervenors urge the board to adopt a new contention, entitled "Seismicity":

> The intervenors contend that neither the Applicant nor the NRC Staff have demonstrated that the spent fuel pool will withstand the adverse effects of seismic events to which it may be subjected.

(Motion 1.) The intervenors say not one word about why this new contention is justified by Minnesota v. NRC.* Nor is it apparent why it should be. Whether or not the North Anna Power Station becomes a permanent repository for spent fuel, the Design Basis Earthquake, which is determined by the seismic history of the site, does not change. Assuming that Minnesota v. NRC is the intervenors' alleged "good cause" for raising this new contention at this late date, the intervenors have failed to show, or even to suggest, how the ulti-

*Nor do they say what the new contention has to do with storing 966 instead of 400 spent fuel assemblies, which is what is at issue in this proceeding.

mate waste disposal issue has any bearing on seismicity. Nor have intervenors suggested any reason to think the seismic design of the North Anna fuel pool might be inadequate. Accordingly, they have failed to give the "basis" for the seismicity contention (see 10 CFR § 2.714(b)). They have also not attempted to show why their untimely motion to amend their petition to intervene is justified by the five factors of 10 CFR § 2.714(a)(1).

In the event that such a contention were admitted to this proceeding, Vepco would ask the ASLB to take official notice of the entire record in the proceeding of several years ago that involved the North Anna geologic fault. One of the findings in that proceeding was that there is "relevant, material and competent evidence of record establishing the adequacy of the seismic design for North Anna Power Station Units 1, 2, 3 and 4." Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), LBP-74-49, 7 AEC 1183, 1221 (1974), aff'd, ALAB-256 (1975), aff'd, North Anna Environmental Coalition v. NRC, 533 F.2d 655 (D.C. Cir. 1976).

B. Modification of Existing Issues.

As an alternative to postponing the evidentiary hearing, the intervenors suggest that the Board modify the issues in controversy "such that they address the suitability of the North Anna spent fuel pool for permanent waste storage" (Motion 6). The intervenors give no explanation of what they mean, and it is certainly not apparent what precise modifica-

tions they have in mind.

The only issues in controversy left in this proceeding* are Radioactive Emissions (accidents only), Missile Accidents, and Service Water Cooling System. The intervenors make no effort to specify how these issues are changed by the ultimate waste disposal issue. They make no effort to state a "basis" for modifying the contentions "with reasonable specificity," see 10 CFR § 2.714(b), and no effort to address the five factors of 10 CFR § 2.714(a)(1). See 10 CFR § 2.714(a)(3).**

In passing, we note that the intervenors indicate (Motion 6) that the parties to this proceeding are not qualified to present evidence on permanent spent fuel disposal and may not be able to address the suitability of the North Anna fuel pool as a permanent waste repository. Vepco does not believe that the intervenors have any basis for claiming that Vepco

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*Subject to reconsideration by the Board. See Order Allowing Additional Time for Certain Answers and Resetting Time for Hearing, June 29, 1979.

**We note that, even assuming Minnesota v. NRC constitutes "good cause" for lateness, at least three of the remaining four factors weigh against the intervenors' motion to amend. The generic proceeding on the ultimate disposal issue that the NRC Solicitor recommends appears likely to be another "means whereby the petitioner's interest will be protected," 10 CFR § 2.714(a)(1)(ii). Intervenors have admitted that they cannot present evidence on the ultimate disposal issue (Motion 5), and so their participation cannot "reasonably be expected to assist in developing a sound record," 10 CFR § 2.714(a)(1)(iii). Finally, it is clear from their motion itself that the intervenors' participation will "broaden the issues" and "delay the proceeding," 10 CFR § 2.714(a)(1)(v).

and the NRC Staff are not able to present evidence on the ultimate disposal issue. As we believe we have shown above, however, it is not necessary to present such evidence in this proceeding.

III. Conclusion

For the reasons stated above, Vepco urges the Board to deny the Intervenors' Motion to Amend Petition to Intervene.

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DATED: July 5, 1979