

District of Columbia Circuit in Minnesota v. NRC, 602 F.2d 412 (D.C. Cir. 1979). They assert that the license amendment was issued contrary to law and must be withdrawn. Petition at 2-3. The Staff disagrees and opposes the petition for review on the grounds that Intervenors have not made a satisfactory showing to warrant Commission review under the applicable provisions of 10 C.F.R. § 2.786.

II. DISCUSSION

Commission review of Appeal Board decisions and actions is governed by the provisions of 10 C.F.R. § 2.786. Pursuant thereto, a party may file a petition for review of an Appeal Board decision on the ground that the decision is "erroneous with respect to an important question of fact, law, or policy." 10 C.F.R. § 2.786(b)(1).^{3/} The petition (and answer thereto) must address certain prescribed matters. 10 C.F.R. § 2.786(b)(2), (3). These matters are addressed serially below. The grant or denial of a petition is within the discretion of the Commission with certain specified exceptions. 10 C.F.R. § 2.786(b)(4). The Staff submits that Intervenors have not met their burden of showing that the Appeal Board Decision herein was "erroneous."

1. Summary of Decision

This proceeding was instituted upon publication, on May 22, 1978, of a notice of the proposed issuance of an operating license amendment involving the

^{3/} See, e.g., Puget Sound Power and Light Company (Skagit Nuclear Power Project, Units 1 and 2), CLI-80, 10 NRC (January 16, 1980); Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-78-11, 7 NRC 735 (1978).

expansion of the North Anna spent fuel pool capacity.^{4/} The Potomac Alliance (Alliance) and Citizens Energy Forum (CEF) intervened in this matter. The unopposed motion of CEF to be consolidated with the Alliance was granted by Licensing Board Order, dated June 6, 1979.

On May 11, 1979, the Applicant filed a motion for summary disposition of all admitted contentions. The motion was opposed by the Intervenors^{5/} and supported by the Staff.^{6/} The Board granted the summary disposition motion in its entirety in an August 6, 1979 ruling (and subsequent explanatory Order of August 24, 1979) thereby dismissing the proceeding.

On September 12, 1979, Intervenors filed an amended statement of exceptions to the Licensing Board ruling. The exceptions were rejected by the Appeal Board in its Decision of March 24, 1980 following the submission of written briefs^{7/} and oral argument.^{8/} The instant petition seeks review of one aspect of the Appeal Board Decision.

2. Statement of Issue Presented Below

As relevant to the instant petition, Intervenors filed a motion before the Licensing Board, dated June 15, 1979, seeking either to suspend the proceeding

4/ 43 Fed. Reg. 21957.

5/ See Answers thereto, dated June 5, 25, and July 23, 1979.

6/ See Answers thereto, dated June 5 and 25, 1979.

7/ See Applicant brief in opposition, dated November 30, 1979, and Staff Brief in opposition, dated December 10, 1979.

8/ Held January 3, 1980.

at bar or expand the scope of contentions to address the suitability of the North Anna spent fuel pool for permanent storage. Intervenors argued that the opinion of the D.C. Circuit in Minnesota, supra, dictated this result. The Applicant and Staff filed briefs in opposition to the Intervenors' motion. The motion was denied in the Board's August 6, 1979 ruling.^{9/} Intervenors took exception to this determination. The exception was denied by the Appeal Board, following oral argument, and the Licensing Board ruling thereon upheld in ALAB-584.^{10/}

3. Correctness of Appeal Board Decision

Intervenors frame the issue for review as follows: "whether the Appeal Board erred in concluding that prior to issuing an [operating license] amendment allowing [spent fuel pool] modification, the Commission is not required under the National Environmental Policy Act (NEPA) [statutory citation omitted] to consider fully the health, safety and environmental consequences which may result from the action subsequent to the expiration of the [operating license]. Petition at 2 (emphasis in original). The Staff believes that this issue should be answered in the negative.

It is undisputed that the decision of the D. C. Circuit in Minnesota, supra, is the centerpiece of this issue. The Minnesota decision involved an appeal

^{9/} The ruling was explained in the Licensing Board's Order of August 17, 1979. Several Licensing Boards have denied similarly grounded motions or contentions. See Consumer Power Co. (Big Rock Point Nuclear Plant), Licensing Board Order Following Special Prehearing Conference, dated January 17, 1980, at 20 (unpublished); Commonwealth Edison Co. (Zion Station, Units 1 and 2), Licensing Board Memorandum and Order Denying the State of Illinois' Motion for Stay of Proceedings (unpublished) (August 27, 1979).

^{10/} Transcript of oral argument at 5-14, 54-55, 64-69, 83-87.

from the decision of the Appeal Board (the Commission declined review) granting two separate spent fuel pool expansion applications. The Court remanded the case to the Commission for such proceedings as it deems appropriate to determine "whether there is reasonable assurance that an offsite storage solution will be available by the years 2004-09, 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 sites beyond these dates." 602 F.2d at 418.^{11/} In so doing, the Court endorsed the Commission's position that such a determination could be reached in the context of a "generic" proceeding such as rulemaking and then "appl[ied] . . . in subsequent adjudicatory proceedings." Id. at 416.

Significantly, the court declined to vacate or stay the license amendments at issue and neither explicitly nor implicitly directed that future individual spent fuel pool expansion proceedings be prohibited or deferred until completion of the then contemplated "generic" proceeding on waste disposal. Id. at 418. The Appeal Board correctly observed that, had the Court desired to achieve this result, it would have so indicated. ALAB-584, slip op. at 29. Indeed, the Court was careful not to disagree with the decision of the Second Circuit Court of Appeals in NRDC v. NRC, 582 F.2d 166 (2d Cir. 1978), affirming the conclusion that "Congress did not intend in enacting the Atomic Energy Act to require a demonstration that nuclear waste could safely be disposed of

^{11/} In his concurring opinion, Judge Tamm explicitly stated that this result is mandated by both NEPA and the Atomic Energy Act. At the same time, he agreed with the majority opinion that licensing actions need not be halted pending the prescribed determination concerning future spent fuel pool storage. Id. at 419-20.

before licensing of nuclear plants was permitted." (emphasis added) Id.^{12/}
at 417. Nor should such a requirement be implied by analogy in Minnesota.

In response to the Minnesota remand, the Commission announced its initiation of a generic rulemaking proceeding on the issue of waste management disposal.^{13/} In a subsequent related notice of proposed rulemaking, the Commission declared that spent fuel pool expansions could proceed during the pendency of the waste confidence rulemaking subject to the later application of whatever determinations are reached in the rulemaking proceeding.^{14/}

Specifically, the Commission explained:

During this [generic] 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

^{12/} The decision of the D. C. Circuit itself in an analogous case is instructive. In the case of Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1081-82 (D.C. Cir. 1974) petitioners argued, in part, that it constituted a denial of due process when the Commission denied them the opportunity to litigate their challenges to the interim acceptance criteria (IAC) for emergency core cooling systems in an individual operating license proceeding to which they were a party and instead invited their participation in a rulemaking proceeding on the acceptability of the IAC being conducted simultaneously. Citing approvingly from Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 624-25 (1973), the Court squarely rejected this argument and held to the contrary.

^{13/} 44 Fed. Reg. 45362 (August 2, 1979).

^{14/} 44 Fed. Reg. 61372 (October 25, 1979).

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 underway will be subject to whatever final determinations are reached in this proceeding.^{15/}

As the Appeal Board aptly observed in ALAB-584,^{16/} any doubt about the conduct of individual proceedings during the pendency of the waste confidence rulemaking was removed by the Commission in its denial of a petition for reconsideration of aspects of its proposed rulemaking notice.^{17/} The Commission therein explicitly rejected the petitioner's argument that, pursuant to Minnesota, individual proceedings must be suspended until completion of the rulemaking proceeding. The Commission stated that the petitioner's claim was based on a "misreading" of that decision.^{18/} Given clear Commission precedent in this matter, the Appeal Board concluded that it could not accept Intervenor's position that the North Anna spent fuel pool expansion could not be authorized until the generic rulemaking proceeding was completed.^{19/}

4. Commission Review Should Not be Exercised

Undeniably, long-term waste management is an important issue of public policy. The Commission's institution of a waste confidence rulemaking

^{15/} Id. at 61373.

^{16/} Slip op. at 30-31.

^{17/} Letter from the Secretary of the Commission to Karin P. Sheldon, dated January 2, 1980, a copy of which was forwarded to the Appeal Board by Staff counsel on January 9, 1980.

^{18/} Id. at 1.

^{19/} ALAB-584, slip op. at 31.

proceeding is responsive to the Minnesota directive and should provide a meaningful forum for ascertaining when a safe permanent means of waste disposal will be available and what course to follow if the availability succeeds the expiration of the facility licenses involved.

In advocating Commission review of ALAB-584, Intervenors mistakenly argue that a "clear statement of whether the Commission reads Minnesota to permit continued issuance of [spent fuel pool expansion amendments] has yet to be made" which would be of "invaluable assistance to licensing boards and appeal boards." Petition at 7. The Commission has, as already noted, clearly stated that individual spent fuel pool expansion actions need not be suspended during the ongoing waste confidence rulemaking proceeding. Rather, it has provided that such individual actions will be subject to whatever terms the Commission may later impose as a result of the generic proceeding. The Licensing Board and Appeal Board in this proceeding, as well as licensing boards presiding in other adjudications,^{20/} clearly understand the Commission's position in this regard. The Commission's response to Minnesota is reasonable. It was properly followed by the Appeal Board in ALAB-584 and Intervenors present no cogent arguments why the result reached therein is erroneous.

^{20/} See n. 9 supra.

III. CONCLUSION

In light of the above, the Staff recommends that the petition for review of ALAB-584 be denied.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Steven Goldberg".

Steven C. Goldberg
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 29th day of April, 1980

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	Docket Nos. 50-338 SP
VIRGINIA ELECTRIC AND POWER COMPANY)	50-339 SP
)	(Proposed Amendment to Facility
(North Anna Nuclear Power Station,)	Operating License NPF-4 to Permit
Units 1 and 2))	Storage Pool Modification)

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF BRIEF IN OPPOSITION TO INTERVENORS' PETITION FOR REVIEW OF ALAB-584" 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 29th day of April, 1980.

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