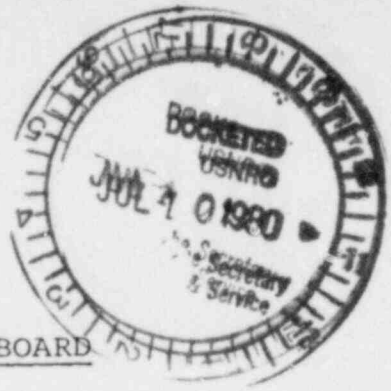

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
DUKE POWER COMPANY	)	Docket Nos. 50-369
	)	50-370
(William B. McGuire Nuclear Station, Units 1 and 2)	)	

APPLICANT'S RESPONSE TO "CESG'S MOTIONS TO ADD NEW CONTENTIONS AND TO REOPEN THE MCGUIRE OPERATING LICENSE HEARING" 1/

On April 18, 1979, the Atomic Safety and Licensing Board ("Licensing Board") issued an Initial Decision in the captioned proceeding. Duke Power Company (William B. McGuire Nuclear Station, Units 1 and 2), LBP-79-13, 9 NRC 489 (1979). Therein, the Licensing Board, on the basis of specific findings of fact and conclusions of law derived therefrom, ordered that the Director of the Office of Nuclear Reactor Regulations, upon making requisite findings with respect to uncontested matters not embodied in the Initial Decision, was authorized to issue operating licenses for the units. 9 NRC at pp. 547-8. However, the Licensing

1/ By order of June 27, 1980, the Licensing Board extended to July 7, 1980 the time for filing of Applicant's response to the instant motions. By oral order of July 7, 1980, the Licensing Board further extended Applicant's filing deadline until July 9, 1980. This latter extension was based upon Applicant's representation that its request was unopposed by either the NRC Staff or CESG.

Board stayed the effectiveness of the Initial Decision "until further order by the Board following the issuance of a supplement to the NRC Staff's Safety Evaluation Report ("SER") addressing the significance of any unresolved safety issues." Id. On May 23, 1980, the NRC Staff issued the aformentioned supplement to the SER. Thereafter, on May 30, 1980, Applicant filed a motion requesting a termination of the stay of the effectiveness of the Initial Decision. Accompanying its June 9, 1980 response to Applicant's motion, Intervenor, Carolina Environmental Study Group ("CESG"), filed the instant motions requesting the reopening of the McGuire operating license hearing and the admission of six new contentions regarding "the consequences of the combustion of a significant hydrogen release [generated by a Three Mile Island ("TMI")-type accident] in a Westinghouse pressure suppression containment. . . ." We submit that CESG has failed to meet the standards regarding the reopening of a hearing record, and thus, CESG's motion to reopen the record, as well as its motion to add contentions, must be denied.

The Commission has recently announced that, with regard to litigation of TMI-related issues in individual licensing proceedings, "present standards governing the reopening of hearing records to consider new evidence on TMI-related issues should be strictly adhered to." 45 Fed. Reg. 41738, 41740 (June 20, 1979). The standards governing reopening

of hearing records are clearly set forth in Kansas Gas & Electric Company (Wolf Creek Generating Station, Unit No. 1) ALAB-462, 7 NRC 320, 338 (1978):

> As is well settled, the proponent of a motion to reopen the record has a heavy burden. Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-359, 4 NRC 619, 620 (1976). The motion must be both timely presented and addressed to a significant safety or environmental issue. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973); Id., ALAB-167, 6 AEC 1151-52 (1973); Georgia Power Company (Alvin W. Vogtle Nuclear Plant, Units 1 and 2), ALAB-291, 2 NRC 404, 409 (1975). Beyond that, it must be established that 'a different result would have been reached initially had [the material submitted in support of the motion] been considered.' Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1), ALAB-227, 8 AEC 416, 418 (1974).

With respect to motions to reopen which are untimely without good cause, "the movant has an even greater burden; he must demonstrate not merely that the issue is significant, but, as well, that the matter is of such gravity that the public interest demands its exploration." Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 2), ALAB-486, 8 NRC 9, 21 (1978). See Vermont Yankee Nuclear Power Corporation, supra, 6 AEC at 523. In short, for CESG to be successful its motion must show that (1) the issue is timely raised, or that good cause exists for an untimely filing, (2) that the issue is significant and, if it has not been timely raised without good cause, is of such gravity that the public interest demands its further

exploration in a reopened hearing, and, (3) based on the material submitted in support of its motion, that a different result would have been reached had such material been considered.

With respect to timeliness, the TMI accident serves as the basis for CESG's motion to reopen the record. We submit that generation of hydrogen at the TMI facility was a well-known and highly publicized fact immediately after the TMI accident in March of 1979, and should have been raised by CESG shortly thereafter. Support for our position is threefold. First, we note that intervenors/petitioners in other proceedings have raised TMI issues, including hydrogen generation, in a timely manner (e.g., Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), Docket No. 50-289 (Restart) (issues raised on October 22, 1979); Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), Docket Nos. 50-445A and 50-446A (issues raised on May 7, 1979)). Second, an examination of the record reflects that CESG's delay in raising the issue was not due to lack of information. As indicated by the official service list, CESG has been routinely furnished NRC Staff documents concerning TMI related issues including hydrogen generation. (See, Letter to all Pending Operating License Applicants from Domenic B. Vassallo, NRC, Concerning

"Follow-up Actions Resulting From the NRC Staff Reviews Regarding The TMI Unit 2 Accident," at p. 2, Enclosure 1 at pp. 1-2, and Enclosure 3 at pp. 1-5 (September 27, 1979)).2/ Third, as early as November 1, 1979, CESG exhibited a familiarity with the hydrogen generation issue, for on that date it publicly stated its intention to raise hydrogen generation as an issue. See the attached November 1, 1979 Charlotte Observer newspaper article.

On the basis of the above, we submit that CESG's instant motion to reopen the record to explore the issue of hydrogen generation is untimely. CESG has made no attempt to explain its tardiness. Thus, with respect to the first criterion set forth above dealing with reopening, the instant motion is deficient.

In the absence of a timely filing and good cause, the second reopening criterion, as noted above, requires that CESG not only demonstrate that the issue it seeks to raise is significant but also that it is of such gravity that the public interest demands its further exploration in this proceeding. Applicant acknowledges that hydrogen generation is an important safety issue not only at the McGuire

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2/ In this regard we note that CESG has long had access, via the local Public Document Room in Charlotte, North Carolina, to major TMI related studies. For example, the "Report Of The President's Commission On The Accident At Three Mile Island" (October 1979), which discusses, inter alia, hydrogen generation, has been on file in the Charlotte Public Document Room since December 18, 1979.

facility but, indeed at every nuclear reactor. However, we maintain that the issue is not of such gravity that public interest demands its further exploration in a reopened proceeding. In this regard we note that the issue of hydrogen generation has been and continues to be the subject of NRC Staff and Commission action. Specifically, the Commission has required and industry has completed implementation of specific actions regarding hydrogen generation (See attached Affidavits). Further, the Commission has stated its intent to continue its pursuit of generic rulemaking on these issues, and during the interim, to generically promulgate intermediate requirements, if necessary, as a condition to issuance of new operating licenses. (NUREG-0660, "Action Plans For Implementing Recommendations of the President's Commission and Other Studies of TMI-2 Accident," Task II.B.8. (May 1980)). In short, the public interest concerns expressed by CESG have been and are currently being addressed generically by the Commission.

As can be seen, the Commission and NRC Staff actions with regard to hydrogen generation is a continuing Staff effort to improve reactor safety standards. Under such a circumstance, the record should not be reopened unless CESG has demonstrated that there is an "indication in the 'new evidence' that the decision on the existing record would permit the use of unsafe equipment or create some other situation similarly fraught with danger to the public that merits immediate attention." Pacific Gas & Electric

Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, ___ NRC ___ (Slip. op. at pp. 19-20) (June 24, 1980). CESG has failed to make such a demonstration; rather, as noted, Commission and Staff actions to date regarding hydrogen generation clearly indicate that licensing of McGuire with regard to the proposed contentions at hand, is not "fraught with danger to the public." 3/ In short, the Commission has taken and is currently taking actions to assure that, with respect to the issue of hydrogen generation, the public will be protected. In view thereof, we maintain that CESG has failed to adequately demonstrate that hydrogen generation is such a grave issue that public interest demands that it be further explored by reopening this operating license hearing.

3/ If the hydrogen generation issue presented a situation significantly adverse to the public health and safety, clearly the Commission would have shut down the operating nuclear reactors in this nation, including units which have the same ice-condenser-type containment as the McGuire facility. However, rather than shutting down nuclear plants, the Commission is proceeding with licensing actions such as the current operating license proceeding for the Sequoyah facility which also has an ice-condenser containment. Significantly, it is the NRC Staff's position that with respect to Sequoyah, and indeed all other pressurized water reactor facilities, licensing should not be delayed pending the completion of a generic rulemaking on the hydrogen generation issues. See SECY-80-107 "Proposed Interim Hydrogen Control Requirements For Small Containments" (February 22, 1980); SECY-80-107A (April 22, 1980); SECY-80-107B (June 20, 1980). Accordingly, the issue cannot be viewed as so grave as to warrant that it be addressed in this proceeding.

Although we submit that CESG's instant motion is both untimely and does not demonstrate that the public interest demands exploration in a reopened license proceeding, we maintain that even if these questions were resolved in CESG's favor, for CESG to be successful, it must demonstrate by the material submitted in support of its motion that a different result would have been reached in the Initial Decision 4/ had such material been considered. Vermont Yankee Nuclear Power Corporation, supra, 6 AEC at 523. As the Appeal Board in Vermont Yankee stated:

> In other words, to justify the granting of a motion to reopen, the moving papers must be strong enough, in light of any opposing filing, to avoid summary disposition. Thus, even though a matter is timely raised and involves significant safety considerations, no reopening of the evidentiary hearing will be required if the affidavits submitted in response to the motion demonstrate that there is no genuine unresolved issue of fact, i.e., if the

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4/ Any argument that an Initial Decision has not been issued is in error. The plain language of the decision document specifies that it is an "Initial Decision" not a partial initial decision. The fact that the ordering clause does not conform to 10 CFR §§2.760, 2.762 should not be viewed as an indication in this instance that an Initial Decision has not been rendered. To the contrary, it was premature for the Licensing Board to include appellate right references, since it retained jurisdiction by virtue of its action staying the effectiveness of the decision. Further Licensing Board action is necessary to lift the stay and at that time the appellate instructions can be given.

Regardless of how one views the status of the Initial Decision, the above standard was recently applied by the Appeal Board in its consideration of a partial initial decision. See Diablo Canyon, supra.

> undisputed facts establish that the apparently significant safety issue does not exist, has been resolved, or for some other reason will have no effect upon the outcome of the licensing proceeding. [6 AEC at 523. (footnote omitted)].
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> * * *
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> If the motion is disposed of on such grounds, the "record" (in the broad sense) will necessarily have been supplemented by the introduction of the affidavits, letters or other materials accompanying the motion and the response thereto. The "hearing record," however, has not been reopened. Typically, in this situation, the result will be designated a denial of the "motion to reopen the record," even though that description of the action taken does not precisely reflect what transpired. [Id., (footnote omitted)].

Indeed, the Commission specifically reiterated this standard in its Policy Statement regarding litigation of TMI related items in instances where initial decisions have already been issued:

> Thus, for example, where initial decisions have been issued, the record should not be reopened to take evidence on some TMI-related issue unless the party seeking reopening shows that there is significant new evidence, not included in the record, that materially affects the decision. [45 Fed. Reg. at 41740].

Applying this criterion here, we submit that CESG's action is fatally flawed in that the basis of its motions and contentions, that a TMI-2 type accident which generates a significant amount of hydrogen is a credible accident for the McGuire facility, is unsupported and, indeed, unsup-

portable. 5/ CESG's position, that a TMI-2 type accident resulting in excessive hydrogen generation can occur at the McGuire facility, is apparently premised on the fact that such a condition did occur at the Three Mile Island facility. With regard to such a condition the Commission has conclusively established that excessive hydrogen generation during the TMI accident was a direct result of operator interference with the emergency core cooling system ("ECCS").

> We are, of course, aware that the Three Mile Island accident resulted in hydrogen being generated far in excess of the hydrogen generation design basis assumptions of 10 CFR 50.44. This was because the operator interfered with actual ECCS operation with the result that the safety system did not operate as designed and as 50.44 assumed it would operate. [Metropolitan Edison Company, Three Mile Island Nuclear Station, Unit 1), CLI-80-16, _____ NRC _____ (May 16, 1980) (Slip. op. at p. 2)].

Indeed, the Commission explicitly stated that the critical issue regarding excessive hydrogen generation is "the likelihood of an operator interfering with ECCS operation." Id. at pp. 3 - 4. We maintain, and our enclosed affidavits clearly demonstrate, that actions taken subsequent to the TMI accident preclude the possibility of inadvertant interference with the ECCS in the event of an accident

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5/ To the extent that CESG attempts to raise events other than a TMI-type situation, we note that such are not "new", and, accordingly, such attempts must fail.

requiring its initiation. 6/ In short, we submit that the undisputed facts in the enclosed affidavits clearly establish that excessive generation of hydrogen due to a TMI-type accident at the McGuire facility is not a credible event. CESG presents no material to dispute these facts, and thus, has failed to establish that the initial decision would be altered based upon litigation of these issues. 7/ So postured, CESG has failed to comply with the third reopening criterion.

Mindful of the Commission's admonition that "present standards governing the reopening of hearing records to consider new evidence on TMI-related issues should be strictly adhered to" (45 Fed. Reg. at 41740), we submit that from the foregoing CESG has failed to meet the standards set forth for reopening the records in licensing proceedings, and, thus, CESG's motion should be denied. 8/ Accordingly,

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6/ It is clear that affidavits are an appropriate means for responding to motions to reopen a record. Vermont Yankee, supra, 6 AEC at 523.

7/ With respect to the specific contentions, we submit that the enclosed Affidavits demonstrate that there is no basis for Contentions 1, 2, 3 and 4. Further, in as much as Contentions 5 and 6 are premised upon Contentions 1, 2, 3 and 4, they must likewise fail.

8/ We submit that to countenance what CESG requests here would be contrary to the basic precept of administrative law that administrative actions must at some time draw to a close. In this regard we note that Mr. Justice Jackson's discussion of this issue over 35 years ago is still applicable today:

(footnote continued on following page)

we urge this Licensing Board to deny CESG's instant motion. 9/

(footnote continued from previous page)

> One of the grounds of resistance to administrative orders throughout federal experience with the administrative process has been the claims of private litigants to be entitled to rehearings to bring the record up to date and meanwhile to stall the enforcement of the administrative order. Administrative consideration of evidence -- particularly where the evidence is taken by an examiner, his report submitted to the parties, and a hearing held on their exceptions to it--always creates a gap between the time the record is closed and the time the administrative decision is promulgated. This is especially true if the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful. If upon the coming down of the order litigants might demand rehearings as a matter of law because some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening. [ICC v. Jersey City, 322 U.S. 503, 515 (1944). See Northern Indiana Public Service Co., supra, 8 NRC at 418].

9/ Applicant is cognizant of the Commission's action in TMI-1, CLI-80-16, supra, wherein certain aspects of the hydrogen generation question were determined to be the proper subject of a hearing. However, that was not a "reopening" case with respect to this issue, and thus is to be distinguished from the situation here. There, the Commission was procedurally precluded from examining the substantive merits of the contentions advanced. Whereas here, reopening standards direct that such an examination occur and, as previously noted, the record be supplemented, as necessary, with affidavits to support the decision on the motion to reopen. Indeed, to hold that the Commission decision in CLI-80-16 is binding in all cases would be contrary to the later guidance of the Commission that reopening standards be "strictly adhered to." 45 Fed. Reg. at 41740.

Respectfully submitted,

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