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 O.L.
	)	50-370 O.L.
(William B. McGuire Nuclear Station, Units 1 and 2)	)	

NRC STAFF RESPONSE TO: (1) CAROLINA ENVIRONMENTAL STUDY GROUP'S (CESG) MOTION TO ADMIT NEW CONTENTIONS AND REOPEN THE MCGUIRE OPERATING LICENSE HEARING AND (2) DUKE POWER COMPANY'S (DUKE OR APPLICANT) MOTION TO TERMINATE THE STAY OF INITIAL DECISION

On April 18, 1979 the Atomic Safety and Licensing Board (Licensing Board) issued its Initial Decision in this proceeding, making findings of fact and conclusions of law on the matters in controversy and authorizing the issuance of an operating license consistent with the Board's Initial Decision. Duke Power Company (William B. McGuire Nuclear Station, Units 1 and 2), LBP-79-13, 9 NRC 489 (1979). The Licensing Board stayed its decision, however, until further order following the issuance of a supplement to the Staff's Safety Evaluation Report (SER) addressing those generic unresolved safety issues under continuing study that have both relevance to facilities of the type under review and potentially significant public safety implications. Ibid, at 545.

In May, 1980, the NRC Staff issued its Safety Evaluation Report Supplement No. 3 (SER, Supp. 3) addressing the significance of the unresolved generic safety issues as they relate to the McGuire facility. Copies of the SER, Supp. 3 were furnished to members of the Licensing Board on June 19, 1980 and copies have been furnished to the parties.

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On May 30, 1980, the Applicant, Duke Power Company (Duke) filed a motion to terminate the stay of the Initial Decision[1/] based on issuance of SER Supp. 3 in response to the Licensing Board's Order of April 18, 1979.

On June 9, 1980, Intervenor, Carolina Environmental Study Group (CESG), filed a pleading opposing Duke's motion to lift the stay. CESG stated that matters being considered following the Three Mile Island, Unit 2 (TMI-2) accident raise unresolved safety issues that must be addressed in further safety supplements before the Licensing Board's Order should be lifted. On June 19, 1980, CESG also filed a motion requesting the Licensing Board to reopen the McGuire operating license hearing to add six new contentions arising out of the TMI-2 accident.[2/] The contentions CESG seeks to raise for the most part involve the effects of hydrogen generation released in a TMI-2 type accident.[3/]

Based on the considerations set forth below, the NRC Staff does not support Duke's motion to lift the stay since it believes under current Commission requirements the Licensing Board's decision may not be issued in its present form.[4/] The NRC Staff opposes CESG's motion to reopen the record and its request to add contentions based on TMI-2 matters as that motion is presently drafted. The NRC Staff, however, would not oppose an additional time of ten (10) days for

1/ "Motion to Terminate Stay of Initial Decision" (May 30, 1980).

2/ "CESG's Motion to Admit New Contentions and to Reopen the McGuire Operating License Hearing" (June 19, 1980).

3/ CESG Contentions, attached to CESG's motion to reopen the record.

4/ On June 19, 1980, the Board granted NRC Staff's request for an extension of time until July 10, 1980 to respond to both Duke's motion to lift the stay of the Initial Decision and CESG's motion to reopen the McGuire operating license record to consider TMI-2 related contentions. Order, June 19, 1980.

CESG to state a contention(s) consistent with current Commission regulations in support of an appropriate motion to reopen the record.

DISCUSSION

Duke's Motion

1. The requirements of the Licensing Board's stay have been met; however, we believe it inappropriate for the Initial Decision to issue in its present form.

   Issuance of the SER, Supp. 3 meets the condition specified in the Licensing Board's Initial Decision of April 18, 1979. There is nothing left to be done with respect to the unresolved safety issue matters. Moreover, CESG has not indicated any interest in raising contentions with respect to unresolved safety matters addressed in SER, Supp. No. 3. CESG, however, argues in opposition to Duke's motion to lift the stay that SER, Supp. No. 3 is not complete since matters raised in TMI-2 are not addressed. CESG's argument that the stay should not be lifted for this reason is without merit, since, as discussed below, the Commission has established specific procedures for dealing with TMI-2 related matters.

   We believe, however, that the Initial Decision should not be issued in its present form.

On October 10, 1979, the Commission issued an Interim Statement of Policy and Procedure stating that licenses would not issue without review by the Commission.[5/] On November 9, 1979, the Commission issued additional policy guidance with respect to issuance of licenses by the Commission in the form of Appendix B to 10 C.F.R. Part 2 ("Suspension of 10 C.F.R. 2.764 and Statement of Policy on Conduct of Adjudicatory Proceedings"). In that statement of policy the Commission directed that:

> Atomic Safety and Licensing Boards shall hear and decide all issues that come before them, indicating in their decisions the type of licensing action, if any, which their decision would otherwise authorize. The Boards' decisions shall not become effective until the Appeal Board and Commission actions outlined below have taken place.
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> In reaching their decisions the Boards should interpret existing regulations and regulatory policies with due consideration to the implications for those regulations and policies of the Three Mile Island accident. In this regard it should be understood that as a result of analyses still under way the Commission may change its present regulations and regulatory policies in important respects and thus compliance with existing regulations may turn out to no longer warrant approval of a license application.

Moreover, Appendix B provides that,

> [w]ithin sixty days of the service of any Licensing Board decision that would otherwise authorize licensing action, the Appeal Board shall decide any stay motions that are timely filed... If no stay papers are filed, the Appeal Board shall, within the same time period (or earlier if possible), analyse the record and decision below on its own motion and decide whether a stay is warranted. It shall not, however, decide that a stay is warranted without given the affected parties an opportunity to be neard."
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> * * * *
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> The running of the sixty day period shall not operate to make the Licensing Board's decision effective.

5/ 44 Fed. Reg. 58559

Appendix B also provides that:

> Reserving to itself the right to step in at any earlier stage of the proceeding, including the period prior to issuance of the Licensing Board's initial decision, the Commission shall, promptly upon receipt of the Appeal Board decision on whether the effectiveness of a Licensing Board decision should be further delayed, review the matter on its own motion...

Thus, the Commission in Appendix B has explicitly provided for review by the Appeal Board and by the Commission itself prior to issuance of any operating license. The Ordering Clauses of the Initial Decision, in this case, issued prior to the promulgation of Appendix B of Part 2, did not reflect these further steps, and simply authorized the Director of Regulation to issue licenses upon completion of NRC Staff review of matters not embraced in the Initial Decision.

We believe that upon terminating its stay the Initial Decision should be modified, in its Ordering Clauses, and related provision, to reflect the review procedures of Appendix B of Part 2.

Since the Motion by Duke appears to envision a simple termination of the stay, giving operative effect to the Initial Decision as presently framed, we do not support such Motion. We disagree with footnote 4 on page 3 of Applicants Motion, in which Applicant asserts that the Policy Statement of November 9, 1979, Appendix B of 10 C.F.R. Part 2, is not applicable to McGuire since a complete initial decision had been issued. We do not believe that the Initial Decision of April 18, 1979 can be properly characterized as issued. It was stayed by the Licensing Board as part of

the Initial Decision. 9 NRC, at 547-48. See also: Duke Power Company (William B. McGuire Nuclear Station, Units 1 and 2), Order [ASLAB], Slip. op., (Unpublished) June 21, 1979.

Moreover, Board action terminating the stay should abide disposition of CESG's Motion to reopen the proceeding. Upon disposition of such motion, the stay should be terminated and the Initial Decision modified to reflect the applicable review procedures of Appendix B (as well as further matters, if any, considered as a result of the Motion to Reopen).

CESG's Motion to Reopen

1. CESG has not met the standards for reopening the record in this proceeding.

The record was closed in this proceeding on August 31, 1978 (Tr. 2672-73). The Licensing Board's Initial Decision, however, stayed the effect of the Initial Decision for the sole purpose of receiving the Staff Safety Evaluation supplement addressing the significance of any unresolved generic safety issues in accordance with Gulf States.[6/] The stay of the Initial Decision preserved the status quo at that point in the proceeding where the record was closed. Initial Decision, at 547-48. This SER has now been issued by the Staff. Nothing remains to be done with respect to the proceeding in this respect. Thus, the status of the record in this proceeding remains closed.

6/ Gulf States Utilities Company (River Bend, Units 1 and 2), ALAB-444, 6 NRC 760 (1977). Accord: Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-491, 8 NRC 245 (1978).

In order to reopen the record in a proceeding:

> ...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 Corporation (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).7/

Moreover, as the Appeal Board has recently indicated:

> The fact that a new proposal is in the wind does not perforce warrant reopening a record. For that result, there must be 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 and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, Slip. op., at 19-20 (June 24, 1980).

With respect to TMI related issues, the Commission on June 16, 1980, issued a Policy Statement which specifies how TMI related matters are to be taken into account in operating license proceedings.8/ In the Policy Statement, the Commission reaffirmed that:

7/ Kansas Gas and Electric Company, et al., (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, at 338 (1978). Accord: Metropolitan Edison Company (Three Mile Island Nuclear Station, Units No. 2), ALAB-486, 8 NRC 9, 21-22 (1978).

8/ "Further Commission Guidance For Power Reactor Operating Licenses: Statement of Policy" 45 Fed. Reg. 41738 (June 20, 1980).

> ...present standards governing the reopening of hearing records to consider new evidence on TMI-related issues should be strictly adhered to. Thus, for example, where initial decisions have been issued, the record should not be reopened to take evidence on some TMI-related issues unless the party seeking reopening shows that there is significant new evidence, not included in the record, that materially affects the decision.

The Staff does not object to CESG's motion on the grounds of timeliness, but we do object to the motion for failure to meet the other standards for reopening. CESG's Motion makes no showing which satisfies these standards. Other than reference to the TMI-2 accident and the hydrogen release and combustion involved in that event, matters generally recognized to be significant, there is no indication of why CESG believes that "a different result would have been reached..." in the McGuire case had the new information been considered. There are no allegations of some clear and close analog or other reasonable nexus between the event at TMI-2 and the issues CESG wishes to raise concerning the operation of the McGuire facilities which might have lead to a different result in the McGuire proceeding.

2. The contentions proposed to be considered in the "reopened" proceedings, attached to CESG's Motion of June 9, 1980, are not framed as admissible contentions.

The Commission has recently discussed the matter of admissibility of issues relating to hydrogen gas control in connection with two questions certified to the Commission by the Licensing Board in the matter of Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1). The Commission held that the hydrogen generation assumptions of 10 C.F.R. 50.44 should not be waived under 10 C.F.R. 2.758. However, the Commission noted that:

> ...quite apart from 10 CFR 50.44, hydrogen gas control could properly be litigated in this proceeding under 10 CFR Part 100. Under Part 100, hydrogen control measures beyond those required by 10 CFR 50.44 would be required if it is determined that there is a credible loss-of-coolant accident scenario entailing hydrogen generation, hydrogen combustion, containment breach or leaking, and offsite radiation doses in excess of Part 100 guideline values. The design basis assumptions of 10 CFR 50.44, in particular the assumption that hydrogen generation following a loss-of-coolant accident is dependent on ECCS design as opposed to actual ECCS operation, do not constrain the choice of credible accident sequences used under 10 CFR 100.11(a). Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1090 (D.C. Cir. 1974).9/
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> * * *
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> We have stated above that the hydrogen control issue can be litigated under 10 CFR Part 100. Under Part 100 the likelihood of an accident entailing generation of substantial (in excess of 10 CFR 50.44 design bases) quantities of hydrogen, the likelihood and extent of hydrogen combustion, and the ability of the reactor containment to withstand any hydrogen combustion at pressures below or above containment design pressure would all be at issue. A critical issue here would be the likelihood of an operator interfering with ECCS operations.10/

9/ Metropolitan Edison Company (Three Mile Island Nuclear Station, CLI-80-16, Slip. Op. at 2 (May 16, 1980). (A motion for reconsideration of CLI-80-16 has been filed.)

10/ Id. at 3.

The contentions proposed by CESG are not cast along the lines that CLI-80-16 indicated may be litigated.[11/] None are cast in terms which raise the likelihood, at McGuire, of an accident generating substantial quantities of hydrogen, or the likelihood and extent of hydrogen combustion, and those contentions which mention effects on containment (Contentions 1 and 2) are simply based on the assertion of the occurrence of a "Three Mile Island 2 type of accident." Contention 3 does not even suggest a basis upon which the postulated event can be related to either the events at TMI or to McGuire.

In short, CESG's contentions are defective as presently framed and the Motion does not satisfy the standards for reopening. However, because CESG contentions were filed in this proceeding on June 9, 1980 a week before the Commission's policy statement of June 16, 1980 and within a month after the Commission's decision in CLI-80-16, we believe

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11/ In this regard, see Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit NO. 1) "Memorandum and Order on Hydrogen Control Contentions" Slip op. at 5 (May 30, 1980) where the Atomic Safety and Licensing Board based on CLI-80-16 framed the following contentions: "The licensee has not demonstrated that in the event of a loss-of-coolant accident at TMI-1:

1. substantial quantities of hydrogen (in excess of the design basis of 10 C.F.R. 50.44) will not be generated;

2. that, in the event of such generation, the hydrogen will not combust,

3. that, in the event of such generation and combustion, the containment has the ability to withstand pressure below or above the containment design pressure, thereby preventing releases of off-site radiation in excess of Part 100 guideline values."

the Licensing Board should provide CESG an opportunity to revise their motion, to meet, if it can, the requirements for reopening a record, and to reframe their contentions in accordance with the guidance of CLI-80-16. We believe that a period of 10 days should be adequate.

CONCLUSION

Based on the foregoing, the Staff believes that Duke's motion to lift the Board's stay should not be granted as reuqested, but upon disposition of CESG's motion to reopen, the stay may be terminated and the Initial Decision modified as indicated above. CESG's motion to reopen should be denied but it should be given an opportunity, within 10 days from the date of a Board determination, to revise its motion and to specify admissible contentions applicable to the McGuire operating license proceeding.

Respectfully submitted,

Edward G. Ketchen
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 10th day of July, 1980

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO: (1) CAROLINA ENVIRONMENTAL STUDY GROUP'S (CESG) MOTION TO ADMIT NEW CONTENTIONS AND REOPEN THE MCGUIRE OPERATING LICENSE HEARING AND (2) DUKE POWER COMPANY"S DUKE OR APPLICANT) MOTION TO TERMINATE THE STAY OF INITIAL DECISION", dated July 3, 1980, 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 3rd day of July, 1980:

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