

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Robert M. Lazo, Esquire, Chairman
Emmeth A. Luebke, Ph.D.
Richard F. Cole, Ph.D.

SERVED MAY 1 1981

In the Matter of:

DUKE POWER COMPANY

(William B. McGuire Nuclear Station,
Units 1 and 2 -- reopened
Operating License Proceeding)

Docket Nos. 50-369 OL
50-370-OL

May 1, 1981

MEMORANDUM AND ORDER
(Certifying a Matter Directly to the Commission
Pursuant to 10 C.F.R. §2.758)

On March 26, 1981, Duke Power Company (Applicant) filed a motion entitled "Applicant's Request for Waiver, Exception or Exemption from the Full Provisions of Appendix B to 10 C.F.R. Part 2" in the above-identified proceeding. The motion, which was accompanied by the affidavit of A. C. Thies, seeks a waiver, pursuant to 10 C.F.R. § 2.758, of the application of the provisions of 10 C.F.R. Part 2, Appendix B in this proceeding, or alternatively a partial waiver to eliminate the requirement for independent review by the Appeal Board. The motion is also filed in the alternative for an exemption from the provisions of 10 C.F.R. Part 2, Appendix B,

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pursuant to 10 C.F.R. § 50.12. Responses dated April 17, 1981, have been submitted by Carclina Environmental Study Group (CESG) and the NRC Staff.^{1/}

In the aftermath of Three Mile Island, the Commission modified previous policy to permit issuance of new construction permits and operating licenses only after action by the Commission itself (44 Fed. Reg. 58559, October 10, 1979). Subsequently, the Commission adopted the provisions of 10 C.F.R. Part 2, Appendix B, to assure that the implications of the Three Mile Island accident were duly considered in decisions of Atomic Safety and Licensing Boards in connection with new construction permits and operating licenses.^{2/} The Commission's purpose for adopting the specific features of 10 C.F.R. Part 2, Appendix B, is set forth in the statement of consideration accompanying the rule, published in the Federal Register, 44 Fed. Reg. 65049, November 9, 1979:^{3/}

^{1/} Without objection by the parties, the Board, by telephone on April 14, 1981, granted CESG's telephone request for an extension of time to file its reply to Applicant's motion until April 20, 1981. The same opportunity was provided to the Staff by telephone on April 15, 1981.

^{2/} Additional guidance concerning future actions on nuclear power reactor operating licenses has been provided by the Commission's Statement of Policy, 45 Fed. Reg. 85236 (December 24, 1980). Additional licensing requirements for pending construction permit applications and manufacturing license applications have been recently proposed. 46 Fed. Reg. 18045 (March 23, 1981).

^{3/} For additional discussion of background, see the statement of considerations in connection with proposed "Immediate Effectiveness Rule; Commission Review Procedures for Power Reactor Operating Licensees," 46 Fed. Reg. 20215 (April 3, 1981).

[T]he Commission has adopted this approach [the approach reflected in Appendix B] because it achieves the objective of increased Commission supervision of licensing actions while (1) avoiding undue delay and duplication of effort by adjudicators and parties; and (2) allowing the Commission maximum flexibility in terms of deciding whether, in light of its other responsibilities, particular proceedings or issues warrant its early intercession or can appropriately be left to the ordinary adjudicatory processes (subject, of course, to ultimate Commission review at the conclusion of the proceeding).

Section 2.758 of 10 C.F.R. Part 2 provides:

(a) Except as provided in paragraphs (b), (c), and (d) of this section, any rule or regulation of the Commission or any provision thereof, issued in its program for the licensing and regulation of production and utilization facilities . . . shall not be subject to attack by way of . . . argument, or other means in any adjudicatory proceeding involving initial licensing subject to this subpart

(b) A party to an adjudicatory proceeding involving initial licensing subject to this subpart may petition that the application of a specified Commission rule or regulation or any provision thereof, of the type described in paragraph (a) of this section, be waived or an exception made for the particular proceeding.

Section 2.758(b) of 10 C.F.R. is applicable to petitions for waiver of the application of a specified Commission rule (or any provision thereof) of the type specified in paragraph (a). Therefore, it applies to "any rule or regulation of the Commission or provision thereof issued in its program for licensing and regulation of production and utilization facilities Accordingly, this broad scope is sufficient to encompass the Commission's procedural rules in 10 C.F.R. Part 2, including 10 C.F.R. Part 2, Appendix B.

As may be seen, the sole ground for such a petition for waiver is that "special circumstances with respect to the subject matter of the particular proceeding are such that application of the rule or regulation (or provision thereof) would not serve the purposes for which the rule was adopted." The petition is to be accompanied by an affidavit(s) setting forth the special circumstances alleged to justify the waiver and other parties must have the opportunity to respond. On the basis of the petition, accompanying affidavits, and the responses thereto, the Licensing Board is to determine whether a prima facie showing has been made that application of the specific Commission rule or provision thereof to a particular aspect of the proceeding would not serve the purposes for which the rule or regulation was adopted. If such a showing has been made, the Licensing Board shall, before ruling thereon, certify the matter directly to the Commission for determination [section 2.758(d)]. If a prima facie showing has not been made, no evidence or argument directed to the matter will be permitted and the presiding officer may not further consider the matter [section 2.758(c)].

In support of its motion, Applicant asserts three special circumstances, also referred to in the accompanying affidavit: (1) that it is a reopened proceeding, which warrants an expeditious conclusion, and that there is a serious need for a full power license for this summer's peak demand; (2) that the subject matter of the reopened proceeding, hydrogen generation in an ice condenser containment, is a limited issue which is well known to the Commission; and (3) that McGuire is in a unique position relative to the impact of Appendix B, since the Licensing Board had issued, but stayed,

an Initial Decision well before the promulgation of 10 C.F.R. Part 2, Appendix B. According to Applicant these special circumstances regarding the nature and status of this proceeding are such that implementation of the provisions of Appendix B in this case would not serve to promote the objectives of Appendix B, viz., increased Commission supervision while avoiding undue delay and duplication of effort by adjudicators and parties.

In its response to Applicant's motion, CESG asserts that there are no special circumstances "that require short circuiting" the formal steps the Commission has established for consideration of the lessons of TMI on post-TMI licensing of nuclear power plants and argues that the seriousness of this matter requires that they each be completed in an insightful and deliberate manner.

CESG acknowledges that this is a reopened proceeding, but states that such is but a normal expectation of the procedure established to review the consequences of TMI in an orderly manner and in any event there is no emergency need for the power from McGuire. CESG has provided little support for such statements.

CESG does not quarrel with Applicant's assertions that the Commission is already familiar with the issue of hydrogen generation in an ice condenser containment and that McGuire is in a unique position relative to the impact of Appendix B. Instead, CESG notes that the Sequoyah license was granted without the participation of an Intervenor and points to the record built by CESG in this proceeding which "ought to be thoroughly

examined." Additionally, CESH refers to post-Sequoyah studies that need to be carefully examined and "serious evidentiary questions" that may need to be considered. However, waiver of Appendix B as requested would not mean that the Commission completely waives its opportunity to assess the application of its guidance. The Commission would retain its opportunity to review this matter in the usual course of the ordinary adjudicatory processes provided by other provisions of 10 C.F.R. Part 2.

In its response to Applicant's motion, the Staff has assessed the special circumstances advanced by Applicant and concluded that the Licensing Board should find that there is, at least, a prima facie showing of special circumstances in the present case that application of 10 C.F.R. Part 2, Appendix B, would not serve the purpose for which the rule was adopted. Accordingly, the Staff believes that the Licensing Board, without ruling thereon, should certify the matter to the Commission in accordance with 10 C.F.R. § 2.758. We agree.

In support of its conclusion, the Staff notes that (1) the only matter in the reopened proceeding relates to hydrogen control in ice condenser containments and this specific matter was considered at length by the Commission in its review of the Staff's evaluation of this same issue in connection with the uncontested license for Sequoyah Unit 1, a virtual sister facility to McGuire in relevant respects;^{4/} (2) for hydrogen control, McGuire uses a distributed igniter system very similar to that used at Sequoyah; (3) the conditions imposed by the Commission in connection with Sequoyah were the guidance used by the Staff in its assessment of the adequacy of McGuire; (4) the Staff assessment is a major element of the evidence in the McGuire proceeding;

^{4/} Thies affidavit, p. 2; Butler affidavit.

(5) thus, the Commission has, with respect to the sole issue involved in the reopened McGuire proceeding, already provided increased guidance concerning hydrogen control in ice condensers;^{5/} and (6) in light of the extensive direct involvement of the Commission on the matter of hydrogen control in ice condenser containments, the additional review called for by Appendix B before the license is issued appears to entail undue duplication of effort.

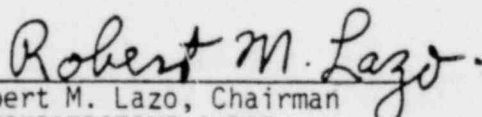
ORDER

Upon consideration of Applicant's Request for Waiver, Exception or Exemption from the Full Provisions of Appendix B to 10 C.F.R. Part 2 and the responses thereto filed by CESG and the NRC Staff, the Licensing Board has determined that a prima facie showing has been made that, due to special circumstances in the McGuire proceeding, application to Appendix B to 10 C.F.R. Part 2 would not serve the purposes for which the rule was adopted. Accordingly, it is this 1st day of May 1981.

ORDERED

That the matter is hereby certified to the Commission in accordance with 10 C.F.R. § 2.758(d).

FOR THE ATOMIC SAFETY AND
LICENSING BOARD


Robert M. Lazo, Chairman
ADMINISTRATIVE JUDGE

^{5/} The Commission has also provided guidance with respect to hydrogen control issues, in general, in its Memorandum and Order, CLI-80-16, in the Three Mile Island-1 Restart case. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), Memorandum and Order, CLI-80-16, 11 NRC 674 (1980). That Memorandum and Order specifies the manner in which hydrogen generation issues are litigable in licensing proceedings.