



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

March 17, 1981



Ms. C. Jean Bishop, Secretary
Atomic Safety and Licensing Appeal
Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

RE: Duke Power Company (Perkins Nuclear Station, Units 1, 2 and 3),
Docket Nos. STN-50-488, STN-50-489 and STN-50-490

Dear Ms. Bishop:

In your letter to J. Michael McGarry, III, Esq., of February 25, 1981, you inquired as to whether the pending appeal in this proceeding, presently scheduled to be argued on April 1, 1981, should be heard at this time. In particular, you directed the parties' attention to the Appeal Board's decision in Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-277, 1 NRC 539 (1975).

The Staff has reviewed the Douglas Point decision as well as the response to your letter provided by William L. Porter, Esq. on behalf of Duke Power Company, by letter dated March 10, 1981 ("Porter Letter"). For the reasons set forth below, the Staff concludes that the presently pending appeal should be heard at this time. In this letter, the Staff will attempt to set forth fully all of the facts, both positive and negative, which have been weighed by the Staff in reaching this conclusion.

BACKGROUND

The application for construction permits in this proceeding was filed in 1974 along with an application for construction permits for the Cherokee Nuclear Station, Units 1, 2 and 3. The six Perkins and Cherokee units employ the concept of engineering standardization, which is based on utilizing the same design for multiple sites. See Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), LBP-78-34, 8 NRC 470, 473 n.1 (1978) (Partial Initial Decision, Construction Permit Proceeding). The construction permits for

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Cherokee were issued in December 1977; construction permits have not yet been issued or authorized for Perkins.^{1/}

On January 9, 1978, the Applicant announced that Perkins Units 1 and 3 will be delayed 3 years (to 1988 and 1993, respectively) and Perkins Unit 2 will be delayed 4 years (to 1991).^{2/} On July 2, 1979, the Applicant informed the Licensing Board that financial commitment for Perkins had been withdrawn and that no final decision had been made as to construction of any of the Perkins units.^{3/} Also on July 2, 1979, the Applicant announced a two-year postponement in commencing operation of Cherokee Units 1 and 2, and stated that financial commitment for Cherokee Unit 3 had been withdrawn. (*Id.*) On February 24, 1981, the Applicant announced an indefinite delay in completing the construction of Cherokee Units 1 and 2.^{4/} Accordingly, the Applicant's plans to proceed with all six of the Perkins and Cherokee units are presently suspended indefinitely, although the Applicant states that "the need for additional generation capabilities in the 1990s is evident" (Porter Letter, at 1).

DISCUSSION

While the Applicant states that the need for additional generating capacity in the 1990s is evident, nowhere does the Applicant state when or if it intends to construct the Perkins facility. Further, the Staff believes that the Applicant's statement may not necessarily mean that it intends to construct Perkins to meet generating demands in the 1990s. Rather, the Applicant states only that further generating capacity will be needed at some time during the 1990s, and it implies that Perkins, or some other facility, might be required during that decade.

^{1/} The Licensing Board has issued three Partial Initial Decisions in Perkins, on environmental consequences of the uranium fuel cycle (LBP-78-25, 8 NRC 87 (1978), radiological health and safety and environmental issues other than alternate sites (LBP-78-34, *supra*), and alternate sites (LBP-80-9, 11 NRC 310 (1980)). Still pending before the Licensing Board are questions involving generic safety issues, TMI-related issues, and Intervenor's motion to dismiss or stay the proceedings indefinitely due to schedule adjustment of Applicant's need for the Perkins units. LBP-80-9, 11 NRC at 336; LBP-78-34, 8 NRC at 511.

^{2/} LBP-78-34, 8 NRC at 509n.19.

^{3/} Letter from William L. Porter, Esq., Duke Power Company, to the Licensing Board, dated July 2, 1979.

^{4/} See Letter from C. Jean Bishop, Secretary, Atomic Safety and Licensing Appeal Board, to J. Michael McGarry, Esq., dated February 25, 1981.

In this regard, the Appeal Board's decision in Douglas Point is particularly pertinent. There, the applicant had announced a delay of 4-5 years in commencing construction and operation of the facility, at a time when evidentiary hearings on the construction permit application had not commenced. The Licensing Board had denied the applicant's motion to proceed with evidentiary hearings on some issues, concluding that fragmented evidentiary hearings "cannot result in any really meaningful findings of fact at this early stage" (1 NRC at 543).

The Appeal Board reversed the Licensing Board's decision and remanded the case for further findings, having determined that (1) there is no legal bar to the disposition of issues which are capable of early scrutiny, and (2) there may have been good reason to dispose of some issues early in the proceeding.^{5/} The case was remanded to the Licensing Board for a determination as to whether early hearings should be held on some issues, upon a consideration of a variety of factors, as follows (1 NRC at 547):

Principal among them are (1) the degree of likelihood that any early findings on the issues(s) would retain their validity; (2) the advantage, if any, to the public interest and to the litigants in having an early, if not necessarily conclusive, resolution of the issues(s); and (3) the extent to which the hearing of the issues(s) at an early stage would, particularly if the issues(s) were later reopened because of supervening developments, occasion prejudice to one or more of the litigants.

The Staff believes that an application of these principles to the Perkins proceeding, while not conclusive, is instructive in determining whether the pending appeal should go forward.

(1) Continuing Validity of Early Findings.

As in Douglas Point, certain determinations in Perkins made in connection with the alternate sites issue are not likely to be affected by the passage of time. These questions, for instance, involve geology, meteorology, and

^{5/} The Appeal Board found it important for the Licensing Board to determine at an early stage "whether (1) the Douglas Point site has a conceivably fatal flaw; (2) additional measures would be required either to allow the use of that site at all or to mitigate potential adverse environmental consequences; and (3) additional studies are called for" (1 NRC at 550). The Appeal Board appeared to have been concerned, in part, about the applicant's statement that if the Douglas Point site were found to be unacceptable, "it would be nine and one-half years before the construction of the facility at another site could be completed" (Id.).

seismology.^{6/} The Staff agrees to some extent with this portion of the Applicant's analysis (Porter Letter, at 3), although we note that new information and studies concerning even these aspects of site suitability may come to light in the course of the next 5, 10 or 20 years.

The Staff believes, however, that other determinations made by the Licensing Board -- including some determinations which are the focus of the pending appeal -- may be subject to change with the passage of time. Such determinations involve, *inter alia*, (a) whether presently planned studies of the interaction of facilities on Lake Norman will point to the possibility of further siting on that body of water;^{7/} (b) whether projected future water needs will develop as anticipated;^{8/} (c) whether the population density near the proposed site will change materially;^{9/} and (d) whether other cooling options, not presently authorized by the State of North Carolina, will become available.^{10/}

In addition, the Staff notes that two other potential developments may affect the alternate sites determination. First, as the Appeal Board is aware, the Commission's siting criteria are presently being re-examined,^{11/} and any future guidelines or regulations which may be developed could have an impact on the suitability of the Perkins site. Secondly, the Staff believes that changes in reactor design and safety features may be anticipated over the course of the next 10 or 20 years, and such changes might affect site selection for the Perkins units.^{12/}

^{6/} See Douglas Point, 1 NRC at 546.

^{7/} LBP-80-9, 11 NRC at 319.

^{8/} Id., at 319 and 335.

^{9/} See id., at 320 n.6.

^{10/} Id. at 322, 320 n.9, and 333.

^{11/} See, e.g., Advance Notice of Rulemaking, "Modification of the Policy and Regulatory Practice Governing the Siting of Nuclear Power Reactors," 45 Fed. Reg. 50350 (July 29, 1980); NUREG-0718, "Proposed Licensing Requirements for Pending Applications for Construction Permits and Manufacturing License" (Draft Report for Comment, August 1980); and NUREG-0625, "Report of the Siting Policy Task Force" (August 1979).

^{12/} In this regard, the Staff disagrees with Applicant's statement that "the passage of time will not alter ... all the other criteria which are included in site suitability and alternative sites. These are essentially fixed" (Porter Letter, p.3) (emphasis added). The Staff notes further that the Applicant has ambiguously stated only that "[t]here is a high

(FOOTNOTE CONTINUED ON NEXT PAGE)

The Staff believes that these factors, taken as a whole, warrant a conclusion that any decision which may be made by the Appeal Board on the alternate sites issue could conceivably lose its validity before the Applicant determines whether or not it intends to construct the Perkins facility, and before the construction permits are issued. Of course, the Staff cannot say that such a result is likely; rather, the Staff states only that such a result is possible. For these reasons, the staff cannot say with certainty whether this factor weighs in favor of or against a deferral of the pending appeal.

(2) Advantage in Early Resolution of the Issue.

The Staff does not perceive that a resolution of the pending appeal at this time will result in significantly advancing the course of this proceeding, except to the extent that it eliminates the need to relitigate the alternate sites issue in depth. As discussed above, other factors are significant in determining the progress of this proceeding. For instance, the Applicant does not appear to have determined whether or not it intends to proceed with its plans to construct the Perkins facility, and several other issues are pending before the Licensing Board which must be resolved before a construction permit may be authorized.

Furthermore, the Staff notes that here, unlike the situation present in Douglas Point, all of the analyses and hearings on the alternate sites issue have been concluded. Here, therefore, there is no need to determine whether the Perkins site "has a conceivably fatal flaw," whether additional measures are required "either to allow the use of that site at all or to mitigate potential adverse environmental consequences," or whether "additional studies are called for." Douglas Point, supra, 1 NRC at 550. Accordingly, the Staff believes that the present circumstances do not require an early resolution of the alternate sites issue, and that, in any event, the present circumstances are not as compelling as those present in Douglas Point.^{13/}

^{12/} (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)
degree [sic] that the findings will retain their validity" (*id.*), and has not stated whether there is a high degree of "likelihood" or of "unlikelihood" that the findings will retain their validity.

^{13/} In this respect, the Staff disagrees with the Applicant's statement that "if evidentiary hearings [in Douglas Point] were determined to be appropriate, there is even greater reason to hear an appeal which has already been briefed by the parties" (Porter Letter, at 2). The Staff believes that the primary reason why the Appeal Board in Douglas Point favored an early resolution of some issues was precisely the fact that no site suitability determination had yet been made by the Staff or the Licensing Board. In Perkins, of course, both the Staff and the Licensing Board have determined that the Perkins site is suitable, with appropriate conditions identified in the Licensing Board's decision. Accordingly, the rationale underlying the Douglas Point decision is inapplicable.

On the other hand, the Staff believes that some benefit would result from proceeding with the pending appeal at this time. As the Applicant notes, the appeal relates to "an issue which has been exhaustively considered in two evidentiary hearings and [has been] thoroughly briefed" (Porter Letter, at 2). The Staff believes that a resolution of the issues raised by the pending appeal will dispel any uncertainty which may exist concerning the Licensing Board's resolution of this issue, at least as of this date. Further, all of the parties, including the intervenors, have already expended considerable financial resources and several years of effort in litigation of this issue. A resolution of the appeal at this time would help to conserve this sizeable investment of time and resources. For these reasons, the Staff believes that this factor, on balance, weighs against a deferral of the pending appeal.

(3) Prejudice to the Parties.

The Staff does not believe that an argument of the pending appeal at this time would prejudice either the Staff or the Applicant, even if issues were later to be reopened because of supervening developments. The Staff cannot say whether any prejudice would be incurred by the intervenors if their appeal were to go forward at this time, although the Staff notes that the intervenors have filed before the Licensing Board a motion to stay or dismiss the proceeding;^{14/} accordingly, the intervenors may be expected to favor a deferral of all proceedings, including their pending appeal.

As noted above, all of the parties have invested a considerable amount of time and resources in the litigation of this issue. If the intervenors are correct as to there being an error of law in the Licensing Board's decision, it would benefit all of the parties to learn that at this time. Further, since the present appeal has been advanced by the intervenors, it would appear to be to their benefit to have a prompt resolution of the issues raised by their appeal.^{15/}

^{14/} See LBP 80-9, 11 NRC at 336.

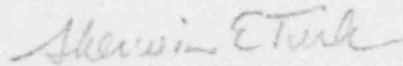
^{15/} In the event that circumstances change following the resolution of this appeal, the intervenors would have other avenues by which to advance information concerning those developments, pursuant to 10 CFR § 2.206. See also, Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-551, 9 NRC 704 (1979). In this regard, the Staff notes that some prejudice to the intervenors may result from a resolution of the instant appeal at this time, in that any motion to reopen the hearings would be required to comply with the principles enunciated in Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978), and related cases.

The Staff recognizes that prosecution of the pending appeal at this time will require an expenditure of time and resources by the Appeal Board and by the parties. The Staff believes, however, that some benefit would result to the parties from that effort, without significant prejudice being incurred. For these reasons, the Staff believes that the factor weighs against a deferral of the pending appeal.

CONCLUSION

On balance, the Staff concludes that there is some advantage in going forward with the appeal at this time. While some further expenditure of time and resources will be required of the Appeal Board and the parties, the Staff believes that such an effort will preserve the value of much of the expenditure of resources which has already been invested in this proceeding. For these reasons, the Staff believes that the pending appeal should be permitted to proceed at this time.

Sincerely,



Sherwin E. Turk
Counsel for NRC Staff

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