



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.



In the Matter of:
DUKE POWER COMPANY
(William B. McGuire Nuclear Station,
Units 1 and 2 -- reopened
Operating license proceeding)

SERVED APR 21 1981
Docket Nos. 50-369-OL
50-370-OL
April 20, 1981

MEMORANDUM AND ORDER
(Denying CESC's Motion For Certification or Referral To
The Commission)

On November 25, 1980, the Atomic Safety and Licensing Board (Licensing Board) granted CESC's motion to reopen the hearing record in the above identified matter to consider four new contentions, all related to hydrogen generation and control arising out of the TMI-2 accident. Previously on September 30, 1980, Duke Power Company (the applicant) had filed a motion for summary disposition regarding its application for a license authorizing fuel loading and low power testing. In its November 7, 1980 response to applicant's motion for summary disposition, CESC moved to add two additional contentions.^{1/} After its

^{1/} CESC proposed Contention 5 states: "Under current practice the NRC is required to issue an environmental impact statement as to the consequences of Class 9 accidents. Such an environmental impact statement is required for McGuire."

CESG proposed Contention 6 states: "The emergency plan for McGuire must, due to the special circumstance of close proximity to a large population center, be revised to provide an emergency response for the city of Charlotte in the event of a Class 9 accident."

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initial filing of November 7, 1980, CESG was given the opportunity to brief the matter by the Licensing Board, and on January 21, 1981, CESG filed "CESG's Memorandum in Support of Motion to Add Further Contentions" (CESG Memorandum). Both Applicant^{2/} and the NRC Staff^{3/} opposed CESG's motion to add further contentions.

On February 13, 1981, the Licensing Board issued its "Memorandum and Order (Denying CESG's Motion to Add 'Further Contentions')." Thereafter, on March 2, 1981, CESG filed an objection to the Licensing Board's Memorandum and Order and a request for certification by the Licensing Board to the Commission pursuant to 10 C.F.R. §2.718(i) or for referral by the Licensing Board to the Commission pursuant to 10 C.F.R. §2.730(f).^{4/} Timely responses were filed by the Applicant and the NRC Staff on April 6, 1981.

^{2/} "Applicant's Response to CESG's Memorandum in Support of Motion to Add Contentions" (February 2, 1981).

^{3/} "NRC Staff Response to CESG's Memorandum in Support of Motion to Add Further Contentions" (February 2, 1981).

^{4/} "CESG's Objection to Memorandum and Order of February 17, 1981 and Motion for Certification or Referral to the Commission" (March 2, 1981) ("CESG Motion"). The Licensing Board Order is dated February 13, 1981, but CESG's motion refers to it by the service date of February 17, 1981.

On March 10, 1981, based on a stipulation among the parties, the NRC Staff requested time of ten (10) days after close of the hearings to respond to CESG's motion for certification or referral. Tr. 4003. For this purpose the record in the reopened hearings was closed on March 25, 1981. Thus, the due date for response, as clarified with the Licensing Board during the telephone conference call on March 25, 1981, was April 6, 1981.

Interlocutory appeals to the Commission may not be taken from a ruling of the presiding officer, except where in the judgment of the presiding officer prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense, the presiding officer may refer the ruling to the Commission. 10 C.F.R. § 2.730(f). A presiding officer has discretionary authority to certify questions to the Commission for its determination. 10 C.F.R. § 2.718(i)

The recent decision of the Atomic Safety and Licensing Appeal Board - ("Appeal Board") in the Allens Creek case on the same issue, that is, preparation of a Class 9 accident environmental supplement under the Commission's Statement of Interim Policy,^{5/} discusses interlocutory appeals quite clearly.^{6/} The Appeal Board in Allens Creek reiterates the Commission's long-standing rule on interlocutory appeals, quoting from Public Service Co. of Indiana (Marble Hill Nuclear Generating Station), ALAB-405, 5 NRC 1190, 1192 (1977):

^{5/} 45 Fed. Reg. 40101, June 13, 1980.

^{6/} Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit No. 1), ALAB-635, Slip Op., March 10, 1981. In Allens Creek, intervenors filed a document consisting of a motion to the Licensing Board for "Interlocutory Appeal per 2.730(f) and Certification of Question per 2.718(i)" and a motion to the Appeal Board for directed certification. The Licensing Board denied the motion addressed to it by Memorandum and Order dated March 2, 1981 (unpublished) and the Appeal Board denied directed certification by ALAB-635.

Almost without exception in recent times, we have undertaken discretionary interlocutory review only where the ruling below either (1) threatened the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal or (2) affected the basic structure of the proceeding in a pervasive or unusual manner.

In Allens Creek, the Appeal Board points out that the fact that the licensing Board's ruling on a significant matter might, on appeal, be found to be erroneous and lead to vacation of the initial decision and remand to the Board below does not constitute sufficient ground, standing alone, for interlocutory appeal.

With respect to certification to the Commission, the Appeal Board has indicated that in the exercise of its very clear authority to certify matters to the Commission under 10 C.F.R. §2.785(d) that:

'[S]uch authority should be exercised sparingly.' See e.g., Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-211, 7 AEC 982, 984 (1974); Consolidated Edison Co. of New York (Indian Point Nuclear Generating Station, Unit 3), ALAB-186, 7 AEC 245, 246 (1974) and cases there cited. Thus '[a]bsent compelling reason, we will decline to certify a question to the Commission.' ALAB-211, supra, 7 AEC at 984.

Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station) and Public Service Co. of New Hampshire (Seabrook Station Units 1 and 2), ALAB-421, 6 NRC 25, 27 (1977).

While these cases are cast in terms of the Appeal Board's exercise of its discretionary review function and in terms of the Appeal Board certification to the Commission under its authority pursuant to 10 C.F.R. §2.785(d), we

believe that they articulate the appropriate standards for us to use in our determination of whether reference or certification is warranted. CESH's motion fails to satisfy these standards.

CESH's request for interlocutory review by motion for certification or referral does not meet the two-part test for interlocutory review of a Licensing Board ruling.^{7/} The motion is devoid of any discussion of immediate and "serious irreparable impact" to it from the Licensing Board's ruling denying admission of the two contentions. Nor does it present any argument that the basic structure of the proceeding was affected in a pervasive or unusual manner by the Licensing Board's ruling. Further, there is no attempt to demonstrate that appellate scrutiny of the Licensing Board's ruling cannot abide the event of the initial decision if it is unfavorable to CESH. CESH's motion, simply stated, asserts that, if the Licensing Board's interpretation of the Commission's Statement of Interim Policy is correct, then the Commission's policy is contrary to NEPA.

It should be noted that Intervenor has had an opportunity to raise the issue, for the Commission has provided a forum upon the showing of special circumstance. The pleadings in the instant case and the Board's decision on February 13, 1981, clearly demonstrate that Intervenor has made no such showing. This failure weighs heavily against its request for certification or referral.

^{7/} This is not a case where rejection of CESH's additional Contentions 5 and 6 affects CESH's standing as a party before the Licensing Board because such rejection would lead to ultimate denial of the intervention petition. Immediate appeal would be permitted in such a case. (10 C.F.R. §2.714a(b)).

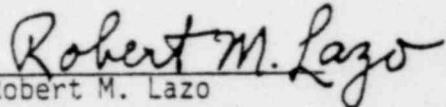
ORDER

For all the foregoing reasons and based upon a consideration of the entire record in this matter, it is, this 20th day of April, 1981

ORDERED

That the motion of CESG for certification or referral to the Commission of the Licensing Board's February 13, 1981 Memorandum and Order denying admission of Contentions 5 and 6 to this proceeding, is denied.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD


Robert M. Lazo
Administrative Judge