UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
CONSUMERS POWER COMPANY	)	Docket No. 50-155
	)	(Spent Fuel Pool Modification)
(Big Rock Point Plant	)	

NRC STAFF RESPONSE TO PETITIONS OF CHRISTA-MARIA, ET AL., JOHN O'NEILL, II, AND JOHN A. LEITHAUSER FOR COMMISSION REVIEW OF ALAB-636

Janice E. Moore
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May 4, 1981

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I. INTRODUCTION

The Staff of the Nuclear Regulatory Commission (Staff) hereby responds to the petitions for Commission review[1/] of the interlocutory decision of the Atomic Safety and Licensing Appeal Board (Appeal Board) set forth in Consumers Power Company (Big Rock Point Plant), ALAB-636, 13 NRC ____ (March 31, 1981). These petitions should be denied on the ground that a petition for review of interlocutory decisions of the

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1/ On April 17, 1981 Christa-Maria, et al., filed a document entitled "Petition For Review of Decision of the Atomic Safety and Licensing Appeal Board That A Environmental Impact Statement Is Not Required As A Matter Of Law." On April 19, 1981 John O'Neill, II, filed a "Motion for Full Commission Review." A document has been received by the Staff by Mr. John A. Leithauser dated April 23, 1981 and entitled "Motion for Review of Decision of the Atomic Safety and Licensing Appeal Baord that an Environmental Impact Statement is not Required as a Matter of Law." Mr. Leithauser has filed this document although he is not a party to this proceeding. Mr. Leithauser filed a motion before the Commission on March 10, 1981 for official notice of his intervenor status. The Commission has referred this motion to the Licensing Board in this proceeding for any action which might be required. In addition to the other grounds discussed in this response for denial of Mr. Leithauser's motion, his motion should also be denied on the ground that he is not a party to this proceeding, and thus is not entitled to seek Commission review of the Appeal Board's decision.

Appeal Board made on questions referred to it by the Licensing Board under § 2.730(f) of the Commission's regulation is not authorized by the Commission's regulations and by Commission precedent.

II. BACKGROUND

This proceeding concerns the application of Consumers Power Company (Licensee) for an amendment to its operating license for the Big Rock Point Plant. This amendment would allow an increase in spent fuel storage capacity from 193 to 441 spent fuel assemblies. Both Christa-Maria, et al., and John O'Neill, II, have been admitted as Intervenors in the above-captioned proceeding.

In its Order Following Special Prehearing Conference dated January 17, 1980, LBP-80-4, 11 NRC 117, the Licensing Board posed the following question to the parties:

> "Where the facility has never been subjected to a National Environmental Policy Act of 1969 (NEPA) review because it was licensed before NEPA, does a license amendment which would permit the continued operation of the facility either require or permit considering a cost-benefit analysis or the need for power in the license amendment proceeding, notwithstanding that the staff may issue a negative declaration?"[2/]

The Staff, Licensee, and Intervenors filed responses. On September 12, 1980, the Licensing Board issued its ruling with regard to this question. Memorandum and Order on NEPA Review, LBP-80-25, 12 NRC 355 (1980).

In its Order the Licensing Board required the Staff to prepare an Environmental Impact Statement (EIS) on the impacts of the spent fuel pool expansion and the continued operation that such expansion would

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2/ Mr. John A. Leithauser, who was denied intervenor status in this proceeding, was permitted by the Licensing Board to respond to its question if he chose to do so. Order Following Special Prehearing Conference, supra, 11 NRC at 133.

permit. Id. at 366. The Licensing Board based its ruling on its determination that:

> "...to the extent that we are asked to approve a Federal action granting a license amendment for the sole purpose of enabling Licensee to utilize a greater term of the license than would otherwise be possible, we consider the action to have a significant effect upon the environment which must be environmentally reviewed under Section 102(2)(C)." (Footnote omitted.)

The Licensing Board focused on the fact that this plant was licensed prior to NEPA and thus never underwent a NEPA review to distinguish this case from other spent fuel pool expansion cases which held that consideration of the environmental impacts of continued operation was not required. Portland General Electric Company (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 266 n. 6 (1979); Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 46 n. 4 (1978).

In its Order the Licensing Board, pursuant to § 2.730(f), referred its ruling to the Appeal Board. By Order dated September 12, 1980, the Appeal Board accepted this referral. The Appeal Board also invited the Council on Environmental Quality (CEQ) to participate as amicus curiae and set up a briefing schedule. Briefs opposing the Licensing Board's ruling were filed by Staff and Licensee. Briefs in support of the Licensing Board's ruling were filed by Intervenors Christa-Maria, et al., and John O'Neil, II, and by CEQ as amicus curiae.[3/] Oral argument was held on January 9, 1981.

3/ Mr. Leithauser also filed a brief supporting the Licensing Board's ruling which the Appeal Board accepted by an Order dated December 19, 1980.

The Appeal Board reversed the Licensing Board's ruling. The Appeal Board stated:

> ".. we find that a reasonable application of NEPA does not require the preparation of an EIS on the continued plant operation likely to result from the proposed expansion of the Big Rock spent fuel pool, assuming that the expansion will not effect any change in reactor operation."

ALAB-636, supra, slip op. at 41. It based this decision on the view that the action sought, expansion of the spent fuel pool, did not affect the method of reactor operation. Id. The Appeal Board viewed the continued operation of Big Rock as a secondary effect of this expansion. Id. at 22-23. The Appeal Board reached the conclusion that, since secondary effects which do not change the environmental status quo do not require an EIS, no EIS was required here. Id. at 26. Both Intervenors now petition for review of this Appeal Board decision.

III. ARGUMENT

A. These Petitions for Commission Review Must be Denied, Since Such Review is Not Authorized by the Commission's Regulations.

As Commission regulations and precedent point out, Commission review of interlocutory orders is generally not favored. See 10 C.F.R. § 2.730(f); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC ____, slip op. at 2 n. 1 (April 1, 1981). In addition, 10 C.F.R. § 2.786(b)(1) of the Commission's regulations states:

> "Within fifteen (15) days after service of a decision or action by an Atomic Safety and Licensing Appeal Board under § 2.785 other than a decision or action on a referral or certification under §§ 2.718(i) or 2.730(f), a party may file a petition for

> review with the Commission on the ground that the decision or action is erroneous with respect to an important question of fact, law, or policy." (Emphasis added.)

This regulation thus specifically does not authorize a party to petition for Commission review of interlocutory Appeal Board decisions which, as here, are on matters referred to an Appeal Board by a Licensing Board. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-77-23, 6 NRC 455, 456 (1977). In its decision in Diablo Canyon the Commission expressly observed:

> "We note that the petition seeks review of an Appeal Board decision on an issue certified to it for determination, and is therefore not authorized by our rules."

The Appeal Board has also expressed its awareness of this limitation. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-500, 8 NRC 323, 325 (1978).

The Petitioners here seek review of an Appeal Board decision which, as stated, is with respect to a matter referred to the Appeal Board by a Licensing Board under § 2.730(f). Therefore, § 2.786(b)(1), Offshore Power Systems and Diablo Canyon apply to the situation now before the Commission. Since review of this decision is unauthorized by the Commission's regulations, these petitions must be denied.

B. The Commission Should not Direct Certification of the Question Resolved by the Appeal Board in ALAB-636.

If the Commission should determine that any of these petitions should be treated as requests for directed certification, under

10 C.F.R. § 2.785(d), of the question which was before the Appeal Board, certification should not be directed.[4/] Section 2.785(d) of the Commission's regulations states:

> "...an Atomic Safety and Licensing Appeal Board may, either in its discretion or on direction of the Commission, certify to the Commission for its determination major or novel questions of policy, law or procedure."

Assuming a party may seek directed Commission certification of an Appeal Board decision under 10 C.F.R. § 2.785(d), rather than direct its petition to the Appeal Board, the requisite grounds for the exercise of Commission discretion thereunder are not present in this case. Under 10 C.F.R. § 2.785(d), the exercise of such discretion is confined to decisions involving "major or novel questions of policy, law or procedure." The present Appeal Board decision involves none of these. It is well established that the Appeal Board's authority to certify a question to the Commission under 10 C.F.R. § 2.785(d) is to be exercised sparingly and only if a "compelling reason" is present.[5/]

4/ Mr. O'Neill in his Motion for Full Commission Review does not state under which section of the Commission's regulations he seeks review of ALAB-636. The petition of Christa-Maria, et al., mentions 10 C.F.R. § 2.786.

5/ Vermont Yankee Nuclear Power Corp., et al. (Vermont Yankee Nuclear Power Station), ALAB-421, 6 NRC 25, 27 (1977) (requested certification involving application of interim Table S-3 declined); Compare Offshore Power Systems (Floating Nuclear Power Plants), ALAB-500, supra (certification granted in case involving Staff proposal to consider Class 9 accidents in environmental impact statement for floating power plant which constituted a novel Staff action that presented a major question of policy with potential ramifications beyond that case and upon which the Appeal Board held divergent views).

The Appeal Board has consistently recognized that the scope of the environmental review performed in connection with a proposed spent fuel pool modification is limited in scope and, as relevant here, does not extend to consideration of the impacts of continued operation.[6/] The only distinction between that line of cases and the instant case is that the former had been the subject of a prior environmental impact statement. The present Appeal Board decision simply determined that the scope of the necessary environmental review in an analogous licensing action should not be broadened simply because that plant was licensed prior to NEPA, and thus had not undergone a prior environmental review. The Appeal Board correctly reasoned that NEPA does not require consideration of continued plant operation in connection with the proposed action since such action simply maintains the environmental status quo in this regard. ALAB-636, supra, slip op. at 26. This decision regarding the scope of the present proceeding is thus in harmony with applicable precedent regarding such licensing actions. Moreover, the factual circumstances which obtain in the case at bar are most unlikely to recur.[7/] Therefore, the Appeal Board decision is without any transcendent importance.[8/]

The Appeal Board's decision was a well-reasoned and pragmatic one which gave due regard to the "spirit of NEPA and the realities of this

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6/ Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 452-58 (1980); Trojan, ALAB-531, supra, at 266-67 and n. 6 (1979); Prairie Island, ALAB-455, surpa, at 46 n. 4 (1978).

7/ Cf. Dairyland Power Cooperative (LaCrosse Boiling Water Reactor), ALAB-638, 13 NRC ____ (April 27, 1981).

8/ Cf. Offshore Power Systems, supra, 8 NRC at 324-25.

case." ALAB-636, supra, slip op. at 32. Petitioners have presented no cogent reasons why this decision is either erroneous or warrants Commission review at this time.

IV. CONCLUSION

In light of the above, the Staff opposes the petitions to review ALAB-636 and requests the Commission to deny them.

Respectfully submitted,

Janice E. Moore
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 4th day of May, 1981.

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CERTIFICATE OF SERVICE

I hereby certify that copies of NRC STAFF RESPONSE TO PETITIONS OF CHRISTA-MARIA, ET AL., AND JOHN O'NEILL, II, FOR REVIEW OF ALAB-636 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 4th day of May, 1981.

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