UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	
VIRGINIA ELECTRIC AND POWER COMPANY	Docket Nos. 50-338-OLA-1 50-339-OLA-1
(North Anna Power Station, Units 1 and 2)	(Receipt of Spent Fuel)

RESPONSE OF NRC STAFF TO APPLICANT'S MOTION FOR DIRECTED CERTIFICATION OF LICENSING BOARD MEMORANDUM OF JUNE 10, 1983

Henry J. McGurren
Counsel for NRC Staff

Dated: September 1, 1983

DESIGNATED ORIGINAL

Certified By

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I. INTRODUCTION

On August 5, 1983, Virginia Electric and Power Company ("VEPCO" or "Applicant") filed a motion[1/] with the Appeal Board requesting directed certification, pursuant to 10 C.F.R. § 2.718(i), of that portion of the Atomic Safety and Licensing Board's ("Licensing Board") Memorandum dated June 10, 1983 ("Memorandum") holding that it could consider the health and safety effects of transportation of spent fuel from Surry to North Anna. The issue VEPCO seeks to certify is:

> Whether the Board may consider the health [and] safety . . . impacts of the transshipment of spent fuel from Surry to North Anna.

The NRC Staff ("Staff") opposes VEPCO's motion for directed certification because it fails to provide the required justification for such an extraordinary procedure. While the Staff agrees with VEPCO that

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1/ Applicant's Motion for Directed Certification, dated August 5, 1983 ("Motion for Directed Certification").

the Licensing Board's holding regarding its jurisdiction to consider the health and safety effects of transportation of spent fuel from Surry to North Anna is erroneous, the Staff submits that this fact alone does not justify interlocutory review. Rather, the Commission's regulations and caselaw provide that directed certification is warranted only where the ruling being certified affects "the basic structure of the proceeding in a pervasive or unusual manner"[2/] or raises a "crucial issue" on which "Commission guidance is needed."[3/] For the reasons discussed below, the Licensing Board's ruling under consideration does not meet these criteria. Accordingly, VEPCO's motion does not merit interlocutory review, and must be rejected.

II. BACKGROUND

The issue of health and safety effects of transportation of Surry spent fuel to North Anna was first raised in this proceeding by the County of Louisa, Virginia and the Board of Supervisors of the County (collectively the "County") in its contentions which were filed on January 17, 1983. To date, the Licensing Board has not ruled on the

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2/ Public Service Co. of Indiana (Marble Hill, Units 1 and 2), ALAB-404, 5 NRC 1190, 1192 (1977).

3/ Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 456-57 (1981).

admissibility of any contention in this proceeding.[4/] By Order (Memorialization of Special Prehearing Conference), dated February 18, 1983, the Licensing Board directed briefing on three issues, one issue being the issue raised here by the instant request for directed certification. VEPCO, the Staff and the remaining petitioner for intervention in this proceeding, Concerned Citizens of Louisa County ("Citizens"), took the position in their briefs that the Board could not consider the health and safety effects of the transshipment of the Surry fuel to North Anna.[5/]

On June 10, 1983, the Licensing Board issued its Memorandum concluding that issues relating to the health and safety of transportation of spent fuel from Surry to North Anna were "fairly raised" by the Federal Register notice in this proceeding and that such issues were

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4/ VEPCO has requested two amendments to its operating licenses for the North Anna Nuclear power Station, Units 1 and 2. One request concerns receipt and storage of 500 spent fuel assemblies from Surry Power Station, Units 1 and 2 and is the subject of this proceeding designated Docket Nos. 50-338/339 OLA-1. The second request concerns expansion of the fuel storage capacity for the North Anna Power Station, Units 1 and 2 and is the subject of a separate proceeding designated Docket Nos. 50-338/339 OLA-2. A 10 C.F.R. § 2.751a joint special prehearing conference was held in both proceedings on February 16, 1983. At that prehearing conference, the Licensing Board admitted two contentions proposed by Citizens in case OLA-2. Order (Memorialization of Special Prehearing Conference), Slip op. at 3, 4 (February 18, 1983). However, the Licensing Board has not ruled on any contentions proffered in case OLA-1.

5/ "Brief of Concerned Citizens of Louisa County on Jurisdictional Issues," dated April 1, 1983; "Applicant's Response to Questions Posed by the Licensing Board," dated April 15, 1983; Applicant's Reply Brief in Response to Board Order," dated April 15, 1983; "NRC Staff Brief on NEPA on Transshipment Issues," dated April 1, 1983; and "NRC Staff Reply Brief on NEPA and Transshipment Issues," dated April 15, 1983.

within the Licensing Board jurisdiction to consider herein. VEPCO's motion for directed certification followed the Licensing Board's June 10, 1983 Memorandum.

On August 22, 1983 Citizens responded to VEPCO's motion asserting, inter alia, that since all the impacts of the proposed shipment could be litigated as "environmental" issues, the Licensing Board's ruling regarding its "health and safety" jurisdiction is of no practical consequence.[6/] By Order of August 24, 1983, the Appeal Board directed VEPCO to respond to this assertion and likewise invited the other parties to reply to this assertion.

III. DISCUSSION

A. The Requirements Ror Directed Certification

Under the provisions of 10 C.F.R. § 2.718(i) and § 2.785(b), Atomic Safety and Licensing Appeal Boards "have the power to direct the certification of legal issues raised in proceedings still pending before licensing boards." Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 482 (1975). Because Commission policy does not favor appellate examination of interlocutory rulings, exceptional circumstances must first be demonstrated before an Appeal Board will exercise its discretionary powers to direct certification of an issue under 10 C.F.R. § 2.718(i). Id. at 483. In accordance with the decision in Public Service Company of Indiana (Marble Hill Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977), Appeal Boards

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6/ "Concerned Citizens of Louisa County Opposition to Applicant's Motion for Directed Certification," dated August 22, 1983, at 7-9 ("Citizens Reply").

will undertake 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 sum, a licensing board may well be in error but, unless it is shown that the error fundamentally alters the very shape of the ongoing adjudication, appellate review must await the issuance of a 'final' licensing board decision." Cleveland Electric Illuminating Company (Perry Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1113 (1982).

The only other method of justifying this extraordinary appellate review is by a showing that there exists a "crucial issue" involving "a significant legal or policy question . . . on which Commission guidance is needed." Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 456-57 (1981). This method of seeking interlocutory review appears only to have been allowed in one instance by an Appeal Board. That referral was allowed based on the Appeal Board's findings that: (1) the issue was a generic issue which involved the interpretation of 10 C.F.R. § 2.714(b) (the circumstances in which a Licensing Board may allow the conditional admission of a contention that it has found to fall short of the degree of specificity mandated by 10 C.F.R. § 2.714(b)); (2) the issue had not been squarely addressed on

an appellate level; (3) the issue had "immediate recurring importance" but would escape appellate scrutiny once the initial decision was issued and (4) the issue was legal in character. Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 465 (1982), vacated in part CLI-83-19, 17 NRC ____ (June 30, 1983).

Thus, a petitioner seeking directed certification of a Licensing Board's decision must satisfy one of the two tests established in Marble Hill, supra, or demonstrate the existence of a "crucial issue" on which Commission guidance is needed in accordance with the guidance established by the Appeal Board in Catawba, supra.

B. VEPCO Has Failed To Demonstrate That Certification Is Justified Based On The Marble Hill Decision

VEPCO only addresses the second prong of the Marble Hill test -- that Appeal Boards will undertake discretionary interlocutory review "only where the ruling below . . . affected the basic structure of the proceeding in a pervasive or unusual manner." Marble Hill, supra, at 1192. VEPCO argues that "every issue added to the proceeding will cause the Board to reexamine activities that are already authorized." Motion for Directed Certification at 15 and 16.

The Staff agrees that the Licensing Board does not have the authority to reexamine activities that have already been approved and that, therefore, the Licensing Board committed error in its June 10, 1983

Memorandum.[7/] However, as the Appeal Board has clearly ruled, "unless it is shown that the error fundamentally alters the very shape of the ongoing adjudication, appellate review must await the issuance of a 'final' licensing board decision." Perry, supra. It is not enough to assert that a ruling is in conflict with Commission case law, policy or

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7/ It is the Staff's position that the health and safety impacts of transshipment of Surry spent fuel to North Anna is not within the Licensing Board's jurisdiction. The Licensing Board has only the authority which is delegated to it by the Commission. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station), ALAB-316, 3 NRC 167, 170 (1976). A Licensing Board may neither enlarge nor contract the jurisdiction conferred upon it by the Commission. Consumers Power Co. (Midland Plant Units 1 and 2), ALAB-235, 8 AEC 645, 647 (1974). To determine what the jurisdiction of the Licensing Board is to be, an Appeal Board has stated that one must look to the Notice of Hearing in the particular case. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-381, 5 NRC 582, 592 (1977). See Midland, supra. The Federal Register notice in the instant proceeding described the nature of the action as the receipt and storage at North Anna, Units 1 and 2 of 500 spent fuel assemblies from Surry and made no mention of a mandate to the Licensing Board to discuss the health and safety impacts of the transshipment of the spent fuel from Surry to North Anna. 47 Fed. Reg. 41892. The Licensing Board opined that issues "fairly raised" by an action noticed in the Federal Register are within the Board's jurisdiction. Memorandum at 3, 4. The health and safety aspects of an action previously authorized by the Commission, transportation of Surry spent fuel, is not a matter "fairly raised" by the instant notice for receipt and storage of Surry spent fuel at North Anna. As the Appeal Board noted in Commonwealth Edison Co. (Zion Units 1 and 2), ALAB-616, 12 NRC 419, 426 (1980) issues "fairly raised" should be limited to those resulting from the action itself and do not include matters already approved or, as in this case authorized by Commission regulations. VEPCO already has authority to transship fuel from Surry to a facility authorized to receive it. 10 C.F.R. § 70.42 provides that any Part 70 licensee may transfer special nuclear material to any person authorized to receive it. Since VEPCO received operating licenses for the Surry units, it is authorized by general license to deliver spent fuel to a carrier for transport so long as VEPCO uses a spent fuel cask which has been issued a Certificate of Compliance by the NRC and complies with other packaging requirements of 10 C.F.R. § 71.12. In addition VEPCO has obtained NRC's prior route approval for the proposed shipments under 10 C.F.R. § 73.37(b)(7).

regulations or that as VEPCO argues in its present petition, there will result an expansion in the scope or length of this licensing proceeding. Id.

Moreover, even VEPCO's argument that the proceeding will be expanded in scope is based on speculation. Not one contention regarding the health and safety of transshipment of fuel has been admitted by the Licensing Board in this proceeding. At the very least, whether or not a ruling affects the basic structure of a proceeding in a pervasive or unusual manner must await the Licensing Board's ruling on contentions. Until such ruling there can only be speculation about how the Licensing Board's assertion of jurisdiction will actually affect the structure of the proceeding.

Citizens asserts that any transshipment issues that it might wish to litigate could be characterized as "environmental" just as easily as "health and safety." Citizens Reply at 8-9. Citizens also notes that VEPCO has not sought directed certification of that aspect of the Licensing Board's Memorandum concerning its jurisdiction over environmental impacts of the proposed spent fuel shipment.[8/] Id. For this

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8/ The Licensing Board while finding it had jurisdiction to consider the reasonably forseeable environmental impacts of transshipment, admitted no contentions relating to such environmental impacts noting that "none of the alleged previously unconsidered environmental impacts adverted to by [Petitioners] have been submitted in the form of proposed contentions and set forth with reasonable specificity." Memorandum at 6. Further, the Licensing Board stated that it expressed "no opinion whether there are any environmental impacts of fuel transshipment which either have not been previously considered or were inadequately considered in the Surry FESs. After the issuance of the EIA, pursuant to Duke Power Company et al. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC ___ (August 19, 1982), Louisa County and Concerned Citizens may assert in a timely manner new contentions founded upon information in that document. The bases for each such contention must be set forth with reasonable specificity as required by 10 C.F.R. § 2.714(b)." Memorandum at 7.

reason, Citizens maintains the ruling challenged by VEPCO is without practical consequences. Id.

It is true that if all the spent fuel transshipment issues in this proceeding could be litigated as environmental issues Citizens' assertion, that the ruling challenged by VEPCO is without "practical consequences," is correct. However, the Licensing Board has not admitted any contentions in this proceeding, be they "health and safety" or "environmental." Until the precise language of proposed contentions is identified by the petitioners and their admissibility ruled upon by the Licensing Board, it is premature to state that any of the petitioners' issues can or will be litigated as environmental issues.

In these circumstances where no contentions have been admitted and where any proposed contention which might be admitted could potentially be litigated as "environmental" there is no showing that the Licensing Board's Memorandum concerning its jurisdiction will "affect the basic structure of the proceeding in a pervasive and unusual manner." Marble Hill, supra. Accordingly, VEPCO's request for the extraordinary relief of directed certification should not be granted.

C. VEPCO Has Failed To Demonstrate That Certification Is Justified Based On The Commission's Policy Statement

The major portion of VEPCO's argument in support of its motion for directed certification is that the Licensing Board's ruling that it "may consider the health and safety impacts of the transport of spent fuel from Surry to North Anna"[9/] raises a "significant legal question . . . on which Commission guidance is needed." See Statement of Policy, supra, at 456.

9/ Memorandum at 4.

The Staff disagrees. The Licensing Board's ruling does not meet the criteria contemplated by the Commission in its Policy Statement and does not merit the extraordinary review sought here by VEPCO. A look at the factors considered by the Appeal Board in Catawba, supra, in its application of the Commission's Statement of Policy with regard to referrals and certification makes clear that the circumstances justifying certification are not extant here. While the issue here appears to meet two of the Catawba standards (i.e. it is a legal issue and has not been squarely addressed at the appellate level), it does not satisfy the two other standards found necessary by the Appeal Board to justify interlocutory review. Catawba, supra.

There is not here the "significant" or "crucial" type of issue that existed in the Catawba case. The referred rulings on contentions in Catawba posed generic questions as to the circumstances in which a licensing board may allow the conditional admission of a contention that it has found to fall short of the degree of specificity mandated by 10 C.F.R. § 2.714(b). This referral was therefore based on an issue which is faced routinely in almost every proceeding. No such issue exists in the instant proceeding. There only exists the statement that the Licensing Board "may consider the health and safety impacts of the transport of spent fuel from Surry to North Anna." Memorandum at 4. Moreover, as noted above, not even one contention regarding transshipment has been admitted in this proceeding. Until the contentions are identified in this proceeding, we can only speculate on the meaning and significance of the Licensing Board's June 10, 1983 ruling. To date,

there has been no demonstration that there will be a significant or generic impact attributable to the Licensing Board's ruling in this proceeding.

VEPCO argues that the generic nature and significance of the issue it seeks to certify is derived from the fact that the issue concerns interim storage of nuclear waste. It is argued that expeditious licensing is urged by the Nuclear Waste Policy Act. Motion at 13 and 14. However, there is no demonstration by VEPCO how the Licensing Board's ruling affects the expeditious consideration by this Licensing Board of the instant amendment. There is only speculation that the Board's ruling will lead to delay. Moreover, the Appeal Board has indicated that delay alone is not enough to support the extraordinary relief of certification. Perry, supra, at 1113.

Further, to the extent VEPCO is drawing significance from the fact that the Licensing Board's ruling may be inconsistent with other Licensing Board decisions, it must also fail. Motion at 4 and 14. The Appeal Board has made clear that "[a]bsent some special circumstances making immediate elimination of the decisional conflict imperative, the parties both can and should be left to the pursuit of those normal appellate remedies which become available to them once the initial decision (or some other appealable order) has been rendered." Seabrook, supra, at 484-85.

Finally, VEPCO has failed to meet the remaining factor considered by the Appeal Board in Catawba -- does the issue have "immediate recurring importance but, for practical reasons, will escape appellate scrutiny once the initial decision has issued." Catawba, supra, at 465. On this

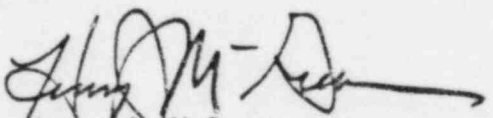
factor VEPCO can only offer the speculation that if VEPCO prevails on the merits of the health and safety aspects of transshipment, the question decided by the Licensing Board will not be reached at all on appeal, and future applicants "will have to run the same . . . licensing hurdles." Motion at 14, n.9. Other than this speculation and assertion of unidentified "hurdles" VEPCO offers no basis that indicates why this issue has "recurring importance" or will escape appellate review.

In sum, giving consideration to the above factors considered by the Appeal Board in Catawba regarding interlocutory review, VEPCO has failed to demonstrate that the issue of whether the Board may consider the health and safety impacts of the transshipment of spent fuel from Surry to North Anna is so "crucial" as to require Commission guidance via interlocutory appellate review.

IV. CONCLUSION

For the reasons stated above, VEPCO has failed to demonstrate that directed certification of the Licensing Board's ruling in its June 10, 1983 Memorandum is warranted.

Respectfully sumitted,



Henry J. McGurren
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 1st day of September 1983

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CERTIFICATE OF SERVICE

I hereby certify that copies of "RESPONSE OF NRC STAFF TO APPLICANT'S MOTION FOR DIRECTED CERTIFICATION OF LICENSING BOARD MEMORANDUM OF JUNE 10, 1983" 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 1st day of September 1983:

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