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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
SACRAMENTO MUNICIPAL UTILITY DISTRICT	)	Docket No. 50-312-DCOM
	)	
	)	(Decommissioning Plan)
(Rancho Seco Nuclear Generating Station, Facility Operating License No. DRP-54)	)	

NRC STAFF RESPONSE TO LICENSEE'S PETITION FOR REVIEW OF SECOND PREHEARING CONFERENCE ORDER AND MOTION FOR DIRECTED CERTIFICATION

Lisa B. Clark
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December 30, 1993

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INTRODUCTION

On November 30, 1993, the Licensing Board issued a Second Prehearing Conference Order admitting for litigation certain bases of a contention pertaining to decommissioning funding.[1] The Board also granted summary disposition of a contention pertaining to LOOP frequency which had previously been admitted for litigation by the Commission. *Id.* The Licensee asks that the Commission review the Board's decision to admit the decommissioning funding contention on directed certification pursuant to 10 C.F.R. § 2.786(g). The Staff supports Licensee's petition.

BACKGROUND

The Licensee, Sacramento Municipal Utility District (SMUD), filed an application for termination of its license and a proposed decommissioning plan for Rancho Seco on May 20, 1991. Environmental and Resources Conservation Organization (ECO) filed a

[1]Second Prehearing Conference Order (Proposed Contentions; Summary Disposition Motion) LBP-93-23, 38 NRC ___, slip op. at 88 (November 30, 1993).

petition to intervene and request for hearing which was originally denied by the Licensing Board. *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-92-23, 36 NRC 120 (1992).

On appeal, the Commission granted discretionary intervention to ECO. *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 141 (1993). The Commission admitted one of ECO's contentions for litigation and permitted ECO to submit additional new or amended contentions before the Licensing Board. *Id.* at 146, 154-55.

Pursuant to the Commission's Order, ECO filed a contention, with numerous bases, alleging that the decommissioning funding plan is inadequate.[2] The Licensing Board admitted bases 1, 5, 11 and 13, finding that even though they may not reflect significant flaws individually, collectively they could constitute a meaningful deficiency in the decommissioning funding plan. LBP-93-23 at 13. As summarized by the Licensing Board, the individual bases are as follows:

> Basis 1: "Increase in long-term debt by 8.8 %/year and increase in dependence upon purchased power; and current avoidance of rate increases in favor of long-term indebtedness; collectively creating uncertainties of confidence in the firmness, availability and cost of power and eventually creating tidal wave of debt that will threaten the viability of the funding plan." *Id.* at 10.
>
> Basis 5: "Unreliability of estimated savings to fund decommissioning to be achieved from Conservation and Load Management Programs." *Id.* at 11.
>
> Basis 11: "Lack of long-term overall financing plan, including planned rated increases, as raising questions concerning adequacy of funding plan." *Id.* at 11.

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[2]ECO's Contention on Licensee's Proposed Decommissioning Funding Plan, March 22, 1993.

> Basis 13: "Funding Plan premised, *inter alia*, on growth through interest earnings at rates that now are unrealistically high; funding plan should consider growth at current interest rates and make provision for possible lower rates." *Id.* at 12.

The Licensing Board also admitted bases 2 and 14, stating that they are related because they both involve costs related to the proposed ISFSI. *Id.* at 23, 29-30. The Board summarized the substance of those bases as follows:

> Basis 2: "Decommissioning cost estimate unreliable because premised on original cost of Independent Spent Fuel Installation Storage Installation (ISFSI) that has been withdrawn and no new design and cost estimate available." *Id.* at 10.

> Basis 14: "Funding Plan inadequate because possibility that spent fuel pool may not be closed by 1998 (as projected) might lead to increased costs of $8 million/year from 1999 through 2008 (total $80 million in 1991 dollars); annual review and five-year revision also inadequate." *Id.* at 12.

SMUD asks that the Commission review the admission of the bases admitted by the Board, with the exception of basis 13, under directed certification in order to resolve two issues: first, whether it is proper to admit contentions on decommissioning funding which question a utility's overall financial structure and resource planning but do not allege any deficiency in the actual decommissioning funding plan; second, whether it is proper to consider the costs of an ISFSI in this proceeding.[3]

DISCUSSION

I. The Commission Should Consider This Interlocutory Appeal Because It Raises Major Issues Which May Not Otherwise Be Reviewed.

Licensee is seeking directed certification of the Board's Order pursuant to 10 C.F.R. § 2.786(g), which provides that Commission review is merited only if the

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[3]Licensee's Petition for Review of Second Prehearing Conference Order and Motion for Directed Certification, December 15, 1993.

matter either (1) threatens a party with irreparable harm which could not be alleviated through a petition for review of the final decision; or (2) affects the basic structure of the proceeding in a pervasive or unusual manner. *See Safety Light Corporation* (Bloomsburg Site Decontamination), CLI-92-9, 35 NRC 156 (1992).

While the Licensee is not threatened by irreparable harm in this case, Commission review is warranted under the second criterion because the basic structure of this proceeding will be affected in a pervasive manner. Should this case go to litigation as currently defined, a Licensing Board will delve into the financial condition of a public utility rather than evaluating whether it is complying with the provisions requiring the establishment of *secured and sufficient* funds for decommissioning. *See* 50.82(b)(4) and (c); 53 *Fed. Reg.* 24,018, 24,031-32, 24,038. Matters such as the overall debt structure of a utility and the utilization of resources are not appropriate for NRC review. The Board's review here should be limited to the question of whether SMUD is accumulating sufficient funds to decommission Rancho Seco pursuant to 10 C.F.R. § 50.75. *See* 10 C.F.R. § 50.82(b)(4) and (c).

At the operating licensing stage, the Commission is precluded by regulation from considering, as a general matter, the financial qualifications a utility such as SMUD.[4] 10 C.F.R. § 50.57(a)(4); *see Public Service Company of New Hampshire* (Seabrook Station, Units 1 and 2) CLI-88-10, 28 NRC 573, 598-600 (1988); *Id.*, CLI-89-20, 30 NRC 231, 242 (1989). For such utilities, inquiry into financial qualifications is considered unnecessary given the fact that costs and expenses may be recovered through

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[4]ECO has not suggested that this general rule should be departed from in this case. *See* 10 C.F.R. § 2.758.

its rates. 49 *Fed. Reg.* 35,747, 35,749-50 (September 12, 1984). In issuing that rule, the Commission stated that its concern is whether adequate funds to safely operate the plant can be obtained, not whether the utility would generate any particular rate of return or level of profit. *Id.* at 35749. The Commission's regulations do not provide otherwise at the decommissioning stage. The fact that a utility has decided to decommission a facility, and thus submitted a plan to do so, should not be used to open up questions concerning its overall financial outlook.

This is not to say that matters concerning the decommissioning plan and its funding cannot be litigated. The problem here is that the Licensing Board has admitted a contention which does not address specific provisions of the plan. Not one provision of the plan is even cited in the admitted contention. Instead, it questions matters such as the extent of the utility's long-term debt, avoidance of rate increases and reliance on purchased power. While the Commission regulates the amounts and the methods by which funds are set aside for decommissioning, it does not regulate the overall financial structure or rate-setting decisions of the utilities which own licensed reactors. *See* 53 *Fed. Reg.* 24,018, 24,031-32 (June 27, 1988). The narrow focus of the NRC's review of decommissioning funding is whether a utility has in place "basic minimum standards for funding methods which provide reasonable assurance of funding for decommissioning in a safe and timely manner." 53 *Fed. Reg.* 24,038. Financial ratemaking issues such as rate of fund collection and responsiveness to change are outside the NRC's jurisdiction. *Id.*

Furthermore, because this is the first decommissioning case to be litigated, the basic structure of all future decommissioning cases could be affected by the precedent set by this case. For this reason, it is vital that the Commission ensure that the scope of the

Licensing Board's inquiry into the adequacy of a utility's funding for decommissioning be properly and clearly defined. The precedent-setting nature of this case requires that the Commission make this determination now and not await final decision by the Licensing Board.

Thus, the decision here would not only affect the present case but future cases until such time as Commission review of this particular issue is undertaken. Providing guidance on the basic structure of litigation concerning decommissioning now, consistent with the Commission's current review of the timing and scope of public participation in the decommissioning process, would ensure that future proceedings are also properly structured and defined.

The Licensee has identified two fundamental errors in the Board's decision: admission of bases which fail to meet the Commission's pleading requirements, and admission of bases relating to the ISFSI which are beyond the scope of this proceeding. Those errors are addressed below.

II. The Licensing Board Admitted Bases Alleging Inadequacies in the Funding Plan Which Fail to Meet the Commission's Pleading Requirements.

In admitting bases 1, 5, and 11, the Licensing Board failed to comply with the Commission's pleading requirements set forth in 10 C.F.R. § 2.714(b)(2)(i),(ii), and (iii). Those requirements were revised in 1989 in order to raise the threshold for admissible contentions by requiring a clear statement of their basis and the submission of more supporting information and references to specific documents. *See* 54 *Fed. Reg.* 33,168, 33,170 (August 11, 1989); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), CLI-91-12, 34 NRC 149, 155-56. (1991).

The revised regulations demand, among other things, a statement of the alleged facts or expert opinion on which the petitioner intends to rely along with references to the specific sources and documents establishing those facts or expert opinion. 10 C.F.R. § 2.714(b)(2)(ii).[5] Reference must be made "to the specific portions of the application disputed." 10 C.F.R. § 2.714(b)(2)(iii). If these requirements, or any other, are not met, the contentions must be rejected. CLI-91-12, 34 NRC at 155. The Commission has particularly stated that these standards are applicable to this proceeding. CLI-93-3, 37 NRC at 142, 147, 150-51.

The Licensing Board clearly erred by not applying these standards. Instead, it acknowledged that there were "pleading deficiencies" and applied the old standard of whether the bases had been "explained with sufficient clarity to require reasonable minds to inquire further". LBP-93-23 at 16, 18-19. Using that standard, the Board admitted bases which it conceded were deficient, *Id.* at 16, on the theory that if they are all considered together they "appear to constitute a material portion of the funding plan and appear to raise significant questions as to the viability of the plan". *Id.* at 20.

ECO did not comply with the current pleading requirements. ECO's bases are not based on informed review of the information available on decommissioning funding, as

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[5]The Board recognized that there was "little description of the qualification of ECO's expert" on financial matters, but surmised he "is likely to have had exposure to, if not detailed involvement in, financial matters" because of governmental and non-governmental positions he has held. *Id.* at 16-17. This is not the showing required for a discretionary intervenor -- that it could significantly aid the Commission by making "a valuable contribution to the decision-making process." *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-7, 4 NRC 610, 617 (1976); *see also Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 246 (1986) (requiring a showing of special expertise in support of late admitted contentions under a standard similar to that required for discretionary intervention).

required under the revised regulations. Not one provision of the decommissioning funding plan is cited in the admitted contention. *Cf.* CLI-93-3, 37 NRC at 147. Instead, for basis 1, ECO selected isolated numbers from SMUD's 1991 annual report to make the broad and unsupported allegation that SMUD will be threatened by a "tidal wave of future debt" which threatens the viability of the funding plan.[6] Basis 5 questions SMUD's ability to accurately predict energy savings from a conservation program which is not shown to have any relevance to the decommissioning fund. *See* Staff Response at 14-15, Tr. at 244-45.[7]

Basis 11 simply alleges that SMUD should be required to submit a long-term overall corporate financing plan, presumably to be approved by the Licensing Board before decommissioning may proceed. ECO's claim is not supported by any NRC requirement or any alleged deficiency in the funding plan. *See* Staff Response at 18-20; Tr. 294-304. Instead of identifying and documenting an alleged deficiency, ECO is simply asking the Board to conduct an inquiry into the financial health of SMUD in order to decide if it will continue to exist. Tr. at 301. Not only would this undertaking be immense, it would culminate in a Licensing Board speculating on the financial future of a utility. Such an

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[6]*See* NRC Staff Response to ECO's Contentions Regarding the Funding of Decommissioning ("Staff Response") at 12; Tr. 222-25.

[7]When asked what impact failure of the conservation program would have on decommissioning funding, counsel for ECO answered that he did not know. Tr. 244-45. He then stated that it was relevant to SMUD's overall financial plan, in that the utility may be obligated to invest in new facilities, which could put some financial strain on the utility if that investment had not been foreseen, and in that way could affect SMUD's ability to fund decommissioning. Tr. 245-46. The difficulty of even following this logic illustrates the absence of any concrete connection between the ability of SMUD to predict the load for a particular year and the ability of SMUD to fund decommissioning.

inquiry would take the Board far astray of the Commission's requirements in 10 C.F.R. §§ 50.75 and 50.82. Such an endeavor should not be permitted.

III. The Licensing Board Admitted Bases Relating to the ISFSI Which Are Beyond the Scope of the Proceeding.

In admitting Bases 2 and 14 the Licensing Board clearly reached beyond the scope of the proceeding, in that the costs associated with the decommissioning of a utility specifically exclude the removal and disposal of spent fuel and spent fuel storage. 10 C.F.R. § 50.75 n.1; 53 *Fed. Reg.* 24,031. The costs of storing spent fuel until it is turned over to the Department of Energy are addressed in § 50.54(bb) and are not relevant to the decommissioning funding plan. *See* Staff Response at 12-13, 21-22.

An Independent Spent Fuel Storage Installation (ISFSI) is licensed under 10 C.F.R. Part 72, and requires a separate application, notice, review and license from the one under review here for decommissioning. Tr. 353. Consistent with this, the District filed a separate application for an ISFSI license which was properly noticed in the *Federal Register*. 57 *Fed. Reg.* 1286 (1992).

The Board admitted these bases largely on the basis of a Staff Memorandum which suggested that it might be appropriate to consider the costs of spent fuel storage as decommissioning costs. *See* LBP-93-23 at 27-28. However, the same memorandum recognized that these storage costs are not decommissioning costs under the current regulations, but are provided for under the separate provisions governing the storage of fuel in 10 C.F.R. § 50.54(bb).[8] To consider whether these storage costs should be

[8]Memorandum of James R. Taylor, Executive Director of Operations to the Commission, September 14, 1992, at 2 and Enclosure 1 at 1-2.

decommissioning costs is an impermissible challenge to the current regulations and cannot be properly accepted for litigation in this proceeding. 10 C.F.R. § 2.758. The Board also stated that basis 14 was not really an ISFSI claim at all, but rather questions the potential fuel storage costs that would be incurred if the ISFSI were not timely licensed. LBP-93-23 at 30. Again, this is an example of the highly speculative nature of the bases put forth for this contention that do not reach the threshold for admissibility under the current regulations. Neither bases 2 or 14 are litigable in this decommissioning proceeding.

CONCLUSION

For the reasons discussed above, the Commission should grant review and accept directed certification of the Licensing Board rulings in LBP-93-23 to clarify the proper scope of proceeding concerning a decommission plan, with particular emphasis on the extent of the NRC's review of the funding provisions of those plans.

Respectfully submitted,

Lisa Clark

Lisa B. Clark
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Dated at Rockville, Maryland
this 30th day of December 1993

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO LICENSEE'S PETITION FOR REVIEW OF SECOND PREHEARING CONFERENCE ORDER AND MOTION FOR DIRECTED CERTIFICATION" 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, by deposit in the Nuclear Regulatory Commission's internal mail system this 30th day of December 1993:

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