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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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NSNRC

COMMISSIONERS:

'94 MAR -1 P12:18

Ivan Selin, Chairman
Kenneth C. Rogers
Forrest J. Remick
E. Gail de Planque

OFFICE OF SECRETARY
DOCKETING & SERVICE

_____)
In the Matter of)
)
SACRAMENTO MUNICIPAL)
UTILITY DISTRICT)
)
(Rancho Seco Nuclear Generating)
Station))
_____)

SERVED MAR - 1 1994

Docket No. 50-312-DCOM
(Decommissioning Plan)

MEMORANDUM AND ORDER

CLI-94-02

The Commission has before it a petition for review and motion for directed certification filed by Sacramento Municipal Utility District (SMUD) pursuant to 10 C.F.R. § 2.786(g). SMUD seeks review in the form of directed certification of certain issues arising out of an interlocutory Order (LBP-93-23), dated November 30, 1993, in which the presiding Atomic Safety and Licensing Board, inter alia, admitted a contention filed by Environmental and Resources Conservation Organization (ECO) concerning the adequacy of SMUD's plan for funding the decommissioning of the Rancho Seco Nuclear Generating Station. SMUD argues that the Licensing Board's acceptance of certain bases for the contention affects the basic structure of the proceeding in a pervasive and unusual manner so as to warrant

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interlocutory review. For the reasons stated in this order, we deny SMUD's petition and motion.

Background

This proceeding involves ECO's challenge to the Nuclear Regulatory Commission (NRC) staff's proposed order approving of a decommissioning plan for, and authorizing decommissioning of, Rancho Seco. In CLI-93-3, the Commission granted intervention to ECO (as a matter of discretion) and permitted ECO to amend its funding plan contention. 37 NRC 135, 149, reconsideration denied, CLI-93-12, 37 NRC 355 (1993).

ECO filed an amended funding plan contention which was supported by 14 bases. In LBP-93-23, the Licensing Board accepted six of the fourteen bases as a foundation for admitting the contention. LBP-93-23, slip op. at 13-30. SMUD objects to the acceptance of all but one of the bases.

SMUD does not object to acceptance of Basis 13 concerning the rate of growth of the decommissioning fund through interest earnings. SMUD objects to the acceptance of Bases 1, 5, and 11 which relate to financial assurance because, according to SMUD, ECO failed to demonstrate the materiality of the issues raised and, thus, these bases do not meet the criteria for admissibility of contentions in 10 C.F.R. § 2.714(b)(2)(iii). In this respect, SMUD argues that ECO did not reference the parts of the funding plan with which it disagreed and did not address relevant matters in the funding plan that, according to SMUD, weigh against admission of these bases. Licensee's Petition for Review of

Second Prehearing Conference Order and Motion for Directed Certification at 4-6 (December 15, 1993) (hereinafter SMUD Petition).

SMUD also objects to the acceptance of Bases 2 and 14. SMUD argues that these matters are beyond the scope of this proceeding because they relate to the cost of SMUD's planned Independent Spent Fuel Storage Installation (ISFSI). In support of its position SMUD argues that funding of spent fuel storage costs is not required to be addressed in a licensee's decommissioning plan, but is instead subject to a separate planning requirement in 10 C.F.R. § 50.54(bb). SMUD Petition at 6. SMUD maintains that licensing of the ISFSI was a separately noticed proceeding in which ECO did not choose to petition for intervention.

Analysis

SMUD filed its petition and motion pursuant to 10 C.F.R. § 2.786(g).¹ Although interlocutory review is disfavored and generally is not allowed as of right under our rules of practice (see 10 C.F.R. § 2.730(f)), the criteria in section 2.786(g) reflect the limited circumstances in which interlocutory review may be appropriate in a proceeding. These criteria are a codification of the case-law standard that the Atomic Safety and Licensing Appeal Board developed under our former appellate structure. The Appeal Board applied these criteria in deciding as a matter of discretion whether to review interlocutory orders

¹ The Licensing Board's order was not subject to appeal under 10 C.F.R. § 2.714a(c).

in response either to a presiding officer's referral of a ruling or certified question or to a party's motion for "directed certification." See Safety Light Corp. (Bloomsburg Site Decontamination), CLI-92-9, 35 NRC 156, 158 (1992). Under our present appellate system, we have entertained petitions for review of an otherwise interlocutory order -- akin to a motion for directed certification -- if the petitioner can satisfy one of the criteria under section 2.786(g). See Oncology Services Corp., CLI-93-13, 37 NRC 419, 420-21 (1993).

SMUD argues that it meets the standard for review in section 2.786(g)(2) because the Board's rulings affect the basic structure of the proceeding in a pervasive and unusual manner, by subjecting SMUD to a broad inquiry into matters without any direct relationship to its decommissioning plan. SMUD maintains that the Board's rulings also establish a precedent affecting other decommissioning funding proposals and certifications as well as the NRC's own regulation establishing certification amounts, because such certifications and plans are not intended to include spent fuel storage costs. SMUD also believes that because the hearing was granted as a matter of discretion, the Commission should grant review as a matter of fairness to SMUD and provide instructions to keep the proceeding within appropriate bounds. SMUD Petition at 8-9. The staff makes essentially the same arguments as SMUD. ECO did not file a reply.

SMUD has failed to demonstrate that review at this time is necessary. The mere expansion of issues rarely, if ever, has been found to affect the basic structure of a proceeding in a pervasive or unusual manner so as to warrant interlocutory review. Safety Light Corp., 35 NRC at 159 (citations omitted). Although SMUD argues that the Licensing Board failed to apply the proper criteria for admissibility of contentions and incorrectly interpreted Commission regulations, these reasons have not been adequate in practice to demonstrate that the structure of a proceeding has been affected in a pervasive or unusual way, where the ultimate result is that the Licensing Board simply admits or rejects particular issues for consideration. In discussing the standards for granting interlocutory review, the Appeal Board stated:

The basic structure of an ongoing adjudication is not changed simply because the admission of a contention results from a licensing board ruling that is important or novel, or may conflict with case law, policy, or Commission regulations. Similarly, the mere fact that additional issues must be litigated does not alter the basic structure of the proceeding in a pervasive or unusual way so as to justify interlocutory review of a licensing board decision.

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 135 (1987) (citations omitted).

Although we are declining review at this time, we make no judgment on the soundness of the Licensing Board's determinations on the particular issues. Our decision here today is largely influenced by our reluctance to take interlocutory review except in extraordinary situations. The licensee argues that this case

requires special attention because intervention was granted as a matter of discretion. However, this fact alone does not provide adequate support for departing from past practice and taking the unusual step of granting interlocutory review at this time. Neither SMUD nor the staff have adequately explained why these matters cannot await final appellate review.

Conclusion

For the reasons stated herein, SMUD's petition and motion are denied.

It is so ORDERED.



For the Commission

A handwritten signature in cursive script, appearing to read "John C. Hoyle".

John C. Hoyle
Assistant Secretary of the Commission

Dated at Rockville, Maryland,
this 1st day of March 1994.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

SACRAMENTO MUNICIPAL UTILITY
DISTRICT
(Rancho Seco Nuclear Generating
Station (Decommissioning Plan))

Docket No.(s) 50-312-DCOM

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMM M&O (CLI-94-2) DTD 3/1/94 have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Dated at Rockville, Md. this
1 day of March 1994


Office of the Secretary of the Commission