UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

BRIEF ON APPEAL

I. BACKGROUND

This proceeding concerns applications submitted by the Virginia Electric and Power Co. (hereinafter "VEPCO") for two amendments to its operating license for the North Anna Power Station. The first application seeks an amendment authorizing VEPCO to receive and store 500 spent fuel assemblies from the Surry Power Station, also owned by VEPCO, at the North Anna plant. That portion of the proceeding devoted to considering this application has been denominated "OLA-1." The other license amendment sought by VEPCO would authorize the company to increase the capacity of the spent fuel storage pool at North Anna, from 966 assemblies to 1737 assemblies. That portion of this proceeding devoted to considering this application has been denominated "OLA-2."

On October 22, 1982 Concerned Citizens of Louisa County (hereinafter "Citizens") filed petitions to intervene with re-

spect to both license amendment applications. With respect to OLA-1, Citizens submitted three contentions of relevance here. Contention 1 asserts that VEPCO's proposal to ship 500 spent fuel assemblies from Surry to North Anna entails significant environmental impacts, and therefore must be considered within an environmental impact statement ("EIS"). Contention 3 asserts that neither VEPCO nor the Nuclear Regulatory Commission staff ("Staff") has given adequate consideration to the alternative of constructing, at the Surry site, a dry cask storage facility. For roughly two years VEPCO has had an application for authority to construct such a facility pending before the Staff. Contention 5, which was submitted after the Staff prepared an environmental assessment, asserts that the assessment is legally inadequate for a number of reasons.

Concerning OLA-2, Citizens submitted three contentions. Contention 1, and the statement of basis that accompanies it, is identical to the "EIS contention" (#1) filed in OLA-1, except that it asserts that the environmental effects of VEPCO's reracking proposal must be summed with the effects of the transshipment proposal for purposes of assessing the environmental significance of the action. Contention 2 is identical to the "alternatives contention" (#3) filed in OLA-1. Contention 3 is identical to the "environmental assessment contention" (#5) filed in OLA-1.

On October 15, 1984 the Atomic Safety and Licensing Board ("the Board") issued a MEMORANDUM AND ORDER ("Order") ruling on all but one of Citizens' contentions. The contention on which

the Board did not rule, namely #4 in OLA-1, concerns VEPCO's security plans for the shipments.

In essence, the Board found Citizens' contentions regarding OLA-1 to be adequate and it admitted them for litigation as rewritten, into a single contention, by the Board.[1/] Regarding OLA-2, the Board rejected each of Citizens' three contentions. In this appeal Citizens asserts that the rejection of its contentions in OLA-2 was error.

II. ARGUMENT

At the outset Citizens confesses, with all due respect to the Licensing Board, that it does not understand the reasoning underlying the Order. Specifically, it is not clear whether Citizens' contentions were rejected for "lack of basis," or because of a legal defect.

1/ Order at 6-7. Citizens does not agree with the Board's apparent conclusion that the rewritten contention does justice to all three of Citizens' contentions. Though Citizens does not raise the issue on this appeal, it believes that the Board misconstrued the nature of #5 by assuming that the contention "reflects in summary fashion" the substance of contentions #1 and #3. Actually, contention #5 raised a different issue - that the Staff's environmental assessment was procedurally deficient, and that even if an environmental impact statement is not legally mandated, the assessment must be revised and expanded.

By citing precedent[2] for the proposition that the NRC may, consistent with its obligations under the National Environmental Policy Act ("NEPA")[3], evaluate certain licensee proposals without considering the environmental effects of certain other actions alleged by an intervenor to be related, the Board suggested that, as a matter of law, Citizens' contention #1 was legally defective in asserting that the environmental effects of the transshipment and reracking proposals must be summed.[4] But the Order next suggests that the Board was not relying on this point, and was instead concerned with whether the contention is supported by an adequate basis:

> As discussed above, at this stage of the proceeding we do not consider the merits of a contention. However, additionally, Applicant urges in substance that there is no basis set forth with reasonable specificity in support of Contention 1. We agree that Contention 1 lacks a basis.[5]

2/ Duke Power Co. (Amendment to Materials License SNM-1773-Transportation of spent Fuel from Oconee to McGuire), ALAB-659, 14 NRC 307 (1981). The Board also cited VEPCO's and the Staff's legal arguments based on this decision.

3/ 42 U.S.C. § 4332(2)(C).

4/ Order at 8.

5/ Id.

In the very next sentence, however, the Order suggests that the Board was in fact still addressing the legal issue of whether the effects of OLA-1 and OLA-2 must be summed under NEPA:

> While [Citizens] urges that environmental effects of the two proposed modifications [sic] must be summed in order to evaluate the significance of both proposed actions, there can be no summing inasmuch as [Citizens] has not filed a contention objecting on the merits, either technical or environmental, to the spent fuel modification [sic].

Compounding the confusion is that this seems to suggest that the contention is subject to yet another legal defect: because Citizens has allegedly not filed a technical or environmental contention objecting to the reracking proposal on the merits, there can be no summing of environmental effects as a matter or law. But then, on page 9, the Order states that Contention #1 is rejected for lack of basis. Evidently, Contentions #2 and #3 were rejected for the same reason.

Parsing this language as best it can, Citizens concludes that the Board did not reject any of these contentions due to Citizens' failure to supply "bases for each contention set forth with reasonable specificity" as required by 10 C.F.R. § 2.714(b). Among the observations pointing to this conclusion are that:

- Contrary to the Board's assertion, VEPCO never argued that Contention #1 lacked a sufficient basis. The thrust of VEPCO's objections was that the contention suffered from the same legal defect mentioned by the Board, i.e., there can be no summing of

environmental impacts.[6/] Since the Board purported to be accepting VEPCO's argument, it decision must have been based on the same legal argument;

- Since the Board specifically ruled that Citizens had presented an adequate basis for Contention #1 in OLA-1, and since that contention and its statement of basis were identical to #1 in OLA-2 except for the addition of another paragraph to the latter, there must have been something else about the latter that troubled the Board.

II. A. If the Board was declaring the statement of basis supporting Contention #1 inadequate, the Board committed error.

Citizens submits these reasons why the Board, if it was declaring the statements of basis for Citizens' contentions to be deficient under 10 C.F.R. § 2.714(b), was in error:

1. The Board didn't explain why. A petitioner for intervention cannot be wholly denied from participating in a proceeding on the basis of the simple assertion that its contentions have no basis. If only for the purpose of enabling

6/ See APPLICANT'S RESPONSE TO THE CONTENTIONS OF CONCERNED CITIZENS OF LOUISA COUNTY, August 14, 1984, at 1-8, where VEPCO asserts that that Citizens has three bases for the contention, two of which are legally defective, while the third does not measure up to 10 C.F.R. § 2.714(b).

appellate review of its decision, the Board was required to say just what it was about Citizens' statement of basis that it found inadequate. This claim of error applies fully to the Board's rejection of Contentions #1, #2, and #3.

2. The Board's decision was plainly wrong. The bases offered by Citizens were succinctly stated, clearly reasoned, and factually supported by citations to authority.

3. The Board's rejection of Contention #1 was irrational because it was completely inconsistent with its treatment of Contention #1 in OLA-1. In its Order at 4, the Board explicitly disagreed with arguments by the Staff and VEPCO that Citizens' EIS contention in OLA-1 lacked a sufficient basis. Yet the statement of basis for the EIS contention in OLA-2 was the very same as that in OLA-1, except that it contained an additional paragraph. Surely this is not grounds for rendering the contention inadequate under § 2.714(b).

II. B. If the Board was ruling that Contention #1 is legally defective due to Citizens' failure to "[file] a contention objecting on the merits, either technical or environmental, to the spent fuel modification, [sic]" the Board committed error.

Citizens submits that if the Board rejected Citizens' contention that the proposed reracking of the North Anna spent fuel pool requires the preparation of an EIS, in part because the environmental effects of reracking and transshipment must be summed under NEPA, it was in error for the following reasons:

1. This is a ruling on the merits of Citizens' contentions and is therefore premature and improper. For the time being the contention satisfies the requirements of 10 C.F.R. § 2.714; if another party wishes to have it struck via summary disposition at a later point in the proceeding, it may do so. At that point Citizens would avail itself of its first opportunity to brief this heretofore unseen legal issue.

2. The ruling is unaccompanied by any citation to authority and, to counsel's knowledge, lacks a shred of legal support. Why should a petitioner for intervention have to submit "a technical or environmental" contention "on the merits" in order to contend separately that the proposed license amendment must, under NEPA, be the subject of an environmental impact statement? Exactly what does this mean?

3. For what its worth, Citizens submits that it has offered "a technical or environmental" contention "on the merits." Certainly the claim, made in Contention #3 (OLA-2), that the environmental assessment for the proposed action was deficient, is an environmental contention going to the merits. Further, Citizens sees no legal reason why it is precluded from advancing a contention, see #2, claiming that the Staff has violated its duty under NEPA to examine alternatives.

II. C. If the Board was ruling that Contention #1 is legally inadequate because the environmental effects of reracking may not be summed with the effects of spent fuel transshipment, the Board committed error.

If, despite the Board's statement that it faulted Citizens' statements of basis, it was actually declaring them to be based on an impermissable interpretation of NEPA, Citizens contends that the ruling was in error for the following reasons:

1. This is a ruling on the merits, and is therefore premature and improper. For the time being the contention satisfies the requirements of 10 C.F.R. § 2.714; if another party wishes to have it struck via summary disposition at a later point in the proceeding, it may do so. At that point Citizens would avail itself of its first opportunity to brief this legal issue.

At the Board's request, the parties have committed a substantial amount of time and resources to briefing and arguing, before the Board and the Appeal Board, "threshold" legal issues going to the validity of Citizens' contentions. However, the Board never sought the parties' views, and was never briefed, on the question of summing, and the related question of "independent utility" as discussed by the Appeal Board in ALAB-651.

2. The Board didn't say so clearly. A footnote to ALAB-651 does not substitute for a reasoned analysis of why the contention is legally inadequate.

3. The Board's interpretation of NEPA is wrong. Citizens does not admit that this issue is properly before the Appeal Board at this time, but it will nevertheless address the issue in the paragraphs that follow.

It is not uncommon, in NRC adjudicatory proceedings as well as NEPA litigation before the federal courts, for a litigant to assert that the proposed federal action at issue is in fact a component of a larger, environmentally more significant project, and that therefore, when determining the limits of the project that must reviewed through the NEPA process, the environmental analysis of the former must be joined with an analysis of the overall project. Such an argument has been made in countless challenges to particular segments of highway projects,[7/] and was similarly made by the intervenors in the NRC proceeding concerning Duke Power Co.'s proposal to ship spent fuel from Oconee to McGuire.[8/] In Oconee to McGuire, the intervenors contended, and the Licensing Board ultimately agreed, that the proposal under immediate consideration was actually part of a "Cascade Plan" calling for a large number of other shipments to be made, at some indefinite point in the future, between other points of origin and destination. Therefore, they contended, the Staff's environ-

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7/ See, e.g., Appalachian Mountain Club v. Brinegar, 394 F. Supp. 105 (D.N.H. 1975).

8/ Duke Power Co. (Amendment to Materials License SNM-1773-Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station)(hereinafter "Oconee to McGuire"), ALAB-651, 14 NRC 307 (1981).

mental analysis had to address the larger proposal. In ALAB-651, the Appeal Board reversed the Licensing Board, ruling not only that it saw no hard evidence of such a plan, but that in any event it was proper to look solely at the instant application for a license amendment, because it had "independent utility" and did not prevent an unbiased consideration of future transshipment proposals.

The "independent utility" argument has no application to this case. To begin with, all "independent utility" cases have a common thread: a real and current proposal for action combined with allegations of a link to some future, or geographically removed, or speculative action said to be environmentally related.[9/] Here, however, we have two proposals that were proposed virtually simultaneously, are now being reviewed simultaneously, and concern the same geographic area.

Second, in the "independent utility" cases the courts have recognized that a holistic consideration of the alleged "big picture" will involve a significant degree of difficulty and speculation because the future proposal is not ripe or well defined.[10/] Here, on the other hand, both projects are sitting squarely, side-by-side, on the same table. From an environmental

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9/ See, e.g., Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2, and 3), ALAB-664, 15 NRC 1 (1982)(proposed storage of low-level waste said to be linked to future plans to incinerate the waste).

10/ See Swain v. Brinegar, 542 F.2d 364, 369 (7th Cir. 1976).

perspective there is no reason not to consider the two together. Although, from the Staff's or VEPCO's point of view, it may make sense to evaluate the two proposals separately, this is not authorized by the "independent utility test." Here we are dealing with NEPA's requirements, not administrative expediency.

Third, in the "independent utility" cases that have been resolved in favor of the agency, the rationale has been that it is reasonable to employ a narrowly-focused environmental analysis for present purposes, since the other, allegedly linked action will be subjected to a separate environmental analysis when it becomes ripe.11/ But that's not the case here. The effect of the Board's order, if sustained, would be to bar an analysis of VEPCO's reracking project for all time. The Board's Order turns the "indepedent utility" rule on its head. This proceeding simply does not resemble the "independent utility" cases.

Further, even if one were to apply some sort of "independent utility analysis" to VEPCO's twin proposals, its would become clear that the two are in fact interdependent. Certainly VEPCO is not going to ship 500 assemblies from Surry to North Anna if it is denied permission to rerack. This would come close to filling the North Anna pool as soon as it were done. Similarly, there is no present utility to reracking North Anna if VEPCO is denied permission to transship. The current inventory at North

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11/ See, e.g., Browns Ferry, supra at 8.

Anna is roughly 300 assemblies, and the current capacity is 966. Absent transshipment, the utility has plenty of time to evaluate alternative solutions for storage of North Anna spent fuel, including shipment off site and construction of a dry case storage facility similar to that now planned for Surry. Indeed, it might even to decide to ship North Anna fuel to the dry cask facility at Surry. It simply makes no sense to rerack now.

If anything, all of this argument over VEPCO's situation involves factual issues that need not be disputed here and should not have been decided by the Board on review of Citizens' contentions. Under the Rules of Practice, such questions are reserved for decision on the merits, perhaps by way of summary disposition.

The NEPA case law makes it clear that when an agency is setting bounds on the scope of its environmental review, it must be careful not to define the scope of the project so narrowly that a full examination of alternative solutions to the problem is impaired.[12/] This is particularly so where excluding part of the overall project would lead to an "irreversible and irretrievable commitment of resources," and thus tend to distort the

12/ Swain v. Brinegar, 542 F. 2d 364, 370 (7th Cir. 1976); Indian Lookout Alliance v. Volpe, 484 F.2d 11, 18 (8th Cir. 1973)(citing Committee to Save Route 7 v. Volpe, 346 F. Supp. 731, 740 (D. Conn. 1972).

agency's evaluation of alternatives.[13] Here, allowing reracking to escape the Staff's environmental review would inevitably make the alternative of dry cask storage less attractive. As the Supreme Court has said in the NEPA context:

> Only through a comprehensive consideration of pending proposals can the agency evaluate different courses of action.[14]

13/ Conservation Society of Southern Vermont v. Sec. of Transportation, 508 F.2d 927, 934 (2d Cir. 1974)

14/ Kleppe v. Sierra Club, 427 U.S. 390 (1976).

III. REQUEST FOR STAY

The foregoing arguments demonstrate that Citizens will probably prevail on the merits of its appeal of the Board's Order. Citizens submits that a stay of the Order is appropriate because no harm will befall the other parties or the public if the Appeal Board remands the decision. As pointed out above, VEPCO has no immediate need to rerack the North Anna spent fuel pool until, and if, it receives permission to move spent fuel to the pool from Surry. Simply ordering the Board to consider the twin halves of VEPCO's proposal simultaneously can do nothing but improve the NRC's review of the proposed license amendment.

Respectfully submitted,

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NUCLEAR REGULATORY COMMISSION

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(North Anna Power Station, Units 1 and 2)	)	50-338 OLA-2 50-339 OLA-2

CERTIFICATE OF SERVICE

I certify that copies of the foregoing NOTICE OF APPEAL AND REQUEST FOR STAY and BRIEF ON APPEAL were served, this 31st day of ~~October~~ November, 1984, by deposit in the United States Mail, First Class, upon the following:

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