

II. BACKGROUND

The parties are currently litigating Contention 5, which is the only contention remaining in the proceeding. Contention 5 alleges:

The Applicants' failure to adhere to the quality assurance/quality control provisions required by the construction permits for Comanche Peak, Units 1 and 2, and the requirements of Appendix B of 10 C.F.R. Part 50, and the construction practices employed, specifically in regard to concrete work, mortar blocks, steel, fracture toughness testing, expansion joints, placement of the reactor vessel for Unit 2, welding, inspection and testing, materials used, craft labor qualifications and working conditions (as they may affect QA/QC) and training and organization of QA/QC personnel, have raised substantial questions as to the adequacy of the construction of the facility. As a result, the Commission cannot make the findings required by 10 C.F.R. 50.57(a) necessary for issuance of an operating license for Comanche Peak.

Many subissues of Contention 5 have been identified by the Board as requiring resolution. See Memorandum (Clarification of Open Issues) (March 15, 1984) ("Open Issues Order"). Among these subissues identified by the Board are the Walsh/Doyle concerns on piping and pipe support design, Staff walkdown inspections, the Cygna Independent Assessment Program Report, welding, protective coatings adequacy, various document control deficiencies, and intimidation of QC inspectors. Id.; see also Memorandum and Order (Quality Assurance for Design) (December 28, 1983); Memorandum (Procedure Concerning Quality Assurance) (October 25, 1983). Presentation of evidence on these subissues is ongoing.

III. DISCUSSION

10 C.F.R. § 50.57(c) permits an applicant, in a contested proceeding where a hearing is being held, to move the Atomic Safety and Licensing Board

to authorize the issuance of a "low power" operating license.^{1/} Section 50.57(c) specifically states that the Board shall give "due regard" to the rights of the parties, including "the right of a party to be heard to the extent that his contentions are relevant to the activity to be authorized."

If no party opposes the issuance of the license, the rule provides that the Board will issue an order authorizing the Director to make the appropriate findings in Section 50.57(a). On the other hand, if the license is opposed by any party, the Licensing Board makes findings on

^{1/} 10 C.F.R. § 50.57(c) provides:

An applicant may, in a case where a hearing is held in connection with a pending proceeding under this section, make a motion in writing, pursuant to this paragraph (c), for an operating license authorizing low-power testing (operation at not more than 1 percent of full power for the purpose of testing the facility), and further operations short of full power operation. Action on such a motion by the presiding officer shall be taken with due regard to the rights of the parties to the proceedings, including the right of any party to be heard to the extent that his contentions are relevant to the activity to be authorized. Prior to taking any action on such a motion which any party opposes, the presiding officer shall make findings on the matters specified in paragraph (a) of this section as to which there is a controversy, in the form of an initial decision with respect to the contested activity sought to be authorized. The Director of Nuclear Reactor Regulation will make findings on all other matters specified in paragraph (a) of this section. If no party opposes the motion, the presiding officer will issue an order pursuant to § 2.730(e) of this chapter, authorizing the Director of Nuclear Reactor Regulation to make appropriate findings on the matters specified in paragraph (a) of this section and to issue a license for the requested operation.

the matters specified in subsection (a) of 10 C.F.R. § 50.57,^{2/} but only to the extent that "there is a controversy." 10 C.F.R. § 50.57(c). The Director is responsible for making findings "on all other matters specified in paragraph (a) of this section." Id. If the admitted contentions

^{2/} 10 C.F.R. § 50.57(a) provides that an operating license may be issued upon finding that:

- (1) Construction of the facility has been substantially completed, in conformity with the construction permit and the application as amended, the provisions of the Act, and the rules and regulations of the Commission; and
- (2) The facility will operate in conformity with the application as amended, the provisions of the Act, and the rules and regulations of the Commission; and
- (3) There is reasonable assurance (i) that the activities authorized by the operating license can be conducted without endangering the health and safety of the public, and (ii) that such activities will be conducted in compliance with the regulations in this chapter; and
- (4) The applicant is technically and financially qualified to engage in the activities authorized by the operating license in accordance with the regulations in this chapter. [However, no finding of financial qualifications is necessary for an electric utility applicant for an operating license for a production or utilization facility of the type described in § 50.21(b) or § 50.22.]
- (5) The applicable provisions of Part 140 of this chapter have been satisfied; and
- (6) The issuance of the license will not be inimical to the common defense and security or to the health and safety of the public.

The bracketed portion of this provision was recently invalidated. See, New England Coalition on Nuclear Pollution v. NRC, No. 82-1581 (D.C. Cir., Feb. 7, 1984). On March 28, 1984, the Commission issued a new proposed rule to eliminate review of financial qualifications of electric utilities in operating license reviews and hearings.

are not "relevant" to the activity to be *authorized* (i.e., do not raise issues which, if proved, could affect a decision on controverted § 50.57(a) findings), then the Board does *not* make any 50.57(a) findings, but instead issues a § 2.730(e) order authorizing the Director to make the required findings. 10 C.F.R. § 50.57(c); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), LBP-81-5, 13 NRC 226, 233 (1981); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-83-27, 18 NRC 1146, 1149-50 (1983).

In accordance with the regulatory scheme described above, the following possible courses of action present themselves to the Board in this proceeding. If Intervenor CASE posed no objection to the Motion,^{3/} the situation would be analogous to that in the Catawba proceeding.

Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), Memorandum and Order (May 30, 1984). In Catawba, the Intervenor agreed with Applicants that the proposed fuel load and testing would not present any "technical threat to the public health and safety." Accordingly, the Intervenor did not oppose the issuance of a license authorizing those activities.

Catawba, pp. 1-2. A stipulation was reached among the parties in that

3/ The Staff received CASE's Partial Answer in Opposition to Applicants' Motion for Authorization to Issue a License to Load Fuel and Conduct Precritical Testing, and Motion for Additional Time to Respond (August 18, 1984 ("CASE's Answer")) on August 20, 1984. In its Answer, CASE indicates that it opposes Applicants' Motion, and appears to provide a partial explanation of why the Applicants' Motion should be denied. However, the Staff has not had sufficient opportunity to analyze CASE's response from the standpoint of whether it properly raises an issue in controversy with respect to the requested license. CASE's motion also requests additional opportunity for discovery. The Staff will respond to CASE's motion within the time provided by the rules.

proceeding; the Licensing Board adopted the stipulation and authorized the Director upon making the finding on all applicable matters in 10 C.F.R. § 50.57(a), to issue the requested license to the Applicants. Id., p. 3. The Board specifically noted that "no findings on [the Intervenor's] contentions are made or implied by this Memorandum and Order." Id. If CASE does not object to the Applicants' Motion, the Staff does not interpose any objection. Accordingly, the Board may then issue an order pursuant to § 2.730(e) authorizing the Director to make the appropriate § 50.57(a) findings.

On the other hand, it appears that CASE does object to the Applicants' Motion;^{4/} therefore CASE should explain why Contention 5 is relevant to the fuel load and testing activities which Applicants propose to conduct. The Board should then review CASE's objection to ascertain whether it raises an aspect of Contention 5 relevant to the requested fuel load authorization. If it does not, the Licensing Board is not required to make 50.57(a) findings concerning the requested license, but should follow the provisions of 50.57(c) and issue an order authorizing the Director of NRR to make appropriate findings and to issue the requested license upon making the requisite findings. If on the other hand CASE's objection raises aspects of Contention 5 relevant to the requested fuel loading authorization, the Licensing Board must make the evidentiary findings called for by 50.57(a) relevant to the requested

^{4/} See note 3 above.

license^{5/} For example, in Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-83-27, 18 NRC 1146 (1983), the Commission approved the Licensee's request to reinstate that portion of its license permitting it to load fuel and conduct pre-criticality testing. In doing so, the Commission held:

A review of the pleadings on Joint Intervenors' two hearing requests reveals no significant safety concerns material to fuel loading and precriticality testing. This should not be surprising since the IDVP and related efforts focus on plant systems engineered to handle the hazards associated with radioactive fission products and, as stated above, no such fission products will be produced (emphasis added).

Diablo Canyon, 18 NRC at 1149. Thus, the Commission specifically found that the Joint Intervenors' contentions in Diablo Canyon were not relevant to fuel loading and precriticality testing.^{6/} However, in the same decision the Commission denied the Licensee's request for reinstatement

^{5/} The Board should note that in the Shoreham proceeding there is presently pending before the Commission a request by the Applicant for guidance on the application of GDC-17 to a request for license authorizing fuel loading, precritical testing, and cold critical testing. A Commission decision on this matter may have a bearing on the scope of the Board's review in the Comanche Peak proceeding. The NRC Staff's Response to applicant's motion in that case briefly sets out the background of the certified question. A copy is attached for the convenience of the Board and the parties.

^{6/} See also Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), LBP-81-4, 13 NRC 216, (1981), where the Board stated, "Contentions were considered "relevant" to the [50.57(c)] motion to the extent that they needed to be resolved prior to criticality. For example, a contention which asserted that the control rod drives were defective would be heard and decided prior to the grant of a testing license." 13 NRC at 233 (emphasis added).

of that portion of its license permitting criticality and low power operation. According to the Commission:

Serious and substantive safety concerns relating to design quality assurance led to the license suspension. These same safety concerns are now the subject of adjudicatory hearings before the Appeal Board. The license suspension and order requiring further hearings recognizes that the adjudicatory record may not now include essential findings on design quality assurance.

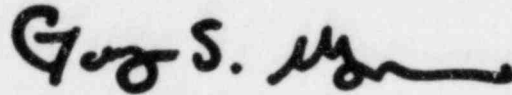
Id., at 1150.

The further procedural course with respect to the Applicant's motion depends on the Board's consideration of CASE's response. If CASE has failed to show that Contention 5 is relevant to the activity to be authorized, the Staff does not object to the Applicant's Motion, which would permit the Board to authorize the Director of NRR to make appropriate findings with respect to the requested fuel load license and to issue such license upon completion of such findings. If the Board finds that Contention 5 is relevant to the activity to be authorized, the Board would be required to make the relevant § 50.57(a) findings. Depending on the issue raised, this may be possible on the basis of the record already compiled, it may be possible to decide on affidavits, or it may require further evidence.

IV. CONCLUSION

The Applicants' Motion should be acted on by the Board in accordance with the requirements of 10 C.F.R. § 50.57(c), as discussed in greater detail above.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Geary S. Mizuno". The signature is written in a cursive style with a long, sweeping underline.

Geary S. Mizuno
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 22nd day of August, 1984