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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE
ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	Docket No.
VIRGINIA ELECTRIC AND POWER COMPANY	)	50-338/339-OLA-2
	)	
(North Anna Power Station,	)	
Units 1 and 2)	)	

APPLICANT'S BRIEF IN OPPOSITION TO APPEAL OF CONCERNED CITIZENS OF LOUISA COUNTY AND ANSWER OPPOSING REQUEST FOR STAY

I.

Introduction

Concerned Citizens of Louisa County (CCLC) filed with the Appeal Board on November 1, 1984, its Notice of Appeal and Request for Stay. The Applicant, Virginia Electric and Power Company (Vepco), opposes, for the reasons set out below, both the Appeal and the Request. We shall deal with CCLC's filings in that order in this Brief.

II.

The Appeal

A. The Facts

Proceeding OLA-2 involves Vepco's application for permission to install neutron-absorbing racks at its North Anna Power Station in Louisa County, Virginia. CCLC's three Contentions, however, and, with one exception, CCLC's statements of basis for its Contentions, deal exclusively with Vepco's proposal to ship spent fuel from its Surry Power Station to North Anna for storage

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there.[1] The Licensing Board rejected each of CCLC's three Contentions. Contention 1 alleges that the proposed license amendment in OLA-2 constitutes a major federal action significantly affecting the human environment. But the bases for this Contention, which purports to deal with Vepco's proposed new racks, are that the transportation of spent fuel by truck creates a risk of accident, risks of sabotage and the possibility of human error in sealing shipping casks. See Third Draft of Contentions, accompanying Mr. Dougherty's July 30, 1984 letter to the Licensing Board, at 6. Contention 2 alleges that the Staff has not adequately considered the alternative of constructing a dry cask storage facility at Surry (not at North Anna). The basis for this Contention deals only with alternatives for storing Surry fuel; it does not mention North Anna fuel. Id. at 7. Contention 3 alleges that the Staff's Environmental Assessment is inadequate because it does not evaluate the risks of shipping accidents, the consequences of shipping accidents and the alternative of constructing a dry cask storage facility at the Surry Station (not at North Anna). Contention 3 thus deals exclusively with the storage of Surry fuel; it does not mention North Anna fuel. Id. at 8.

The only respect in which these three Contentions deal with the proposed racks, which after all are the only subject of the

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[1] Vepco's application for a license amendment authorizing storage of Surry fuel at North Anna is the subject of a separate proceeding, OLA-1.

proceeding, is in connection with Contention 1. As part of the basis for that Contention, CCLC states:

> [T]he environmental impacts of the proposed license amendment cannot be evaluated apart from the environmental impacts of the Surry-to-North Anna spent fuel transshipment proposal which is being addressed in [OLA-1]. The modification of the North Anna spent fuel pool is designed to accommodate the 500 fuel assembles that VEPCO intends to remove from the Surry spent fuel pool. Actions that are related in this way cannot be "segmented" for purposes of the environmental review required by NEPA. Therefore, in evaluating the significance of the two proposed actions, the effects of the spent fuel pool modification must be summed with the effects of the spent fuel transshipment proposal. As discussed below, the effects of the transshipment are themselves "significant."

Id. at 6.

In short, one can examine CCLC's Contentions in OLA-2 from beginning to end and find only one factual allegation dealing with the proposed racks, namely that the new racks "are designed to accommodate the 500 fuel assemblies that VEPCO intends to remove from the Surry spent fuel pool."

For the reasons set out below, the Licensing Board correctly rejected all three Contentions and dismissed the OLA-2 proceeding.

B. Argument

1. Contention 1

Contention 1 fails for three reasons.

First, CCLC has not stated an adequate factual basis for "summing" the environmental effects of the OLA-1 and OLA-2 proposals. It has merely alleged that the proposed new racks will accommodate fuel assemblies from the Surry spent fuel pool.

It has not alleged that the racks will not accommodate North Anna fuel, nor has it alleged that but for the shipments from Surry, Vepco would not install the new racks. In fact, the North Anna racks will accommodate Surry fuel just as they will accommodate North Anna fuel, and so CCLC's sole factual allegation with respect to the racks is one with which Vepco takes no issue. But this is hardly an adequate basis for contending that the reracking proposal lacks independent utility and that the environmental effects of the racks and the shipping must be summed.[2]

Second, the Licensing Board correctly held that "there can be no summing inasmuch as CCLC has not filed a contention objecting on the merits, either technical or environmental, to the spent fuel modification." Memorandum and Order at 8. None of CCLC's three Contentions addresses the merits of the racks in and of themselves. That is to say, CCLC has neither (a) raised safety questions with respect to the racks nor (b) challenged the Staff's conclusion that the racks (aside from transportation-related concerns) present negligible environmental effects, see Environmental Assessment By The Offices of Nuclear Reactor Regulation and Nuclear Material Safety and Safeguards Related to Increasing the Spent Fuel Storage Capacity and the Storage of Surry Spent Fuel at the North Anna Power Station, Units No. 1

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[2]North Anna will lose full core reserve (FCR) in 1989 if no Surry fuel is stored there. The new racks would extend the loss of FCR at North Anna to 1998 if no Surry fuel is stored there. Vepco Spent Fuel Storage, A Summary of Information in Support of Increasing the Spent Fuel Storage Capacity at North Anna Power Station Units 1 and 2, August 1982 (Spent Fuel Storage), at 4.

and No. 2 (Environmental Assessment), at 29. Thus, if CCLC were successful in resisting Vepco's OLA-1 proposal, and transshipment were not permitted, no transportation-related environmental effects would exist. And if that were true - CCLC having assigned no significant environmental effects to the racks - there would be no basis to support an OLA-2 proceeding. If, on the other hand, CCLC were to lose in the OLA-1 proceeding, that would necessarily mean, in light of Consolidated Contention 1 in OLA-1, that the transportation-related effects had been found negligible by the Licensing Board. Since CCLC has cited no significant effects associated with the racks themselves, CCLC would be left with only negligible transportation-related effects to be "summed" with the negligible effects associated with the installation of the proposed racks. In either case, CCLC's opposition to the racks would necessarily be futile, because it would have identified no safety or environmental shortcoming, associated with the racks alone, to fall back on in OLA-2.

Third, although the Board declined to accept the argument, we believe that Contention 1 is inadequate to implicate the racks because the OLA-2 proposal has "independent utility." We are mindful of the Appeal Board's admonition that Licensing Boards, in ruling on contentions, are to avoid deciding the merits of those contentions, Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 547-49 (1980), and we would not lightly urge the Appeal Board to depart from that practice. In this particular case, however, the Appeal Board should do just that, because the

"independent utility" of reracking is so crystal clear that it can be said to exist as a matter of law.

In Duke Power Co. (Amendment to Materials License SNM-1773-Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-651, 14 NRC 307 (1981), the Appeal Board stated the test for determining whether an agency's environmental review has to cover only a particular proposal or some larger plan of which the proposal is but a part. The review may be limited to the proposal alone if the proposal has "independent utility" and if authorizing the proposal would not foreclose the agency's freedom to deny other parts of a larger plan. 14 NRC at 313.

Duke, of course, did not involve a reracking proposal. Yet the Appeal Board went out of its way to state that when the exhaustion of spent fuel storage capacity approaches, a plant operator will have limited alternatives and that one of those alternatives is "expansion of the spent fuel pool's storage capability by reracking." Id. at 314. Without regard to the facts in Duke the Appeal Board said:

> [W]here available, each of these alternatives [including reracking] had manifest independent utility. Whether or not it provides a long-term benefit, it most assuredly offers a significant near-term one.

Id. at 315.

The Board went on to say that an application for a license amendment for a particular spent fuel storage alternative need not be invariably granted; the alternative must, among other things, undergo and survive an environmental analysis:

> The significance of the independent utility of a particular proposal is simply that, for NEPA purposes, the environmental analysis may be confined to that proposal.

Id.

In short, the Appeal Board has recognized in the case law what is apparent as a matter of common sense, namely that reracking necessarily has "independent utility." That being so, the environmental effects of reracking are not to be summed with those of an independent proposal. We can think of no useful purpose to be served by remanding Contention 1 so that the Licensing Board can determine on the merits whether the views stated by the Appeal Board in Duke are correct.

2. Contention 2

With respect to Contention 2, the Licensing Board simply held that it is "directed solely to the transshipment of Surry spent fuel assemblies or to an alternative thereto" and thus lacks an adequate basis. Memorandum and Order at 9. That is undeniably true. As we indicated at the outset of our argument, one can search Contention 2 high and low without discovering any reference whatever to the use of dry cask storage as an alternative for the storage of North Anna fuel.[3]

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[3] In Contentions 2 and 3, CCLC did not make the argument about "segmentation" for NEPA purposes that it made in connection with Contention 1. If that argument were deemed applicable with respect to Contentions 2 and 3, then the second and third arguments made by Vepco with respect to Contention 1 should also be treated as applying to Contentions 2 and 3.

Moreover, if Contention 1 is denied, then Contention 2 - quite aside from its lack of basis - must also fail for legal reasons. This is because of the principle, well established in NRC practice, that absent an unresolved conflict concerning alternative uses of available resources, alternatives need not be analyzed in instances where the environmental effects of a proposed action are insignificant. Portland General Electric Co. (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 266 (1979). The Staff, of course, has determined in its Environmental Assessment that the effects of the reracking would indeed be negligible. CCLC has neither contended nor suggested in its statement of basis for Contention 2 that the installation of the new racks involves any unresolved conflict over the use of available resources.

3. Contention 3

This Contention also lacks any basis whatever. It deals solely with the risk of shipping accidents, the consequences of those accidents, and an alternative for disposing of Surry fuel. For the reasons set forth in connection with Contention 2, it is inadequate.

III.

Request for Stay

CCLC seeks a stay under 10 CFR § 2.788 of the effectiveness of the Licensing Board's decision. Section 2.788 sets out four factors for the Appeal Board to consider in deciding whether to grant a stay. Each of them is addressed below. The burden of persuasion as to all four factors is on CCLC. Alabama Power Co.

(Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981). CCLC has failed to carry that burden. Indeed, as will be shown, CCLC has addressed only two of the four factors defined under § 2.788 and has ignored the most important.

1. Irreparable Injury

Section 2.788(e)(2) requires a movant to show whether it will be irreparably injured unless a stay is granted. This has been called the "crucial" factor; without it, the chances of obtaining a stay are slight. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-437, 6 NRC 630, 632 (1977). Despite this requirement, CCLC has not addressed the factor. In fact, CCLC will not be irreparably harmed by the denial of a stay, even if it prevails on this appeal. As we have pointed out, if CCLC succeeds in defeating the proposal in OLA-1, there will be no transshipment environmental effects to "sum" with the concededly negligible effects of the racks standing alone. If CCLC fails in OLA-1, then it will have no basis in any event for opposing installation of the racks. Above all, even if the stay were denied, the license amendment issued, and the new racks installed, and even if CCLC were to succeed in this appeal and thereafter defeat the reracking proposal, CCLC still would not be injured. In that event, the North Anna reracking license amendment would be vacated. The license would then continue to limit the allowable number of assemblies to the present 966 and the center-to-center spacing to the present 14 inches. See Spent Fuel Storage, at 7. CCLC would have lost nothing.

2. The Other Three Factors

As we have noted, the showing of irreparable injury to CCLC is the "crucial" factor. If there is not irreparable injury to CCLC, then "an awfully compelling showing must be made on the other three factors." Florida Power & Light Co., (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-415, 5 NRC 1435, 1437 (1977).

CCLC has not made a "compelling" showing on the remaining three factors. It has not addressed the public interest at all. With respect to the likelihood that it will prevail on appeal, its showing is not the "strong" one required by § 2.788(e)(1). It has shown no more than the possibility of error by the Licensing Board.

Only the final factor - harm to the "other parties" - favors CCLC's request. Vepco's present plan is to install the racks in April or May of 1985. Thus, if the Appeal Board should hold for CCLC on the merits of this appeal, it is possible that the remanded OLA-2 proceeding could be resolved by the Licensing Board in Vepco's favor, perhaps on a motion for summary disposition, prior to that date. In that event, a stay of the effectiveness of the Board's order now under review would not have harmed Vepco. But we repeat, this is the only factor that tends to support CCLC's request. And it is far outweighed by CCLC's utter failure to make any showing whatever that it will be irreparably harmed by the denial of its request or that denial is required by the public interest.

Respectfully submitted,

VIRGINIA ELECTRIC AND POWER COMPANY

By: /s/Patricia M. Schwarzschild
Patricia M. Schwarzschild

Of Counsel

Michael W. Maupin
Patricia M. Schwarzschild
Marcia R. Gelman
HUNTON & WILLIAMS
P. O. Box 1535
Richmond, Virginia 23212

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served Applicant's Brief in Opposition to Appeal of Concerned Citizens of Louisa County and Answer Opposing Request For Stay upon each of the persons named below by depositing a copy in the United States mail, properly stamped and addressed to him at the address set out with his name:

Secretary
U. S. Nuclear Regulatory Commission
Washington, D.C. 20555
Attention: Chief Docketing and Service Section

Alan S. Rosenthal
Atomic Safety and Licensing Appeal Board
U. S. Nuclear Regulatory Commission
Washington, D.C. 20555

Gary J. Edles
Atomic Safety and Licensing Appeal Board
U. S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Reginald L. Gotchy
Atomic Safety and Licensing Appeal Board
U. S. Nuclear Regulatory Commission
Washington, D.C. 20555

Sheldon J. Wolfe, Chairman
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Jerry Kline
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. George A. Ferguson
School of Engineering
Howard University
2300 5th Street
Washington, D.C. 20059

Henry J. McGurren, Esq.
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

James B. Dougherty, Esq.
3045 Porter Street, NW
Washington, D.C. 20008

Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

By: /s/ Patricia M. Schwarzschild
Patricia M. Schwarzschild, Counsel for
Virginia Electric and Power Company

Dated: November 15, 1984