

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of

VIRGINIA ELECTRIC & POWER COMPANY

(North Anna Nuclear Power Station,  
Units 1 and 2)

Docket Nos. 50-338 OLA-2  
50-339 OLA-2

(Expansion of Spent Fuel Pool)

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NRC STAFF BRIEF IN OPPOSITION TO  
CONCERNED CITIZENS' APPEAL AND MOTION FOR STAY

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Henry J. McGurren  
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November 16, 1984

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November 16, 1984

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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In the Matter of	)	
VIRGINIA ELECTRIC & POWER COMPANY	)	Docket Nos. 50-338 OLA-2
(North Anna Nuclear Power Station,	)	50-339 OLA-2
Units 1 and 2)	)	(Expansion of Spent Fuel Pool)

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CONCERNED CITIZENS' APPEAL AND MOTION FOR STAY

I. INTRODUCTION

On November 1, 1984, Concerned Citizens of Louisa County (hereinafter "CCLC" or "Concerned Citizens") filed a "Notice of Appeal and Request for a Stay" accompanied by a supporting "Brief on Appeal." Specifically CCLC asserts that the Licensing Board in its Memorandum and Order dated October 15, 1984 erroneously denied its petition for leave to intervene in the above captioned proceeding and furthermore requests this Board to stay the effectiveness of that portion of the Licensing Board's Order authorizing the issuance of an amendment which would permit the expansion of the spent fuel storage capacity for North Anna, Units 1 and 2.

II. BACKGROUND

1. On July 13, 1982 and August 20, 1982, the Applicant herein filed applications seeking amendments to the operating licenses for North Anna Units 1 and 2. The first amendment sought authority to receive and store at the North Anna facility 500 spent fuel assemblies from the Surry Power

Station Units 1 and 2. See 47 Fed. Reg. 41892 (September 22, 1982). This proceeding was designated Case OLA-1. The second amendment sought authority to expand the fuel storage capacity for North Anna Units 1 and 2. See 47 Fed. Reg. 41893 (September 22, 1982). This latter proceeding was designated Case OLA-2.

2. The Petitioner herein, CCLC, submitted five contentions for litigation in the receipt and storage proceeding (OLA-1) <sup>1/</sup> and three contentions for litigation in the fuel pool expansion proceeding (OLA-2). The first contention submitted in OLA-1 asserts that the proposed license amendment seeking authority to ship 500 spent fuel assemblies from Surry to North Anna constitutes a major Federal action significantly affecting the human environment and thus may not be granted prior to the preparation of an environmental impact statement. <sup>2/</sup> As a basis for this contention CCLC states that the transportation of spent fuel by truck presents: (i) a risk of accidents causing tremendous health and environmental damage; (ii) the risk of sabotage; and (iii) the possibility of error by Applicant's employees when performing such tasks as sealing the shipping casks. <sup>3/</sup>

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<sup>1/</sup> Contention 2 was subsequently withdrawn by CCLC (See Board's Order dated September 13, 1984, at 2) and consideration of Contention 4 is awaiting further review by the Petitioner of certain physical protection system documents provided to it by the Board pursuant to a Protective Order issued on September 26, 1984.

<sup>2/</sup> See Attachment 1 to letter from James B. Dougherty to the Licensing Board, dated July 30, 1984, setting forth the revised contentions advanced by CCLC.

<sup>3/</sup> Id. at 1-2.



The third contention proposed by CCLC in OLA-1 alleges that neither the Applicant nor the Staff has adequately considered the alternative of constructing a dry cask storage facility at the Surry stations. <sup>4/</sup> The basis for this contention as asserted by CCLC is that "contrary to the National Environmental Policy Act, 42 U.S.C. 4332(2)(E), consideration was not given to this alternative method which is feasible, can be effected in a timely manner, is the least expensive and safest method for at least 50 years, and can be used on or offsite". Memorandum and Order (October 15, 1984) at 5.

Finally, the fifth contention proposed by CCLC in OLA-1 states that the Environmental Assessment prepared by the NRC Staff is inadequate in that: (i) it does not evaluate the risks of accidents (including sabotage) involving Surry - North Anna shipments; (ii) it does not evaluate the consequences of credible accidents involving Surry - North Anna shipments; and (iii) it does not evaluate the alternative of constructing a dry cask storage facility at the Surry station. <sup>5/</sup> As the basis for this contention CCLC argues, inter alia, that the Environmental Assessment prepared by the NRC Staff in connection with the proposed license amendment contains no "site-specific" discussion or analysis of the environmental effects of the amendment. <sup>6/</sup>

3. The three contentions submitted by CCLC in the spent fuel pool expansion proceeding (OLA-2) are identical to Contentions 1, 3 and 5,

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<sup>4/</sup> Id. at 3.

<sup>5/</sup> Id. at 4.

<sup>6/</sup> Id. at 4-5.

above, except that the basis for Contention 1 further asserts "that the environmental effects of [the Applicant's] re-racking proposal must be summed with the effects of the transshipment proposal for purposes of assessing the environmental significance of the action". CCLC's Brief at 3.

4. Following the submission of the above contentions in the two proceedings, the Atomic Safety and Licensing Board issued a Memorandum and Order on October 15, 1984 addressing both sets of contentions. With respect to the receipt and storage proceeding (OLA-1), the Licensing Board consolidated Contentions 1, 3 and 5 into a single redrafted contention which it admitted for litigation in that proceeding; the Board also admitted CCLC as a Party-Intervenor in Case OLA-1. Memorandum and Order at 4-5 and 9.

With respect to Contentions 1, 2 and 3 submitted in the spent fuel pool expansion proceeding (OLA-2), the Licensing Board denied all three contentions, denied CCLC's petition to intervene and dismissed the proceeding. Id. at 9. <sup>7/</sup> In ruling on CCLC's first contention, the Licensing Board declined to consider either CCLC's segmentation argument or the Applicant's responsive argument that the spent fuel pool expansion at North Anna had independent utility, i.e., that even if no spent fuel assembly was ever shipped from Surry, the North Anna enlarged spent fuel pool would accommodate its own spent fuel assemblies and thus would extend the full core reserve date from 1989 to 1998. Id. at 7-8. Rather,

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<sup>7/</sup> The Licensing Board further authorized the Director of the Office of Nuclear Reactor Regulation to issue the requested fuel pool expansion amendment. Memorandum and Order at 10.



the Board observed that "at this stage of the proceeding we do not consider the merits of a contention" (Id. at 8) and denied the contention solely upon the ground that it "lacks a basis." Id. <sup>8/</sup> With respect to Contentions 2 and 3, the Board observed that they are either directed "solely to the transshipment of Surry spent fuel assemblies or to an alternative thereto" and thus "lack bases." Id. at 9.

5. Thereafter, on November 1, 1984, CCLC filed a notice of appeal from that portion of the Licensing Board's Order rejecting the proffered contentions in the spent fuel pool expansion proceeding (OLA-2) and denying CCLC's petition to intervene. CCLC also sought a stay of the effect of the Licensing Board's October 15, 1984 Order. <sup>9/</sup> The Staff opposes CCLC's appeal and request for a stay for the reasons set forth below.

### III. DISCUSSION

#### A. Appeal

The Licensing Board's Memorandum and Order of October 15, 1984 (regarding Case OLA-2) should be affirmed in that the Board properly held that CCLC's contentions lack the necessary basis for admission as issues in controversy in the instant proceeding. 10 C.F.R. § 2.714.

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<sup>8/</sup> The Board further observed that "[w]hile CCLC urges that environmental effects of the two proposed modifications must be summed in order to evaluate the significance of both proposed actions, 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". Id. at 8.

<sup>9/</sup> CCLC's Notice of Appeal and Request for Stay.

Pursuant to 10 C.F.R. § 2.714(b), a petitioner is required "to file a list of contentions which petitioner seeks to have litigated in the matter, and the basis for each contention set forth with reasonable specificity." This section further provides that a petitioner who fails to file at least one contention which satisfies the requirements of § 2.714(b) will not be permitted to participate as a party. In the present proceeding the Board correctly determined, with sufficient detail for the parties "to apprehend the foundation of the ruling," <sup>10/</sup> that CCLC did not satisfy these requirements.

In the present appeal, CCLC, after first confessing its inability to fully understand the Licensing Board's ruling, argues that the Licensing Board improperly rejected each of its contentions upon the ground that each was not supported by a proper basis. CCLC's Brief at 7-8. We cannot agree.

In asserting a basis for Contention 1, CCLC first relied on the basis previously stated in support of its first contention in OLA-1, the transshipment proceeding. Specifically, CC asserts as a basis for its first contention that the transportation of spent fuel by truck presents: (i) a risk of accidents causing tremendous health and environmental damage; (ii) the risk of sabotage; and (iii) the possibility of error

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<sup>10/</sup> Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-104, 6 AEC 179 n.2 (1973). The Appeal Board there found that the Licensing Board's bare statement that "considering the entire petition, we conclude that Mr. Gadler should be admitted as a party [to] this proceeding" insufficient and remanded the proceeding to the Licensing Board with instructions to issue a supplemental memorandum. *Id.* This is not the situation here where sufficient details have been set forth by the Board in its order for the parties "to apprehend the foundation of the ruling."

by Applicant's employees when performing such tasks as sealing the shipping casks. While this stated basis proved sufficient to support a like contention in the transshipment proceeding (Memorandum and Order at 4) it is, on its face, insufficient to support the similarly worded contention in the spent fuel pool proceeding. CCLC's concerns regarding the perceived dangers of transshipment of spent fuel is simply unrelated to the proposed amendment to expand the North Anna fuel pool, and whatever economy CCLC may have initially gained in using the same basis twice, does not now serve it well on appeal. <sup>11/</sup>

Similarly, the second basis asserted by CCLC in support of Contention 1 - that the environmental impacts of the spent fuel pool amendment cannot be evaluated apart from the environmental impacts associated with the transshipment amendment - is also lacking in merit. In the present proceeding, CCLC has failed to identify in any of its contentions or their supporting basis, any environmental impacts resulting from the spent fuel pool amendment. And in the absence of any identified environmental concern that should be evaluated in conjunction with the present proposed amendment, CCLC has, a fortiori, failed to set forth any environmental impacts which must properly be summed with the impacts identified in the transshipment proceeding. The Licensing Board's conclusion that "there can be no summing inasmuch as CCLC has not filed

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<sup>11/</sup> Moreover, for the same reason, i.e., that Contentions 2 and 3 and their bases are "directed solely to the transshipment of Surry spent fuel assemblies or to an alternative thereto" the Licensing Board correctly ruled that both of these contentions lack the basis required by 10 CFR § 2.714. See Memorandum and Order at 9.



a contention objecting on the merits, either technical or environmental, to the spent fuel modification" is therefore both logically and legally correct. Memorandum and Order at 8.

CCLC further argues that the same basis asserted by it and found adequate to support Contention 1 in the OLA-1 proceeding should accordingly be sufficient to support the same contention in the OLA-2 proceeding. CCLC's Brief at 7 and 8. As discussed above, CCLC has failed to recognize that there are two separate proceedings, one involving transshipment of spent fuel (the OLA-1 proceeding) and another involving expansion of spent fuel capacity at the North Anna Station (the OLA-2 proceeding); and that "bases" found adequate to support a contention in one proceeding may not be adequate to support the same contention in another proceeding. Moreover, as the Appeal Board has noted in rejection of contentions offered in one proceeding which were identical to those asserted in another proceeding:

The Board must satisfy itself not only that the contention applies to the facility at bar but, as well, that there has been sufficient foundation assigned for it to warrant its further exploration. If it appears to the board that the intervenor has no basis for offering the contention other than that it was advanced in some earlier proceeding, summary disposition of it will be mandated. <sup>12/</sup>

While the Staff recognizes that CCLC raises the additional issue of an asserted interdependence of the OLA-1 and OLA-2 proceedings, it is not enough to satisfy the 10 C.F.R. § 2.714 standards with respect to a con-

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<sup>12/</sup> Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 246 (1973).

tention offered in the OLA-2 proceeding by merely arguing that the identical contention was admitted in the OLA-1 proceeding.

Finally CCLC argues that the Board committed error by ruling on the merits of Contention 1, basing its decision on the "independent utility" argument advanced by the Applicant in opposition to the proposed contention. CCLC's Brief at 10-15. The basis for CCLC's argument appears to be grounded solely on the Board's reference to the Duke Power Company decision discussing the legal standard for permissible segmentation. <sup>13/</sup> CCLC's Brief at 10. The Staff submits that the Board's reference to the decision was merely to clarify the Applicant's argument and not an indication that the Board was relying on the decision for its ruling. <sup>14/</sup> The Board made clear that the reason for rejection of Contention 1 was that the contention "lacks a basis." Order at 8. The Board made no finding, as the Applicant urged, that the proposed expansion of the North Anna spent fuel pool "has independent utility" and that approval of the proposed expansion would not foreclose the agency's freedom to withhold approval of subsequent portions of the overall plan. "Applicant's Response to the Contentions of Concerned Citizens of Louisa County," dated August 14, 1984, at 12-14.

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<sup>13/</sup> Duke Power Company (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).

<sup>14/</sup> The Staff believes that no cause has been given to doubt the accuracy of the Board's representation that it did not consider the merits of the segmentation question. See Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-770, 19 NRC 1163, 1180-81 (1984).

B. Motion for Stay

In addition to its request for relief pursuant to 10 C.F.R. § 2.714a, CCLC also argues that it is appropriate in this proceeding to stay the Licensing Board's order authorizing the issuance of the requested amendment. CCLC's Brief at 16.

The requirements pertinent to issuance of a stay as set forth in 10 C.F.R. § 2.788(e) are:

- (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
- (2) Whether the party will be irreparably injured unless a stay is granted;
- (3) Whether the granting of a stay would harm other parties; and
- (4) Where the public interest lies.

In determining whether the movant has satisfied these four factors it must be recognized that:

The burden of persuasion on these factors rests on the moving party. While no single factor is dispositive, the most crucial is whether irreparable injury will be incurred by the movant absent a stay. To meet the standard of making a strong showing that it is likely to prevail on the merits of its appeal, the movant must do more than merely establish possible grounds for appeal. In addition, an "overwhelming showing of likelihood of success on the merits" is necessary to obtain a stay where the showing on the other three factors is weak. <sup>15/</sup>

CCLC has failed to sustain its burden.

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<sup>15/</sup> Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981; footnotes omitted); see also United States Department of Energy (Clinch River Breeder Reactor Plant), ALAB-721, 17 NRC 539, 543-44 (1983); and Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-437, 6 NRC 630, 632 (1977).



1. With respect to the first factor, likelihood of prevailing on the merits, for the reasons discussed above in response to CCLC's appeal, CCLC has not shown a likelihood of prevailing on the merits.

2. In considering the second and most crucial factor, Farley, supra., whether the party will be injured unless a stay is granted, CCLC has failed to set forth in its motion any harm which it will incur if the requested amendment is granted. Having thus failed to articulate or document any such harm, the present record simply does not lend support to CCLC on this factor. Accordingly, CCLC has failed to satisfy its burden with regard to this factor.

3. Regarding the third factor, harm to other parties, CCLC asserts that the Applicant has no immediate need for the proposed amendment to expand the fuel pool capacity at North Anna until Applicant receives permission to move spent fuel to the pool from Surry. CCLC's Brief at 16. The Applicant has stated that apart from shipment of any fuel from Surry, North Anna will lose full core reserve in 1989. "Applicant's Response to the Contentions of Concerned Citizens of Louisa County," dated August 14, 1984, at 14. The date by which loss of full core reserve would occur would be extended to 1998 with issuance of the proposed amendment. Id. Accordingly, while it appears that there would be no immediate harm to other parties should the stay be granted, given that CCLC has failed to satisfy the first two factors for issuance of a stay and has not otherwise established that a stay is warranted this factor does not appear to provide, in itself, a sufficient basis to support a stay.

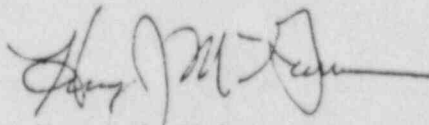
4. With regard to the fourth factor, where the public interest lies, CCLC simply states that consideration of both proceedings (OLA-1 and OLA-2) simultaneously "can do nothing but improve the NRC's review of the proposed license amendment." CCLC's Brief at 16. This type of speculation is insufficient to establish where the public interest lies and thus does not satisfy CCLC's burden on this factor.

In sum, the Staff submits that CCLC has failed to satisfy the requirements of 10 C.F.R. § 2.788(e) and thus its request for a stay should be denied.

#### IV. CONCLUSION

For the reasons set forth above, the Staff submits that the Licensing Board's denial of CCLC's petition for leave to intervene in the OLA-2 proceeding was proper and should be affirmed. Moreover, the Staff submits for the reasons set forth above that CCLC's request for a stay should be denied.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'Henry J. McGurren', is written over a horizontal line.

Henry J. McGurren  
Counsel for NRC Staff

Dated in Bethesda, Maryland  
this 16th day of November 1984

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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(North Anna Nuclear Power Station, ) 50-339 OLA-2  
Units 1 and 2) (Expansion of Spent Fuel Pool)

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF BRIEF IN OPPOSITION TO CONCERNED CITIZENS' APPEAL AND MOTION FOR STAY" 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 through deposit in the Nuclear Regulatory Commission's internal mail system, this 16th day of November, 1984:

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