1764

DOCKETED
USNRC

'84 DEC 24 A10:33

OFFICE OF SECRETARY
DOCKETING & SERVICE

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
DUKE POWER COMPANY, et al.	)	Docket Nos. 50-413 OL
	)	50-414 OL
(Catawba Nuclear Station, Units 1 and 2)	)	

OPPOSITION OF DUKE POWER COMPANY, ET AL. TO "INTERVENORS' APPLICATION FOR A STAY PENDING ADMINISTRATIVE AND JUDICIAL REVIEW"

J. Michael McGarry, III
Anne W. Cottingham
Mark S. Calvert
BISHOP, LIBERMAN, COOK, PURCELL & REYNOLDS
1200 Seventeenth Street N.W.
Washington, D.C. 20036
(202) 857-9833

Albert V. Carr, Jr.
DUKE POWER COMPANY
P.O. Box 33189
Charlotte, North Carolina 28242
(704) 373-2570

Attorneys for Duke Power Company, et al.

December 21, 1984

8412260419 841221
PDR ADOCK 05000413
Q PDR

D503

Pursuant to 10 C.F.R. §2.788(d), Duke Power Company, et al. ("Applicants") submit that Intervenors' written stay application, which consists largely of broad, conclusory assertions of error supported by little or no explanatory detail and virtually no citations to the record, fails to satisfy Intervenors' burden as movants for injunctive relief. This skeletal document places upon Applicants the burden of interpreting, as well as refuting, Intervenors' claims; and it improperly places upon this Appeal Board the burden of piecing together the record[1/] to enable it to rule upon Intervenors' bald assertions.

ARGUMENT

I. Intervenors have failed to make a strong showing that they are likely to prevail on the merits of their appeals

In support of this factor, Intervenors argue that:

A. The Licensing Board erroneously authorized the issuance of an operating license for Catawba despite the existence of "serious violations"of NRC Quality Assurance (QA) regulations and "known yet uncorrected workmanship deficiencies" (Stay Application at 2).

B. The Licensing Board improperly excluded contentions from litigation (Stay Application at 7).

As discussed below, none of the grounds of alleged support for these arguments have any merit.

A. The Board's actions in the QA proceeding were proper and are amply supported by the record[2/]

1. 1981 SALP Report. Intervenors cite the NRC's 1981 SALP

1/ This licensing proceeding has involved 65 days of hearing, testimony by 167 witnesses, admission of over 395 exhibits, and the production of a transcript of over 20,000 pages.

2/ Deference given to the trier of fact when reviewing a decision on the merits is "even more compelling" in a stay proceeding. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-680, 16 NRC 127, 133 (1982).

Report as evidence that the history of Catawba construction is "replete" with violations of 10 C.F.R. Part 50, Appendix B. The Licensing Board properly found this Report was "not entitled to very much weight, for several reasons." 19 NRC 1418, 1457-58 (1984).

2. Application of Callaway in QA Rulings. Intervenors argue that the Licensing Board misapplied the Appeal Board's decision in Callaway[3/] in several respects. Callaway recognizes that with regard to QA deficiencies the Board must consider, first, "whether all ascertained construction errors have been cured," and, second, whether there has been a "pervasive failure" to carry out the QA program. 18 NRC at 346. The Licensing Board, having heard all of the evidence during the extensive QA hearing, properly concluded that those QA lapses (including allegations of harassment and retaliation) that had occurred were detected, did not result in deficient work, were isolated in nature and had been corrected, and that accordingly they did not call into question the overall Catawba QA program. See 19 NRC at 1434, 1504-05, 1519-20, 1530-32, 1572, 1583-84; 20 NRC ___ slip op. at 41-42 (Nov. 27, 1984)("November 27, 1984 PID").

3. Discovery Rulings. Intervenors' complaints regarding certain discovery rulings are without merit. First, Intervenors' May 1983 request for several additional months of unrestricted discovery was properly denied by the Board because Intervenors had failed to demonstrat good cause except in the area of welding.

3/ Union Electric Co. (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 345-47, pet. for reconsid. denied, ALAB-750, 18 NRC 1205 as modified, ALAB-750A, 18 NRC 1218 (1983).

Memorandum and Order of June 13, 1983. With regard to welding, Palmetto was allowed an extension of time from June 20-July 15, 1983 to conduct numerous depositions. The Board's ruling was clearly proper -- and, under the circumstances, generous.

Second, the Licensing Board's denial of Intervenors' September 9, 1983 oral motion for a "reopening" of discovery was proper. In Camera Tr. 948-951. The Board devoted an entire day of hearing time to questioning a panel of the authors of the document in question to provide itself with sufficient information to rule on Palmetto's request. Tr. 10,040-276. Palmetto's suggestions as to the composition of the panel and substantive areas of inquiry were largely accepted by the Board (Tr. 8946-47; 9045-46), and Palmetto cross-examined the panel. Tr. 10,162-229.

Third, the Licensing Board properly denied Palmetto's discovery request on issues raised by in camera witnesses for a number of reasons other than time constraints, including the extreme tardiness of the request, the availability of informal discovery, the fact that these were Board witnesses, and Palmetto's overall failure to demonstrate good cause. Tr. 11,217-221.

4. Foreman Override. Intervenors' claim that discovery on the foreman override issue was "extremely truncated" misrepresents the facts. Discovery opportunities on foreman override did not begin on September 21, 1984. On the contrary, the NRC Inspection Reports on this issue were available beginning January 31, 1984; Applicants' report on this issue was distributed August 3, 1984; and the Staff's report on August 28, 1984. More importantly, the Board noted that no specific objection was made to the Board's

proposed schedule until after the foreman override hearing began. November 27, 1984 PID at 3-4. Moreover, Intervenors' assertion that the Board erred by failing to call for further inspection for possible weld sensitization ignores the Board's proper determination that such inspection was unnecessary since Applicants did not rely upon the absence of weld sensitization to support their conclusion that intergranular stress corrosion cracking (IGSCC) will not be a problem at Catawba. Id. at 38-40.4/

B. The Licensing Board properly excluded contentions from litigation5/

1. Diesel Generators. The Licensing Board properly conditioned admission of two separate late-filed diesel generator contentions upon Intervenors' obtaining expert assistance. Tr. 12,548; 19 NRC at 1586, n.50. Such condition is consistent with Appeal Board case law.6/ Upon Intervenors' default of their obligations the Licensing Board properly dismissed the contentions.7/ See Orders of April 13, August 22, and September 4, 1984.

4/ Intervenors' reliance upon the Schlissel affidavit does not further their argument for the reasons stated on p. 10.

5/ Intervenors incorrectly imply that "late-filing hurdles" were erected to "thwart consideration" of the rejected contentions. The only contentions for which section 2.714(a) was applied as the sole basis for dismissal were those dealing with the diesel generators. Moreover, Intervenors provide no citation contravening Appeal Board rulings that to make a strong showing, a party seeking a stay must do more than merely list possible grounds for reversal. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 & 3), ALAB-385, 5 NRC 621, 634 (1977). The Licensing Board has previously instructed Intervenors in this regard. See 17 NRC 282, 283 (1983).

6/ See Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1180-81 (1983) and cases cited therein.

7/ The Staff has issued several SERs dealing with the diesel

(footnote continued)

2. Hydrogen Control. The Licensing Board, citing this Board's ruling in Rancho Seco,[8] properly rejected Intervenors' hydrogen contentions, holding that the issue raised was being addressed in rulemaking. 15 NRC at 584. The Board recognized that hydrogen issues could be litigated if a credible accident scenario were postulated. Id. Intervenors' subsequent attempt to advance four accident scenarios was also properly rejected by the Board: three because they were the subject of rulemaking (16 NRC at 1808-1810); the fourth because of the doctrines of res judicata and collateral estoppel. 16 NRC at 1808. When Intervenors renewed their contentions in April 1984, the Board properly dismissed them again on the basis of ongoing rulemaking. 19 NRC at 1425, n.3. The propriety of the Board's reliance upon rulemaking was confirmed last week by the Commission, when it affirmed the final rule which embraced the deliberate ignition system, a spectrum of degraded core accidents and several hydrogen combination phenomena.[9] See SECY 83-357A.

3. Control Room Design. In originally dismissing Intervenors' contention, the Board directed Applicants to provide

---

(footnote continued from previous page)
generators which establish that they will provide reliable sources of emergency power. See e.g., SER, Supp. 4, Section 8 and Appendix G.

8/ Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), ALAB-655, 14 NRC 799, 816 (1981).

9/ The propriety of the Licensing Board's action should not serve as grounds for a stay. The Commission has stated its satisfaction with the hydrogen control system used by Applicants. SECY 83-357A, Enclosure F, p. 16; SER, Supp. 2 at 6-2. The Staff has likewise approved the system. SER, Supp. 4 at 6-5. Accordingly, the public health and safety would not be jeopardized by full power operation of the plant while this matter is pursued in the normal appellate process.

Intervenors with pertinent control room design information. 16 NRC 1791, 1794-95, n.2 (1982). Applicants did so on February 28, 1983, and June 1, 1983 as reflected in Applicants' letter of June 8, 1983. Despite being advised of their obligation to file timely contentions, Intervenors waited until January 31, 1984, the last day of the QA hearing, to raise the matter. Tr. 12,404-05. Accordingly, the Licensing Board properly rejected Intervenors' late-filed contention. 19 NRC at 1425, n.3.10/

4. Financial Qualifications. The Board properly dismissed Intervenors' financial qualifications contention on the basis of the June 7, 1984 Commission Policy Statement (49 Fed. Reg. 24111), which has recently been codified in 10 C.F.R. §50.40(b). 49 Fed. Reg. 35747, 35753 (1984). 19 NRC at 1425, n.3.

5. Severe Accidents. The Licensing Board properly denied admission of Intervenors' severe accident contentions on the grounds that these contentions lacked the specificity and bases required by 10 C.F.R. §2.714. 16 NRC 1791, 1793, 1796-98 (1982).11/

10/ The Catawba SER approves the adequacy of the control room design. SER, Supp. 2 at 18-11. Accordingly, there is no threat to the public health and safety if this issue is resolved in the normal appellate process while the plant is operating.

11/ One aspect of the severe accident contentions was admitted. 16 NRC at 1798. However, it was subsequently dismissed for lack of specificity. March 24, 1983 Memorandum and Order.

The Applicants and Staff have found that Catawba can withstand a broad spectrum of postulated accidents. See attached affidavit of P.M. Abraham. Accordingly, the plant should be permitted to operate during the completion of the appellate process.

6. Need for Power.[12] The Licensing Board properly rejected Intervenors' need for power contentions as barred by 10 C.F.R. §51.53(c). 15 NRC 566, 586-87 (1982). See also 16 NRC 167, 170-71 and 16 NRC at 1801.

7. Transshipment. The Licensing Board's denial of transshipment of spent fuel contentions is set forth in its thorough and well-reasoned opinions supporting its decisions. 15 NRC 566, 579; 16 NRC 167, 171; 17 NRC 291 (1983); 18 NRC 421 (1983).[13]

II. Intervenors have failed to show that they would be irreparably injured if a stay is not granted

A. Operation of Catawba does not pose a risk to the public. Dr. Kaku asserts a risk from plant operation due to contamination. Contamination is common to the operation of all nuclear power plants. If such an assertion were, in itself, sufficient to constitute "irreparable injury," the issuance of every NRC operating license would be stayed. However, neither the Atomic Energy Act or NRC regulations provide for such relief.

Dr. Kaku's assertion of risk from possible nuclear accidents is supported only by sheer speculation (see Kaku affidavit at 13-14). Speculation is insufficient to constitute irreparable

---

12/ Although it is not clear from their motion, which provides no references to specific contentions, Intervenors appear to object to the dismissal of their "need for power" contentions.

13/ In any event, this matter should not support a stay in that Duke does not plan to ship any spent fuel from its Oconee or McGuire Nuclear Stations to Catawba for some time, which time should be well after the appellate process in this case has been completed. Further, the Licensing Board has found that the impact of such transshipment is within the limits allowed by Commission regulations. 17 NRC at 294.

injury; alleged threats of harm must be actual and imminent. New York v. NRC, 550 F.2d 745, 755-56 (2d Cir. 1977).14/ In addition, the only non-generic issues raised by Dr. Kaku's affidavit (the Catawba containment and the proximity of Charlotte) are refuted by the attached affidavit of P.M. Abraham; the alleged vulnerability of the Catawba containment is addressed by the attached affidavit of W. H. Rasin; the claims of Dr. Kaku and Mr. Schlissel with respect to sensitized welds leading to IGSCC are refuted by the attached affidavit of Steven E. Ferdon.

B. Operation of Catawba will not result in an irretrievable commitment of resources. Intervenors' assertion that operation of Catawba will involve "an irretrievable commitment of resources" which will prejudice NRC action in favor of licensing is completely without foundation. As in (A), above, acceptance of Intervenors' argument would require that a stay be automatically granted upon the issuance of all operating licenses. This claim also implies, without any support, that the NRC would authorize operation of a plant without making the requisite safety findings. Moreover, the NRC has not hesitated to order modifications to plants that have been operating at full power for many years. See, e.g., Connecticut Light and Power Co. v. NRC, 673 F.2d 525 (D.C. Cir. 1982), cert. denied, 459 U.S. 835 (1982). Further, as set forth in the attached affidavit of Lionel L. Lewis, there is no work that would be precluded by plant criticality.

14/ A nearly identical affidavit of Dr. Kaku was specifically rejected by the Commission. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-84-5, 19 NRC 953, 964 (1984). The Commission's reasoning applies with equal force to Catawba.

C. Operation of Catawba will not compromise Intervenors' appeal. Intervenors' novel argument that they will somehow be deprived of their right to appeal if the Appeal Board does not stay operation of Catawba is flawed. The issuance of an operating license is not irrevocable. See Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Unit 1), CLI-81-30, 14 NRC 950 (1981); 10 C.F.R. §2.202. Further, acceptance of this argument would mandate that no contested administrative ruling could become effective until all possible avenues of appeal were exhausted, a course of action which would paralyze administrative agencies, and render meaningless established legal precedent.15/

D. Catawba operation is consistent with NEPA. Intervenors' suggestion that NEPA was violated by the denial of certain of their contentions is unsupported. As discussed above, the Board's dismissal of these contentions was proper. Moreover, even assuming that a NEPA violation were found to have occurred, this would not automatically constitute injury warranting a stay. See Potomac Alliance v. NRC, 682 F.2d 1030, 1031-32 (D.C. Cir. 1982); Natural Resources Defense Council v. NRC, 606 F.2d 1261, 1272-73 (D.C. Cir. 1979).16/

III. The issuance of a stay would substantially harm Applicants

---

15/ Intervenor's Public Utilities Commission of D.C. case, wherein a preliminary injunction was issued to restrain a corporation from paying a proposed dividend pending Commission determination of the adequacy of the company's depreciation reserve, does not further their argument.

16/ Even Intervenors' Massachusetts v. Watt case held that "this is not to say that a likely NEPA violation automatically calls for an injunction; the balance of harm may point the other way." 716 F2d at 952. Applicants submit that a balancing of harm should result in denial of the stay.

Intervenors' assertion that "no cognizable harm" would result from a stay is in error. The affidavit of W. H. Owen explains that any delay in the testing sequence would translate into an equivalent delay in commercial operation; the affidavit of W.R. Stimart explains that each day of delay in the commercial operation of Catawba Unit 1 would cost the customers in Duke's service area over one million dollars; the affidavit of W. H. Reinke explains how such a delay would unacceptably reduce Duke's system reliability.

IV. The public interest does not favor the granting of a stay

The public interest would not be served by the issuance of a stay in this proceeding. Intervenors have provided no evidence of error in any of the rulings of which they complain. With respect to Mr. Schlissel's statement regarding inspection and rework, Applicants submit, first, that the affiant lacks standing to make this assertion since he was not involved in the hearings wherein the issue was raised. Second, the record does not support Intervenors' claim that "further inspection and rework" is necessary. Third, even if such were found necessary, any inspection and modifications could properly be completed after criticality, as has been done in many instances at other nuclear plants. See attached affidavit of Lionel Lewis.

The public interest would be served by the timely completion of this lengthy proceeding. The public interest will also be served by the timely operation of the plant, which would enable Applicants to fulfill their statutorily-mandated obligation to provide reliable electric power to the public.

V. CONCLUSION

A balancing of the four factors in section 2.788(e) clearly demonstrates that Intervenors are not entitled to a stay.

Respectfully submitted,

J. Michael McGarry, III
Anne W. Cottingham
Mark S. Calvert
BISHOP, LIBERMAN, COOK, PURCELL & REYNOLDS
1200 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 857-9833

Albert V. Carr, Jr.
DUKE POWER COMPANY
P.O. Box 33189
Charlotte, North Carolina 28242

Attorneys for Duke Power Company, et al.

December 21, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
DUKE POWER COMPANY, et al.	)	Docket Nos. 50-413
	)	50-414
(Catawba Nuclear Station, Units 1 and 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Opposition Of Duke Power Company, et al. To 'Intervenors' Application For A Stay Pending Administrative And Judicial Review'" in the above captioned matter have been served upon the following by deposit in the United States mail this 21st day of December 1984.

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

*Thomas S. Moore
Administrative Judge
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

*Howard A. Wilber
Administrative Judge
Atomic Safety and Licensing
Appeal Board
U.S.Nuclear Regulatory
Commission
Washington, D.C. 20555

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

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

George E. Johnson, Esq.
Office of the Executive Legal
Director
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Albert V. Carr, Jr., Esq.
Duke Power Company
P.O. Box 33189
Charlotte, North Carolina 28242

Richard P. Wilson, Esq.
Assistant Attorney General
State of South Carolina
P.O. Box 11549
Columbia, South Carolina 29211

** Robert Guild, Esq.
Attorney-at-Law
P.O. Box 12097
Charleston, South Carolina 29412

* Indicates those hand delivered.

** Also delivered to 35 Church Street, Westwood, Massachusetts 02090 by Express Mail.

Palmetto Alliance
2135 1/2 Devine Street
Columbia, South Carolina 29205

Jesse L. Riley
854 Henley Place
Charlotte, North Carolina 28207

Karen E. Long, Esq.
Assistant Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602

Bradley Jones, Esq.
Regional Counsel,
Region II
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Docketing and Service Section
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Don R. Willard
Mecklenburg County
Department of Environmental
Health
1200 Blythe Boulevard
Charlotte, North Carolina 28203

J. Michael McGarry, III