UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Alan S. Rosenthal, Chairman
Thomas S. Moore
Howard A. Wilber

December 24, 1984
(ALAB-794)

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

Robert Guild, Columbia, South Carolina, and Jesse L. Riley, Charlotte, North Carolina, for the intervenors Palmetto Alliance and Carolina Environmental Study Group.

J. Michael McGarry, III, Anne W. Cottingham and Mark S. Calvert, Washington, D.C., and Albert V. Carr, Jr., Charlotte, North Carolina, for the applicant Duke Power Company, et al.

George E. Johnson for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

Before us are appeals from three partial initial decisions rendered by the Licensing Board in this operating license proceeding involving the two-unit Catawba nuclear facility. The first of these decisions, issued last June 22, determined a wide variety of questions, principally in the area of quality assurance.[1] In doing so, it paved

[1] LBP-84-24, 19 NRC 1418 (1984).

the way for the Director of Nuclear Reactor Regulation's July 18 authorization to the applicants to load fuel into Unit 1 and to conduct pre-criticality testing of that unit.[2] The second decision, issued on September 18, disposed of all emergency planning questions.[3] The third, issued on November 27, resolved favorably to the applicants the single remaining question and brought to an end the Licensing Board's jurisdiction over the proceeding.[4] It was followed by the NRR Director's issuance on December 6 of a license allowing the operation of Unit 1 at levels up to five percent of rated power.[5]

On December 11, intervenors Palmetto Alliance and Carolina Environmental Study Group filed an application under 10 CFR 2.788 for a stay of the authorization for a license contained in the several partial initial decisions pending the completion of all appellate review

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[2] The construction of Unit 2 is not as yet completed and it is our understanding that that unit is not scheduled for fuel loading for at least another year.

[3] LBP-84-37, 20 NRC ___ (1984).

[4] LBP-84-52, 20 NRC ___ (1984).

[5] The Commission must itself approve the authorization of Unit 1 operation at higher power levels. See 10 CFR 2.764(f). To date, it has not completed the so-called "immediate effectiveness" review that necessarily precedes the grant of such approval.

(administrative and judicial) of those decisions.[6] According to the intervenors, all four of the established criteria to be applied in passing upon stay requests support the grant of such relief here.[7] The applicants and NRC staff disagree and urge that a stay be denied.

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[6] Intervenors' Application for a Stay Pending Administrative and Judicial Review (Dec. 11, 1984) (hereafter Stay Application). Previously, the intervenors had submitted successive oral stay applications to both the Licensing Board and this Board. In each instance, the application was denied after a telephone conference involving the Board and all parties -- our denial being without prejudice to the subsequent filing of a written stay request. See Licensing Board December 3, 1984 order (unpublished); Appeal Board December 4, 1984 order (unpublished).

The justification offered by the intervenors for seeking stay relief orally was their understanding that the applicants planned to have Unit 1 achieve criticality within a matter of a few days. For reasons of no present moment, however, the applicants have now deferred that event until at least January 10, 1985.

[7] Those criteria are set forth in 10 CFR 2.788(e):

> (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.

The same criteria are applied by the courts. See, e.g., Virginia Petroleum Jobbers Assn. v. FPC, 259 F.2d 921 (D.C. Cir. 1958); Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977).

1. In arguing that there is a "strong likelihood" that they will prevail on the merits of their appeals, the intervenors cite a number of assertedly incorrect Licensing Board rulings and actions, both substantive and procedural. Although intervenors are emphatic in the statement of their belief that serious error has been committed, virtually all of their scattergun charges are put before us in the most cursory form. In any event, none is supported by enough analysis to comprise the required strong showing[8] that one or more of the three partial initial decisions likely will be reversed in response to the intervenors' appeals.

We appreciate, of course, that stay applications may not exceed ten pages in length.[9] This being so, the intervenors perhaps should have concentrated their attack upon those purported Licensing Board errors they deemed to be of particular gravity. Moreover, it is worthy of passing note that, to a considerable extent, the intervenors' fire is directed to the June 22 partial initial decision. Although the intervenors might have filed the brief in support of their appeal from that decision some time ago, they elected to obtain from us a deferral of all appellate briefing in this proceeding until after the rendition of the

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[8] See note 7, supra.

[9] See 10 CFR 2.788(b).

final (i.e., November 27) Licensing Board decision. Because of other asserted demands on their limited resources, this was a perfectly legitimate choice on their part. But they should not now be heard to complain that they have been deprived of the opportunity to place a full development of their position on the June 22 partial initial decision before us.[10]

2. As we very recently reiterated, "the second factor, irreparable harm, is often the most important in determining the need for a stay."[11] We thus have examined with particular care the underpinnings of the intervenors' insistence that they will suffer irreparable injury if a stay is not granted.

In this regard, the intervenors maintain that (i) the "irreversible radioactive contamination of the facility" will pose a "definite and significant" health and safety risk to workers and the public in the form of "routine releases, exposures and accidents"; (ii) the final agency

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[10] To avoid any possible misunderstanding, we stress that al we now decide is that the stay application does not establish a likelihood that the intervenors will prevail on the merits of their appeals. After full briefing, it may turn out that the intervenors will persuade us that one or more of the partial initial decisions is fatally infected with error.

[11] Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-789, 20 NRC ___, ___ (Nov. 5, 1984) (slip opinion at 3), and cases cited.

decision will be prejudiced "in favor of licensing" by an "irretrievable commitment of resources"; (iii) intervenors will be deprived of their right of appeal because operation of the facility will risk "mooting any appeal since the status quo ante will be forever beyond reach"; and (iv) the National Environmental Policy Act (NEPA) will be violated because a decision will have been made "without taking into account the environmental impacts claimed by intervenors."[12] In support of their first point, the intervenors offer the affidavits of Dr. Michio Kaku, a Professor of Nuclear Physics at the City University of New York, and David A. Schlissel, a consulting engineer with degrees in astronautical engineering (as well as one in law).[13] The other three points are merely stated without any attempt at elaboration either in the stay application itself or in a supporting affidavit.

a. We turn first to the asserted threat to the public health and safety said to be established by the Kaku and Schlissel affidavits. For its part, Dr. Kaku's affidavit is essentially a collection of broad statements respecting (i) the potential consequences of nuclear power plant accidents;

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[12] Stay Application at 9.

[13] Those affidavits are appended to the stay application as Exhibits 3 and 4, respectively. Each is followed by the affiant's biographical statement.

and (ii) the radiation exposure that plant personnel would receive during routine operations. Apart from a few passing references to Catawba's containment design and hydrogen mitigation system, the affidavit offers nothing that could not be equally said with regard to virtually every nuclear power facility now in operation.[14] Further, it is totally lacking in specificity with respect to both (i) the manner in which the postulated accidents might be created and the probability of their occurrence; and (ii) the significance of the asserted occupational exposure. For these reasons, the Kaku affidavit does not aid intervenors' cause.

The thrust of Mr. Schlissel's affidavit is that, under certain conditions, intergranular stress corrosion cracking of stainless steel piping might develop if corrosives are introduced into the facility's primary system. But this scarcely is a startling revelation; indeed, the Licensing Board itself took note of that undisputed fact.[15] The

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[14] As a matter of fact, Catawba's ice condenser containment and associated hydrogen mitigation system are not totally unique. They are to be found, for example, at Duke Power Company's McGuire facility. In affirming the Licensing Board's authorization of operating licenses for McGuire, we discussed the hydrogen mitigation system at considerable length. See Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 459-72 (1982).

[15] LBP-84-52, supra, 20 NRC at ___ (slip opinion at 38-40).

difficulty with the affidavit is that it does not go on to explain how the corrosives might enter that system; all we are told by Mr. Schlissel is that the intergranular stress corrosion cracking phenomenon "has occurred in previously unanticipated locations through previously unanticipated pathways." This plainly will not suffice to establish that the intervenors' members would be irreparably injured were Unit 1 to be allowed to go into operation. Further, the Schlissel affidavit is equally unilluminating with regard to how rapidly the assumed corrosive environment might produce an imminent threat to safety -- i.e., whether there is any possibility of such a threat prior to the disposition of the intervenors' appeals.

b. The intervenors' other irreparable injury claims merit little discussion. There is simply no basis for the assertion that the outcome of their appeals might be unduly influenced were Unit 1 to be allowed to operate pendente lite. To the contrary, that factor cannot and will not be given any recognition in the consideration of the issues presented by the appeals.[16] Nor is there substance to

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[16] In this connection, intervenors have failed to explain what "irretrievable commitment of resources" they believe would be associated with Unit 1 operation. Similarly, their bare assertion, without more, that the National Environmental Policy Act is violated clearly does not establish irreparable injury.

intervenors' insistence that the commencement of facility operation might serve to moot their appeals. Should those appeals be successful, we will have full authority to order a halt to operation or such other relief as might be appropriate in the totality of circumstances. True, the precise status quo ante will no longer be restorable once the reactor has achieved criticality. But that consideration is of no avail to intervenors, given the fact that they have failed to establish that their members might suffer irreparable harm from the achievement of criticality, low-power operation, or early-stage operation at full power.

3. In light of the foregoing, we need not dwell long on whether a stay would cause serious injury to the applicant. Nor need we delve deeply into public interest considerations. Suffice it to say that, even when viewed in its most favorable light, the intervenors' presentation on those factors does not approach balancing the shortcomings of its case on the other two factors. Indeed, standing by itself, the intervenors' failure to demonstrate that they might be irreparably injured in the absence of a stay is enough to call for the denial of their application.

The intervenors' application for a stay pendente lite is denied.

It is so ORDERED.

FOR THE APPEAL BOARD

Barbara A. Tompkins
Secretary to the
Appeal Board