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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)	)	

NRC STAFF OPPOSITION TO INTERVENORS' APPLICATION FOR STAY

George E. Johnson
Counsel for NRC Staff

December 21, 1984

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I. INTRODUCTION

Palmetto Alliance and Carolina Environmental Study Group ("Intervenors") have applied for a stay [1/] of the effectiveness of Atomic Safety and Licensing Boards' partial initial decisions dated June 22, September 18, and November 27, 1984, insofar as those decisions authorize the issuance of an operating license permitting Duke Power Company, et al., ("Applicants") to attain criticality and to operate Catawba Nuclear Station, pending completion of the appellate review process. The Staff hereby responds in opposition to Intervenors' request for a stay.

II. DISCUSSION

A. The Standards Applied to Stay Applications

In applying the four factors considered by the Commission in ruling on stay requests, [2/] particular emphasis is given to the showing by the

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1/ "Intervenors' Application for a Stay Pending Administrative and Judicial Review" ("Application"), dated December 10, 1984.

2/ The factors considered 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.

10 C.F.R. § 2.788(e).

moving party of irreparable injury and probability of success on the merits. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-84-13, slip op., August 10, 1984. Of these, both the Commission and the Appeal Board have stated that the question as to whether irreparable injury will be incurred by the moving party in the absence of a stay is the most important. Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981); Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-789, November 5, 1984, slip op., at 3. 3/ Intervenors' showing on each of the four factors and particularly on the question of irreparable injury, is insufficient to warrant a stay of the decisions below or a suspension of the license authorized by those decisions. 4/

B. Intervenors Have Not Made the Necessary Showing Under 10 C.F.R. § 2.788(e) to Warrant Issuance of a Stay or Suspension Order

1. Intervenors Have Failed to Make A Strong Showing That They Are Likely to Prevail on the Merits

Intervenors argue that the Licensing Board erroneously applied the Appeal Board's Callaway 5/ guidance to the evidence of quality assurance lapses, which evidence they believe precluded the Licensing Board from finding reasonable assurance that the Catawba plant will operate without

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3/ See also, United States Department of Energy (Clinch River Breeder Reactor Plant), ALAB-721, 17 NRC 539, 543-44 (1983) and Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-437, 6 NRC 630, 632 (1977).

4/ Where, as here, a license has issued prior to consideration of the stay request, insofar as that license is concerned, the application is treated as a motion to suspend the underlying authorization for the license. Limerick, ALAB-789, supra, at 2. However, the same criteria applicable to stay requests are applied. Id.

5/ Union Electric Co. (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343 (1983).

endangering the public health and safety. 6/ Application, at 2-4, 5-7. It is also claimed that the Licensing Board erroneously restricted the availability of discovery in derogation of Intervenors' hearing rights and development of a sound record on the quality assurance issue. Id., at 5. Finally, Intervenors briefly allude to the rejection, pursuant to 10 C.F.R. § 2.714, of several contentions on procedural grounds. Application, at 7. However, Intervenors do not particularize the specific nature of the errors they claim to be reversible.

Although Intervenors state that the Licensing Board improperly applied the Callaway guidance to the evidence, they fail to note that, under Callaway, emphasis is not on the number of construction defects, or the mere fact that they are tied to quality assurance lapses. Rather, the question is whether there is "reasonable assurance that, as built, the facility can and will be operated without endangering the public health and safety." Callaway, ALAB-740, supra, 18 NRC at 346. The inquiry into the implications of quality assurance deficiencies on safe plant operation entails first, examining whether all ascertained construction errors have been cured, and, second, even if this is established, determining "whether there has been a breakdown in quality assurance procedures of sufficient dimensions to raise ligitimate doubt as to the overall integrity of the facility and its safety-related structures and components." Id. Curiously, Intervenors have avoided discussing the Licensing Board's actual evaluations

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6/ Palmetto Alliance's quality assurance contention (PA Contention 6) asserted: "Because of systematic deficiencies in plant construction and company pressure to approve faulty workmanship, no reasonable assurance exists that the plant can operate without endangering the health and safety of the public."

of the evidence of construction errors and the safety implications of identified lapses in the quality assurance program.

During lengthy hearings, and in a detailed decision, the Licensing Board considered all of Intervenors' claims and determined pursuant to the Callaway guidance that such quality assurance lapses as were found were not "of such a magnitude and so pervasive that the safe operation of the plant may have been compromised." Duke Power Company, et al. (Catawba Nuclear Station, Units 1 and 2), LBP-84-24, 19 NRC 1418, 1440 (1984). The Licensing Board considered each of Intervenors' claims of violation of Appendix B to Part 50, see, id., at 1499-1504, and concluded:

> Although, as one would expect, we find violations of the QA program and Appendix B, we find no pervasive failure or breakdown. On the contrary, we find that, on the whole, the Duke QA program at Catawba worked well.

The Board evaluated the evidence on technical concerns and found it did not show significant deficiencies in the Catawba plant. Id., at 1505. Indeed, apart from Intervenors' claim of certain inadequate welds due to violation of weld interpass temperature and weld sensitization, Intervenors do not raise any specific claim of an uncorrected technical deficiency or situation affecting plant safety.

In addition, while some harassment of QC inspectors was found to have occurred, the Board examined the safety significance of the incidents and concluded:

> The evidence presented to the Board does not indicate any faulty items went uncorrected. The inspectors affirmed that they continued to do their work properly in spite of the harassment. In some instances where the inspector perceived a lack of support, this too did not seem to affect the future actions of the inspector.

Id., at 1530.

Similarly, despite finding that Duke retaliated and discriminated against welding QC inspector supervisor Gary E. "Beau" Ross in his

performance evaluation, the Board also found that his work was not affected, that Mr. Ross and his crew continued to perform their duties conscientiously, and that, as a result, "there was no 'breakdown' or even relaxation of the QA program." Id., at 1514, 1519-20.

Finally, the Board considered the 1981 NRC assessment of Duke's QA program deficiencies to be adverse to Applicants, but determined that this adverse evidence was "far outweighed by other favorable evidence on the record." Id., at 1457-8.

In sum, by failing to point to a single uncorrected construction deficiency or to address the safety significance of the quality assurance deficiencies they claim to exist, Intervenors have presented nothing which undermines the Licensing Board's finding of reasonable assurance or suggests that Intervenors will prevail on appeal.

Intervenors claim that the Licensing Board erroneously restricted discovery in the face of evidence indicating a "pattern of widespread breakdown in the QA system." Application, at 4. However, the Board's June 13, 1983 discovery ruling specifically found that Intervenors had raised specific problems only regarding "quality assurance and control in welding at Catawba," and granted 25 additional days of discovery to permit depositions of Duke employees and NRC personnel. June 13, 1983 Memorandum and Order, at 2-3, 6-7. In fact, 26 depositions were taken during this period. Intervenors were accorded adequate discovery and hearing time to uncover and raise such quality assurance problems as may have existed. See, Catawba, LBP-84-24, supra, at 1426.

Also challenged is the Board's denial of further discovery based on the "Construction Project Evaluation" report, a self-initiated evaluation performed by a team from Tennessee Valley Authority and Duke Power

Company. Application, at 5; In Camera Transcript, at 948-951. In fact, the Board conducted a full-day mini-hearing on whether to re-open discovery. None of the 11 witnesses examined thought there had been any systematic breakdown in QA at Catawba, leading the Board to conclude that good cause did not exist to reopen discovery. Id., at 950.

Similarly, Intervenors do not show that the denial of further discovery relating to the in camera witness concerns precluded their developing any crucial evidence. The Board found that adequate opportunity for informal discovery was given, and that Intervenors' request for formal discovery, submitted on the eve of the hearing, would have substantially delayed the proceeding. Tr. 11217-11219. Moreover, the Board found that formal discovery was not necessary for the Intervenors to effectively question Applicants and Staff witnesses on whether the witnesses' particular concerns were substantiated. Id., at 11220; Catawba, LBP-84-24, supra, at 1432.

Finally, Intervenors allude to the brief period allowed for discovery on the "foreman override" issue. Again, however, Intervenors do not state what crucial information they needed, but were denied by the discovery procedures adopted. See, Catawba, supra, 20 NRC at ___, November 27, 1984, slip op. at 4-5. The Appeal Board has noted that "to establish reversible error arising from curtailment of discovery procedures, a party must demonstrate that the action made it impossible to obtain crucial evidence..." Northern Indiana Public Services Company (Bailly Generating Station, Nuclear 1), ALAB-303, 2 NRC 858, at 869. No such showing has been made here.

With respect to weld sensitization at Catawba, Intervenors appear to assert that the Licensing Board erred in attributing no safety significance to welding in violation of interpass temperature requirements, insofar as it may have led to sensitization and susceptibility to inter-

granular stress corrosion cracking (IGSCC). However, the vague statement in the Affidavit of David A. Schlissel that "the history of IGSCC has been that phenomenon has occurred in previously unanticipated locations through previously unanticipated pathways" simply does not show any likelihood of reversing the Board's detailed findings that IGSCC is not likely to occur at Catawba. See, Catawba, supra, 20 NRC at ____, November 27, 1984, slip op. at 40. See also, Tr. 13908-9, Czajkowski; Tr. 13610-13614, Ferdon; Affidavit of Carl J. Czajkowski and John R. Weeks. As a result, nothing Intervenors have offered undermines the Licensing Board's conclusion that these concerns did not compromise plant safety and did not reflect a signficant breakdown in the quality assurance program at Catawba. Catawba, supra, November 27, 1984, slip op. at 41-42.

Intervenor also lists seven claims (offered as contentions) which they argue the Licensing Board rejected by improper application of 10 C.F.R. § 2.714 with regard to admission of contentions. Apart from a general discussion of the standards for admission of late-filed contentions, however, Intervenors do not identify the errors which are asserted to have been made, nor their grounds for believing such error would be reversed on appeal. Since the burden of showing likelihood of success is on the moving party, the absence of such showing requires rejection of this basis for a stay. See, Farley, CLI-81-27, supra, 14 NRC at 797.

In sum, Intervenors have expressed general disagreement with many Licensing Board findings and rulings but have provided no basis for believing that those findings and rulings are erroneous or that Intervenors are likely to prevail on the merits of those findings and rulings.

C. Intervenors Have Failed to Show They Will Be Irreparably Injured

Intervenors claim as injury to them, that contamination of the facility presents "a definite and significant" health and safety risk

from routine releases, exposures and accidents. Application, at 9. However, the sole support for these points are the affidavits of Drs. Kaku and Schlissel. First, as noted above, the likelihood that IGSCC will occur in the Catawba plant is virtually non-existent. Second, except for brief references to the ice-condenser containment at Catawba, a statement of accident consequences to Charlotte without reference to the extremely remote probability of such consequences, and a vague reference to IGSCC, Dr. Kaku's affidavit could have been written about virtually any nuclear power reactor. A very similar affidavit by Dr. Kaku, purportedly addressing the Diablo Canyon Power Plant, was considered by the Commission and found to furnish no evidence of "undue risk to public health and safety or to the plant personnel." Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-84-5, 19 NRC 953, at 964, (1984). The Commission found the affidavit to be "based on general and well-known considerations... and hypothetical accident scenarios without any indication of their likelihood of occurrence..." Id. Vague references to ice-condenser containments, remote accident consequences to Charlotte, and IGSCC, do not cure the defects found by the Commission. The Commission's observation concerning Dr. Kaku's earlier affidavit applies here:

> It is well established that speculation about a nuclear accident does not, as a matter of law, constitute the imminent, irreparable injury required for staying a license decision.

Id. As stated in the accompanying affidavits of Jacques Read, Jerry J. Swift and Sammy S. Diab, the anticipated exposures to the public and to workers from routine operations and the risk of accidents at Catawba are not unusual, have been fully considered by the Staff, and found to be very low. Dr. Kaku's affidavit does not effectively undermine the Staff's evaluations. Under these circumstances, Intervenors have failed to show the likelihood of irreparable harm.

Intervenors' second point on irreparable injury misapplies the holding in Calvert Cliffs Coordinating Committee v. AEC, 449 F.2d 1109, 1128-29 (D.C. Cir. 1971), that the National Environmental Policy Act requires consideration of alterations in the original plans of a facility prior to completion of construction. Id. The environmental costs and alternatives to Applicants' construction plans are certainly not at issue in this proceeding, and no showing has been made that the licensing hearings and the Staff's environmental review related to operation did not adequately "consider action" as required in Calvert Cliffs. Id. Moreover, consideration of actions sought by Intervenors is not precluded by such contamination as may exist even after operation commences. See, Affidavit of Jerry J. Swift. Similarly, there is no basis for assuming the Commission will not fully consider and appropriately decide the safety issues raised prior to final agency action on the license. See, Power Reactor Development Co. v. International Union of Electrical, Radio and Machine Workers, AFL-CIO, 367 U.S. 396, 414-16 (1961).

Intervenors' argument that their appeal rights will be abridged by plant operation is based on the erroneous premise that the very operation of Catawba constitutes irreparable injury. Such a standard would not only impugn the validity of all NRC public health and safety findings on power plants, but effectively preclude plant operation prior to completion of appeals in all cases. In any event, if Intervenors were to succeed in shutting down the plant on appeal, the mere contamination of the reactor constitutes no injury to them.

Finally, Intervenors appear to argue that failure to supplement the Final Environmental Statement for operation of Catawba in accordance with their contentions violates NEPA, and this constitutes irreparable injury.

To establish that such failure warrants a stay, Intervenors first must show that the Board's decision not to evaluate the further impacts they claim to exist was erroneous. In addition, they must show that the agency's environmental review was insufficient to allow "an informed decision." Massachusetts v. Watt, 716 F.2d 946, 948 (1st Cir. 1983). Since neither has been shown, this basis for the claim of irreparable injury must be rejected.

D. Applicants Will Suffer Economic Harm if the Application is Granted

As noted in the Affidavit of Erastace N. Fields, a substantial economic benefit to the operations of Duke Power Company will flow from the lower operating costs of Catawba, as a nuclear generating facility, when compared to other types of generating stations it will replace. Any delay in the commercial operation of Catawba will therefore cause economic harm to Duke Power, its customers, and to the public. Id.

E. The Public Interest Lies in Denial of a Stay

Intervenors have presented nothing which undermines the Licensing Board conclusion that Catawba can operate without endangering the health and safety of the public, nor have they shown irreparable injury. In such circumstances, the public interest lies in giving effect to the rational and well-supported initial decisions authorizing issuance of the operating license.

III. CONCLUSION

In sum, Intervenors have failed to demonstrate that application of the stay criteria warrant issuance of a stay.

Respectfully submitted,

George E. Johnson

George E. Johnson
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 21st day of December, 1984.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF OPPOSITION TO INTERVENORS' APPLICATION 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, by deposit in the Nuclear Regulatory Commission's internal mail system, or, as indicated by double asterisks, by hand delivery prior to 2:00 p.m., this 21st day of December, 1984:

**Alan S. Rosenthal, Chairman
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

**Howard A. Wilber
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

**Thomas S. Moore
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

*James L. Kelley, Chairman
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dr. Paul W. Purdom
Administrative Judge
235 Columbia Drive
Decatur, GA 30030

Dr. Richard F. Foster
Administrative Judge
P. O. Box 4263
Sunriver, OR 97702

Richard P. Wilson, Esq.
Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211

J. Michael McGarry, III, Esq.
Mark S. Calvert, Esq.
Bishop Liberman, Cook,
Purcell & Reynolds
1200 Seventeenth Street, N.W.
Washington, DC

Robert Guild, Esq.
Attorney for the Palmetto Alliance
35 Church Street
Westwood, MA 02090

Palmetto Alliance
2135½ Devine Street
Columbia, South Carolina 29205

Jesse L. Riley
Carolina Environmental Study Group
854 Henley Place
Charlotte, NC 28207

William L. Porter, Esq.
Albert V. Carr, Esq.
Ellen T. Ruff, Esq.
Duke Power Company
P.O. Box 33189
Charlotte, NC 28242

John Clewett, Esq.
236 Tenth Street, S.E.
Washington, DC 20003

*Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Mr. Donald R. Willard
Department of Environmental Health
1200 Blythe Boulevard
Charlotte, NC 28203

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

*Atomic Safety and Licensing Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

*Docketing & Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555

George E. Johnson
Counsel for NRC Staff