LBP-88-18

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges

Charles Bechhoefer, Chairman
Glenn O. Bright
Dr. James H. Carpenter

In the Matter of	)	
VERMONT YANKEE NUCLEAR POWER CORPORATION	)	Docket No. 50-271-OLA
(Vermont Yankee Nuclear Power Station)	)	(ASLBP No. 87-547-02-LA)
	)	July 12, 1988

SECOND PREHEARING CONFERENCE ORDER
(Rulings on Temporary Stay Order and on Schedules)

On June 28, 1988, the Licensing Board conducted a prehearing conference in this proceeding, in which Vermont Yankee Nuclear Power Corp. (Applicant) is seeking authority to expand the capacity of the spent fuel storage pool at the Vermont Yankee Nuclear Power Station.[1] Participating in the conference were the Applicant, the New England Coalition on Nuclear Pollution (NECNP) (Intervenor) and the Commonwealth of Massachusetts and the State of Vermont (both currently participating as "interested States" pursuant to 10 C.F.R. § 2.715 (c)).

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1 Notice of this conference, dated May 24, 1988, was published in the Federal Register on May 31, 1988 (53 Fed. Reg. 19836).

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The conference was initially billed as a "status" conference, in which the Board was to be apprised of the status of various documents being prepared by the Applicant or NRC Staff, to enable the setting of further schedules for the proceeding. On June 13, 1988, however, the Commonwealth of Massachusetts and NECNP filed a Joint Motion to stay the operation of License Amendment 104 to the Vermont Yankee operating license, which had been issued by the NRC Staff on May 20, 1988. That amendment by its terms permitted the Applicant to install new racks in the spent fuel pool, capable of storing up to 2870 fuel elements, but continued the present limitation on the capacity for which the racks could be used to the currently authorized 2000 fuel elements. By Memorandum dated June 20, 1988, the Board posed three questions to the parties concerning certain matters raised by the Joint Motion, to be addressed at the prehearing conference.

Following is a summary of the matters discussed and rulings made by the Board at the conference.

1. The Applicant confirmed that the document setting forth details of its revised fuel pool cooling system, about which the Board had inquired in the Notice of the prehearing conference, had been submitted to the Board and parties on June 7, 1988 (Tr. 230). The Staff indicated that it expected its review of the cooling system to be completed in August and that its safety evaluation (SER) and environmental assessment (EA) would be issued in early September (Tr. 231). Upon inquiry from the Board, however, the Staff indicated that the EA had already been written, although not released (Tr. 250, 322).

The Staff held out the possibility that the EA might be issued somewhat earlier, in August. The Board requested the Staff to provide a status report on the issuance of the EA (or other environmental review document, as applicable) as of August 1, 1988 (Tr. 325).

2. NECNP (as well as the Commonwealth of Massachusetts and the State of Vermont) requested additional discovery concerning the revised fuel pool cooling system (which is the subject of Contention 1). The Board rejected the Applicant's claim that the contention had become moot as a result of the filing of an FSAR amendment (on June 7, 1988) incorporating a revised fuel pool cooling system, on the basis that the question whether the revised system was capable of performing as specified was still open (Tr. 323).

The Board granted 60 days' additional discovery on Contention 1 between the Applicant and NECNP and the interested States (Tr. 323-24). Further, the Board ruled that discovery between various parties and the Staff on this contention should await the issuance by the Staff of its SER. On Contention 1, discovery against the Staff will extend for 30 days from the date of service of the SER; the 30-day period will encompass second-round interrogatory questions but not responses (Tr. 338-39). (The schedule for the submission of new contentions based on the Staff review documents, and for discovery with respect to new contentions which may be accepted, remains as set forth in our Prehearing Conference Order dated May 26, 1987, LBP-87-17, 25 NRC 838, 862.)

3. With respect to the Joint Motion, in which the State of Vermont indicated that it had joined (Tr. 280),[2] the Commonwealth of Massachusetts moved orally for emergency relief, for a temporary stay of License Amendment 104 pending our decision on the merits of the motion (Tr. 267). The Commonwealth explained that such emergency relief was subsumed within the Joint Motion's request for "such other relief [beyond the injunctive relief primarily sought by the motion] as may be necessary and equitable under the circumstances" (Tr. 271). Vermont and NECNP joined in the request for a temporary stay (Tr. 280, 281).

The Applicant and NRC Staff each opposed our granting of a temporary stay. They raised jurisdictional, as well as procedural and substantive, reasons for our denying the request for emergency relief.

The alleged basis for both the permanent and temporary stay requests is that the Staff, in issuing an amendment which permitted reracking, without preparing and releasing an environmental review of the entire fuel pool capacity expansion, violated the requirements of the National Environmental Policy Act, 42 USC § 4332, as implemented by NRC in 10 C.F.R. Part 51. The claim is that the Staff, by reviewing only the environmental aspects of reracking (which it found to qualify as a categorical exclusion under 10 C.F.R. § 51.22(c)(9)), has

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2 On June 24, 1988, the State of Vermont filed a timely response in support of the Joint Motion, indicating that it joined in the motion seeking a stay of License Amendment 104. At the time of the prehearing conference, the Board had not yet received that response.

improperly segmented the environmental review of the entire application. The Intervenor and interested States asserted that there is no "independent utility" to the reracking apart from its contribution to the entire project. If that were so, the Staff's action in approving License Amendment 104 without an environmental review of the entire proposal might well be void. The Board perceives at least a prima facie basis for the validity of this claim. But because of the significant procedural and substantive objections asserted by the Applicant and Staff at the prehearing conference, the Board declined to decide any of these questions prior to considering the written responses of the Applicant and Staff to the motion.

The Board denied the request for a temporary stay solely on the basis that the Intervenor and interested States had not demonstrated irreparable injury, as required by 10 C.F.R. § 2.788(e)(2) (Tr. 316). That ruling was without prejudice to a ruling on the permanent injunctive request or even to whether irreparable injury would have to be considered in ruling on the permanent injunction. The only injury asserted was that our eventual consideration of alternatives, as sought by the interested States and NECNP, would be prejudiced if most of the physical work leading to the expansion in capacity had already been performed (Tr. 266, 276). However, it appears that the Applicant has already purchased and paid for the new racks (Tr. 243). Moreover, any review of alternatives which we may be called on to undertake will be carried out on the assumption that no expenditure at all had been made with respect to any of the expansion alternatives--in other words, all

expenses for purchase and installation of the new racks are at the risk of the Applicant. This is not to say that the Staff may ignore the mandates of NEPA with impunity; it is only that, for temporary injunctive relief to be granted prior to our decision on the merits, a strong showing of irreparable injury must be--but has not been--made.

For the foregoing reasons, it is, this 12th day of July, 1988

ORDERED

1. The motion of the Commonwealth of Massachusetts, NECNP and the State of Vermont for a temporary stay of License Amendment 104 is hereby denied, without prejudice to our ruling on the request for a permanent injunction.

2. Further discovery, as set forth in ¶ 2, supra, is hereby authorized.

3. The NRC Staff is hereby requested to provide us by August 1, 1988 with a status report on its preparation and schedule for release of its EA (or other environmental review document, as applicable) for the entire spent fuel pool expansion application.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Charles Bechhoefer

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland
this 12th day of July, 1988.