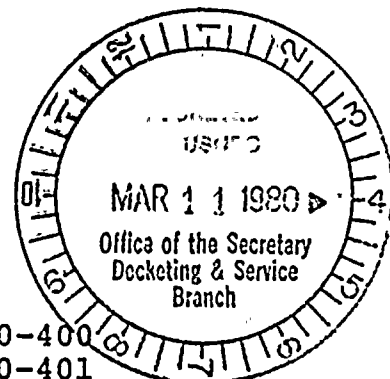


March 11, 1980

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION



In the Matter of	)	
	)	
CAROLINA POWER & LIGHT COMPANY	)	Docket Nos. 50-400
	)	50-401
(Shearon Harris Nuclear Power	)	50-402
Plant, Units 1, 2, 3 and 4)	)	50-403

APPLICANT'S PETITION FOR REVIEW OF ALAB-581

Applicant hereby petitions the Commission, pursuant to 10 C.F.R. § 2.786, for review of the Atomic Safety and Licensing Appeal Board's ("Appeal Board") decision of February 20, 1980 (ALAB-581).<sup>1</sup> Commission review is appropriate here because the Appeal Board's order involves an important procedural issue and raises important questions of public policy.<sup>2</sup>

SUMMARY OF THE DECISION OF WHICH REVIEW IS SOUGHT

In ALAB-577 the Appeal Board affirmed the Supplemental Initial Decision<sup>3</sup> of the Atomic Safety and Licensing Board

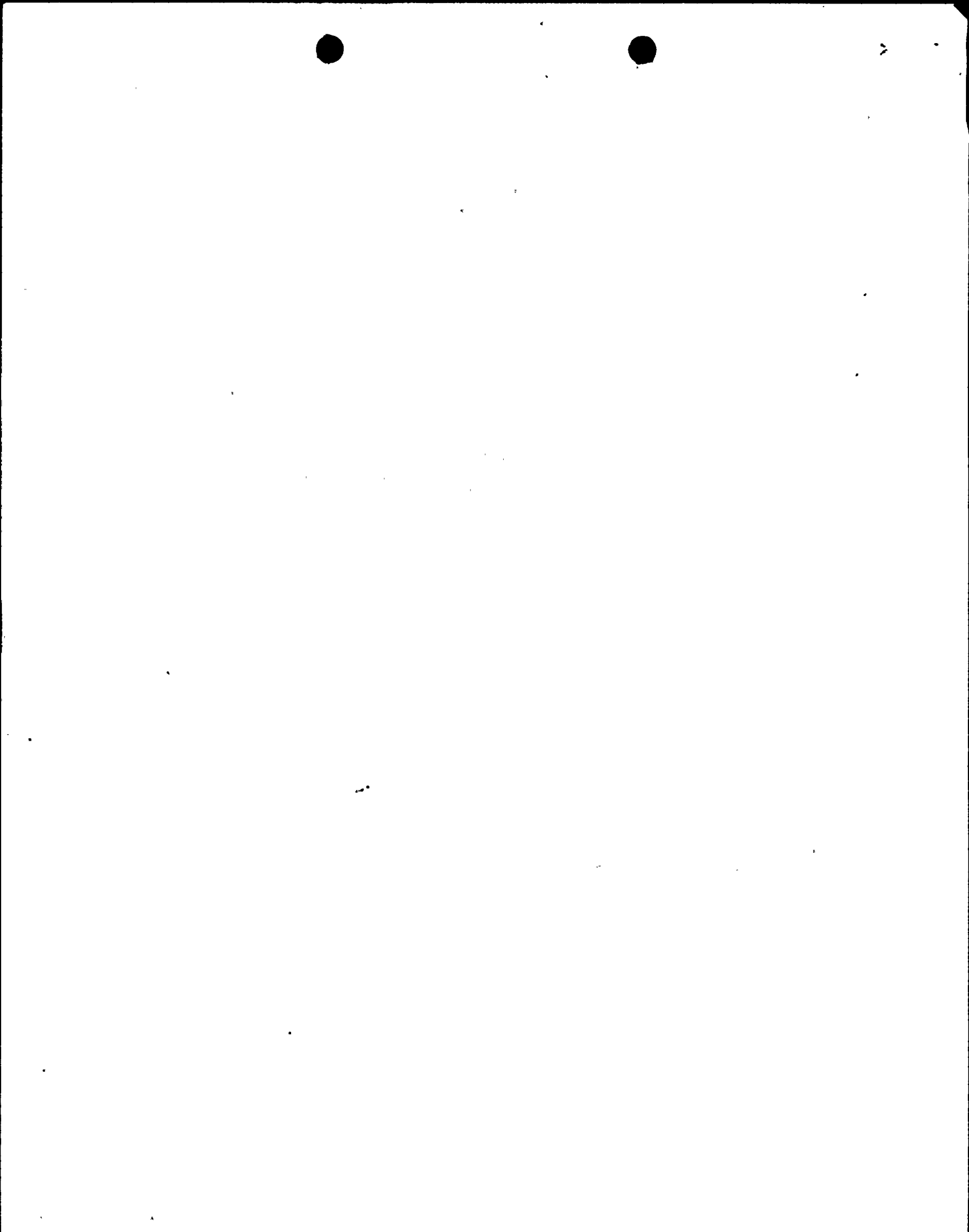
1 In ALAB-581 the Appeal Board denied "Applicant's Motion for Modification of the Appeal Board's Order in ALAB-577" dated February 11, 1980 and attached hereto as Exhibit A (hereinafter "Motion for Modification").

2 If this precedent for Appeal Board assumption of supervisory authority over the Commission's procedures established for processing an application for a license is permitted to stand, it will likely be used again. The Commission's regulations are not to be treated as mere guidelines. Applicants and the public expect the Commission to follow its own regulations so that there is some certainty to the process.

3 LBP-79-19, 10 NRC 37 (1979).

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("Board") which found that Applicant possesses the requisite management capability and technical qualifications to design and construct the Shearon Harris facility. The Appeal Board modified the Supplemental Initial Decision by deleting a condition imposed by the Board on the Applicant's construction permits which would have required that a hearing be held on Applicant's management capability and technical qualifications at the operating license ("OL") stage.<sup>4</sup> In deleting the condition the Appeal Board instead issued its own directions to the Staff:<sup>5</sup>

[T]he Staff is hereby directed to insure that no notice of opportunity for hearing under 10 CFR 2.105 is issued in connection with any application which may be filed for operating licenses for the Shearon Harris facility unless and until:

(1) The Staff has conducted, on the basis of the content of the operating license application and supporting documentation (together with any other pertinent information then at its disposal), a preliminary evaluation of the applicant's capability to manage the operation of the facility in conformity with all regulatory requirements which have or may be imposed in the interest

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4 The Staff had challenged the Board's authority to impose such a condition to the construction permits. The Staff has now petitioned for Commission review of ALAB-577 arguing that the Appeal Board lacked jurisdiction to issue directions to the Staff with respect to an application which has yet to be filed with the Commission. Nuclear Regulatory Commission Staff, "Petition for Review" dated February 13, 1980 (hereinafter "Staff Petition"). By Order dated February 21, 1980 the Commission extended the time within which the Commission may act upon or grant the petition to review ALAB-577 to expire co-extensively with the review times for ALAB-581.

5 ALAB-577 at 35-36 (citations to slip opinion).

of the protection of the public health and safety; and

(2) The findings and conclusions reached upon that evaluation have been (a) made publicly available in written form; and (b) brought specifically to the attention of the Commission with an accompanying reference to both the Licensing Board's supplemental initial decision and our decision today. It is further directed that, pursuant to 10 CFR 2.105(b)(2), the notice of opportunity for hearing (if one is issued) set forth the manner in which a copy of that analysis may be obtained or examined.

Applicant views the Appeal Board's approach as over-reaching and unnecessary to accomplish its objective of having the Staff perform an evaluation of Applicant's management capability early in the OL application review process and publish the results for the benefit of the Commission and potential intervenors. The Appeal Board's directions to the Staff are inconsistent with the Commission's regulations which provide that the notice of opportunity for hearing "shall be issued as soon as practicable after the [OL] application has been docketed."<sup>6</sup> 10 C.F.R. § 2.105(a)(4). By virtue of the Appeal Board's order, commencement of an OL

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<sup>6</sup> The Staff apparently interpreted the Appeal Board's order in ALAB-577 as directing a Staff evaluation prior to docketing Applicant's OL application. Staff Petition at 7, fn.5. That the Appeal Board has in mind a post-docketing evaluation can be inferred from its discussion in ALAB-581 (see especially at 11). The Staff's interpretation of the Appeal Board's directions would be contrary to the intent of 10 C.F.R. § 2.101. Certainly the Appeal Board's Order does not direct the Staff to defer a determination of acceptability and completeness of the OL application and docketing of the application pending completion of the evaluation.

proceeding would be held hostage to the issuance of a Staff report on Applicant's management capability: Applicant voiced its concern about any delays in the OL process and explained why delays could have severe consequences to Applicant. Motion for Modification at 4-5. Thus, Applicant proposed a modification to the Appeal Board's order which would ensure that all OL proceeding activities unrelated to Applicant's management capability would commence in accordance with Commission regulations, and which would also serve the Appeal Board's objective:

Applicant proposes that the Appeal Board modify its instructions to the Staff such that the notice of opportunity for hearing would be published as soon as practicable after the OL application is docketed as required by § 2.105(a)(4). However, to accomplish the Appeal Board's objective, the notice of opportunity for hearing would state additionally (1) that the Staff had been instructed to perform an evaluation of Applicant's management capability, (2) that a notice will be published in the Federal Register upon completion of the Staff's evaluation; (3) that the notice will set forth the manner in which a copy of the Staff's evaluation may be obtained or examined; (4) that the public will then have an additional thirty days in which to petition to intervene and request a hearing in the Harris OL proceeding on the sole issue of Applicant's management capability and technical qualifications; and (5) that any petitioner already admitted as a party to the Harris OL proceeding, and who has not already established a contention on management capability, will then have thirty days in which to petition to expand his contentions to include a contention on Applicant's management capability or technical qualifications. [Id. at 3-4 (footnote omitted)].

In ALAB-581 the Appeal Board denied Applicant's Motion for Modification. The Appeal Board did not address the question of its authority to deviate from Commission regulations which require the issuance of a notice of opportunity for hearing "as soon as practicable after the application has been docketed." The Appeal Board did not address why, in its view, the process of establishing the standing of petitioners, identifying parties, defining the contentions and commencing any discovery should not move forward while the Staff's evaluation of Applicant's management capability was being conducted. The Appeal Board did not deny that its objective could be served under Applicant's proposed modified procedure. Instead the Appeal Board asserted that the Staff evaluation which it had in mind would be accomplished "by early Fall at the latest" and that Applicant had not demonstrated how such a delay "might interfere with the achievement of [its] goal [of an operating license before June 1983]." ALAB-581 at 8, 9. Furthermore, the Appeal Board suggested that Applicant's proposed modification suffers from at least one serious infirmity -- that without an "incentive" to complete the evaluation of Applicant's management capability prior to issuance of an opportunity for hearing, the Staff might assign the evaluation a "relatively low priority" which could result in a delay caused by belated contentions while an adjudicatory proceeding to hear other issues was well underway.

THE ACTION OF THE APPEAL BOARD WAS ERRONEOUS

A. The Appeal Board Exceeded its Jurisdiction

Applicant supports the Staff's argument that the Appeal Board exceeded its jurisdiction in issuing instructions to the Staff respecting how the Staff will treat an application for an OL that has yet to be filed. Applicant adopts the Staff's arguments at pages 4-7 of the Staff Petition.

B. The Appeal Board Exceeded its Authority in Directing the Staff to Deviate from Commission Regulations<sup>7</sup>

The Appeal Board acknowledged that its directions to the Staff deviate from Commission regulations. However, it took the position that the regulations simply "chart the course that the Staff is generally to pursue in its processing of an operating license application" and thus it apparently finds that "some deviation [here 'modest in scope'] from that course is permissible." ALAB-577 at 29-30. The Appeal Board's casual attitude toward the regulations does not square with the

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<sup>7</sup> The Appeal Board asserted that Applicant did not question its authority to issue the "substitute directive." ALAB-581 at 6. In fact, Applicant, in arguing for the modification to the Appeal Board's order, noted that the directions to the Staff deviated from the Commission's regulations. Motion for Modification at 2. Applicant's modification would provide "that the notice of opportunity for hearing would be published as soon as practicable after the OL application is docketed as required by § 2.105(a)(4)." Motion for Modification at 3 (emphasis added). Rather than simply challenge the Appeal Board's authority, Applicant proposed a remedy which would accomplish the Appeal Board's objective and would be less likely to affect adversely Applicant's schedule for obtaining an OL.

Commission's intent in establishing its procedures. In issuing substantial amendments to its regulations governing the procedures for reviewing facility license applications and conducting proceedings concerning license applications, the Commission acknowledged its responsibility to applicants, the public participating in the licensing process and the general public. The Commission expressly recognized "the positive necessity for expediting the decisionmaking process and avoiding undue delays." 37 Fed. Reg. 15127 (July 28, 1972). Furthermore, the Commission explained its requirement that a notice of opportunity for hearing be issued as soon as practicable after the application is docketed as one "to provide potential intervenors a better opportunity for more meaningful participation in the hearing process."<sup>8</sup> Id. at 15128. Furthermore, the courts have established a judicial rule that agencies must follow their own regulations once they are issued. See e.g. Nader v. NRC, 513 F.2d 1045, 1051 (D.C. Cir. 1975); Service v. Dulles, 354 U.S. 363, 388 (1957); U.S. v. Nixon, 418 U.S. 683, 695-97 (1975). The Appeal Board apparently did not feel so bound.

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8 The Staff also noted its concern that the Appeal Board's order "is inconsistent with the established Commission policy of encouraging an opportunity for the public to observe and participate in the licensing process at its earliest stages." Staff Petition at 7, fn.5.



C. The Appeal Board's Reasons for Denying Applicant's Motion for Modification Were based on Dubious and Unsupportable Assumptions

The Appeal Board asserts that it is not "clear" that its directions to the Staff will delay Applicant's obtaining an operating license by June 1983 and thus it questions the need for Applicant's proposed modification. Applicant concedes that it is conjecture as to how long the Staff will take to perform its evaluation and whether or not the delay in issuance of a notice of opportunity for hearing will delay the issuance of an OL. The Appeal Board suggests that "in the exercise of appropriate diligence" the Staff could comply with its instructions "in time to enable its issuance of the notice of opportunity for hearing by early Fall at the latest." ALAB-581 at 9. Of course the Appeal Board offers no assurances. In fact it suggests a few pages later that without a "strong incentive" to the Staff, there is the possibility of a "lengthy deferral" of the Staff's evaluation. Id. at 11. We believe that it is reasonable to assume, in light of the considerable demands made on the Staff in the aftermath of Three Mile Island and due to the back-log of case work already pending, that the Appeal Board's optimistic projection could be just that.<sup>9</sup> Certainly, the Commission is in a better position than the Appeal Board to predict the Staff's work-load and can take official notice of the potential for undue delay. However,

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<sup>9</sup> Applicant is concerned that the Staff might be more likely to take from six months to a year to issue its report.

Applicant's proposed modification would minimize the impact of any delay in the Staff's completion of the evaluation.

The only reason given for actual rejection of Applicant's proposed modification was the Appeal Board's concern that the Staff might unreasonably delay completion of its evaluation. If the Appeal Board views such dilatory performance by the Staff as a real concern, the more appropriate remedy would be to require the Staff to complete its evaluation within a specified period of time. It does not follow that notice to the public and initiation of the OL proceeding should be held hostage to the Staff's evaluation in order to provide an incentive to the Staff to do its job in a timely manner.

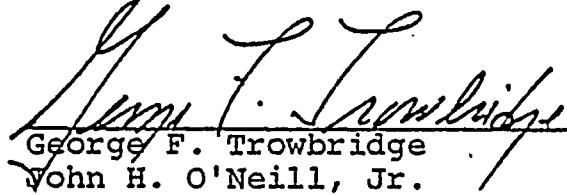
#### CONCLUSION

Applicant petitions the Commission to find that the Appeal Board's directions to the Staff in ALAB-577, without adoption of Applicant's proposed modifications which were rejected in ALAB-581, controvert the Commission's regulations. In the alternative, the Commission could find, as urged by the Staff, that the Appeal Board lacks jurisdiction to issue any such directions to the Staff concerning the procedures by which the Staff will treat an application that has not yet been filed. If the Commission accepts the Staff's suggestion to issue similar directions respecting an evaluation of Applicant's management capability in conjunction with a review of Applicant's application for an OL for the Shearon Harris

facility, Applicant urges that the Commission adopt the modified procedures suggested in Applicant's Motion for Modification.

Respectfully submitted,

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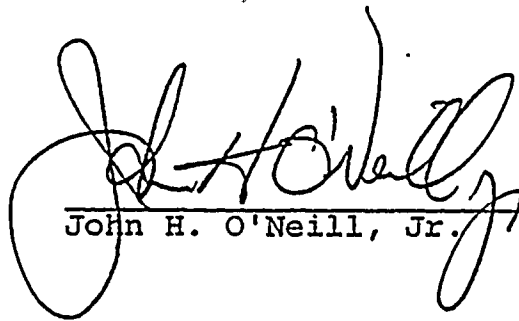
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "APPLICANT'S PETITION FOR REVIEW OF ALAB-581" have been served upon each of the persons listed on the attached service list by mail, postage prepaid, or by hand delivery this 11th day of March, 1980.

  
\_\_\_\_\_  
John H. O'Neill, Jr.

Dated: March 11, 1980

UNITED STATES OF AMERICA  
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