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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
DUKE POWER COMPANY)	Docket No. 70-2623
(Amendment to Materials License)	
SNM-1773 for Oconee Nuclear Station)	
Spent Fuel Transportation and)	
at McGuire Nuclear Station))	

NRC STAFF RESPONSE IN OPPOSITION TO NATURAL RESOURCES COUNCIL
MOTION TO STRIKE TESTIMONY

I. NRC Staff Position

The NRC Staff opposes the Natural Resources Defense Council's (NRDC) motion to strike specific parts of NRC Staff testimony. The basis for NRDC's motion is contrary to Commission rules of procedure as a matter of law and prior Commission practice.

II. Background

On August 13, 1979, NRDC filed a motion to strike identified portions of NRC Staff testimony proffered at the hearing and on which extensive cross-examination was conducted.^{1/} The basis stated is that selected statements in Staff written direct testimony proffered at the hearing are "conclusory,"

^{1/} The parties stipulated and the Board approved the procedure for NRDC filing a written motion to strike with the NRC Staff having the opportunity to respond under the Commission Rules of Practice for responding to motions. See 10 CFR § 2.730(c) (Tr. 3804-08.)

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"argumentative," constitute "legal conclusions," and "summarizes other parties' positions".

III. Discussion^{2/}

A. The Natural Resources Defense Council Motion To Strike Does Not Have An Adequate Basis Under The Nuclear Regulatory Commission Regulations.

NRDC's motion to strike certain parts of NRC Staff testimony offered at the hearings is grounded on improper application of evidentiary standards under the Commission's rules of practice.

The Commission's Rules of Practice provide the standard for admissibility of evidence as follows:

"Only relevant, material, and reliable evidence which is not unduly repetitious will be admitted. Immaterial or irrelevant parts of an admissible document will be segregated and excluded as far as practicable."

The positive evidentiary tests of admissibility, and the only ones called out by the Commission are: relevancy, materiality and reliability.^{3/} The evidentiary test of admissibility pursuant to 10 CFR § 2.743(c), at least insofar as this case is concerned, is whether the information was reliable.

^{2/} An Appendix entitled "Specific Staff Responses to Particulars of NRDC's Motion to Strike" (copy attached) is incorporated by reference.

^{3/} In our review, NRDC's motion to strike does not appear to raise objections to the admissibility of evidence based on relevancy or materiality grounds.

The NRC Staff experts are permitted to give conclusions and summarize other parties positions in order to arrive at an independent conclusion as to whether the Applicant has met regulatory and statutory requirements and, as a concomitant, to judge whether Intervenors' contentions raise considerations that would require the Staff to modify its conclusions. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 335, 337 (1973); cf., Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-83, 5 AEC 354, 357 (1972); cf. Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 765-67 (1977); Wisconsin Electric Power Company, et al. (Point Beach Nuclear Plant, Unit 2), ALAB-78, 5 AEC 319, 332 (1972).

See also, Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 200-208 (1978); Northeast Nuclear Energy Company, et al. (Montague Nuclear Power Station, Units 1 and 2), LBP-75-19, 1 NRC 436, 437 (1975); Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-379, 5 NRC 565, 568-69 (1977); New England Power Co., et al. (NEP, Units 1 and 2), LBP-78-9, 7 NRC 271, 279-81 (1978). The Staff's review of an application is based on a multi-disciplinary approach, that " [i]n many instances the direct testimony is prepared and presented not by just one person but by a panel of witnesses, no one of whom possesses the variety of skills and experience necessary to permit him to endorse and to explain the entire testimony." Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-379, 5 NRC 565, 569 (1977). Wisconsin Electric Power Co., et al. (Point Beach Nuclear Plant, Unit 2), ALAB-78, 5 AEC 319 (1972). Cf. Offshore Power Systems, *supra*, see, 10 CFR § 2.102.

- B. Staff testimony is not "conclusory," and there is no exclusionary rule of evidence that bars the admissibility of Staff testimony pursuant to 10 CFR § 2.743(c) on grounds that the testimony is conclusory or summarizes other parties' positions.^{4/}

NRDC moves to strike Staff testimony because it is conclusory (Items 4, 8, 10-14, 17-19, 23-27, 29, 30), and because it summarizes other parties' positions,^{5/} (Items 25-16.)^{6/} The NRC Staff is permitted to draw conclusions and summarize other parties positions in determining whether an application meets regulatory requirements. See generally, Rules 702-703 of the New Federal Rules of Evidence; Point Beach, supra.

^{4/} A detailed rebuttal to each of NRDC's objections is set forth in the attached Appendix.

^{5/} We have heard the naked assertion that the Staff testimony summarizes other parties' positions a number of times during the course of these proceedings. As a matter of simple common sense, however, it does not make much sense in this evidentiary format for the Staff to write something down in addressing an Intervenor position without somewhere in the document indicating what its view of the position is (not Intervenor's view but what the NRC Staff understands the Intervenor's position to be from reading and hearing Intervenor's words) - whether it is factual or legal or a mixture of both. Otherwise, there would simply be no focus about what matters the Staff's analysis in the form of testimony seeks to address about an Intervenor's contention, and the testimony would sail around without any course or destination.

^{6/} The Staff uses the numbering system adopted by NRDC in its motion in this response and in the Appendix to this response. The numbering system used by NRDC in its motion identifies parts of testimony of Staff witnesses that NRDC asserts is not admissible in these proceedings.

Evidence, including testimony, presented at the hearing is reliable, even though it may constitute hearsay if NRDC's objections can be interpreted to be hearsay objections. Duke Power Co. (Catawba Nuclear Station), ALAB-355, 4 NRC 397, 411-12 (1976).

(1) The direct testimony proffered by the Staff is simply not conclusory^{7/} if by objection to it NRDC means that it is not reliable because it draws conclusions and makes judgments about DPC's application and it constitutes an explanation and supplement to the Staff's review. If NRDC's objection is a hearsay objection, it should be overruled. Even the New Federal Rules of Evidence would permit the evidence objected to by NRDC. See, Rule 702, Rule 703, Rule 704, Rule 801(8) and Rule 801(24).

The Staff review function is fulfilled by review and analysis and, ultimately, judgment and conclusions about information furnished by others outside the Staff, viz, the Applicant. The Commission's rules recognize that within the Staff technical review of an application is a complicated process involving a multi-disciplinary review process. Point Beach, supra, at 332. In addition, the nature of the contention in issue, i.e., whether

^{7/} The definition of "conclusory" used by NRDC Counsel is completely ambiguous. If he means "conclusory" in the sense that the statement is a flat statement without supporting basis, then the question is not one of admissibility but one of weight to be given to the conclusion judged by the extent of the supporting basis given. If, on the other hand, NRDC Counsel means by use of the term that the Staff's regulatory role bars it from drawing conclusions from information it has about whether a licensing action pending before it meets regulatory requirements, he is simply wrong. Catawba, supra.

it is specific or not, impacts directly on the nature of the Staff's testimony on a particular issue. Thus, the Staff's review, judgments, and conclusions in the form of Staff testimony in response to a contention will be more or less specific depending on the nature and specificity of the contention addressed. The NRC Staff has never agreed that the NRDC contentions were specific or particularized enough for meaningful evidentiary hearings. (Prehearing Conference; March 13, 1979).

(2) Under the Commission's standard for admissibility pursuant to 10 CFR § 2.743(c) that testimony be reliable, there is no basis for an objection that certain Staff testimony that summarizes and relies on testimony of other witnesses in our evidentiary proceedings is not admissible. A witness clearly may rely on what other witnesses say or have said in our proceedings in drawing conclusions. Point Beach, supra, 322-23, 332-33 and Rule 703 of the Federal Rules. This is particularly true -- the testimony is reliable when the underlying data is furnished by others -- where those other witnesses whose testimony was relied on for extending the evidentiary record further presented direct testimony themselves and were available for cross-examination at the very same hearings. Point Beach, supra, at 332.

As set forth in the Appeal Board's reasoning in Point Beach;

"There is, of course, a line of authority which might be construed as limiting the use which may be made of hearsay testimony in administrative proceedings. But the judicial limitations would apply solely to the weight which could be accorded to such evidence, and not to its admissibility.

The extent to which the evidence, including underlying data, has been subject to cross-examination, or is available for cross-examination, is a factor which must be taken into account by a licensing board.

"Dr. Schneider's reliance in part on data prepared by others does not mean that his study was not "independent," although his use of such data must be taken into account in evaluating the weight which it may be given.***"

* * * * *

"We find on this basis no reason to differ with the Licensing Board's assessment of the staff study as being "independent." Moreover, we see no basis for discrediting the testimony of Dr. Schneider and other staff witnesses because of their reliance on data gathered by others and not formally introduced into the record in this proceeding. Dr. Schneider and the other witnesses were available to answer questions on their use of such data and their knowledge or lack of knowledge of the methodology used in gathering it."

The procedure described in Point Beach and followed by the Staff in its review and testimony in this case recognizes the multi-disciplinary approach of the Staff's review process, Point Beach, supra, 322. The witnesses involved in the evaluation of the proposed license action were available at the hearing, offered direct testimony, and were cross-examined extensively.

C. The Staff testimony is not argumentative. (Items 20-22).

There is no basis for barring the admissibility of parts of Staff testimony in this proceeding grounds that it is argumentative. The Staff testimony, which directly quotes from published Government documents, i.e., (Items 20 and 21), and then gives the Staff assessment of what the quoted material means (Item 22) on a vague contention involving broad policy matters, which we have argued are not relevant to the instant proceeding is not argumentative.

Item [20], in part, contains an introductory statement of fact, and Items [20], in part, and Item 21 are quoted statements from a Government document, DOE/ET-0055. The document cited itself was specified in NRDC Contention 1 as a basis for NRDC Contention No. 1. In addition, NRDC can hardly be heard to object since it quotes almost the same material in Dr. Cochran's testimony, NRDC Exhibit No. 17A, at page 3. The difference is that Dr. Cochran did not quote the additional preceding paragraph in the DOE document that is relevant to the contentions in this proceeding. The purpose underlying Mr. Spitaler's recitation in his testimony was, in part, to give the full flavor of DOE/ET-0055, first mentioned by NRDC, and in part to show that Intervenor's witness had not fully used, in the context of this case, quoted material from DOE/ET-0055.

Therefore, this information, Items 20-21, in the context of this case is reliable and admissible as part of the overall testimony of this Staff witness.

Item [22] constitutes the NRC Staff analysis and evaluation in the context of this case of the meaning of written material quoted from the Government document cited by NRDC's testimony. The document was first identified by NRDC in response to an Applicant interrogatory which asked for the basis for an NRDC contention. Information in quoted form from the DOE document was later used by NRDC, in part, in direct written testimony by an NRDC witness. With respect to Item [22], it seems fair and consistent procedure that the same ruling under the reliability standard would apply to the NRC Staff.

The Staff's assessment of how information (which is, in part, factual information being reported to the Board about what a part of a document, quoted in NRDC testimony says), published in a document by the Department of Energy affects the Staff's analysis and evaluation in the context of this case is reliable testimony and, therefore, admissible.

- D. The Staff testimony (Items 1-3, 5-7, 9,) is not barred because it constitutes legal conclusions.

The testimony objected to does not constitute legal conclusions. Rather, it constitutes Staff positions in these proceedings relative to Staff review of the proposed licensing action against regulatory standards and criteria. The Licensing Board in this proceeding specifically ruled that Staff witnesses are permitted to explain their understanding of what Commission regulations require in order for the Staff witnesses to review and judge whether an application for a licensing action meet Commission standards and criteria for licensing. (Tr. 588-90; 2627-29; 2589-90.)

In addition, however, taken in the context of this case, where broad generalized policy type contentions were admitted in these proceedings (i.e., NRDC Contention 1), the Staff testimony (Items 1-3, 5-7, 9) do not constitute legal conclusions, but rather:

- (a) A description of the Staff's understanding of the Commission's directive to it to conduct Staff's review of proposed applications for handling and storage of

spent fuel during the interim period in which the Commission was preparing the Generic Environmental Impact Statement (G.E.I.S.) on the issue per Commission policy set forth in 40 Fed. Reg. 42,801.

(b) A description of the application of the five factors by the Staff during its review of the proposed action, as required by the Commission in 40 Fed. Reg. 42,801.

(c) Recitation of the conclusions based on substantive and reliable supporting facts, opinions, and analysis by the Staff in fulfillment of its regulatory role under 40 Fed. Reg. 42,801, Commission regulations, NEPA, the AEA, as amended, and the Energy Reorganization Act, as amended.

For similar reasons, the material in Item 28 does not constitute a legal conclusion, but is reliable testimony and therefore admissible in these proceedings.

The first sentence of Item 28 is a statement of fact, e.g., "As the NRC Project Manager of this licensing action, I have directed and taken part in the preparation of the Environmental Impact Appraisal (EIA) in support of the Staff's negative declaration. (43 Fed. Reg. 61057)." It tells who the project manager was and what he did.

The second sentence described the Staff's evaluation and analysis and gave a factual conclusion about the environmental significance of the matters raised by the Carolina Environmental Study Group (CESG) in its contention in the context of the entire testimony which set forth the detailed factual basis for the Staff's review. We note that the contention itself (CESG Contention No. 3) is broad and general, i.e., the action proposed in a major

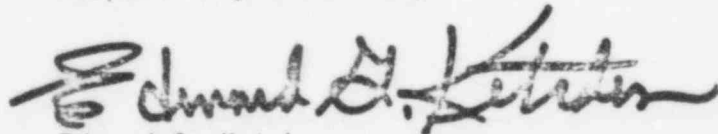
Federal action. Because of its very nature those attempting to respond to the contention get into the thicket of mixed questions of fact and law (see Prehearing conference, Transcript, at Tr. 49-50). The contention, however, requires an answer by the Staff in performance of the Staff's independent review role and its role as a party before the Licensing Board.

Called by any semantic label and whether the CESG Contention No. 3 involves a mixed question of fact or law, the information on which the evaluation of the second sentence of Item [28] is based is reliable. Therefore, the information in the second sentence of Item [28] as well is admissible as evidence in these proceedings pursuant to 10 CFR § 2.743(c).

IV. Conclusion

The Natural Resources Defense Council motion to strike Staff testimony should be denied since the Staff testimony is admissible pursuant to the requirements of 10 CFR § 2.743(c).

Respectfully submitted,



Edward G. Ketchen
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 4th day of September, 1979.

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APPENDIX - SPECIFIC STAFF RESPONSES TO
PARTICULARS OF NRDC'S MOTION TO STRIKE

STAFF EXHIBIT 16A- SPITALNY AND ROBERTS

a. Objection - Conclusory

NRDC, Item [4], pages 5-6, Staff Exh. 16A

Response:

This testimony is reliable and therefore admissible.

The statement reflects the result of Staff analysis required by Commission practice and procedure, particularly the directive set forth by the Commission at 40 Fed. Reg. 42,801, September 16, 1975; "Intent to Prepare Statement on Handling and Storage of Spent Light Water Power Reactor Fuel." The conclusion reached, or reflected in the testimony objected to, is supported by extensive factual basis in the written testimony itself and in testimony given in response to extensive cross-examination at the hearing. Staff personnel who gave that statement were available at the hearing.

b. Objection - legal conclusions.

NRDC, Items [1] - [3], pages 2-3 and [5] - [7], pages 5-6 of Staff Exh. 16A.

Response:

This testimony is reliable and, therefore, admissible.

Taken in context of the role of the NRC Staff and the specified NRDC Contention No. 1, these are not legal conclusions but rather (a) a description of the Staff's understanding of the Commission's directive to it to conduct Staff's review of proposed applications for handling and storage of spent fuel during the interim period in which the Commission was preparing the Generic Environmental Impact Statement (G.E.I.S.) on the issue per Commission policy set forth in 40 Fed. Reg. 42,801; (b) description of the application of the five factors by the

Staff during its review of the proposed action as required by the Commission in 40 Fed. Reg. 42,801; (c) recitation of the conclusions based on substantiative and reliable supporting facts, opinions, and analysis as required by the Staff in fulfillment of its regulatory role under 50 Fed. Reg. 42,801, Commission regulations, NEPA, the AEA, as amended, and the Energy Reorganization Act, as amended.

STAFF EXHIBIT 18A - CARTER

a. Objection - conclusory

NRDC, Item [8], page 5 of Staff Exh. 18A

Response:

The testimony is reliable and, therefore, admissible.

The information is basically factual in nature in the context of the Full-Core Reserve (FCR) contention (NRDC Contention No. 5) to which this witnesses' testimony was directed (see the first sentence). The statement challenged is the factual basis on which the witness relies to draw his conclusion. The factual basis and the source of the basis for the witnesses' conclusions are identified in the challenged testimony. The factual basis or the conclusion drawn from the express facts stated were not challenged during cross-examination of the witness at the hearing. A conclusion drawn in fulfillment of a Staff witnesses' review function when a specific factual basis is provided is reliable, pursuant to 10 CFR §2.743(c), and, therefore, is not barred by an ipsi dixit objection that the material is conclusory.

b. Objection - legal conclusion

Item [9], pages 5-6, Staff Exh. 18A

Response:

This material in Mr. Carter's testimony (a) reports his understanding of the Commission's policy directive to the Staff as set forth in 40 Fed. Reg. 42,801. (Intent to Prepare G.E.I.S.); (b) is a statement of fact giving information about how many licensing actions involving on site spent fuel pool expansions have been

approved by the Commission; and (c) with reference to the spent fuel pool expansion actions licensed by the Commission is a statement of fact reporting that in those cases a universal fact found was that the cost of shutting down a reactor, even for a short time, is greater than the cost of increasing on-site storage capability the cost or shipment of spent fuel to another facility.

There is nothing even arguable that could constitute a legal conclusion in any of this material. These facts are clear factual information on which Mr. Carter relied in part of his testimony. And he was not seriously challenged on this information during cross-examination on all his testimony. There is no question that all of Mr. Carter's testimony is reliable and, therefore, admissible as evidence in these proceedings.

STAFF EXHIBIT 19A - SPITALNY

a. Objection - conclusory

Items [10], pages 2-4

Response:

This information is reliable and therefore admissible, pursuant to 10 CFR §2.743.

The objection to Mr. Spitalny's testimony appears to be some form of hearsay objection. However, hearsay is permissible in Commission proceedings, if reliable. All witnesses on which this witness relied. Diablo Power Company (Catawba Nuclear Station), ALAB-355, 4 NRC 397, 411-12 (1976). All witnesses on which this witness relied for his direct written testimony were available at the hearing for cross-examination and each underwent extensive cross-examination by Intervenors. Thus, the basis on which this witness had to direct his testimony to an overly broad and general contention necessarily called for a generalized response which depended in part upon testimony of other experts (a multidisciplinary approach is permitted, Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-78, 5 AEC 319, 332 (1978)) was fully set forth in the record. Those other witnesses relied on by Mr. Spitalny were available and were cross-examined extensively. Thus, there can be no objection that the information on which Mr. Spitalny relied could not be tested.

An additional point, but important point, needs discussion with respect to NRDC Contention 2 for the Staff believes it is being "whipsawed" in the gamesmanship of this litigation. NRDC Contention 2 was objected to at the outset as being overly broad and not meeting the requirements of 10 CFR §2.714 (see Prehearing Transcript Tr.).

NRDC Contention 2 states in toto:

"The proposed action is a major federal action significantly affecting the quality of the human environment and cannot be acted upon until preparation of a final environmental impact statement."

There is absolutely no basis stated for this contention. Thus, there is no way to meet this objection to the licensing of the action except to say "that is not so," unless the action is broken down into its parts and evaluated.

Hence, the need for the multidisciplinary approach to evaluate the action with a Staff witness required to pull the parts together to arrive at the final conclusion about the action insofar as the NRC Staff is concerned. This was done by the Staff person with training, experience and the regulatory responsibility for the entire project review.

To arrive at the conclusion on this broad contention the Staff witness responsible for the entire review necessarily had to rely on others who evaluated the parts. But those others were available at the hearing for cross-examination. All this means is that Items [10] - [14] are reliable and therefore admissible since the statements, analyses, evaluations, and conclusions drawn therefrom are based on fact and opinions of experts set forth orally at the hearing or in documentation relied on by those experts.

STAFF EXHIBIT 19B - SPITALNY AND GLENN

a. Objection - conclusory

Items [17] - [19], pages 4-6, [23], p. 11, Staff Exh. 19B

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STAFF EXHIBIT 19B - SPITALNY AND GLENN

a. Objection - conclusory

Items [17] - [19] , pages 4-6, [23] , p. 11, Staff Exh. 19B.

Response:

The testimony is reliable and therefore admissible.

The factual basis for the conclusion drawn in performance of the Staff's review role is expressed. The documents relied on as a basis relied on are identified. The NRC Staff personal and witnesses who prepared the documents which were relied on were available and extensively cross-examined. In addition, Item [18] is a statement of fact and/or expert opinion that forms part of the basis of the evaluation set forth in the testimony. Therefore, the information on which the evaluations set forth in the testimony were based is reliable and therefore admissible.

b. Objection - argumentative

Items [20] - [22] pages 7-8 of Staff Exh. 19B.

Response:

The testimony objected to is reliable and therefore admissible in this proceeding.

Item [20] in part contains an introductory statement of fact, and Item [20] in part and Item [21] are quoted statements from a Government document, DOE/ET-055. The document cite itself was specified as a basis for NRDC Contention No. 1. NRDC can hardly be heard to object since it quotes the same material in Dr. Cochran's testimony, NRDC Exhibit No. 17A, at page 3. The purpose underlying Mr. Spitalny's recitation in his testimony was in part to give the full flavor of DOE/ET-055 first mentioned by NRDC, and in part to show that Intervenor's witness had not fully used in context quoted material from DOE/ET-055.

Therefore, these information items in the context of this case are reliable and admissible as part of the overall testimony of this Staff witness.

Item [22] constitutes the NRC Staff analysis and evaluation in the context of this case of the meaning of a Government document first raised by NRDC in response

to an Applicant interrogatory which asked for the basis for an NRDC contention and later in direct written material quoted and relied on by an NRDC witness.

With respect to Item [22], it seems fair simply as a matter of consistent procedure that reliability for the goose is reliability for the gander.

The Staff's assessment of the information (which is in part factual information being reported to the Board about what a documents says), published in a document by the Department of Energy as a basis for how that information affects the Staff's analysis and evaluation in the context of this case is reliable testimony and, therefore, admissible in this case.

c. Objection - summarizing other parties' positions.

Items [15] - [16], pages 2-3 of Staff Exh. 19B.

Response:

The testimony is reliable and therefore admissible.

This testimony taken in context is a statement about what the record shows. It is background information used to give focus to technical Staff testimony. It also states the Staff's understanding as a matter of fact of what factual issues the Intervenor is raising that must be addressed in responsive testimony. As such, therefore, the statements constitute factual statements of what the NRC Staff understands the factual issues to be. Taken in context, the information is reliable factual information and admissible.

We note, as an aside, that NRDC was careful not to object to the sentence in the paragraph in the testimony between the two sentences, Items [15] and [16] objected to. This is understandable, however, since the sentence in between supports NRDC's case.

STAFF EXHIBIT 19D - BRETT S. SPITALNY

Staff Exhibit 19D responded to Carolina Environmental Study Group's Contention No. 3. NRDC is a discretionary Intervenor having limited participation rights in this proceeding. Accordingly, NRDC is barred from objecting to the admissibility of evidence with respect to CESG Contention No. 3, although CESG's Contention No. 3 is similar to NRDC's Contention 2.

a. Objection - conclusory

Items [24] - [27], pages 2-5, Items [29] - [30], pages 4-5 of Staff Ex. 19D.

Response:

The Staff testimony is reliable and therefore admissible.

It is important for consideration of the motion and Items [29] - [30] to consider that Items [24] - [27] is Staff testimony addressing CESG Contention No. 3. Contention No. 3 is a broad generalized contention which in and of itself does not have a specific focus which lends itself to being addressed by detailed factual treatment in Staff testimony.

Items [24] - [27] and Items [29] - [30] constitute Staff review evaluations, analysis, and conclusions in written direct testimony supported by detailed factual analysis, documentation, and reliable expert opinion.

The detailed basis for the Staff's presentation on the contention that is the subject of this testimony is set forth in the form of document references, including the EIA, the SER, and expert testimony of witnesses. The authors of the factual information and basis relied on in the evaluation and analysis set forth in the testimony were available and were subjected to extensive cross-examination at the hearings.

Item [29] is significant in part because of the basis for the general objection that the witness relied on information and evaluation by others. However, in Item [29], the witness points to the EIA as the basis for his evaluation. The witness, himself, was the

primary author of that document. (Tr. .)
In addition, the witness points to confirmatory studies (in the form of testimony) done by others who were available and were cross-examined extensively by the Intervenor at the evidentiary hearings. This is permissible. Point Beach, ALAB-78, supra.

The Staff testimony in Item 29 is on its face reliable and therefore admissible.

b. Objection - legal conclusion.

Item [28], page 4 of Staff Exh. 19D.

Response:

The testimony is reliable and therefore admissible.

The first sentence is a statement of fact, e.g., "As the NRC Project Manager of this licensing action, I have directed and taken part in the preparation of the Environmental Impact Appraisal (EIA) in support of the Staff's negative declaration. (43 Fed. Reg. 61057). Clever sophists may be able to make a convincing argument otherwise, but this material simply does not constitute legal argument. Rather, it tells who the project manager was and what he did.

The second sentence describes the Staff's evaluation and analysis and of factual conclusion about the environmental significance of the matters raised by CESG in its contention in the context of the whole testimony which set forth the detailed factual basis for the Staff's review. We note that the contention itself (CESG Contention No. 3) is broad and general and because of its very nature gets those attempting to respond to it into the thicket of mixed questions of fact and law but, nevertheless, requires an answer by the Staff in performance of the Staff review role and the Staff's role as a party before the Licensing Board.

Called by any semantic label dreamed up, whether mixed question of fact or law, the information on which the evaluation of the second sentence of Item [28] is based is reliable. Therefore, the information in the second sentence of Item [28] is admissible as evidence in these proceedings.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)

DUKE POWER COMPANY)

(Amendment to Materials License)
SNM-1773 for Oconee Nuclear Station)
Spent Fuel Transportation and Storage)
at McGuire Nuclear Station))

Docket No. 70-2623

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE IN OPPOSITION TO NATURAL RESOURCES COUNCIL MOTION TO STRIKE TESTIMONY", dated September 4, 1979, 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, through deposit in the Nuclear Regulatory Commission's internal mail system, this 4th day of September 4, 1979.

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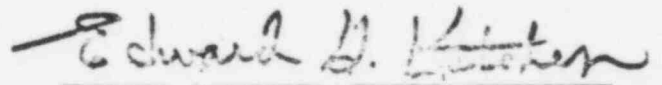
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