

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

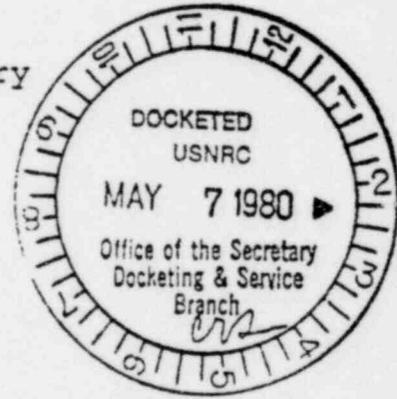
ATOMIC SAFETY AND LICENSING APPEAL BOARD

Alan S. Rosenthal, Chairman
Dr. John H. Buck
Richard S. Salzman

SERVED MAY 7 1980

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In the Matter of)	
DUKE POWER COMPANY)	Docket Nos. STN 50-488
(Perkins Nuclear Station, Units 1,)	50-489
2 and 3))	50-490
_____)	

Mr. Charles A. Barth for the Nuclear Regulatory Commission staff



MEMORANDUM AND ORDER

May 7, 1980
(ALAB-591)

On April 15, 1980, David Springer filed a petition with the Licensing Board in this construction permit proceeding involving the proposed Perkins nuclear facility. The petition sought leave to intervene in this proceeding, ^{1/} as well as certain allied relief.

1/ A previous (and also untimely) intervention petition filed by Mr. Springer was denied by the Licensing Board; on his appeal from that denial, we affirmed. See ALAB-431, 6 NRC 460 (1977).

On May 5, the NRC staff filed its response, in which it urged that the petition be denied on the merits. That response was not, however, submitted to the Licensing Board. Instead, it was addressed to us. The articulated reason was that, because of the rendition of its February 22, 1980 partial initial decision on alternate site issues,^{2/} the Licensing Board no longer has jurisdiction to entertain the petition; rather, such jurisdiction now resides exclusively in this Board.

We need not now decide whether the staff is right about that.^{3/} Be that as it may, it is for the Licensing Board to consider ab initio whether it is empowered to grant relief which has been specifically sought of it. Every tribunal --

^{2/} LBP-80-9, 11 NRC _____. By unpublished order of March 4, 1980, we tolled the running of the time period for the filing of exceptions to that decision.

^{3/} It is worthy of passing note, however, that the Licensing Board has not totally relinquished jurisdiction over this licensing proceeding. As stated at the very inception of its February 22 partial initial decision, that Board still has before it generic safety issues. Thus, at present, there is divided jurisdiction between the two Boards. In that circumstance, the question possibly might be somewhat more difficult than the staff's response suggests. This is so notwithstanding the staff's asserted belief (Response, p. 4) that the "substance" of Mr. Springer's petition is a motion to reopen the record on matters covered in the February decision. Indeed, the papers might also be construed as a motion to reconsider. See, e.g., Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-235, 8 AEC 645, 646 (1974). We neither express nor intimate any opinion on how the papers should be construed, we merely reiterate that things may not be so plain as they seem at first glance.

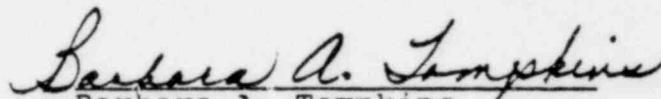
whether judicial or administrative -- possesses the inherent right (indeed, the duty) to determine in the first instance the bounds of its own jurisdiction. United States v. United Mine Workers, 330 U.S. 258, 292 fn. 57 (1947); accord, Nestor v. Hershey, 425 F.2d 504, 511 (D.C. Cir. 1969). As the Supreme Court has said in a related context: "While the Board's decision is not the last word [respecting its jurisdiction], it must assuredly be the first". Marine Engineers Beneficial Assn. v. Interlake S.S. Co., 370 U.S. 173, 185 (1962); accord, FPC v. Louisiana Power & Light Co., 406 U.S. 621, 647 (1972). The staff has not brought our attention to any special circumstances which might justify its attempt to circumvent that well-settled rule; i.e., its calling upon an appellate body to pass initial judgment upon the jurisdiction of a lower tribunal to decide a matter which has been put before that tribunal by another party (or, as here, a prospective litigant).

In short, even if wholly meritorious, the staff's jurisdictional assertions must originally be given consideration by the Licensing Board. Although we accordingly might simply reject the staff's papers as having been improvidently filed with us, in the interest of expediting the ultimate disposition of the matter we shall refer them to the Licensing Board for its

consideration. We assume that, following its receipt of the applicant's response to Mr. Springer's petition, ⁴/ the Board will take such action on the petition as appears to it appropriate in the circumstances.

It is so ORDERED.

FOR THE APPEAL BOARD



Barbara A. Tompkins
Secretary to the
Appeal Board

⁴/ The applicant applied for and obtained an extension until May 9 of the time for the filing of that response.