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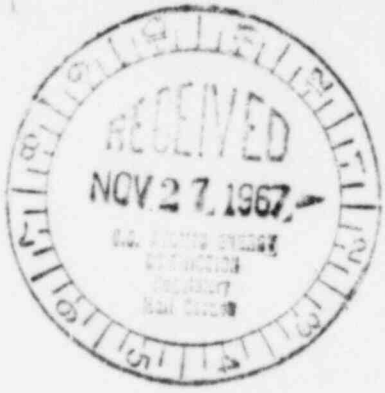

UNITED STATES OF AMERICA

ATOMIC ENERGY COMMISSION

IN THE MATTER OF	)	
	)	
DUKE POWER COMPANY	)	
	)	DOCKET NOS. 50-269
(OCONEE NUCLEAR STATION	)	50-270
	)	50-287
UNITS 1, 2 and 3)	)	

INTERVENORS' EXCEPTIONS TO INITIAL DECISION OF ATOMIC SAFETY AND LICENSING BOARD AND REQUEST FOR ORAL ARGUMENT

Cities of Statesville, High Point, Lexington, Monroe, Shelby, and Albemarle, and the Towns of Cornelius, Drexel, Granite Falls, Newton, and Lincolnton, all in North Carolina,
Intervenors

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Attorneys for Intervenors

November 21, 1967

UNITED STATES OF AMERICA

ATOMIC ENERGY COMMISSION

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Now Come the Intervenors, Cities of Statesville, High Point, Lexington, Monroe, Shelby, and Albemarle and Towns of Cornelius, Drexel, Granite Falls, Newton, and Lincolnton, all in North Carolina, and, pursuant to Section 2.762 of the Rules of Practice of the Atomic Energy Commission (Commission) and other related rules, hereby, in apt time, file exceptions to the Initial Decision (I. D.) in these Dockets of the Atomic Safety and Licensing Board (Board), issued 3 November 1967, and request oral argument thereon, as follows:

EXCEPTION 1

Intervenors except to the Order of the Board which reads as follows (I. D., pp. 23-24*):

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*Page references to I. D. Mimeo throughout.

"WHEREFORE, IT IS ORDERED, pursuant to the Act and the Commission's regulations, that (1) the motion of the intervenors to dismiss the application in regard to Unit 3 is denied, (2) subject to review by the Commission upon its own motion or upon the filing of exceptions in accordance with the Rules of Practice, 10 CFR Part 2, the Duke Power Company is authorized to construct the facilities in accordance with the application and with the evidence and representations entered in the record at the hearing; and the Director of Regulation is directed to issue provisional construction permits pursuant to Section 104 b of the Act substantially in the form of Appendices A, B, and C to the Notice of Hearing on Application for Provisional Construction Permit in this proceeding, within 10 days from the date of issuance of this decision.

"IT IS FURTHER ORDERED, in accordance with 10 CFR Section 2.764, good cause not having been shown to the contrary, this Initial Decision shall be immediately effective."

The grounds of this first Exception are:

GROUND 1. The Board erroneously rejected the Order proposed by Intervenors, as follows (Intervenors' Proposed Findings of Fact and Conclusions of Law (IPF) pp. 22-23):

"PROPOSED FORM OF ORDER

The Application of Duke Power Company for licenses (licenses for forty years) under the Atomic Energy Act of 1954, as amended, which is specifically for Research and Development Licenses (including a construction permit), applied for under Section 104(b) of the Act, 'to construct, own, use and operate the utilization facilities hereinafter described as an integral part of the nuclear generation plant to be located in Oconee County, South Carolina, and to be known as the Oconee Nuclear Station', consisting of three

Pressurized Water Type Reactors and appurtenant facilities, is hereby denied, for lack of jurisdiction."

GROUND 2. The grounds of each of the exceptions hereinafter set forth, together with the authorities and record references cited in support thereof, are each and all incorporated herein by reference in support of this summary Exception.

EXCEPTION 2

Intervenors except to the ultimate conclusion of the Board, which reads as follows (I. D. p. 22):

"Duke's proposed nuclear utilization facility including Oconee Units 1, 2 and 3 are properly subject to license under Section 104 b of the Act."

The grounds of this second Exception are:

GROUND 1. The Board erroneously rejected the ultimate conclusion proposed by the Intervenors, as follows: (IPF, p. 22):

"PROPOSED CONCLUSION OF LAW

The Commission is without jurisdiction under Section 104 (b) of the Atomic Energy Act of 1954, as amended, to grant to Duke Power Company Research and Development Licenses (including a construction permit) 'to construct, own, use, and operate' for forty years the three Pressurized Water Type Reactors which Duke proposed to employ in the Oconee Nuclear Station Units 1, 2 and 3."

GROUND 2. The grounds of each and all of the exceptions hereinafter set forth, together with the authorities and record references cited in support thereof, are each and all incorporated

herein by reference in support of this summary Exception.

EXCEPTION 3

Intervenors except to the Board's finding and conclusion that Intervenors' "summary proposed finding of fact....is rejected as contrary to law," (I. D. p. 21), said Intervenors' "summary proposed finding of fact" being as follows (IPF p. 22):

"SUMMARY

PROPOSED FINDING OF FACT

> Applicant, Duke Power Company, has not sustained its jurisdictional burden of proving that the Pressurized Water Type of Reactor to be employed by Duke in each of the three units of the proposed Oconee Nuclear Station is (1) a Research and Development Utilization facility and (2) of a type which does not have practical value for commercial purposes."

The grounds of each of the exceptions hereinafter set forth, together with the authorities and record references cited in support thereof, are each and all incorporated herein by reference in support of this summary exception.

EXCEPTION 4

The Board adopted a standard contrary to law for determining whether or not the Pressurized Water Type of Reactor to be employed in each of the three units of the Oconee Nuclear Station is a type of utilization facility which has demonstrated practical value for industrial and commercial purposes in that the Board found and concluded (I. D. p. 19-20):

> "The principal remainder of the intervenors' presentation has concerned economic data and the interpretation thereof..... These economic inferences and assertions, however, since they are projections only and are not substantiated by operating experience, do not constitute a demonstration of the practical value of the proposed facilities within the requirements of Section 104 b of the Act, and they have no bearing on the basic requirement that there must be found that the facilities are '...involved in the conduct of research and development activities...which activities are of a kind that will lead...to the demonstration of the practical value of such facilities.'"

and erred in failing to find and conclude that: (IPF pars. 5 and 6, pp. 6, 12)

> "The lawful standard for determining whether or not the Pressurized Water Type of reactor utilization facility to be employed by Applicant has demonstrated practical value for industrial and commercial purposes is simply whether or not it is being sold by the manufacturer and bought by the purchaser, without Government subsidy to either, for use in the large scale generation and sale of electrical energy in the regular course of business, and not merely for the disposal of by-product energy."

The grounds of this exception are:

GROUND 1. The Board's standard is not in accord with the single plain meaning of the Act, including, among others, the following sections:

101
102
103
104
44
42 USC Sec 2133(c)
42 USC Sec 2019
105 (c), 42 USC Sec 2135(c)
42 USC Sec 2232 (c)
42 USC Sec 2232 (d)
See also C.F.R. Title 10, Sec. 50.24(a) and (b)

GROUND 2. The Intervenors' proposed standard is in accord with the single plain meaning of the Act, and the usual and ordinary meaning of the words used by the Congress, including, among others, the sections of the Act listed under Ground 1, supra.

EXCEPTION 5

Intervenors except to that part of the opinion of the Board and to that finding of fact by the Board on page 18 of the Initial Decision reading "on this record, the intervenors have made no substantial contest with Duke's position on the research and development program and the need therefor."

The grounds for this exception (and Intervenors' citations of authorities in support of such grounds) are:

This "finding" of the Board begs the question of the proper definition of "research and development".

It is true that the Intervenors have not disputed Duke's word that Duke would run certain tests on and within these reactors to verify whether they were constructed and whether they will operate according to design and projection. But the entire record fully demonstrates that the Intervenors have consistently disputed Duke's interpretation that these minor tests and adjustments (such as would be given an automobile coming off an assembly line) constitute "research and development".

The controlling definition is given in Section 11x of the Act (42 U.S.C. 2014) as:

> "The term 'research and development' means (1) theoretical analysis, exploration, or experimentation; or (2) the extension of investigative findings and theories of a scientific or technical nature into practical application for experimental and demonstration purposes, including the experimental production and testing of models, devices, equipment, materials, and processes.
>
> "[Sec. 11x as redesignated by Public Law 85-256, Act of September 2, 1957 and Public Law 89-645, Act of October 13, 1966.]"

This definition can contain and comprehend nothing more than "...the extension of investigative findings and theories of a scientific or technical nature into practical application for* experimental and demonstration purposes..."

Duke's application and Duke's evidence comprehend and contain far more and predominantly more than this; they comprehend and contain the persuasive and predominant purpose of the production of commercial electric energy in enormous quantities; therefore, such application and evidence cannot be fitted into the statutory narrow definition of "research and development".

EXCEPTION 6

Intervenors except to the finding and conclusion of the Board that "..Duke has sustained the burden of proof that its proposed nuclear project constitutes a utilization facility

*All emphases, unless otherwise indicated, are the Intervenors'.

involved in the conduct of research and development activities within the scope of Section 104 b of the Act." (I. D. p. 18), and to the Board's rejection of the finding and conclusion that "Applicant, Duke Power Company, has not sustained its jurisdictional burden of proof to show that the Pressurized Water Type of Reactor to be employed in the Oconee Nuclear Station, Units 1, 2, and 3 is a Research and Development Utilization Facility (IPF Par. 5, p. 6).

The grounds for this exception (and Intervenors' citations of authorities in support of such grounds) are:

The Act (Section 11cc; 42 U.S.C. 2014) defines "utilization facility" as:

> "The term 'utilization facility' means (1) any equipment or device, except an atomic weapon, determined by rule of the Commission to be capable of making use of special nuclear material in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public, or peculiarly adapted for making use of atomic energy in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public; or (2) any important component part especially designed for such equipment or device as determined by the Commission. [42 U.S.C.2021.]
>
> "Sec. 11cc as redesignated by Public Law 85-256, Act of September 2, 1957 and Public Law 89-645, Act of October 13, 1966.]"

This definition implies and is meant to include a facility that would use an amount of special nuclear material

significant to common defense and security or health and safety.

There is no doubt on this Record that Duke's proposed plant would use such significant amounts. It would.

But Duke has not and cannot have sustained its burden of proof just by its meeting the criteria that this will be a "utilization facility". It is that. But Duke must also bring this plant within the meaning of "research and development".

To avoid repetition on this point, we simply refer the Commission to our grounds and citations of argument under Exception 5 above, and ask that they be considered here also as if fully re-written here.

However, the Board's finding and Duke's burden of proof fail, in the instance of this Exception 6, for an additional deficiency of definition.

The Board here finds that this proposed utilization facility will be "involved in the conduct of..." research and development activities within the scope of Section 104b of the Act.

The common words "involved in" and "the conduct of" are not defined in the definitional parts of the Act; but Sections of the Act, intimately related to each other, use, in similar contexts, revealing synonyms for these common terms.

Here is Section 104B (42 U.S.C. 2134b) of the Act:

"The Commission is authorized to issue licenses to persons applying therefor for utilization and production facilities involved in the conduct of research and development activities leading to the demonstration of the practical value of such facilities for industrial or commercial purposes. In issuing licenses under this subsection, the Commission shall impose the minimum amount of such regulations and terms of license as will permit the Commission to fulfill its obligations under this chapter to promote the common defense and security and to protect the health and safety of the public and will be compatible with the regulations and terms of license which would apply in the event that a commercial license were later to be issued pursuant to section 2133 of this title for that type of facility. In issuing such licenses, priority shall be given to those activities which will, in the opinion of the Commission, lead to major advances in the application of atomic energy for industrial or commercial purposes."

Here is Section 104c (42 U.S.C. 2134c) of the Act:

"The Commission is authorized to issue licenses to persons applying therefor for utilization and production facilities useful in the conduct of research and development activites of the types specified in section 2051 of this title and which are not facilities of the type specified in subsection (b) of this section. The Commission is directed to impose only such minimum amount of regulation of the licensee as the Commission finds will permit the Commission to fulfill its obligations under this chapter to promote the common defense and security and to protect the health and safety of the public and will permit the conduct of widespread and diverse research and development."

Here is a portion of Section 31 (42 U.S.C. 2051) of the Act:

"(a) The Commission is directed to exercise its powers in such manner as to insure the continued conduct of research and development and training

> activities in the fields specified below, by private or public institutions or persons, and to assist in the acquisition of an ever-expanding fund of theoretical and practical knowledge in such fields. To this end the Commission is authorized and directed to make arrangements (including contracts, agreements, and loans) for the conduct of research and development activities relating to--
>
> .....
>
> "(4) utilization of special nuclear material, atomic energy, and radioactive material and processes entailed in the utilization or production of atomic energy or such material for all other purposes, including industrial uses, the generation of usable energy, and the demonstration of the practical value of utilization or production facilities for industrial or commercial purposes; and..."

Notice that Section 104c uses the words "useful in" the conduct of research and development activities in the same place and the same sense as Section 104b uses the words "involved in".

Notice that Section 31 uses the words "entailed in" in the same context and the same sense as Section 104b uses the words "involved in".

From all this the conclusion is plain that Duke can derive no comfort from and its burden of proof can't be aided by reading any substantive content into the words "involved in". From all three of these statutory citations it is plain that the Congress was simply expressing the obvious: that production and utilization facilities and special nuclear material and the like

are, necessarily "involved in" or "entailed in" or "useful in" either research and development or commercial production.

The term "involved in" is, therefore, a neutral term, equally applicable to research and development or commercial production, and leaving still unanswered (and Duke's burden of proof still uncarried) that Duke here can come within and only within the truly substantive definitions of other portions of Section 104b.

Not only is this true, but it leads us to a further significant indication that Section 104b does not and cannot be matched with Duke's application.

The Act clearly contemplates two, separate avenues of research and development.

1) Under Section 31 (42 U.S.C.2051) the Commission was authorized and directed to take the initiative (as it many times has) to contract with private and public persons, companies and others for the conduct of research and development relating to, among other things the "...production of atomic energy...for all other purposes, including industrial uses, the generation of usable energy, and the demonstration of the practical value of utilization or production facilities for industrial or commercial purposes."

Aside from this quoted portion, other portions of Section 31 authorize other true research and development activities.

2) Under Section 104 (42 U.S.C.2134) the same spectrum of true research and development activities is authorized by the

avenue of private persons, companies and others taking the initiative to be licensed by the Commission to conduct such activities.

Section 104b is the enabling section for true research and development activities leading to the demonstration of the practical value of such facilities for industrial and commercial purposes. Notice the parralellism of language between Sections 31 and 104b.

Section 104c is the enabling section for true research and development activities in all other fields included (as to Commission initiatives) in Section 31.

Thus, Section 31, Section 104b and Section 104c, all, authorize no further scope or reach for a license than, at most, a leading to the demonstration of the practical value of such facilities for industrial or commercial purposes.

Such license cannot be issued on an Application and a record that contemplate and promise the massive production of commercial electric power.

This is made even more clear by the provision in Section 104b that the Commission should impose regulations and terms as to a Section 104b license that would be compatible with a Section 103 commercial (42 U.S.C.2133) license if such a commercial license were later to be issued for that type of

facility.

The Commission has itself recognized this latter interpretation, since it has provided:

> "Effect of finding of practical value upon licenses previously issued.--The making of a finding of practical value pursuant to Section 102 of the Act will not be regarded by the Commission as grounds for requiring:
>
> "(a) the conversion to a Class 103 license of any Class 104 license prior to the date of expiration contained in the license; or
>
> "(b) the conversion to a Class 103 license of any construction permit, issued under Section 104 of the Act, prior to the date designated in the permit for expiration of the license.
>
> "[Sec. 5024, Regulations, Atomic Energy Commission, as added November 23, 1956, effective November 30, 1956 (21 F.R. 9354).]"

Thus the Commission has recognized that there are: 1) true research and development plants in terms of nature and size, and 2) true commercial plants in terms of nature and size; and that any finding by the Commission of practical value for a <u>type</u> of reactor is not supposed to be the determinant of whether a given plant is 1) research and development, or 2) commercial.

Certainly, it seems clear that Congress intended that no truly commercial activity should be licensed under Section 104.

Duke's Application and evidence contemplate exactly such commercial activity. Duke, therefore, should be required to proceed under Section 103.

Nor does Section 102 of the Act (42 U.S.C.2132) concerning practical value and the fact that the Commission has not by Rule found such preclude such an application.

The Commission can construe its several previous licenses of this type of reactor as findings in writing of practical value for such type, or it can find such practical value in writing in its order licensing Duke under Section 103.

Indeed, the Commission, itself, has in effect said that any lack of finding of practical value should not have and need not have the preclusive effect for which Duke contends.

The Commission reported to the President:

> "The original intent of this provision of the Act was to provide the Commission with discretionary authority over commercial reactor plant construction, based upon determining that there was sufficient availability of nuclear fuel...On August 29, 1966, the Commission advised the Joint Committee of its belief that there is no continuing need for the requirement of a formal finding of 'practical value' as embodied in Section 102, or for the statutory distinction between licenses issued for production and utilization facilities under Section 103 (commercial licenses) and Section 104b (research and development licenses), and that the Commission is giving consideration to preparing legislation on this subject."
>
> Civilian Nuclear Power - The 1967 Supplement to the 1962 Report to the President (February 1967), p. 55.

EXCEPTION 7

Intervenors except to that part of the opinion of the Board and to that finding of fact by the Board on page 20 of the Initial Decision reading "The proposed findings and conclusions submitted by Duke have been accepted in substance except that proposed findings 6 and 8 have been accepted in part only as shown by the Board's findings in the Initial Decision."

The grounds for this exception (and Intervenors' citations of authorities in support of such grounds) are:

Intervenors except to the action of the Board in adopting in full (with the minor exceptions noted by the Board) Duke's proposed findings and conclusions specifically in that the Board thereby has adopted Duke's proposed finding and conclusion No. 18 (found on pages 12, 13 and 14 of Duke's proposed findings of fact and conclusions of law, filed 25 September 1967) and has adopted Duke's proposed conclusion No. 5 (page 15 of Duke's proposed findings of fact and conclusions of law, filed 25 September 1967), in that both Duke's proposed finding and conclusion No. 18 and Duke's proposed conclusion No. 5 rest upon the same false and unwarranted interpretation of the meaning of "research and development"; and the Intervenors' grounds for refuting such false and unwarranted interpretation and the Intervenors' authorities for its argument in refutation of such false and unwarranted interpretation have been fully set forth in the

foregoing Exceptions and, to avoid repetition, Intervenors request that such grounds and citations be here fully considered as if re-written here.

EXCEPTION 8

Intervenors except to that part of the opinion of the Board and to that finding of fact by the Board on page 20 of the Initial Decision reading "The proposed findings and conclusions submitted by the Regulatory Staff of the Commission have been accpeted in substance except that proposed findings 9 and 10 have been accepted in part only as shown by the Board's findings in the Initial Decision."

The grounds for this exception (and Intervenors' citations of authorities in support of such grounds) are:

Intervenors except to the Board's adopting completely (except for the minor exceptions related as to proposed finding 9 and 10) the proposed findings and conclusions of the Regulatory Staff in that in proposed finding and conclusion No. 20 of the Regulatory Staff (found on page 9 of such "Proposed Finding and Conclusion of Fact by the AEC Regulatory Staff") and proposed finding and conclusion No. 21 on page 10 of such "Proposed Finding and Conclusion of Fact by the AEC Regulatory Staff", and that proposed conclusion and order No. 1 found on page 11 of said "Proposed Finding and Conclusion of Fact by the AEC Regulatory Staff" are, each and all, based upon a false and unwarranted

interpretation of "research and development" under the Act. Intervenors' grounds and citations of authorities in support of such grounds have asserted that such interpretation is false and unwarranted, are fully set forth in the foregoing Exceptions; and, to avoid repetition, Intervenors request that such grounds and citations be here considered as fully as if re-written here.

EXCEPTION 9

Intervenors except to that part of the opinion of the Board and to that finding of fact by the Board on page 21 of the Initial Decision in that in said part of the opinion of the Board on said cited page the Board (with the exceptions noted upon said page) failed to find and adopt each and all of the other proposals for findings of fact and conclusions of law submitted by the Intervenors.

The grounds for this exception (and Intervenors' citations of authorities in support of such grounds) are:

Each and all of the other parts and separate numbers of the Intervenors' proposed findings of fact and conclusions of law are fully supported in this Record and fully required to be found upon this Record if Intervenors' contentions as to the true interpretation of the relevant portions of the Act are accepted. If so accepted, accordingly, all of such Intervenors' proposed findings of fact and conclusions of law should have been adopted.

As to the basic question of such interpretation, to avoid repetition, Intervenors refer to their statements of grounds and citations under the foregoing Exceptions, and ask that the same be here fully considered as if fully re-written here.

EXCEPTION 10

Intervenors except to that part of the opinion of the Board and to that finding of fact and conclusion by the Board on page 22 of the Initial Decision reading "2 (c) Safety features or components, if any, which require research and development have been described by Duke and Duke has identified, and there will be conducted, a research and development program reasonably designed to resolve any safety questions associated with such features or components;"

The grounds for this exception (and Intervenors' citations of authorities in support of such grounds) are:

Intervenors' exception here is limited to that portion of the quoted finding and conclusion of the Board which labels certain testing of safety features or components as "research and development" for the basic reason stated that Intervenors consider such labelling to be a misinterpretation of the meaning of the Act; and Intervenors, in order to avoid repetition, respectfully refer to Intervenors' grounds and citations of authorities in connection

with the foregoing Exceptions, and respectfully request that they be fully considered here as if fully re-written here.

EXCEPTION 11

Intervenors except to that part of the opinion of the Board and to that finding of fact and conclusion by the Board on page 23 of the Initial Decision reading "(1) the motion of the intervenors to dismiss the application in regard to Unit 3 is denied,".

The grounds for this exception (and Intervenors' citations of authorities in support of such grounds) are:

The exception of the Intervenors here is not only to the dismissal of the Motion in regard to Unit 3 but, recalling the earlier history of the case and the motion of the Intervenors to dismiss Duke's application as to all three units (see page 6 of the Initial Decision) the Intervenors except to the failure of the Board to sustain and allow the Intervenors' motion to dismiss Duke's application as to Units 1, 2 and 3. Again, such dismissal of Duke's application as to all three units would be justified and compelled upon the basis of this entire record if the Intervenors are correct in their interpretation of the Act. Again, accordingly, the Intervenors call attention to their grounds and citations of authorities in reference to the foregoing Exceptions; and, in order to avoid repetition, respectfully request that such grounds and citations be here fully considered as if re-written here.

WHEREFORE the Intervenors pray that the Commission sustain each and all of the above listed exceptions; and, as to each and all, overrule the Board; and that the Commission dismiss the application of Duke Power Company as unjurisdictionally submitted under Section 104(b) of the Act; and direct the resubmission of an application by Duke, if Duke so wishes, under Section 103 of the Act; and that the Commission allow and order oral argument upon these exceptions and this appeal from the Board to the Commission.

Respectfully Submitted,
City of Shelby
City of Statesville
City of High Point
City of Lexington
City of Monroe
City of Albemarle
Town of Cornelius
Town of Drexel
Town of Granite Falls
Town of Newton
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21 November 1967

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